Nos. 13-56706, 13-56755

In the United States Court of Appeals for the Ninth Circuit

DAVID MARIN, *ET AL.*,
Respondents-Appellants,

vs.

ALEJANDRO RODRIGUEZ, *ET AL.*,
Petitioners-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO. 2:07-CV-03239-TJH-RNB
HON. SUSAN R. BOLTON, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF FEDERAL RESPONDENTS-APPELLANTS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: July 27, 2018

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief with the written consent of the parties.[1] IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), and *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

STATEMENT OF THE CASE

A group of aliens (hereinafter, "Petitioners") have sued the Director of the Los Angeles District of the Immigration and Customs Enforcement ("ICE"[2]) and several

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[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

[2] ICE is the successor within the Department of Homeland Security ("DHS") of the former Immigration and Naturalization Service ("INS").

higher-ranking federal officers (collectively, the "Government") to seek periodic bond hearings at which an immigration judge can assess Petitioners' eligibility for bail, in light of flight risk and danger to the community. Their complaint raised statutory arguments under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA") as well as constitutional Due Process arguments. Although this case began as a pure *habeas corpus* action, the operative complaint combines an aspect of systemic review of immigration policy: "This action is both a complaint for declaratory and injunctive relief under 28 U.S.C. 1331 and a petition for writ of habeas corpus under 28 U.S.C. 2241[.]" Third Am. Compl. ¶2 n.1.

The District Court certified a class of aliens whom the Los Angeles District detained for six months or longer as they awaited resolution of their removal or admission process, and issued an injunction that required periodic bond hearings with procedural and evidentiary protections for the class, such as shifting the burden of proof to the Government. In doing so, the District Court divided the class into three subclasses, based on the statutory section for their detention: Sections 1225(b), 1226(c), and 1226(a). 8 U.S.C. §§1225(b), 1226(a), (c). Of the three subclasses, only the Section 1225(b) detainees have already received an initial bail hearing. The other two classes are also known as the "Arriving Class" for aliens taken into custody at the border, 8 U.S.C. §1226(a), and the "Mandatory Class" for convicted criminals in removal proceedings, *id.* §1226(c).

This Court upheld the injunction on INA grounds, while recognizing that "many, if not most, members of the 1225(b) subclass" would fail on constitutional grounds. *Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013) ("*Rodriguez II*"); *accord Rodriguez v. Robbins*, 804 F.3d 1060, 1082-83 (9th Cir. 2015) ("*Rodriguez IV*"). In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), the Supreme Court reversed on INA grounds, but remanded the constitutional questions. The Court also remanded the question whether a Rule 23(b)(2) class action meets the criterion of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) that "'a single injunction or declaratory judgment would provide relief to each member of the class,'" given this Court's finding that many class members lack constitutional claims. *Jennings*, 138 S.Ct. at 852 (*quoting Dukes*, 564 U.S. at 360). This Court's order dated April 12, 2108, sets out the questions for supplemental briefing on remand.

SUMMARY OF ARGUMENT

Under 8 U.S.C. §1252(f)(1), neither this Court nor the District Court has jurisdiction to enjoin the Petitioners' removal or admission proceedings in a class action (Section I.A). And declaratory relief requires statutory and constitutional subject-matter jurisdiction, which is lacking here for several reasons. First, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and its progeny deny aliens in Petitioners' position a right to enter the United States pending

completion of the immigration process; without an underlying right, Petitioners lack not only standing generally (Section I.B.1) but also procedural standing (Section I.B.2) to pursue these claims. Second, because detained aliens can simply leave to pursue their removal or admission proceedings from abroad, any detention represents a "self-inflicted injury" not caused by the Government (Section I.B.3). Third, the lack of an ongoing violation of due-process rights also means that the Government's sovereign immunity bars this litigation (Section I.C.1), as do the various INA preclusion-of-review provisions (Section I.C.2). Fourth, because the Supreme Court's decisions in *Mezei* and its progeny already answer the questions Petitioners raise, federal-question jurisdiction is absent (Section I.C.3).

