UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUGUSTIN SAJOUS, on behalf of himself and all others similarly situated,

Plaintiffs-Petitioners,

v.

THOMAS DECKER, *et al*.

Defendants-Respondents.

Case No: 18-cv-2447 (AJN)

PLAINTIFFS-PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS-WIDE PRELIMINARY INJUNCTION

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INTRODUCTION

In March of 2018, the government abruptly stopped providing bond hearings to the plaintiffs in this case—noncitizens imprisoned for prolonged periods while their immigration cases work their way through backlogged immigration courts—after having provided such hearings as a matter of course for several years. The plaintiffs now seek preliminary injunctive relief to remedy the government's unconstitutional refusal to hold bond hearings within six months to determine whether they pose a danger or flight risk that would justify their continued prolonged imprisonment. The Second Circuit has strongly condemned the government's practice here, declaring that "mandatory detention for longer than six months without a bond hearing affronts due process," *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015), and that position remains undisturbed by a recent Supreme Court decision that interpreted the text of the detention statute but that explicitly disclaimed any constitutional ruling. The government's reversal thus violates the Constitution.

In addition to being likely to succeed on the merits of their claim that within six months of detention due process requires a constitutionally adequate bond hearing, the plaintiffs are also suffering irreparable harm. Putative class members have been deprived of their liberty, suffered from medical and mental health issues, been separated from their families, and experienced obstacles to assisting their lawyers in defending their immigration cases—the outcomes of which will have life-altering consequences.

Finally, it serves no public interest to deny the plaintiffs a bond hearing and would not impose a hardship on the government, particularly since the government provided such bond hearings in exactly these circumstances for over two years pursuant to *Lora*, and since the plaintiffs do not seek outright release but only a hearing to test whether their detention is

justified. Accordingly, the plaintiffs meet the requirements for a preliminary injunction. They respectfully request that the Court order the government to provide putative class members with bond hearings at which the government must prove by clear and convincing evidence that continued prolonged detention is justified on the basis of a risk of either flight or danger.

STATUTORY FRAMEWORK

The plaintiffs are all detained pursuant to the same subsection of the Immigration and Nationality Act, 8 U.S.C. § 1226(c). Under the INA and its implementing regulations, the Department of Homeland Security ("DHS") has the authority to arrest and initially detain or release a noncitizen pending a decision on whether she is subject to removal, and if so, whether she should receive relief from removal. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(b)(1). Thereafter, an immigration judge ("IJ") generally may conduct a bond hearing to decide whether or not a detained individual should be released pending the resolution of her removal proceedings. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1).

There is a limited exception to this opportunity for release, as set out in Section 1226(c). That section imposes mandatory detention without a bond hearing on individuals who are removable based on several broad categories of convictions, such as for crimes involving moral turpitude and nearly any drug offense. 8 U.S.C. § 1226(c)(1).[1] In February, the Supreme Court interpreted Section 1226(c) to require detention for the entire duration of removal proceedings

[1] Section 1226(c) authorizes release only in extremely narrow circumstances: when "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." 8 U.S.C. § 1226(c)(2). Otherwise, the only way for a noncitizen detained under Section 1226(c) to obtain a bond hearing is to convince the IJ that DHS has misclassified them and that they do not properly fall under Section 1226(c). *See Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

but did not rule on whether such detention without a bond hearing violates due process when it becomes prolonged. *See Jennings v. Rodriguez,* 138 S. Ct. 830, 851 (2018) (remanding the case for the lower court to address the constitutional issue).

STATEMENT OF FACTS

The plaintiffs all have been or will be imprisoned for over six months pursuant to Section 1226(c) without a bond hearing while they challenge their removal in immigration court. This is a group that includes over 100 currently detained individuals, and it continues to expand as the government's abrupt termination of *Lora* hearings relegates increasing numbers of people to prolonged detention without the opportunity for release on bond. *See* Plaintiffs' Memorandum in Support of Class Certification (ECF No. 14-1) at 3-6.

In recent years, between the New York Field Office and the Buffalo Field Office—the ICE field offices with jurisdiction over noncitizens whose removal cases are adjudicated at the Varick Street Immigration Court in Manhattan and the Batavia Immigration Court in Batavia, New York—over 200 Section 1226(c) detainees per year have had cases that lasted longer than six months, representing approximately 50% of all Section 1226(c) removal cases in those courts. *See* Declaration of David Hausman (ECF No. 14-7) ¶¶ 6, 10. Once an individual has been detained for six months, they are more likely than not to spend six-and-a-half *more* months in detention—or more than one year in total. Supplemental Declaration of David Hausman (April 25, 2018) ¶ 6. This is partly because, as a threshold matter, plaintiffs with cases at the Varick Street Immigration Court spend approximately 43 days in detention before the government even schedules an initial appearance before an immigration judge; at Batavia that wait time is approximately 34 days. *See* Supp. Hausman Decl. ¶ 5.

