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Rodriguez v. Hayes: Government Accountability For Immigrants in Prolonged Detention

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CASE SUMMARY

RODRIGUEZ V. HAYES: GOVERNMENT ACCOUNTABILITY FOR IMMIGRANTS IN PROLONGED DETENTION

I. INTRODUCTION

At any given time, the United States government has more than 32,000 beds in more than 350 facilities nationwide for the purpose of housing immigrants awaiting removal.[1] But how long does the government detain these people without granting them an opportunity to contest their detention? Mr. Tijani was held for two years and eight months,[2] Mr. Nadarajah for almost five years,[3]

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[1] U.S. Immigration and Customs Enforcement, 2009 Immigration Detention Reforms, Aug. 6, 2009, http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

[2] Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005). The Ninth Circuit observed that Mr. Tijani's more-than-two-year detention under the expedited removal detention statute, 8 U.S.C. § 1226, was far from expeditious, stating that it was "constitutionally doubtful that Congress may authorize imprisonment for this duration . . . ." *Id.* at 1242. The government was ordered to release him on bond "unless the government establishes [in a prompt hearing] that he is a flight risk or will be a danger to the community." *Id.*

[3] Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006). The Ninth Circuit started its opinion with the following facts:

> Starting at age 17, Ahilan Nadarajah was repeatedly tortured in Sri Lanka. He fled to the United States where he was detained upon arrival. He applied for asylum, withholding of removal, and protection under the Convention Against Torture. Twice, the government's arguments against the grant of immigration relief have been rejected and Nadarajah has been awarded relief by an immigration judge. This decision was affirmed by the Board of Immigration Appeals. Yet, the government continues to detain Nadarajah, who has now been imprisoned for almost five years despite having prevailed at every administrative level of review and who has never been charged with any crime. We order that a writ of habeas corpus issue, and that he be released on appropriate conditions during the pendency of any further

Mr. Casas-Castrillon for nearly seven years,[4] and Mr. Rodriguez for more than three years.[5]

United States Immigration and Customs Enforcement (ICE) chooses to keep many immigrants incarcerated while they await the results of their hearings before immigration judges, appeals to the Board of Immigration Appeals (BIA),[6] or second appeals to the federal courts of appeals.[7] Starting with *Zadvydas v. Davis*[8] in 2001, federal courts have been facing the question of whether such lengthy detentions are permissible under either the Immigration and Nationality Act (INA) or the U.S. Constitution. The U.S. Supreme Court in *Zadvydas* held that indefinite detention "would raise serious constitutional concerns"[9] and decided to construe the prolonged-detention statute at issue "to

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proceedings.

Id. at 1071.

[4] Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008). The Ninth Circuit described the facts as follows:

> Luis Felipe Casas-Castrillon (Casas) is a native and citizen of Colombia and has been a legal permanent resident of the United States since 1990. He was served with a notice to appear and detained by the Immigration and Naturalization Service in August 2001, following his release from a state prison for a conviction on an auto burglary charge. An immigration judge (IJ) found that Casas was a removable alien because he had been convicted of two crimes involving moral turpitude. *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that "[a]ny alien who . . . is convicted of two or more crimes involving moral turpitude . . . is deportable"). Casas appealed this determination to the Board of Immigration Appeals (BIA), which affirmed the removal order in July 2002.
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> From that time until the present, Casas has remained in the continuous custody of the federal government while he has pursued various avenues of relief from removal in the federal district court and the court of appeals, some successful and some not. While he has sought judicial review, his removal has been stayed by court orders for much of the period from 2002 to the present. As of the time that this opinion is filed, Casas is now back before the BIA after this court granted his petition for review of his final order of removal. During this nearly seven-year period of detention, it is unclear what, if any, opportunity Casas has had to argue to a neutral decision maker that his detention is unnecessary because he does not pose a danger to the community or a flight risk.

Id. at 944-45 (footnotes omitted).

[5] Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010).

[6] The BIA is part of the Executive Office of Immigration Review (EOIR) of the Department of Justice. It sits in Falls Church, Virginia, and its members are appointed by the Attorney General. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 744 (5th ed. 2009) (*citing* 8 C.F.R. § 1003.1(a)(1) (2008)).

[7] STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 818 (5th ed. 2009).

[8] Zadvydas v. Davis, 533 U.S. 678 (2001).