Even if jurisdiction existed, declaratory class relief would be inappropriate for three reasons. First, the declaratory relief would not benefit each member, as *Dukes* requires (Section II.A). Second, the relief would not end the controversy between the parties, as the Supreme Court's Declaratory Judgement Act precedents require (Section II.B). Third, however Petitioners envisioned the initial suit, the case now presents a facial challenge to admission procedures, which fails because many class members lack a claim to relief (Section II.C).

With regard to the merits, Petitioners' due-process challenge involves neither a fundamental right nor a protected class and so falls under the rational-basis test. Under that test, federal courts must uphold Government action if any rational basis

supports it, and the Supreme Court has already ratified the choices Congress made (Section III.A). Similarly, Petitioners should bear the burden of proof because the Supreme Court has ratified that approach and the common-law rule is that the moving party bears the burden of proof (Section III.B.1). The length of detention should not benefit Petitioners in bond hearings because Congress plausibly may have viewed crediting delay as a recipe for creating more delay (Section III.B.2). Finally, periodic bond hearings for Petitioners are not warranted under Circuit precedent because Petitioners lack an underling cognizable liberty interest that their detention violates (Section III.B.3).

ARGUMENT

I. THIS COURT AND THE DISTRICT COURT BOTH LACK JURISDICTION, EITHER TO CERTIFY A CLASS OR TO REACH THE MERITS.

Appellate courts must determine not only their own appellate jurisdiction, but also the lower court's jurisdiction. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998). Appellate courts must do so even if the parties concede jurisdiction: "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (interior quotation marks omitted); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional arguments are an exception to rule that courts ordinarily do not consider issues raised only by *amici*).

Jurisdiction poses several barriers that this Court should resolve before reaching the merits.

A. This Court lacks jurisdiction over petitioners' constitutional claims under 8 U.S.C. §1252(f)(1).

Under 8 U.S.C. §1252(f)(1)'s plain language, courts below the Supreme Court lack jurisdiction to issue injunctive relief in class litigation: "It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," but the "ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). That provision alone takes injunctive relief off the table, although some jurisdictional barriers to declaratory relief apply equally to injunctive relief. *See* Sections I.B-I.C, *infra*. But §1252(f)(1) by itself eliminates the availability of classwide *injunctive* relief.

The instant briefing order then asks whether declaratory relief remains an option, as an alternative to injunctive relief. For several jurisdictional, prudential, and substantive reason, the answer is "no." Although the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, "expands the scope of available remedies" that a federal court can provide, it "does not expand [a court's] jurisdiction." *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978). As explained in Sections I.B-I.C, *infra*, this Court and the District Court lack subject-matter jurisdiction for declaratory relief. Similarly, as explained in Sections II-III, *infra*, declaratory relief would be prudentially inappropriate and substantively unwarranted.

B. Petitioners lack standing to challenge their detention.

Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, §2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). As relevant here, courts assess a plaintiff's Article III standing under a tripartite test for an "injury in fact": judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Petitioners lack not only a cognizable injury but also causation; given that lack of substantive standing, they also lack procedural standing to litigate the availability of bond hearings.

1. Petitioners lack an injury in fact because they have no cognizable right.

The Supreme Court has made it abundantly clear that Petitioners have no right to be in the United States: "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Finally, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. Quite simply, Petitioners' Due Process claims

cannot succeed here because Petitioners already are receiving the process due them.