After waiting all of this time in detention for their cases merely to commence, the plaintiffs then face myriad delays as their cases move forward. Some experience scheduling errors and other bureaucratic burdens that extend their case. *See, e.g.*, Declaration of Jesse Rockoff (ECF No. 27-3) ¶¶ 6-15 (describing governmental scheduling errors and delays in processing document requests that extended Augustin Sajous's case). In addition, some cases are particularly complex and involve multiple challenges to the government's charges or evidence; some involve multiple forms of relief from removal; some involve clients with mental health or mental competency issues; and some involve appeals to the Board of Immigration Appeals ("BIA") that can add at least an additional five to six months. *See* Supplemental Declaration of Andrea Saenz (April 25, 2018) ¶¶ 6-8; Declaration of Sarah Gillman (April 25, 2018) ¶ 3. Having a meritorious case against removal, or multiple meritorious arguments, can significantly add to the length of time it takes for that case to resolve. *See, e.g.*, *Rodriguez v. Robbins*, 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."), *rev'd on other grounds sub nom. Jennings*, 138 S. Ct. 830; *Reid v. Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) (referring to "increase[ed] detention times for those least likely to actually be removed at the conclusion of proceedings"), *cert. denied*, No. 17-923, 2018 WL 1786072 (U.S. Apr. 16, 2018); *see also* Supp. Saenz Decl. ¶¶ 6-8; Gillman Decl. ¶¶ 3-4. This is partly because noncitizens who present a challenge to removability must have that claim adjudicated before moving on to seek relief from removal, which necessitates additional time for briefing, argument, and decision. Individuals with multiple forms of relief—such as both a fear-based claim and an application for cancellation of removal—require additional time to prepare their various defenses. *See* Supp. Saenz Decl. ¶¶ 6-7; Gillman Decl. ¶ 4.

Under *Lora*, individuals facing the prospect of such prolonged detention received a bond hearing within six months, and a majority of them successfully had bond set. Before the government stopped providing such bond hearings to class members in March 2018, immigration judges at those hearings concluded that approximately 56-62% of individuals did not pose a danger or flight risk requiring detention and set bond. *See* Vera Institute of Justice, *Analysis of* Lora *Bond Hearing Data* (Oct. 2016) ("Vera Report") (report finding that, out of 158 bond hearings analyzed, bond was set in 62%), attached as Exhibit A to Supp. Saenz Decl.; Supp. Saenz Decl. ¶ 3 (stating that BDS represented 90 clients in *Lora* bond hearings between Oct. 2015 and March 2018 and 56% of them had bond set); Declaration of Sarah Deri Oshiro (April 25, 2018) ¶ 4 (stating that The Bronx Defenders represented 96 clients in *Lora* bond hearings during the same period and nearly 60% had bond set). Now none even have the chance to argue for bond.

Instead, these plaintiffs have been returned to a pre-*Lora* world described in vivid detail by the Second Circuit in which "thousands of individuals in immigration detention" regularly spent "many months and sometimes years in detention." *Lora*, 804 F.3d at 605. Class members with proceedings "within the jurisdiction of [the Second Circuit] languish in county jails and in short-term and permanent ICE facilities." *Id.* They join the thousands of immigrants around the country who are incarcerated for many months or years pending the resolution of their removal proceedings, many of whom will ultimately win their cases. *See Jennings*, 138 S.Ct at 860 (Breyer, J., dissenting) (identifying cases of immigrants detained in the Central District of California for 831, 608, and 561 days before winning their immigration cases and noting that nearly 40% of Section 1226(c) class members in *Jennings* would receive relief from removal). Indeed, in recent years Section 1226(c) detainees in New York who spent six months or more in

detention ultimately succeeded in 44% of their immigration cases. *See* Supp. Hausman Decl. ¶ 7; *accord* Supp. Saenz Decl. ¶ 4 (of clients with completed immigration cases, 55% of those who received *Lora* bond hearings ultimately won the right to remain in the country). For many class members, their immigration detention exceeds the time they spent in criminal custody, if they spent any time there at all. *See Jennings*, 130 S.Ct at 860 (Breyer, J., dissenting) ("[B]etween one-half and two-thirds of the class served sentences less than six months."); *Sopo v. U.S. Attorney Gen*., 825 F.3d 1199, 1221 (11th Cir. 2016) (noting petitioner's civil detention under 1226(c) had gone on longer than his criminal sentence for underlying offense).

