CONSTITUTIONAL AND PROCEDURAL PATHWAYS TO FREEDOM FROM IMMIGRATION DETENTION: INCREASING ACCESS TO LEGAL REPRESENTATION

ADITI SHAH*

Each day, tens of thousands of noncitizens are caged in immigration prisons and jails across the United States. Locked up and separated from their families and the outside world, detained noncitizens experience the pain and suffering associated with criminal incarceration without many of the same salient procedural safeguards. One of the most crucial missing protections is access to legal representation. Empirical studies show that legal representation makes all the difference in allowing noncitizens to challenge their imprisonment and gain freedom. Yet, the vast majority of detained noncitizens never receive legal representation. As a result, for many people in immigration detention, the only conceivable exit options are those worse than detention itself: deportation or death.

Despite legal scholarship arguing for a right to appointed counsel in removal proceedings, comparatively little attention has been devoted to access to legal representation for the specific purpose of seeking freedom from detention. This Article aims to fill that gap by examining two structural pathways to increasing access to legal representation for people seeking release from immigration detention. First, the Due Process Clause of the Fifth Amendment demands a right to appointed counsel for the purpose of challenging detention (the "constitutional pathway"). A direct application of the procedural due process test established in Mathews v. Eldridge and expounded in Turner v. Rogers provides sufficient justification to extend the right to appointed counsel to individuals in immigration detention. Although courts have yet to recognize a constitutional right to appointed counsel in criminal bail hearings, the comparative dearth of procedural protections in immigration detention proceedings justify identifying the right in that context. Second, "legal representation" is not limited to each detainee getting

---

* Law Clerk to the Honorable Richard C. Wesley, United States Court of Appeals for the Second Circuit. I am grateful to Sabrineh Ardalan, Peter Margulies, Martha Minow, and Philip Torrey for their helpful suggestions on earlier drafts of this Article and to the editors of the *Georgetown Immigration Law Journal* for their thoughtful feedback. I also thank Martha Minow for her support and guidance in the process of developing this Article, and William B. Rubenstein and the Hon. Richard C. Wesley for their mentorship and encouragement. All opinions in this Article are my own.

her own lawyer: the class action, a device that allows a small group of detained noncitizens to litigate on behalf of a larger group of detainees, is a powerful, but underappreciated, tool for allowing detained noncitizens their day in court (the "procedural pathway"). Two recent developments—specifically Justice Alito's dicta on the viability of the class device in Jennings v. Rodriguez and debates over whether the Immigration and Nationality Act prohibits classwide injunctions—threaten the existence and efficacy of class actions in the context of immigration detention. The first, questioning the class device's viability, mistakenly conflates the flexible nature of due process with the requirements for class certification. The second, doubting the permissibility of classwide injunctions, reveals that the only relief available for the class may be declaratory in nature, which often falls short of the relief detainees most need.

Immigration detention is unique among the crises currently plaguing the U.S. immigration system. The impact of the coronavirus pandemic on people in detention has only made this problem more apparent. Access to legal representation is crucial to prevent unlawful imprisonment, lessen the economic and human costs of detention, and fight forces of xenophobia and racial prejudice that have influenced immigration law's understanding of "who belongs" for far too long. In tandem, the constitutional and procedural pathways chart two broad solutions, present benefits and limitations, and raise further ideas for roads to a fairer, more just system.

TABLE OF CONTENTS

INTRODUCTION

The United States is facing an immigration detention crisis. During fiscal year 2019, the average daily number of immigrants in Immigration and Customs Enforcement (ICE) custody reached 50,165.[1] Since 2004, at least 193 people have died in immigration detention,[2] with eighteen deaths alone occurring over eight months between April and December 2019.[3] Since the start of the coronavirus pandemic, as of October 9, 2020, at least eight detained noncitizens have died due to COVID-19, and more than six thousand detainees have tested positive for the virus since ICE started testing in February 2020.[4] According to the Department of Homeland Security's (DHS) fiscal year 2020 budget, $2.7 billion in taxpayer dollars will be spent to maintain a total of 54,000 detention beds.[5] People detained in these facilities suffer in unhygienic, overcrowded, unsafe conditions,[6] and experience physical, psychological, and sexual abuse.[7] Unsurprisingly, imprisoned noncitizens prioritize pursuing release from detention. However, the lack of access to legal representation makes release exceedingly difficult to attain for most, leaving too many worrying: "*I wonder if it will ever end*."[8]

In general, there are two steps to securing freedom from immigration detention. First, the noncitizen must be able to have her day in court to challenge her detention—she must obtain a custody redetermination hearing, whether it is a bond hearing, a *Joseph* hearing,[9] or habeas review. Second, she must prevail at said custody hearing. Access to legal representation is crucial during both steps. Per Professor Ingrid Eagly and attorney Steven Shafer's National Study of Access to Counsel in Immigration Court,[10] 44% of detainees with legal representation obtained a custody hearing in court,

---

1. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/8HWF-WY8L].

2. *See* Alex Nowrasteh, *8 People Died in Immigration Detention in 2019, 193 Since 2004*, CATO INST. (January 8, 2020, 3:05 PM), https://www.cato.org/blog/8-people-died-immigration-detention-2019-193-2004 [https://perma.cc/TBX2-3RFC].

3. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, DEATH DETAINEE REPORT (Feb. 4, 2020), https://www.ice.gov/death-detainee-report [https://perma.cc/S26Y-EFR3].

4. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, ICE DETAINEE STATISTICS (last updated Oct. 9, 2020), https://www.ice.gov/coronavirus#citations [https://perma.cc/MR2F-YA5X].

5. *See* U.S. DEP'T OF HOMELAND SEC., FY 2020 BUDGET-IN-BRIEF, at 3, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf [https://perma.cc/M9HE-JZUZ].

6. *See* Madeline Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know* (July 12, 2019, 11:54 AM), TIME, https://time.com/5623148/migrant-detention-centers-conditions/ [https://perma.cc/93KX-6E5H].

7. *See Sexual Abuse in Immigration Detention–Raquel's Story*, AM. CIVIL LIBERTIES UNION, (last visited Feb. 17, 2020), https://www.aclu.org/other/sexual-abuse-immigration-detention-raquels-story [https://perma.cc/E9R6-9QG3].

8. ALICIA PORTNOY, CHRISTINA FIALHO & KRISTINA SHULL, CALL ME LIBERTAD: POEMS BETWEEN BORDERS 46 (2016).

9. *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

10. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 69–72 (2015).

compared to only 18% of pro se detainees.[11] At step two, once a custody hearing was granted, detainees with legal counsel were *four times* more likely to prevail at the hearing and be released from detention than those without.[12]

Despite these facts, nearly 86% of detained noncitizens had no legal representation.[13] To make matters worse, ICE frequently transfers detainees across the country without notice,[14] charges a fee for phone calls,[15] and holds detainees in rural areas where there are fewer lawyers[16] —adding further barriers to legal representation. Many noncitizens held in detention are indigent, face language barriers, and are unfamiliar with the American legal system.[17] Yet, they are asked to navigate the complexities of immigration detention law and challenge their detention without adequate access to legal representation.

The human and economic costs of immigration detention create a need to increase access to legal representation. Existing scholarship on access to legal representation in the immigration context has focused on the right to counsel for specific groups of noncitizens,[18] and has advocated for this right largely within removal proceedings.[19] There is, however, a hole in the literature on increasing legal representation for the specific purpose of seeking freedom from detention, which is a distinct issue from removal. This Article aims to fill that gap by offering two structural solutions for achieving greater access to legal representation for individuals pursuing release from detention. First, the Due Process Clause of the Fifth Amendment[20] demands a right to appointed counsel for challenging detention (the "constitutional pathway"). Second, the class action device provides access to legal representation by allowing one or a few detained noncitizens to litigate on behalf of a larger group of detainees challenging their detention (the "procedural pathway").

---

11. *See id*. at 70.

12. *See id*. at 70–71 ("[R]epresented detainees were almost seven times more likely than their pro se counterparts to be released from the detention center (48% versus 7%).").

13. *See id*. at 8, 36.

14. Adrienne Pon, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 752 (2019) ("The government currently exercises almost unfettered discretion in choosing where to detain immigrants, often inexplicably transferring them far from their communities and counsel.").

15. Julia Harumi Mass & Carl Takei, *Forget About Calling A Lawyer Or Anyone at All if You're in an Immigration Detention Facility*, ACLU (Jun. 15, 2016, 12:30 PM), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/forget-about-calling-lawyer-or-anyone-all-if [https://perma.cc/424V-ZQTV].

16. *See* Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar* NPR (Aug. 15, 2019, 7:13 AM), NPR, https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks [https://perma.cc/M9BC-6Z68].

17. *See* Eunice Cho, Tara Cullen & Clara Long, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU RESEARCH REPORT (April 2020), at 19, 60–61, https://www.aclu.org/sites/default/files/field_document/justicefree_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf [https://perma.cc/7UL6-8YXQ].

18. *See, e.g.*, Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013) (advocating for a right to appointed counsel specifically for lawful permanent residents).

19. *See, e.g.*, Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001 (2015); Andrew L. Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257 (2019).

20. U.S. CONST. amend. V.

While both pathways are procedural, given that the first is based on a procedural due process argument, it is named the "constitutional pathway" to distinguish it from the class action analysis that is grounded in Rule 23 of the Federal Rules of Civil Procedure rather than the Constitution.

The absence of a meaningful opportunity to challenge detention reaches the heart of the liberty interest protected by the Fifth Amendment.[21] Although courts have yet to recognize a due process right to appointed counsel for noncitizens seeking to challenge their detention, a direct application of the Fifth Amendment due process test established in *Mathews v. Eldridge*[22] supports recognizing such a right. The Supreme Court's application of *Mathews* on the right to counsel in civil contempt and parental rights termination cases, and specifically its analysis in *Turner v. Rogers*,[23] establish a framework for recognizing a right to appointed counsel for detained noncitizens seeking freedom. Although existing scholarship has applied the *Mathews* test to argue for a due process right to appointed counsel for immigrants, it has done so in the context of removal proceedings,[24] missing an opportunity in the Supreme Court's right-to-counsel jurisprudence to support a right to appointed counsel when physical liberty is at stake. The constitutional pathway in this Article takes advantage of this opening by arguing that the Court's longstanding focus on the special harm associated with the deprivation of physical liberty strongly supports the argument for appointed counsel to challenge immigration detention.

A right to appointed counsel, in the purest sense, imagines a utopia where every detained noncitizen seeking to challenge her detention can have her own lawyer. However, a broader conception of "legal representation" exists in the form of representative litigation. In recent years, private lawyers and public interest organizations such as the American Civil Liberties Union (ACLU) have filed increasing numbers of class actions arguing for a right to individualized bond hearings before an immigration judge.[25] The class action device is also useful for challenging unfair procedures during step two, the actual hearing, in favor of detainees.[26] The class action device is often underappreciated as a mechanism for providing effective legal representation: because courts are required to appoint class counsel after approving their competency, a small group of skilled, well-resourced lawyers are able to litigate on behalf of a large group of detained noncitizens seeking freedom,

---

21. *Id.* ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

22. Mathews v. Eldridge, 424 U.S. 319 (1976).

23. Turner v. Rogers, 564 U.S. 431, 444–449 (2011).

24. *See* Hanna, *supra* note 19, at 290 (explaining why the presumption that civil litigants not facing loss of physical liberty do not require appointed counsel should not apply to immigrant children in removal proceedings). In contrast to Hanna's argument, this Article takes advantage of the Court's focus on the special harm due to loss of physical liberty in arguing for a due process right to appointed counsel.

25. *See, e.g.*, Guzman Chavez v. Hott, 940 F.3d 867 (4th Cir. 2019).

26. *See* Brito v. Barr, 415 F. Supp. 3d 258, 271 (D. Mass. 2019) (holding that the burden of proof in bond hearings must be on the government rather than the noncitizen-defendant).

allowing those without individual counsel to obtain legal representation.[27] Two recent developments—specifically Justice Alito's dicta in *Jennings v. Rodriguez*[28] warning that the class device might not be appropriate to challenge prolonged detention as well as debates in lower courts over whether classwide injunctions can be issued to order bond hearings under the Immigration and Nationality Act—have raised alarms about the continuing viability and efficacy of the class device. An analysis of class actions before and after *Jennings* and the split among courts of appeals on their authority to issue classwide injunctions will demonstrate the propriety and, in the absence of a right to appointed counsel, practical necessity of the class device.

The Article will proceed in four parts. Part I will give an overview of the legal landscape of immigration detention and options for release, with emphasis on the role of counsel. Part II will set forth a Fifth Amendment due process argument for a right to appointed counsel for the purpose of challenging immigration detention (the "constitutional pathway"). Part III will examine recent class actions brought on behalf of detained noncitizens seeking a right to bond hearings and to fairer procedures at custody hearings, and will confront emerging threats to the class device (the "procedural pathway"). Part IV will discuss the relationship between racial inequality and legal representation and will raise other considerations and roads to legal representation for future study.

I. THE LAW OF IMMIGRATION DETENTION & OPTIONS FOR RELEASE

> *They tell you that if you want to leave, sign - get deported. After 15 days of being in there, I just wanted to sign and get out.*
>
> —— ALEXANDER LORA, FORMERLY DETAINED NONCITIZEN[29]

Mr. Lora moved to Brooklyn, New York from the Dominican Republic when he was seven years old and lived there until one early morning when ICE arrested and detained him.[30] Like so many detained noncitizens, he considered voluntary deportation just to get out of immigration detention. The only things that stopped him were his need to be there for his young son, who was placed into foster care upon Mr. Lora's arrest, and being able to secure free legal representation through the New York Immigrant Family Unity Project (NYIFUP).[31] To understand how so many detained noncitizens reach

---

27. *See* FED. R. CIV. P. 23(g)(1)(A) (providing factors courts must consider in appointing class counsel).

28. Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018).

29. *See* PROLONGED DETENTION STORIES, *No Access To Help: Alex Lora's Story* (last visited Jul. 7, 2020) https://www.prolongeddetentionstories.org/the-stories#no-end-in-sight [https://perma.cc/U6HH-BUHA].

30. *See id.*

31. *See* THE BRONX DEFS., *New York Immigrant Family Unity Project* (last visited Apr. 17, 2020) https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/ [https://perma.cc/D8S9-RMDC] (explaining that the NYIFUP is funded by New York City and New York State and is the

a similar point of hopelessness as Mr. Lora did, and to frame the arguments for increasing access to legal representation, this Part will provide an overview of the legal landscape of immigration detention and options for release, with emphasis on the ways in which legal representation makes an important difference for detained noncitizens.

A. *The Law of Immigration Detention*

A visibly anguished man appeared on a screen in a courtroom in the Boston Immigration Court.[32] Speaking from his detention facility hundreds of miles away via videoconference, he was called for his master calendar hearing, a preliminary proceeding in the removal process.[33] As is common during master calendar hearings, the judge conducted a bond hearing to determine if he should be released from detention. After several minutes of confusion and frustration, he relayed through the court's Spanish interpreter: *I need a lawyer, but cannot afford one*. Without a skilled representative learned in the labyrinth of immigration detention law advocating for his release, his chance for freedom was even more remote than his distance from the courtroom.

The federal government has long held broad power over immigration matters, including the authority to arrest and detain noncitizens pending a removal decision and actual removal.[34] Although detained noncitizens are often caged in conditions identical to those of individuals convicted of crimes,[35] immigration detention does not formally serve a punitive purpose. Instead, it is considered civil in nature and serves purposes similar to pre-trial detention in criminal cases: to ensure noncitizens will attend their immigration court proceedings ("flight risk") and to lessen any threat to the community ("security threat").[36]

The Immigration and Nationality Act (INA),[37] enacted in 1952, is the primary federal statute that governs immigration detention and the options for release. There are two overarching categories of immigration detention:

---

first program in the U.S. to provide free legal representation to low-income immigrants facing deportation).

32. This anecdote is based on a personal experience observing bond hearings at the Immigration Court in Boston on March 14, 2019.

33. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 66 (2020), https://www.justice.gov/file/1250706/download [https://perma.cc/QM9Q-SKHL].