Although Petitioners understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve. *Plasencia*, 459 U.S. at 32; *Demore*, 538 U.S. at 523. Moreover, Petitioners can avoid detention by simply leaving the United States. *See* Section I.B.3, *infra*. Petitioners' ability to end their detention by simply leaving the United States distinguishes Petitioners from dissimilarly situated citizens in civil and criminal detentions, as well as aliens who have successfully asserted Due Process claims. With respect to citizens, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) (interior quotation marks omitted). With respect to certain aliens, Petitioners' claim that *Zadvydas v. Davis*, 533 U.S. 678 (2001), implicitly overruled *Mezei* is risible (and futile[3]). Pets.' Suppl. Br. at 35. In *Zadvydas*, 533 U.S. at 697, deportation proved impossible, so detention during removal became punitive, with no endpoint. Petitioners' detentions

[3] This Court must follow *Mezei* and leave it to the Supreme Court to import *Zadvydas* principles here: "if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (interior quotation marks omitted).

all have endpoints.[4]

2. Petitioners cannot raise procedural claims because they lack any underlying substantive rights.

As indicated in Section I.B.1, *supra*, Petitioners lack an independent right to be in the United States while their immigration proceedings resolve. Attempting to sidestep the Government's plenary authority over admission, Petitioners claim to challenge their detention's procedures rather than their admission. Pets.' Suppl. Br. at 36. Because they lack a substantive right to be in the United States, however, Petitioners also lack a procedural right to bail hearings beyond those already afforded them (*e.g.*, upon material change in their circumstances or *habeas corpus* rights).

Under Article III, Petitioners cannot have a procedural due-process right without having an underlying substantive right first: "the procedures in question [must be] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and which is "apart from his interest in having the

[4] Petitioners' invoking *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) for the proposition that "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to protection under the Due Process Clause" is disingenuous. Pets.' Suppl. Br. at 31 (interior quotation marks and alterations omitted). The *Diaz* aliens were "paroled into the United States," 426 U.S. 67, 74 n.7, which distinguishes them from Petitioners. Accordingly, the process due Petitioners under *Mezei* differs from the process due the paroled *Diaz* aliens. The dispute is not whether Petitioners deserve Due Process, but what process is due.

procedure observed." *Defenders of Wildlife*, 504 U.S. at 573 n.8; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing"); *cf. Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). The Due Process Clause does not afford Petitioners the right to be released into the United States pending resolution of their immigration proceedings. *Plasencia*, 459 U.S. at 32; *Mezei*, 345 U.S. at 212; *Demore*, 538 U.S. at 523 ("detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"). Petitioners lack a procedural right to a bond hearing because they lack a concrete right to be released into the United States pending the end of their admissions or removal procedures.

3. Petitioners' detentions are self-inflicted injuries, and thus raise no Article III case or controversy.

The detentions here are all in service of pursuing the detainee's decision to try to gain entry into or avoid removal from the United States. Each detainee is free to pursue that legal issue – entry or removal – from abroad. The only thing that keeps most – and probably all – class members in detention is their own decision to remain here while the process resolves. Thus, although Petitioners try to analogize their detentions to compelled detention in the criminal or civil contexts that apply to

residents of this Nation, that analogy is inapposite. Contrary to compelled detainees, the detainees here "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947) (interior quotation marks omitted). The detainees' ability to escape detention by simply leaving the United States undermines Petitioners' claims in two respects, one going to the equities and the other to jurisdiction.

First, because the detainees choose detention over the other perfectly viable and lawful choice – leaving the United States – they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. Since no one is keeping them here, they cannot challenge the legislative grace that allows them to stay at the taxpayers' expense. It does not matter whether detainees knew the law prior to coming here: "We have long recognized … that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotation marks omitted). And, in any event, they know the law now.

Second, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *Amicus* IRLI does not dispute that the detainees may have an Article III case or controversy with the United States on whether the detainees can enter the United

States, but "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Petitioners cannot bootstrap a *Due Process claim* to release into the United States when their actual case involves only an *immigration claim* on whether they can enter or remain in the United States. Until their immigration claims resolve, Petitioners must choose between detention and leaving. The choice they make does not entitle them to raise new claims, premised only on their own choice.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by coming here and then protesting the terms of being here. *Clapper*, 133 S.Ct. at 1152-53. Having the right to a determination of admissibility does not create the right to reside in the United States while the system answers the first question. If they want the certainty of avoiding detention while their immigration proceedings resolve, Petitioners need to apply for admission or non-removability from abroad.

