Habeas Class Actions: Current Opportunities and Challenges in Immigration Law

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The explosion of “a massive deportation and detention infrastructure” in recent years has spurred a new era of advocacy in immigration law.¹ Statutory changes that expand detention and deportation while simultaneously restricting judicial review² have both increased enforcement and fundamentally reshaped the immigration field. One major change has been to the longstanding existence of habeas jurisdiction to contest the legality of executive detention and deportation.³ In 2001, the Supreme Court held that despite statutory changes, habeas jurisdiction remained available in two vital contexts: to review legal questions in removal decisions in St. Cyr,⁴ and to “challenge detention that is without statutory authority” in Zadvydas.⁵ This essay focuses on the latter type of case—challenges to detention—and one tool for bringing those challenges on a scale that helps keep pace with the growth of immigration detention: habeas class actions.

Habeas class actions have been an important method for bringing structural reform challenges to immigration detention for several decades now,⁶ but in one that recently made it to the Supreme Court—Jennings v. Rodriguez—the Court divided on key questions of jurisdiction

⁴ INS v. St. Cyr, 533 U.S. at 310.
⁶ The University of Michigan’s Civil Rights Litigation database returns 31 results since 1981 for immigration detention cases in which both habeas relief and class status were sought. CIVIL RIGHTS LITIGATION CLEARINGHOUSE, UNIV. MICH., https://www.clearinghouse.net/search.php.
and expressed skepticism about whether a class action was appropriate for the relief sought.7

Similar jurisdictional concerns were echoed by a divided Court the next year in Nielsen v. Preap.8 Lower courts have continued certifying habeas classes in the wake of these two cases, but they illustrate the difficulties of bringing a successful habeas class action even where it is theoretically possible.

In Part I, I give a brief overview of the history and legal framework of habeas corpus and civil immigration detention, along with examples of how habeas class actions have been used to challenge elements of each of the major detention schemes. In Part II, I describe some obstacles to habeas class actions: statutory restrictions, Rule 23, standing, exhaustion, and mootness, with a few examples of habeas classes that have overcome those obstacles or failed to. Part III reviews the importance of habeas class actions in immigration, and argues that both habeas and class actions should be interpreted expansively as a necessary backstop to arbitrary detention.

I. Overview and Framework

a. Historical Background

The Writ of Habeas Corpus, which stretches back to English common law and is enshrined in the U.S. Constitution, is celebrated as one of the great protections of liberty in our democratic society.9 It occupies a unique space in legal procedure, encompassing elements of “civil, appellate, collateral, equitable, common law, and statutory procedure.”10 Unfortunately, in the U.S. today it offers relief to only the smallest fraction of petitioners and has arguably failed

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7 Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (the Ninth Circuit to reassess jurisdiction and “whether respondents can continue litigating their claims as a class”).
10 RANDY HERTZ & JAMES LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 (7th ed., 2018).
as a meaningful check on the state’s detention power. This has led commentators to suggest that for habeas corpus to truly protect individual liberty, it should be dramatically reformed.

The idea that habeas class actions “should be welcomed in view of the burden on the federal courts resulting from the vast increase in habeas corpus applications” is neither new nor surprising in light of the massive scale of incarceration in the U.S. Between the 1960s and 1990s, they were used in the criminal context, as “[h]abeas corpus class action representatives sought to litigate common issues on claims that criminal convictions were unconstitutional or violated federal law… such as access to counsel in capital cases, access to legal materials, disparate sentences for juveniles, and the constitutionality of the death penalty.” The exhaustion requirements imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA) made joinder in post-conviction habeas cases all but impossible, and the Supreme Court in Calderon v. Ashmus held that the Declaratory Judgment Act could not be used to challenge an AEDPA provision before the class members had filed habeas petitions and met those requirements. Although not a habeas class action itself, the reasoning in Calderon

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11 GREGORY, supra note 9 at 293-96 (describing how the sheer size of the modern U.S. detention state renders habeas as traditionally construed an ineffective remedy for the vast majority of prisoners); Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 CALIF. L. REV. 1, 6 (2010) (arguing that “federal habeas review of state convictions has become a waste of resources while providing almost no real relief, even to deserving petitioners”).

12 See GREGORY, supra note 9 at 309 (arguing for reconsideration of Tarble’s Case “to restore habeas corpus as it once was – a states’ right against federal detention power”); Brensike Primus, supra note 11 at 7 (proposing a model in which “a petitioner... would also have to produce some evidence that the violation was systemic rather than an idiosyncratic error in his case”).

13 See Multiparty Federal Habeas Corpus, 81 HARV. L. REV. 1482, 1483 (1968) (suggesting habeas class actions could reduce the burden of post-conviction petitions on federal courts).

14 Brandon L. Garrett, Aggregation in Criminal Law, 95 CALIF. L. REV. 383, 404-05 (2007); see also HERZT & LIEBMAN, supra note 10 at § 11.4, fn. 9 (collecting habeas class action cases).

15 Calderon v. Ashmus, 523 U.S. 740, 747-48 (1998) (“[A]ny claim by a prisoner attacking the validity or duration of his confinement must be brought under the habeas sections of Title 28…. this means that a state prisoner is required to exhaust state remedies before bringing his claim to a federal court. But if respondent Ashmus is allowed to maintain the present action, he would obtain a declaration as to the applicable statute of limitations in a federal habeas action without ever having shown that he has exhausted state remedies.”).
dramatically curtailed class action habeas as a potential method for structural challenges by state prisoners, leading one scholar to decry it as “the end of the habeas corpus class action.”

But collateral review of criminal convictions is not the only context in which habeas class actions can be brought. 28 U.S.C. § 2241 remains a pathway for individuals to challenge executive detention, including in the immigration context. Just as the large number of post-conviction habeas petitions is related to the massive size of the U.S. criminal justice system, as immigration detention has expanded in scope and size over the past several years, habeas petitions challenging that confinement have increased, as well.