The plaintiffs face severe hardships while incarcerated. They are held in lock-down facilities, with limited freedom of movement and access to their families: "the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails." *Jennings*, 138 S.Ct. at 861 (Breyer, J., dissenting).[2] "And in some cases the conditions of their confinement are inappropriately poor." *Id.* (citing Dept. of Homeland Security ("DHS"), Office of Inspector General ("OIG"), *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, *e.g.*, indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee)).

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[2] *Accord Chavez–Alvarez v. Warden, York County Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (noting that "the reality that merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures"); *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("It is . . . unrealistic to believe that . . . INS detainees are not actually being 'punished' in some sense for their past conduct.") (internal citations omitted); *Sopo*, 825 F.3d at 1218, 1221 (observing that petitioner's "civil immigration detention is in a prison-like facility").

The facility in which most of the class members with cases at the Varick Street Immigration Court are imprisoned has had six inmate deaths since June 2017 alone, including four suicides. Monsy Alvarado, *After latest suicide, Hudson County takes steps to terminate jail's medical provider*, northjersey.com (Mar. 26, 2018), *available at* https://njersy.co/2uIvxis (quoting County Executive saying that medical and mental health provider had "faile[d] to meet an appropriate standard of care"); Human Rights First, *Ailing Justice: New Jersey: Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention* (Feb. 2018), *available at* https://bit.ly/2qTt0Od (noting that components of mental health program at Hudson "despite recent reform, may actually discourage people from seeking mental health care").

The plaintiffs being consigned to prolonged detention in facilities like this are separated from family members and forced to give up the jobs that support them. *See Lora*, 804 F.3d at 616 (describing how Mr. Lora was the primary caretaker of a two-year-old U.S. citizen son who had to be placed in foster care while his father languished in detention); Vera Report at 4 (analyzing data from over 150 *Lora* bond hearings and finding that nearly 70% of individuals had children and 66% had jobs prior to detention); Declaration of Putative Class Member Wilder Cruz ¶¶ 2, 3, 6 (separated from four U.S. citizen children since Oct. 2017 and lost job as a taxi dispatcher); Declaration of Putative Class Member Jose Nunez ¶¶ 1, 4 (separated from 8-year-old U.S. citizen son since Dec. 2017); Declaration of Putative Class Member Herlin Cruz ¶ 2 (separated from 6-year-old U.S. citizen daughter since Nov. 2017). Many are longtime lawful permanent residents, like Augustin Sajous, with deep roots in this country and in their communities. *See* Vera Report at 2-3 (69% of individuals who received *Lora* bond hearings were LPRs, and the average length of residency in the United States was 22 years); W. Cruz Decl. ¶ 2 (LPR who has been in the U.S. since 1989); Nunez Decl. (came to U.S. 26 years ago as 10-year-old green card holder).

Without class-wide relief, it would be very difficult, if not impossible, for the plaintiffs to challenge their prolonged detention through individual habeas actions.[3] As a threshold matter, litigating an individual habeas action seeking a bond hearing can take many months or even years, *see Lora*, 804 F.3d at 615, all the while adding time in prison for the individual litigant. *See* Brief of Amici Curiae Americans for Immigrant Justice, et al. ("AIJ Amicus Br."), *Jennings v. Rodriguez*, 2016 WL 6276886, *31 (U.S. 2016) (collecting cases describing how, without the six-month bond hearing requirement of *Lora*, "[a]d hoc litigation often results in arbitrary denials and delays in due process").

The largest institutional providers of removal defense services to immigrant detainees are non-profit offices with fixed and limited resources, and they are unable to file individual habeas petitions on behalf of every client whom the government has deemed ineligible for bond hearings post-*Jennings*. *See* Gillman Decl. ¶ 5 (stating that the Legal Aid Society would be unable to file such habeas petitions for every client); Saenz Decl. (ECF No. 14-6) ¶ 6 (describing Brooklyn Defender Services's anticipated challenges); Deri Oshiro Decl. ¶ 6 (describing similar difficulties for The Bronx Defenders). And, because of the complexity of such actions, it is not realistic to expect detainees to successfully litigate habeas actions pro se. *See* AIJ Amicus Br., *Jennings v. Rodriguez*, 2016 WL 6276886, at *28 (collecting cases describing how pro se litigants challenging prolonged detention "lack the legal expertise to seek relief through federal litigation"); *see also Reid*, 819 F.3d at 498 ("[F]ederal habeas litigation itself is both complicated

