No. _____

IN THE

Supreme Court of the United States

MARK ANTHONY REID,

Petitioner,

—v.—

CHRISTOPHER DONELAN, SHERIFF OF FRANKLIN COUNTY, MASSACHUSETTS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents three questions that are already presented in *Jennings v. Rodriguez*, No. 15-1204. The questions are as follows:

1. Whether the immigration statutes require that individuals otherwise subject to mandatory detention under 8 U.S.C. 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

2. Whether the Constitution requires that individuals subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether, at such bond hearings, the individual is entitled to release unless the Government demonstrates by clear and convincing evidence that the individual is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Mark Anthony Reid, for himself and on behalf of a class of similarly situated individuals, was the petitioner in the district court and the appellee and cross-appellant in the court of appeals. He is the Petitioner in this Court.

Respondents in this Court were respondents in the district court and appellants and cross-appellees in the court of appeals. They are: Christopher Donelan, in his official capacity as Sheriff of Franklin County, Massachusetts; David A. Lanoie, in his official capacity as Superintendent of Franklin County Jail and House of Correction; Thomas M. Hodgson, in his official capacity as Sheriff of Bristol County, Massachusetts; Joseph D. McDonald, Jr., in his official capacity as Sheriff of Plymouth County, Massachusetts; Stephen W. Tompkins, in his official capacity as Sheriff of Suffolk County, Massachusetts; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Christopher Cronen, in his official capacity as Director of the Boston Field Office of Immigration and Customs Enforcement ("ICE"); Thomas D. Honan, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director for ICE; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; and James McHenry, in his official capacity as Acting Director of the Executive Office for Immigration Review.[*]

[*] Kirstjen M. Nielsen and Christopher Cronen are substituted for their predecessors, Elaine Duke and Dorothy Herrera-Niles. *See* Sup. Ct. R. 35.3.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Mark Anthony Reid, on behalf of himself and a class of similarly situated individuals, respectfully petitions for a writ of certiorari before judgment to review a judgment by the United States District Court for the District of Massachusetts.[1] Petitioner waives the 14-day waiting period for distribution of this petition pursuant to Sup. Ct. R. 15.5.

OPINIONS BELOW

The judgment of the district court (App., *infra*, 1a-20a) is reported at 22 F. Supp. 3d. 84. The opinion of the panel of the court of appeals (App., *infra*, 21a-48a) is reported at 819 F.3d 486. The opinion of the district court granting individual habeas relief (App., *infra*, 90a-105a) is reported at 991 F. Supp. 2d 275.

JURISDICTION

The district court entered summary judgment and issued a permanent injunction on May 27, 2014. A panel of the court of appeals issued an opinion reversing and remanding the district court's order on April 13, 2016. A petition for panel rehearing or rehearing en banc was timely filed on June 30, 2016, suspending the finality of the panel's ruling. The First Circuit stayed the appeal pending this Court's disposition of *Jennings v. Rodriguez*, No. 15-1204, on July 6, 2016. This Court has jurisdiction under 28 U.S.C. 1254(1) and 2101(e).

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[1] In the alternative, Petitioner asks the Court to review the opinion of the panel of the court of appeals. *See* App., *infra*, 21a-48a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.
>
> U.S. Const. amend. V.

Relevant statutory provisions are set forth in the appendix to this petition. App., *infra*, 112a-114a.

STATEMENT OF THE CASE

This petition presents important questions regarding the Government's power to subject immigrants to mandatory detention for prolonged periods of time. This Court previously determined that these questions were worthy of review when it granted certiorari in *Jennings v. Rodriguez*, No. 15-1204. *See* 136 S.Ct. 2489 (2016). In light of Justice Kagan's recent recusal in *Jennings*, this case presents an appropriate and potentially superior vehicle to resolve these questions, as it would permit consideration by the full Court.

I. Legal Framework

The Immigration and Nationality Act ("INA"), 8 U.S.C. 1226(c), subjects noncitizens who are inadmissible or deportable based on a broad set of criminal convictions to mandatory detention. Section 1226(c)(1) provides that the Attorney General "shall take into custody" noncitizens who are inadmissible or deportable for a list of predicate offenses "when . . . released" from criminal custody. The list includes, *inter alia*, certain crimes involving moral turpitude,

nearly all controlled substance offenses, and aggravated felonies. *See* 8 U.S.C. 1226(c)(1)(A)–(D). Section 1226(c)(2) permits release of a noncitizen "only if the Attorney General decides" that release "is necessary to provide protection to a witness" or under related circumstances, and if the individual "satisfies the Attorney General" that she "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id*. 1226(c)(2).

II. Facts and Procedural History

A. Lead Petitioner Mark Anthony Reid

Lead Petitioner Mark Anthony Reid was admitted to the United States as a Lawful Permanent Resident in 1978 at the age of 14. App., *infra*. 3a, 91a. He has resided in the United States for 39 years and has two children, both of whom are U.S. citizens by birth. Mr. Reid served in the U.S. Army Reserve for six years and was honorably discharged. *Id*. at 91a.

In 2010, Mr. Reid was convicted of one count of sale of an illegal drug, one count of third degree burglary, and one count of failure to appear in the first degree in Connecticut state court. *Id*. at 92a. Mr. Reid served two years in prison and was granted parole on November 13, 2012. *Id*. at 3a, 92a. On that day, U.S. Immigration and Customs Enforcement ("ICE") took Mr. Reid into custody on the authority of Section 1226(c) and placed him in removal proceedings without providing him a bond hearing. *Id*. at 3a-4a, 92a.

Mr. Reid sought a bond hearing before the immigration court. On June 17, 2013, seven months after Mr. Reid was taken into ICE custody, the immigration judge denied the motion, concluding that under Section 1226(c), he lacked authority to grant Mr. Reid a bond hearing. *Id.* at 93a.

On July 1, 2013, Mr. Reid filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Massachusetts. He challenged his prolonged detention without a bond hearing as unconstitutional under the Due Process Clause and other constitutional provisions and as unauthorized by Section 1226(c). *Id.* at 4a, 93a.

On January 9, 2014, the district court granted Mr. Reid's individual habeas petition and ordered a bond hearing. *Id.* at 5a, 104a-105a. The court held that detention over six months was presumptively unreasonable absent an individualized finding justifying continued detention and therefore not authorized by statute. *Id.* at 5a, 94a-102a. The immigration judge granted release on bond, which Mr. Reid posted on February 25, 2014. After 400 days in ICE custody, Mr. Reid was released subject to electronic monitoring, monthly reporting requirements, and other conditions. *Id.* at 26a.[2]

Mr. Reid has now been in removal proceedings for over five years while challenging whether his

[2] Mr. Reid was convicted of many offenses from 1986 to 2010, of which the Government has alleged that four are bases for removal. Mr. Reid has not been convicted of any crimes since his release on bond pursuant to the district court's order in this case. Mr. Reid also served as a cooperating witness in a homicide prosecution, at great personal risk. *See State v. Hines*, 709 A.2d 522 (Conn. 1998).

convictions are aggravated felonies or controlled substance offenses, *see Mathis v. United States*, 136 S.Ct. 2243 (2016) (clarifying distinction between elements and means in modified categorical approach, under which Mr. Reid argues he is not removable), and also seeking withholding of removal and relief under the Convention Against Torture. The immigration court has denied relief three times. The Board of Immigration Appeals ("BIA") has reversed each denial and remanded Mr. Reid's case for further proceedings. His case remains pending in immigration court.

B. Class Action Relief

On August 15, 2013, Mr. Reid moved for certification of a class consisting of "all individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to Section 1226(c) for over six months and are not provided an individualized bond hearing." App., *infra*, 70a, 71a. On February 10, 2014, the district court granted Mr. Reid's motion for class certification. *Id*. at 88a.

On May 27, 2014, the court granted summary judgment for the Plaintiff class and ordered bond hearings for all class members. *Id*. at 17a-20a. The court reiterated its holding that detention under Section 1226(c) becomes presumptively unreasonable (and therefore unauthorized) after six months absent an individualized hearing. *Id*. at 6a-9a. But the court declined to put the burden on the Government in those hearings. It rejected Plaintiffs' claim that the Government was required to prove by clear and convincing evidence that continued detention beyond six months was justified, holding instead that due

process permits the individual to bear the burden of proving he is not a flight risk or danger. *Id.* at 14a-17a. The Government appealed the district court's determinations that Section 1226(c) contained an implicit reasonableness requirement; that detention under the statute was presumptively unreasonable after six months; and that Mr. Reid's individual detention had become unreasonable. Mr. Reid cross-appealed the district court's determination that the Government was not required to justify prolonged detention by clear and convincing evidence at the bond hearings the court had ordered. *Id.* at 26a.

A First Circuit panel issued an opinion on April 13, 2016. Agreeing with the district court and with every circuit court to have considered the question, the panel found that Section 1226(c) authorizes mandatory detention only for a reasonable period of time. *Id.* at 28a-31a. However, the panel rejected the district court's holding that mandatory detention exceeding six months was presumptively unreasonable, holding instead that whether detention has become unreasonable must be determined on a case-by-case basis. *Id.* at 31a-39a. The panel noted that this case-by-case rule had numerous disadvantages, including "wildly inconsistent determinations," the "perverse effect of increasing detention times for those least likely to actually be removed," the lack of "institutional competence" of district courts to make reasonableness determinations about "moving target[s]," and the "wastefully duplicative" use of the resources of federal and immigration courts. *Id.* at 37a-39a. The panel nonetheless adopted that approach because, *inter alia*, it "view[ed] [*Demore v. Kim*, 538 U.S. 510 (2003)] as implicitly foreclosing" a

bright line rule requiring individualized bond hearings at six months. App., *infra*, 36a-37a. The First Circuit did not reach the question of whether the Government must justify prolonged detention by clear and convincing evidence. *See id*. at 44a-46a.

On June 7, 2016, the First Circuit extended the time for the parties to file petitions for rehearing and stayed issuance of its mandate. *Id*. at 109a-110a. On June 30, 2016, Mr. Reid petitioned for panel rehearing and for rehearing en banc. On July 6, 2016, the First Circuit stayed the appeal pending this Court's disposition of *Jennings v. Rodriguez*, No. 15-1204, directing the parties to file status reports every 90 days and immediately upon a decision in *Jennings*. App., *infra*, 106-107a. Accordingly, the First Circuit's judgment is not yet final.[3]

REASONS FOR GRANTING THE PETITION

The Court already has deemed the questions presented in this petition to be worthy of review. In *Jennings v. Rodriguez*, No. 15-1204, the Court granted review of the core question in this case: namely, whether the Government must provide bond hearings for individuals detained for six months pursuant to Section 1226(c). The Court also granted review of the question of whether, at those hearings, the Government must bear the burden of justifying prolonged immigration detention through proof, by clear and convincing evidence, that an individual presents a flight risk or danger to the community.

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[3] *See, e.g.*, *Dep't of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942) ("A timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment . . . .").

See Jennings v. Rodriguez, 136 S.Ct. 2489 (2016) (order granting certiorari); Pet. for Writ of Certiorari at I, *Jennings v. Rodriguez*, No. 15-1204 (filed Mar. 25, 2016); *see also Jennings v. Rodriguez*, No. 15-1204 (Dec. 15, 2016) (order directing the parties to file supplemental briefs).[4]

Although the Court granted review and heard argument in *Jennings*, this case may be a superior vehicle in light of Justice Kagan's recent recusal in *Jennings*. After careful consideration of *Jennings* by an eight-member Court—including oral argument and two rounds of briefing—the Court did not issue a decision during the October 2016 Term. Instead, the Court set the case for re-argument in October 2017. *See Jennings v. Rodriguez*, No. 15-1204 (June 26, 2017) (order restoring the case to the calendar). However, because of Justice Kagan's recusal, *Jennings* once again is pending before an eight-member Court. Thus, should Justice Kagan's recusal render *Jennings* an inappropriate vehicle for resolving the questions presented, the Court should grant certiorari in this case to permit the full Court's participation in deciding these important issues. If it

[4] Every question presented here is presented in *Jennings*. *Jennings* presents questions that are not at issue here. These separate questions concern the prolonged detention without bond hearings of arriving non-citizens, whether bond hearings for prolonged detainees should occur periodically every six months, and whether the length of an individual's detention should weigh in favor of release. *See* Pet. for Writ of Certiorari at I, *Jennings v. Rodriguez*, No. 15-1204 (filed Mar. 25, 2016).

does so, it should hold *Jennings* in abeyance pending its disposition of *Reid*.[5]

This Court has previously granted certiorari in cases that raise issues similar to those raised in concurrently-pending cases or petitions for certiorari, where doing so would advance resolution of an issue on the merits.[6] Accordingly, if the Court believes that

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[5] The Government's petition for certiorari in *Shanahan v. Lora* on the same questions presented here is pending before this Court. *See* Pet. for Writ of Certiorari at I, *Shanahan v. Lora*, No. 15-1205 (filed Mar. 25, 2016). However, *Reid* is a more appropriate vehicle for review, for two reasons. First, because *Reid* is a class action, it will not become moot during this Court's review. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). In contrast, *Lora* could become moot before this Court is able to render decision. Indeed, the petitioner in *Lora* has a merits hearing scheduled in immigration court on January 8, 2018. If he is granted immigration relief at that hearing, his removal case may be terminated, and he would then no longer be subject to immigration detention.

Second, because *Reid* is a class action, it has a much fuller factual record than *Lora*, which involves a single detainee. *Cf.* Pet. for Writ of Certiorari at 7-8, *Shanahan v. Lora*, No. 15-1205 (filed Mar. 25, 2016). (arguing that this Court should grant review in *Jennings* and hold *Lora* in abeyance because *Jennings* is "a class action with a significant evidentiary record," in contrast to "an individual habeas corpus case in which the district court did not conduct discovery on or address any length-of-detention questions").

[6] *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 229 (2005) (pre-judgment certiorari petition granted alongside post-judgment petition); *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (same); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (certiorari before judgment granted after direct appeal from three-judge court in related case); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (pre-judgment certiorari petition filed after certiorari granted in *Greene v. McElroy*, 360 U.S. 474 (1959), and granted); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (petition

granting this petition would advance its resolution of the questions presented here and in *Jennings*, immediate review is appropriate.[7]

A grant of certiorari before judgment is also appropriate for two additional reasons. First, six circuit courts, including the First Circuit panel below, have considered the legal issues presented here.[8] In addition to these lower court opinions, this Court has itself considered the relevant legal arguments during the current and previous Terms in

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for pre-judgment certiorari filed after oral argument in *Reid v. Covert*, 351 U.S. 487 (1956), and granted); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (petition for certiorari before judgment filed, granted, and decided concurrently with post-judgment petition in *Porter v. Lee*, 328 U.S. 246 (1946)); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (petition for certiorari before judgment filed after grant of certiorari in *United States v. Butler*, 297 U.S. 1 (1936), and granted); *cf. United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) (petition for certiorari filed before judgment, and certiorari granted after court of appeals proceeded to final decision).

[7] Though Mr. Reid prevailed in part before the district court, it is well-established that any party may seek certiorari before judgment once the case is in the court of appeals. *See, e.g.*, Stephen M. Shapiro et al., Supreme Court Practice 87 (10th ed. 2013).

[8] Six circuit courts have reached decisions, and a seventh court of appeals has held the issues in abeyance pending *Jennings*. *See Sopo v. United States Attorney General*, 825 F.3d 1199 (11th Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Jarpa v. Mumford*, 211 F. Supp. 3d 706 (D. Md. 2016), *appeal docketed*, No. 16-7665 (4th Cir. Dec. 2, 2016) (placed in abeyance pending resolution of *Jennings*).

Jennings, which included two rounds of briefing and two oral arguments. Thus, far from requesting action before legal issues have sufficiently percolated, this petition presents the Court with a vehicle to resolve issues that have been aired extensively before this Court and the lower courts.

Second, certiorari is proper because the issues presented in this case implicate the liberty of thousands of individuals. Freedom from physical incarceration lies at the heart of the liberty that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Prior to the district court's injunction, all Plaintiff class members were incarcerated for at least six months, and sometimes for years, without any individualized hearing where the Government had shown that further detention was needed. The Constitution and the INA do not permit incarceration of this length absent individualized custody hearings to ensure that detention serves a valid purpose and remains reasonable in relation to that purpose. Under these circumstances, certiorari before judgment is warranted to permit the full Court to consider and definitively resolve these issues of nationwide importance.

Given that *Jennings* has been thoroughly briefed and argued, and the issues presented in *Reid* with regards to Section 1226(c) are identical to those in *Jennings*, Petitioner would waive briefing and argument. Alternatively, should the Court find it necessary, it could order briefing in *Reid* on an expedited basis to allow for a decision in the October 2017 term.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: December 22, 2017

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID, on behalf of himself and others similarly situated, Plaintiff/Petitioner,	)	
v.	)	C.A. NO. 13-cv-30125-MAP
CHRISTOPHER DONELAN, Sheriff of Franklin County, et al., Defendants/Respondents.	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION FOR NOTICE OF CLASS CERTIFICATION, PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT & PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(Dkt. Nos. 95, 96, 117 & 123)

May 27, 2014.