34. *See* Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

35. *See* Charles v. Orange Cnty., 925 F.3d 73, 78 n.3 (2d Cir. 2019) ("Civil immigration detainees are held in custody to assure their presence throughout the administrative removal proceedings. Such detainees are not charged with crimes. Nevertheless, civil immigration detainees are housed in conditions similar to those experienced by detainees awaiting trial on criminal charges."); *see also* Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1383–84 (2014).

36. *See* Hillel R. Smith, CONG. RESEARCH SERV., *Immigration Detention: A Legal Overview* 6 (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/YY62-5D8U].

37. 8 U.S.C. §§ 1101–1537.

1) mandatory detention, where the INA requires the government to detain noncitizens; and 2) discretionary detention, where the INA authorizes, but does not require, the government to detain noncitizens.[38] Whether a noncitizen will be placed in immigration detention depends on her individual situation and legal status.

There are four main parts of the INA that govern whether a noncitizen will be detained: 1) discretionary detention of noncitizens placed in formal removal proceedings under INA § 236(a);[39] 2) mandatory detention of noncitizens who have committed certain crimes or terrorist-related acts under INA § 236(c);[40] 3) mandatory detention of noncitizens who are applying for initial admission and are placed in expedited or formal removal proceedings under INA § 235(b);[41] and 4) detention of noncitizens who have a final order of removal and are awaiting deportation under INA § 241(a).[42] Each type of detention offers options for release, but the procedures and regulations governing the options are rarely transparent to noncitizens or decipherable by those who lack legal training.

The first type, discretionary detention under INA § 236(a), applies to noncitizens placed in removal proceedings, the legal proceedings that occur in relation to the person's potential deportation.[43] Removal proceedings initiate when DHS issues a "Notice to Appear" (NTA) to a noncitizen. An NTA is a charging document that notifies the noncitizen that she is at risk of deportation and is supposed to give her information about, among other matters, her upcoming immigration court hearing.[44] Immigration officers have discretion to arrest and detain noncitizens issued an NTA.[45] After ICE arrests a noncitizen, an immigration officer may issue a custody determination at any time during the removal proceedings.[46] If ICE agents arrest a noncitizen without a warrant,[47] DHS regulations require that the immigration officer make a

38. *See* Smith, *supra* note 36, at 1.
39. 8 U.S.C. § 1226(a).
40. *Id.* § 1226(c).
41. *Id.* § 1225.
42. *Id.* § 1231.
43. *See Id.* § 1226 ("[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."); *see also* Smith, *supra* note 36, at 1.
44. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 33, at 57; *cf.* Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018) (holding that NTAs that do not specify the time and place of the noncitizen's hearing are not proper notices under the statute, noting that DHS "at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information.").
45. *See Jennings*, 138 S. Ct. at 837 (2018) (noting that § 236(a) permits, but does not require, DHS to arrest and detain noncitizens pending removal proceedings).
46. *See* 8 C.F.R. § 236.1(g)(1) (2020) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I-286, Notice of Custody Determination.").
47. *See id.* § 236.1(b)(1) ("[T]he respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest."); 8 U.S.C. § 1357(a)(2) (noting that in some cases, the immigration officer may arrest without a warrant if he has reason to believe the noncitizen is present unlawfully and is likely to escape before a warrant can be obtained); *see also* IMMIGRANT LEGAL RESOURCE CENTER, ICE WARRANT (2017), https://www.ilrc.org/sites/default/files/resources/i-200_and_i-205_sample_annotated.pdf [https://perma.cc/A4SG-TTG6].

custody determination within 48 hours of the arrest unless there is an "emergency or other extraordinary circumstance."[48]

On the custody determination form, the immigration officer will check one of three boxes: 1) the noncitizen is to be kept in detention with no option for release; 2) the noncitizen may be released under bond of at least $1,500; or 3) the noncitizen may be released on conditional parole.[49] If a detained noncitizen is released, ICE might elect to enroll her in an "Alternatives to Detention" (ATD) program so that ICE can monitor to ensure her presence at removal proceedings.[50] The detainee has a right to request review of ICE's initial custody determination before an immigration judge.[51] Although the detainee can request a bond hearing, the statute does not require that a bond hearing be provided.[52] The immigration judge has the authority to determine whether the person should be released from custody, and to increase or decrease the bond amount (not below $1,500) set by ICE.[53] If a detainee disagrees with the immigration judge's decision, she can appeal to the Board of Immigration Appeals (BIA), the highest administrative body with adjudicatory power in the immigration system, within thirty days of the judge's decision.[54] The government also has a right to appeal the immigration judge's decision to the BIA.[55] Federal and state courts cannot review bond determinations,[56] but the Supreme Court has held that federal courts retain authority to review habeas petitions filed by detained noncitizens.[57] Thus, for a noncitizen discretionarily detained under INA section 236(a), her options for release are conditional parole, enrollment in an ATD, bond, or habeas. Of these options, a detained noncitizen only has the power to affirmatively seek or contest bond in immigration court, or habeas relief in federal court.

The second type, mandatory detention under INA section 236(c), requires DHS to detain noncitizens who have committed certain criminal or terrorist-related offenses.[58] The list of eligible acts include crimes of "moral

48. *See* 8 C.F.R. § 287.3(d) (2020).
49. *See* 8 U.S.C. § 1226(a); *id.* § 236.1(g)(1) (2020).
50. *See* Smith, *supra* note 36, at 10.
51. *See* 8 C.F.R. § 236.1(d)(1) ("After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order [of voluntary departure or cancellation of removal] becomes final, request amelioration of the conditions under which he or she may be released.").
52. *See* Smith, *supra* note 36, at 11.
53. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 33, at 132–34.
54. *See* 8 C.F.R. §§ 1003.1(d)(1), 1236.1(d)(3)(i) (2020); *see also* Smith, *supra* note 36, at 11 ("The filing of an appeal generally will not stay the [immigration judge]'s decision or otherwise affect the ongoing removal proceedings.").
55. 8 C.F.R. § 1236.1(d)(3)(i) (2020).
56. 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by [DHS] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").
57. *See* INS v. St. Cyr, 533 U.S. 289, 311 (2001) ("In the immigration context . . . 'judicial review' and 'habeas corpus' have historically distinct meanings.").
58. 8 U.S.C. § 1226 ("[DHS] *shall* take into custody any alien who. . . .") (emphasis added). Originally, the authority to enforce immigration law vested almost exclusively in the Attorney General. However, some of this authority was transferred to DHS following its establishment in 2003. *See id.* § 1103.

turpitude," drug crimes, aggravated felonies, and crimes related to engagement in a terrorist activity or provision of material support to a terrorist organization.[59] Often, such individuals are transferred to immigration detention when they are released from criminal custody.[60] Unlike the release options available to those discretionarily detained under section 236(a), those detained under section 236(c) cannot be released on conditional parole or bond.[61] Instead, the detainee's only option is to seek review by an immigration judge of whether she actually falls within one of the categories in section 236(c) that make a noncitizen subject to mandatory detention.[62] This type of proceeding is known as a *Joseph* hearing.[63] If the immigration judge determines that the person is not properly included within section 236(c), the judge may consider whether she is eligible for bond.[64] The noncitizen or the government can appeal the immigration judge's decision to the BIA and seek review in federal court.[65] Additionally, detained noncitizens retain the right to file habeas petitions in federal court.[66]

The third type, mandatory detention pursuant to INA section 235(b), requires DHS to detain noncitizens who are applicants for initial admission and placed in expedited or formal removal proceedings.[67] Applicants for admission include those seeking admission who arrive at a port of entry, a place to lawfully enter the country (such as an airport), and those who are already present in the United States and have not yet been admitted.[68] This group includes noncitizens who asylum officers have interviewed and found to have a credible fear of persecution, making them eligible to apply for

---

59. *Id.* §§ 1182(a)(2), (a)(3)(B).

60. *See id.* § 1226(c)(1); *see also* Smith, *supra* note 36, at 18.

61. *See id.* § 1226(c)(2) (stating that an alien detained pursuant to § 1226(c)(1) may be released "only if . . . that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies [DHS] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

62. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (2020) ("[N]othing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.").

63. *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

64. *See id.* at 806 ("A determination in favor of an alien on this issue does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of section 236(a) of the Act.").

65. *See id.* at 804 ("Our role in this appeal is, instead, to determine whether the Immigration Judge correctly found that the respondent was not properly included in the mandatory detention scheme."); *see also* Demore v. Kim, 538 U.S. 510, 514 n.3 (2003) ("Because respondent conceded that he was deportable because of a conviction that triggers § 1226(c) and thus sought no Joseph hearing, we have no occasion to review the adequacy of Joseph hearings generally in screening out those who are improperly detained pursuant to § 1226(c). Such individualized review is available, however. . . .").

66. *See Demore*, 538 U.S. at 514 ("Respondent instead filed a habeas corpus action. . . .").

67. *See* 8 U.S.C. § 1225(b)(1)(B) (concerning detention of people arriving or who have recently arrived in the United States and are subject to expedited removal), 1225(b)(2)(A) (regarding detention of "other aliens" seeking admission deemed inadmissible).

68. *See id.* § 1225(a)(1).

asylum.[69] Like under § 236(c), the options for release available to those detained under section 235(b) are limited. In *In re M-S-*,[70] Attorney General William Barr overruled a prior BIA decision,[71] holding that noncitizens who establish a credible fear of persecution and are detained under section 235(b) are ineligible for bond.[72] Instead, the only option for release available for those detained under section 235(b) is parole: DHS has discretion to temporarily parole noncitizens on a case-by-case basis for "urgent humanitarian reasons"[73] or if "required to meet a medical emergency or [it] is necessary for a legitimate law enforcement objective,"[74] but DHS decisions regarding the applicability of those circumstances are not subject to further review.[75] That said, detainees can still file a habeas petition in federal court challenging the legality of their detention.[76]

The fourth type, detention under INA section 241(a), governs the detention of noncitizens who have been issued a final order of removal and are awaiting deportation.[77] During the "removal period," a 90-day period during which people with a final order of removal should be removed,[78] DHS is generally required to detain noncitizens with a final order.[79] DHS is required to keep those who have committed certain criminal or terrorist-related offenses in detention,[80] but has discretion to release noncitizens with no criminal history as well as those who have committed criminal offenses but have been granted certain protections from removal.[81] After the 90-day period, noncitizens who DHS has not yet removed typically must be released under an order of supervision, but DHS has discretion to detain certain groups, such as inadmissible arriving immigrants.[82] If DHS orders continued detention, it must conduct

---

69. *See id.* § 1225(b)(1)(B)(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum."), 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

70. *In re* M-S-, 27 I. & N. Dec. 509, 519 (A.G. 2019).

71. *In re* X-K-, 23 I. & N. Dec. 731 (B.I.A. 2005).

72. *See In re M-S-*, 27 I. & N. Dec. at 510. In a recent challenge to the *In re M-S-* decision, the Ninth Circuit held that plaintiffs, a nationwide class of noncitizens detained under § 235(b) were likely to succeed on their claim for a due process right to bond hearings. *See* Padilla v. Immigration & Customs Enf't, 953 F.3d 1134, 1143 (9th Cir. 2020), *cert. granted, judgment vacated sub nom.* Immigration & Customs v. Padilla, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021).

73. *See* 8 U.S.C. § 1182(d)(5)(A).

74. *See* 8 C.F.R. §§ 235.3(b)(2)(iii), (4)(ii), (5)(i) (2020).

75. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *see also* Islam v. Quarantillo, 350 F. Supp. 3d 183, 186 (E.D.N.Y. 2018), *aff'd on other grounds*, 803 F. App'x 543 (2d Cir. 2020) ("[E]xclusion of federal court review extends to the discretionary decision to grant or deny humanitarian parole to an alien.").

76. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1968–70 (2020) (explaining that the main problem for the respondent, who was at least initially detained for expedited removal under § 235(b), was that "his [habeas] petition made no mention of release from custody," which is the "historic role of habeas").

77. *See* 8 U.S.C. § 1231.

78. *See id.* § 1231(a).

79. *See id.*§ 1231(a)(2) ("During the removal period, [DHS] shall detain the alien.").

80. *See id.*

81. *See* Smith, *supra* note 36, at 30.

82. *See* 8 U.S.C. § 1231(a)(6).

periodic custody reviews to ensure detention is still warranted.[83] In *Zadvydas v. Davis*,[84] the Supreme Court construed the INA as implicitly requiring a six-month limit on detention after a final order of removal to avoid the "serious constitutional threat" indefinite detention would pose.[85] Release on bond is not an option and there is no appeal of DHS's determination in custody reviews, but detainees can file a habeas petition.[86]

The above overview is an abbreviated explanation of the law of immigration detention.[87] The following section will detail the three release options that detained noncitizens have comparatively more control over: bond hearings, *Joseph* hearings, and habeas.

B. *Options for Release*

When Mr. Lora was arrested, he did not think he could request a bond hearing or file a habeas petition. Instead, the option he was considering was the only one he remembers ICE offering—one that presented a fate even worse than detention: "voluntary departure," an agreement to be deported.[88] For Mr. Lora, this would have meant returning to a country he left with his parents when he was just seven years old—hardly a place he could call home.[89] For countless detained noncitizens, especially those applying for asylum, voluntary departure is a non-option, and can even be deadly.[90] Unlike voluntary departure, the actual options for freedom outlined in Part I (A), bond hearings, *Joseph* hearings, and habeas review, are too often invisible and inaccessible to detainees. To discern why this is the case, it is important to understand how these options for release operate in our current reality.

1. *Bond Hearings*

A noncitizen discretionarily detained under section 236(a)[91] has a right to request a bond hearing before an immigration judge.[92] A detainee can request

---

83. *See* Smith, *supra* note 36, at 33.

84. Zadvydas v. Davis, 533 U.S. 678, 702 (2001).

85. *See id.* at 699 ("[I]nterpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."). The Supreme Court later extended the *Zadvydas* 6-month limitation on detention to inadmissible noncitizens being detained after the 90-day removal period. *See* Clark v. Martinez, 543 U.S. 371, 378 (2005).

86. *Zadvydas*, 533 U.S. at 688 ("We conclude that . . . habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.").

87. For greater detail on the law of immigration detention, *see generally* Smith, *supra* note 36.

88. Brooklyn Defender Services, *Prolonged Detention: A Short Documentary on the Landmark 'Lora' Case*, YOUTUBE (Nov. 26, 2016), https://www.youtube.com/watch?v=N-1jluidWiI&feature=youtu.be [https://perma.cc/Z4SX-FUPN].

89. *See id.*

90. *See* Maria S. v. Garza, No. 1:13-CV-108, 2015 WL 4394745, at *2 (S.D. Tex. July 15, 2015) (describing how plaintiff's daughter was abducted and killed after signing a voluntary departure form that caused her deportation to Mexico); *see also* Nicolas A. Novy, *The Problem of Coerced Consent: When Voluntary Departure Isn't So Voluntary*, 68 U. KAN. L. REV. 315, 328 (2019).

91. 8 U.S.C. § 1226 (a).

92. *See* 8 C.F.R. § 236.1(d)(1) (2020).

a bond hearing by checking the "I do . . . request a redetermination of the custody decision by an immigration judge" box at the bottom of the custody determination form.[93] Even if a detainee does not check that box, she can still request a bond hearing at any point during her detention, including orally to the immigration judge in court, by submitting a written motion to the immigration court, or, sometimes, by telephone.[94] Although detained noncitizens have a right to request a bond hearing, there is no requirement that a bond hearing be provided.[95] In practice, unless the detained noncitizen is in mandatory detention and thus lacks the right to request bond, the request is likely to be granted.[96]

Once a bond hearing before an immigration judge is scheduled, the detained noncitizen must prepare for the hearing. In most cases, to win at a bond hearing, the detainee must prove that she is 1) not a flight risk, and 2) not a danger to the community.[97] To win, the detainee must research and present favorable facts and be able to anticipate and mitigate unfavorable facts the government's lawyer will argue.[98] Prior to the hearing, the detainee may wish to file documents as evidence to prove that she is neither a flight risk nor a danger to the community.[99] For example, to prove she is not a flight risk, she might provide a "sponsor letter," a letter from someone who knows the detainee and is willing to sponsor her by providing a place to live and supporting her so that she will attend her future court proceedings.[100] To determine if the noncitizen is a threat to the community or national security, immigration judges usually consider the person's criminal history, if any, and any evidence of prior illegal conduct or alleged illegal conduct or association, such as with a gang.[101] According to the Immigrant Legal Resource Center's (ILRC) bond practice guide designed to advise lawyers representing detained noncitizens in bond hearings, it is crucial that the lawyer investigate any past arrests and/or criminal convictions, the nature of the crimes involved, and present proof of rehabilitation and other possible mitigating evidence.[102] In

93. *Representing Clients in Bond Hearings an Introductory Guide*, IMMIGRANT LEGAL RES. CTR. (Sept. 2017), at 5, https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf [https://perma.cc/UTA9-N9HY].