[9] *Id*. at 682.

contain an implicit 'reasonable time' limitation."[10] The Court thereafter set six months as the presumptively reasonable time for detention, after which an alien should be provided with a bond hearing and a right to challenge his or her continued detention.[11]

Since the *Zadvydas* decision,[12] the Ninth Circuit has revisited and interpreted the high Court's holding four times,[13] extending the holding to various types of non-citizen detentions and each time requiring the government to justify the prolonged detention by granting the detainee a hearing.[14] In 2009, the Ninth Circuit heard a fifth case, *Rodriguez v. Hayes*,[15] in which it confronted a new and crucial issue: whether to certify a class action on behalf of immigrants challenging their prolonged detentions as violations of their due-process rights under *Zadvydas*. In a succinct, two-sentence order, the district court denied class certification without explanation.[16] However, the Ninth Circuit reversed the district court and allowed the action to go forward as a class action.[17]

II. FACTS AND PROCEDURAL HISTORY

Born in Mexico, Alejandro Rodriguez immigrated to the United States in 1979 when he was one year old.[18] He became a lawful permanent resident[19] at the age of nine.[20] In April 2004, he was

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[10] *Id.*

[11] *Id.* at 701 ("After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.").

[12] Subsequent to *Zadvydas*, in *Clark v. Martinez*, 543 U.S. 371 (2005), the Court expanded *Zadvydas* to apply to undocumented immigrants in detention.

[13] Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008) (applied *Zadvydas*, like *Prieto-Romero*, to criminal aliens detained under 8 U.S.C. § 1226 and ordered that Casas-Castrillon be given an individualized hearing to determine whether he was a flight risk or a danger to the community, i.e., whether his continued detention was justified); Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008) (extending *Zadvydas* to criminal immigrants detained under 8 U.S.C. § 1226, but upholding detention because petitioner had been granted a hearing and his removal was reasonably foreseeable under the circumstances); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (applying six-month *Zadvydas* framework to expedited removal detention statute, 8 U.S.C. § 1226(c)); Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006) (applying *Zadvydas* to entering asylum seeker detained under 8 U.S.C. § 1225(b)).

[14] *Casas-Castrillon*, 535 F.3d 942; *Prieto-Romero*, 534 F.3d 1053; *Tijani*, 430 F.3d 1241; *Nadarajah*, 443 F.3d 1069.

[15] Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010).

[16] *See Rodriguez*, 591 F.3d at 1112.

[17] *Rodriguez*, 591 F.3d at 1111.

[18] *Id.*

[19] The term "lawful permanent resident" (LPR) is technically defined as "aliens lawfully admitted for permanent residence." STEPHEN H. LEGOMSKY & CRISTINA M.

arrested and charged with removability based on past drug and theft convictions[21] and was detained by the Department of Homeland Security.[22] During his more-than-three-year detention, he received three "custody reviews"[23] from ICE that did little more than determine, in writing, to continue his detention.[24] However,

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RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 250 (5th ed. 2009). Synonymous terms include "permanent resident aliens" and "green card holders." *Id.* The so-called "green card," the credit-card-sized identification of LPR status, must be periodically renewed to maintain LPR status. *Id.* LPRs are eligible to apply for citizenship after five years of residence if they satisfy other statutory requirements. *See id.* at 1306-07.

[20] *Rodriguez*, 591 F.3d at 1111.

[21] In 1998, Mr. Rodriguez pled guilty to a charge of unlawful driving or taking of a vehicle under section 10851(a) of the California Vehicle Code, for which he was sentenced to two years. Five years later, in 2003, he pled no contest to a charge of possession of a controlled substance under California Health and Safety Code section 11377(a), for which he received five years of formal probation under the conditions of California Proposition 36. Petition for Writ of Habeas Corpus at 7, Garcia v. Hayes, No. CV07 3239 VAD (C.D. Cal. May 16, 2007), *available at* http://www.aclu.org/files/pdfs/immigrants/garciavhayes_habeaspetition.pdf.

[22] *Rodriguez*, 591 F.3d at 1111-12.

[23] These three reviews presumably consisted of an ICE agent reading through Rodriguez's file and issuing a "decision to continue detention" without ever interviewing or giving Mr. Rodriguez a hearing. Mr. Rodriguez was only given a questionnaire that asked about his family members, employment experience, and any outstanding probation requirements. Even though he complied with this questionnaire, documenting his employment history as a dental assistant as well as his extensive family ties, including his U.S. citizen father and sister and his lawful permanent resident (LPR) mother and brother, ICE denied his request for release. Petition for Writ of Habeas Corpus at 10-11, Garcia v. Hayes, No. CV07 3239 VAD (C.D. Cal. May 16, 2007), *available at* http://www.aclu.org/files/pdfs/immigrants/garciavhayes_habeaspetition.pdf.