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff Mark Anthony Reid has brought this suit on behalf of all aliens in Massachusetts who were or will be detained under 8 U.S.C. § 1226(c) for over six months and not provided an individualized

bail hearing. On January 9, 2014, the court granted Plaintiff's individual habeas petition and concluded that detention beyond six months, absent an individualized assessment, was presumptively unreasonable. Reid v. Donelan, -- F. Supp. 2d --, 2014 WL 105026 (D. Mass. Jan. 9, 2014) ("Reid I"). On February 10, 2014, the court determined that the case could proceed as a class action. Reid v. Donelan, 297 F.R.D. 185 (D. Mass. 2014) ("Reid II"). Currently pending before the court are Plaintiff's Motion for Notice of Class Certification (Dkt. No. 95), Plaintiff's Motion for a Preliminary Injunction (Dkt. No. 96), and cross-motions for summary judgment (Dkt. Nos. 117 & 123).

As the curtain closes on this litigation, two issues require examination. The penultimate question is whether either party is entitled to summary judgment. The court, reaffirming its view that § 1226(c) includes a six-month "reasonableness" limitation on the length of no-bail detention, will formally award the class judgment as a matter of law.

The more difficult issue is whether the class should receive permanent, equitable relief. That analysis requires the court to address three questions. Is a class-wide injunction permissible? Is it proper? If so, what should it include? Ultimately, because the court possesses jurisdiction to issue class-wide equitable relief and because the relevant factors all suggest that such a remedy is appropriate, an order enjoining Defendants from applying § 1226(c) to the class, detailed in the conclusion of this memorandum, will issue.

II. BACKGROUND

Plaintiff, Mark Anthony Reid, represents a class of aliens who were (or will be) detained under 8 U.S.C. § 1226(c), were not provided an individualized bail hearing, and were in custody for over six months. The background of this litigation and the underlying statutory framework have previously been outlined in detail. See Reid v. Donelan, 991 F. Supp. 2d 275, 2014 WL 105026 (D. Mass. Jan. 9, 2014) ("Reid I"). As a result, only a summary is required here.

Plaintiff came to the United States in 1978 as a lawful permanent resident. He has since amassed a substantial criminal history. In 2010, he was convicted of several crimes in Connecticut state court and was sentenced to twelve years in prison, to be suspended after five.

On November 13, 2012, after serving two years, the state transferred Plaintiff into the custody of Immigration and Customs Enforcement ("ICE"). ICE immediately initiated proceedings to remove him based on four non-violent state drug convictions.[1] ICE detained Plaintiff under 8 U.S.C. § 1226(c)—a statute that mandates detention for certain criminally convicted aliens and does not provide them any opportunity for a bail hearing.[2]

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[1] An Immigration Judge initially ordered Plaintiff removed on April 5, 2013. The Board of Immigration Appeals ("BIA"), however, remanded the case on October 23, 2013, for a hearing on Plaintiff's Convention Against Torture claim. An Immigration Judge held an evidentiary hearing on that matter on November 19, 2013, and again ordered Plaintiff removed. Plaintiff's second appeal to the BIA is currently pending.

[2] That statute requires the alien to be detained "when ...

Pursuant to this law, Plaintiff was not afforded any opportunity to seek an individual bail assessment. A different section of the statute, § 1226(a), permits non-mandatory detention and provides those aliens an opportunity for conditional release.

After more than six months of detention, Plaintiff, on July 1, 2013, filed an individual habeas petition seeking the opportunity to argue for release on bail. The driving legal question presented in his petition was whether § 1226(c) included a "reasonableness" requirement after which an individual's detention, absent a bail hearing, became unreasonable.[3] Plaintiff anchored his claim on Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009), where the court found that such a limit did exist. Plaintiff also filed a Motion for Class Certification on August 15, 2013. (Dkt. No. 33.) The

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released" from criminal custody. Recently, in Gordon v. Johnson, the court concluded that such language signified an immediacy requirement and limited the class of aliens subject to mandatory detention. Gordon v. Johnson, -- F. Supp. 2d --, 2014 WL 2120002 (D. Mass. May 21, 2014). The court ordered equitable relief analogous to the remedy provided here. Id. at *12–13.

[3] A peripheral issue in Plaintiff's case has been his individual challenge to ICE's policy of shackling all § 1226(c) detainees during immigration proceedings without any form of individual consideration. On March 6, 2014, the court concluded that such a policy violated Plaintiff's due process rights. Reid v. Donelan, -- F. Supp. 2d --, 2014 WL 896747 (D. Mass. March 6, 2014). However, because ICE had already provided Plaintiff an individual assessment, he had obtained the remedy he was entitled to and thus was unable to establish irreparable harm. Therefore, the court did not issue an injunction and, instead, allowed Defendants' motion for summary judgment on the issue.

next day, Defendants moved to dismiss the case. (Dkt. No. 35.)

After hearing argument on December 12, 2013, the court, on January 9, 2014, granted Plaintiff's individual petition for habeas corpus. Reid I, 2014 WL 105026. After reexamining its prior decision in Bourguignon, it concluded that § 1226(c) must be read as including a "reasonableness" limit to comport with due process. That limitation was set, consistent with an approach adopted by the Ninth Circuit, at six months. Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

On February 10, 2014, the court allowed Plaintiff's Motion for Class Certification. Reid II, 297 F.R.D. at 194. It defined the class, pursuant to Fed. R. Civ. P. 23, as "all individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing." Id.

Plaintiff, on March 2, 2014, filed a Motion for Notice of Class Certification (Dkt. No. 95) and a Motion for a Preliminary Injunction (Dkt. No. 96). Given the procedural posture of the case, Defendants argued that briefing on those issues should be consolidated with the parties' dispositive motions. (Dkt. No. 103.) The court agreed with Defendants and ordered an expedited briefing schedule. (Dkt. No. 111.) Accordingly, the parties filed their cross-motions for summary judgment on April 4, 2014, (Dkt. Nos. 117 & 123), and counsel appeared for argument on May 7, 2014. The court then took the matter under advisement.

III. DISCUSSION

Though a number of motions are currently pending, they raise two broad questions. The first—whether either party is entitled to summary judgment—is easily answered in Plaintiff's favor given the court's previous rulings.

The more challenging question is what relief is appropriate. This analysis, like the one presented in the court's recent decision in Gordon, comprises three issues: whether class-wide equitable relief is permissible under 8 U.S.C. § 1252(f)(1), whether equitable relief is appropriate in this case, and what such relief, if any, should entail.

A. Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences from those facts in that party's favor. Pac. Ins. Co., Ltd. v. Eaton Vance Mgmt., 369 F.3d 584, 588 (1st Cir. 2004). In the absence of a dispute over a genuine issue of material fact, summary judgment is appropriate. Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997). When addressing cross-motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." Id. at 6.

Both parties agree that the question before the court is one purely of law: whether § 1226(c) includes a "reasonableness" limit on the length of time an individual can be detained without an individual

bond hearing and, if so, where that limit lies. Plaintiff believes that the analysis employed for his individual habeas petition equally resolves the class-wide motion here. Defendants argue that the court's prior decisions were incorrect and should be reconsidered.[4]

After reviewing Reid I and Bourguignon, the court again concludes that due process requires § 1226(c) to be read as including a "reasonableness" limit requiring the government to provide detainees a chance at conditional release after that threshold is crossed. That view, as discussed at length in those two decisions, is compelled by two Supreme Court opinions: Zadvydas v. Davis, 533 U.S. 678 (2001), and Demore v. Kim, 538 U.S. 510 (2003).

In Zadvydas, the Supreme Court held that detention following issuance of an order of removal, absent a bail hearing, was only permissible so long as removal was "reasonably foreseeable." 533 U.S. at 699.[5] After six months, the court concluded that the detention became presumptively invalid and a bail hearing was required. Id. at 701. The Court grounded this limit on its concern that indefinite detention would violate due process.

Two years later, the Supreme Court addressed the constitutionality of § 1226(c) in Demore. The court upheld the constitutionality of the statute, but

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[4] On March 10, 2014, Defendants indicated that they would be appealing the court's decision on Plaintiff's individual habeas petition. (Dkt. No. 108.)

[5] Apparently, even after an alien is ordered removed, it can take a significant period of time—months or even years—to effectuate that order.

assumed that the removal process would be relatively brief. Demore, 538 U.S. at 513. Critically, Justice Kennedy noted in his concurrence that "a lawful permanent resident ... could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J., concurring)(citing Zadvydas, 533 U.S. at 684–86).

Weighed together, these two cases mandate that § 1226(c) be read as including a temporal limit on detention to avoid due process problems. This view, as discussed in Reid I, has been consistently adopted by this district and other courts throughout the country. See, e.g., Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Flores–Powell v. Chadbourne, 677 F. Supp. 2d 455 (D. Mass. 2010) (Wolf, J.); Sengkeo v. Horgan, 670 F. Supp. 2d 116 (D. Mass. 2009) (Gertner, J.) In line with these cases, this court again concludes that it must invoke the canon of constitutional avoidance and interpret the statute as including this "reasonableness" limitation.

The Ninth Circuit's approach to determining the "reasonableness" limit—setting a bright-line six-month rule—is also still the most appropriate. Robbins, 715 F.3d at 1133. As emphasized in Reid I, this limit is consistent with the Supreme Court's own rule in Zadvydas, comports with due process—both in terms of the individual detainee's interests and broader access-to-justice concerns—and is significantly more workable than the alternative, individualized approach Defendants favor. Reid I, 2014 WL 105026 at *4–6. Because "no persuasive argument justifies discarding this pragmatic

approach when dealing with individuals detained under § 1226(c)," the court will apply the six-month rule to the entire class. Reid I, 2014 WL 105026 at *4.

This court first addressed this legal issue five years ago. The arguments and analysis are largely unchanged. It was as true in Bourguignon as it is today: due process requires § 1226(c) detainees the opportunity to argue for conditional release after detention extends beyond the six-month limit. As such, the court will award the class judgment as a matter of law.

B. Relief

As noted above, the analysis of appropriate permanent relief presents three issues: whether relief is permissible; whether relief is appropriate; and what the relief should include.

1. Is Relief Permissible?

The first question is whether § 1252(f)(1) bars classwide equitable relief.[6] That statute states that no court "shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1231] ... other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Defendants contend that the plain language of this law bars equitable relief here.

[6] If § 1252(f)(1) did serve as a bar to relief, Plaintiff believes that the court would maintain its habeas jurisdiction and could still issue a class-wide injunction. The court need not decide that issue as § 1252(f)(1), for the reasons discussed, does not bar a remedy here.

A prolonged analysis is not required. In Gordon, the court concluded that a distinction exists between enjoining the "operation" of the law and requiring the government to obey it. Gordon, 2014 WL 2120002 at *8–9. Indeed, an injunction "will not prevent the law from operating in any way, but instead would simply force Defendants to comply with the statute. The purposes underlying § 1252(f)(1) and associated case law justify this distinction." Id. at *9.

If § 1226(c) should be read as requiring a bail hearing after detention becomes unreasonable—which it must—the distinction previously highlighted is equally applicable here. In this case, since a class-wide injunction will only require the government to comply with that proper interpretation, § 1252(f)(1) does not preclude class-wide relief.[7] See also Rodriguez v. Hayes, 591 F.3d 1105, 1109 (9th Cir. 2010).

2. Is Relief Appropriate?

The second, related question is whether equitable relief should issue. To obtain declaratory relief, Plaintiff must show that it "will serve the interests of the litigants or the public." Metro. Prop. & Liab. Ins. Co. v. Kirkwood, 729 F.2d 61, 62 (1st Cir. 1984). An injunction is appropriate where a plaintiff, in addition to succeeding on the merits, establishes: (1) irreparable harm; (2) the absence of an adequate remedy at law; (3) a favorable balance of

[7] The court is also satisfied, given the plain language of the statute and the First Circuit's decision in Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003), that class-wide declaratory relief is available. Reid II, 297 F.R.D. at 193.

hardships; and (4) that an injunction is in the public interest. Esso Standard Oil v. Lopez–Freytes, 522 F.3d 136, 148 (1st Cir. 2008) citing eBay v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

Defendants' main argument against an injunction, one intertwined with their view on the merits, is that equitable relief is not in the public interest.[8] Specifically, the class seeks a remedy that, in Defendants' view, conflicts with Congress' clear goal of detaining certain individuals pending their removal without opportunity to seek bail. Their argument is essentially that § 1226(c) cannot be read as including a "reasonableness" requirement and that, therefore, a court order imposing one would be against the public interest.

Defendants' arguments, dependent almost exclusively on the merits of the case, cannot succeed. First, there can be no doubt that members of the class are suffering irreparable harm each day they are detained beyond six months without the opportunity to argue for release. See Robbins, 715 F.3d at 1144. Such detention is an emotional and physical ordeal for class members and is particularly severe for those who have colorable claims for release on bail during the pendency of their removal proceedings. Furthermore, the deprivation of due process rights, as is occurring here, is sufficient on its own to establish irreparable harm. Cf. Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987).

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[8] Defendants also focus on the preliminary nature of the relief requested. They correctly contend that a preliminary injunction, given the procedural posture of this case, would be duplicative.

The second factor is also easily satisfied. No monetary damages can remedy the harm alleged. As such, there exists no adequate remedy at law.

In terms of the balance of hardships, Plaintiff has shown that an injunction would assist the class while imposing a negligible burden on the government. As this court has noted before, the court's order will not require the government to release a single individual. Instead, the government must simply provide class members the opportunity to argue for release. "This opportunity, of course, will not make actual release inevitable, or even necessarily likely." Reid II, 297 F.R.D. at 188. Besides the slight logistical challenge of providing individual bail determinations and hearings—a modest burden—the government loses nothing. Under such circumstances, the balance of hardships favors Plaintiff's position.

Finally, despite Defendants' contention, an injunction is in the public interest. The public has a general interest in upholding individuals' constitutional rights. See Phelps–Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008), overruled on other grounds by Phelps–Roper v. City of Manchester, Mo., 697 F.3d 678 (8th Cir. 2012). Indeed, the public has an interest in ensuring that all persons, including aliens, obtain fair treatment in legal proceedings. Here, due process requires reading § 1226(c) in the manner discussed.[9]

[9] Given the conclusions with respect to each factor, declaratory relief is also appropriate in this case.

Ultimately, a binding order requiring the government to comply with the constitutionally mandated interpretation of § 1226(c) is warranted. This is the only guarantee that the government will provide members of the class with the remedy they are entitled to.

3. What Should Relief Entail?

Since the court will be ordering permanent, injunctive relief, it must determine the shape of that order. Here, two issues must be addressed: (1) the notice, if any, the court should provide class members, and (2) the process to be used in making bail determinations.

a. Motion for Notice of Class Certification

Notice for Rule 23(b)(2) classes is discretionary and should be ordered "with care." Fed. R. Civ. P. 23(d), advisory committee's notes to 2003 amendment. This special attentiveness is demanded because formal notice may not serve any purpose and the costs of providing notice may be substantial. Id.

Defendants believe that this case, particularly since the class is not seeking monetary damages, does not warrant notice. See Key v. Gillette Co., 90 F.R.D. 606, 611–12 (D. Mass. 1981). In their view, class members have counsel to represent their interests and notify them of their rights. Moreover, an individual's knowledge that he or she is a member of the class may be unrelated to whether this individual obtains a remedy. Alternatively, Defendants request that any order be limited to general, rather than individual, notice.

This argument ignores the need class members will have to contact class counsel to obtain assistance in navigating the balky remedial process. The remedy the court will be imposing will be to require Defendants to afford each class member detained under § 1226(c) for over six months the same opportunity for a bail hearing available under § 1226(a). In order to access relief under § 1226(a), class members (including aliens with limited command of English) will themselves bear the burden to request bail hearings. To take this step, it is essential that aliens actually know that they are members of the class and that they have counsel to assist them. Without this, the court's remedy will be, as a practical matter, illusory in many cases.

Notice is particularly essential for the class members transferred out of Massachusetts. At least two class members—after being detained in Massachusetts for over six months—have been transferred to other states. (Dkt. No. 97, Ex. 1.) Individual notice is critical for these members, who would not otherwise have access to any general notice provided in the Commonwealth.

The government should also shoulder the burden to provide the individual notice. Defendants are in exclusive possession of the names of individual class members. Further, the cost of providing the notice—since members are in its custody—will not be substantial. Indeed, the government, as discussed below, will need to provide each member with an individualized bail determination pursuant to § 1226(a). The government may provide notice of class certification simultaneously with that individualized decision—thereby further minimizing the burden.

For all these reasons, the court will allow Plaintiff's motion on this point and will order that the government provide individual notice of class certification.

b. Logistics of Bail Determinations

In terms of the specific remedy, Plaintiff contends that a number of protections beyond those provided in § 1226(a) are necessary. He justifies this approach by relying on the Ninth Circuit's decision in Robbins. There, the court affirmed a district court's decision to require the government to show "by clear and convincing evidence that continued detention is justified." Robbins, 715 F.3d at 1131; see also Diop, 656 F.3d at 223 (placing the burden of proof on ICE.)

Plaintiff argues that the court should adopt the Ninth Circuit's approach with respect to the burden and standard of review for these class members. He also requests that the government automatically schedule hearings as members enter the class and that the government maintain contemporary records of the hearings in the event of an appeal. Finally, Plaintiff seeks an order requiring Immigration Judges to consider all alternatives to detention when contemplating an individual's release on bail.

The court, of course, respects the Ninth Circuit's approach, but concludes that the government's recommendation—that the court should limit any remedy to the one available to detainees under § 1226(a)—is the better option. As the court recently discussed in Gordon, individuals who committed a § 1226(c) predicate offense should not receive more protections than § 1226(a)

detainees.[10] As noted,

> Although the court has its concerns about the procedures used to effectuate the requirements of § 1226(a)—specifically the time between detention and a bail hearing as well as the ability of a detainee to ensure his or her request for a hearing makes its way to an Immigration official—as a matter of fairness, class members should not receive more than their counterparts who, it should be noted, have not committed any § 1226(c) predicate offense.