94. *See id.*; *see also* 8 C.F.R. § 1003.19(b) (2020) ("Application for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.").

95. *See* 8 C.F.R. § 1003.19(a) (2020) ("Custody and bond determinations made by the service pursuant to 8 CFR part 1236 *may* be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.") (emphasis added).

96. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 33, at 134 ("In general, after receiving a request for a bond hearing, the Immigration Court schedules the hearing for the earliest possible date and notifies the alien and the Department of Homeland Security. In limited circumstances, an Immigration Judge may rule on a bond redetermination request without holding a hearing."); *see also Representing Clients in Bond Hearings an Introductory Guide, supra* note 93, at 5.

97. *See Representing Clients in Bond Hearings an Introductory Guide, supra* note 93, at 7.

98. *See id.* at 8.

99. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 33, at 135.

100. *See Representing Clients in Bond Hearings an Introductory Guide, supra* note 93, at 10–11.

101. *See id.* at 7–8.

102. *See id.* at 8.

addition to these substantive requirements, there are procedural requirements for submitting the evidence and presenting the case in court that vary by region.[103]

A lawyer's assistance is often critical to succeed at step one, requesting a bond hearing, and even more so at step two, prevailing at the bond hearing.[104] For a detained noncitizen in this vulnerable state who is unrepresented, not fluent in English, and unfamiliar with the U.S. legal system, it is unsurprising that, often, noncitizens do not spontaneously realize to request a bond hearing and accordingly leave the "I do" box unchecked.[105] At step one, a lawyer is especially useful in helping determine if a detainee is eligible for a bond hearing.[106] For example, if a person is in mandatory detention where bond is not an option, a lawyer can analyze the complexities of detention law and may find a way to contest the person's mandatory detention.[107] At step two, lawyers are best suited to utilize their training and resources to investigate facts and advocate in adversarial courtroom proceedings.[108]

2. *Joseph Hearings*

For noncitizens in mandatory detention under section 236(c), which requires detention of those who have committed certain criminal or terrorist-related offenses, the only option for release is through a *Joseph* hearing where the determination that a noncitizen falls within the section 236(c) categories can be contested.[109] In the 1999 decision *In re Joseph*,[110] the BIA ruled that an immigration judge has the authority to decide whether a noncitizen is properly subject to mandatory detention.[111] A *Joseph* hearing is notoriously difficult for a noncitizen to win.[112] The challenge for mandatorily detained noncitizens seeking release is three-fold: step one, they must know to ask for

---

103. *See id.* at 10 ("[A]sk local practitioners about practices and procedures in the particular immigration court where your client's bond hearing will take place."); *see also infra* Part III, p. 30-31 for a discussion on recent litigation contesting the procedures applied at custody hearings.

104. *See* Eagly & Shafer, *supra* note 10, at 70 ("[R]epresented detainees were almost *seven times* more likely than their pro se counterparts to be released from the detention center. . . .") (emphasis added).

105. *See id.* ("[O]f individuals who were detained at some point during their case, 44% of represented detainees were granted a custody hearing before the judge, compared to only 18% of pro se detainees.").

106. *See id.* at 71.

107. *See Representing Clients in Bond Hearings an Introductory Guide, supra* note 93, at 13 ("[N]ever take for granted that ICE has correctly determined that your client is subject to mandatory detention. It is a very complex legal determination, and ICE agents are not lawyers."); s*ee also* Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (citation omitted).

108. *See* Eagly & Shafer, *supra* note 10, at 71 ("In addition, once a custody hearing was held, represented litigants were more likely to be released from custody. Of those respondents with custody hearings . . . 44% of represented respondents were released, compared to only 11% of pro se respondents.").

109. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (2020).

110. *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

111. *Id.* at 802.

112. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

a *Joseph* hearing; step two, if granted a *Joseph* hearing, they must win at the hearing in order to get a custody hearing such as a bond hearing; and finally, at step three, they must prevail at the custody hearing.[113] At step one, the Notice of Custody form can mislead the detainee regarding her right to a *Joseph* hearing: since she is in mandatory detention, the immigration officer will check the box that says she cannot request an immigration judge to review her eligibility for release from detention.[114] Without access to further information, it is highly unlikely a detainee will know to pursue a *Joseph* hearing, often resulting in unlawful, prolonged detention.[115]

If a detainee is able to secure a *Joseph* hearing, she must prove at the hearing that the government is "substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention."[116] To do so, the detainee typically must prove that her charged crime is not one of the crimes that render an immigrant inadmissible under 8 U.S.C. § 1182(a)(2).[117] For example, she may show that her charge is not "a crime involving moral turpitude" or that the charged crime meets an exception, such as the maximum penalty for the crime being less than one year.[118] As Mark Noferi explained in his article arguing for a constitutional right to appointed counsel for lawful permanent residents in mandatory pre-hearing detention,[119] "[e]ach of the three *Joseph* issues—the immigration classification of a conviction, the immigration impact of a non-conviction disposition, and citizenship—involves complex statutory analysis."[120] This is a very heavy burden on the detainee, and as a result, some judges have argued that the *Joseph* standard is unconstitutional because "[t]he standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable."[121] If a detainee wins at the *Joseph* hearing, she may receive a bond hearing and be released if she wins at the bond hearing.[122] If she loses, she may appeal to the BIA and then to a federal court of appeals, but will remain in detention while the appeals pend.[123]

---

113. *See id.*

114. *See id.* at 85 ("[The Notice of Custody] affirmatively misadvises mandatory detainees, despite the available *Joseph* hearing, that they 'may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.' No other DHS notice of the right to a *Joseph* hearing is provided, nor required.") (footnotes omitted); *see also* Gayle v. Johnson, 81 F. Supp. 3d 371, 385 (D.N.J. 2015), *vacated and remanded sub nom.* Gayle v. Warden Monmouth Cnty. Corr. Inst., 838 F.3d 297 (3d Cir. 2016).

115. *See* Noferi, *supra* note 112, at 63, 85.

116. *In re Joseph*, 22 I. & N. Dec. at 800.

117. *See Demore*, 538 U.S. at 514 n.3 (2003) ("At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention.").

118. *See* 8 U.S.C. § 1182(a)(2)(i), (ii)

119. *See* Noferi, *supra* note 112, at 70.

120. *Id.* at 110.

121. Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J. concurring).

122. *See* Noferi, *supra* note 112, at 88.

123. *See id.*

Given the difficulty of obtaining and winning a *Joseph* hearing, there is an especially strong need for legal representation. While a detainee may request a *Joseph* hearing by checking on the form that she would like to "request a redetermination hearing," as mentioned previously, she is unlikely to do this because ICE will indicate she is in mandatory detention. As a result, the ILRC's bond practice guide advises lawyers that requesting a *Joseph* hearing "will require submitting a motion to the court and briefing your argument."[124] The struggles of succeeding at a *Joseph* hearing are compounded by the procedural burdens on the detainee to file Freedom of Information Act (FOIA) requests to obtain information from the government, which is especially important given the general reluctance to allow discovery in immigration proceedings and the lack of an equivalent to the *Brady* rule,[125] requiring the government to produce such information in criminal cases.[126] Thus, for noncitizens dependent on winning a *Joseph* hearing for release, having a lawyer is invaluable.

3. *Habeas Review*

Regardless of the type of detention, detained noncitizens can file a writ of habeas corpus ("habeas petition") in federal court to challenge their detention.[127] Predating the Constitution, the writ of habeas corpus is a long-standing tool available to detained individuals to challenge their imprisonment, especially executive detention.[128] Although certain provisions of the INA prohibit judicial review,[129] the Supreme Court has held that absent a clear statement showing Congress's intent to preclude habeas review, detained noncitizens can file habeas petitions in federal courts to challenge to their detention.[130] The Supreme Court has explained that because a habeas petition raises statutory or constitutional challenges to detention, the INA's prohibition on judicial review of DHS's discretionary judgment does not extend to habeas review.[131]

---

124. *Representing Clients in Bond Hearings an Introductory Guide, supra* note 93, at 19.

125. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

126. *See Representing Clients in Bond Hearings an Introductory Guide*, *supra* note 93, at 87.

127. *See* INS v. St. Cyr, 533 U.S. 289, 305 (2001) ("The writ of habeas corpus has always been available to review the legality of Executive detention."). Although the Supreme Court has explicitly recognized that habeas review is available for detained noncitizens to challenge their detention under INA § 236(a) (discretionary detention) (*see Jennings*, 138 S. Ct. at 841 (2018)); § 236(c) (mandatory detention) (*see Demore*, 538 U.S. at 511) and § 241 (post-final order of removal detention) (*see Zadvydas*, 533 U.S. at 688 (2001)), it has rejected a challenge that the limits on habeas review in the immigration statute for challenges to expedited removal orders violate the Suspension Clause of the Constitution or the Due Process Clause of the Fifth Amendment (*see Thuraissigiam*, 140 S. Ct. at 1964).

128. *See* Thuraissigiam v. Dept't of Homeland Sec., 917 F.3d at 1105, *rev'd and remanded sub nom.* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) ("Our nation's founders viewed the writ as a 'vital instrument' to secure individual liberty.") (citation omitted).

129. *E.g.,* 8 U.S.C. § 1226(e).

130. *See Demore*, 538 U.S. at 511.

131. *See Jennings*, 138 S. Ct. at 841 (noting that because the respondents raised statutory and constitutional challenges to the government's authority to detain them, "the extent of the Government's detention authority is not a matter of 'discretionary judgment,'" and thus can be reviewed).

A successful habeas petition typically requires a lawyer, and can especially benefit from a lawyer experienced in federal court litigation. This is in part because of the nature of the claims involved. Many habeas petitions require arguments that the government acted outside of its statutory authority in keeping a noncitizen detained or that the noncitizen's detention violated the Constitution. In order to prevail on such arguments, the detained noncitizen must convince the court that her detention is unlawful or unconstitutional, often based on unsettled precedent and unclear higher court guidance. Although some detained noncitizens proceeding pro se have been successful in their habeas petitions,[132] many more have failed.[133] Moreover, the ability of a *pro se* detainee to win on habeas review is often contingent on factors entirely outside the detainee's control, such as the type of legal self-aid resources the detention facility provides and the availability of relevant forms and precedents to the detainees.[134] In addition, because many of the standards regarding the constitutionality of prolonged detention without a bond hearing are varied and unresolved,[135] it is further difficult for detainees to anticipate and raise winning habeas arguments.

C. *Summary of the Role of Counsel*

Although non-lawyer representatives can appear on behalf of individuals in immigration court proceedings, as a class, lawyers are best positioned to help detained noncitizens challenge their detention for three main reasons: 1) the substantive and procedural complexity of the legal arguments; 2) the benefits of enhanced credibility that allow lawyers to better negotiate with ICE outside of court proceedings and fare better with judges; and 3) the administrative feasibility and associated efficiency gained when immigration detention challenges are brought by counsel. While the previous Parts argued the first reason, the other two reasons are equally vital in distinguishing the role of legal counsel from non-lawyer representatives.

On reason two, the benefits of enhanced credibility for lawyers, empirical analyses suggest that in addition to the in-court legal representation they provide, lawyers are also effective in negotiating with immigration officials to secure their client's release.[136] For example, some organizations that offer

---

132. *See* Davydov v. Doll, No. 1:19-CV-2110, 2020 WL 969618, at *5 (M.D. Pa. Feb. 28, 2020).

133. *See, e.g.*, Perez Cobon v. Doll, No. 1:19-CV-1841, 2020 WL 869744, at *3 (M.D. Pa. Feb. 21, 2020) (dismissing detained noncitizen's habeas petition as premature); Hernandez T. v. Warden, Essex Cnty. Jail, No. CV 19-12584 (SRC), 2020 WL 634235, at *3 (D.N.J. Feb. 11, 2020).

134. *See* Maisie A. Baldwin, Note, *Left to Languish: The Importance of Expanding the Due Process Rights of Immigration Detainees*, 102 MINN. L. REV. 1703, 1727 (2018) ("[I]mmigration detainees who wish to use law libraries face various barriers.").

135. *See, e.g.*, *Jennings*, 138 S. Ct. at 851–52 (remanding to the Ninth Circuit to consider in the first instance whether noncitizens detained under INA §§ 235(b), 236(a), and 236(c) are constitutionally required to receive periodic bond hearings).

136. *See* Eagly and Shafer, *supra* note 10, at 72 ("[A]ttorney representation could make a difference in these various contexts, including through informal advocacy to secure release from the detention officer and by assisting family members in gathering and posting the required bond amount.").

resources to assist lawyers in immigration proceedings include sample letters directed to ICE officials explaining why their client is not a flight risk or security threat and should be released on parole.[137] Scholars have argued that lawyers may also succeed due to what one researcher calls "relational expertise,"[138] referring to credibility developed through the repeat-player relationship judges and lawyers build over time and the common legal language they share.[139]

On reason three, administrative feasibility and efficiency gains, lawyers are also better suited for representing detained noncitizens because of regulatory requirements for non-lawyer representatives. Aside from law students and people who have a pre-existing relationship with noncitizens, non-lawyers must be "accredited representatives" in order to represent noncitizens before DHS, in immigration courts, or the BIA.[140] Only recognized organizations, or those applying for recognition, can request for individuals to be accredited, and those seeking accreditation must meet certain criteria for approval of the Director of the Office of Legal Access Programs.[141] The pool for non-lawyer representatives is thus limited. In contrast, an advantage of having lawyers represent detained noncitizens is that they can use their expertise and experience without requiring further accreditation that can be costly and inefficient. For example, lawyers trained as public defenders at organizations like the Bronx Defenders in New York are able to provide skilled representation to detained noncitizens at custody hearings.[142] The Notice of Entry of Appearance as Attorney form (EOIR-28) even encourages lawyers to provide unbundled services by allowing representatives to appear for "[c]ustody and bond proceedings only."[143]

Thus, while there is limited empirical research comparing outcomes of challenging detention between lawyers and non-lawyer representatives, these theories support the special role of a lawyer. Non-lawyer representatives certainly provide valuable representation and services to noncitizens. This

---

137. *See* Van Der Hout, Brigagliano, & Nightingale, *Letter to ICE Advising of Representation of Detained Individual, Requesting Local Detention, and Requesting Release on Own Recognizance or Reasonable Bond*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (May 24, 2018), https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention.

138. *See* Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 LAW & SOC'Y REV. 503, 523–24 (2018).

139. *See id.* at 524–25 (noting that although "existing studies of the role of immigration lawyers have yet to consider the relative importance of relational expertise in immigration proceedings," lawyers' relational expertise "likely generate distinct advantages to the lawyer's clients").

140. *See* 8 C.F.R. § 1292.1 (2020) (noting law students and individuals who have a pre-existing relationship with a noncitizen and appear without remuneration are able to represent noncitizens subject to certain conditions).

141. *See id.* § 1292.12(a) (2020).

142. *See Immigration Defense*, THE BRONX DEFS. (last visited Apr. 17, 2020), https://www.bronxdefenders.org/our-work/immigration-defense [https://perma.cc/Z7EM-52AQ].

143. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FORM EOIR-28 NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE BEFORE THE IMMIGRATION COURT (Dec. 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf [https://perma.cc/F89E-MQSP].

Article does not argue otherwise. Rather, it argues that courts should recognize a constitutional right to appointed counsel, rather than to any kind of representative, because of the unique contributions lawyers can make in securing freedom for detained noncitizens.