Immigration detention is at its most massive level ever. At the end of 2018, ICE was holding 47,486 individuals in 215 facilities across the country, about 10% of whom had been detained over six months. In contrast, the average daily population of immigrant detainees in 1994 was 6,785. Just as the U.S. outpaces the rest of the world in incarceration, it outpaces the rest of the world in immigration detention, for example by admitting 323,591 individuals to detention in 2017 compared to only 28,978 in the UK that same year. Although immigration detention is not criminal, “civil detention” is very much a legal fiction. Immigrant detainees are housed in jails, often alongside criminal inmates, and have their freedom restricted. Given the

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16 Garrett, supra note 14 at 406.
18 GREGORY, supra note 9 at 294-95.
19 Emily Ryo, Detained: A Study of Immigration Bond Hearings, 50 L. & SOC’Y REV. 117, 121 (2016) (detailing the expansion of immigration detention since the 1980s alongside a rise in “tough on crime” rhetoric).
20 See Suits Challenging Confinement of Noncitizens Up, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) IMMIGRATION (Sept. 20, 2018) (reporting a 98.6% increase in immigration habeas filings between August 2013 and August 2018).
21 ICE Focus Shifts Away from Detaining Serious Criminals, TRAC IMMIGRATION 1-2 (June 25, 2019) https://trac.syr.edu/immigration/reports/564/.
23 Id. at 99.
25 Id.; Ryo, Understanding Immigration Detention, supra note 22 at 104-05.
slow pace of immigration proceedings, an individual who chooses to fight their case may face years in jail, not to mention a lower chance of success on the merits.26

b. Legal Framework of Immigration Detention

This massive scale of detention is authorized and implemented by statutory provisions of the INA, regulations, and Board of Immigration Appeals (BIA) case law. There are four main statutory provisions that authorize detention: 8 U.S.C. §§ 1226(a), 1226(c), 1225(b), and 1231(a), and each has its own nuances that have been challenged through habeas class actions.

The permissive detention statute, 8 U.S.C. § 1226(a), allows an immigration judge to detain a person pending adjudication of their case, or release them on conditional parole or a bond not less than $1,500.27 The BIA places the burden of proof on the detainee to show that he or she is not a danger to society or a flight risk.28 If the detainee fails to meet the burden of showing he or she is not a danger, bond is denied.29 The amount is supposed to guarantee future appearance in court, but the BIA has stated in multiple unpublished cases that ability to pay is irrelevant.30 Whether to grant bond, the amount, and how to weigh the factors are discretionary.31

Multiple aspects of § 1226(a) bond hearings have been challenged through class actions seeking habeas relief. For example, immigration judges in the Ninth Circuit are now required to

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26 Two interactive datasets from TRAC Immigration allow us to reach this conclusion. *Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION (last visited Nov. 17, 2019) https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (setting the graph to average days for the entire U.S. shows a dramatic rise in processing time, reaching an average of 578 days to resolve a case in fiscal year 2018); *Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/nta/ (last visited Nov. 17, 2019) (filtering by custody and outcome shows that a full 93% of detained individuals since 2001 were ordered removed or accepted voluntary departure, compared to only 39% of those who were never detained).

27 8 U.S.C. § 1226(a). This is also referred to as 236(a) detention, after its numeration in the INA.


consider ability to pay when setting bond as a result of the habeas class action *Hernandez v. Sessions*, which successfully argued that failure to do so led to unconstitutional imprisonment for poverty. Many courts have found that due process requires the government to bear the burden of proof in a § 1226(a) bond hearing, including a recent habeas class action, *Brito v. Barr*. In contrast, under the mandatory detention scheme of 8 U.S.C. § 1226(c), immigrants with certain criminal convictions are detained without bond. Mandatory detention began in 1990 but the list of crimes expanded considerably in IIRIRA. Section 1226(c) cross-references the removability and inadmissibility provisions, and includes crimes relating to controlled substances, a list of “aggravated felonies”—which may not even be felonies, and “crimes involving moral turpitude.” An individual detained under § 1226(c) has the right to an initial “Joseph hearing” to contest that classification. While § 1226(c) uses the phrase “take into custody,” the BIA has interpreted that to require detention rather than alternatives like

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35 8 U.S.C. § 1226(c). This is also referred to as 236(c) detention, for INA § 236(c).


37 IIRIRA, *supra* note 2 at § 303(a) (amending 8 U.S.C. 1226(c) to require mandatory detention for a list of criminal inadmissibility or removability grounds).


39 8 U.S.C. § 1227(a)(2)(A)(iii) (2018). “Aggravated felony” is in turn defined in 8 U.S.C. § 1101(a)(43) and lists offenses like theft (G), failure to appear in court (T), and obstruction of justice (S); although whether a conviction is an aggravated felony depends on the length of the sentence and the elements of the state law. The list also includes a “crime of violence,” which is defined in yet another section of the U.S. Code, part of which was found to be unconstitutionally vague in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).


42 8 U.S.C. § 1226(c)(1).
electronic monitoring. Thus, an individual may be detained under this provision for years while his or her case moves through immigration court, resulting in an extended loss of liberty.

The facial constitutionality of mandatory detention was upheld by the Supreme Court in *Demore v. Kim*, but multiple circuits have determined that Due Process requires reading an implicit reasonableness requirement into § 1226(c) making detention unconstitutional when “prolonged.” One such case, which set a bright-line rule requiring a bond hearing following six months of prolonged detention in the Ninth Circuit, was the habeas class action that reached the Supreme Court as *Jennings v. Rodriguez*. Two habeas classes that reached the Supreme Court a year later as *Nielsen v. Preap* challenged the government’s application of § 1226(c) to individuals who had been released from criminal custody—sometimes years earlier—before being detained by ICE, on the basis that § 1226(c) only requires the Secretary to take those individuals into custody “when the alien is released.” The Court rejected that argument on the merits, but splintered on the questions of jurisdiction for judicial review and mootness.

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45 Demore v. Hyung Joon Kim, 538 U.S. 510, 530 (2003). *Demore* was a habeas case, though not a class action. See also Alex Sirotta, *Note: Locked Up: Demore, Mandatory Detention, and the Fifth Amendment*, 74 Wash. & Lee L. Rev. 2337, 2366-70 (criticizing the *Demore* decision).

46 After *Demore*, a split arose between circuits that required a case-by-case determination of when detention became “unreasonable,” and those that set a bright-line rule of six months after which detention became presumptively unreasonable. Sirotta, *supra* note 45; compare Sopo v. Attorney General, 825 F.3d 1199, 1215 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486, 497 (1st Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221, 233 (3d Cir. 2011); Hoang Minh Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003) (adopting a fact-specific analysis); with Rodriguez v. Robbins, 715 F.3d 1127, 1133 (9th Cir. 2013); Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015) (adopting a bright-line rule of six months).