Gordon, 2014 WL 2120002 at *11.

Class members here are detained, under valid statutory authority, for six months. Once a member's detention crosses that six-month barrier, he is entitled to seek some form of individualized analysis of his entitlement to release on bail. Section 1226(a) provides a reasonably effective way for class members to obtain the individualized assessment they are entitled to, without giving them heightened

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[10] In Gordon, § 1252(f)(1) also arguably barred the court from imposing a more intrusive remedial order beyond requiring the government to afford class members access to the § 1226(a) process. Gordon class members should have been classified as § 1226(a) detainees but, instead, were improperly held under § 1226(c). Gordon, 2014 WL 2120002 at *11. The class-wide remedy was rightly limited to rectifying that mistake. Here, no question exists that class members were properly categorized as § 1226(c) detainees, and thus § 1252(f)(1) offers no bar—if the court concluded it was appropriate—for a more detailed remedy.

or special treatment that due process does not require. Therefore, the court will adhere to the approach it adopted in Gordon and order Defendants to apply § 1226(a) to all current and future class members.

IV. CONCLUSION

The burden on the executive branch officials to manage our labyrinthine immigration system is heavy. The need to detain certain individuals pending removal cannot be denied. But, where the government applies a statute without consideration for constitutional guarantees, the rights of vulnerable aliens are at risk. The suggestion that § 1226(c) permits indefinite detention—for years, in some cases—without even the opportunity to request bail, ignores the assumption underlying this law, which Justice Kennedy recognized in Demore, that removal occur swiftly and that detention be "reasonable."

Accordingly, the court hereby ALLOWS Plaintiff's Motion for Summary Judgment (Dkt. No. 123), and Plaintiff's Motion for Notice of Class Certification (Dkt. No. 95), DENIES Defendants' Motion for Summary Judgment (Dkt. No. 117), and DENIES as moot Plaintiff's Motion for a Preliminary Injunction (Dkt. No. 96). The court DECLARES as follows:

- As to every class member, the mandatory detention provision, 8 U.S.C. § 1226(c), applies only to aliens detained by the Department of Homeland Security ("DHS") for a "reasonable" period of time—specifically six months or less.

- As to every class member, an alien who is subject to detention pursuant to 8 U.S.C. § 1226(c) for over six months is entitled to an individual bail determination and a bond hearing before an Immigration Judge as contemplated in § 1226(a).

In accordance with that finding, the court hereby ORDERS the following:

- Defendants shall immediately cease and desist subjecting all current and future class members—that is, those detainees held under 8 U.S.C. § 1226(c) beyond six months—to mandatory detention under that statute.
- Defendants shall immediately determine the custody of every current class member under 8 U.S.C. § 1226(a) and timely provide a bond hearing to every class member that seeks a redetermination of his or her custody by an Immigration Judge pursuant to 8 C.F.R. §§ 1003.19 & 1236.1(d).
- As individuals enter the class at the six-month mark, Defendants will immediately determine the custody of each individual under 8 U.S.C. § 1226(a) and provide a bond hearing to every class member that seeks a redetermination of his or her custody by an Immigration Judge pursuant to 8 C.F.R. §§ 1003.19 & 1236.1(d).
- Defendants will provide individual notice of class certification, in both English and Spanish. Notice shall include a description of the class and the names and contact information for all class counsel. Notice may be provided either before, or simultaneously

with, the initial bail determination under § 1226(a). Notice must be individually provided to:

- all current class members detained in Massachusetts;
- those who were detained in Massachusetts under 8 U.S.C. § 1226(c) for over six months without a bail hearing as of February 10, 2014, and have since been transferred out of the Commonwealth; and
- all future class members at the point they enter the class.

- On or before June 30, 2014, Defendants shall provide class counsel with a list of identified class members, including their names and alien numbers, and the facility in which they are detained.
- On or before July 31, 2014, Defendants shall submit to the court a report detailing the following:
  - any custody determinations made for class members, including the dates they were made, the determination, and, if applicable, whether the individual petitioned for a bail redetermination in front of an Immigration Judge;
  - any bond hearings held for class members, including the dates they were held and the outcomes of those hearings, including the amounts of any bond set; and,

- the process and criteria by which class members have been identified.

The clerk shall set this matter for a status conference on September 15, 2014, at 4:00 p.m., to review Defendants' compliance with this order and to discuss entry of final judgment.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

United States Court of Appeals
For the First Circuit

Nos. 14-1270; 14-1803; 14-1823

MARK ANTHONY REID

Petitioner - Appellee/Cross-Appellant

v.

CHRISTOPHER DONELAN, Sheriff, Franklin County, Massachusetts; DAVID A. LANOIE, Superintendent, Franklin County Jail and House of Correction; THOMAS M. HODGSON, Sheriff, Bristol County, Massachusetts; JOSEPH D. MCDONALD, JR., Sheriff, Plymouth County, Massachusetts; STEVEN W. TOMPKINS, Sheriff, Suffolk County, Massachusetts; JEH CHARLES JOHNSON, Secretary of the Department of Homeland Security; DOROTHY HERRERA-NILES, Director, Immigration and Customs Enforcement, Boston Field Office; JOHN T. MORTON, Director of Immigration and Customs Enforcement; ERIC H. HOLDER, JR., Attorney General; JUAN OSUNA, Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Respondents - Appellants/Cross-Appellees

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, U.S. District Judge]

Before

Howard, Chief Judge,
Selya and Stahl, Circuit Judges.

Elianis N. Perez, Senior Litigation Counsel, with whom Joyce Branda, Acting Assistant Attorney General, Civil Division, William C. Peachey, Director, Office of Immigration Litigation, District Court Section, Colin A. Kisor, Deputy Director, and Regan Hildebrand, Senior Litigation Counsel, Officer of Immigration Litigation, District Court Section, were on brief, for appellant.

Anant K. Saraswat and Swapna C. Reddy, Law Student Intern, with whom Mark C. Fleming, Wilmer Cutler Pickering Hale and Dorr LLP, Ahilan T. Arulanantham, Michael Tan, ACLU Immigrants' Rights Project, Nicole Hallett, Supervising Attorney, Michael Wishnie, Supervising Attorney, Conchita Cruz, Law Student Intern, Grace Kao, Law Student Intern, Lunar Mai, Law Student Intern, My Khanh Ngo, Law Student Intern, Ruth Swift, Law Student Intern, and Jerome N. Frank Legal Services, were on brief, for appellee.

April 13, 2016

STAHL, Circuit Judge. Under 8 U.S.C. § 1226(c), aliens who have committed certain criminal offenses are subject to mandatory detention after serving their criminal sentence and pending their removal proceedings. Petitioner, a lawful permanent resident, committed such offenses, served his sentence, and then was held under § 1226(c) without an individualized showing that he posed a flight risk or danger to society and without an opportunity to seek release on bond. After eight months, Petitioner challenged his continuing detention and filed a class action on behalf of himself and similarly situated noncitizens held for over six months.

The district court held that detention pursuant to § 1226(c) for over six months was presumptively unreasonable and granted summary judgment to the class, thereby entitling each class member to a bond hearing. With respect to Petitioner, the court also held, in the alternative, that the individualized circumstances of his case rendered his detention unreasonable. Finally, the court declined to mandate certain procedural protections for the class members' bond hearings. We affirm the judgment with respect to Petitioner, vacate the judgment with respect to the class members, and remand the class action for reconsideration of the district court's class certification.

I. Facts & Background

The U.S. Department of Homeland Security ("DHS") generally has the discretionary authority to detain an alien during removal proceedings. 8 U.S.C. § 1226(a). An alien that U.S. Immigration and Customs Enforcement ("ICE") decides to detain under

§ 1226(a) may seek a bond hearing before an immigration judge ("IJ") to show that he or she is not a flight risk or a danger. 8 C.F.R. § 236.1(c)(8). For aliens who have committed certain criminal or terrorist offenses, however, Congress made detention during removal proceedings mandatory, except for witness protection purposes. 8 U.S.C. § 1226(c).

Mark Anthony Reid ("Reid" or "Petitioner") came to the United States in 1978 as a lawful permanent resident. Between 1978 and 1986, Reid served in the U.S. Army, pursued post-secondary education, was employed as a loan originator, worked in construction, and owned and rented several properties. Following a conviction for narcotics possession in 1986, however, Reid amassed an extensive criminal record, including larceny, assault, drug and weapon possession, failure to appear, interfering with an officer, driving on a suspended license, selling drugs, violation of probation, and burglary.

After being released from criminal custody on November 13, 2012, Reid was detained by ICE under § 1226(c) without bond pending immigration removal proceedings. Reid conceded the factual allegations underlying his removability charges, but sought relief from removal on two grounds: (1) that the Convention Against Torture ("CAT") applied, and (2) that removal was a disproportionate punishment for his crimes.

At several IJ hearings held between February 13, 2013 and March 11, 2013, Reid presented evidence in support of his application for relief from removal. On April 5, 2013, the IJ denied Reid's application and ordered him removed to Jamaica. Reid filed a notice of appeal to the Board of

Immigration Appeals ("BIA") on May 5, 2013. On October 23, 2013, nearly half a year after the IJ's decision and nearly a full year after Reid's detention began, the BIA reversed and remanded the case for further proceedings related to Reid's CAT claim. On December 17, 2013, the IJ again denied Reid's CAT claim. Reid appealed again and, on December 29, 2014, the BIA found error and remanded the case once more.

Between his first appeal and the BIA's first remand, Reid filed the present habeas corpus petition along with a class-action complaint in the United States District Court for the District of Massachusetts. Reid contends that he and other similarly situated noncitizens cannot be held under § 1226(c) in prolonged detention without an individualized bond hearing to ascertain individual flight or safety risk. Reid argues that § 1226(c) contains an implicit "reasonableness" requirement and should be read to authorize mandatory detention only up to six months, at which time the government must provide a bond hearing. At the bond hearing, Reid argues, the government must bear the burden of presenting clear and convincing evidence that detention remains necessary. What is more, Reid contends that the government must employ the least restrictive means available to prevent the alien's flight or danger to the community.

On January 9, 2014, the district court granted Reid's habeas petition and held that § 1226(c) only authorizes mandatory detention for a reasonable period of time. Reid v. Donelan (Reid I), 991 F. Supp. 2d 275, 278–79 (D. Mass. 2014). The court further held that detention over six months was

presumptively unreasonable absent individualized justification. Id. at 279–81. The court also noted that even if no such presumption applied, the individualized circumstances of Reid's case rendered his continued detention unreasonable. Id. at 281–82. The court ordered the government to set a hearing and to determine whether conditions could be placed upon Reid's release to reasonably account for any flight or safety risks. Id. at 282. On February 25, 2014, Reid posted bond and was released after 400 days of civil detention, subject to electronic monitoring, monthly reporting, and other conditions.

On May 27, 2014, the district court granted summary judgment in the related class action and ordered bond hearings for all class members. Reid v. Donelan (Reid II), 22 F. Supp. 3d 84, 93–94 (D. Mass. 2014). The court reiterated its holding that § 1226(c) only justifies mandatory detention for a period of six months, at which time the detention becomes presumptively unreasonable absent an individualized showing at a bond hearing. Id. at 88. However, the court declined to adopt any specific procedural protections for the bond hearings themselves. Id. at 92–93. The court observed that aliens detained under § 1226(a) bore the burden of proof at their bond hearings, and "individuals who committed a § 1226(c) predicate offense should not receive more protections than § 1226(a) detainees." Id. at 92.

The government appeals the lower court's determination that § 1226(c) contains an implicit reasonableness requirement, that any detention under § 1226(c) is presumptively unreasonable after six months, and that Reid's specific detention had become unreasonable. Reid cross-appeals the lower

court's class determination that bond hearings for aliens held pursuant to § 1226(c) do not require specific procedural protections.

II. Analysis

Until the late 1980s, the Attorney General had broad authority to take aliens into custody during their removal proceedings and to release those aliens in his discretion. See Demore v. Kim, 538 U.S. 510, 519 (2003) (citing 8 U.S.C. § 1252(a) (1982)). Over time, Congress became concerned that criminal aliens too often obtained release and were thereby able to evade removal and continue committing crimes. See id. at 518–21. In response, "Congress limited the Attorney General's discretion over custody determinations with respect to deportable aliens who had been convicted of aggravated felonies" and then expanded the definition of "aggravated felonies" in subsequent legislation to subject more criminal aliens to mandatory detention. Id. at 520–21. "At the same time, however, Congress ... authorize[d] the Attorney General to release permanent resident aliens during their deportation proceedings where such aliens were found not to constitute a flight risk or threat to the community." Id. at 521.

The current take on this mandatory detention theme can be found in 8 U.S.C. § 1226(c), which requires the Attorney General[11] to take criminal

[11] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security.

aliens into custody "when released"[12] from criminal custody and only permits the release of such aliens for limited witness protection purposes. See 8 U.S.C. § 1226(c). Whatever the merits of this approach may be as a matter of policy, we must ensure that the statute falls within constitutional limits.

The constitutionality of the categorical detention scheme embodied in § 1226(c) was first put to the test in Demore. In Demore, the petitioner launched a broad attack on the statute, arguing "that his detention under § 1226(c) violated due process because the [government] had made no determination that he posed either a danger to society or a flight risk." 538 U.S. at 514. In other words, the petitioner argued that his detention was unconstitutional from the outset due to the categorical nature of the mandatory detention regime.

The Supreme Court rejected the challenge and upheld the statute in a narrowly framed ruling. The Court recognized the constitutional pressures at play, calling it "well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Id. at 523 (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)). Yet, the Court also noted that "[d]etention is necessarily a part of [the] deportation procedure," id. at 524 (alteration in original) (quoting Carlson v. Landon, 342 U.S. 524, 538 (1952)), and that Congress may employ "reasonable presumptions

[12] The instant case asks what § 1226(c) requires after a criminal alien has been brought into custody. This case does not touch upon what the statute requires at the commencement of such detention. This circuit recently considered the meaning of the statute's "when . . . released" provision in Castañeda v. Souza, 810 F.3d 15 (1st Cir. 2015) (en banc).

and generic rules" when legislating with respect to aliens, id. at 526 (quoting Flores, 507 U.S. at 313). Accordingly, the Court left a limited degree of constitutional space to Congress' categorical judgment that, "even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." Id. at 520.

The "limited" scope of this categorical sanction, however, was plainly evident. The Court made the brevity of the detention central to its holding: "We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." Id. at 513 (emphasis added). This was no passing remark. See id. at 526 ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." (emphasis added)). Indeed, the Court took pains to point out the specific durations that it envisioned were encompassed by its holding: "[T]he detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." Id. at 530.

In a concurring opinion, Justice Kennedy drove the point of temporal limitations home, noting that an alien "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J.,

concurring). "Were there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." Id. at 532–33.

The case before us tests the assumption upon which Demore was based, and asks whether Congress may employ categorical, mandatory detention for "the period necessary for removal proceedings" when that period turns out not to be so "brief" after all.

The concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690 (2001). Because of the limited nature of the holding in Demore, every federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause imposes some form of "reasonableness" limitation upon the duration of detention that can be considered justifiable under that statute. See Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015); Rodriguez v. Robbins (Rodriguez I), 715 F.3d 1127, 1138 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221, 232–33 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263, 269–70 (6th Cir. 2003). And, each circuit has found it necessary to read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance. See Lora, 804 F.3d at 614; Rodriguez I, 715 F.3d at 1138; Diop, 656 F.3d at 235;

Ly, 351 F.3d at 270.

This is not, as the government contends, contrary to congressional intent. "[C]ourts interpret statutes with the presumption that Congress does not intend to pass unconstitutional laws." Diop, 656 F.3d at 231. In this case, "while Congress did express a desire to have certain criminal aliens incarcerated during removal proceedings, it also made clear that such proceedings were to proceed quickly." Ly, 351 F.3d at 269; see also Diop, 656 F.3d at 235 ("We do not believe that Congress intended to authorize prolonged, unreasonable[ ] detention without a bond hearing."). This reading similarly accords with Demore's authorization of only a "brief" or "limited" detention, 538 U.S. at 513, 526, and Justice Kennedy's stipulation that an individualized determination would become necessary "if the continued detention became unreasonable or unjustified," id. at 532 (Kennedy, J., concurring).

Yet, the courts of appeals have split on the method for enforcing this statutory reasonableness requirement. The Third and Sixth Circuits have held that individualized review is necessary in order to determine whether the detention has become unreasonable. See Diop, 656 F.3d at 233 (noting that the inquiry into whether detention has become unreasonable "will necessarily be a fact-dependent inquiry that will vary depending on individual circumstances" and "declin[ing] to establish a universal point at which detention will always be considered unreasonable"); Ly, 351 F.3d at 271 ("A bright-line time limitation ... would not be appropriate.... [C]ourts must examine the facts of each case[ ] to determine whether there has been

unreasonable delay in concluding removal proceedings."). "Under this approach, every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the 'reasonableness' threshold, thus entitling him to a bail hearing." Lora, 804 F.3d at 614; see also Ly, 351 F.3d at 272.