II. CONSTITUTIONAL PATHWAY: A DUE PROCESS RIGHT TO APPOINTED COUNSEL

The interest in securing that freedom, the freedom from bodily restraint, lies at the core of the liberty protected by the Due Process Clause.
——UNITED STATES SUPREME COURT, TURNER V. ROGERS[144]

Since the Supreme Court's landmark decision in *Gideon v. Wainwright*[145] requiring states under the Sixth Amendment to provide counsel to all criminal defendants unable to hire their own, lawyers, scholars, and the American Bar Association (ABA)[146] have argued for a civil *Gideon*—"an expanded constitutional right to counsel in civil matters."[147] Much scholarship has advocated for the right to counsel for specific groups of noncitizens (*e.g.* lawful permanent residents;[148] asylum seekers;[149] children[150]), the right in immigration proceedings broadly,[151] and has relied on different legal doctrines to support a right to counsel (*e.g.* the access to courts doctrine[152] and the Sixth Amendment for those in mandatory immigration detention[153]). While this scholarship has been crucial to advancing the discourse on access to legal representation in immigration, the due process theory presented here fills a gap in the academic literature: it proposes a broad, classwide right for all detained noncitizens, but for the narrow, focused purpose of helping detainees gain freedom. In doing so, this theory underscores that immigration detention is a crisis on its own and frames freedom from immigration detention as the natural next step in civil *Gideon*'s evolution.

A direct application of the Fifth Amendment procedural due process test established in *Mathews v. Eldridge*,[154] and most recently applied in the right-

144. *Turner*, 564 U.S. at 445 (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (internal quotation marks omitted)).

145. Gideon v. Wainwright, 372 U.S. 335 (1963).

146. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf [https://perma.cc/QH4D-RMVK].

147. Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998); *see also* Bernice K. Leber, *The Time for Civil Gideon is Now*, 25 TOURO L. REV. 23 (2009).

148. *See* Johnson, *supra* note 18.

149. *See* Ardalan, *supra* note 19.

150. *See* Hanna, *supra* note 19.

151. *See, e.g.*, Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013).

152. *See The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726, 747 (2018).

153. *See "A Prison Is a Prison Is a Prison": Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 543 (2015).

154. *Mathews*, 424 U.S. 319.

to-counsel context in *Turner v. Rogers*,[155] supports recognizing a right to appointed counsel for detained noncitizens seeking release from detention. Courts apply the *Mathews* due process test to determine what safeguards the Due Process Clause of the Fifth Amendment requires to make a civil proceeding, such as a custody hearing for detained noncitizens, "fundamentally fair."[156] The *Mathews* test involves balancing three factors: "(1) the nature of the private interest that will be affected; (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements."[157] Applied here, the test requires balancing detained noncitizens' interest in seeking release from detention, the risk of erroneously keeping noncitizens in detention without a right to appointed counsel, and the government's interest in not recognizing a right to appointed counsel for detained noncitizens.

The Supreme Court's jurisprudence on the right to appointed counsel in civil contempt and parental rights termination cases further supports recognition of a right to appointed counsel for detained noncitizens. In 1981, the Supreme Court upheld the presumption that the deprivation of physical liberty is a necessary condition for finding that an indigent litigant is entitled to appointed counsel.[158] While the Court has since rejected that deprivation of physical liberty alone is sufficient to recognize a categorical right to counsel,[159] its analysis of the *Mathews* due process test in civil contempt and parental rights termination cases establishes a framework that supports recognizing such a categorical right for detained noncitizens. In this framework, three distinctions between the civil contempt, parental rights cases, and immigration detention favor recognizing the right here: 1) the detained noncitizen's adversary is the federal government, represented by a DHS attorney;[160] 2) substitute safeguards are lacking in immigration detention to ensure fundamental fairness; and 3) perhaps counterintuitively, the efficiency gains associated with a right to appointed counsel would serve, rather than oppose, the government's interest in detention to the extent it is legitimate.

This Part will proceed by first applying the *Mathews* due process test to the situation of detained noncitizens seeking release and making comparisons to civil contempt and parental rights termination cases. It will then respond to the counterargument that because courts have not yet recognized a

---

155. *Turner*, 564 U.S. 431.

156. *Id.* at 444.

157. *Id.* at 444–45 (quoting *Mathews*, 424 U.S. at 335) (internal quotation marks omitted).

158. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) ("[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.").

159. *See Turner*, 564 U.S. at 443 ("[T]he Court previously had found a right to counsel '*only*' in cases involving incarceration, not that a right to counsel exists in *all* such cases. . . .").

160. *See id.* at 447 (noting that in that case, where the adversary to the indigent litigant is a parent who was also unrepresented rather than the government, "[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would 'alter significantly the nature of the proceeding'" (quoting Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)).

constitutional right to appointed counsel in criminal bail hearings, it would be premature to extend the right in immigration custody hearings. This counterargument is unconvincing due to the distinctions between immigration detention proceedings and criminal bail hearings. Finally, this Part will address the challenges of recognizing such a broad, classwide right and explain why, despite such challenges, the scope of the right best promotes rule-of-law and efficiency-based values.

A. *Locating a Due Process Right to Challenge Detention*

At the outset, in order to apply the *Mathews* due process test, detained noncitizens must possess an underlying due process right or interest which the test can be used to protect in the first place.[161] The Fifth Amendment's Due Process Clause states that the federal government may not deprive any person of "liberty . . . without due process of law."[162] In *Zadvydas v. Davis*, a case concerning mandatory detention of noncitizens issued final orders of removal under INA section 241(a), the Supreme Court penned "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."[163] The Court's jurisprudence within and outside the immigration context shows that detained noncitizens possess a liberty interest in freedom from imprisonment that the Due Process Clause protects.

First, the Supreme Court has accepted that the Due Process Clause applies to noncitizens, including those present in the United States unlawfully.[164] Historically, the Court has explicitly recognized that lawful permanent residents have protected due process rights.[165] Second, in many contexts, the Court has recognized that individuals have a due process right to challenge unlawful detention. For example, in *United States v. Salerno*,[166] the Court stated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[167] In *Hamdi v. Rumsfeld*,[168] which concerned the federal government's detention of American citizens as

161. *See Mathews*, 424 U.S. at 332 ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

162. U.S. CONST. amend. V.

163. *Zadvydas*, 533 U.S. at 690.

164. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

165. *See* Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 213 (1953) ("To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process."); *see also Demore*, 538 U.S. at 532. (Kennedy, J., concurring) ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

166. United States v. Salerno, 481 U.S. 739 (1987).

167. *Id*. at 755.

168. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

enemy combatants after September 11, the Court concluded "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[169] The right to be heard when deprivation of liberty is at stake is a well-established promise of due process.

The strongest arguments against the position that detained noncitizens have a due process interest in seeking freedom from detention are grounded in the same general proposition that, in the Court's words, "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[170] This principle has troubled some categories of detained noncitizens more than others in establishing their due process interest. In *Demore v. Kim*,[171] the Court held that the no-bail provision of INA section 236(c), which requires detention of noncitizens convicted of certain criminal and terrorism-related offenses, did not violate the noncitizens' due process rights, explaining that detention for a limited period necessary for removal did not pose a due process problem.[172] More recently, the government argued that initial applicants for admission detained under INA section 235(b) lack due process rights regarding their admission and removal[173]—including a right to seek freedom from detention because detention is "incident to removal proceedings."[174] This argument is often based on the Supreme Court's assertion in *Landon v. Plasencia*,[175] that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."[176] Thus, the argument follows that without an underlying due process right in the first place, whatever process the government gives is sufficient[177]—including the failure to provide a right to appointed counsel.

These counterarguments fly in the face of decades of Supreme Court precedent and a fundamental understanding that, as Justice Breyer noted in his dissent in *Jennings*, "the Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention."[178] First, *Demore* is easily distinguishable because the holding that bail hearings are not constitutionally required was based on the short-term nature of the detention.[179] In 2003 when

169. *Id*. at 509.
170. *Demore*, 538 U.S. at 522; *see also* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").
171. *Demore,* 538 U.S. at 510.
172. *See id*. at 526.
173. *See* Brief for the United States at 21, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (2019) (No. 19-161).
174. *See* Respondents-Appellants' Supplemental Brief at 34, Rodriguez v. Marin, 909 F.3d 252 (9th Cir. 2018) (No. 13-56706).
175. Landon v. Plasencia, 459 U.S. 21 (1982).
176. *Id*. at 32.
177. *See* Brief for the United States, *supra* note 173, at 21–22.
178. *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting).
179. *Demore*, 538 U.S. at 526.

Demore was decided, the average detention period for those detained under section 236(c) was ninety days, whereas today the period is twice as long, and for many it is longer than six months.[180] Similarly, the argument that initial applicants under section 235(b) lack a due process right to challenge detention entirely fails to appreciate that applicants detained under section 235(b) are still detained in the United States, and that detention, although pursuant to removal, is distinct for due process purposes. As the Court acknowledged in *Zadvydas*, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens."[181] Most recently, in *Department of Homeland Security v. Thuraissigiam*,[182]—even as the Supreme Court concluded that immigrants "seeking initial entry" have "only those [due process] rights regarding admission that Congress has provided by statute"[183]—the Court's decision did not decide whether due process rights exist for those seeking freedom from detention, a separate subject from admission, and in fact affirmed the historic role of the habeas petition in allowing immigrants to challenge unlawful detention.[184]

Thus, as Justice Breyer articulated and the Court's precedents support, "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries"[185]—and detained noncitizens are no exception to its application.

B. *Applying the Procedural Due Process Test*

The following sub-sections will apply the three factors of the *Mathews* due process test to argue that the factors weigh in favor of recognizing a right to appointed counsel for detained noncitizens seeking freedom. An analysis of each factor will show that: 1) the private interest at stake, detained noncitizens' interest in freedom from detention, is extremely strong; 2) the risk of

---

180. *Jennings,* 138 S. Ct. at 869 (Breyer, J., dissenting).

181. *Zadvydas*, 533 U.S. at 693.

182. *Thuraissigiam*, 140 S. Ct. 1959.

183. *Id.* at 1982–83. Previously, the Supreme Court recognized that immigrants stopped at a port of entry in the United States, such as an airport, are considered to be "on the threshold of initial entry" and thus "stand[] on a different footing" with respect to their due process rights in deportation proceedings. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953). This has since become known as the "entry fiction" doctrine. In *Thuraissigiam*, the Court expanded "entry fiction" to include the respondent, who made it twenty-five yards past a port of entry into the United States before he was stopped. *See Thurassigiam*, 140 S. Ct. at 1982–83. However, the "entry fiction" doctrine and its expansion concern due process rights for admission and removal, not challenging unlawful detention.

184. *See id.* at 1969–70. Some scholars fear that *Thuraissigiam*, although about challenging expedited removal, implicates detention as well. Specifically, because of the majority's point that the due process rights of immigrants who are considered to be "on the threshold of initial entry" are limited to those rights given by statute, there is concern after *Thuraissigiam* that the Court will defer to Congress on detention as it did for habeas corpus. *See* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in DHS v. Thuraissigiam*, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/ (criticizing the majority's "gratuitous due process analysis").

185. *Jennings*, 138 S. Ct. at 863 (Breyer, J., dissenting).

unlawful detention is strong given the lack of safeguards to ensure detainees have a meaningful chance to challenge their detention and empirical research supporting the difference in outcomes for detainees with counsel, as described above in Part I; and 3) because a right to appointed counsel would ultimately make the immigration detention system less expensive, the government's interest should align with the detainees' interest.

1. *Factor One: The Detained Noncitizens' Interest in Freedom*

Noncitizens' interest in freedom from detention is one of the strongest types of private interests under the *Mathews* balancing test. The Supreme Court has repeatedly recognized that freedom from bodily restraint lies at the heart of the Fifth Amendment's promise of due process.[186] In *Turner*, the Court acknowledged that the private interest at stake—"an indigent defendant's loss of personal liberty through imprisonment"—"argues strongly for the right to counsel."[187] In assessing the private interest, there is no meaningful difference between criminal incarceration and civil commitment,[188] nor is there special significance in the fact that noncitizens are being detained pursuant to removal proceedings.[189] The private interest at stake here is obvious and paramount.

Additionally, the private interest is even stronger when detained noncitizens are also separated from their family members who live in the United States.[190] As the Court in *Landon* recognized, the right to be with one's family is "a right that ranks high among the interests of the individual."[191] Although not all detained noncitizens have immediate family members who live in the United States, for those who do, the interest in seeking freedom from detention is even greater.

Thus, the private interest here is fundamental and weighs strongly in favor of recognizing a right to appointed counsel.

---

186. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").

187. *Turner*, 564 U.S. at 445.

188. *See* Addington v. Texas, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

189. *See* Clerveaux v. Searls, 397 F. Supp. 3d 299, 309 (W.D.N.Y. 2019) ("Clerveaux's interest in his freedom pending the conclusion of his removal proceedings deserves great weight and gravity.") (internal quotation marks and citation omitted).

190. *See No Access To Help Alex Lora's Story*, *supra* note 29 (describing how when ICE detained Mr. Lora, his young son was placed into foster care); *Clerveaux*, 397 F. Supp. 3d at 309–10 (citation omitted) (noting that the detained noncitizen's "father, mother, and at least one sibling live in this country" and that if he "chose not to challenge his removal, he would 'lose the right to rejoin h[is] immediate family, a right that ranks high among the interests of the individual'").

191. *Landon*, 459 U.S. at 34.

2. *Factor Two: The Risk of Unlawful Detention and Probable Value of Counsel*

In *Mathews*, the Supreme Court announced that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[192] As discussed in Part I, legal representation plays a crucial role in allowing detained noncitizens to receive a custody hearing before an immigration judge and to win at the custody hearing once granted. This sub-section will focus on comparing the risk of error and probable added value of a right to appointed counsel in the immigration detention context to the Court's analysis of these factors in *Turner*.

In *Turner*, the Court acknowledged that when the deprivation of personal liberty is at stake, accurate decision-making is crucial to prevent wrongful imprisonment.[193] There, the specific determination requiring accuracy asked whether a father, who the state court ordered to pay child support, had the ability to pay in order to comply with the order.[194] If the court determined Turner could pay the child support but failed to do so, he could be imprisoned for twelve months pursuant to a civil contempt proceeding.[195] However, if the court determined he could not pay the child support, he would not face imprisonment.[196] Mr. Turner argued that in order for his civil contempt proceeding to be "fundamentally fair," he had a due process right to appointed counsel.[197] The Court concluded that the risk of erroneous detention, as well as the probable value of the right advised against recognizing a right to appointed counsel for three main reasons, described below.[198] In the immigration detention context, each of these reasons calls for the opposite conclusion.

First, in *Turner*, the Court determined that the critical question in such child support cases is the defendant-parent's ability to pay, which the Court called a fairly "straightforward" inquiry.[199] This is in sharp contrast to the legal complexity of determining a detained noncitizen's eligibility for various options for release and of representing the detainee in an adversarial custody hearing in immigration or federal court.[200] Furthermore, unlike the *Turner* context where ability to pay is an objective determination and dispositive to save the parent from civil contempt, the immigration statute leaves decisions regarding a noncitizens' detention, grant of parole, or bond largely to DHS's judgment—which may, and often does, result in wrongful imprisonment.[201]

---

192. *Mathews*, 424 U.S. at 333 (internal quotation marks and citation omitted).
193. *Turner*, 564 U.S. at 445.
194. *See id.*
195. *See id.* at 435.
196. *Id.*
197. *Id.* at 444.
198. *See id.* at 446.
199. *Id.*
200. *See supra* Part I, pp. 187–198.
201. *See id.*

Second, the Court focused on the fact that Mr. Turner's adversary was the mother seeking child support, also unrepresented.[202] This point was significant in the Court's analysis. The Court explained that should it recognize a right to appointed counsel for Mr. Turner and those situated like him, there would be an "asymmetry of representation" that "could make the proceedings *less* fair overall" and add "a degree of formality or delay that would unduly slow payment" to the family in need of child support.[203] In contrast, in immigration detention proceedings the adversary is the United States government, always represented by a DHS attorney. This difference can be vital in evaluating the probable value of a right to appointed counsel. As the *Turner* Court conceded, its analysis would not apply in civil contempt proceedings where child support payment is owed to the state, as "the government is likely to have counsel or some other competent representative."[204] This consideration thus strongly favors of a right to appointed counsel for detained noncitizens.