47 Rodriguez v. Robbins, 715 F.3d at 1138.


49 See *id.* at 962-63 (finding jurisdiction to review in the plurality section of the opinion).
If an arriving immigrant is inadmissible, he or she is known as an “arriving alien” and is subject to expedited removal without a hearing.\(^{50}\) However, if he or she indicates a fear of persecution, 8 U.S.C. § 1225(b) states that he or she “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”\(^{51}\) If found to have a credible fear, a person may be paroled into the U.S.\(^{52}\) or “shall be detained for further consideration of the application for asylum.”\(^{53}\) For years, individuals who passed a credible fear interview and were transferred to removal proceedings were eligible for bond,\(^{54}\) but over the summer, Attorney General Barr set a new precedent that they are instead subject to mandatory detention as long as their asylum proceedings last.\(^{55}\) That interpretation was challenged—and enjoined—by a nation-wide habeas class action in *Padilla v. ICE*.\(^{56}\)

The final type of detention is 8 U.S.C. § 1231, which covers individuals subject to final removal orders.\(^{57}\) It begins when a removal order becomes administratively final, and allows the

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\(^{52}\) 8 U.S.C. § 1182(d)(5)(A). A recent class action, though not a habeas petition, received a preliminary injunction requiring five ICE Field Offices to comply with its own internal directive when parole grant rates suddenly dropped from over 90% to nearly 0% following a change in administration. Damus v. Nielsen, 313 F. Supp. 3d 317 (D.D.C. 2018).


\(^{54}\) *See In re X-K*, 23 I. & N. Dec. 731, 736 (B.I.A. May 4, 2005) (“[T]hose provisions do not expressly alter the jurisdiction conferred by the regulations on Immigration Judges to redetermine the custody status of aliens in removal proceedings.”).

\(^{55}\) *See In re M-S*, 27 I. & N. Dec. 509, 509 (B.I.A. April 16, 2019) (“There is no way to apply those provisions except as they were written—unless paroled, an alien must be detained until his asylum claim is adjudicated.”).


\(^{57}\) 8 U.S.C. § 1231(a).
government to detain someone for 90 days to effectuate deportation. The removal of detainees to countries that lacked a functioning government to accept them was challenged under this statute through early habeas class actions, but ultimately that challenge was rejected on the merits. If removal is not possible in 90 days, the individual may be released under supervision, or may continue to be held if they are “a risk to the community or unlikely to comply with the order of removal.” DHS initially took the position that it could detain individuals indefinitely under this provision, but the Supreme Court held that detention under § 1231(a)(6) was presumptively reasonable for only six months, and that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute” in Zadvydas v. Davis.

This section also covers individuals who have been deported and returned to the country. Instead they are subject to “reinstatement” of the original removal order, with no opportunity to apply for relief unless they can show a reasonable fear of torture to qualify for withholding of removal, a form of relief similar to asylum with a higher evidentiary threshold. Whether an individual whose fear is found reasonable is subject to mandatory detention under § 1231(a)(6) or is entitled to a bond hearing under § 1226(a) during withholding-only proceedings is currently a circuit split, but all the courts to address it have determined that either statutory

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58 Id.
59 See Ali v. Ashcroft, 213 F.R.D. 390, 396 (W.D. Wash. 2003) (seeking to enjoin detention and deportation of a class of Somalis who could not be deported because there was no functioning government of Somalia to accept them). This decision was vacated following the Supreme Court’s decision in Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005), which held that § 1231(b) did not require consent from the country of removal. Ali v. Gonzales, 421 F.3d 795, 796 (9th Cir. 2005) (vacating and remanding to reconsider class certification).
62 Zadvydas v. Davis, 533 U.S. 678, 699, 701 (2001). Zadvydas was a consolidation of two habeas cases, in one of which the district court considered “about 100 similar cases together [and] issued a joint order.” Id. at 686.
63 8 U.S.C. § 1231(a)(5).
64 8 U.S.C. § 1231(b)(3).
scheme requires a bond hearing following prolonged detention.65 Recently, the Eastern District of Virginia certified, and granted summary judgment to, a habeas class of immigrants in withholding-only proceedings, entitling them to an individualized bond hearing.66 Two more habeas class actions currently being litigated in the Ninth Circuit argue that due process entitles § 1231(a)(6) detainees to a bond hearing following six months of detention.67

*Jennings v. Rodriguez* was a habeas class action that challenged prolonged detention for four subclasses of individuals held under each of these provisions.68 The Ninth Circuit had held that each of the statutes implicitly required bond hearings after six months of detention to avoid an unconstitutional reading of those provisions.69 That statutory interpretation was overturned by the Supreme Court, but the Court remanded to consider the constitutional issue.70 In addition, the Court directed the Ninth Circuit to redetermine whether the class was appropriately certified and whether there was continuing jurisdiction now that the statutory claim had been rejected.71

II. Potential Obstacles in Habeas Class Actions

While habeas class actions have been and continue to be creatively used to challenge various aspects of the immigration detention scheme described above, there are major obstacles to bringing a habeas class action in the immigration context. Lower courts have struggled with

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65 Compare Padilla-Ramirez v. Bible, 862 F.3d 881, 886 (9th Cir. 2017) and Guerrero-Sanchez v. Warden of York County Prison, 905 F.3d 208, 219 (3d Cir. 2018) (determining that detention during withholding-only proceedings is governed by § 1231(a)(6)) with Guerra v. Shanahan, 831 F.3d 59, 64 (2d Cir. 2016) and Chavez v. Hott, 940 F.3d 867, 882 (4th Cir. 2019) (determining that § 1226(a) governs the detention of individuals withholding-only proceedings).
69 Rodriguez v. Robbins, 715 F.3d at 1138.
70 Jennings v. Rodriguez, 138 S. Ct. at 843.
71 Id. at 851-52.
these obstacles for years, but especially after Jennings. The largest obstacles are statutory restrictions on judicial review imposed by IIRIRA and the REAL ID Act. Three clauses are particularly relevant to habeas class actions: 8 U.S.C. §§ 1252(b)(9), 1252(f)(1), and 1226(e). In addition, standing, mootness, and exhaustion are ever-present obstacles. Finally, Rule 23 is a hurdle, and whether a class can be certified will generally depend on the legal question raised. These obstacles, with examples of how courts have addressed them, are each discussed below.


8 U.S.C. § 1252(b)(9) requires that “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title” only be reviewable on review of a final order, and strips jurisdiction under any other provision, including § 2241. This provision was most recently amended in the REAL ID Act of 2005, to specifically reference § 2241 after the Supreme Court’s decision in St. Cyr. Read broadly, it would mean no habeas petition could be filed except with a petition for review of a final order of removal, making detention pending that final order essentially unreviewable.