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[3] Because the plaintiffs seek a preliminary injunction that would provide class-wide relief, they include facts relevant to that request with the understanding that, if this Court decides the present motion before deciding the pending motion for class certification, it may need to engage in some additional analysis regarding the appropriateness of a class-wide injunction. *See* discussion *infra* at 10 n.5.

and time-consuming, especially for aliens who may not be represented by counsel."); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 401 (2014) (collecting cases discussing how "[h]abeas proceedings, which often involve exclusively written submissions, are difficult to navigate without counsel," and "[m]any detainees lack the language or research skills necessary to successfully pursue this procedure"). As a result, without injunctive relief requiring a bond hearing within six months of detention, many individuals would be left to languish in prolonged detention without access to the bond hearing that is their constitutional right.

ARGUMENT

The plaintiffs seek preliminary injunctive relief to maintain the *status quo* that existed until just before the filing of this case, when the government abruptly stopped its practice of providing bond hearings to Section 1226(c) detainees who approached six months of detention. Because they seek to restore the *status quo ante*, the plaintiffs must meet the standard for a "prohibitory" injunction and show: "(1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest." *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (citations and internal quotation marks omitted).[4] To the extent that the government argues that the plaintiffs seek a "mandatory"

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[4] Here, it is the government's action that has disturbed the *status quo* because it abruptly abandoned its policy of providing bond hearings within six months of detention. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (in a case challenging a revised state policy, "[b]y revising their policy . . . Defendants affirmatively changed this status quo"); *see also Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025-26 (2d Cir. 1985) (finding that prisoners challenging prison officials' decision to change a mail screening policy sought a prohibitory

injunction that will alter the *status quo*, the distinction is immaterial because the plaintiffs also meet the higher mandatory injunction standard of a "clear or substantial" likelihood of success on the merits and a "strong showing of irreparable harm." *Id.*[5]

I. UNCONSTITUTIONAL PROLONGED DETENTION IRREPARABLY HARMS THE PLAINTIFFS.

In the Second Circuit, a "showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted). That irreparable harm must be "actual and imminent" rather than a matter of mere speculation. *Id.* Here, the plaintiffs plainly are suffering severe and irreparable harm stemming from their ongoing and prolonged imprisonment.

Beyond the well-established principle in the Second Circuit that a constitutional violation constitutes irreparable harm,[6] the plaintiffs face significant harms directly resulting from their

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injunction); *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (holding that "the requirement that [the government] conduct future initial bond hearings in accordance with constitutional processes . . . is prohibitory").

[5] For all of the reasons described in the plaintiffs' memorandum in support of their motion for class certification (ECF No. 14-1), certification is appropriate here. Prior to deciding that motion, however, the Court "may grant preliminary injunctive relief in favor of putative class members before class certification, and correspondingly, assess the harm to putative class members when considering the preliminary injunction motion." *Abdi v. Duke*, 280 F. Supp. 3d 373, 400 (W.D.N.Y. 2017) (citing *Ligon v. City of New York,* 925 F. Supp. 2d 478, 539 (S.D.N.Y. 2013)), *appeal docketed*, No. 18-94 (2d Cir. Jan. 12, 2018); *see also LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 56 (2d Cir. 2004) (holding "that the district court did not abuse its discretion in relying on [six affidavits from putative class members] in concluding that the then-putative class suffered irreparable harm warranting a preliminary injunction").

[6] *See Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (noting that "it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm") (emphasis in original); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")

time in detention and away from their lives in the United States. Class members in detention, many of whom are longtime LPRs, spend that time separated from their families, communities, jobs, and lives that are deeply entrenched here in the United States. *See* Sajous Decl. (ECF No. 27-2) ¶¶ 3-6; W. Cruz Decl. ¶¶ 2, 3, 6 (LPR who has been in the U.S. since 1989 with four U.S. citizen children); Nunez Decl. ¶¶ 1, 4 (separated from 8-year-old U.S. citizen son); Vera Report at 2-4 (69% of individuals who received *Lora* bond hearings at Varick Street were LPRs, nearly 70% had children, 66% had jobs prior to detention, and the average length of residency in the United States was 22 years). Some face worsening medical conditions in detention, *see* Sajous Decl. ¶¶ 7-11 (describing worsening back pain and issues related to schizophrenia); Nunez Decl. ¶¶ 9-10 (depression and back pain); Declaration of Julio David Xajap Sinai ¶ 6 (anxiety), and others suffer irreparable harm due to the potential loss of a home or a job as a result of their continued imprisonment, *see* Sajous Decl. ¶ 6 (imminent loss of his rent-assisted apartment); W. Cruz Decl. ¶ 6 (lost job as taxi dispatcher). Such harms, flowing from the "effects of [a prisoner's] confinement," serve as "an independent basis" for a finding of irreparable harm. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Abdi v. Duke*, 280 F. Supp. 3d 373, 404 (W.D.N.Y. 2017) (finding that immigration detainees suffered irreparable harm including "negative physical and mental health effects of prolonged detention"), *appeal docketed*, No. 18-94 (2d Cir. Jan 12, 2018).