Third, the Court held in *Turner* that in civil contempt proceedings for lack of compliance with a child support order, other safeguards could, and should, be implemented to reduce the risk of erroneous imprisonment.[205] The Court even provided specific examples, such as giving the defendant notice that his ability to pay is a critical issue, using a form to elicit financial information, allowing the defendant to respond at the hearing to questions about his financial status, and having the court issue an express finding on the defendant's ability to pay.[206] In immigration detention proceedings, the only way to check DHS's custody decision for a noncitizen is to seek review before an immigration judge or file a habeas petition in federal court.[207] As courts have begun to recognize, this method fails to meaningfully reduce the risk of erroneous deprivation of liberty.[208] Potential safeguards that might assist detained noncitizens in litigating their release would also be insufficient. For example, even if all ICE detention facilities provided adequate law libraries, lists of pro-bono counsel actually available to detainees, and other resources, which they currently do not,[209] these tools would not replace the assistance trained counsel can provide "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the individual] has a defense and to prepare and submit it"[210]—factors

202. *See Turner*, 564 U.S. at 447 (2011).
203. *Id.*
204. *Id.* at 449.
205. *Id.* at 447.
206. *Id.* at 447–48.
207. *See supra* Part I, p. 193–198.
208. *See* Clerveaux v. Searls, 397 F. Supp. 3d 299, 314 (W.D.N.Y. 2019) ("A procedure whereby long-term detainees, many without counsel, are saddled with the responsibility of determining how to apply for parole only slightly reduces the risk of erroneous deprivation of their interest in being free from arbitrary imprisonment.").
209. *See supra* Introduction, p. 185. Such safeguards would also be more difficult to enforce uniformly across all ICE facilities given different local administrators compared to state family courts, and perhaps would be too costly to implement under a *Mathews* part three analysis.
210. *In re* Gault, 387 U.S. 1, 36 (1967).

the Court held supported recognizing a right to appointed counsel in proceedings to determine delinquency that might result in a juvenile's civil commitment.[211]

The risk of erroneous detention and the probable value of a right to appointed counsel thus weigh strongly in favor of recognizing the right in the immigration detention context.

3. *Factor Three: The Government's Interest*

In requiring that the government's interest be weighed as part of the due process test, the Supreme Court in *Mathews* defined this factor the government's interest "in conserving scarce fiscal and administrative resources."[212] Although it is reasonable to initially assume that recognizing a right to appointed counsel for detained noncitizens would be enormously costly and burdensome, empirical analyses and examples of locally-run programs offering indigent detained noncitizens free legal representation show that a right to appointed counsel, while not inexpensive, would actually *save* costs in implementing the immigration detention regime overall.

The government's interest in not recognizing a right to appointed counsel for detained noncitizens is two-fold.[213] The government in the immigration detention context has an interest in both: 1) avoiding "the expense of appointed counsel," and 2) "the cost of the lengthened proceedings [counsel's] presence may cause."[214] Both concerns, although relevant, are insufficient to outweigh detained noncitizens' private interest in freedom and the probable value of counsel to prevent unlawful imprisonment.

First, regarding the expense of appointed counsel, empirical research suggests that the most costly cases in the immigration system are detainee cases due to the high costs of detention.[215] In ICE's budget report for fiscal year 2020, of the various costs ICE enumerated for enforcement of immigration laws, the largest figure was $2.7 billion to maintain a total of 54,000 detention beds, significantly more than the other listed costs.[216] While specific monetary savings are difficult to estimate, if the data discussed in Part I showing that detainees with counsel are four times more likely to be released than those who are unrepresented provides any indication,[217] the government's most substantial expenditures for immigration enforcement may be significantly lessened by recognizing the right to appointed counsel for detained noncitizens.

---

211. *Id.* at 54–55.
212. *Mathews*, 424 U.S. at 348.
213. *See* Lassiter v. Dep't of Soc. Servs. 452 U.S. 18, 28 (1981) (describing the state's interest in not providing a right to appointed counsel in parental rights termination proceedings).
214. *Id.*
215. *See* Eagly & Shafer, *supra* note 10, at 69 ("The high cost of detention makes these cases the most costly for the federal government to handle.").
216. *See* U.S. DEP'T OF HOMELAND SEC., FY 2020 BUDGET-IN-BRIEF, *supra* note 5.
217. *See* Eagly & Shafer, *supra* note 10.

Second, the efficiency and accuracy gains that would result if detainee were given a right to appointed counsel undermine the government's concern of lengthened immigration detention proceedings. In an earlier study, economist John Montgomery concluded that providing counsel for detained noncitizens would likely "pay for itself," in part because detained noncitizens who have lawyers "would be more likely to secure release at the outset of removal proceedings through a successful bond hearing," saving the government the costs of extra time in detention.[218] Another useful data point is that, according to Professor Eagly and Steven Shaffer's study, in cases where immigration judges granted continuances for detained noncitizens to find counsel, "an average of 33 days was spent seeking counsel"[219]—leading to the conclusion that "appointed counsel would reap cost savings associated with not having to pay to detain immigrants while they search, often unsuccessfully, for counsel."[220]

A right to appointed counsel would also align with the government's interest in detaining noncitizens who are a flight risk or security threat. In *Lassiter*, the Court recognized that "[s]ince the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."[221] Similarly here, the government has an interest in ensuring immigration laws are followed, and as a result shares detained noncitizens' interest in release from unnecessary detention. In other words, the government lacks any legitimate interest in being over-inclusive in its detention practices, as it arguably has been in recent years, and appointed counsel can help prevent such over-inclusion. For example, on preventing flight risk, research shows that detained noncitizens who have lawyers are actually far more likely to attend their court hearings.[222] Legal representation also promotes meaningful adjudication at the detained noncitizen's removal hearing, furthering the government's interest in not deporting individuals with a legal right to remain in the United States. Evaluation of the NYIFUP, mentioned earlier as the first program to guarantee legal representation for

---

218. Dr. John D. Montgomery, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS, NERA ECON. CONSULTING (May 28, 2014), https://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf [https://perma.cc/AWY8-B3Z4]; *see also* Eagly & Shafer, *supra* note 10, at 69 ("To the extent that attorney involvement can facilitate the release of clients that should not be subject to detention, having counsel is associated with efficiency gains in removal adjudication.").

219. Eagly & Shafer, *supra* note 10, at 60.

220. *Id.* at 62; *see also* Campbell v. Moniz, No. CV 20-10697-PBS, 2020 WL 1953611, at *2 (D. Mass. Apr. 23, 2020) ("Petitioner has been held in immigration detention since February 28 or March 1, 2019. Petitioner's initial hearing was scheduled for March 25, 2019. The immigration judge (IJ) reset the case until April 1, 2019, to allow Petitioner to obtain counsel. The case was then reset for April 15, 2020 and again for April 22, 2020, both times to allow Petitioner more time to seek counsel.").

221. *Lassiter*, 452 U.S. at 27.

222. *See* Eagly & Shafer, *supra* note 10, at 74–75 ("90% of pro se respondents with removal orders were removed in absentia, versus only 29% of represented respondents with removal orders . . . One reason why represented immigrants may be more likely to attend all of their hearings is because of the role counsel plays in guiding their clients and advising them of their hearings.").

detained noncitizens,[223] supports this; since the launch of the program, there was a 1,100% increase in the successful outcome rate, from 4% to 48%, for detainee cases.[224] Thus, a right to appointed counsel would also benefit the government's interest in making sure it is only detaining noncitizens who must be detained, and only for the duration necessary.

Ultimately, the *Mathews* due process test requiring courts to balance all three factors.[225] As a result, and as the Court has acknowledged previously, "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here."[226] Thus, even accepting that a right to appointed counsel would be costly, balancing all of the *Mathews* factors together—the detained noncitizen's interest in freedom, the risk of error, and probable added value of counsel—outweigh the projected burdens on the government.

C. *The Lack of a Constitutional Right to Appointed Counsel in Pre-trial Criminal Detention*

The strongest counterargument to recognizing a constitutional right to appointed counsel for detained noncitizens seeking freedom is that courts have yet to recognize such a right for people who are arrested and imprisoned in criminal pre-trial detention. As an initial matter, the Supreme Court has made clear that "the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened."[227] As a result, it is perhaps unsurprising the Court has not yet recognized a constitutional right, under either the Fifth Amendment Due Process Clause or the Sixth Amendment, to appointed counsel in criminal bail hearings.[228] Similarly, in *Gagnon v. Scarpelli*,[229] the Court held that there was no categorical due process right to appointed counsel for defendants in a probation revocation hearing.[230] Without diminishing the need for

223. *See New York Immigrant Family Unity Project*, *supra* note 31.

224. *See* Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc & Noelle Smart, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA INSTITUTE OF JUSTICE (Nov. 2017), at 6, https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf [https://perma.cc/775M-J9BN] (defining "successful outcome" as "an immigration court outcome of legal relief, termination, or administrative closure," not including removal orders or voluntary departure); *Id.* at 24.

225. *See* Gonzales Garcia v. Barr, No. 6:19-CV-06327 EAW, 2020 WL 525377, at *15 (W.D.N.Y. Feb. 3, 2020) (internal quotation marks and citations omitted) (recognizing that courts apply the *Mathews* test in cases where detainees argue for a bond hearing have also found that "[t]aking all of the above into consideration and weighing the *Mathews* factors accordingly, the Court finds the minimal burden that a bond hearing would place on the Government is far outweighed by [Petitioner]'s interest in ensur[ing] that his continued detention is justified.").

226. *Lassiter*, 452 U.S. at 28.

227. *Turner*, 564 U.S. at 446.

228. *See* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 23–24 (2016).

229. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

230. *Id.* at 790.

recognizing a constitutional right to appointed counsel at bail hearings or the advocacy of many scholars on that issue,[231] key distinctions between criminal pre-trial detention proceedings, including bail hearings, and immigration detention proceedings demonstrate why the absence of the right to counsel in criminal bail hearings does not support the same absence for detained noncitizens.

One distinction between criminal bail hearings and immigration custody hearings is that criminal defendants have a right to appointed counsel protected by the Sixth Amendment that will attach if the prosecution proceeds.[232] In *Rothgery v. Gillespie*,[233] the Supreme Court held that a criminal defendant's "initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[234] While the Court dodged the question whether an initial bail hearing is a "critical stage" of the criminal trial such that the Sixth Amendment right to counsel kicks in (because bail was not at issue in *Rothgery*), the holding is significant for affirming that the right to appointed counsel for criminal defendants attaches at the defendant's initial appearance in court.[235] Professor John Gross, writing on this topic, suggested that although the right to appointed counsel attaches at the defendant's initial appearance, the right "attaching" does not necessarily mean counsel will actually be present.[236] While this is to some extent unclear,[237] even accepting Professor Gross's position as accurate, the thirty-two state statutes he quotes still require the judge at the defendant's initial appearance to inform of his/her right to appointed counsel,[238] which is more than can be said for detained noncitizens at any point within the detention and removal process. Because detained noncitizens do not have the benefit of a right to appointed counsel at all, there is a greater risk of prolonged imprisonment without any guarantee detained noncitizens can access the crucial aid of legal representation.

Another distinction is the set of procedural protections available at criminal bail hearings that are not present in immigration detention proceedings.

---

231. *See, e.g.*, Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter – The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002); Douglas L. Colbert, *Thirty-Five Years after Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998).

232. *See* Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, 9 UC IRVINE L. REV. 101, 103 (2018).

233. Rothgery v. Gillespie, 554 U.S. 191 (2008).

234. *Id.* at 213.

235. *See* Bunin, *supra* note 228, at 24.

236. *See* John P. Gross, *The Right To Counsel But Not The Presence of Counsel: A Survey of State Criminal Procedures For Pre-Trial Release*, 69 FLA. L. REV. 831, 840 (2018) ("[T]here is a difference between the 'attachment' of the Sixth Amendment right to counsel and the requirement that counsel actually be present during a specific stage of the criminal proceeding.").

237. *See* McNeil v. Wisconsin, 501 U.S. 171, 180–81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at that time and ordinarily requested.").

238. *See* Gross, *supra* note 236, at 841–50.

At the federal level, the Bail Reform Act of 1984[239] provides criminal defendants a right to appointed counsel at the pretrial detention hearing.[240] At the state level, regardless of whether appointed counsel is actually present at the pretrial detention hearing or defendants are only informed of their right to appointed counsel, other procedural protections also attach that are absent in immigration detention hearings. For example, according to Professor Gross, across various states,

> defendants are typically informed of the charges against them, advised of certain rights, including the right to have counsel appointed if they are indigent, conditions of pretrial release are determined, and, if the arrest was made without a warrant, the judicial officer determines if there was probable cause for the arrest.[241]

In immigration detention, the step one problem of actually obtaining a custody hearing in the first place is often a difficult hurdle itself, particularly for noncitizens in mandatory detention whose only option to get a custody hearing is to first contest ICE's assessment that they belong in mandatory detention.[242]

Therefore, there is an equal, if not greater, need for a right to appointed counsel for detained noncitizens seeking release. A wrong in one context should not justify a wrong in another.

D. *The Broad Scope of the Right*

A possibly peculiar aspect of this due process argument for a right to appointed counsel for detained noncitizens as a class is its broad, categorical nature. This observation carries some merit, as courts usually look to avoid announcing new, broad constitutional rules.[243] The Supreme Court has even said as much in *Gagnon*, when it concluded that there was "no justification for a new inflexible constitutional rule with respect to the requirement of counsel" and instead ruled that "the decision as to the need for counsel must be made on a case-by-case basis."[244] In *Lassiter*, the Court also held that the right to counsel in parental rights termination cases should be made on a case-by-case basis.[245]

---

239. 18 U.S.C. § 3142.

240. *See* United States v. Salerno, 481 U.S. 739, 752 (1987). ("[The Act] provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing.").

241. *See* Gross, *supra* note 236, at 841–50.

242. *See supra* Part I, pp. 195–197.

243. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) ("We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system."); *see also* Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 32 (1981).

244. *Gagnon*, 411 U.S. at 790.

245. *See Lassiter*, 425 U.S. at 26–27.

As a result, a similar argument can be made that whether the Due Process Clause requires a right to appointed counsel for noncitizens seeking freedom from detention should be determined on a case-by-case basis. Detained noncitizens are already bringing individual lawsuits in federal court arguing for a due process right to a bond hearing based on their circumstances.[246] Moreover, courts have already begun to recognize a right to appointed counsel for narrower classes of noncitizens, such as detained noncitizens with a serious mental disorder.[247]

The claims against recognizing a categorical right fail to convince because the arguments in support of a right to appointed counsel apply to all detained noncitizens unable to otherwise secure legal representation. In *Lassiter*, the Court determined that, like in *Gagnon*, the "facts and circumstances . . . are susceptible of almost infinite variation" such that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements."[248] However, in the immigration detention context, individual variation would not preclude courts from finding that the Due Process Clause requires a right to appointed counsel because, as the *Mathews* analysis above shows, differing individual circumstances do not erase the strong private interest, probable value of counsel, and benefits to the government's interest that detained noncitizens as a class share. Furthermore, unlike parole revocation and parental rights termination, immigration detention is centralized and implemented at the federal level, thus lacking many of the jurisdiction and court-based variations found in state court proceedings.[249]

Instead, a categorical right to appointed counsel for detained noncitizens is as appropriate as it was for the Supreme Court to recognize a right to appointed counsel for all inmates in hearings for involuntary transfer to a mental hospital in *Vitek v. Jones*.[250] In *Vitek*, the Court recognized that some inmates—specifically, those "thought to be suffering from a mental disease or defect"—are likely to have a greater need for legal assistance, but it recognized a right to appointed counsel for all indigent inmates who would face an involuntary transfer hearing, not just that group of inmates. Applying the same logic here, while it is likely there are some detained noncitizens who may need counsel more than others, the need exists, and therefore should be recognized, on a classwide basis.

---

246. *See, e.g.*, Clerveaux v. Searls, 397 F. Supp. 3d 299, 321 (2019).

247. *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013); *see also In re* M-A-M-, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) ("If an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge will evaluate which available measures would result in a fair hearing.").

248. *Lassiter*, 452 U.S. at 32 (citation omitted).

249. *See Gagnon*, 411 U.S. at 790.