The Second and Ninth Circuits, on the other hand, have "appl[ied] a bright-line rule to cases of mandatory detention" and have held that "the government's 'statutory mandatory detention authority under Section 1226(c) ... [is] limited to a six-month period, subject to a finding of flight risk or dangerousness.'" Lora, 804 F.3d at 614 (alterations in original) (quoting Rodriguez I, 715 F.3d at 1133). Under this interpretation, every alien held pursuant to § 1226(c) must be provided a bond hearing once his or her detention reaches the six-month mark, because any categorical and mandatory detention beyond that timeframe is presumptively unreasonable. Id. at 616. The detainee may continue to be held if an IJ determines that the individual does, in fact, pose a flight risk or danger to society, but the categorical nature of the detention expires. Id.

In this circuit split, we sense a tension between legal justifications and practical considerations. From a strictly legal perspective, we think that the Third and Sixth Circuits have the better of the argument. This view is informed by our analysis regarding the source of the six-month rule, the nature of the reasonableness inquiry itself, and the circumstances surrounding the Supreme Court's Demore decision.

To justify employing a six-month presumption, the Second and Ninth Circuits point to the Supreme Court's decision in Zadvydas. There, the Court was faced with a particularly thorny problem. Aliens who had been deemed unlawfully present, had completed removal proceedings, and had a final removal order entered against them were subject to detention during a 90–day statutory "removal period" while the government secured their physical removal from the country. 533 U.S. at 682. If the government failed to remove the alien from the country during this time period, the government could continue to detain them for successive periods so long as they posed a risk to the community or were unlikely to comply with the order of removal when such physical removal became possible. Id. The trouble arose when, for one reason or another, there was simply no country willing to accept the alien and no reasonably foreseeable point at which the detained individual would ever be released from this theoretically interim detention. Id. at 684–86. The question thus became "whether [the] post-removal-period statute authorize[d] the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal." Id. at 682.

There, as here, the solution was to read an implicit reasonableness limitation into the statute to avoid constitutional conflict. Id. at 689. The Court held that "if removal is not reasonably foreseeable," then "continued detention ... [is] no longer authorized by [the] statute." Id. at 699–700. The Court then went one step further and adopted a six-month presumption: "After [a] [six]-month period, once the alien provides good reason to believe that there is no

significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." Id. at 701.

Although it is tempting to transplant this presumption into § 1226(c) based on the superficial similarities of the problems posed, such a presumption has no place here. Unlike the "post-removal-period detention" at issue in Zadvydas, which had "no obvious termination point," a "detention pending a determination of removability" under § 1226(c) has "a definite termination point." Demore, 538 U.S. at 529 (quoting Zadvydas, 533 U.S. at 697). Just because the conclusion of removal proceedings may not be imminent does not mean the conclusion is not reasonably foreseeable. Why does this distinction matter? Because the six-month presumption developed in Zadvydas would never be triggered under the circumstances found here.

In adopting a bright-line six-month rule, the Second and Ninth Circuits have looked past the primary lesson of Zadvydas and fixated on a secondary, backup rule. In Zadvydas, the Court read an implicit reasonableness limitation into the statute and then noted that judges evaluating such cases "should measure reasonableness primarily in terms of the statute's basic purpose." 533 U.S. at 699. When faced with a detention with no reasonably foreseeable end, the statute's purpose—"namely, assuring the alien's presence at the moment of removal"—was drawn into doubt, making continued detention "unreasonable and no longer authorized by [the] statute." Id. at 699–700.

This primary holding was then buttressed by a secondary bright-line six-month rule. The Court pointed out that not every alien to be removed would be released after six months. "To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Id. at 701. If six months had passed and the alien had demonstrated "no significant likelihood of removal in the reasonably foreseeable future," then the government was required to "respond with evidence sufficient to rebut that showing." Id. If the government could demonstrate a reasonably foreseeable termination point, the detention continued.

Thus, the secondary six-month rule was predicated on there being no foreseeable hope of removal. Unlike in this case, the confinement at issue in Zadvydas was "potentially permanent." Id. at 691. Because the detention in such cases had to stop at some point, and there were simply no metrics by which to judge just how much longer towards eternity could be considered "reasonable," a bright-line rule was warranted. That is why we think it inappropriate to import the six-month presumption from Zadvydas into a statute where individualized reasonableness review remains feasible.

This brings us to the character of the "reasonableness" inquiry itself. As the Diop court pointed out, "[r]easonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." 656 F.3d at 234. The reasonableness of continued detention under § 1226(c) must be measured "primarily in terms of

the statute's basic purpose." Zadvydas, 533 U.S. at 699. Although the statute's purpose at first glance is to protect public safety and ensure that aliens appear for their removal proceedings, we think the purpose is a bit more nuanced than that. If an individualized determination of flight and safety risk were sufficient, for example, there would be little reason to pass § 1226(c) at all.

Instead, the statute was passed "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens" and "near-total inability to remove deportable criminal aliens" due to "the agency's failure to detain [such] aliens during their deportation proceedings." Demore, 538 U.S. at 518–19. Thus, the animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens. Measuring reasonableness by this basic purpose requires a different inquiry than the flight-and-safety-risk evaluation conducted in an individualized bond hearing. Therefore, arguing that aliens receive the equivalent of an individualized "reasonableness" review at their bond hearings entails a certain judicial sleight-of-hand. See Rodriguez I, 715 F.3d at 1139. It is a supposed finding of "unreasonableness" under the implicit statutory limitation that entitles the alien to a bond hearing in the first place. In other words, while the Second and Ninth Circuits claim to have read an implicit "reasonableness limitation" into § 1226(c), we think it more accurate to say that they have simply read an implicit "six-month expiration" into § 1226(c).

Finally, we view Demore as implicitly foreclosing our ability to adopt a firm six-month rule.

In Demore, the Supreme Court declined to state any specific time limit in a case involving a detainee who had already been held for approximately six months. See 538 U.S. at 530–31 (noting that most removal proceedings usually require one to five months, and that the respondent had been "detained for somewhat longer than the average—spending six months in INS custody prior to the ... habeas relief"); Ly, 351 F.3d at 271 (noting that Demore "specifically authorized such detention in the circumstances there"). The Demore Court also briefly discussed facts specific to the detainee, such as his request for a continuance of his removal hearing. 538 U.S. at 531 & n. 15. Taken together, Zadvydas, Demore, and the inherent nature of the "reasonableness" inquiry weigh heavily against adopting a six-month presumption of unreasonableness.

From a more practical standpoint, however, the approach employed by the Third and Sixth Circuits has little to recommend it. Reid and his amici point to a plethora of problems raised by the method. First, the approach has resulted in wildly inconsistent determinations. See Lora, 804 F.3d at 615 (collecting cases and noting that "the pervasive inconsistency and confusion exhibited by district courts ... when asked to apply a reasonableness test on a case-by-case basis weighs, in our view, in favor of adopting an approach that affords more certainty and predictability").

Second, the failure to adopt a bright-line rule may have the perverse effect of increasing detention times for those least likely to actually be removed at the conclusion of their proceedings. See Rodriguez v. Robbins (Rodriguez II), 804 F.3d 1060, 1072 (9th Cir.

2015) ("Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability."). Moreover, federal habeas litigation itself is both complicated and time-consuming, especially for aliens who may not be represented by counsel. See Lora, 804 F.3d at 615 ("[A six-month] rule avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years.").

Third, even courts that have adopted the individualized habeas approach have questioned the federal courts' "institutional competence" to adjudicate these issues and the consequences of such an interpretation. See Ly, 351 F.3d at 272 (noting that the habeas approach raises "a question of institutional competence" since "federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion"). As the Third Circuit has lamented, federal courts are faced with a "moving target" in such cases because petitioners presumably cannot challenge their detention until it becomes unreasonable, but, even if the petitioner prematurely lodges a challenge, the detention may become unreasonable during the pendency of the claim. See Diop, 656 F.3d at 227.

Moreover, the federal courts' involvement is wastefully duplicative. Not only may "the underlying removal proceedings justifying detention ... be nearing resolution by the time a federal court of appeals is prepared to consider them," id., but it is

also likely that the evidence and arguments presented in a "reasonableness" hearing before a federal court are likely to overlap at the margins with the evidence and arguments presented at a bond hearing before an immigration court. This inefficient use of time, effort, and resources could be especially burdensome in jurisdictions with large immigration dockets. See Lora, 804 F.3d at 615–16.

Finally, Reid and his amici stress the harms suffered by detainees and their families when detainees are held in prolonged detention. While perhaps beyond our judicial cognizance, we do not mean to diminish the real, human consequences of being held for prolonged periods of time in civil confinement away from family, friends, and loved ones.

Despite the practical advantages of the Second and Ninth Circuits' approach, however, we have surveyed the legal landscape and consider ourselves duty-bound to follow the trail set out by the Third and Sixth Circuits. A bright-line rule may offer significant benefits, but these are persuasive justifications for legislative or administrative[13] intervention, not judicial decree. In the end, we think the Third and Sixth Circuits' individualized approach

[13] To be clear, it is quite possible that the government is less captive to the § 1226(c)'s categorical command than it believes. Because we read an implicit reasonableness limitation into the statute itself, the statute authorizes a bond hearing as soon as continued, mandatory detention has reached the point of being constitutionally unreasonable. Whether (and how) the govern**m**ent may rely on this implicit component of the state to streamline its detention under § 1226(c) for a prolonged period of time poses a question for another day.

adheres more closely to legal precedent than the extraordinary intervention requested by Petitioner.

In conducting this individualized reasonableness inquiry, the district court must evaluate whether the alien's continued detention sufficiently serves the categorical purpose of the statute. This is not, as the government contends, simply a question of asking "whether there are significant, unjustifiable delays in the proceedings ordered at the government's request or other evidence demonstrating that the government is not actively engaged in prosecution of the removal case."

The government's view of reasonableness fails for two reasons. First, while the Demore Court did not find any specific duration dispositive, the holding was premised on the notion that proceedings would be resolved within a matter of months, including any time taken for appeal by the detainee. See 538 U.S. at 529. The majority emphasized that "[t]he very limited time of the detention at stake under § 1226(c) [was] not missed by the dissent," which referred to proceedings taking "several months." Id. at 529 n. 12. The majority then employed a "but see" citation with respect to the dissent's warning that § 1226(c) could result in a "potentially lengthy detention." Id. Thus, the Demore majority disclaimed any suggestion that its decision somehow sanctioned categorical custody beyond a matter of months.

The Third Circuit's Diop decision provides a clear example of why the government's reading must fail. In that case, "[t]he Government doggedly pursued Diop's detention and removal for three years." Diop, 656 F.3d at 228. The government did not "delay" proceedings, and yet the detention still

reached an unreasonable duration. As that court noted, "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable ... period of time." Id. at 223. Total duration matters to a person held in civil confinement, and due process demands a better answer than "we haven't gotten around to it yet."

The second problem with the government's suggested reading is its failure to focus on the categorical nature of the detention. While detention under § 1226(c) undoubtedly prevents flight and protects the public, this argument involves the same stratagem used by the Ninth Circuit in finding bond hearings sufficient to satisfy the implicit reasonableness requirement. The basic purpose of § 1226(c) is not merely flight and danger prevention. After all, an alien who, at a bond hearing, is found likely to abscond or harm society could clearly remain in detention. The specific purpose of § 1226(c) is to categorically deny bond hearings to a class of aliens who may pose these threats. An inquiry into the reasonableness of categorical detention must, therefore, be measured by reference to Congress' use of "reasonable presumptions and generic rules" about danger and flight risk. Demore, 538 U.S. at 526 (quoting Flores, 507 U.S. at 313).

Categorical detention is only permitted for a short time as "a constitutionally valid aspect of the deportation process." Id. at 523 (emphasis added). As Justice Kennedy noted in his Demore concurrence, the government's categorical denial of bond hearings is premised upon the alien's presumed deportability

and the government's presumed ability to reach the removal decision within a brief period of time. See id. at 531 (Kennedy, J., concurring) ("While the justification for 8 U.S.C. § 1226(c) is based upon the Government's concerns over the risks of flight and danger to the community, the ultimate purpose behind the detention is premised upon the alien's deportability." (citation omitted)); see also Ly, 351 F.3d at 271–72 ("The actual removability of a criminal alien ... has bearing on the reasonableness of his detention prior to removal proceedings."). In other words, there is a difference between the "foreseeability" of proceedings ending and the "foreseeability" of proceedings ending adversely. As the likelihood of an imminent removal order diminishes, so too does the government's interest in detention without a bond hearing.

Thus, a court looking to measure the reasonableness of continued categorical detention must examine the presumptions upon which that categorical treatment was based (such as brevity and removability). As the actualization of these presumptions grows weaker or more attenuated, the categorical nature of the detention will become increasingly unreasonable. For example, a court might examine, inter alia, the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will

culminate in a final removal order.[14]

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[14] These non-exhaustive factors are similar to those advanced by the Ly court. See Flores–Powell v. Chadbourne, 677 F. Supp. 2d 455, 471 (D. Mass. 2010) (summarizing the factors from Ly, 351 F.3d at 271–72, that are suggestive of unreasonable delay: "(1) the overall length of detention; (2) whether the civil detention is for a longer period than the criminal sentence for the crimes resulting in the deportable status; (3) whether actual removal is reasonably foreseeable; (4) whether the immigration authority acted promptly to advance its interests; and (5) whether the petitioner engaged in dilatory tactics in the Immigration Court").

Two clarifications are worth noting here. First, there is a difference between "dilatory tactics" and the exercise of an alien's rights to appeal. As the Ly court noted:

> [A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him. Further, although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take. The mere fact that an alien has sought relief from deportation does not authorize the INS to drag its heels indefinitely in making a decision. The entire process, not merely the original deportation hearing, is subject to the constitutional requirement of reasonability.

351 F.3d at 272. In Demore, the Supreme Court held that detention for a number of months remains appropriate "in the minority of cases in which the alien chooses to appeal." 538 U.S. at 530 (emphasis added). When an alien appeals, and the appeal occurs within this limited timeframe, a presumption of removability remains and a presumption of promptness remains. Although there may come a time when promptness lapses, aliens may be detained for "several months" before this point is reached. Id. at 529 n. 12. Of course, the same logic

There may be other factors that bear on the reasonableness of categorical detention, but we need not strain to develop an exhaustive taxonomy here. We note these factors only to help resolve the case before us and to provide guideposts for other courts conducting such a reasonableness review.

Applying the rule we have adopted today to the case at bar, we affirm the district court's individualized holding with respect to Reid's particular habeas petition. In its alternative holding, the district court weighed "the length of detention; the period of detention compared to the criminal sentence; the foreseeability of removal; the prompt action of immigration authorities; and whether the petitioner engaged in any dilatory tactics." Reid I, 991 F. Supp. 2d at 281. The court also noted that Reid had been detained for fourteen months, which was "well beyond the brief detainment contemplated in Demore." Id. These factors aptly anticipated those

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would not apply if a detainee prevails before an IJ and the government appeals. In such cases, the presumption of ultimate removability is weakened, rendering the alien's continued categorical detention far less reasonable. (Of course, an IJ might still find such an alien too risky to release at an individualized bond hearing.)

Second, we think it worth noting that the Ninth Circuit, in Rodriguez II, recently rejected a proposal that an IJ consider "the likely duration of future detention and the likelihood of eventual removal" at bond hearings because consideration of those factors "would require legal and political analyses beyond what would otherwise be considered at a bond hearing." 804 F.3d at 1089. While we agree that these factors are not relevant at a bond hearing, where the focus is on the alien's flight and safety risk, these factors are relevant when a federal court is conducting a reasonableness inquiry and determining whether a bond hearing needs to be held in the first place.

articulated above, and we agree with the district court's holding that Reid's detention had become unreasonable under § 1226(c).

Moreover, Reid's case had already been through one round of appeals and was pending another round at the time of the lower court's decision, making final resolution "certainly far enough out to implicate due process concerns." Id. at 282. None of these appeals involved "dilatory tactics." Id. Rather, Reid "raised a colorable claim against deportation and ... vigorously contest [ed] removal." Id. Finally, it should be noted that although the IJ's initial order was adverse to Reid, the BIA's first decision, rendered almost a year after detention began, reversed and remanded the IJ's determination, drawing into question Reid's presumed deportability.

With respect to the class claims, however, we must vacate the district court's summary judgment decision. The district court certified a class consisting of "[a]ll individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing." Reid v. Donelan, 297 F.R.D. 185, 194 (D. Mass. 2014). The court subsequently granted summary judgment to this class on the basis of its previous decisions adopting the six-month bright-line rule. See Reid II, 22 F. Supp. 3d at 88–89. It then examined the appropriate relief, which included a request by Reid that the court mandate certain procedural protections at bond hearings—protections that exceed those currently contemplated by regulations implementing bond hearings under 8 U.S.C. § 1226(a). The court

declined to impose these additional procedural protections, concluding that due process did not require them. See id. at 92–93. Reid cross-appeals this conclusion, offering a bevy of weighty constitutional arguments.

Yet, Reid's personal situation does not warrant adjudication of these constitutional questions. Reid received a bond hearing pursuant to the district court's order and was granted bond. He has thus suffered no cognizable harm attributable to the challenged procedures, and the claim persists only with respect to the class that Reid represents. The problem, however, is that the district court's adoption of the bright-line rule was an essential predicate to class certification. Our ruling today, requiring an individualized approach, removes that predicate. The class is thus substantially overbroad in light of our disposition.