> The issue of ICE "custody reviews," also known as Post-Order Custody Reviews (POCRs), was discussed by the Ninth Circuit in *Casas-Castrillon,* where the court rejected them as inadequate substitutes for a bond hearing. The court stated:
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> > The only evidence in the record showing that Casas has received any procedural review relates to a file review he received in November 2005. At that time, two Immigration and Customs Enforcement (ICE) field officers filled out a "Post-Order Custody Review Worksheet" and recommended that Casas remain in custody because he "would be a flight risk," a determination that was then approved by an ICE field director. Although these ICE officials reviewed Casas' record when making their determination, they did not interview him personally or by telephone. It is not clear from the record whether Casas was even notified of this impending review or whether he was given an opportunity to contest the facts on which the ICE officials based their decision. There is no indication that he had a right to an administrative appeal. This review falls far short of the procedural protections afforded in ordinary bond hearings, where aliens may contest the necessity of their detention before an immigration judge and have an opportunity to appeal that determination to the BIA.
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> Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 951-52 (9th Cir. 2008) (footnote omitted) (citing 8 C.F.R. § 236.1(d); Matter of Guerra, 24 I. & N. Dec. 37, 38-40 (B.I.A. 2006)).

[24] Petition for Writ of Habeas Corpus at 10-11, Garcia v. Hayes, No. CV07 3239

during this three-year period, Rodriguez received neither an explanation of nor an opportunity to challenge the government's decision to detain him.[25]

On May 16, 2007,[26] Rodriguez filed a petition for habeas corpus against the Department of Homeland Security, the Department of Justice, ICE, and the head officials of various alien-detention facilities.[27] Unlike the typical habeas petitioner, Rodriguez challenged not only the constitutionality of his own detention, but also the detention of the following class:

> [A]ll non-citizens detained within [the Central District of California] who 1) are or will be detained for longer than six months pursuant to one of the general detention statutes pending completion of removal proceedings, including judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified.[28]

After Rodriguez filed a motion for class certification in the district court, ICE responded by releasing him pursuant to an order of supervision and, thereafter, filed a motion to dismiss, arguing that the case had become moot.[29] In a two-sentence order, the district court denied both Rodriguez's motion for class certification and the government's motion to dismiss.[30] Rodriguez thereafter appealed the denial of class certification.[31]

The central question for the Ninth Circuit was whether to certify this habeas class action.[32] The court answered this in the affirmative,[33] finding that the requirements of Federal Rule of Civil Procedure 23 had been met, including the requirements of Rule

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VAD (C.D. Cal. May 16, 2007), *available at* http://www.aclu.org/files/pdfs/immigrants/garciavhayes_habeaspetition.pdf.

[25] *Id.*

[26] Between 2004 and 2007, an immigration judge determined that Rodriguez was subject to mandatory removal based on either of his past drug or theft offenses. Rodriguez appealed, and the BIA reversed the IJ's finding that he was removable on the basis of his drug offense but upheld his removal under the theft conviction. Rodriguez then appealed that finding to the Ninth Circuit and at the same time filed the habeas petition and motion for class certification. The Ninth Circuit stayed his removal pending its decision in the habeas action. *Rodriguez*, 591 F.3d at 1111-12.

[27] *Id.* at 1112.

[28] Appellant's Opening Brief at 4, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No 08-56156), 2008 WL 4726528.

[29] *Rodriguez*, 591 F.3d at 1112.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1112-13.

[33] *Id.* at 1126.

23(a) (i.e., numerosity, commonality, typicality, and adequacy of class representation)[34] and of Rule 23(b)(2), which authorizes class treatment if injunctive or declaratory relief sought is "appropriate respecting the class as a whole."[35]

III. ANALYSIS BY THE COURT

A. PRELIMINARY MATTERS: STANDARD OF REVIEW AND APPROPRIATENESS OF CLASS DEFINITION

First, the court addressed the standard of review it should use to evaluate the district court's denial of class certification.[36] Normally, on review of a class-certification decision, an appellate court grants a certain amount of deference to the lower court and reviews the record simply for abuse of discretion.[37] However, if the lower court's order was not supported by sufficient findings — as in *Rodriguez*, where the lower court made no findings whatsoever — the court of appeals may evaluate the question of class certification for itself, with less deference to the lower court's opinion.[38]

The court next acknowledged that the proposed class of non-citizen detainees was adequately defined.[39] Although the class members were detained under different statutes (and, therefore, might not fall into a single class), the court found Rodriguez's class definition to be adequate, agreeing that the "general

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[34] Rule 23(a) provides that a class may be certified only if:

> (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.

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

[35] Rule 23(b) provides in part that:

> A class action may be maintained if Rule 23(a) is satisfied and if: . . . (2) 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 . . . .

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

[36] *Rodriguez*, 591 F.3d at 1112-13.

[37] *Id.* (citing Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001)).

[38] *Rodriguez*, 591 F.3d at 1113 (citing Molski v. Gleich, 318 F.3d 937, 946 (9th Cir. 2003); Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir. 2001)).

[39] *Rodriguez*, 591 F.3d at 1113.