250. Vitek v. Jones, 445 U.S. 480, 496–97 (1980).

The Fifth Amendment due process argument for a detained noncitizen's right to appointed counsel for the purpose of seeking release from detention is based upon a classic understanding of legal representation. Part III of this Article will analyze a different and unconventional construction of legal representation for the same group and purpose: the class action device.

III. PROCEDURAL PATHWAY: UTILIZING THE CLASS ACTION DEVICE

Class action lawsuits have been integral to challenging immigration detention. Due to the expanded use of prolonged immigration detention in the Trump administration, the number of class actions brought on behalf of detained noncitizens seeking release has increased in recent years.[251] Inadequate access to counsel for detained noncitizens bolsters the significance of class actions in allowing detained noncitizens their day in court, albeit through a perhaps unconventional conception of "legal representation." Specifically, the class action device is a mechanism for providing legal representation because it enables court-appointed counsel to litigate on behalf of a large group of individual detained noncitizens who might not have individual counsel. As a result, because of the representative function of the class device and because of the requirements in Federal Rule of Civil Procedure 23 for courts to evaluate and appoint class counsel, the class device plays an important—and often underappreciated—role in allowing detained noncitizens competent legal representation. Its legitimacy should therefore be protected.

A class action is a type of representative lawsuit: one or more plaintiffs litigate on behalf of a larger group of similarly situated individuals or parties, called class members, and all class members become bound by the outcome of the case.[252] Federal Rule of Civil Procedure 23 ("Rule 23") governs class actions in federal courts. Rule 23(a) sets out four requirements that must be met for a court to certify a class action:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[253]

The class action device is not a constitutional idea; instead, class action doctrine is rooted in interpretations of Rule 23 and occasional interactions with federal statutes and constitutional provisions.[254]

---

251. A search on Westlaw for the terms "immigration detention" and "class action" revealed that 79 out of 130 results were from the last three years alone.

252. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2019).

253. FED. R. CIV. P. 23(a).

254. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806 (1985) (considering whether the Due Process Clause requires courts to have personal jurisdiction over absent class members).

In addition to satisfying these four conditions, the action must be one of the four types of class actions specified in Rule 23(b).[255] Noncitizens challenging their detention usually seek injunctive or declaratory relief, wanting courts to order DHS to provide bond hearings.[256] As a result, the most common type of class action for challenging immigration detention is a Rule 23 (b)(2) action, which allows for a class action where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[257]

The central benefit of the class device, especially in the immigration detention context, is that it enables similarly situated detainees to seek common relief in a single lawsuit. This saves time and resources, and also addresses the problem of lacking individual counsel by allowing class counsel, who are court-appointed per Rule 23's requirements,[258] to advocate on their behalf. Despite its frequent use and value, recent developments pose potential threats to the continuing viability of the class action device for challenging immigration detention. Specifically, Justice Alito writing for the Supreme Court in *Jennings* advised the Ninth Circuit on remand to first determine whether a Rule 23(b)(2) class action is an appropriate mechanism to resolve the detainees' due process claims before deciding the merits of their constitutional claims.[259] In addition, lower federal courts are split on whether section 242 of the INA[260] prohibits courts from issuing classwide injunctive relief, raising doubts about the efficacy of class actions if the only possible remedy is declaratory relief.[261]

To better understand the value of the class device to challenge immigration detention and the threats it faces, the following sections will illustrate two

---

255. FED. R. CIV. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied. . . ."). The four types of class actions under Rule 23(b) are: 1) a situation where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class," *id.* 23(b)(1)(A); 2) where "prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," *id.* 23(b)(1)(B); 3) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," *id.* 23(b)(2); and 4) money damages class actions, where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *id.* 23(b)(3).

256. *See, e.g.*, *Guzman Chavez*, 940 F.3d at 869 (describing a class of detained noncitizens arguing for a right to individualized bond hearings while awaiting the outcomes of their withholding-of-removal applications).

257. FED. R. CIV. P. 23(b)(2).

258. *See id.* 23(g). For further discussion on the relationship between class actions and legal representation, *see infra* Part III, p. 228–230.

259. *See Jennings*, 138 S. Ct. at 852.

260. 8 U.S.C. § 1252(f)(1).

261. *See, e.g.*, Vazquez Perez v. Decker, No. 18-CV-10683 (AJN), 2019 WL 4784950, at *5 (S.D.N.Y. Sept. 30, 2019).

ways class actions help detained noncitizens seek freedom and will then examine the two threats identified above in more detail.

A. *Types of Class Actions Challenging Immigration Detention*

Different types of class actions have been brought to challenge immigration detention.[262] The two sub-sections below will focus on two types of class actions aimed at securing release. The first type targets step one of the release process, obtaining a custody hearing, by challenging DHS's failure to provide bond hearings. The second type targets step two, winning at the custody hearing, by challenging the procedures applied at the hearing that disfavor detainees and seeking reforms such as shifting the burden of proof to the government. The following discussions will aim to illuminate the utility of the class device as an instrument for confronting violations of the detainees' statutory and due process rights on the scale at which these violations are occurring.

1. *Class Actions Seeking Custody Hearings*

Jennings serves as an example of detained noncitizens bringing a class action to argue they are entitled to bond hearings. In *Jennings*, Alejandro Rodriguez, a Mexican citizen and lawful permanent resident in the United States, represented a class of noncitizens within the Central District of California certified under Rule 23(b)(2) who had been detained for more than six months without a bond hearing.[263] The class was divided into subclasses for three of the provisions of the immigration statute pursuant to which class members were detained: noncitizens mandatorily detained under INA section 235(b), discretionarily detained under section 236(a), and mandatorily detained under section 236(c).[264] Rodriguez and the other class representatives argued that prolonged detention without bond hearings violated these statutory provisions and the Due Process Clause of the Fifth Amendment, and thus sought injunctive and declaratory relief requiring the government to provide individualized bond hearings every six months.[265] The Supreme Court held that the statutory provisions did not require, and could not be interpreted to require, bond hearings every six months and remanded to the lower courts to decide the due process claims.[266] Nevertheless, the case

---

262. A common type of class action lawsuit challenging immigration detention is a class action arguing that the conditions of confinement at detention facilities are unlawful. *See, e.g.*, Novoa v. GEO Grp., Inc., No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at *1 (C.D. Cal. Nov. 26, 2019). Because these lawsuits do not advocate for release from detention, I do not discuss them in this Article.

263. *See Jennings*, 138 S. Ct. at 838–39 (explaining that the certified class consisted of "[a]ll noncitizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.").

264. *Id.* at 839.

265. *Id.*

266. *See id.* at 850–51.

exemplifies the utility of the class device to overcome step one—obtaining a custody hearing—for a large number of detainees (notwithstanding Justice Alito's hesitancy in this same case, as discussed below[267]).

Class actions filed before and after *Jennings* similarly used the class device to argue for a statutory and/or constitutional right to bond hearings. In *Franco-Gonzalez v. Holder*,[268] a 2013 case, plaintiffs brought a class action on behalf of detained noncitizens in California, Arizona, and Washington with serious mental disorders, seeking among other things an order requiring a custody hearing for those detained for more than six months.[269] While *Jennings* eliminated the INA-based arguments for periodic bond hearings, recent class actions relying on the due process arguments have seen success. In *Padilla v. Immigration & Customs Enforcement*,[270] the Ninth Circuit upheld the district court's grant of a preliminary injunction requiring bond hearings for a nationwide class of asylum seekers who were determined to have a credible fear of persecution and detained without a bond hearing pursuant to section 235(b).[271] A week later, in *Aleman Gonzalez v. Barr*,[272] the Ninth Circuit similarly affirmed the district court's grant of a preliminary injunction requiring bond hearings for a class of noncitizens with final removal orders detained under INA section 241(a), concluding that the plaintiffs were likely to succeed on their statutory claims.[273]

2. *Class Actions Seeking Fairer Procedures in Custody Hearings*

In addition to suing for custody hearings, detained noncitizens have been using the class action device to reform the procedures applied at custody hearings in favor of detainees. As described in Part I, current procedures for bond and other types of custody hearings impose heavy burdens on the noncitizens challenging their detention. As a result, class actions arguing for a right to custody hearings have often included claims for changing the burden and standard of proof at the hearings.[274] For example, in *Jennings*, the plaintiffs also argued that at the bond hearings, the government must prove by "clear and convincing evidence that the class member's detention remains justified."[275]

---

267. *See infra* Part III, pp. 221–225.

268. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

269. *See id.* at *20.

270. *Padilla*, 953 F.3d 1134. On January 11, 2021, the Supreme Court granted the government's petition for certiorari and vacated the Ninth Circuit's judgment. The Court remanded the case to the Ninth Circuit "for further consideration in light of" the Court's decision in *Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020). Immigration & Customs v. Padilla, No. 20-234, 2021 WL 78039, at *1 (U.S. Jan. 11, 2021).

271. *See id.* at *3.

272. Gonzalez v. Barr, 955 F.3d 762, 772 (9th Cir. 2020).

273. *See id.* at 771 (finding that the *Jennings* decision did not pose a problem because *Jennings* did not involve a class certified pursuant to § 1231(a)(6)).

274. *See, e.g.*, *Brito*, 415 F. Supp. 3d at 266.

275. *Jennings*, 138 S. Ct. at 839.

In cases since *Jennings*, the claims for greater procedural protections in hearings have seen more success than those arguing for a right to bond hearings. For example, in two cases from the federal district court in Massachusetts, the plaintiff classes won declaratory and injunctive relief ordering that at the bond hearings, the government must prove the noncitizen is dangerous by clear and convincing evidence or a flight risk by a preponderance of the evidence.[276] For detainees challenging their detention in *Joseph* hearings, the federal district court in New Jersey issued a classwide injunction ordering the government to "initially satisfy an immigration judge that there is probable cause to find that a detained alien under section 236(c) falls under the mandatory detention requirements under that statute."[277]

Complementing the cases seeking bond hearings, these cases similarly illustrate detained noncitizens' employment of the class device to collectively increase their chances for release—in these instances, by giving detainees a slightly better chance of winning at hearings. The government has appealed the district courts' decisions in the above cases, and the appellate courts' decisions will likely be informed by the debates discussed in the sub-sections below.

3. *Key Advantages of the Class Device*

The key benefits of these cases being litigated as class actions, rather than as individual lawsuits, extend beyond efficiency gains. This sub-section will discuss three of these key benefits as they relate to mootness, enforcement issues, and the obstacles detained noncitizens face in bringing individual actions.

The first notable advantage is that the class device can prevent cases from becoming moot before they are decided.[278] A case is considered moot if the plaintiff's claim is no longer "live" and the plaintiff no longer has a "legally cognizable interest in the outcome."[279] A detained noncitizen risks her individual lawsuit becoming moot if, for example she is released from detention or the removal action against her is resolved. In the absence of a class action, an exception to mootness applies when the action being challenged is "capable of being repeated and evading review."[280]

In *Mehmood v. U.S. Att'y Gen.*,[281] Yasir Mehmood brought a habeas petition arguing that his detention pursuant to section 236(c) without a bond

---

276. *See Brito*, 415 F. Supp. at 271 (covering a class of noncitizens detained pursuant to INA § 236 (a)); Reid v. Donelan, 390 F. Supp. 3d 201, 227–28 (D. Mass. 2019) (covering a class of noncitizens detained pursuant to INA § 236(c)).

277. Gayle v. Warden Monmouth Cnty., No. CV 12-2806 (FLW), 2019 WL 4165310, at *25 (D.N.J. Sept. 3, 2019).

278. *See generally* RUBENSTEIN, NEWBERG ON CLASS ACTIONS, *supra* note 252, at § 2:9.

279. *See id.*; *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)).

280. Mehmood v. U.S. Att'y Gen., 808 F. App'x 911, 913 (11th Cir. 2020).

281. *Id.*

hearing violated his due process rights.[282] He appealed the district court's denial of his petition, but the Eleventh Circuit dismissed Mehmood's appeal as moot because he was deported to Pakistan, his home country.[283] The Eleventh Circuit explained that in the absence of a class action, the "capable of repetition, yet evading review" exception to mootness did not apply, given how speculative it was that Mehmood would return from Pakistan—the only scenario where he would plausibly be at risk of once again facing detention without a bond hearing.[284] The Eleventh Circuit's decision stands as one example of how the government's broad power to release or deport detained noncitizens while their removal cases are pending translates to a high risk of mootness for any detained noncitizen seeking relief through an individual lawsuit.

The utility of the class device for noncitizens challenging detention is also realized through debates on the "necessity" of certifying a Rule 23(b)(2) class. There is a plausible argument that an individual detainee's lawsuit can raise the same statutory and/or constitutional claims and seek injunctive and declaratory relief in a way that benefits all detained noncitizens because of the court's ruling, even without a certified class. The Second Circuit nearly achieved as much in its ruling in *Lora v. Shanahan*,[285] an individual lawsuit where the court held section 236(c) implicitly required bond hearings every six months for detained noncitizens (a ruling that *Jennings* mooted).[286] The Third Circuit's analysis in *Gayle v. Warden Monmouth Cnty. Corr. Inst.*[287] is instructive in countering this argument. First, the *Gayle* decision supports the previous point on avoiding mootness, as the court proclaimed, "class claims can breathe life into an otherwise moot case" in ruling the case was not moot since the plaintiffs had live claims when they filed their motion for class certification.[288] The Third Circuit then turned to the district court's decision to deny class certification solely because it "did not find certification of a class necessary."[289] Although necessity is nowhere mentioned in the text of Rule 23, the district court believed certifying a class was unnecessary because "the court's declaration as to the unconstitutionality of the government's procedures and its grant of injunctive relief on an individual basis 'would be binding on all of the governmental agencies and would indeed inure to the benefit of all members of the proposed class.'"[290] The district court relied on Eighth Circuit cases denying class certification if the court found it could resolve the same claims in an individual action.[291]

---

282. *Id.* at 912.
283. *Id.* at 912–13.
284. *Id.* at 913–14.
285. Lora v. Shanahan, 804 F.3d 601, 602 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018).
286. *See id.* at 616.
287. *Warden Monmouth Cnty*, 838 F.3d 297.
288. *See id.* at 305.
289. *Id.* at 308.
290. *Id.* at 309 (quoting *Johnson*, 81 F. Supp. 3d at 403).
291. *Id.*

The Third Circuit, however, found the district court and the Eighth Circuit's approach unconvincing. Instead, it held that while necessity may be considered in deciding class certification, it cannot be "a freestanding requirement justifying the denial of class certification."[292] After considering the varying views of sister circuits, the Third Circuit ultimately found the First Circuit's middle-ground approach persuasive: allowing consideration of necessity as part of Rule 23(b)(2)'s requirement that injunctive or declaratory relief be "appropriate," but not dispositive, especially when there are other considerations such as "the risk of mootness, [and] the possibility of a defendant's non-acquiescence in the court's decision."[293] There is no shortage of such risks for detained noncitizens. In addition to the risk for mootness already discussed, there is no guarantee the government will implement relief obtained in an individual action to all those similarly-situated as it would in a class action.[294] In *Gayle*, the government even warned in its brief that "as a matter of practice, the Department of Justice may choose to acquiesce in a particular district court decision, but such acquiescence is not as a matter of law" and in prior cases, the government has sometimes changed its practice pursuant to a court order only in that circuit.[295]

In addition to mootness and enforcement issues, the undeniable realities associated with the "necessity" argument make forcing individual actions normatively undesirable. As the Third Circuit acknowledged in *Gayle*, if class certification is denied, the only option class members have "may be to undertake the expense, burden, and risk of instituting their own litigation—barriers that in many cases will be prohibitive."[296] As explained in Part I, the majority of detained noncitizens face such barriers. In addition, even when an individual action could achieve the same effect, there are "critical safeguards for class members that [class] certification alone can provide," such as having court-appointed counsel as per Rule 23's requirements.[297] Moreover, a powerful benefit of the Rule 23(b)(2) class action, particularly for challenging immigration detention, is its capacity to bring about institutional change in the government's immigration detention procedures. The scale of the problem here demands and deserves a response at a similar level.