C. The District Court and this Court lacks statutory and constitutional subject-matter jurisdiction over Petitioners' claims.

As indicated, Petitioners' operative complaint combines *habeas corpus* relief with systemic review: "This action is both a complaint for declaratory and injunctive relief under 28 U.S.C. 1331 and a petition for writ of habeas corpus under 28 U.S.C. 2241[.]" Third Am. Compl. ¶2 n.1. Regardless of whether bootstrapping like that might work in other contexts, Petitioners cannot bring such a suit against the federal

sovereign in this immigration context for three distinct reasons.

1. The federal respondents enjoy sovereign immunity.

Of course, the "United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity is thus a prerequisite to a court's exercise of jurisdiction over the United States. *See*, *e.g.*, *United States v. King*, 395 U.S. 1, 4 (1969). Such a waiver "must be unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope," in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Here, the injunction exceeds the limited relief available.[5]

The 1976 amendments to 5 U.S.C. §702 "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8

[5] The "officer suit" exception in *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception to sovereign immunity, but only for *ongoing violations* of federal law. *Green v. Mansour*, 474 U.S. 64, 66-67 (1985). Accordingly, the only relief potentially available against the Government would apply to individual *Zadvydas*-like cases, not to all detained Petitioners.

(1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver itself has restrictions, including the withholding of "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," 5 U.S.C. §702, and – for issues not expressly reviewable by statute – allowing review only where "there is no other adequate remedy in a court." *Id.* §704. Here, legally adequate review is available under the allowance for *habeas corpus*, and that review in the immigration context has several limits on review that preclude resort to §702's broad waiver.

2. Preclusion-of-review provisions limit the Government's waiver of sovereign immunity.

In addition to the bar to Administrative Procedure Act ("APA") suits where plaintiffs have another adequate remedy, 5 U.S.C. §704, the APA also limits general review when the underlying substantive statute limits review. 5 U.S.C. §702; *accord id.* §701(a)(1)-(2). Under §701(a), APA precludes review when substantive "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(1)-(2). Although *Demore* held that §1226(e) does not preclude "challenges [to] the statutory framework that permits … detention without bail," 538 U.S. at 516-17, these APA limitations all apply to the statutes at issue here.

First, unlike in *Demore*, Petitioners here claim a due-process right to compel

the Government to use less-intrusive alternatives to detention (*e.g.*, intensive supervision). *See* Pets.' Suppl. Br. at 54. Weighing detention versus supervised release is precisely the "discretionary judgment regarding the application of this section" that §1226(e) shields from review.

Second, and along the same lines, §1252(g) precludes both statutory and nonstatutory review "to hear *any* cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to *commence proceedings, adjudicate cases*, or execute removal orders." 8 U.S.C. §1252(g) (emphasis added). Unlike §1226(e), §1252(g) applies beyond §1226 and extends more broadly than §1226(e)'s "discretionary judgment" to reach "*any* cause or claim … *arising from* the decision … to commence proceedings … against any alien under this Act." 8 U.S.C.S. §1252(g) (emphasis added).

Third, the limitations on APA review cut against review. Because statutory preclusion-of-review provisions apply here, 8 U.S.C. §§1252(g), 1226(e), the United States' general waiver of sovereign immunity does not apply. 5 U.S.C. §702; *accord id.* §701(a)(1). Similarly, the *habeas corpus* remedy is a legally adequate one, even if class members prefer other methods of review. As such, the waiver of sovereign immunity does not extend to alternate procedures because there is an adequate *habeas* remedy. 5 U.S.C. §§702, 704.