[immigration] detention statutes" mentioned in the class definition referred narrowly to three specific detention statutes.[40] Turning to each of these statutes separately, the court explained their relevance as follows:

> The three immigration detention statutes implicated by the proposed class govern detention of aliens at different stages of the admission and removal process. 8 U.S.C. § 1225(b) provides for discretionary detention of aliens pending a determination of admissibility. 8 U.S.C. § 1226 provides for both discretionary detention generally and mandatory detention for certain narrow categories of aliens pending a determination of their removability. 8 U.S.C. § 1231(a) provides for mandatory detention of aliens ordered removed during the 90 day removal period and discretionary detention after the end of the removal period.[41]

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[40] *Id.* The three general immigration statutes are the following sections of the INA: 8 U.S.C. §§ 1225(b), 1226, 1231(a). The court noted some ambiguity with regard to the applicability of a fourth detention statute, 8 U.S.C. § 1182(d)(5)(A), but stated that that statute was of no practical importance as it dealt with providing for discretionary parole of detainees.

[41] *Rodriguez*, 591 F.3d at 1113-14 (footnotes omitted).

8 U.S.C. § 1225(b)(1)(B)(ii) provides, in relevant part:

> If the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution . . ., the alien shall be detained for further consideration of the application for asylum.

8 U.S.C.A. § 1225(b)(1)(B)(ii) (Westlaw 2010).

8 U.S.C. § 1225(b)(2)(A) provides as follows:

> [I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229(a) of this title.

8 U.S.C.A. § 1225(b)(2)(A) (Westlaw 2010).

8 U.S.C. § 1226(a) provides as follows:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

8 U.S.C.A. § 1226(a) (Westlaw 2010).

8 U.S.C. § 1226(c) provides, in relevant part, as follows:

> The Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced[sic] to a term of imprisonment of at least 1 year, or . . . is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title when the alien is released, without regard to

The court then explained that the underlying merits of Rodriguez's and the class' claims were based on whether prolonged detention without a bond hearing was authorized under any of these statutes and, if so, whether such detention was constitutional.[42] Finally, the court reached the central question of whether class certification was appropriate.[43] The government raised many challenges on appeal, including justiciability issues such as mootness and ripeness, jurisdictional challenges, and a claim of basic inappropriateness of certifying a class action on a petition for habeas corpus.[44] The court addressed each argument in turn.

B. JUSTICIABILITY CHALLENGES: MOOTNESS AND RIPENESS

Approximately one month after Rodriguez filed the class-certification motion in the district court, and shortly before filing its opposition to the motion, the government decided to release

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

8 U.S.C.A. § 1226(c) (Westlaw 2010).

8 U.S.C. § 1231(a)(2) provides as follows:

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C.A. § 1231(a)(2) (Westlaw 2010).

8 U.S.C. § 1231(a)(6) provides as follows:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C.A. § 1231(a)(6) (Westlaw 2010).

8 U.S.C. § 1231(a)(1)(C) provides as follows:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

8 U.S.C.A. § 1231(a)(1)(C) (Westlaw 2010).

[42] *Rodriguez*, 591 F.3d at 1114-15.

[43] *Rodriguez*, 591 F.3d at 1111.

[44] Respondents-Appellees' Answering Brief, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 5053992.

Rodriguez under an order of supervision.[45] In light of his release, the government filed a motion to dismiss the action as moot, which the district court denied in a two-sentence order.[46] On appeal, Rodriguez argued that the government had attempted to moot the class action by "picking off" the class representative.[47]

Without addressing this characterization of the government's conduct, the court of appeals noted that mootness was not a ground for denying class certification; rather, it is a ground to dismiss the action, which the lower court did not do.[48] Furthermore, it continued, the case was not moot.[49] The court found the mootness issue in this case to be similar to that found in the recent Supreme Court case *Clark v. Martinez*,[50] where one of the petitioners was released from detention and put on discretionary parole while his suit was ongoing.[51] The Supreme Court found the petitioner in *Clark* to have a continuing personal stake in the outcome, notwithstanding his release from custody, because he was still subject to the government's discretionary authority to terminate his release.[52]

The Ninth Circuit noted that Rodriguez's release was also

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[45] *Rodriguez*, 591 F.3d at 1117.

[46] *Id.* at 1112.

[47] Appellant's Opening Brief at 5-7, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 4726528. Rodriguez's opening brief recites the evidence of this "picking off" accusation: After Rodriguez was released under supervision, his attorney filed a separate and similar class action habeas petition challenging the same governmental conduct. The class representative of this action was a man named Mr. Jung Jin Lee, who had been detained for more than two years with no detention hearing. Again, shortly after filing the case, the government released Mr. Lee on supervision without any explanation from ICE. *Id.* at 6-7. In its reply brief, the government stated that this argument "is without merit." *See* Respondents-Appellees' Answering Brief at 22, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 5053992.