(internal quotations and citations omitted); *see also Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) ("Alleged violations of constitutional rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.") (citation omitted). Where, as here, the constitutional violations are ongoing, the irreparable harm is even more concrete. *Id.* ("Ongoing unlawful deprivations of liberty and the threat of unlawful detention . . . constitute quintessential irreparable harm.").

Moreover, ongoing detention inflicts irreparable harm by seriously impairing the plaintiffs' ability to prepare for their removal cases and thus increasing the possibility that they will be deported. *See* Sajous Decl. ¶ 13 (explaining that it is "impossible" to "find phone numbers, get in touch with family and friends who can help with [his] case, and gather documents that [his immigration] lawyer needs" while in detention); H. Cruz Decl. ¶ 11 (describing how he cannot "gather evidence and speak to family members in Honduras" for his immigration case, which "is a big problem for [his] case because [his] lawyer is having a hard time communicating with" them); *Abdi*, 280 F. Supp. 3d at 405 (noting that prolonged immigration detention "limited the detainees' capacity to contact friends and family . . . [and] hampered the detainees' preparation for upcoming" immigration proceedings); *cf. Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) (in context of pretrial criminal detainees, characterizing time spent in jail as "simply dead time" and noting that detainee "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense"). Indeed, one study that tracked success rates for noncitizens in immigration court found that an immigrant's chances of prevailing nearly doubled when they had been released prior to their hearings. *See* Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* 19 (2016), *available at* http://bit.ly/2wiRroI.

Finally, as the Federal District Court for the Western District of New York noted when it granted preliminary injunctive relief to a separate class of immigrant detainees—asylum seekers held pursuant to a different subsection of the INA—also seeking bond hearings after six months of detention, a finding of irreparable harm is particularly appropriate where, as here, the plaintiffs are being denied "the full and fair process afforded to them under the law" and,

"[u]nlike economic harm, the harm from detention pursuant to an unlawful policy cannot be remediated after the fact." *Abdi*, 280 F. Supp. 3d at 406 (internal quotation marks omitted).

II. THE PLANTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

In support of their contention they are likely to prevail on the merits of their due process claim to a bond hearing within six months at which the government bears the burden of justifying further detention by clear and convincing evidence, the class relies on the same arguments made by the named plaintiff Augustin Sajous in support of his motion for an individual preliminary injunction. *See* Mem. in Support of Individual PI (Apr. 9, 2018) (ECF No. 27-1). As that memorandum noted, the Second Circuit recognized the right to such a hearing pursuant to careful analysis of the issue in *Lora*, and the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), does not undermine that analysis.[7] Moreover, *Lora*'s well-reasoned analysis rests on firmly established law regarding the due process constraints on detention that, too, remains undisturbed by *Jennings*. Because this motion is a separate motion, however, the plaintiffs reiterate much of their earlier arguments.

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[7] Nor does the summary Grant/Vacate/Remand ("GVR") procedure used to vacate the judgment in *Lora*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018), undermine *Lora*'s due process analysis. *See Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 550-51 (S.D.N.Y. 2011) (explaining that, following GVR, "expressions of the court below on the merits, if not reversed, will thus continue to have precedential effect notwithstanding the issuance of a GVR order" and citing *United States v. Adewani,* 467 F.3d 1340, 1342 (D.C. Cir. 2006) ("When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb it.")), *rev'd on other grounds,* 726 F.3d 290 (2d Cir. 2013). And although upon remand the Second Circuit dismissed Mr. Lora's case as moot given that he had won cancellation of removal, the government did not request that the court vacate its opinion, *see* Letter from Christopher Connolly to Hon. Catherine O'Hagan Wolfe, dated Mar. 23, 2018, ECF Dkt # 181 (No. 14-2342), attached as Exhibit B to Supp. Saenz Decl., nor did the court do so in its dismissal order, *see* Order, 2018 WL 1545596 (2d Cir. Mar. 30, 2018).