In short, the Supreme Court's allowance of systemic review in *Demore* does

not transfer here. That should come as no surprise, however, because – unlike in *Demore* – the statutory scheme has not broken down here. Petitioners' removal proceedings are all on track, with an end in sight.

3. Federal-question jurisdiction does not exist for settled questions.

To support the complaint's assertion that "28 U.S.C. 1331 … confers jurisdiction to consider federal questions," Third Am. Compl. ¶2, Petitioners rely mainly on *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998), in which this court rejected the Government's objection to an injunction against future deportations. There, the Government – which did not question jurisdiction generally – cited 8 U.S.C. §1252(g) as precluding any injunctive relief for future class members. This litigation involves different parties and different statutory and constitutional bases, so *Walters* cannot control. *Compare Montana v. United States*, 440 U.S. 147, 153 (1979) *with United States v. Mendoza*, 464 U.S. 154, 162 (1984).[6] If the lower courts lacked jurisdiction for the systemic-review facets of this case, no such relief is available here, even if the parties have not briefed the jurisdictional issues here.

When the Supreme Court has answered a question, that question ceases to

[6] The other case that Petitioners' complaint cites – *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) – concerns availability of §1983 actions to review parole-release procedures. *See* Third Am. Compl. ¶2. Because *Wilkinson* concerned state actors, the federal government's sovereign immunity was not at issue.

present a federal question for jurisdictional purposes: "federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit," where a claim is "plainly unsubstantial … [when] its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans v. Lavine,* 415 U.S. 528, 537 (1974) (interior quotations omitted); *Goosby v. Osser,* 409 U.S. 512, 518 (1973). The Supreme Court has held that Petitioners have no constitutional rights at issue here, *see* Section I.B.1, *supra*, which forecloses federal-question jurisdiction altogether.

II. IF JURISDICTION EXISTED, A CLASS ACTION WOULD REMAIN AN IMPROPER VEHICLE FOR THIS LITIGATION.

Even if the District Court had jurisdiction to issue classwide declaratory relief, that relief would remain inappropriate. Furthermore, given the discretionary nature of that type of relief and the extent to which the Supreme Court's *Jennings* decision rejected the District Court's rationale for the injunction, *vacatur* and remand are the only viable actions that that this Court should consider on remand from the Supreme Court.

A. ***Dukes*** **makes this an inappropriate vehicle for a Rule 23(b)(2) class.**

Under *Dukes*, an appropriately formed class requires that "a single injunction

or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. As this Court has already recognized, however, "many, if not most, members of the 1225(b) subclass would fall into the category of aliens described in *Mezei*" and therefore would receive *no* constitutional relief. *Rodriguez II*, 715 F.3d at 1140; *accord Rodriguez IV*, 804 F.3d at 1082-83; *see* Section I.B.1, *supra*. Although the District Court likely cannot solve the problem on remand, this Court's obligation remains clear: the existing injunction and class certification are untenable, so this Court must vacate them.

B. Courts should not use the Declaratory Judgment Act when their decree will not resolve the controversy.

For reasons similar to the class-action restrictions in *Dukes*, declaratory relief is equally inappropriate. The Declaratory Judgment Act provides *discretionary* relief: "any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party." 28 U.S.C. §2201(a) (emphasis added). Under that discretion, the Supreme Court has held it inappropriate to exercise that discretion piecemeal when the "proposed decree cannot end the controversy." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952); *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (declaratory relief improper where it "would not completely resolve [petitioner's] challenges, but would simply

carve out one issue in the dispute for separate adjudication").[7] Accordingly, this Court should reject declaratory relief altogether.

C. Petitioners cannot use a class-action suit to set facial rules for future individualized hearings when many – indeed most – class members have no claim to relief.