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77 Family, supra note 3 at 84.
This was the provision that led to the split of the plurality and concurrence in *Jennings*, and again divided the court in *Preap*. In *Jennings*, the justices disagreed on whether review of the legal question—whether bond hearings were required following six months of prolonged detention—was foreclosed by § 1252(b)(9) because that detention could be considered “arising from” a “proceeding brought to remove an alien.” The plurality chose to interpret “arising from” narrowly. It listed types of claims such as *Bivens* actions or state torts that might conceivably “arise from” detention, and concluded that “cramming judicial review of those questions into review of final removal orders would be absurd” and “would also make claims of prolonged detention effectively unreviewable.” The concurrence disagreed, and thought that “no court has jurisdiction over this case.” The concurrence then considered whether this restriction violated the Suspension Clause, but instead decided that the suit was not truly a habeas petition. Despite the disagreement, neither party in *Jennings* had even raised § 1252(b)(9) before the Supreme Court. The Court divided along the exact same lines a year later in *Preap*, which addressed the statutory scope of mandatory detention, with both the plurality and concurrence reiterating their arguments in *Jennings*.

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81 *Id.*
82 *Id.* at 840.
83 *Id.*
84 *Id.* at 852.
85 *Id.* at 858.
86 See *id.* at 841 (“The parties in this case have not addressed the scope of § 1252(b)(9), and it is not necessary for us to attempt to provide a comprehensive interpretation.”); *id.* at 853 (“Although neither party raises § 1252(b)(9), this Court has an ‘independent obligation’ to assess whether it deprives us and the lower courts of jurisdiction.”) (Thomas, J., concurring).
87 See *Nielsen v. Preap*, 139 S. Ct. at 958-59 (describing the legal question); *id.* at 962 (referencing the earlier reasoning in *Jennings* for why § 1252(b)(9) did not apply) (Alito, J., writing for the plurality); *id.* at 974 (referencing earlier concurrence in *Jennings* for why no court has jurisdiction) (Thomas, J., concurring).
On remand, the Ninth Circuit agreed with the plurality about its own jurisdiction, before remanding the class certification question and constitutional question to the district court.\textsuperscript{88} When discussing § 1252(b)(9), it quoted the plurality’s language that petitioners were “not asking for review of an order of removal; [] not challenging the decision to detain them in the first place or to seek removal; and [] not even challenging any part of the process by which their removability will be determined”—only their indefinite detention during that process.\textsuperscript{89}

Since then, other lower courts have relied on the plurality’s analysis to determine when § 1252(b)(9) applies. The district court in \textit{Alvarez v. Sessions} found it lacked jurisdiction over a habeas petition\textsuperscript{90} asserting that the transfer of petitioners between detention facilities interfered with their right to access counsel.\textsuperscript{91} The court discussed \textit{Jennings} and determined that “‘cramming’ issues related to legal representation during removal proceedings into the [Petition for Review] process neither creates an absurdity in the way contemplated by the Supreme Court in \textit{Jennings}, nor places those decisions outside of meaningful judicial review.”\textsuperscript{92}

Similarly, the putative habeas class action \textit{Cancino-Castellar v. Nielsen} alleged that the government’s practice of unnecessary delay in detaining immigrants prior to their first hearing violated the Fourth and Fifth Amendments.\textsuperscript{93} The district court had initially dismissed those claims for a lack of jurisdiction under § 1252(b)(9), determining that the delay “cannot be extricated from the removal proceedings,” and rejecting the argument that challenges to

\textsuperscript{88} \textit{Rodriguez v. Marin}, 909 F.3d 252, 255-56 (9th Cir. 2018).
\textsuperscript{89} \textit{Id.} at 256.
\textsuperscript{90} This particular habeas petition included ten petitioners, but did not seek class certification. \textit{Alvarez v. Sessions}, 338 F. Supp. 3d 1042, 1044 (N.D. Cal. 2018).
\textsuperscript{91} \textit{Id.} at 1045.
\textsuperscript{92} \textit{Id.} at 1049. \textit{But see Singh v. Gonzalez}, 499 F.3d 969, 972 (9th Cir. 2007) (holding, pre-\textit{Jennings}, that “a narrow claim of ineffective assistance of counsel in connection with a post-administrative filing of an appeal with the court of appeals… falls outside the jurisdiction-stripping provisions of the REAL ID Act”).
detention were categorically outside the scope of § 1252(b)(9). However, it reconsidered following *Jennings*. The district court determined that the clause continued to bar jurisdiction over the Fourth Amendment claim that the petitioners were being detained prior to the hearing without probable cause, because that claim was “challenging the decision to detain them in the first place,” which the plurality suggested would fall under § 1252(b)(9). But it reinstated the petitioners’ Fifth Amendment claim challenging the delay in providing an initial hearing because that delay was not a part of the removal process, and like the prolonged detention claims in *Jennings*, would be “effectively unreviewable” on a petition for review.

b. (Possible) limit on class-wide injunctive relief: 8 U.S.C. § 1252(f)(1)

Another provision of IIRIRA, 8 U.S.C. § 1252(f)(1), limits class-wide injunctive relief. It reads, “[N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [this chapter] other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.” Legislative history suggests this clause was intended to prevent broad injunctions that would prevent the new system from taking effect. Early cases discussing this provision lent support to the idea that courts could enjoin an unlawful *interpretation* of the

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95 Cancino-Castellar v. Nielsen, 338 F. Supp. 3d at 1115 (citing *Jennings*, 138 S. Ct. at 841). The district court also discussed how the plurality differed from prior Ninth Circuit law on § 1252(b)(9), and described the relevant question as no longer whether a claim was “inextricably linked” or “collateral” to removal proceedings, but rather “whether the claims otherwise challenge issues that are cognizable in the [Petition for Review] process.” *Id.* at 1114.
96 *Id.* at 1117 (citing *Jennings*, 138 S. Ct. at 840).
98 See *Jill Family, Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 31-32 (2006) (discussing the House Committee Report, H.R. Rep. No. 104-469 (I) at 161 (1996), which reads: “These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.”).
statutes on a class-wide basis, but that a determination of whether the law itself should be enjoined could only be made for individually affected petitioners, or by the Supreme Court.99

This was the argument that the Ninth Circuit relied on in the lead-up to Jennings, stating that § 1252(f)(1) “prohibits only injunction of ‘the operation of’ the detention statutes, not injunction of a violation of the statutes.”100 The Supreme Court appeared to agree, as it did not discuss § 1252(f)(1) as an obstacle to its own review, but directed the Ninth Circuit on remand to consider whether it could still offer injunctive relief now that the statutory basis for the injunction had been overruled, and if not, whether declaratory relief could sustain the class.101

