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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE ARNULFO GUERRERO ORELLANA,)	
)	
Petitioner)	
)	
-VS-)	CA No. 25-12664-PBS
)	Pages 1 - 39
ANTONE MONIZ, et al,)	
)	
Respondents)	

MOTION HEARING BY VIDEO

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way
Boston, Massachusetts 02210
March 4, 2026, 9:33 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
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4 for the Petitioner.

5 KATHERINE J. SHINNERS, ESQ., U.S. Department of Justice,
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8 RAYFORD FARQUHAR, ESQ., Assistant U.S. Attorney,
9 Office of the U.S. Attorney, 1 Courthouse Way, Room 9200,
10 Boston, Massachusetts, 02210, for the Respondents.

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P R O C E E D I N G

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THE CLERK: Good morning, Judge.

THE COURT: Good morning.

THE CLERK: So I have both sides on, so I'll call the case. The Court calls Civil Action 25-12664, Orellana v. Moniz, et al. Could counsel please identify themselves.

MR. McFADDEN: Good morning, your Honor. Dan McFadden from the ACLU of Massachusetts on behalf of the petitioner and the class.

MS. SHINNERS: Good morning, your Honor. Katherine Shinnners from the DOJ on behalf of the defendants.

THE COURT: Okay, thank you. For some reason my screen is -- it's a little strange here. Are you seeing me?

(Discussion off the record.)

THE COURT: All right, can you hear me?

MR. McFADDEN: Yes, your Honor, we can.

THE COURT: All right, that's good. And Mr. Farquhar I guess has turned off his camera.

All right, so I'm sorry I had to cancel the last hearing because essentially I was stuck in Florida after the big storm. So I was in an airport, and I don't think you wanted to be dealing with the airport noise, so I rescheduled. And I know that might have caused some inconvenience, but I guess the storm caused a lot of inconvenience for people.

So, anyway, all right, so we have here, procedurally

1 speaking, the government's motion to dismiss, petitioner's
2 opposition, and motion for partial summary judgment. And I
3 guess we should probably start off with the government's --
4 well, the government's motion to dismiss which came in first.
5 But let me first ask you, as I understand it -- I just want to
6 make sure I'm current on everything -- the First Circuit has
7 ordered expedited briefing. When is the briefing over?

8 MR. McFADDEN: Your Honor, the First Circuit did order
9 expedited briefing and consolidated the appeal of the
10 preliminary injunction and the final judgment on Count 1, and
11 the briefing would be concluded on March 16th.

12 THE COURT: And do you have a date for oral argument
13 yet?

14 MR. McFADDEN: Not yet, your Honor, no.

15 THE COURT: Has any circuit other than the Fifth ruled
16 on this yet?

17 MR. McFADDEN: So, your Honor, there's the Seventh
18 Circuit in the *Castanon Nava* decision from December that ruled
19 in a preliminary posture against the government, and then the
20 Fifth Circuit adopted the minority position and agreed with the
21 government in the *Buenrostro-Mendez* case in early February.
22 Our understanding in the Fifth Circuit is that a petition for
23 rehearing en banc will be filed by March 23rd.

24 THE COURT: In the Fifth?

25 MR. McFADDEN: In the Fifth Circuit, your Honor, yes.

1 MS. SHINNERS: And, your Honor, there was argument
2 this week in the Ninth Circuit, and there was argument I
3 believe last week in the Eighth Circuit, and I believe in the
4 Sixth Circuit, briefing is also complete. This may not be a
5 complete picture, but there are a number of cases --

6 THE COURT: It's percolating throughout the system,
7 right?

8 MS. SHINNERS: Yes.

9 THE COURT: And the issues raised in all these other
10 statutes, are they primarily the statutory questions, or are
11 they also raising the due process and Administrative Procedure
12 Act questions?

13 MS. SHINNERS: Oh, most raise the statutory question.
14 I think in some cases there may be due process arguments as
15 well, but these appeals, the primary focus is the statutory
16 question.

17 THE COURT: And you said with respect to the Ninth,
18 Eighth, and Sixth Circuits, are those class actions, or are
19 those individual decisions? Do you know?

20 MS. SHINNERS: *Ruggerio Vasquez* in the Ninth is a
21 class action. It's a class related to Immigration Court, I
22 believe, or a particular detention facility, I'm not quite
23 sure, but it's a class action. All the others are, to my
24 knowledge, individual actions, individual habeas actions.