A. The Second Circuit Has Condemned Mandatory Detention Beyond Six Months Without a Bond Hearing as an "Affront" to Due Process.

The plaintiffs' ongoing detention under Section 1226(c) for more than six months without a bond hearing violates their constitutional right to due process. This conclusion follows from the Second Circuit's analysis in *Lora*, a case in which a lawful permanent resident challenged his prolonged detention under Section 1226(c). The Second Circuit prefaced its opinion by observing that although in 2003 the Supreme Court in *Demore v. Kim* upheld Section 1226(c) against a facial constitutional challenge, the opinion "[e]mphasiz[ed] the relative brevity of detention in most cases." 804 F.3d at 604 (citing *Demore v. Kim*, 538 U.S. 510 (2003)). The Second Circuit then contrasted that observation with the reality that the number of immigrants detained by the federal government had increased "enormous[ly]" since then and that "the time that each immigrant spends in detention [under Section 1226(c)] has also risen substantially" to the point where "a non-citizen detained under section 1226(c) who contests his or her removal regularly spends many months and sometimes years in detention." *Id.* at 604-05. The Second Circuit observed that "for a variety of individualized reasons," some among the many noncitizens who "languish" in immigration detention "are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation." *Id.* at 605.

When the Second Circuit later turned to Mr. Lora's "constitutional argument," it began as follows: "[Lora] argues to this Court that his indefinite detention without being afforded a bond hearing would violate his right to due process. We agree." *Id.* at 613. Given that the "Due Process Clause applies to all persons within the United States, including aliens," and given *Demore*'s "emphasi[s] that, for detention under [Section 1226(c)] to be reasonable, it must be for

a brief period of time," the court concluded "that mandatory detention under Section 1226(c) is permissible, but that there *must* be some procedural safeguard in place for immigrants detained for months without a hearing." *Id.* at 613-14 (emphasis added). Thus, the court held, to comply with the dictates of due process Section 1226(c) "must be read as including a temporal limitation," after which a bond hearing is required. *Id.* at 614.[8]

The Second Circuit then considered whether to have habeas courts determine on a case-by-case basis the point when detention without a bond hearing violates due process or instead to establish a bright-line rule regarding when detainees are entitled to a bond hearing. It chose the latter approach, citing "the relevant Supreme Court precedent, the pervasive confusion [among district courts] over what constitutes a 'reasonable' length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous." *Id*. at 614; *see also id.* at 615 (providing detailed reasons justifying this bright-line approach).

Citing *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Demore*, the Second Circuit established six months of detention as the bright-line after which due process requires a bond hearing. *Id.* In reaching this conclusion, the court observed that "six months was a 'presumptively reasonable period of detention'" used in *Zadvydas*. *Id.* (quoting 533 U.S. at 700-01). Moreover, it observed that five months marked the outer bounds of the "limited period" of

[8] In addition to the Second Circuit, every federal court of appeals to address the issue has held that, to comport with due process, there must be a time limit on mandatory detention under Section 1226(c), after which a bond hearing is required. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1079-81 (9th Cir. 2015) (construing statute to authorize mandatory detention for only six months); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232-33, 235 (3d Cir. 2011) (requiring hearing when detention is unreasonably prolonged); *Reid*, 819 F.3d at 494-95 (same in First Circuit); *Sopo*, 825 F.3d at 1213-14 (same in Eleventh Circuit); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (requiring release when detention has become unreasonable).

detention contemplated by the Supreme Court in upholding Section 1226(c) in *Demore*. *Id.* (citing 538 U.S. at 531). The court also invoked the need for an administrable rule given "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis." *Id.* (collecting cases with widely disparate outcomes relative to months of detention). The court then explained that the burden on courts in the Second Circuit, given their sizable immigration dockets, militated in favor of a bright-line six-month rule. *Id.* at 615-16. Finally, the court explained, the absence of a six-month rule would cause devastating "real-life consequences for immigrants and their families" by subjecting them to "endless months of detention, often caused by nothing more than bureaucratic backlog." *Id.* at 616. After six months, the Second Circuit required that "the detainee must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." *Id.* at 616.