B. *Examining Threats to Class Actions Challenging Immigration Detention*

The following sub-sections analyze still-developing threats to the continuing viability of the Rule 23(b)(2) class action for detained noncitizens seeking release. The first sub-section will assess Justice Alito's dicta in *Jennings*

---

292. *Id.*
293. *Id.* at 310.
294. *See id.*
295. *Id.* at 311.
296. *Id.*
297. *See* 2 RUBENSTEIN, NEWBERG ON CLASS ACTIONS, *supra* note 252, at § 4:35.

instructing the Ninth Circuit on remand to first determine if the Rule 23(b)(2) class is appropriate for resolving the detainees' due process claims. The second sub-section will evaluate the ongoing debates and circuit split over whether 8 U.S.C. § 1252(f)(1)'s prohibition on classwide injunctive relief prevents courts from issuing the kinds of injunctions detainees seek, and if so, what value the Rule 23(b)(2) class action still serves if it can only achieve declaratory relief.

1. *Threat One: Challenging the Appropriateness of Rule 23(b)(2) Classes*

At the end of Justice Alito's opinion in *Jennings*, he assigned the Ninth Circuit homework on certain procedural issues to be completed before deciding the merits of the plaintiffs' constitutional claims.[298] Justice Alito initially asked the court to assess whether it continues to have jurisdiction to issue classwide injunctive relief despite 8 U.S.C. § 1252(f)(1), which is the subject of the next sub-section (III. B. 2).[299] Then, Justice Alito more generally questioned whether plaintiffs' claims should continue to be litigated as a class, expressing doubt about whether "a Rule 23(b)(2) class action continues to be the appropriate vehicle for [plaintiffs'] claims."[300] First, he postulated that because the Ninth Circuit already recognized some class members may not have a constitutional right to bond hearings, the class may no longer satisfy the standard articulated in *Wal-Mart Stores, Inc. v. Dukes*[301] that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."[302] Second, he suggested that because the due process test is "flexible" and dependent on individual circumstances, a Rule 23(b)(2) class litigated on common facts may not be the proper vehicle to resolve the detainees' due process claims.[303] Of these two sub-points, the latter poses a greater threat to the continuing viability of Rule 23(b)(2) class actions challenging immigration detention: taken to the extreme, it endangers due process class actions entirely.[304]

a. Arguments Against Rule 23(b)(2) Class Actions Challenging Immigration Detention

The basis for Justice Alito's suggestions stems from the Supreme Court's Rule 23 analysis in *Wal-Mart,* and prior cases emphasizing the flexibility and

298. *See Jennings*, 138 S. Ct. at 851.
299. *See id.*
300. *Id.*
301. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).
302. *Id.* at 360.
303. *Jennings*, 138 S. Ct. at 851–852.
304. *See* Alexandra D. Lahav, Maureen Carroll, David Marcus & Adam Zimmermann, *Government Class Actions After Jennings v. Rodriguez*, HARV. L. REV. BLOG (May 8, 2018), https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez/. The focus here is on the implications of Justice Alito's instructions on Rule 23(b)(2) class actions specifically challenging immigration detention.

individualized nature of due process. In *Wal-Mart*, current and former female employees of Wal-Mart brought a nationwide class action against the store alleging Title VII claims for gender-based discrimination.[305] The Supreme Court held that the class was not properly certified as it failed to meet the requirements of Rule 23(a) and (b)(2).[306] In its analysis, the Court expounded on what (b)(2) requires. Specifically, the Court noted that "Rule 23(b)(2) applies only when a *single* injunction or declaratory judgment would provide relief to each member of the class."[307] Borrowing from Professor Richard Nagareda's law review article, the Court further emphasized that "the key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[308] Justice Alito relied on these points in instructing the Ninth Circuit to reconsider whether the subclasses certified in *Jennings*, particularly the section 23(b) class, meet the *Wal-Mart* standard.[309] The section 23(b) subclass poses some difficulty because it consists of recently arrived asylum seekers and lawful permanent residents, two groups the Ninth Circuit conceded may be differently situated for their due process claims.[310] However, the groups still present common claims that can be resolved with a common answer. And if not, as the plaintiffs suggest in their briefs on remand, the subclass can be further divided into the two groups so that class certification as a whole is not defeated.[311]

The more pressing, and possibly existential, threat is Justice Alito's suggestion that because due process is flexible, a Rule 23(b)(2) class might be inappropriate for adjudicating the plaintiffs' arguments for a due process right to bond hearings.[312] Justice Alito cited a few prior cases that have stated due process is flexible, and relied more broadly on due process as a test involving consideration of individual circumstances.[313] The government quickly took advantage of this dicta and some courts have already decertified (b)(2) classes or denied injunctive and declaratory relief that detainee classes sought based on *Jennings*. For example, in *Abdi v. McAleenan*, the federal district court for the Western District of New York decertified a subclass of asylum-seekers who were detained at the Buffalo Federal Detention Facility

305. *See Wal-Mart Stores, Inc*., 564 U.S. at 342.
306. *See id*. at 359–360.
307. *Id*. at 360. (emphasis added).
308. *Id*. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).
309. *See Jennings*, 138 S. Ct. at 851.
310. *See id*.
311. *See* Supplemental Brief of Petitioners-Appellees at 20, Rodriguez v. Jennings, 887 F.3d 954 (9th Cir. 2018) (Nos. 13-56706, 13-56755).
312. *See Jennings*, 138 S. Ct. at 851.
313. *See, e.g., Landon*, 459 U.S. at 34 ("The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

without a bond hearing for more than six months.[314] The court concluded the class no longer met Rule 23(b)(2)'s requirements because plaintiffs could not show the Due Process Clause entitles plaintiffs to a bond hearing after a certain period of time, and thus a "single injunction may not issue in favor of this subclass."[315] In *Reid v. Donelan*, although the federal district court in Massachusetts did not decertify the class, it held it could not grant injunctive or declaratory relief that the government was required to provide a bond hearing after six months in detention under the Due Process Clause, agreeing that whether a detainee has a due process right to a bond hearing is "inherently fact-specific."[316]

The strongest argument that a (b)(2) class is inappropriate for detained noncitizens arguing for a due process right to bond hearings ties together the analyses in *Abdi* and *Reid*, and is one the government makes explicit in its brief in the *Jennings* remand: "[t]he individual characteristics of the members of the subclasses and the varied procedural protections available to them make it impossible for the Court to answer the due process question the same way for each of them"[317]—violating the requirements of Rule 23(b)(2) and *Wal-Mart*. However, as the following discussion will show, a fundamental flaw debilitates this argument.

b. Arguments for Rule 23(b)(2) Class Actions Challenging Immigration Detention

Writing for the dissent in *Jennings*, Justice Breyer briefly noted that *Wal-Mart* does not bar such class actions because "[e]very member of each class seeks the same relief (a bail hearing), every member has been denied that relief, and the differences in situation among members of the class are not relevant to their entitlement to a bail hearing."[318] As discussed above, the government disagrees that the situational differences among class members are irrelevant and argues that, as a result, the class device is inappropriate. A key flaw in the arguments against 23(b)(2) class actions challenging immigration detention is that whether or not certain differences between class members are relevant to the due process claims is a *merits* issue that is irrelevant to the Rule 23 procedural analysis. Discerning the distinction between issues that speak to the merits of the detainees' claims and issues that are necessary to analyze Rule 23(b)(2)'s requirements is crucial to understanding the fatal weakness of the opposing position.

As history shows, and the Supreme Court has acknowledged, "civil rights cases . . . are prime examples" of Rule 23(b)(2) class actions.[319] Many civil

---

314. *See* Abdi v. McAleenan, 405 F. Supp. 3d 467, 469, 483 (W.D.N.Y. 2019).
315. *Id.* at 481.
316. *Reid*, 390 F. Supp. 3d at 216.
317. Supplemental Brief of Respondents-Appellants at 23, *Rodriguez*, 887 F.3d 954 (No. 13-56706).
318. *Jennings*, 138 S. Ct. at 876 (Breyer, J., dissenting).
319. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

rights class actions have included constitutional due process claims, and even after *Wal-Mart* due process class actions were not especially controversial.[320] Although the Court has stated that "sometimes it may be necessary to probe behind the pleadings before coming to rest on the certification question"[321] and that often that analysis "will entail some overlap with the merits of the plaintiff's underlying claim,"[322] it has also penned that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."[323] Determining that detained noncitizens cannot maintain a Rule 23 (b)(2) class action to argue they have a due process right to bond hearings because there is no such due process right to bond hearings represents a decision on the merits of the underlying claim disguised as a decision on class certification.

Abdi and the government's arguments in the *Jennings* remand, in particular, exemplify this problematic conflation of merits with Rule 23: whether the individual characteristics of the class members "make it impossible for the Court to answer the due process question the same way for each of them"[324] answers the merits of the class's due process claim. As the plaintiffs' brief in the *Jennings* remand points out, even if the government is correct that due process is inherently flexible and thus cannot entitle a class of detainees to bond hearings, there is still enough to certify a 23(b)(2) class. If the government prevails at the merits stage in its position that due process does not demand bond hearings for all class members, the answer to plaintiffs' due process question is "no" for the entire class; if the plaintiffs succeed in arguing that due process demands bond hearings for all class members, the answer is "yes" for the entire class.[325] A possible "no" to the ultimate merits question should not prevent a "yes" to the initial Rule 23(b)(2) class certification question.

The Ninth Circuit's recent decision in *Padilla* is an example of observing the distinction correctly. There, the Ninth Circuit affirmed the district court's grant of a preliminary injunction for a nationwide class arguing for a due process right to bond hearings.[326] On appeal, the government did not challenge the district court's certification of the class under Rule 23(b)(2) or the scope of the class.[327] The Ninth Circuit observed that class certification was proper given that "[t]he nationwide class in this case is defined by a shared alleged constitutional violation."[328] If the line between merits determinations and the Rule 23 analysis is honored, certifications of class actions raising due process

320. *See* Lahav et al., *supra* note 304.
321. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).
322. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351. (2011).
323. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).
324. Supplemental Brief of Respondents-Appellants at 23, *Rodriguez*, 887 F.3d 954 (Nos. 13-56706 & 13-56755).
325. *See id*. at 36.
326. *Padilla*, 953 F.3d at 1152.
327. *See id*. at 1151–52.
328. *Id*. at 1151.

challenges to immigration detention that satisfy the criteria of Rule 23(b)(2) need not be anomalous post *Jennings*.

2. *Threat Two: Challenging the Availability of Classwide Injunctive Relief*

Another obstacle detained noncitizens face in litigating class actions seeking injunctions to order the government to provide bond hearings is a provision of the INA that might forbid courts from issuing such relief. 8 U.S.C. § 1252(f)(1) states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, *no court* (other than the Supreme Court) *shall have jurisdiction or authority to enjoin or restrain the operation* of the provisions of part IV of this subchapter [8 U.S.C. §§ 1221–1232], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *other than with respect to the application of such provisions to an individual alien* against whom proceedings under such part have been initiated.[329]

The circuits are split as to whether § 1252(f)(1) prohibits courts from issuing classwide injunctions,[330] including, for example, an injunction ordering DHS to provide bond hearings for a class of detained noncitizens. The following discussion will explain and assess the positions courts have taken and the impact a prohibition on classwide injunctive relief would have on the efficacy of class actions challenging immigration detention.

a. Debates on Whether § 1252(f)(1) Forbids Classwide Injunctive Relief

Views among courts on the meaning of § 1252(f)(1) range from conclusions that § 1252(f)(1) always forbids classwide injunctions, full stop, to conclusions that § 1252(f)(1) is irrelevant to class actions, and various other positions in between. The contrast is apparent when comparing the Ninth and Sixth Circuits' approaches. In *Padilla*, the Ninth Circuit in a 2-1 decision adopted a highly permissive interpretation of § 1252(f)(1), declining "to read into the text [of § 1252(f)(1)] . . . a broad but silent limitation on the district court's powers under [Rule] 23."[331] The Ninth Circuit reasoned that although § 1252(f)(1) uses the word "individual," absent express statutory language

---

329. 8 U.S.C. § 1252(f)(1) (emphasis added).

330. On August 27, 2020, the government filed a petition for certiorari urging the Supreme Court to decide whether 8 U.S.C. § 1252(f)(1) prohibits lower courts from granting classwide injunctions against the operation of 8 U.S.C. §§ 1221–1232. *See* Petition for Writ of Certiorari, Immigration and Customs Enf't v. Padilla (No. 20-234). As noted above, on January 11, 2021, the Supreme Court granted the government's petition for certiorari and remanded the case to the Ninth Circuit "for further consideration in light of" the Court's decision in *Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020). *See Padilla*, *supra* note 270. The Court has yet to address the circuit split over whether § 1252(f)(1) prohibits courts from issuing classwide injunctions.

331. *Padilla*, 953 F.3d at 1149.

limiting classwide relief, "individual" might simply mean congress intended to prohibit injunctive relief for organizational plaintiffs—when each class member is an *individual* detained noncitizen seeking release from detention, § 1252(f)(1) does not apply.[332] The Ninth Circuit also found support in the statute's legislative history.[333] In complete opposition, the Sixth Circuit held that § 1252(f)(1) plainly prohibits classwide injunctions, ruling in *Hamama v. Adducci,*[334] "[t]here is no way to square the concept of a class action lawsuit with the wording 'individual' in the statute."[335] Unlike the Ninth Circuit, the Sixth Circuit believed Supreme Court precedent closed this issue, citing cases where the Court in dicta interpreted § 1252(f)(1) as barring classwide injunctions.[336]

Other courts have taken less absolute, more functional approaches to interpreting the scope of § 1252(f)(1). One theory that has seen some success is that § 1252(f)(1) does not prohibit classwide injunctive relief if the conduct the plaintiff class seeks to enjoin violates the relevant provisions of the INA. The Ninth Circuit accepted this theory in granting classwide injunctive relief in *Jennings* before the Supreme Court's decision.[337] Similarly, the federal district court for the Southern District of New York held in *Vazquez Perez v. Decker*[338] that "1252(f)(1) may not strip it of jurisdiction to enjoin explicit violations of Sections 1221–1232 as written, because such an injunction cannot be said to 'enjoin or restrain' the operation of those provisions."[339] In contrast, in *Brito v. Barr*,[340] the Massachusetts federal district court adopted a different theory. In *Brito*, the class of noncitizens detained pursuant to section 236(a) (recently arrived immigrants) challenged the procedures applied in bond hearings.[341] Because § 1226 does not govern procedural requirements in bond hearings, the court reasoned that § 1252(f)(1) does not apply because the requested injunctive relief would not "enjoin or restrict the operation of the INA."[342]

These varying positions reveal the range of potential interpretations of § 1252(f)(1) and imply that, under at least one of the theories, there is perhaps

---

332. *Id.* at 1150.

333. *Id.* at 1149 ("The statute's legislative history also reveals that Congress was concerned that § 1252(f)(1) not hamper a district court's ability to address imminent rights violations.").

334. Hamama v. Adducci, 912 F.3d 869, 877 (6th Cir. 2018).

335. *Id.* at 877.

336. *Id.* at 878; *see also* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 481–82 (1999) ("It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231, but specifies that this ban does not extend to individual cases.").

337. *See Jennings*, 138 S. Ct. at 851 (noting that the Ninth Circuit held 1252(f)(1) did not prohibit the court from issuing a classwide injunction "because those claims did not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes") (internal quotation marks and citation omitted).

338. Vazquez Perez v. Decker, No. 18-CV-10683 (AJN), 2019 WL 4784950 (S.D.N.Y. Sept. 30, 2019).

339. *Id.* at *8.

340. *Brito*, 415 F. Supp. 3d 258.

341. *Id.* at 269.

342. *Id.* (internal quotation marks omitted).

a stronger chance of success for class actions seeking to change the procedures applied in bond hearings rather than class actions challenging DHS's failure to provide bond hearings. However, the cases do not elucidate what impact a bar on classwide injunctions would have for detained noncitizens litigating Rule 23(b)(2) class actions hoping that courts will require DHS to provide bond hearings.

b. The Limited Usefulness of 'Declaratory Relief Only' Class Actions

Although courts are divided on whether § 1252(f)(1) prohibits classwide injunctions, they are mostly in agreement that § 1252(f)(1) does not forbid courts from issuing classwide declaratory relief. Rule 23(b)(2) permits certification of a class when "final injunctive relief *or corresponding declaratory relief* is appropriate respecting the class as a whole,"[343] and the text of § 1252(f)(1) does not mention declaratory relief at all. The option of classwide declaratory relief for detained noncitizens presents two distinct concerns: first, whether classwide declaratory relief is actually available if the declaratory relief would be the "functional equivalent" of injunctive relief;[344] and second, the practical impact of limiting classwide remedies to declaratory relief on detained noncitizens in their efforts to secure release.