25 And there's also been an appeal filed in *Bautista*,

1 which is the nationwide class action in the Central District of
2 California, two appeals filed actually in that case.

3 THE COURT: And she went the broadest probably, right?
4 She did a vacatur under the Administrative Procedure Act as
5 well as due process, as well as statutory, and a nationwide
6 class, right?

7 MS. SHINNERS: Well, she very recently issued vacatur.
8 I wouldn't say -- there's a lot of issues with that ruling, and
9 the government has appealed and sought a stay, as petitioner
10 represented. There wasn't an APA claim in that case
11 challenging *Yajure Hurtado*. Judge Sykes initially declined to
12 issue vacatur relief of the *Yajure Hurtado* decision, and then
13 more recently issued vacatur under 28 U.S.C. 2202 who -- I
14 think she refers to jurisdiction of the APA, but there was not
15 actually an APA claim in that case challenging *Yajure*
16 *Hurtado*, and, I mean, that's one of the issues as well.

17 THE COURT: Oh, all right. So this case is getting
18 the national attention it deserves because it involves so many
19 people. My case is a class action involving the Boston ERO,
20 but I think raises, at least before the First Circuit right
21 now, only the statutory claims, and I guess the plaintiffs are
22 asking me to broaden it. So we can start with the motion to
23 dismiss unless you all think that we should start with the
24 motion for summary judgment by the plaintiffs and the motion to
25 expand the basis for the class action. Have you talked among

1 yourselves?

2 MR. McFADDEN: We have not, your Honor. I would be
3 happy to proceed, unless the government wants to go first.

4 MS. SHINNERS: I mean, I think we can go first on the
5 motion to dismiss.

6 THE COURT: All right, well, why don't we do that.
7 We'll start with the motion to dismiss because you basically
8 want to dismiss the entire case, and I guess one of the things
9 I would ask you is, given the -- what can I say? -- I'm
10 counting out loud here -- the five cases in the circuits right
11 now, would it be prudent for me just to wait to see some
12 appellate case law?

13 MS. SHINNERS: I mean, so our position is that the APA
14 claim is subject to dismissal, but we also recognize that
15 despite these issues and the statutory claim percolating, we
16 also recognize that potentially it could be -- if the Court is
17 not ready to dismiss the APA claim, to avoid addressing these
18 very thorny questions about the proper scope of relief and the
19 adequacy of the habeas remedy, and whether vacatur of the Board
20 of Immigration Appeals' decision in this context is
21 appropriate, that perhaps the Court could hold that claim in
22 abeyance or hold petitioner's motion for summary judgment and
23 our motion to dismiss in abeyance if the Court is not ready to
24 dismiss them. I am prepared to argue as to why that claim
25 should be dismissed.

1 As to the constitutional claims, they really are at
2 this point, with the statutory ruling in petitioner's favor,
3 they really are not necessary to decide, and I think petitioner
4 agrees with that. We did move to dismiss those claims without
5 prejudice, but we also noted that another option is to hold
6 those claims in abeyance pending resolution of the appeal. And
7 if the First Circuit were to side with the government on the
8 statutory issue, then the parties could address whether the
9 constitutional claims should go forward. I do think that we
10 have made arguments in the alternative that if the statutory
11 issue were to be reversed, if the ruling on the statutory issue
12 were to be reversed, then the due process claims are subject to
13 dismissal, but we also recognize that potentially it could
14 be -- if the Court is not ready to dismiss the APA claim, to
15 avoid addressing these very thorny questions about the proper
16 scope of relief and the adequacy of the habeas remedy, and
17 whether vacatur of the Board of Immigration Appeals' decision
18 in this context is appropriate, that perhaps the Court could
19 hold that claim in abeyance, or hold petitioner's motion for
20 summary judgment and our motion to dismiss in abeyance, if the
21 Court is not ready to dismiss them. I am prepared to argue as
22 to why that claim should be dismissed.