Pursuant to the Second Circuit's decision, hundreds of individuals like the class members here have been given bond hearings in New York since 2015. For over two years following the Second Circuit's *Lora* decision, habeas litigation seeking bond hearings ceased for noncitizens detained by ICE's New York field offices for six months or more under Section 1226(c), and instead IJs held bond hearings through which some detainees found to pose no danger or flight risk were released on bond, while others remained detained. Indeed, the government scheduled such a bond hearing for the named plaintiff Augustin Sajous on March 19, 2018. *See* Rockoff Decl. (ECF No. 27-3) (bond hearing originally scheduled for February 20, 2018, was adjourned until March 19, 2018, because of a government "scheduling error"); *see also* H. Cruz Decl. ¶ 5 (*Lora* bond hearing scheduled for March 5, after the IJ adjourned his original bond hearing date of January 30).

In March of 2018, however, all of that changed and the government began refusing to provide bond hearings to Section 1226(c) detainees at six months of detention. The government seeks to justify this shift as a product of the Supreme Court's February 27 decision in *Jennings*. In that case, the Supreme Court reversed a Ninth Circuit ruling that erroneously applied the canon of constitutional avoidance to limit detention under Section 1226(c). 138 S. Ct. at 851. Despite having ordered the parties to brief whether due process requires a bond hearing if detention lasts six months, however, the Court expressly did not reach that constitutional question, instead returning the case to the Ninth Circuit to decide the question in the first instance. *Id.*

As explained above, the Second Circuit already has given careful consideration to what due process requires in this context. Thus, although *Jennings* abrogates *Lora*'s saving constitutional construction of Section 1226(c), it leaves undisturbed the Second Circuit's due process analysis. *See Wojchowski v. Daines*, 498 F.3d 99, 106, 109 (2d Cir. 2007) (explaining that Second Circuit panel opinions remain good law unless reversed *en banc* or by the Supreme Court, except when a decision is incompatible with an intervening Supreme Court decision). The Second Circuit's considered treatment of the requirements of due process and its embrace of the view that "mandatory detention for longer than six months without a bond hearing affronts due process" survive *Jennings*. *Lora*, 804 F.3d at 606. As a result, the plaintiffs here are likely to succeed on their claim that mandatory detention in excess of six months without a bond hearing violates due process.

B. Ample Supreme Court Precedent Supports *Lora*'s Conclusion That Due Process Requires a Bond Hearing Once Immigration Detention Lasts for Six Months and Requires That the Government Bear The Burden of Proof by Clear and Convincing Evidence.

Each of the Second Circuit's conclusions—that due process requires a bond hearing once immigration detention becomes prolonged, that such detention becomes prolonged at six months, and that the government should bear the burden of justifying further detention by clear and convincing evidence——are supported by well-established Supreme Court precedent. "'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Kim*, 538 U.S. at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). "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*, 533 U.S. at 690. Due process therefore requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (internal quotation marks omitted). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *See id.*; *see also Demore*, 538 U.S. at 528.

In *Demore*, the Supreme Court upheld the mandatory detention of a noncitizen under Section 1226(c). However, it did so based on the petitioner's concession of deportability and the Court's understanding that detentions under Section 1226(c) are typically "brief." 538 U.S. at 522 n.6, 528; *see also Lora*, 804 F.3d at 614 (highlighting *Demore*'s emphasis on a "brief period" of detention). By contrast, where immigration detention is prolonged, due process requires an individualized determination that the continuing significant deprivation of liberty is

warranted. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"). Indeed, even the government conceded in *Lora* that at some point detention without a bond hearing becomes unconstitutionally prolonged. 804 F.3d at 606 n.10, 613.

Moreover, Supreme Court precedent supports the Second Circuit's bright-line rule that mandatory detention "affronts due process" once it lasts six months. First, as the Second Circuit explained in *Lora*, both *Zadvydas* and *Demore* support the rule. *See* 804 F.3d at 615 (interpreting *Demore* and *Zadvydas*, "taken together," to support "a presumptively reasonable six-month period of detention"). In *Zadvydas*, the Supreme Court deemed six months to be a "presumptively reasonable period of detention" for individuals ordered removed. 533 U.S. at 700-01. In *Demore*, the Court held that mandatory detention was authorized for a "limited period" of time, consisting on average of one and a half months in the majority of cases and up to five months in a "minority of cases." 538 U.S. at 529-30; *see also Faure v. Decker*, No. 15-Civ-5128 (JGK), 2015 WL 6143801, at *3 (S.D.N.Y. Oct. 19, 2015) (finding six-month mandatory detention violated due process under either bright-line rule or as-applied analysis).[9] Indeed, the case for requiring an individualized bond hearing before allowing detention to continue beyond six months is even stronger here than the claim for release in *Zadvydas*. In contrast to the petitioner in *Zadvydas*, none of the plaintiffs in this case have been ordered removed—rather

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[9] Outside of the immigration context, the Supreme Court similarly has held that six months is the outer limit on civil confinement without a judicial order. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249-52 (1972).

they are all pursuing defenses against removal—and they do not seek outright release but only an individualized hearing on flight risk and danger.