[48] *Rodriguez*, 591 F.3d at 1117.

[49] *Id.* at 1117-18.

[50] Clark v. Martinez, 543 U.S. 371 (2005) (extending *Zadvydas* to undocumented immigrants).

[51] The *Rodriguez* court quoted the Supreme Court:

> If Benitez [one of the petitioners in *Clark v. Martinez*] is correct, as his suit contends, that the Government lacks the authority to continue to detain him, he would have to be released, and could not be taken back into custody unless he violated the conditions of . . . or his detention became necessary to effectuate his removal . . . . His current release, however, is not only limited to one year, *but subject to the Secretary's discretionary authority to terminate*. . . . Thus, Benitez continue[s] to have a personal stake in the outcome of his petition.

Rodriguez, 591 F.3d at 1117 (quoting Clark v. Martinez, 543 U.S. 371, 376 n.3 (2005) (omitting citations and internal quotations, and adding emphasis)).

[52] *Rodriguez*, 591 F.3d at 1117; *see* Clark v. Martinez, 543 U.S. 371, 376 n.3 (2005).

subject to revocation at the government's discretion.[53] Furthermore, the court noted that Rodriguez's release was subject to many restrictions, including that he wear an ankle monitoring device at all times and remain within fifty feet of his home from 7:00 p.m. to 7:00 a.m. every night.[54] Accordingly, the court found the controversy to be live and not moot.[55]

The government next argued that class certification should be denied because some of the claims of the proposed class were not yet ripe.[56] According to the government, the class claims were not ripe for two reasons. First, "there is no indication yet that the government is refusing to comply with *Casas-Castrillon's* ruling."[57] Second, the proposed class itself "references future class members."[58] The court disagreed with both points.[59]

The Ninth Circuit first stated that, even if the government were complying with *Casas-Castrillon* by granting a bond hearing to those immigrants detained for more than six months, it would not affect the claims of class members who had not yet received such hearings.[60] As the court explained, if the government complied with *Casas-Castrillon* (by giving some members valid hearings), the size of the class would be reduced, but it would not render the other class members' claims unripe.[61] Second, the court made clear that there is nothing unusual or objectionable about including future class members in a class.[62] The court explained that when these future persons become members of a proposed class, their claims will necessarily be ripe.[63] Thus, neither ripeness nor mootness barred class certification.[64]

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[53] *Rodriguez,* 591 F.3d at 1118.

[54] *Id.* ("The strict limitations on Petitioner's freedom, therefore, provide an additional reason why his case presents a live controversy." *Id.* (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968))).

[55] *Rodriguez*, 591 F.3d at 1117-18.

[56] *Id.* at 1118 ("[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur at all." (quoting Bova v. City of Medford, 564 F.3d 1093, 1096 (9th Cir. 2009))).

[57] *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008) is the most recent of the Ninth Circuit's post-*Zadvydas* line of cases interpreting the need for bond hearings.

[58] *Rodriguez*, 591 F.3d at 1118.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.; see*, *e.g.*, Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986); LaDuke v. Nelson, 762 F.2d 1318, 1321-26 (9th Cir. 1985).

[63] *Rodriguez*, 591 F.3d at 1118.

[64] *Id.*

C. JURISDICTION AND AUTHORITY UNDER SECTION 306(A) OFTHE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

Perhaps as its strongest argument, the government contended that Section 306(a) (codified as 8 U.S.C. § 1252(f)[65] of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)) required a denial of class certification because it divests federal courts (except the Supreme Court) of jurisdiction to grant injunctive relief from removal or detention to anyone other than certain individuals.[66] This issue raises interesting constitutional questions. Can Congress limit either the courts' jurisdiction to resolve habeas corpus claims or their power to grant injunctive relief from these detention statutes?[67] Can Congress eliminate the lower federal courts' jurisdiction to hear class claims completely? According to the government, that is exactly what Congress did in 1996 with the passage of IIRIRA.[68]

The Ninth Circuit found the government's contention to be mistaken primarily for two reasons.[69] First, the court noted that section 1252(f) does not restrict the availability of declaratory relief, and in this case, the class was seeking a declaration that, in order to comply with the Constitution, detention under the general

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[65] 8 U.S.C.A. § 1252(f) (Westlaw 2010).

[66] *Rodriguez*, 591 F.3d at 1118-19 (quoting 8 U.S.C. § 1252(f)(1)); Respondents-Appellees' Answering Brief at 11, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 5053992. IIRIRA section 306(a), codified at 8 U.S.C. §1252(f)(1), provides as follows:

> 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 sub-chapter, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C.A. § 1252(f)(1) (Westlaw 2010).