On the first point, the Third Circuit confronted the § 1252(f)(1) barrier to classwide injunctions in an earlier case, *Alli v. Decker*,[345] involving a class of detained lawful permanent residents arguing they were entitled to bond hearings under the INA and the Due Process Clause. The Third Circuit held that while classwide injunctive relief was prohibited, § 1252(f)(1) did not bar classwide declaratory relief.[346] The Third Circuit then dismissed the government's argument that the court should not issue the requested classwide declaration because it would be the "functional equivalent" of classwide injunctive relief and would produce an "absurd result."[347] Although the court agreed that declaratory relief might be impermissible if it was the equivalent of an injunction, it disagreed that would be the case if it issued a declaration that class members had a right to bond hearings because class members could "pursue individual injunctions after issuance of a classwide declaration."[348] However, in dicta, the Sixth Circuit nearly reached the opposite conclusion on the same type of claim, noting that "[t]he practical effect of a grant of declaratory relief as to [p]etitioners' detention would be a classwide injunction against the detention provisions, which is barred by § 1252(f)(1)."[349] Thus, even if all courts agree in theory that § 1252(f)(1) does not bar classwide declaratory relief, potential division over when classwide declarations are

343. FED. R. CIV. P. 23(b)(2) (emphasis added).
344. *See* Alli v. Decker, 650 F.3d 1007, 1014 (3d Cir. 2011).
345. *Id.* at 1007.
346. *Id.* at 1013.
347. *See id.* at 1014–15.
348. *Id.*
349. *Hamama*, 912 F.3d at 880.

actually available limits any reasons for detained noncitizens to bring a Rule 23(b)(2) class action in the first place.

The contrast between the Third and Sixth Circuits' views highlights a separate consideration if only classwide declaratory relief is available: the practical impact this has on class members. In the specific context of detained noncitizens hoping for the government to provide bond hearings, a classwide declaration that, for example, the Due Process Clause requires a bond hearing every six months would likely result in class members having to pursue their own individual lawsuits seeking injunctions to secure those bond hearings.[350] While a declaratory judgment would be favorable to the class, it is difficult to measure how helpful it would actually be in mitigating the previously-discussed barriers detained noncitizens face when bringing individual actions. For example, absent class members may have little to no knowledge about the class litigation and may not know they need to pursue an individual action or have access to counsel to litigate individually for an injunction.

The scope and nature of the declaratory relief can also reduce the value of a Rule 23(b)(2) class action. For example, in *Reid*, the court issued a classwide declaration that "mandatory detention without a bond hearing under 8 U.S.C. § 1226(c) violates due process when the detention becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens."[351] It further held that given this declaratory judgment, class members "must bring a habeas petition in federal court to challenge [their] detention as unreasonably prolonged."[352] If the principle benefits of class litigation include enabling indigent class members to seek common redress in a single action, it is doubtful how useful a classwide declaration as broad as that in *Reid* is at all. Hopefully, these limitations regarding classwide declaratory relief underscore the risk that interpreting § 1252(f)(1) as forbidding classwide injunctions will diminish the value of the Rule 23(b)(2) class device for detained noncitizens.

C. *Class Actions and Legal Representation*

The relationship between the class action device and greater access to legal representation is not as straightforward as the argument for a due process right to appointed counsel.[353] However, class actions produce the effect of expanding access to legal representation for detained noncitizens precisely because of their representative function: they enable court-appointed counsel to litigate on behalf of a large group of noncitizens with no individual

350. *See Alli*, 650 F.3d at 1015; (*see also Abdi*, 405 F. Supp. 3d at 480; Supplemental Brief of Petitioners-Appellees at 16–17, *Rodriguez*, 887 F.3d 954 (Nos. 13-56706, 13-56755) ("If classwide injunctive relief were unavailable due to Section 1252(f)(1), classwide declaratory relief would still serve as a basis for later individual injunctive relief—i.e., once the law is declared, each class member could pursue an individual action to enforce the law.").

351. *Reid*, 390 F. Supp. 3d at 227.

352. *Id.*

353. *See supra* Part II, pp. 200–14.

lawyers. Rule 23 explicitly requires courts to evaluate and appoint class counsel to represent the class. Rule 23(g) requires courts certifying a class to appoint class counsel and to consider factors including

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.[354]

Even before Rule 23(g) was codified, courts used Rule 23(a)(4)'s requirement for adequate representation—aimed at the class representatives (named plaintiffs)—to evaluate class counsel's adequacy.[355] As a result, unlike in a typical individual lawsuit where a detained noncitizen hires her own lawyer or obtains the assistance of a pro-bono lawyer, the court in a class action is heavily involved in determining the lawyers who will litigate the case. In part, this is because in a class action, "it is primarily the class counsel, not the class representative, who controls the class's interest," and thus the quality of counsel is doubly important.[356] Courts also provide more oversight over counsel in class actions because class counsel are responsible for advancing the interests of a larger group of people who did not select their counsel in the same way they usually would.[357]

Because class action litigation allows one or, more commonly, a small group of lawyers to litigate on behalf of a larger class and courts are required to appoint class counsel, there is an argument that the class device enables detained noncitizens to achieve both greater access to legal representation and access to better quality counsel. The degree to which the latter benefit is true probably hinges on an empirical assessment. However, patterns especially over the past few years show that in a large number of class actions brought on behalf of noncitizens challenging immigration detention, class counsel are prominent public interest organizations such as the national ACLU, affiliate organizations such as the New York Civil Liberties Union (NYCLU), and the American Immigration Council, often in collaboration with prestigious private law firms—counsel who have significant resources and experience to litigate these high-stakes cases.[358] However, class counsel and the class action device should not be considered substitutes for individual counsel for those seeking release from immigration detention. As discussed above, the class device is most useful for allowing detained noncitizens to

354. FED. R. CIV. P. 23(g)(1)(A)(i-iv).

355. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, *supra* note 252, at § 3:72.

356. *Id*.

357. *See id*. Although the named plaintiffs have the opportunity to select counsel and in theory have more interaction with counsel, this is not always the case in practice.

358. *See, e.g*., *Padilla*,, 953 F.3d at 1138 (2020) (class counsel including lawyers from the American Immigration Council and the ACLU); *Abdi*, 405 F. Supp. 3d at 469 (class counsel including NYCLU and private law firm Sidley Austin LLP).

surpass step one, obtaining a custody hearing, and for bettering their chances of prevailing at step two, the actual custody hearing.[359] The class device is not useful during the ultimately necessary step of proving to an immigration judge that any individual detained noncitizen should be released on bond. Noncitizens still need their own lawyer to succeed at their individualized bond hearing for all the reasons discussed in Parts I and II.[360]

Thus, while the class device is not aimed at achieving the sort of legal representation utopia that the argument for a categorical due process right to appointed counsel does, it still accomplishes greater access to legal representation and access to quality counsel. And, in the absence of a right to appointed counsel for detained noncitizens, it highlights why it is important to promote, rather than deter, class action lawsuits for seeking freedom from immigration detention.

IV. FURTHER CONSIDERATIONS AND ROADS TO FREEDOM

America has power, but not justice.
In prison, we were victimized as if we were guilty.
Given no opportunity to explain, it was really brutal.
I bow my head in reflection but there is nothing I can do.
—CHINESE IMMIGRANT DETAINED AT ANGEL ISLAND IN SAN FRANCISCO (1910–1940)[361]

A. *Racial Inequality and Legal Representation*

During the late nineteenth and early twentieth centuries, in the midst of the Second Industrial Revolution, immigration to the United States increased, with people from countries previously not as popular making the long trek to America for—among other reasons—greater job opportunities.[362] On the west coast, immigrants from southern and eastern Europe, Australia, New Zealand, Mexico, Central and South America, and Asia arrived at the Angel Island Immigration Station in the San Francisco Bay.[363] However, beginning in the early twentieth century, arriving Chinese immigrants were singled out and detained at Angel Island pursuant to the Chinese-exclusionary laws in place at the time.[364] The Chinese-exclusionary laws prevented Chinese

359. *See supra* Part III, pp. 47–49.

360. *See supra* Part I, pp. 15–16; Part II, pp. 21–23.

361. *Angel Island Immigration Station Poetry*, *1910-1940*, Ancestors in the Americas (last accessed Nov. 9, 2020), http://www.cetel.org/angel_poetry.html (citing excerpts from HIM MARK LAI, GENNY LIM & JUDY YOUNG, ISLAND POETRY AND HISTORY OF CHINESE IMMIGRANTS ON ANGEL ISLAND, 1910-1940 (1991)).

362. *See History of Angel Island Immigration Station*, ANGEL ISLAND IMMIGR. STATION FOUNDATION (last accessed Apr. 30, 2020), https://www.aiisf.org/history [https://perma.cc/4RCS-58L5].

363. *See id.*; *see also* Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 CAL. W. L. REV. 219, 225 (2017).

364. *See* Dech, *supra* note 363 ("Unlike Ellis Island, which detained immigrants in a minimal way, a facility called Angel Island in San Francisco Bay detained predominately Asian immigrants for extended periods of time.").

immigrants from entering the United States unless they could prove they were related to American citizens.[365] As a result, hundreds of Chinese immigrants suffered for months, sometimes years, in detention—being interrogated to show they belonged.[366] The plight of tens of thousands of noncitizens imprisoned across the United States every day resonates with the anguish Chinese immigrants suffered at Angel Island. While the poems etched on the walls of the 1910 facility represented a specific historical era of racism and xenophobia made explicit in immigration laws, the modern political and legal machinery of immigration detention continues to preserve and effectuate these harmful ideologies.

Although no provision of the INA specifies detention for particular racial or ethnic groups, about 89% of detained noncitizens in the United States are from just four countries: Mexico, El Salvador, Guatemala, and Honduras.[367] In the lead-up to and during the Trump administration, certain remarks the President made regarding immigrants, particularly about Mexican and Muslim immigrants, made the racial undertones of U.S. immigration policy more obvious.[368] As with other social institutions, embedded in the history of immigration in the United States are racial prejudice and a sense of *"otherism"* that are closely connected to the call for greater legal representation. In an article on race and the right to counsel in the criminal context, Professor Gabriel Chin argues that although *Gideon* arose at a time when African Americans were subject to Jim Crow, "to the extent that *Gideon* was intended to promote racial equality . . . it has failed."[369] This raises the question: would a right to appointed counsel for detained noncitizens create an effect similar to Professor Chin's view about the right to appointed counsel in the criminal justice system of legitimizing,[370] rather than confronting and solving, the racial inequality embedded in the immigration detention system? Relatedly, do the systemic racial effects of immigration detention call for a greater need for the class device to enable institutional reform litigation? These questions and the contours of the relationship between racial/nationality-based discrimination,

---

365. *See* Beenish Ahmed, *The Lost Poetry of the Angel Island Detention Center*, THE NEW YORKER (Feb. 22, 2017), https://www.newyorker.com/books/page-turner/the-lost-poetry-of-the-angel-island-detention-center [https://perma.cc/2FJF-S5BF].

366. *See id.*; *see also* Dech, *supra* note 363.

367. *See* Emily Ryo and Ian Peacock, *The Landscape of Immigration Detention in the United States,* AMERICAN IMMIGRATION COUNCIL (Dec. 5, 2018), https://www.americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states [https://perma.cc/V7BX-W5XN] ("The U.S. deportation regime has been called a 'gendered racial removal program' that targets Latino men.").

368. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018); Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time (Aug. 31, 2016), https://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/YS75-YSYK].

369. *See* Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236, 2251 (2013).

370. *See also* Felipe Hernandez, *Not a Matter of If, but When: Expanding the Immigration Caging Machine Regardless of Nielsen*, 22 HARV. LATINX L. REV. 87, 94 (2019) (arguing that scholarship advocating to reform immigration detention and removal proceedings instead of abolition helps to "refine and bolster the crimmigration system's sophisticated ability to marginalize noncitizen people").

immigration detention, and legal representation are subjects ripe for future research and scholarship.

B. *Additional Considerations and Roads*

The constitutional and procedural pathways analyzed in Parts II and III can be analogized to two wide highways, with multiple lanes and exits to local roads, all leading to the destination of freedom from immigration detention. Here, the lanes on both pathways designated access to legal representation as the mode of transportation, but the discussion is incomplete in its assessment of how those lanes could be constructed in reality. In particular with the due process argument, while the analysis of *Mathews'* third factor on cost and the government's interest in avoiding a right to appointed counsel covers this to some extent, further empirical research on models to implement a right to appointed counsel would benefit the scholarly discussion and perhaps even be necessary if the argument were to be litigated. For this, as a starting point, it would be useful to study existing systems that guarantee counsel for all detained noncitizens such as the NYIFUP and comparable organizations in other states.[371]

Access to legal representation is also not the only lane on these highways; lanes allowing other types of vehicles not discussed in this Article could also lead to freedom from detention. For example, an express lane to freedom might focus on the substance of the underlying due process claims in the class actions discussed in Part III,[372] perhaps arguing for a due process right to a bond hearing immediately or soon after ICE's initial custody decision and periodic bond hearings thereafter if bond is initially denied. Furthermore, the options are not limited to lanes on these highways. For instance, a local road off the highway might advocate for abolition of the immigration detention regime,[373] and/or alternatives to the immigration detention regime, such as attorney Phil Torrey's argument that "the mandatory detention statute can be interpreted to afford DHS and Immigration Judges discretion to make custody determinations that utilize alternatives to detention that are less costly and more humane."[374] These ideas, their potential to achieve freedom from detention, and their benefits and limits present possibilities for further exploration.

---

371. *See New York Immigrant Family Unity Project, supra* note 31 ("Local elected officials in cities such as Boston, Chicago, San Francisco, and Los Angeles have replicated the NYIFUP model to protect the due process rights of their constituents.").

372. *See supra* Part III, pp. 216–218.

373. *See* Hernandez, *supra* note 370.

374. Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879, 883 (2015).

CONCLUSION

Immigration detention is often coupled with, and sometimes overshadowed by, the risk for deportation. In that construction, immigration detention is treated as but one element of larger issues within the deportation system. By isolating immigration detention as a crisis on its own, the aim here has been not to trivialize the problems in removal proceedings, but to emphasize the benefits of, and need for, a specialized focus on achieving freedom from "civil" imprisonment. The pathways chart two broad solutions to help individuals like Mr. Lora. The constitutional pathway envisions a paradise where all detained noncitizens hoping to challenge their detention can receive the aid of a lawyer who will secure a custody hearing and win release on the merits at the hearing. The procedural pathway, while perhaps less ambitious, aims to do more with less by highlighting and advocating for the utility of the class action device as a powerful tool capable of getting detained class members a custody hearing and making it easier for them to win at their individualized hearings. As the discussion in Part IV shows, these are two of the many possible avenues to obtaining freedom from detention. In light of the coronavirus pandemic, as detained noncitizens have been filing individual habeas petitions and class action lawsuits seeking release from immigration detention facilities failing to provide adequate safeguards for detainees' health,[375] the need for attention to the lack of a meaningful chance to seek freedom from detention is now greater than ever.

375. *See, e.g.*, Ferreyra v. Decker, No. 20 CIV. 3170, 2020 WL 2612199, at *12 (S.D.N.Y. May 22, 2020) (multi-party habeas action); Thakker v. Doll, 451 F. Supp. 3d 358 (M.D. Pa. 2020) (several petitioners, but not class action); C.G.B. v. Wolf, No. 20-CV-1072, 2020 WL 2935111, at *35 (D.D.C. June 2, 2020) (denying motion to certify nationwide class action of transgender individuals in immigration detention); *see also* Aditi Shah, *The Role of Federal Courts in Coronavirus-Related Immigration Detention Litigation,* LAWFARE (Jun. 29, 2020), https://www.lawfareblog.com/role-federal-courts-coronavirus-related-immigration-detention-litigation [https://perma.cc/6HWY-RSVB] (analyzing ongoing litigation to improve detention conditions and/or release people from immigration detention because of the pandemic).