Second, Supreme Court precedent supports the establishment of bright-line rules to guide government officials and ensure they consistently act within the bounds of constitutional limits. Administrable rules protect "the individual against arbitrary action of government," which the Supreme Court "ha[s] emphasized time and again [is] the touchstone of due process." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (listing cases, citation and alteration omitted). Such rules are particularly appropriate when, in their absence, courts or government officials would be left "at sea" in attempting to enforce constitutional requirements. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion)*; see also Maryland v. Shatzer,* 559 U.S. 98, 110 (2010) (specifying time period because "law enforcement officers need to know, with certainty and beforehand," when they can renew interrogation); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that constitutionally required judicial evaluation of probable cause generally must occur not later than forty-eight hours after arrest).

Finally, the Supreme Court's due process precedent involving comparably severe deprivations of liberty supports placing the burden on the government to justify any prolonged detention by clear and convincing evidence, as the Second Circuit did in *Lora*. 804 F.3d at 616. In *Zadvydas*, the Court identified a "serious constitutional problem" with a scheme that placed the burden on the detainee to prove that he was not dangerous. *See* 533 U.S. at 692; *see also Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (holding statute violated due process in placing burden on detained insanity acquittee to prove he is not dangerous in order to be free from continued detention). Conversely, in upholding certain civil detention schemes, the Court has relied heavily on the fact that the government bears the burden of justifying the detention at

issue. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 751 (1987) (upholding bail regime given that it required government to "prove[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"). In the context of other "particularly important individual interests," *Addington v. Texas,* 441 U.S. 418, 424 (1979), due process requires the government to carry a burden of at least clear and convincing evidence. *See Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982) (in parental termination context, holding that preponderance standard violated due process and that clear-and-convincing standard was "necessary to satisfy due process"); *Addington*, 441 U.S. at 433 (same, in context of civil commitment); *Woodby v. I.N.S.*, 385 U.S. 276, 285-286 (1966) (same, in context of deportation orders); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (same, in context of denaturalization). That rule applies here, as the government seeks to deprive the plaintiffs of "freedom from imprisonment," which "lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690; *cf. Addington*, 441 U.S. at 425 (explaining that chosen standard of proof "reflects the value society places on individual liberty").

Within six months of the plaintiffs' detention, due process requires that they be afforded bond hearings. Moreover, because of the severe deprivation of liberty that prolonged detention entails, the government must bear the burden of proving, by clear and convincing evidence, that detention is necessary to prevent flight or to protect the community from harm.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR GRANTING THE PLAINTIFFS PRELIMINARY RELIEF.

Finally, the balance of equities and the public interest also favor the plaintiffs. Balancing the equities, the harm that the plaintiffs will endure absent an injunction—including violations of their constitutional rights and harm to their health, ability to assist in their defense from removal,

and livelihood—reaches all facets of their lives. By contrast, the government's only burden will be the scheduling of bond hearings for individuals who, up until last month, received them regularly as a matter of course. *See Abdi*, 280 F. Supp. 3d at 410 ("Granting preliminary injunctive relief will simply require Respondents to comply with their legal obligations and afford Petitioners procedural protections.") When striking a balance between the "risk of substantial constitutional harm" and the government's administrative concerns, the Second Circuit has "little difficulty concluding . . . that the balance of hardships tips decidedly in" favor of protecting against constitutional harm. *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984) (upholding a preliminary injunction to prevent New York State from violating prisoners' Eighth Amendment constitutional rights despite defendants' claim that injunction would cause "fiscal chaos" and "strain on the DOCS' security force").

Similarly, the public interest weighs strongly in favor of granting the preliminary injunction and providing constitutionally guaranteed process to foster faith in government. *See Abdi*, 280 F. Supp. 3d at 410 (finding that a preliminary injunction requiring the government to hold bond hearings was in in the public interest because "it simply means that certain procedural safeguards must be followed"); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (in a case involving prolonged mandatory immigration detention, finding that "public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution") (internal citations and quotation marks omitted). Because there is no public interest in denying the plaintiffs these hearings and a great interest in providing them pending the outcome of this litigation, the public interest is decidedly in favor of granting the preliminary injunction.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

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Respectfully submitted,

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