Although this case began as a *habeas corpus* action, it subsequently morphed into a facial, systemic challenge to removal procedures under federal immigration law. In seeking periodic bond hearings, with burdens of proof, standards of review, and a ruling on the impact of the duration of detention in a bond hearing, Petitioners' suit seeks relief utterly removed from any one litigant's specific facts. Analyzed individually, most class members would not warrant the relief that Petitioners seek. Accordingly, this Court should recognize this as a facial challenge and then dismiss it because Petitioners failed to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Quite the contrary, the Government's policies are valid in most, if not all, circumstances presented by this litigation.

Of course, a "facial challenge to a legislative Act is … the most difficult

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[7] The All Writs Act cited by Petitioners' complaint (Third Am. Compl. ¶2) is inapposite, both because 8 U.S.C. §1252(g) specifically precludes resort to it and, more importantly, because the requested relief here does not *preserve* future appellate jurisdiction, 28 U.S.C. §1651(a), given that Petitioners can pursue their claims independently both in detention and from abroad.

challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno,* 481 U.S. at 745. Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply different from prevailing in a facial challenge. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2665 (2011); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Because "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior quotation marks and alterations omitted), this Court has ample reason to decline the facial systemic relief that Petitioners seek.

Generally, where relief would reach beyond the particular parties' circumstances, the party seeking that relief "must … satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Similarly, where the complaint's "claims are better read as facial objections" to the law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). There is little to distinguish facial challenges from class challenges like this one. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 886 (Mar. 2015) ("facial challenge to

the constitutionality of a statute, regulation, ordinance, or policy can be thought of as an implicit class action"). Even if Petitioners first styled their case an as-applied challenge, Pets.' Suppl. Br. at 13, it survives (if at all) as a declaratory-only suit over general detention procedures: in essence, a facial challenge. *Driehaus*, 134 S.Ct. at 2340 n.3. This Court should recognize that, even if styled initially under *habeas corpus*, this litigation is a facial challenge to federal removal procedures.

Petitioners cannot use heightened burdens that a few class members allegedly face to alleviate other class members from burdens that the Supreme Court's precedents allow. In short, neither Petitioners nor federal courts can use this litigation as a vehicle to adopt immigration policy via court decree for all aliens: "The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). Thus, a reviewing court would need to tailor the declaratory relief to the actual violations (if any), as distinct from the "blunderbuss" facial relief proposed here. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[8] Because the claims here easily fail the *Salerno* test, this Court should either remand with orders to

[8] Our common-law tradition and its limits are particularly compelling here, where the existence of Petitioners' *habeas corpus* action depends in part on the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001) ("at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'") (*quoting Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

dismiss or reject the availability of class-wide declaratory relief on so thin a record of actual constitutional concerns.

III. THE CONSTITUTION DOES NOT SUPPORT PETITIONERS.

As indicated, either as a prudential or jurisdictional matter, this Court should dismiss Petitioners' claims and vacate the injunction without reaching the merits. If it reaches the merits, this Court should deny relief for the reasons argued by the Government, as well as the reasons outlined below.

A. Six months of detention do not trigger Due Process rights for aliens in either the §1225(b) or §1226(c) classses.

Petitioners understandably prefer release to detention while immigration proceedings remain pending, but they simply have no right to be in the United States until the proceeding resolves. *See* Section I.B.1, *supra*. Indeed, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). As long as the Government complies with INA – and *Jennings* held that the Government *has complied* with INA – the Government has satisfied Due Process.

Under *Mezei*, Petitioners do not suffer injury to a liberty interest because they lack a Due Process liberty interest. But even if Petitioners had a cognizable liberty interest, restricting that interest would not necessarily violate Due Process. When injuries implicate neither fundamental rights nor protected classes, due-process analysis proceeds under the rational-basis test. *Franceschi v. Yee*, 887 F.3d 927, 939

(9th Cir. 2018); *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). Under that test, denying Petitioners' preference for supervised release does not *per se* violate a constitutional command or entitlement: "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. While good policy arguments may support supervised release for some detainees, those policies arguments do not suffice for rational-basis review.