[67] The government explained its stance on the issue as follows:

> Petitioner [Rodriguez] argues that Congress cannot strip courts of jurisdiction to grant habeas corpus relief without specifically citing to the federal habeas statute. [. . .] This argument lacks merit as it confuses the issue. Congress did not strip the courts of habeas corpus jurisdiction, but rather acted to limit injunctive relief. Here, Petitioner seeks an injunction requiring the Government to conduct bond hearings for all class members. This is precisely the request that Section 1252(f)(1) bars.

Respondents-Appellees' Answering Brief at 13, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 5053992 (citation omitted).

[68] *Rodriguez*, 591 F.3d at 1118-19.

[69] *Id.* at 1119.

immigration statutes requires that class members receive a bond hearing.[70] Second, the court emphasized that section 1252(f) "prohibits only injunction of 'the operation of' the detention statutes, not injunction *of a violation* of the statutes."[71] The court therefore agreed with Rodriguez that section 1252(f) did not apply to bar injunctive relief for the proposed class.[72]

D. APPROPRIATENESS OF HABEAS CORPUS CLASS ACTIONS

The last of the preliminary arguments addressed by the court was whether the Supreme Court's holding in *Rumsfeld v. Padilla*[73] rendered class relief inappropriate in this instance.[74] The government contended that *Padilla* made class relief impossible because it requires individual class members to bring their claims against the various wardens overseeing their specific detention and, therefore, does not allow one representative to bring suit against all the wardens in the whole Central District of California.[75] The government therefore suggested that, "'at a jurisdictional minimum,' all proposed class members must be under the immediate supervision of the same custodian."[76] While this argument may be creative, the court rejected it as "baseless"[77]

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[70] *Id.* In so holding, the Ninth Circuit relied on the following reasoning: "Nor do we agree with Respondents that Section 1252(f)'s 'enjoin or restrain' should be interpreted to have the same scope as a different phrase, 'enjoin, suspend or restrain,' in the Tax Injunction and Johnson Acts, 28 U.S.C. §§ 1341 and 1342." *Id.* The court stated that the absence of the word "suspend" from § 1252(f) "suggests that Congress intended Section 1252(f)'s scope to be more limited than [those acts]." *Id.*

[71] *Rodriguez*, 591 F.3d at 1120 (emphasis added) (quoting Ali v. Ashcroft, 346 F.3d 873, 886 (9th Cir. 2003) (holding that where "a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated."), *vacated on unrelated grounds sub nom* by Ali v. Gonzales, 421 F.3d 795 (9th Cir. 2005)).

[72] *Rodriguez*, 591 F.3d at 1120.

[73] Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) (holding that in habeas petition challenging present physical detention, "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.").

[74] *Rodriguez*, 591 F.3d at 1121.

[75] *Id.*

[76] *Id.* (quoting Respondents-Appellees' Answering Brief at 16, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156), 2008 WL 5053992).

[77] *Rodriguez*, 591 F.3d at 1121. The court explained as follows:

> Respondents fail to recognize that *Padilla* specifically reserved the question of whether the proper respondent in habeas challenges brought by "an alien detained pending deportation" would be the immediate custodian of the alien. *Padilla,* 542 U.S. at 436 n.8, 124 S. Ct. 2711. We need not reach it because, even were the Supreme Court's statement in *Padilla* applicable here, Respondents' argument is

and pointed out various precedents in which analogous habeas class actions have been maintained.[78]

E. COMPLIANCE WITH RULE 23

1. Rule 23(a)

Since no preliminary issue precluded the action, the Ninth Circuit was able to reach the question of whether the *Rodriguez* class satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure.[79] Under the Rule, the party seeking class certification has the burden of proving each of the four Rule 23(a) requirements and at least one of the requirements of Rule 23(b).[80] The court began by examining the requirements of Rule 23(a) and followed with a discussion of Rule 23(b)(2).

Rule 23(a) provides that a class may be certified only if:

> (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.[81]

a. Commonality

The commonality requirement is satisfied if the named plaintiff shares at least one common question of law or fact with the

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> baseless. Respondents cite no authority or rationale for the proposition that we do not have jurisdiction to provide class relief in a habeas corpus action that meets the requirements for certification merely because class members are in the immediate custody of different facilities. Such actions have been maintained previously against single and multiple respondents.

Id.

[78] *Id.* (citing Schall v. Martin, 467 U.S. 253 (1984) (class of juveniles sought habeas corpus relief from pre-trial detention); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974) (class of young adults sought habeas corpus relief from confinement in state reformatories)).

[79] *Rodriguez*, 591 F.3d at 1121-22.

[80] *Id.* at 1122.