On remand, the Ninth Circuit concluded it had jurisdiction despite § 1252(f)(1) at minimum to enter declaratory relief, and because “[a]ll of the individuals in the putative class are ‘individual[s] against whom proceedings under such part have been initiated’ and are pursuing habeas claims, albeit as a class…. Section 1252(f)(1) also does not bar the habeas class action because it lacks a clear statement repealing the court's habeas jurisdiction.”102 The Padilla v. ICE court soon followed this lead and found it had jurisdiction despite § 1252(f)(1) because the class was a collection of individuals already in removal proceedings, and because this was not a regular class action, but a habeas petition.103 Specifically, it reasoned that “[t]here is nothing… to indicate that, absent a specific restriction, this Court is not authorized to exercise the full panoply of its habeas powers, including its equitable powers to enjoin conduct found unconstitutional.”104

This same interpretation failed in Hamama v. Homan, in which the Sixth Circuit found that while the district court had jurisdiction over the class’s prolonged detention claims, it could

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99 Id. at 29-30 (collecting early cases).
100 Rodriguez v. Hayes, 591 F.3d 1105, 1120 (9th Cir. 2010).
102 Rodriguez v. Marin, 909 F.3d at 256-57.
104 The district court also made a point of rejecting the adverse reasoning in Hamama, discussed infra. Id.
not enter injunctive relief because of § 1252(f)(1). The petitioners there also argued that the statute didn’t expressly prohibit class certification, and its reference to “an . . . alien . . . against whom proceedings under such part have been initiated” was intended as a carveout, making § 1252(f)(1) inapplicable if the entire certified class was already in immigration proceedings. But the Sixth Circuit noted, “there is a big difference between barring the certification of a class under Rule 23 and barring all injunctive relief. The former bars a class action regarding anything; the latter only bars injunctive relief for anyone other than individuals.” It also rejected the argument that § 1252(f)(1) suspended the writ of habeas, since § 1252(f)(1) doesn’t preclude traditional habeas relief or injunctive habeas relief for individuals.

Regardless of the disagreement, the carveout argument for why § 1252(f)(1) should not apply to a given habeas class is fortunately not always necessary. First of all, class-wide declaratory relief will often be a sufficient remedy and is still available by the plain terms of § 1252(f)(1), which the Supreme Court plurality in Preap recognized the next year. Moreover, the argument that § 1252(f)(1) doesn’t prohibit injunctive relief restraining the unlawful interpretation of a statute still applies to a range of cases challenging interpretations and regulations. For example, in Brito, the court held that § 1252(f)(1) didn’t apply because petitioners were requesting an injunction against agency regulations implementing the statute,

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106 Id.
107 Id. at 878.
108 Id. at 879. The petitioners in Hamama also raised the argument that their request for bond hearings following prolonged detention would not “enjoin or restrain the operations” of the detention statutes, but rather ensure that those statutes were being correctly implemented. The Sixth Circuit rejected that argument, concluding Jennings had foreclosed the possibility of any such statutory requirement, and went on to say that requiring bond hearings for prolonged detention was a restraint on the operation of the statute. Still, reasonable minds can differ as to whether forcing the government to justify prolonged, rather than initial, detention is truly a restriction on the operation of a statute. Id. at 879-80.
109 Nielsen v. Preap, 139 S. Ct. at 962. (“Whether the [district] court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs’ request for declaratory relief, and for independent reasons given below, we are ordering the dissolution of the injunction that the District Court ordered.”).
not the statute itself. The court then issued an injunction requiring the government to bear the burden of proof in § 1226(a) bond hearings, which had been established by BIA precedent but not mandated by statute.

c. Non-reviewability of discretionary decisions: 8 U.S.C. § 1226(e)

A final provision that presents a potential limit to habeas class actions is 8 U.S.C. § 1226(e), which states that “The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.” The Supreme Court has clearly held, however, that this provision “does not preclude ‘challenges [to] the statutory framework that permits [the alien’s] detention without bail.’” In other words, § 1226(e) does not bar habeas class actions challenging the decision-making process rather than the actual decision. For example, in Hernandez, a habeas class challenged immigration judges’ refusal to consider ability to pay in setting bond. Though bond amount is discretionary, the court found that § 1226(e) did not bar review where the petitioner was challenging the constitutionality of the process—and its failure to include a certain discretionary factor—rather than its application. This has continued to be the case after Jennings, including in the Ninth Circuit’s decision on remand.

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110 See Brito v. Barr, 395 F. Supp. 3d at 146 (“In any event, § 1252(f)(1) strips courts of jurisdiction to enjoin the operation of the statute, not any agency regulation or precedent…”).

111 Id.

112 8 U.S.C. § 1226(e).


115 Id.

116 Rodriguez v. Marin, 909 F.3d at 256; see also Rivera v. Holder, 307 F.R.D. 539, 546 (W.D. Wash. 2015) (“While an IJ’s discretionary judgment in how it applies the statute is not subject to review, this Court has found no authority supporting the notion that an IJ has the discretion to misinterpret the statute under which he operates.”). A similar statute foreclosing judicial review of discretionary parole decisions, 8 U.S.C. § 1252(a)(2)(B)(ii), was found not to be an obstacle to jurisdiction for the class of asylum seekers who challenged not the denial of parole, but the de facto denial of an individualized determination. Damus v. Nielsen, 313 F. Supp. 3d at 327.
Standing has not been a major obstacle to class habeas petitions in the immigration context before or after Jennings. In fact, Jennings did not even mention standing at all. One way it occasionally arises in the lower courts, though, is when the injury is purely procedural, such as in discretionary bond hearings under § 1226(a). For instance, in Rivera v. Holder, the government argued that the petitioners were not injured by the immigration judge’s refusal to consider release on conditional parole instead of bond. The court determined that the inadequate bond hearing was a procedural injury, for which the named petitioner only needed to show “(a) that she has a procedural right that, if exercised, ‘could’ protect her concrete interests and (b) that those interests fall within the zone of interests protected by the statute at issue.” It had no trouble finding that the petitioner had an interest in an adequate bond hearing and standing to challenge the defects in that hearing even before her detention became prolonged.