When a class representative lacks a live claim, and changes in the law—whether through legislative enactment, see Kremens v. Bartley, 431 U.S. 119, 130 (1977), or judicial decision, see Hartman v. Duffey, 19 F.3d 1459, 1470, 1474–75 (D.C. Cir. 1994)—cast substantial doubt on the composition of the class, it is appropriate to remand for reconsideration of the class certification. This prudential procedure recognizes that serious concerns about premature adjudication of constitutional questions arise where the legitimacy of a class is called into question by changes in the law. See Kremens, 431 U.S. at 128, 136–37; Smook v. Minnehaha County, 457 F.3d 806, 815 (8th Cir. 2006). Those concerns are heightened where, as here, we lack information about the status of the unnamed class members, including whether they have been

afforded bond hearings, whether any of them have been denied bond under the challenged procedures, and the justification for those denials. Remand (rather than dismissal) is also fairer to the class members, especially since the government has not appealed the class certification order, and we have no briefing from the parties about the impact our case-by-case rule has on the class as a whole.

On remand, the district court may consider whether it is feasible to redefine the class, excluding those class members with moot claims and substituting class representatives with live claims as appropriate. See Fed. R. Civ. P. 23; Kremens, 431 U.S. at 134–35; Hartman, 19 F.3d at 1474. It may well be that no suitable class can be formed, and that the due process concerns presented by the bond procedures must be raised by an individual denied bond under these standards, in which case decertification of the present class is the appropriate course. See Smook, 457 F.3d at 815.

In concluding, we wish to emphasize that our decision to read an implicit reasonableness requirement into § 1226(c) cannot be read so broadly as to unwind § 1226(c)'s mandatory detention requirement. There is no doubt that a challenge like Demore's would still fail today. Categorical and mandatory detention for a brief, reasonable duration remains constitutional, and any challenge to such detention at the outset or early stages of categorical custody must be dismissed without hesitation. As long as the statute remains in effect, Demore so requires.

Yet, at a certain point the constitutional imperatives of the Due Process Clause begin to

eclipse the claimed justifications for such bridling custodial power. When the duration of this categorical custody exceeds reasonable bounds, the implicit terms of the statute disclaim any pretense to bolster the state's unconstitutional bidding.[15]

III. Conclusion

For the foregoing reasons, the judgment is AFFIRMED as to Reid and VACATED as to the class members. Because we reject the six-month presumption underlying the class certification and judgment, the class action is REMANDED for reconsideration of the certification order in a manner consistent with this decision.

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[15] Because our affirmance in this case is limited to the particular facts presented by Reid's petition, we have no occasion to consider here whether another petitioner might be able to challenge the individualized reasonableness of his continued categorical detention before the immigration courts rather than the federal courts. The regulatory and statutory regime does not explicitly address the propriety of such an approach, and the parties before us have not fully briefed or argued the issue. Given the shortcomings of case-by-case habeas review identified above, however, it would be appropriate for the executive (or the legislature, as the case may be) to consider explicitly permitting detainees in the position of the petitioner to seek a reasonableness review before a federal court or before an IJ more familiar with the intricacies of the case and the particulars of the underlying removal proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID, on behalf of himself and others similarly situated, Plaintiff,	)	
v.	)	C.A. NO. 13-cv-30125-MAP
CHRISTOPHER DONELAN, Sheriff of Franklin County, et al., Defendants.	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFFS' MOTION FOR ENFORCEMENT OR MODIFICATION OF CLASS CERTIFICATION ORDER AND FOR LIMITED DISCOVERY
(Dkt. No. 144)

December 10, 2014

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff,[1] an alien and lawful permanent resident who was detained without the right to seek

[1] The class is represented by a single person, Mark Anthony Reid, who stands in the shoes of all others similarly situated. For purposes of clarity, the court refers to "Plaintiff" in the singular throughout this memorandum.

release pending deportation, brought a class action on behalf of himself and all similarly situated persons held in custody for longer than six months within the Commonwealth of Massachusetts by Immigration and Customs Enforcement ("ICE") pursuant to 8 U.S.C. § 1226(c). The court has previously granted individual habeas relief, certified the class, and granted summary judgment allowing class-wide relief and ordering Defendants to give notice to class members of their entitlement to bond hearings after six months. See Reid v. Donelan, 991 F. Supp. 2d 275 (D. Mass. 2014) ("Reid I") (granting habeas relief); Reid v. Donelan, 297 F.R.D. 185 (D. Mass. 2014) ("Reid II") (certifying class); Reid v. Donelan, 22 F. Supp. 3d 84 (D. Mass. 2014) ("Reid III") (granting summary judgment).

Some disagreements have arisen regarding the interpretation of the court's remedial order. Plaintiff has moved to enforce the order to the extent that it requires Defendants to provide individualized bond hearings and notice to all individuals held under 8 U.S.C. § 1226(c). Insofar as some ambiguity exists regarding who exactly these individuals are, Plaintiff has moved, in the alternative, to modify the language of the class certification order so that it provides relief to the class as Plaintiff construes it. Plaintiff has also moved for limited discovery to identify class members who may be entitled to relief but who have not yet been disclosed by Defendants. Lastly, Plaintiff has moved for an order requiring Defendants to notify class counsel of the date and time when a class member's bond hearing is scheduled. For the reasons set forth below, the court will substantially allow Plaintiff's motion, denying for now only some aspects of the requested relief.

II. BACKGROUND

The facts of this litigation have been set forth in detail in the court's three previous memoranda, cited above. Only the facts germane to this motion merit repetition.

Plaintiff represents a class of individuals who were detained in Massachusetts pursuant to 8 U.S.C. § 1226(c) by ICE for over six months without an opportunity for a bond hearing. On January 9, 2014, the court, relying on its prior decision in Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009), granted Plaintiff's individual petition for habeas corpus. Reid I, 991 F. Supp. 2d at 282. The court concluded that two Supreme Court decisions, Zadvydas v. Davis, 533 U.S. 678 (2001), and Demore v. Kim, 538 U.S. 510 (2003), implied that § 1226(c) contained a reasonableness limitation on the length of time an individual could be detained without a bond hearing. Citing the Ninth Circuit's decision in Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013), the court set that reasonableness threshold at the six-month mark.[2] Reid I, 991 F. Supp. 2d at 279–81.

One month later, on February 10, 2014, the court certified the case as a class action. Reid II, 297

[2] A peripheral issue in this case was Plaintiff's individual challenge to Defendants' policy of shackling him during immigration proceedings absent any individualized consideration. The court, after three hearings, concluded that due process did mandate some form of individualized consideration. Reid v. Donelan, 2 F. Supp. 3d 38, 47 (D. Mass. 2014). However, because ICE had already made a determination regarding Plaintiff individually, the court found that he failed to establish the irreparable harm necessary to warrant a permanent injunction.

F.R.D. 185. The court defined the class as "all individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing." Id. at 194. Defendants expressed concern that two of the requirements for class certification, typicality and commonality, were lacking because the proposed class included individuals who had received a final order of removal and were, according to Defendants, therefore not detained under § 1226(c). To assuage that concern, the court explicitly stated, "The class requested, and being certified, only includes individuals held under § 1226(c) beyond the six-month mark. Any individual held under a different statute is not, for the time being at least, part of this class." Id. at 191 (emphasis in original). The court further explained, "Plaintiff does point out that an individual may be held under one statute but, due to the nature of his or her immigration litigation, later held under § 1226(c). At the point such individuals have been held under § 1226(c) for six months, they will become members of the class." Id. at 191 n. 3.

The parties then filed their dispositive motions. On May 27, 2014, the court, adhering to its prior decisions, granted summary judgment for Plaintiff. Reid III, 2014 WL 2199780, at *6-7. The court entered an injunction requiring Defendants to provide all class members held under § 1226(c) for more than six months the opportunity for a bond hearing pursuant to § 1226(a), which requires an initial bond determination. If a class member is not satisfied with that determination, he or she may seek provisional release under a bond through a hearing before an Immigration Judge.

A dispute quickly arose over which detainees were class members, specifically which were subject to detention under § 1226(c). Defendants contended that the class only included what they termed "pre-removal" aliens. Once an administrative order of removal was issued, even if it was appealed, Defendants contended, the aliens were no longer in a "pre-removal" status under § 1226(c) since they were supposedly held pursuant to § 1231(a)(1) in a 90–day "removal period." As such, they were not class members. Plaintiff disputed Defendants' construction of § 1231 and their distorted interpretation of the class boundary. By incorrectly grafting this "pre-removal" qualification onto the class definition, Plaintiff argued, Defendants improperly reduced the size of the class and, in the process, failed to comply with the court's order.

As this disagreement was blossoming, Plaintiff's counsel was also attempting to obtain information about the date and time of the calendared bond hearings for individuals who, Defendants conceded, actually were class members. The immigration court in Hartford refused to provide that information. Since presence of counsel is often crucial at bond hearings, Plaintiff's counsel asked Defendants to provide notice of scheduled bond hearings, which Defendants also declined to do.

In this context, on July 21, 2014, Plaintiff filed this motion for enforcement or modification of the class certification order and for limited discovery. (Dkt. No. 144.) Specifically, Plaintiff requested that the court make clear that the cohort of aliens supposedly within the 90–day "removal period," whom Defendants were attempting to excise from the

class, were being detained pursuant to § 1226(c) and not § 1231(a)(1), and were in fact class members subject to the court's remedial order. Plaintiff further requested that the court order Defendants to alter their notice of class certification to reflect the proper scope of the class. In addition, Plaintiff sought limited discovery to ensure that all class members were obtaining timely bond hearings. Finally, Plaintiff requested that the court order Defendants to provide notice to class counsel of the dates and times of bond hearings as they were calendared, so that counsel could be present to advocate on behalf of individuals appearing before an Immigration Judge.

On August 11, 2014, Defendants filed their opposition to Plaintiff's motion. (Dkt. No. 158.) Defendants contended that the class certified by the court did not include individuals who had been detained for more than six months but had received a final administrative removal order and were therefore not "pre-removal" but rather within the "removal period." Defendants characterized Plaintiff's motion as an impermissible attempt to expand the boundary of the class.

Plaintiff's reply brief cited a decision from this district, Brown v. Lanoie, No. 1:13–cv–13211, Dkt. No. 27 (D. Mass. Aug. 4, 2014) (unpublished), in which Judge Indira Talwani ruled that Petitioner Brown was a member of the Reid class and entitled to a bond hearing, despite the fact that he had received a final administrative removal order and was appealing that order to the Second Circuit. For the reasons set forth below, this court agrees with Judge Talwani that Plaintiff's construction of the class boundary, and not Defendants', is correct. As a

result, the court will substantially allow Plaintiff's Motion for Enforcement (Dkt. No. 144). No modification of the order is needed, since by its terms it clearly covers the entire class cohort as conceived by Plaintiff. On one or two details the court will decline, for the time being, to provide some of the relief requested by Plaintiff.

III. DISCUSSION

A. Procedural Framework

A motion for noncompliance with a court order focuses on the four corners of the order, and the court's inquiry is limited to the order's language. U.S. v. Saccoccia, 433 F.3d 19, 28 (1st Cir. 2005). A party is only considered noncompliant if the order is clear and unambiguous. Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991).

In Reid III, the court ordered, "Defendants shall immediately cease and desist subjecting all current and future class members—that is, those detainees held under 8 U.S.C. § 1226(c) beyond six months—to mandatory detention under that statute." 2014 WL 2199780, at *8. Defendants take the position that certain individuals subject to administrative orders of removal are no longer held under § 1226(c) and thus are not members of the class. Consistent with this interpretation, Defendants have not given notice of class membership or the right to individualized bond hearings to those persons. As the discussion below will demonstrate, Defendants' argument is based upon a clear misreading of the applicable statutes—a misreading that has already been noted by a number of courts.

B. Categories of Contested Individuals

Plaintiff has identified four disputed categories of individuals detained under § 1226(c) in the Commonwealth for a total of at least six months who, Plaintiff argues, are class members entitled to the benefit of the court's remedial order: (1) those who have received—in the awkward wording of the statute—"administratively final" orders of removal but are then granted a stay of their removal by a Court of Appeals; (2) those who have received "administratively final" orders of removal and whose motions for a stay are pending before a Court of Appeals; (3) those who receive "administratively final" orders of removal after they have been detained for more than six-months; and (4) those who receive "administratively final" orders, but whose petitions for review, motions to reopen, or motions to reconsider are thereafter granted. Defendants counter that none of these categories of aliens is entitled to relief under the court's remedial order because they are no longer held pursuant to § 1226(c).

No analytical difference separates the first and second categories, i.e. those who have been granted a stay of removal by a Court of Appeals and those whose motions seeking a stay of removal are pending before a Court of Appeals. These two categories will be addressed together below. The third category—individuals who have received a final administrative order of removal after the six-month detention limit—contains two sub-categories: individuals who received a final order before May 27, 2014 (the date Reid III was issued) and individuals who received a final order after that date. These two sub-groups will

be addressed separately. Lastly, the court will address the status of individuals in the fourth category—aliens whose petitions for review, motions to reopen, or motions to reconsider have actually been granted, but who continue to held under 1226(c) without the opportunity for a bond hearing.

1. Individuals whose motions to stay removal are granted by, or pending before, a Court of Appeals

The parties agree the key question as to this group is whether its detention is governed by § 1226 or § 1231. Section 1231(a)(1) provides:

> (A) In general—Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> (B) Beginning of period—The removal period begins on the latest of the following:
>
> > (i) The date the order of removal becomes administratively final.
> >
> > (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
> >
> > (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. (emphasis added).

Defendants contend that individuals who are pursuing appeals before a Courts of Appeals are held under § 1231, rather than § 1226, because the "removal period" for purposes of § 1231 commences at "the date the order of removal becomes administratively final."

The glaring flaw in this argument is that it overlooks the preceding phrase, "on the latest of the following." The statute makes clear that an alien is not within the "removal period" and is not detained for purposes of § 1231 until the latest of three enumerated events, including "the day the removal order becomes administratively final" or "if the removal order is judicially reviewed and if a court orders a stay of the removal, the date of the court's final order." If a removal order has been stayed, or if a motion to stay is pending, the reviewing court's decision will obviously occur later than the administrative decision that precipitated the motion for stay. Until the reviewing court issues its final order, the individual subject to the order is not within any "removal period" and is simply not being held under § 1231.

The Ninth Circuit has noted the manifest import of the statute's language.

> The more sensible reading of the statute is that if an alien files a timely petition for review and requests a stay, the removal period does not begin until the court of appeals (1) denies the motion for a stay or (2) grants the motion and finally decides the petition for review.

Prieto–Romero v. Clark, 534 F.3d 1053, 1059 n. 5

(9th Cir. 2008)(emphasis in original) (citation omitted).

Indeed, every circuit to consider the matter has found that § 1226 continues to govern the detention in this situation.[3] See Leslie v. A.G., 678 F.3d 265, 270 (3d Cir. 2012) ("[Section] 1231 cannot explain nor authorize detention during a stay of removal pending further judicial review."); Wang v. Ashcroft, 320 F.3d 130, 147 (2d Cir. 2003) (same); Bejjani v. INS, 271 F.3d 670, 689 (6th Cir. 2001) (abrogated on other grounds)(same).

Furthermore, as noted above, this district has already considered this very question with respect to the detention of an individual in this category. In Brown v. Lanoie, No. 1:13–cv–13211, Dkt. No. 27, (D. Mass. Aug. 4, 2014) (unpublished), Judge Talwani ruled that Petitioner Dwane Brown's detention was authorized by § 1226, rather than § 1231, during the pendency of his appeal and that Brown was therefore a member of the Reid class. Brown, 1:13–cv–13211 at *7.

Defendants' remaining arguments regarding this group of aliens have no merit. In re Joseph, 22 I. & N. Dec. 660 (BIA 1999), is not controlling, and to

[3] Defendants do not pursue a distinction between an alien being held under § 1226(a) as opposed to § 1226(c). At least one circuit has held that the authority to detain an alien who is in custody following the commission of an aggravated felony and who has received a final administrative removal order which he then appealed to the Court of Appeals is held under § 1226(a). Prieto–Romero, 534 F.3d at 1058. However, as § 1226(a) contains the hearing procedure that this court afforded to class members as relief in Reid III, it is clear that application of either 1226(a) or 1226(c) would require a bail hearing.

the extent it may be interpreted as reaching a different conclusion about the applicability of § 1226, it is unpersuasive. Defendants' arguments that § 1231 must be read in light of § 1252(b)(3)(B) and § 1252(b)(8)(A) and that this perspective supports their interpretation of the scope of § 1231 have been convincingly rejected by the Ninth Circuit. As that court recognized,

> Section 1252(b)(8) merely clarifies that a pending petition for review does not, by itself, detract from the detention authority otherwise conferred by § 1231(a)(2) and (a)(6).... When the court of appeals has issued a stay, however, the alien may not be detained under any subsection of § 1231(a) unless and until the court finally denies the alien's petition for review.

Prieto–Romero, 534 F.3d at 1060.

In sum, the most reasonable interpretation, indeed the only reasonable interpretation, of § 1231(a), and the consensus of courts that have addressed this issue, make it clear that the statutory authority to detain an individual who has successfully obtained a stay from a Court of Appeals, or has a motion to stay pending, is to be found in § 1226(c). Those individuals are therefore members of the class and entitled to the relief set forth in Reid III.

2. Individuals who received "administratively final" orders after the six-month mark

The next category of persons with disputed entitlement to bond hearings are those individuals who received "administratively final" removal orders, not subject to stay or review by the Court of Appeals, after six-months of detention. Individuals in this category are now indisputably being held under § 1231(a) and not § 1226(c). This category must be subdivided into a pre-Reid III period and a post-Reid III period.