[81] FED. R. CIV. P. 23(a). The court did not analyze the "numerosity" requirement because the government did not challenge this aspect of the class claim: "Respondents challenge the proposed class's compliance with all aspects of Rule 23 except the numerosity requirement, which Respondents concede is met." *Rodriguez*, 591 F.3d at 1122.

grievances of the prospective class.[82] This requirement ensures "that absentee members are fairly and adequately represented"[83] and that case management is practical and efficient.[84]

The court expressly found that the class met the commonality requirement.[85] Even though many of the class members were detained under different immigration statutes and did not share exactly the same issues of law or fact,[86] they all raised a common constitutional issue: whether "an individual [may] be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns."[87] The court also mentioned that finding commonality in this case would further the purposes of this requirement because it would increase judicial efficiency by enabling the court to adopt a "uniform framework for analyzing detainee claims to a bond hearing."[88] Finally, the court pointed out that, whatever differences may exist among the class members (e.g., their detention under different sections of the INA), sub-classes might be formed as the lower court may find appropriate.[89]

b. Typicality

The typicality requirement necessitates that the claims of the class representative be typical of those of the class.[90] This requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[91]

Rodriguez's claim seeking a bond hearing was found to be "reasonably co-extensive with the claims of the class."[92] That his detention was under a different statute from the detentions of some other class members, that his challenge occurred at a

[82] *Rodriguez*, 591 F.3d at 1122 (quoting Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)).

[83] *Rodriguez*, 591 F.3d at 1122 (quoting Walters v. Reno, 145 F.3d 1032, 1045 (9th Cir. 1998)).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1123.

[88] *Id*.

[89] *Rodriguez*, 591 F.3d at 1123-24.

[90] *Id.* at 1124.

[91] *Id.* (quoting Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001)).

[92] *Id.*

different stage in his removal proceedings (i.e., during the appeal of his "aggravated felon" status determination to the Ninth Circuit), and that he had been out on supervised release were all held to be immaterial.[93] They did not render his claim moot, nor did his "aggravated felon" status make him any less entitled to a bond hearing than other class members.[94] Therefore, the court held that Rodriguez's claim was typical.[95]

c. Adequacy

For a class representative to satisfy the adequacy requirement, various factors must be considered, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive."[96] Because Rodriguez had alleged the qualifications of his counsel in the district court and because respondents did not question those allegations but merely challenged his adequacy by "re-asserting their commonality and typicality arguments,"[97] the court found no reason to deny class certification due to lack of adequate representation.[98]

2. Rule 23(b)(2)

An action that meets the requirements of Rule 23(a) may proceed as a class action under Rule 23(b)(2) if the primary relief sought is declaratory or injunctive.[99] The Ninth Circuit previously found the 23(b)(2) requirement satisfied when "class members complain of a pattern or practice that is generally applicable to the class as a whole."[100] Rodriguez and the class challenged the government's practice of prolonged detention without providing a bond hearing. As a remedy, the class sought injunctive and declaratory relief requiring each class member access to a constitutionally valid hearing before an immigration judge with the

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[93] *Id.*

[94] *Rodriguez*, 591 F.3d at 1124.

[95] *Id.*

[96] *Id.* at 1125 (quoting Walters v. Reno, 145 F.3d 1032, 1046 (9th Cir. 1998)).

[97] *Rodriguez*, 591 F.3d at 1125.

[98] *Id.*

[99] *Id.* (quoting Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1195 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001)).

[100] *Rodriguez*, 591 F.3d at 1125 (quoting *Walters*, 145 F.3d at 1047).

burden placed on the government to show by clear and convincing evidence that the detention is justified, e.g., that the detainee is a flight risk or poses a danger to the community.[101] Accordingly, the court held the class satisfied the requirements of Rule 23(b)(2).[102]

F. DISPOSITION

The Ninth Circuit concluded that there was no reason to deny class certification. The court, therefore, reversed and remanded to the district court for further proceedings, leaving to the lower court's discretion whether the formation of sub-classes would be appropriate.[103]

IV. IMPLICATIONS OF THE DECISION

Rodriguez v. Hayes has real-life implications far more significant than any of the legal issues it discussed. It is a bombshell victory for immigrants' rights and due process. By allowing class certification, the Ninth Circuit is effectively holding the government accountable to all immigrant detainees, which will force ICE to change its detention policies to allow for bond hearings on a broad scale.

In immigration proceedings, the vast majority of detainees are unrepresented.[104] Because non-citizens in immigration

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[101] The relief Rodriguez and the class sought is described as follows:

> Petitioner's requested relief includes the certification of the proposed class, appointment of Petitioner's counsel as class counsel, and injunctive and declaratory relief providing all members of the class "constitutionally-adequate individual hearings before an immigration judge . . . , at which Respondents will bear the burden to prove by clear and convincing evidence that Petitioner and each class member is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future."

Rodriguez, 591 F.3d at 1112 (quoting Petition for Writ of Habeas Corpus at 21, Garcia v. Hayes, No. CV07 3239 VAD (C.D. Cal. May 16, 2007), *available at* http://www.aclu.org/files/pdfs/immigrants/garciavhayes_habeaspetition.pdf).