Under the rational-basis test, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *Beach Communications,* 508 U.S. at 315. Consequently, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the Government plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted). Petitioners cannot prevail even by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Petitioners' conjecture – while not evidence – would not help Petitioners, even if it were evidence.

For example, the Government may have believed that supervised release

would act as a magnet for further illegal immigration (*i.e.*, the policy would equate to a billboard reading "come to the United States, spend six months in detention, and get released"). Contrary to the message such a policy would send, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). And that *possible* rationale alone suffices to rebut Petitioners' arguments for supervised release.

In any event, the Supreme Court has already resolved the issue that Petitioners raise. Provided that the detention is neither punitive nor indeterminate, detention during immigration proceedings here does not violate Due Process. *Demore*, 538 U.S. at 523. In situations like this, "where justice is supposed to be swift but deliberate," a court "cannot definitely say how long is too long." *Barker v. Wingo*, 407 U.S. 514, 521 (1972).[9] Under the circumstances, this Court must reject Petitioners' request to promulgate a constitutional rule in favor of those with no right to be here in the first place.

1. The §1225(b) class has no right to periodic bond hearings.

Although the Supreme Court has not recently addressed the constitutional rights against detention of non-criminal aliens like the Arriving Class, that subclass

[9] *Amicus* IRLI thus submits that this Court should not set *any* timeline here, and certainly a rigid six-month deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523, which would be inappropriate here. *See* Section II, *supra* (no basis for declaratory relief).

faces the same result as the Mandatory Class. In *Mezei*, 345 U.S. at 215, the Supreme Court held that "temporary harborage" such as detaining an alien at Ellis Island in lieu of rejecting him at the border was "an act of legislative grace" that "bestows no additional rights" on the alien. *Amicus* IRLI respectfully submits that this Court must hold to the rule established in *Mezei* and its progeny.

Petitioners claim that "all Arriving Subclass members *do* have a right to live here." Pets.' Suppl. Br. at 30 (emphasis in original). But Petitioners cannot cherry-pick their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). As the Supreme Court has recognized, Congress found that "'aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.'" *Demore*, 538 U.S. at 518 (*quoting* S. Rep. No. 104-249, at 7 (1996)). Congress plausibly might have viewed this as a basis for detaining the Arriving Class members until their immigration process resolved. Petitioners cannot take the right to be here – detained, unless released by discretion – and then pare away detention via Due Process claims. The right that is afforded them is the right that they get.[10]

[10] Of course, under *Zadvydas*, detention must be in furtherance of removal proceedings and not punishment, but there is no allegation that the detentions here are punitive in that sense.

2. The §1226(c) class has no right to periodic bond hearings.

With regard to the Mandatory Class, the Supreme Court has already held that the "justifiabl[e] concern[] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers" entitled Congress to "require that persons such as respondent be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. Significantly, "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Id.* at 518 (citing legislative record). It would be remarkable for this Court to second-guess Congress on this issue, given the plenary authority that Congress possesses in this field. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (recognizing "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (interior quotation marks omitted). There is no legitimate basis for this Court to interject itself into this area of plenary congressional authority.

B. The Constitution does not require the procedural and evidentiary benefits listed in the Court's briefing order.

The final question set out in the Court's briefing order lists several procedural and evidentiary protections that could apply in bond hearings for aliens detained for more than six months under 8 U.S.C. §§1225(b), 1226(c), or 1226(a). For jurisdictional and prudential reasons, *see* Sections I-II, *supra*, this Court should not

reach these issues. If this Court does reach these issues, the Court should deny any relief.

1. Petitioners bear the burden of proof.

The injunction's placing the burden of proof on the Government to show flight risk or danger to the community conflicts with both Supreme Court precedent on immigration and the default common-law rule placing the burden of proof on the movant (here, the detainee seeking bail, contrary to the Government's desire to continue to hold that detainee). Both reasons compel this Court to rule for the Government on the burden of proof.