In contrast, mootness often presents a more difficult obstacle due to the very nature of immigration detention. Individual immigration habeas claims are susceptible to being dismissed as moot if the petitioner is either released, granted immigration relief, or deported before the habeas petition is resolved. When ruling on class certification, though, courts have held that the named petitioner’s release on bond does not moot a claim if the government had the ability to

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119 Id. at 545.
120 Id. at 548.
revoke that bond and refused to “unconditionally assert that Plaintiffs will not be re-detained”\textsuperscript{122} or if the release imposes conditions of supervision such as electronic monitoring.\textsuperscript{123}

Even where the named plaintiff’s claim is definitely mooted before certification, such as after being unconditionally released following a grant of immigration relief, courts have been permissive in certifying classes under the “inherently transitory” exception.\textsuperscript{124} As the district court explained in \textit{Hernandez}, this exception is grounded in the “capable of repetition yet evading review” exception to mootness, and allows a class to be certified even if a claim becomes moot before certification if other class members will have the same problem and the trial court likely could not rule on the motion before any such claim expired.\textsuperscript{125} This exception fits most immigration detention claims, “given the Government's ability to end the allegedly unconstitutional detention of an alien through removal or release” in these cases.\textsuperscript{126}

The Supreme Court blessed both these lines of reasoning in the \textit{Preap} plurality. When the two habeas classes were certified below, all the named plaintiffs had been released, but the Court held that mootness was not an obstacle because at least “one named plaintiff in both cases had obtained release on bond, as opposed to [immigration relief], and that release had been granted following a preliminary injunction…. Unless that preliminary injunction was made permanent and was not disturbed on appeal, these individuals faced the threat of re-arrest and mandatory detention.”\textsuperscript{127} The Court went further, though, and noted that even if there had not been a live claim, the inherently transitory exception would have applied.\textsuperscript{128}

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\textsuperscript{122} Padilla v. ICE, 387 F. Supp. 3d at 1225.
\textsuperscript{123} Rodriguez v. Hayes, 591 F.3d at 1118 (9th Cir. 2010).
\textsuperscript{124} \textit{See, e.g.}, Brito v. Barr, 395 F. Supp. 3d at 146; \textit{Padilla v. ICE}, 387 F. Supp. 3d at 1225.
\textsuperscript{126} Brito v. Barr, 395 F. Supp. 3d at 146.
\textsuperscript{127} Nielsen v. Preap, 139 S. Ct. at 963.
\textsuperscript{128} \textit{Id.}
\end{flushright}
e. Exhaustion of administrative remedies

28 U.S.C. § 2241 does not require exhaustion as a statutory matter. Although some provisions of the INA require exhaustion for review of a removal order, exhaustion is only prudential for habeas petitions challenging detention apart from the merits of removal. Exhaustion requires appeal to the BIA, but this necessarily prolongs detention, and may make habeas review impossible if the BIA is slower than the parallel immigration proceedings.

While the exact standard for when exhaustion is prudentially required varies by circuit, there are several widely applied exceptions. One of the most important is futility, which applies where the agency lacks the power to redress the issue, or has already addressed the issue and shows no indication that it intends to reconsider. Courts have waived exhaustion as futile even where the BIA could theoretically alter its policy if previous decisions indicate that it had already made up its mind. For example, in Hernandez, the court agreed that exhaustion would have been futile in challenging the immigration judge’s refusal to consider ability to pay because

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130 See Hertz & Liebman, 2 Federal Habeas Corpus Practice and Procedure § 42.2 (2019) (discussing exhaustion in immigration cases); El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 746 (9th Cir. 1992) (“Exhaustion of administrative remedies is statutorily required only if appellees are seeking to attack a final order of deportation or exclusion. We have joined a number of other circuits in drawing a distinction between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on an alleged pattern and practice of constitutional or statutory violations.”).
131 Yan Lan Wu v. Ashcroft, 393 F.3d 418, 422 (3d Cir. 2005) (“Where an immigration petitioner makes some effort to put the Board on notice of an issue being raised on appeal, he or she may be deemed to have exhausted his or her remedies.”).
132 See Hertz & Liebman, supra note 130 (listing exceptions for failure to exhaust such as “where exhaustion would be futile… or where the agency or some other governmental official has interfered with the petitioner’s ability to make effective use of the administrative or other remedy; or where the petitioner cannot practicably utilize the remedy because of the imminence of removal or some other harm; or…. utilization of the administrative procedure would serve no useful purpose; or where strict application… would result in a ‘manifest injustice.’”).
133 See, e.g., Rivera v. Holder, 307 F.R.D. at 552.
134 See, e.g., Order granting certification, Padilla v. United States ICE, 2019 U.S. Dist. LEXIS 36473 at *14 (W.D. Wash. 2019) (“[W]here a defendant’s policies are immutable, a futile effort at administrative exhaustion is not required.”); Cox v. Monica, 2007 WL 1804335 at *3 (M.D. Pa. 2007) (accepting that appeal of classification under § 1226(c) would have been futile based on unpublished BIA cases that suggested the BIA had “predetermined the issue before it”).
“in several unpublished cases the BIA has concluded that an alien's ability to pay the bond amount is not a relevant bond determination factor.”\textsuperscript{135} Similarly, in \textit{Rivera}, the court found unpublished BIA decisions and the EOIR handbook sufficient evidence that exhaustion would be futile on the issue of whether immigration judges must consider conditional parole.\textsuperscript{136}

f. Rule 23

Despite the skepticism of the \textit{Jennings} concurrence about whether “habeas relief can be pursued in a class action,”\textsuperscript{137} the Supreme Court has reviewed other habeas class action cases, including \textit{Preap}, without appearing too concerned.\textsuperscript{138} However, it is not obvious that Rule 23 even applies to habeas. The Conformity Clause of the Federal Rules of Civil Procedure states that the rules—such as Rule 23— are applicable “to proceedings for habeas corpus … to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions.”\textsuperscript{139} The Supreme Court declined to apply another civil rule (interrogatories) to habeas because habeas practice had not conformed to that practice when the Rules were enacted.\textsuperscript{140} Although habeas practice did not include multiparty actions when Rule 23 was enacted, courts have the power to utilize a similar procedure and rely on Rule 23 by analogy when certifying habeas classes.\textsuperscript{141} As the Ninth Circuit explained when

\textsuperscript{135} \textit{Hernandez v. Sessions}, 872 F.3d at 989. \textit{But see} \textit{Paz Nativi v. Shanahan}, 1:16-cv-08496 at *4 (S.D.N.Y., Jan. 23, 2017) (dismissed an individual habeas claim petition raising ability to pay for failure to exhaust because the BIA had no binding precedent on the issue).
\textsuperscript{136} \textit{Rivera v. Holder}, 307 F.R.D. at 552.
\textsuperscript{137} \textit{Jennings v. Rodriguez}, 138 S. Ct. at 858, fn. 7 (“This Court has never addressed whether habeas relief can be pursued in a class action. I take no position on that issue here...”) (Thomas, J., concurring) (internal citations omitted).
\textsuperscript{139} Fed. R. Civ. Pro. 81(a)(4).
\textsuperscript{141} \textit{See} United States ex. rel. \textit{Sero v. Preiser}, 506 F.2d 1115, 1125-26 (2d Cir. 1974) (determining that Rule 23 does not govern habeas actions, but allowing a “multi-party proceeding similar to the class action” anyway); \textit{Bijeol v. Benson}, 513 F.2d 965, 968 (7th Cir. 1975) (agreeing that “a representative procedure analogous to the class action
affirming the certification of a habeas class in *Ali v. Ashcroft*, “although Rule 23 might be ‘technically inapplicable to habeas corpus proceedings,’ the courts have ‘applied an analogous procedure by reference to Rule 23.’”142

Even as district courts apply the requirements of Rule 23 to habeas classes, it is not clear whether those requirements are a ceiling or a floor.143 The majority in *Jennings* implied that Rule 23, and the required level of analysis under it, applies to habeas by instructing the lower court to reconsider whether a class action continued to be appropriate to litigate fact-specific due process claims in light of *Dukes*.144 District courts appear to apply the exact same analysis when certifying habeas classes as for any other certification under Rule 23, though.