[102] *Rodriguez*, 591 F.3d at 1126.

[103] *Id.*

[104] A recent report to the American Bar Association, entitled "Reforming the Immigration System: Proposals To Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases," found that eighty-four percent of detained respondents in immigration court do not have representation. *See* News Release, AMERICAN BAR ASSOCIATION, *New Report to ABA Addresses Crisis Within Immigration Removal System* (Feb. 2, 2010), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=870.

proceedings have no constitutional right to counsel,[105] most detainees cannot afford to bring habeas petitions to challenge their prolonged detention.[106] By allowing class habeas relief, the Ninth Circuit has made it possible for those immigrants who cannot afford counsel to have their claims adjudicated. As the Ninth Circuit explained, without class certification, "many of the putative class members likely would not be able to adjudicate their claimed need of a bond hearing," and therefore, "class treatment in this case is likely necessary to provide the remedy sought."[107]

Furthermore, requiring the government to provide bond hearings as a regular practice will promote transparency and oversight of decisions that deprive people of their freedom. This extends procedural due process to all immigrants, not just those who can afford to bring suit. It will also likely result in fewer prolonged detentions overall.

As another possible effect, this case could invite the Supreme Court to reexamine its holding in *Zadvydas*, which was decided in 2001 by a narrow five-to-four majority with strong dissents by Justices Scalia and Kennedy. Justice Scalia would likely vote to overturn *Rodriguez* and the other *Zadvydas* progeny because, in his view, the Due Process Clause does not require any bond hearing or any other procedural protection for a criminal or inadmissible alien in removal proceedings, regardless of the length of time in custody.[108]

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[105] *See, e.g.* Aguilera-Enriquez v. INS, 516 F.2d 565, 568-569 (6th Cir. 1975) (discussing the right to counsel and holding that deportation proceedings are protected by procedural due process so that the assistance of counsel is necessary only when depriving counsel would deprive a non-citizen of fundamental fairness).

[106] *See* News Release, AMERICAN BAR ASSOCIATION, *New Report to ABA Addresses Crisis Within Immigration Removal System* (Feb. 2, 2010), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=870.

[107] *Rodriguez*, 591 F.3d at 1123.

[108] *See, e.g.*, Justice Scalia's dissenting opinion in *Zadvydas*:

> Like a criminal alien under final order of removal, an inadmissible alien at the border has no right to be in the United States. The Chinese Exclusion Case, 130 U.S. 581, 603 (1889). In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), we upheld potentially indefinite detention of such an inadmissible alien whom the Government was unable to return anywhere else. We said that "we [did] not think that respondent's continued exclusion deprives him of any statutory or constitutional right." Id., at 215. While four Members of the Court thought that Mezei deserved greater procedural protections (the Attorney General had refused to divulge any information as to why Mezei was being detained, id., at 209), no Justice asserted that Mezei had a substantive constitutional right to release into this country. . . .
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> . . . .
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> Mezei thus stands unexplained and undistinguished by the Court's opinion. We

Finally, *Rodriguez* could incentivize Congress to finally and fully reexamine U.S. immigration laws. President Obama has listed comprehensive immigration reform as a priority on his agenda for 2010.[109] If Congress acts, it will be faced with the choice of either revising the Immigration and Nationality Act to codify the bond hearings as mandated by *Rodriguez*, imposing other similar procedural safeguards, or attempting to statutorily overrule *Rodriguez* and *Zadvydas* altogether.

V. CONCLUSION

The court's holding that class certification was appropriate will force the government to grant hearings to non-citizen detainees within the jurisdiction of the Ninth Circuit. The potential impact of *Rodriguez* is enormous and will be felt by immigrants in the Ninth Circuit and across the country. It could potentially lead to the end of unjustified detentions of non-citizens for lengthy periods in removal proceedings.

*OTIS CARL LANDERHOLM**

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are offered no justification why an alien under a valid and final order of removal--which has totally extinguished whatever right to presence in this country he possessed--has any greater due process right to be released into the country than an alien at the border seeking entry. Congress undoubtedly thought that both groups of aliens--inadmissible aliens at the threshold and criminal aliens under final order of removal--could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision, see 8 U.S.C. § 1231(a)(6). Because I believe Mezei controls these cases, and, like the Court, I also see no reason to reconsider Mezei, I find no constitutional impediment to the discretion Congress gave to the Attorney General.

Zadvydas v. Davis, 533 U.S. 678, 703-05 (2001) (Scalia, J., dissenting).

[109] *See generally,* The White House, Issues, Immigration, http://www.whitehouse.gov/issues/immigration (last visited Apr. 13, 2010).

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