At least two individuals identified by counsel, Triston Lewin and Melvin Nooks, received final removal orders prior to May 27, 2014, the date of Reid III. As noted, they were therefore being held under § 1231(a) and not § 1226(c) at the time the court's remedial order issued. At least two others, Carlos Zapata and Jean Cange, received their final orders of removal after May 27, 2014. These two individuals had been held pursuant § 1226(c) for more than six months at the time the remedial order issued, but they are currently being held under § 1231(a).

a. Final administrative removal orders received before May 27, 2014

Plaintiff argues that, in fairness, because the two identified individuals, and perhaps others, were members of the class at the time it was certified on February 10, 2014, they should be entitled to the same relief as all other class members, even if they were no longer held pursuant to § 1226(c) as of the

date that the court issued its remedial order in Reid III, more than three months later. Apart from fairness, Plaintiff's concern is that, if members can fall out of the class with the passage of time, the government will have an incentive to engage in dilatory tactics.

While Plaintiff's anxiety is understandable, it is assuaged by the fact—which Plaintiff acknowledges—that this small group of individuals will soon disappear. To comply with the remedial order, Defendants as of now must provide individualized bond hearings to class members at or before the six-month mark. The few detainees who received final removal orders prior to May 27, 2014, are not within the purview of the Reid III order. It would be unfair to Defendants for the court to hold that they failed to comply with an order that did not yet exist when they issued the final administrative order of removal against this very limited group of individuals without granting an earlier bond hearing.

b. Final administrative removal orders received after May 27, 2014

The result is different for individuals who received the final administrative order of removal after May 27, 2014. The court at that time ordered Defendants immediately to give aliens held within the Commonwealth pursuant to § 1226(c) for six months or more an individualized bond hearing. At the time this order issued, those individuals were within the scope of the court's order. Defendants had a duty to comply with that order and their failure to grant immediate relief to the affected persons

constituted noncompliance with that order.

An example makes the justice of this conclusion clear. Jean Cange was a class member and subject to the Reid III order on May 27, 2014; he was entitled to a bond hearing then. Nearly two months later, in their July 31, 2014, status report, Defendants conceded that Cange "was a Reid class member until he became subject to a final administrative order on 7/8/14, and thus, was no longer a class member." (Dkt. No. 154–1.) In other words, up until July 8, 2014, Cange was entitled to a bond hearing, but the government failed to provide it in a timely manner. In Reid III, the court stated, "Once a member's detention crosses that six-month barrier, he is entitled to seek some form of individualized analysis of his entitlement to bail." Reid III, 22 F. Supp. 3d at 93. As the court recognized in Bourguignon, "simple fairness, if not basic humanity, dictates that a court should take into consideration the entire period in which a person has lost his liberty." 667 F. Supp. 2d at 183. Denying Cange the right to an individualized bond hearing now would violate the plain language of the court's order and the spirit behind its decision.

In this instance, moreover, Plaintiff's concern about rewarding Defendants' dilatoriness is compelling. If class members can fall out of the class because of Defendants' delay in providing a bond hearing, Defendants have an incentive to stall. The only way to avoid this is to recognize that once the entitlement to a bond hearing attaches at the six-month mark individuals must be permitted the hearing, even if, due to delays, they subsequently find themselves detained under 1231(a) and not

1226(c). The right to a bond hearing for this group of detainees essentially vested on May 27, 2014. Defendants' failure to identify those individuals and provide a bond hearing constituted a violation of the court's order. The fact that individuals later received a final order of removal does not excuse the previous violation or justify Defendants' noncompliance with the court's order.

3. Individuals who received administratively final orders but whose petitions for review, motions to reopen, or motions to reconsider are granted

Lastly, the parties seek clarification on whether individuals who were detained pursuant to § 1226(c) in the Commonwealth for a total of at least six months and who receive administratively final orders but whose petitions for review, motions to reopen, or motions to reconsider were granted are subject to the Reid III order. It is worth noting that neither party has identified any individual who falls into this category. However, it is clear that if an individual successfully obtains review, reopening, or reconsideration of an administratively final order, then the statutory basis for his or her continued detention would have to be § 1226(c). Once the individual is held for six months, he or she would be entitled to a bond hearing.

In sum, with the exception of individuals who were already subject to an administratively final order of removal as of the effective date of Reid III, May 27, 2014, all the categories of individuals identified by Plaintiff are class members entitled to bond hearings under the court's remedial order.

C. Request for Limited Discovery

In addition to seeking clarification from the court, Plaintiff has also requested discovery—including the right to serve interrogatories and requests for production and to conduct depositions—to determine the breadth of Defendants' noncompliance. This may not be necessary. Defendants' noncompliance was borne out of a dispute over the interpretation of the scope of the court's order, rather than an expression of bad faith or intentional obstruction. The preferable course, now that the boundaries of the court's order are clear, is to allow the parties to attempt to resolve any discovery issues informally. If this effort fails, the court will consider permitting formal discovery. The parties will submit a report to the court on this issue on or before January 16, 2015.

D. Class Notification

The parties also disputed the timing and language of the class notification. Plaintiff expressed concern that the proposed notice did not timely or accurately apprise class members of the relief available to them. During the September 15 hearing, Defendants represented to the court that any perceived timing issues had been resolved and that the content of the notice would be adjusted so that it would be consistent with the court's definition of the class. Accordingly, the parties will, again, be directed to work together to craft a notice letter consistent with the scope of the class as detailed in this order. The status report due on January 16, 2015, will inform the court of the progress made on this joint effort.

E. Notice of Bond Hearings

Lastly, Plaintiff requests that the court direct Defendants to notify class counsel upon calendaring a class member's bond hearing. Defendants' refusal to advise class counsel regarding the timing of impending bond hearings will obviously handicap severely individuals appearing at these hearings. The unfairness of requiring persons to appear pro se is especially galling, and gratuitous, since Plaintiff's counsel has assembled a network of pro bono counsel who are willing to appear and offer their services to class members if they know in advance when a hearing will be taking place.

The process of scheduling hearings, admittedly, creates some awkwardness. In the typical case, an alien who requests a bond hearing will receive written notice of the date and time via regular mail shortly before the hearing is to take place. The Immigration Court will provide notice of the hearing to an attorney only if the attorney has previously filed an appearance. No notice will be given to attorneys who, though willing to come to the hearings and offer representation, have not yet entered into an attorney-client relationship with an alien or filed an appearance.

Defendants point out that Reid III only required Defendants to notify class members; the order imposed no duty to notify class counsel. Defendants contend that it would violate the individual alien's privacy to notify a lawyer the alien may never have heard of, and may or may not want to retain, of the scheduling of the alien's bond hearing.

Further complicating matters, class counsel is understandably reluctant to enter a blanket appearance for all bond hearings because of the ethical and practical issues related to formal representation and, where appropriate, withdrawal. As noted, class counsel will try to arrange for attorneys to come to the bond hearings, when notice is available, by acting as a facilitator for a network of pro bono attorneys it has recruited. These volunteer attorneys appear at bond hearings and establish attorney-client relationships at that time with aliens who wish to be represented.

The crux of the dispute appears to be the privacy concerns raised by Defendants. The actual risk of some improper invasion seems minimal, given that the bond hearings themselves are public proceedings. The court therefore proposes the following approach. Along with the notification of the alien's right to request a bond hearing, Defendants will provide, or include, a notice that he or she may request that class counsel be notified of the date and time of the bond hearing. Class members will be permitted, at the same time they request a bond hearing, to request that class counsel be notified of the date and time of the bond hearing. Where an alien makes this request, class counsel will be notified of the date and time of the bond hearing. Counsel are directed, again, to work together to draft the language of this notification and include a report on this effort in the status report to be submitted on or before January 16, 2015.

It may be that the court's proposal overlooks some practical problem that the parties can themselves work out, or that will need to be

presented to the court for resolution. If so, the problem may be described in the status report. Striking the balance between privacy concerns, logistical demands, and the obvious importance of having counsel available for class members at these bond hearings wherever possible does not seem overly difficult if the parties work in good faith to find a solution.

IV. CONCLUSION

For the reasons set forth, Plaintiff's Motion for Enforcement (Dkt. 144) is ALLOWED in part. The Reid III order is applicable to the class as described above.

In addition, the court orders as follows:

1. The parties will meet promptly to discuss informal discovery regarding class members entitled to relief.

2. The parties will meet promptly to craft a notice to class members that informs them of their rights, consistent with this memorandum.

3. The parties will meet promptly to draft language informing class members of their right to consent to have notice of the date and time of their bond hearing conveyed to class counsel. If a class member so consents, Defendants will notify class counsel of the date and time of the class member's bond hearing.

4. On or before January 16, 2015, counsel will file a joint status report regarding their progress in providing informal

> discovery or the need for more formal discovery. Counsel will include as an exhibit a copy of the new class notice regarding their rights, as well as a description of the progress on the issue of class notice regarding informing class counsel of the date and time of calendared bond hearings. This report will be drafted and submitted by Plaintiff's counsel, though it should be substantively the product of the joint efforts of counsel for both sides. In the event counsel cannot agree on the contents of a joint status report, they may submit separate reports.

The clerk shall set this matter for a status conference to take place on January 21, 2015, at 11 a.m. to discuss any outstanding matters, as well as entry of final judgment.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID, on behalf of himself and others similarly situated, Plaintiff/Petitioner	)	
v.	)	C.A. NO. 13-cv-30125-MAP
CHRISTOPHER DONELAN, Sheriff of Franklin County, et al., Defendants/Respondents	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

(Dkt. No. 33)

February 10, 2014.

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff, a lawful permanent resident, has been held in immigration detention pursuant to 8 U.S.C. § 1226(c) without an opportunity for release on bail. He has brought a motion seeking to certify a class of all individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to § 1226(c) for over six months and are not provided an individualized bond hearing. (Dkt. No.

33.) Defendants, a number of state and federal government agents, oppose the motion. Because the four requirements of Fed. R. Civ. P. 23(a) are satisfied, and because the proposed class falls squarely into Rule 23(b)(2), the court will allow Plaintiff's motion.

II. BACKGROUND

The detailed facts underlying this litigation are well documented in the court's recent Memorandum and Order Regarding Plaintiff's Petition for Habeas Corpus and Plaintiff's Motion for Order to Show Cause. Reid v. Donelan, -- F. Supp. 2d --, 2014 WL 105026 (D. Mass. Jan. 9, 2014).

To briefly summarize, in November 2012, the state of Connecticut released Plaintiff from criminal custody, and Immigrations and Customs Enforcement (ICE) immediately detained him. The government invoked § 1226(c), a statute that permits the detention of certain aliens without an opportunity for release on bail, to justify Plaintiff's fourteen-month detention.

Plaintiff brought this case, relying on Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009), to argue that Defendants may only detain an individual without an individualized bond hearing for a "reasonable" period of time. Once that threshold is crossed, the government must provide the detainee with an opportunity to argue for his or her release. This opportunity, of course, will not make actual release inevitable, or even necessarily likely.

On August 15, 2013, Plaintiff filed the pending Motion for Class Certification. Counsel argued the class issue in tandem with Plaintiff's habeas petition on December 12, 2013, and the court took both matters under advisement.

On January 9, 2014, the court granted Plaintiff's individual Petition for Habeas Corpus. (Dkt. No. 80).[1] Relying on the Supreme Court's decisions in Zadvydas v. Davis, 533 U.S. 678 (2001), and Demore v. Kim, 538 U.S. 510 (2003), the Ninth Circuit's opinion in Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013), and its prior decision in Bourguignon, the court concluded that a "reasonableness" limit does exist in the statute. Furthermore, it determined that six months is the ceiling for detention absent individualized consideration, since any holding beyond that time would be "presumptively unreasonable."

The court is now tasked with determining whether class treatment is appropriate.

III. DISCUSSION

In order to sustain a suit under Fed. R. Civ. P. 23, Plaintiff must satisfy the four requirements of Rule 23(a) and show that the proposed class falls into a Rule 23(b) category. Plaintiff's attorneys also request certification as class counsel and thus must meet the demands of Rule 23(g).[2]

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[1] Plaintiff's bond hearing, pursuant to the order, occurred on February 3, 2014. (Dkt. No. 91.) The Immigration Judge granted Plaintiff's request for bond and set a number of conditions of release.

[2] Plaintiff also believes that the class can be certified as a

A. Rule 23(a)

Plaintiff's first obstacle, Rule 23(a), is composed of four elements. The rule requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class exist; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(a). Plaintiff bears the burden of establishing each requirement, In re Eaton Vance Corp. Sec. Litig., 219 F.R.D. 38, 43 (D. Mass. 2003), and the court must engage in a "rigorous analysis" to discern whether that burden is met. Wal–Mart Stores v. Dukes, 131 S. Ct. 2541, 2551 (2011). Each factor will be addressed independently below.

1. Numerosity

Initially, class certification must be "so numerous that joinder of all its members is impracticable." Rule 23(a)(1). Numerosity involves a class-specific inquiry, Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980), and requires more than mere speculation. See Marcus v. BMW of No. Am., LLC, 687 F.3d 583, 596–97 (3d Cir. 2012). Although no specific threshold exists, a class size of forty or more

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"representative habeas action" pursuant to U.S. ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974). Since the Rule 23 requirements are satisfied, only limited discussion on this point is required. The keys to the Sero analysis are, in essence, commonality, numerosity, and considerations of judicial economy. The Rule 23 analysis overlaps significantly with Sero, and therefore the reasons justifying class treatment in this decision are equally applicable to that analysis.

will generally suffice in the First Circuit. See George v. Nat'l Water Main Cleaning Co., 286 F.R.D. 168, 173 (D. Mass. 2012). A plaintiff need not provide a precise number, as a court may draw "reasonable inferences from the facts presented to find the requisite numerosity." McCuin v. Sec'y of Health & Human Servs., 817 F.2d 161, 167 (1st Cir. 1987). Moreover, the threshold may be relaxed when a party seeks only declaratory or injunctive relief, since the inclusion of future members increases the impracticability of joinder. Id.

Here, Plaintiff successfully demonstrates that the proposed class meets the forty-person threshold and, more importantly, that joinder is impracticable. Plaintiff presents data provided by ICE listing the individuals held in Massachusetts for over six months pursuant to § 1226(c). (List of Individuals Detained, Dkt. No. 34, Ex. 3) At any given time in the year provided, January 2011 to January 2012, there were between 39 and 42 members of the proposed class. Although Defendants believe that this estimate is outdated and over-inclusive, two factors suggest that the precise number is actually higher.

First, an influx of future members will continue to populate the class. Despite numerous court decisions ruling against Defendants, see, e.g., Ortega v. Hodgson, No. 11–cv–10358–MBB, 2011 WL 4103138 (D. Mass. Sept. 13, 2011); Flores–Powell v. Chadbourne, 677 F. Supp. 2d 455 (D. Mass. 2010); Sengkeo v. Horgan, 670 F. Supp. 2d 116 (D. Mass. 2009), the government has remained steadfast to its dubious interpretation of § 1226(c). This has coincided with the government's expanded focus on

detaining criminal-aliens and prolonged delays in immigration litigation. See Transactional Records Access Clearinghouse (TRAC), Average Time Pending Cases Have Been Waiting in Immigration Courts as of December 2013, Syracuse University (Dec. 2013), http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php. As a result, increasing numbers of individuals are held pursuant to this statute beyond six months, but are not provided an individualized bond hearing.

The potential inclusion of these currently uncountable, future class members not only increases the number beyond forty, but also illustrates the transient nature of the proposed class. Unforeseen members will join the class at indeterminate points in the future, making joinder impossible. See William B. Rubenstein, Newberg on Class Actions § 3.15 (5th ed. 2013)(noting that the inclusion of future members "may make class certification more, not less, likely"). The estimate of 39 to 42 is merely the floor for this numerosity inquiry when inevitable future members are taken into consideration.

Plaintiff's estimate is also conservative since the class members in this case, including those currently in detention, are not easily identifiable. Members are located in four facilities across the Commonwealth and are housed among individuals held under a variety of statutory provisions, for distinct periods of time. As the court noted previously, many do not speak English, a majority do not have counsel, and most are unlikely even to know that they are members of the proposed class. See Reid, 2014 WL 105026, at *5. To expect Plaintiff to find every class member across Massachusetts and

join each one in this suit is unreasonable under such circumstances.

Thus, since the number of current and future class members is beyond the forty-person threshold, and because joinder is impracticable in this case, the proposed class meets the first Rule 23(a) requirement.

2. Commonality

The second element of Rule 23(a) is the existence of a question of law or fact common to the class. Rule 23(a)(2). The key to commonality is that the truth or falsity of a question "will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal–Mart Stores, 131 S. Ct. at 2551. A plaintiff need only establish "a single common question" to satisfy this requirement. Id. at 2256.

Although Plaintiff presents a single question of law that hovers over the entire *190 case—namely, whether § 1226(c) requires a bond hearing after an unreasonable period of detention—Defendants argue that commonality is lacking for two reasons. First, § 1226(c) permits detention for a variety of legal and factual reasons. Members of the proposed class have committed significantly different crimes, ranging from those involving moral turpitude to acts of terrorism. Moreover, the dispositions of the potential class members' criminal cases may vary: some may be convicted of the crime charged, while others may be subject to detention absent any conviction. This variety, in Defendants' view, undermines any finding of commonality.