The first requirement of 23(a), numerosity, is not generally contested in the immigration detention context.145 In *Abdi v. Duke*, the court found that numerosity was satisfied for a proposed class of asylum seekers who had passed a credible fear interview and been detained at a certain detention center for over six months even though the petitioners could only identify 28 class members.146 It reasoned that the situation was analogous to class actions in prison litigation

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142 *Ali v. Ashcroft*, 346 F.3d 873, 891 (9th Cir. 2003) (citing *Napier v. Gertrude*, 542 F.2d 825, 827 (10th Cir. 1976)) (opinion withdrawn on other grounds by *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005)); *see also Rodriguez v. Hayes*, 591 F.3d at 1117 (9th Cir. 2010) (“While ‘ordinarily disfavored,’ the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus.”).

143 *Compare* Bertrand v. Sava, 535 F. Supp. 1020, 1025 (S.D.N.Y. 1982) (“[M]ore stringent standards of commonality may apply to group habeas actions.”) *with* Bijecol v. Benson, 513 F.2d at 968 (“[W]e need not decide whether the District Court complied with the precise provisions of Rule 23 [, which are not applicable to these proceedings.]”) (internal citations omitted).


145 *See, e.g.*, Order granting certification of the classes, Padilla v. United States Immigration & Customs Enforcement, 2019 U.S. Dist. LEXIS 36473 at *6 (“Defendants do not challenge this element, and the Court finds that the requirement for numerosity has been satisfied.”); Cabrera Diaz v. Hott, 297 F. Supp. 3d at 626 (“Respondents do not challenge petitioners' ability to satisfy the numerosity and adequacy requirements”); Brito v. Barr, 395 F. Supp. 3d at 144 (“apparently conceding that the numerosity and adequacy of class counsel requirements are met...”).

in that “the fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant.”147

Adequacy is likewise not usually a highly contested issue, and usually arises when the named plaintiff’s claim varies from some class members in a significant way.148 For instance, plaintiffs in Gayle v. Warden sought to certify a class of § 1226(c) detainees, asserting that the form they were provided upon entry to detention was inadequate notice of their right to a Joseph classification hearing, and the procedures in those hearings violated due process.149 The court found that because the plaintiffs had received a different version of the form than current and future class members, they could not adequately represent the class on that issue.150 However, the plaintiffs were adequate to represent the class on the due process claims, and it did not matter that the representatives were all permanent residents while some class members lacked status, because the due process analysis did not turn on status.151

Commonality and typicality are generally addressed together, and depend on the specific legal question being raised. One way the government argues commonality and typicality are not met is by saying differences regarding types of detention or status between class members (or between members and representatives) matter for the type of remedy a court can provide, but those challenges will be overcome when the injury, such as a procedure that violates due process,

147 Id. (citing Dean v. Coughlin, 107 F.R.D. 331, 332-33 (S.D.N.Y. 1985)).
148 See, e.g. Cabrera Diaz v. Hott, 297 F. Supp. 3d at 626 (“Respondents do not challenge petitioners' ability to satisfy the... adequacy requirements.”). Adequacy of class counsel is even less of a concern, since the plaintiffs that try to certify habeas classes always have lawyers, usually large impact litigation advocacy groups. See, e.g., Brito v. Barr, 395 F. Supp. 3d at 144 (D. Mass. 2019) (“conceding that the... adequacy of class counsel requirements are met”).
150 Id. at *34.
151 Id. at *55-56.
is the same. Subclasses are also used if relief between members necessarily varies based on those differences. Unlike civil rights classes alleging discrimination, classes of detainees don’t face the same difficulty in showing “significant proof” of their common detention—no one is disputing that they are detained or what the procedures are, only the legality of that detention.

Much of the commonality analysis in these cases overlaps with certification under Rule 23(b)(2), but Jennings added a new wrinkle to this prior pattern as well. Before reaching the Supreme Court, the Ninth Circuit had held although class members were held under each of the different detention schemes, that did not defeat commonality because they were all challenging prolonged detention that had lasted over six months—the legality of which formed the “issue at the heart of each class member's claim for relief.” The Court in Jennings didn’t discuss commonality directly, but it did ask the Ninth Circuit to reconsider whether certification was appropriate under 23(b)(2) in light of Dukes. Applying Dukes makes both commonality and 23(b)(2) more difficult in prolonged detention classes post-Jennings. Now that the Court has overturned the statutory reading of those clauses, and due process is all that could entitle class members to a hearing following prolonged detention, it is possible that not all class members

152 See, e.g., Brito v. Barr, 395 F. Supp. 3d at 149 (holding that differences between class members who had received a defective bond hearing and those who had not received a hearing did not defeat commonality because the burden allocation question was the same); Gayle v. Warden Monmouth Cty. Corr. Inst., 2017 U.S. Dist. LEXIS 188498 at *40 (“[E]ach proposed class member may have different facts underlying his or her immigration case and some may not prevail in arguing that they are not ‘properly included’ in a mandatory detention category, but every proposed class member is subject to the same allegedly unconstitutional Joseph standard and procedural deficiencies.”).
153 See, e.g., Rodriguez v. Hayes, 591 F.3d at 1123 (“To the extent… that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical… it may counsel the formation of subclasses.”).
155 See id. at 1122-23 (holding that the proposed class satisfied Rule 23); Rodriguez v. Robbins, 804 F.3d 1060, 1066 (9th Cir. 2016) (recounting the procedural history of the Rodriguez cases).
157 See Shah, supra note 72 (explaining the hurdle Jennings created for due process class claims).
have “suffered the same injury.”158 Because due process may require a different outcome for each class member, there may no longer be “a single injunction or declaratory judgment would provide relief to each member of the class,” making certification under 23(b)(2) improper.159