First, immigration law supports retaining the burden of proof on the alien who seeks bail. In *Zadvydas*, the Supreme Court accepted that the petitioner bore the burden. 533 U.S. at 683, 692. *A fortiori*, in *Carlson v. Landon*, 342 U.S. 524, 538 (1952), the Court allowed the Government to hold aliens without bail, pending deportation, based on *systemic* criteria under the statute, without an individualized determination. As *Demore* explains, the Government "could deny bail to the detainees by reference to the legislative scheme even without any finding of flight risk." 538 U.S. at 524 (interior quotation marks omitted). To move the burden of proof to the Government would flout the Supreme Court's precedents, and be especially difficult to justify against the plenary authority that Congress and its Executive-Branch delegates enjoy here.

Second, the common-law default is for the plaintiff or movant in civil litigation to bear the burden of proof when the statute is otherwise silent. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Even Petitioners do not ask this Court to hold them entitled to *release*. Thus, Petitioners would be the party seeking relief, and the default rule places the burden on them.

In addition to placing the burden of proof on the Government, the injunction requires the Government to make its flight-risk and community-danger showings by clear and convincing evidence. Given the rational-basis context here, and that the plaintiff has no liberty interest, see Section III.A, *supra*, *amicus* IRLI respectfully submits that this Court lacks authority so to elevate the showing that the Government must make, even assuming *arguendo* that the Government bears the burden at all. *See* Section III.A, *supra*. Processing immigrants is a core function of the Executive Branch, as is defending the border. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Zadvydas*, 533 U.S. at 700. There is no good reason – much less authority – for federal courts to stand in the way.

2. The length of the alien's detention is irrelevant to release.

In addition to the other procedural advantages that they seek, Petitioners also asked that detention time weigh in the bail analysis, even if the Government did not cause the delay. Assuming *arguendo* Petitioners' claim that lengthy proceedings currently correlate with meritorious cases and aliens who would not abscond, the

injunction could trigger expanded legal activity by detainees, without regard to merit. If the system values delay for detainees, detainees will introduce more delay.

At the very least, the rational-basis test requires that reviewing courts must weigh not only the bases on which Congress *acted*, but also those on which it *plausibly may have acted*. *Beach Communications*, 508 U.S. at 313; *Lehnhausen*, 410 U.S. at 364. Under that test, had the Government considered the issue, it could have concluded reasonably that counting delay to detainees' benefit would create more delay in detainee proceedings. Because the Government could have plausibly rejected Petitioners' proposal to avoid the increased delay that the proposal likely would cause, this Court must uphold the Government's actions.

3. The Constitution does not require periodic bond hearings.

Petitioners lack a constitutional liberty interest, *see* Section I.B.1, *supra*, so they lack a right to periodic bond hearings. This facet of this case distinguishes cases such as *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011). In *Singh*, this Court found Due Process to require the Government to hold a hearing when the detainee's "substantial liberty interest" was at stake, *id.*, but that presupposed the existence of a liberty interest. In *Singh*, that interest came from §1226(c) under *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008). IRLI has no quarrel with the notion that a statute can create rights, the denial of which supports standing. *Warth v. Seldin,* 422 U.S. 490, 514 (1975). But *Jennings* rejected the notion that INA

creates liberty interests or rights here, thus undermining the statutory basis for the right that *Singh* perceived. While IRLI would dispute the *Singh* panel's reasoning *in an INA case*, this litigation does not present that issue: Petitioners here have no constitutional liberty interest, *see* Section I.B.1, *supra*, and that ends the inquiry.

CONCLUSION

For the foregoing reasons and those argued by the Government, this Court should vacate the injunction.

Dated: July 27, 2018

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This brief contains thirty pages, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically submitted the foregoing *amicus curiae* brief to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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