Second, Defendants say, even if a reasonableness requirement is embedded in the statute, it necessarily requires a fact-specific inquiry as to whether an individual's detention is "unreasonable." See Diop v. ICE/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003). The question of whether a reasonableness limit exists is only part of the analysis and, therefore, fails to resolve the claims of the entire class.

These arguments cannot withstand scrutiny. The distinctions Defendants highlight, particularly the varied criminal histories across the class, are irrelevant to the court's ruling on the issue of class certification. The question raised by this litigation is not whether any individual detainee is entitled to release on bail—a question that is certainly impacted by the factual differences asserted. Instead, the sole question here is whether an individual detainee has a due process right to argue for such release. That question is one purely of law, resolvable irrespective of the distinctions identified by Defendants.

Defendants' second contention, though ultimately flawed, strikes at the heart of the commonality analysis: does the inclusion of a "reasonableness" limit in § 1226(c) ensure class-wide relief, or does a remedy hinge on individual considerations? Given the prior order on Plaintiff's individual habeas petition, which addressed that very question, it would be artificial for the court to approach this inquiry as though it were writing on a clean slate. Indeed, the Supreme Court has opined on the permissibility of courts' examining the merits of a case, if necessary, at this stage of the analysis. As the

Court said,

> Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claims. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (internal citations and quotations omitted).

In analyzing Plaintiff's individual petition, this court deemed the Ninth Circuit's six-month approach as most compatible with Supreme Court precedent, due process considerations, and administrative constraints. Reid, 2014 WL 105026, at *4-6. Thus, in interpreting § 1226(c), the court not only found a reasonableness limit in the statute, but determined that the limit resided at the six-month date. Id. Since that interpretation, if applied to the entire class, resolves the claim of every member, the commonality metric is certainly met.

Even if the commonality query presented itself in a vacuum, one where the individual habeas petition was still pending, the court need only re-

frame the question to illustrate the clarity of commonality. As the Ninth Circuit said, the question is simply: "May an individual be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns?" Rodriguez v. Hayes, 591 F.3d 1105, 1123 (9th Cir. 2009). Accordingly, were the court to answer affirmatively and, therefore, agree with Defendants that individual determinations were required, that answer would still resolve the entire case. That is, even if Defendants offered the correct interpretation of the statute, they would still be providing an answer to a common question of law.

Therefore, since the answer to a single, legal question disposes of the claims of the entire class, Plaintiff satisfies the commonality metric.

3. Typicality

The third requirement under Rule 23(a) is that the claims of the class representative must be typical of the other class members. Rule 23(a)(3). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (citations and internal quotation marks omitted). Although the analysis of commonality and typicality "tend to merge," id. at 157 n. 13, they are different concepts warranting distinct examinations. See Connor B. ex rel. Vigurs v. Patrick, 272 F.R.D. 288, 293 (D. Mass. 2011). "[C]ommonality evaluates the sufficiency of the class itself while typicality evaluates the sufficiency of the named plaintiff." Id. (internal quotations omitted),

quoting Hassine v. Jeffes, 846 F.2d 169, 177 n. 4 (3d Cir. 1988).

Defendants, recognizing this overlap, simply apply their commonality discussion to the typicality analysis. For the same reasons those arguments were rejected before, they are unavailing in this context. Simply put, no possibility exists that an individual claim or factual difference will "consume the merits" of this class action. Durmic v. J.P. Morgan Chase Bank, 10–cv–10380–RGS, 2010 WL 5141359, at *4 (D. Mass. Dec. 10, 2010).

Plaintiff presents the same, single question of law as his fellow class members. He seeks the same remedy—an individualized bond hearing—as everyone else. No serious objection to typicality can be offered under these circumstances.

4. Adequacy

The final Rule 23(a) requirement is that the class representative must be one who will "fairly and adequately protect the interests of the class." Rule 23(a)(4). This requires the party to show "first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985).

Defendants provide two arguments to attack Plaintiff's status as an adequate representative. First, the list of potential class members presented by Plaintiff includes detainees with final orders of removal. Such aliens, Defendants posit, are clearly

distinct.

Second, the legal and factual differences, discussed previously, will require each party to present his or her claim differently. Each individual litigant will need to make different strategic decisions respecting his or her case. Given this individualized need, any class member would be an unsuitable representative for any other.

Defendants' first concern is easily assuaged. The class requested, and being certified, only includes those individuals held under § 1226(c) beyond the six-month mark. Any individual held under a different statute is simply not, for the time being at least, part of this class.[3]

Defendants' second contention suffers from the same flaws as their commonality and typicality arguments. The differences they allege speak to the outcome of the bond hearing—release on bail—and not whether a bond hearing is required in the first place. Factual differences may indeed yield different outcomes at individual bond determinations. But, in this case, every member is seeking the same remedy—the hearing itself, whatever its outcome—based on an identical theory. Plaintiff's interests are coextensive with the class, and he is therefore an adequate class representative.

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[3] Plaintiff does point out that an individual may be held under one statute but, due to the nature of his or her immigration litigation, later held under § 1226(c). At the point such individuals have been held under § 1226(c) for six months, they will become members of the class.

The fact that the court decided Plaintiff's habeas petition before the class certification motion does not pose a problem in the adequacy analysis. First, the "inherently transitory" exception to the mootness doctrine was designed for precisely this situation. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that the decision regarding a named representative's pretrial detention before the decision on the class certification motion did not moot the entire case. Id., at 110 n. 11. Instead, the court said, "[I]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify a class." Id.

Here, it is not clear how long any given individual will be held and, therefore, whether anyone would be subject to detention long enough for the court to certify a class. This is particularly true since any potential class representative would have the right to seek immediate relief through an individual habeas petition.

Moreover, Plaintiff retains a continuing interest in this case. In filing an individual motion and a motion for class certification, Plaintiff brings two separate claims: a claim that he is entitled to relief and a claim that he is entitled to represent a class. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980) (finding that a class representative can appeal the denial of class certification, despite the fact that his individual petition became moot). Although the First Circuit has not determined whether this applies when an individual's claim becomes moot before a class is certified, the Third Circuit has allowed a plaintiff to continue as a class

representative in such a context. Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987). It would be anomalous to remove a plaintiff from a case where he files both motions within the same period of time, simply because the court moves expeditiously to provide individual relief.[4]

Plaintiff has also more than met his burden to demonstrate the adequacy of class counsel. Plaintiff's counsel—supervising attorneys and law student interns of the Jerome N. Frank Legal Services Organization at Yale Law School—have experience in immigration and constitutional law, civil rights litigation, and habeas corpus actions. In fact, they have previously litigated similar § 1226(c) challenges in the federal courts. See, e.g., Bourguignon, 667 F. Supp. 2d 175; Hyppolite v. Enzer, 2007 WL 1794096 (D. Conn. June 19, 2007). Counsel also has experience managing class actions. See Brizuela v. Feliciano, No. 3:13–cv–226–JBA (D. Conn. filed Feb. 13, 2012); Shepherd v. McHugh, No. 3:11–cv–641–AWT (D. Conn. filed Dec. 3, 2012). The adequacy of counsel is made even clearer when examining the Rule 23(g) requirements below.

Rule 23(a) is the essence of a class certification analysis. In satisfying the four requirements of Rule 23(a), Plaintiff has successfully cleared the first and most important hurdle.

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[4] Although Plaintiff remains an adequate representative of the class, the court will consider a motion to amend the complaint to include additional class representatives.

B. Rule 23(b)

In addition to meeting the four requirements of Rule 23(a), Plaintiff must show that the proposed class falls into one of the three defined categories of Rule 23(b). The most applicable here is Rule 23(b)(2), which requires a showing that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole."

Defendants again assert that individual differences among the potential class members preclude their eligibility under this rule. The government, in its view, does not treat all § 1226(c) detainees alike. Instead, it makes different determinations related to detention based on individual factors. Notably, the government does not specify how it considers individual characteristics nor, crucially, does it contend that it provides bond hearings to any § 1226(c) detainees regardless of these characteristics.

Defendants also believe that 8 U.S.C. § 1252(f)(1) bars this court from granting class-wide injunctive or declaratory relief, thus making certification under Rule 23(b)(2) inappropriate. That statute provides that no court "shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1231] ... other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1).

Despite Defendants' arguments, the proposed class fits neatly into Rule 23(b)(2). First, Defendants

have acted, or refused to act, on grounds generally applicable to all members of the class. In fact, civil rights actions like this one, where a party charges that another has engaged in unlawful behavior towards a defined group, are "prime examples" of Rule 23(b)(2) classes. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

Here, it is undisputed that Defendants refuse to provide any of the class members with an individualized bond hearing. Despite alleged differences, members of the class have all been treated identically with respect to the opportunity to argue for release on bail. Defendants have thus consistently and, in the court's view, incorrectly applied § 1226(c) to the entire class.

Second, Plaintiff seeks a single injunction or a single declaratory judgment—specifically, an order that § 1226(c) must be read as providing an individualized bond hearing after six months of detention. He does not request any damages that have the potential to muddy the analysis. As the Supreme Court has recently made clear,

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Wal–Mart, 131 S. Ct. at 2557. Critically, the entire class seeks the same remedy, placing it firmly in the Rule 23(b)(2) category.

Defendants' final argument respecting § 1252(f)(1) is also fruitless. At a minimum, class-wide declaratory relief is available.[5] Equitable relief may only be restricted by "clear and valid legislative command," or "by a necessary and inescapable inference." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). Since injunctive and declaratory relief are distinct, see Steffel v. Thompson, 415 U.S. 452, 471 (1974), the statute, by its own terms, does not proscribe a class-wide declaratory remedy.

This conclusion is augmented by the First Circuit's interpretation of § 1252(f)(1). In Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003), the court probed the language of the clause and gave meaning to both operative terms. Specifically, it found that "restrain" meant something different from "enjoin"—the former referring to a temporary injunction and the latter indicating a permanent injunction. Id. at 1013. In doing so, the First Circuit defined each key term in § 1252(f)(1), yet did not construe either as "declaratory relief."

Finally, persuasive authority recognizing the utility of class treatment in this circumstance further justifies the court's conclusion. See Hayes, 591 F.3d at 1119; Alli v. Decker, 650 F.3d 1007 (3d Cir. 2011).

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[5] The court is confident, at this stage of the litigation, to say that class-wide declaratory relief is permissible. However, since that question also speaks to whether Plaintiff can obtain a class-wide remedy, this conclusion is subject to reconsideration at a later phase of the proceedings.

As the Third Circuit said, "[A]llowing class-wide declaratory relief would facilitate the Supreme Court review that Congress apparently intended." Alli, 650 F.3d at 1016 (internal quotation marks omitted). As a result, the class can, at a minimum, seek declaratory relief, and therefore certification as a Rule 23(b)(2) class is appropriate.[6]

Plaintiff has successfully shown that the class falls squarely into Rule 23(b)(2) and that class treatment is appropriate.

C. Rule 23(g)

The final consideration is whether class counsel can be certified under Rule 23(g). Here, four factors are relevant:

> (I) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Rule 23(g)(1)(A). Counsel must also "fairly and adequately represent the interests of the class." Rule 23(g)(4).

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[6] Whether the class can obtain injunctive, rather than simply declarative, relief may require a more searching analysis at some point in the future. However, since some type of class relief is clearly available, that thornier question need not be addressed at the current juncture.

Plaintiff's counsel easily meet these requirements. Class counsel have done considerable work identifying and investigating the potential claims in this action. Furthermore, co-counsel Muneer Ahmad and Michael Wishnie have litigated representative habeas actions before, and they have experience in Rule 23 class actions. See Shepherd v. McHugh, No. 3:11–cv–641–AWT (D. Conn. filed Dec. 3, 2012); Brizuela v. Feliciano, No. 3:13–cv–226–JBA (D. Conn. filed Feb. 13, 2012). Counsel have also done extensive work litigating complex federal civil rights and immigrant rights cases. See Doe v. United States, No. 13–cv–2802 (S.D.N.Y. filed Apr. 26, 2013); Barrera v. Boughton, No. 3:07–cv–1436–RNC, 2010 WL 1240904 (D. Conn. Mar. 19, 2010); Diaz–Bernal v. Myers, 758 F. Supp. 2d 106 (D. Conn. 2010); Families for Freedom v. Napolitano, 628 F. Supp. 2d 535 (S.D.N.Y. 2009); El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249 (D. Conn. 2008). Finally, counsel have already devoted significant resources to this case, and no evidence suggests that their level of commitment will diminish. No cogent argument can be made that Plaintiff's counsel do not satisfy the relevant requirements or, as discussed previously, that counsel cannot adequately represent the interests of the class.

Ultimately, Plaintiff has shown that this is precisely the type of case that should move forward as a class action. As a result, class certification is appropriate.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification under Fed. R. Civ. P. 23 (Dkt. No. 33) is hereby ALLOWED.

The court certifies the following class: "All individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing." Plaintiff Reid is appointed class representative, and Nicole Hallet, Muneer Ahmad, Michael J. Wishnie, and the Law Student Interns of the Jerome N. Frank Legal Services Organization at Yale Law School are appointed class counsel pursuant to Fed. R. Civ. P. 23(g).

The parties shall submit a joint proposal setting forth a briefing schedule for the filing of dispositive motions no later than February 25, 2014.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID, on behalf of himself and others similarly situated, Plaintiff/Petitioner	)	
v.	)	C.A. NO. 13-cv-30125-MAP
CHRISTOPHER DONELAN, Sheriff of Franklin County, et al., Defendants/Respondents	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S PETITION FOR WRIT OF HABEAS CORPUS AND PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE

(Dkt. No. 4 & 5)

January 9, 2014.

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff, a lawful permanent resident, has been held in immigration detention for fourteen months pursuant to 8 U.S.C. § 1226(c). He has brought a Petition for Writ of Habeas Corpus, 28 U.S.C. § 2241, seeking an individualized bond hearing to challenge his detention. (Dkt. No. 4.) He has also filed a Motion for Order to Show Cause. (Dkt. No. 5.) Defendants are: Christopher Donelan,

Sheriff of Franklin County; David Lanoie, Superintendent, Franklin County Jail and House of Correction; Jeh Charles Johnson, Secretary of the Department of Homeland Security; John Morton, Director of Immigration and Customs Enforcement (ICE); Dorothy Herrera–Niles, Director, ICE Boston Field Office; Thomas Hodgson, Sheriff of Bristol County; Joseph McDonald, Jr., Sheriff of Plymouth County; Steven Tompkins, Sheriff of Suffolk County; Eric Holder, Attorney General of the United States; Juan Osuna, Director of the Executive Office for Immigration Review; and The Executive Office for Immigration Review.

The decision in Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009), finding a "reasonableness" requirement embedded in § 1226(c), controls this case. Because detention pursuant to § 1226(c) for over six months is presumptively unreasonable, the court will grant Plaintiff's Petition for Habeas Corpus and deny as moot Plaintiff's Motion for Order to Show Cause. Furthermore, even if detention after six months were not categorically unreasonable, the facts of this case would still entitle Plaintiff to an individualized bond hearing.

II. BACKGROUND[1]

Plaintiff, Mark Anthony Reid, left Jamaica for the United States in 1978 and was admitted as a lawful permanent resident. Although Plaintiff faced a number of hardships growing up, he earned a GED and served in the U.S. Army Reserve for six years.

[1] The facts are drawn from Plaintiff's Petition for Habeas Corpus. (Dkt. No. 4.)

Between 1986 and 2010 Plaintiff amassed an extensive criminal history. His convictions included, inter alia, possession of narcotics, larceny, assault, interfering with an officer, driving with a suspended license, and selling illegal drugs. Relevant for the pending motions are his convictions for selling an illegal drug, third degree burglary, and failure to appear. As a result of those convictions in 2010, Plaintiff was sentenced in Connecticut state court to twelve years in prison, to be suspended after five.

After Plaintiff served two years in prison, he was paroled on November 13, 2012. On the same day, ICE took Plaintiff into custody pursuant to 8 U.S.C. § 1226(c).[2] ICE immediately took action to remove Plaintiff. Although Plaintiff conceded the factual allegations underlying the case, he sought relief on two grounds. First, he argued that the Convention Against Torture (CAT) applied. Second, he believed that removal was a disproportionate punishment to the crimes committed.

A hearing on these claims was held before an Immigration Judge (IJ) on February 13, 2013. Two months later, the IJ denied both of Plaintiff's claims and ordered him deported. Plaintiff appealed to the Board of Immigration Appeals (BIA).

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[2] Section 1226 of Title 8 governs the detention of noncitizens during immigration removal proceedings. Subsection (c) requires the government to detain certain individuals who have committed a crime enumerated in the statute. § 1226(c)(1). These individuals are not entitled to an individualized bond hearing.

While his immigration case was pending, Plaintiff filed a motion with the IJ requesting a bond re-determination hearing. That motion was argued on June 17, 2013, at the Hartford Immigration Court. The IJ concluded that he lacked authority under § 1226(c) to make a bond re-determination and, therefore, denied Plaintiff's motion.

On October 23, 2013, nearly half a year after the IJ ruled on Plaintiff's claims, the BIA reversed the IJ's decision and remanded the case for further proceedings related to Plaintiff's CAT claim. An evidentiary hearing was held on November 19, 2013. On December 17, 2013, the IJ again denied Plaintiff's CAT claim. (Dkt. No. 76.) Plaintiff has indicated that he will appeal that decision to the BIA. (Id.)