This has been a major difficulty for prolonged detention classes since then. On remand from Jennings, the Ninth Circuit also remanded the certification question to the district court, noting that the subclasses may need to be modified, but “certainly no process at all may be a common characteristic of each of the statutes at issue.”160 Likewise, the court in Reid v. Donelan declined to decertify a § 1226(c) prolonged detention class post-Jennings.161 It found commonality and typicality were met even in the absence of a bright-line statutory rule because “the class still presents the common threshold question of whether their detention after six months without a bail hearing or reasonableness review violates the Constitution. Even if the answer to that question is no, the class still meets the commonality requirement.”162

In contrast, a district court that had previously certified a class of § 1225(b) immigrants detained over six months in Abdi v. Duke, decertified the class after Jennings.163 The court determined that the now-invalidated statutory interpretation requiring bond hearings at six months “was the linchpin to the Court's conclusion that individualized bond hearings could be applied across-the-board to each putative class member…. “164 It rejected the argument that due

159 Id. at 360.
160 Rodriguez v. Marin, 909 F.3d at 255.
162 Id. at *14-16 (summary judgement granted in part, Reid v. Donelan, 390 F. Supp. 3d 201 (D. Mass. 2019). The petitioners suggested the government should conduct a reasonableness review every six months, rather than force each detainee to litigate that reasonableness through habeas, but the court ultimately disagreed. Reid v. Donelan, 390 F. Supp. at 220-21.
164 Id. at *16 (internal citations omitted).
process alone required bond hearings after six months. Because the due process analysis would need to be individualized, it held the class no longer satisfied commonality or 23(b)(2).

Although Rule 23(b)(2) is the natural and most popular choice for habeas classes challenging legal aspects of immigration detention, they can also be certified under 23(b)(1)(A) and (B). For example, *Hernandez* certified the class under 23(b)(1)(A) and (B), as well as (b)(2), because of the risk that individual petitions asserting a constitutional requirement to consider ability to pay in bond hearings could result in inconsistent adjudications on that question, which would create conflicting directives for immigration judges, and would affect nonparties subject to that same practice. Certification under 23(b)(1) might provide a way around the problem of whether any legal determination regarding due process could provide relief to an entire class in the prolonged detention classes following *Jennings*. Even if flexible concepts of due process might not require a bond hearing at six months, individual petitions might result in inconsistent adjudications that require immigration judges to take different actions in similar circumstances. Those determinations could be dispositive of nonparties’ interests in similar cases—and would disproportionally leave petitioners that cannot afford counsel or file a pro-se habeas petition without any protections at all.

III. Conclusion: The Importance of Habeas Class Actions in Immigration Detention

Whether a habeas class can overcome the above obstacles will depend on the specific legal issue and the class definition. But despite the difficulties, the need for large-scale litigation is clear. Immigration detention affects a record number of individuals every year, and its moral

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165 Id. at *22-23 (“While certain principles arising out of criminal jurisprudence may be somewhat analogous to civil immigration detention, the cases relied upon by Petitioners do not compel the conclusion that a six-month bright-line rule is mandated by the Constitution.”).
166 Id. at *33.
167 See, e.g., Brito v. Barr, 395 F. Supp. 3d at 149 (certifying the class under 23(b)(2)).
and economic costs are devastating. In fiscal year 2018, almost 400,000 people were booked into ICE custody, and over 240,000 into Customs and Border Patrol custody. The Department of Homeland Security has come under fire for abysmal conditions in detention centers, including by its own Inspector General, which has reported on overcrowding, spoiled food, a lack of basic hygiene materials, unjustified strip searches, and abuse of solitary confinement in detention facilities. Medical care is frequently delayed or inadequate, with at least 24 immigrants dying in U.S. custody during the Trump administration alone, including seven children. And despite being civil in name, “detention promotes beliefs among detainees that the legal system is punitive, . . . that legal rules are inscrutable by design, and that legal outcomes are arbitrary.”

Habeas class actions are a necessary backstop against these excesses and arbitrary executive detention of immigrants. They provide one of the few ways to challenge the complex immigration detention scheme in a uniform manner, particularly given the barriers to habeas relief for the vast majority of detainees, the ever-expanding size of immigration detention, and the aggressive Congressional restriction of judicial review. Courts should exercise their power to hear habeas class actions consistent with the principles behind both habeas corpus and Rule 23.

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169 See Manning & Stumpf, supra note 1 at 415 (“Aggregating the number of people detained in connection with civil immigration proceedings and those incarcerated for immigration-related crimes results in a big number: over half a million individuals in custodial facilities.”); Detention by the Numbers, FREEDOM FOR IMMigrants, https://www.freedomforimmigrants.org/detention-statistics (last visited Dec. 2, 2019) (providing data on the costs of detention, which are nearly $150 per person per day in some states, and primarily benefit private detention companies).


174 Ryo, supra note 22 at 108.
Allowing habeas class actions is consistent with the principles behind Rule 23 class actions. They promote judicial economy, especially as immigration detention grows exponentially. Class actions in the immigration detention context also promote basic fairness to the detainees, who often lack English proficiency, cannot afford a lawyer, are isolated from support systems, and are unfamiliar with the U.S. legal system. Expecting each detainee to challenge his or her detention through an individual habeas petition is patently unrealistic, and would flood the courts if it did happen. The modern version of Rule 23 was designed in the 1960s with civil rights class actions in mind. As the cases above show, immigration detention class actions address civil rights issues such as discrimination on the basis of poverty, conditions of detention, and due process protections. As such, they fit squarely within the model of public interest impact litigation that “evolve[d] in lockstep” with the class action.

Similarly, allowing habeas class actions in the immigration detention context is consistent with the principles behind habeas. As the Supreme Court said in St. Cyr, “At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” As recent years have shown, the operation of immigration detention is largely subject to the whims of the executive. And no matter how long it lasts, or which statute authorizes it, it is a restriction of liberty in every sense, in which detainees are confined to jails for months or years at a time if they exercise their right to pursue immigration relief. Habeas class actions in the immigration detention context thus

175 See Marouf, supra note 44 at 2150-51 (describing the how detention inflicts financial, physical, and emotional hardship, as well as makes it difficult to successfully pursue relief); Ryo, supra note 22 at 105 (describing difficulties for non-English and non-Spanish speaking inmates).
176 Marcus, supra note 154 at 783.
177 Marcus, supra note 154 at 783, 785.
178 I.N.S. v. St. Cyr, 533 U.S. at 301.
provide an invaluable tool for protecting liberty and ensuring due process for the tens of thousands of people detained by the executive branch every day.