On July 1, 2013, Plaintiff filed the present Petition for Habeas Corpus and the Motion for Order to Show Cause to challenge his prolonged immigration detention.[3] Counsel appeared for argument on December 12, 2013, and the court took the matter under advisement.

[3] Plaintiff also filed a Motion for Summary Judgment to challenge ICE's policy of shackling him during immigration proceedings, absent an individualized determination that such shackling was necessary, (Dkt. No. 1), and a Motion for Class Certification. (Dkt. No. 33.) Defendants responded with a Motion to Dismiss. (Dkt. No. 35.) The shackling issue was postponed based upon the government's request to submit further briefing. The question of class certification will be addressed in a separate memorandum and order that will soon issue.

III. DISCUSSION

The answers to two questions dictate the result in this case. The first question is whether § 1226(c) includes a "reasonableness" restriction on the length of time an individual can be detained without a bond hearing. For the reasons set forth in Bourguignon and repeated below, the court must conclude that such a reasonableness restriction does exist. The second question is how to define and apply a "reasonableness standard."[4]

A. § 1226(c) and a "Reasonableness" Limit

The threshold question is whether § 1226(c) imposes a "reasonableness" limit on the length of time an individual can be detained in immigration custody without an individualized bond hearing. This court has previously held that such a limit does exist. Bourguignon, 667 F. Supp. 2d at 182.

Defendants believe Bourguignon was wrongly decided and should be reconsidered. Their argument is anchored on a broad reading of Demore v. Kim, 538 U.S. 510 (2003), where the Supreme Court upheld the constitutionality of § 1226(c). Far from supporting reconsideration of Bourguignon's holding, Demore supports this court's ruling. Only a brief

[4] Defendants suggest that the claims against all parties except Defendant Donelan should be dismissed. They highlight Rumsfeld v. Padilla, 542 U.S. 426 (2004), to contend the immediate custodian of a petitioner is the only person who can be named as a defendant in a habeas action. This argument is unavailing in this case. First, each Sheriff–Defendant is properly named since Plaintiff seeks, and the court has not yet decided the propriety of, class resolution. Second, every other Defendant is potentially required to effectuate the remedies requested. See Vasquez v. Reno, 233 F.3d 688 (1st Cir. 2000).

discussion is required to make this clear.

As discussed in Bourguignon, the two Supreme Court cases touching upon this issue, Zadvydas v. Davis, 533 U.S. 678 (2001), and Demore, suggest a "reasonableness" limit in § 1226(c). In Zadvydas, the Supreme Court held that post-removal detention without a bond hearing was permissible so long as removal was "reasonably foreseeable." Zadvydas, 533 U.S. at 699. In that context, detention for less than six months was considered presumptively valid. Id. However, after six-months, if an individual "provides good reason to believe that there is no significant likelihood of removal," the detention is presumptively invalid and a bond hearing is required. Id. at 701.

Two years later, the Supreme Court directly addressed the constitutionality of § 1226(c) in Demore. There, Chief Justice Rehnquist distinguished Zadvydas and upheld the constitutionality of § 1226(c) for the "brief period necessary for [the detainee's] removal proceedings." Demore, 538 U.S. at 513.

Picking up on that language, Justice Kennedy, in his concurrence, explicitly identified a "reasonableness" requirement that limited the scope of 1226(c). He said, "[A] lawful permanent resident ... could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J., concurring) (citing Zadvydas, 533 U.S. at 684–86).

Taken together, these two cases support the conclusion that a "reasonableness" requirement is included in the statute. Bourguignon, 667 F. Supp.

2d at 182. Such an interpretation is necessary to avoid the Fifth Amendment due process problem that prolonged detention, absent an individualized hearing, would present.[5] No subsequent controlling authority alters this analysis.

Indeed, strong authority supports this interpretation. At least two other circuits have considered this issue and have both found a "reasonableness" limitation in the statute. See Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011). Moreover, since Bourguignon, a majority of judges in this district have reached the same conclusion. See Ortega v. Hodgson, No. 11–cv–10358–MBB, 2011 WL 4103138 (D. Mass. Sept. 13, 2011) (Bowler, Mag. J.); Flores–Powell v. Chadbourne, 677 F. Supp. 2d 455 (D. Mass. 2010) (Wolf, J.); Sengkeo v. Horgan, 670 F. Supp. 2d 116 (D. Mass. 2009) (Gertner, J.); see also Zaoui v. Horgan, No. 13–11254–DPW, 2013 WL 5615913, at *4 (D. Mass. Aug. 23, 2013) (Woodlock, J.) (finding against the petitioner, but recognizing the "reasonableness" requirement in § 1226(c)).

No sound reason justifies departure from Bourguignon's analysis. To comply with the constitution's due process requirement, § 1226(c) must be read to include a "reasonableness" limit on the length of time an individual can be detained without an individualized bond hearing.

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[5] Plaintiff also believes that the detention implicates the Eighth Amendment. Given the strength of the due process argument, analysis under the Eighth Amendment is unnecessary.

B. Defining "Reasonableness"

The thornier aspect of this case lies in the definition of "reasonableness." Two approaches have emerged. One view, adopted by the Third and Sixth Circuits, requires a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case," to determine whether detention without an individualized hearing is unreasonable. Diop, 656 F.3d at 234 (3d Cir. 2011); see also Ly v. Hansen, 351 F.3d 263, 272 (6th Cir. 2003). This approach requires each detainee to file a habeas petition challenging his or her detention. If a federal court believes the detention crosses the reasonableness threshold, then the individual is subsequently entitled to a bond hearing.

The other approach, one employed by the Ninth Circuit, applies a bright-line rule. Under that view, the government's "statutory mandatory detention authority under Section 1226(c) ... [is] limited to a six-month period, subject to a finding of flight risk or dangerousness." Rodriguez, 715 F.3d at 1133 (9th Cir. 2013). The Ninth Circuit justified its view by applying one of its prior cases, Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011), to § 1226(c). In Diouf, the court analyzed the due process considerations arising from an immigration detention lasting over six-months. Consistent with Zadvydas, it concluded that such detention, absent an individual hearing, violated the constitution.

The First Circuit has not yet weighed in on this question, but the simpler approach adopted by the Ninth Circuit strikes this court as fairest to both sides. This rule follows in line with Supreme Court precedent, satisfies due process, and avoids the

unnecessary administrative burden of holding two, repetitive hearings—a habeas proceeding to determine if a bond hearing is required and then the bond hearing itself. This is the approach this court will take unless and until it is instructed otherwise. Significantly, however, the court would grant the petition here even using the more complex rule adopted by the Third and Sixth Circuits.

1. Six–Month Rule

This rule is optimal for a number of reasons. First, this bright-line rule is consistent with Supreme Court precedent. In Zadvydas, after determining that indefinite, post-removal detention was impermissible, the Court said, "[W]e think it practically necessary to recognize some presumptively reasonable period of detention." Zadvydas, 533 U.S. at 700–01. Such pragmatism was justified by prior Supreme Court cases. Id. at 701, citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991) (applying a 48–hour rule to probable cause determinations); Cheff v. Schnackenberg, 384 U.S. 373, 379–80 (1966) (plurality opinion) (adopting a rule that the right to a jury trial extends to all cases in which a sentence greater than six months is imposed). Although the six-month line did not guarantee the detainee's release in Zadvydas, of course, it did entitle the detained individual to a bond hearing. A closely analogous situation is present in this case.

The Seventh Circuit's dicta in a comparable case is noteworthy. As Judge Posner said, "[I]t would be a considerable paradox to confer a constitutional or quasiconstitutional right to release on an alien ordered removed (Zadvydas) but not on one who

might have a good defense to removal." Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007). The Ninth Circuit's conclusion in Rodriguez applies that logic to § 1226(c). Indeed, no persuasive argument justifies discarding this pragmatic approach when dealing with individuals detained under § 1226(c).

The fact that Demore did not adopt a six-month rule does not undermine this logic. Defendants argue that the Demore Court could have utilized this approach. In failing to do so, they contend, the Court made a deliberate choice.

However, the Demore Court had no reason to invoke this rule. Demore explicitly noted that detention under § 1226(c) is inherently "of a much shorter duration," lasting "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." Demore, 538 U.S. at 529–31. Since the Court was facing a direct constitutional challenge to § 1226(c) and was operating under those temporal assumptions, it simply avoided answering an unripe question.[6] Justice Kennedy's concurrence, which was the fifth vote to comprise the majority, clearly implies as much. In utilizing Zadvydas to opine on a reasonableness requirement in § 1226(c), Justice Kennedy seems to suggest that the temporal discussion in that case is still the most applicable law on this issue. Id. at 532 (Kennedy, J., concurring)(citing Zadvydas affirmatively).

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[6] Although the plaintiff's detention in that case was for roughly six-months, the court noted that the length was largely due to plaintiff's own tactics. It thus anchored its broad decision on the average length of detainment.

Due process considerations also favor the six-month approach. As the Ninth Circuit said in Diouf,

> When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.

Diouf, 634 F.3d at 1091–92.

These considerations, as the Ninth Circuit later found in Rodriguez, are equally applicable to the § 1226(c) analysis. After six months, a detainee's private interest in freedom from unreasonable restraint is high. The risk of unnecessary detention, unless it is found to be justified by safety concerns or flight risk, is also substantial.

Significantly, the burden on the government to hold such a bond hearing is minimal. Indeed, adopting a six-month approach actually eases the burden on the government. This approach only requires the executive to hold one hearing, rather than defend against an individual habeas petition first.

Broader due process concerns also militate against the individualized approach adopted by the Third and Sixth Circuits. Although that approach may work for those individuals with access to the

federal courts, only a minority of detainees have this capacity. The individualized approach presumes that detainees have knowledge about the American court system and have finances to obtain an attorney (or are fortunate enough to receive pro bono assistance) and that they have the language skills required to navigate the legal thicket. Simply put, "litigation is unlikely to be a viable solution for most immigrants in prolonged detention ... [because] it is logistically difficult to bring a habeas petition." Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigration Detention, 45 Harv. C.R.–C.L. L. Rev. 601, 603 (2010). The six-month approach protects the due process rights of all detainees whose confinement has become "presumptively unreasonable."[7]

Finally, administrative concerns favor this rule. Defendants suggest that factual differences between cases justify the Third and Sixth Circuit's approach. However, this argument conflates the right to a bond hearing with the outcome of said hearing—the possible right to release. In a bond hearing, an IJ is necessarily going to consider the reasonableness of the alien's continued detention. For example, an IJ may properly decline to grant bail to a detainee whose stalling tactics were the sole cause of the length of confinement. It makes more sense to have one hearing in front of an IJ, rather

[7] This factor is particularly persuasive since the government has continued to employ its interpretation of § 1226(c) as new cases arise, despite consistent court orders to do otherwise. Absent an approach that deals with this issue globally, Defendants will likely continue to apply their incorrect interpretation of the statute in violation of the Fifth Amendment.

than require each detainee to file a habeas petition first so that the detainee can obtain a hearing on whether he or she is entitled to a hearing. This six-month rule effectively protects both a detainee's due process rights and Defendants' resources.

Under the six-month approach, the analysis in this case is simple: Plaintiff has been held in custody for fourteen months, and thus his continued detention without a bond hearing is presumptively unreasonable.

2. Case–by–Case Determination

Even if the individualized approach were more appropriate, Plaintiff's prolonged detention without a bond hearing is unreasonable. Relevant factors in this determination include: the length of detention; the period of detention compared to the criminal sentence; the foreseeability of removal; the prompt action of immigration authorities; and whether the petitioner engaged in any dilatory tactics. Zaoui, 2013 WL 5615913, at *4 citing Flores–Powell, 677 F. Supp. 2d at 471.

The length of Plaintiff's criminal sentence compared to his detention is the only factor that cuts against his claim. That element, however, is substantially outweighed by the length of Plaintiff's confinement and the uncertainty underlying his immigration case.

First, Plaintiff has been detained for fourteen months. This is well beyond the brief detainment contemplated in Demore. Demore, 538 U.S. at 529. In Demore, the Court assumed that detention would last an average of thirty days up to a maximum of five months.

Moreover, this court has already ruled that a seven-month detainment, half the length of the confinement here, would be unreasonable. Bourguignon, 667 F. Supp. 2d at 183. In dealing with the defendants' arguments in that case, this court said, "[E]ven if the court made its calculations conservatively ... the more than seven-month detention period still exceeds the brief time frame contemplated by Chief Justice Rehnquist in Demore." Id.

It is significant, as well, that Plaintiff's removal is not foreseeable. In Bourguignon, there was no end in sight for the petitioner's case before the BIA, since it was unclear when the BIA would rule and subsequently, whether the petitioner would appeal. Id. Here, Plaintiff is even further away from a final outcome. Nearly half a year after the IJ's initial decision, the BIA reversed and remanded Plaintiff's case. Then, on December 17, 2013, the IJ again ruled against Plaintiff. Plaintiff now intends to bring his case back to the BIA. At best, he will receive another favorable decision and obtain the remedy he seeks. At worst, the BIA, at some indeterminate point in the future, will rule against Plaintiff. In that latter scenario, he will have the right to appeal his case to the Second Circuit Court of Appeals. It is impossible to determine exactly when that litigation will conclude, but the date is certainly far enough out to implicate due process concerns.

The other relevant factors do not weigh one way or the other. Although the government has not dragged its feet, Plaintiff has also not engaged in dilatory tactics. Like the petitioner in Bourguignon, Plaintiff has raised a colorable claim against

deportation and is vigorously contesting removal. Defendants' contentions notwithstanding, Plaintiff should not be penalized simply because he is invoking his rights.

Ultimately, § 1226(c) includes a "reasonableness" threshold. Regardless of how that limit is defined, Plaintiff's detention has crossed the line. While Plaintiff may not obtain the relief he seeks, he is at least entitled to take a shot at persuading the IJ to release him.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Petition for Habeas Corpus (Dkt. No. 4) is hereby ALLOWED, and Plaintiff's Motion for Order to Show Cause (Dkt. No. 5) is hereby DENIED as moot.

Having allowed the Petition for Habeas Corpus, the court orders as follows:

1. Petitioner will receive a bond hearing by February 7, 2014, before an Immigration Judge, at which the judge will consider whether conditions may be placed upon Petitioner's release that will reasonably ensure that he will pose no danger to the community and will not pose a risk of flight. If such conditions are found to exist, Petitioner will be released from custody.

2. Counsel for Respondents will report to this court on or before February 14, 2014, regarding compliance with this order. This report will include notification as to the outcome of the bond hearing.

3. Failure of an Immigration Judge to conduct

the bond hearing as ordered will entitle Petitioner to request a bond hearing before this court.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

United States Court of Appeals
For the First Circuit

Nos. 14-1270; 14-1803; 14-1823

MARK ANTHONY REID

Petitioner - Appellee/Cross-Appellant

v.

CHRISTOPHER DONELAN, Sheriff, Franklin County, Massachusetts; DAVID A. LANOIE, Superintendent, Franklin County Jail and House of Correction; THOMAS M. HODGSON, Sheriff, Bristol County, Massachusetts; JOSEPH D. MCDONALD, JR., Sheriff, Plymouth County, Massachusetts; STEVEN W. TOMPKINS, Sheriff, Suffolk County, Massachusetts; JEH CHARLES JOHNSON, Secretary of the Department of Homeland Security; DOROTHY HERRERA-NILES, Director, Immigration and Customs Enforcement, Boston Field Office; SARAH SALDANA, Director of Immigration and Customs Enforcement; LORETTA LYNCH, Attorney General; JUAN OSUNA, Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Respondents - Appellants/Cross-Appellees

ORDER OF COURT

Entered: July 6, 2016

This appeal is hereby stayed pending the Supreme Court's disposition of Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), petition for cert. granted sub nom. Jennings v. Rodriguez, No. 15-1204, 2016 WL 1182403, at *1 (U.S. June 20, 2016). The parties are directed to file joint status reports every 90 days and immediately upon a decision from the Supreme Court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Mark Christopher Fleming
Anant K. Saraswat
Lauren J. Carasik
Michael King Thomas Tan
Rebecca Fabian Izzo
Amber Nicole Hallett
Michael J. Wishnie
Ruth Swift
Ahilan Arulanantham
Conchita Cruz
Swapna Reddy
Stuart F. Delery
Yamileth G. Davila
Dina Michael Chaitowitz
Karen L. Goodwin
William Charles Peachey
Regan C. Hildebrand
J. Max Weintraub
Elianis N. Perez
Colin A. Kisor
Sarah Hiles Paoletti

Nina Rabin
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Michael J. Iacopino
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Mark David McPherson
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Muneer I. Ahmad
Tina M. Thomas

United States Court of Appeals
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MARK ANTHONY REID

Petitioner - Appellee/Cross-Appellant

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Respondents - Appellants/Cross-Appellees

ORDER OF COURT

Entered: June 7, 2016

Upon consideration of petitioner-appellee/cross-appellant's motion to enlarge time to file a rehearing petition and to stay mandate, the motion is allowed in part. The deadline for petitioner and respondents to file a petition for rehearing is enlarged to June 30, 2016, without prejudice to a renewed request for extension of time. With respect to petitioner's motion to stay mandate, mandate will issue in accordance with Fed. R. App. P. 41(b).

By the Court:

/s/ Margaret Carter, Clerk

cc:
Mark Christopher Fleming
Anant K. Saraswat
Lauren J. Carasik
Michael King Thomas Tan
Rebecca Fabian Izzo
Amber Nicole Hallett
Michael J. Wishnie
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RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C.A. § 1226(c)

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is

released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.