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24 this point, with the statutory ruling in petitioner's favor,
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2 prejudice, but we also noted that another option is to hold
3 those claims in abeyance pending resolution of the appeal; and
4 if the First Circuit were to side with the government on the
5 statutory issue, then the parties could address whether the
6 constitutional claims should go forward. I do think that we
7 have made argument in the alternative that if the statutory
8 issue were to be reversed, if the ruling on the statutory issue
9 were to be reversed, then the due process claims are subject to
10 dismissal. But we also recognize that right now, it may make
11 sense to hold them in abeyance pending the resolution of the
12 issues on appeal.

13 THE COURT: So are there any cases -- I mean, as I
14 understand, it's a difficult statutory question; I understand
15 that. The vast majority of courts have ruled against the
16 government, but obviously the Fifth Circuit has not. But
17 there's also a powerful due process argument. I'm going to
18 press plaintiffs on why I should do a vacatur, since it strikes
19 me that if the statutory argument plaintiffs are pressing at
20 the end of the day is effectively a vacatur. But, in any
21 event, so have any -- as I understand it, the only Supreme
22 Court case on point on the due process dealt with a very
23 different factual situation, someone who had just crossed the
24 border, and the question really that a number of courts have
25 raised is whether or not there's a due process right for people

1 who lived here 20, 30, 40 years and may have other claims -- I
2 don't know, you know the immigration better than I do -- like
3 asylum or humanitarian parole, or even marriage, to hold them
4 in custody pending -- without a bail hearing, without review of
5 the possibility of these claims.

6 MS. SHINNERS: I think that's one person's argument,
7 but there's also the case of *Demore v. Kim*, which is a case in
8 which the court upheld the constitutionality of mandatory
9 detention, as provided for by Congress. Now, that case
10 involved 1226(c), but the second part of our argument -- or
11 actually the first part of our argument is that what petitioners
12 are actually pressing, it's not a procedural due process claim.
13 They're pressing a substantive due process claim, challenging
14 essentially the decision of Congress to render applicants for
15 admission subject to mandatory detention. And so essentially,
16 you know, although, again, we do think it's premature to get to
17 this issue at this posture, but recognizing that there -- you
18 know, assuming that the First Circuit agrees with the
19 government and recognizing there's an appeal, the statute
20 clearly authorizes the detention of aliens like petitioner, and
21 plaintiff doesn't deny -- like, essentially petitioner, excuse
22 me, and the class, they don't deny that they're applicants for
23 admission. They're not seeking process to determine whether or
24 not --

25 THE COURT: They're not seeking admission, that

1 they've been here for 10, 20, 30 years basically.

2 MS. SHINNERS: Understood, but assuming that the First
3 Circuit were to agree with the government that they are still
4 subject to detention under 1225(b)(2)(A), which is really the
5 only reason we would get to these constitutional claims to
6 begin with, is then, at that point, they still don't dispute
7 that they are within the category of inadmissible aliens who
8 are subject to detention pending a removal proceeding. In this
9 case, you know, it could be expedited removal for some members
10 of the class. For our petitioner and for others, it's regular
11 1229(a) or Section 240 removal proceedings. But they're
12 subject to removal proceedings, and Congress has determined
13 that they shall be detained for that removal proceeding and
14 pending that removal proceeding.

15 So in a sense, petitioners in their claims, they're
16 not seeking more procedures to determine whether they fall into
17 that category of individuals who are subject to -- who are
18 applicants for admission, again, assuming that the statutory
19 issue is resolved in the government's favor.

20 Instead, they're seeking to challenge Congress'
21 decision to impose mandatory detention, and that's a substantive
22 due process claim. That's a claim that's saying, "We have a
23 right to have a determination of our flight risk or
24 dangerousness." But that's not part of the statute. And so
25 it's more similar to *Demore v. Kim*, which the Supreme Court

1 upheld mandatory detention based on Congress' determination
2 that mandatory detention --

3 THE COURT: Wasn't *Demore*, though, a very different
4 procedural posture, right? Right? There had been already a
5 final determination, right?

6 MS. SHINNERS: In that case, no. They were
7 pre-removal orders. They were subject to detention under
8 1226(c), which is a different statutory provision. It wasn't
9 1225(b) (2) (A).

10 THE COURT: That's right.

11 MS. SHINNERS: Right, regarding criminal aliens, but
12 the --

13 THE COURT: All right, I got the basis wrong. It was
14 a very different procedural process.

15 MS. SHINNERS: But again, though, the court --

16 THE COURT: They were criminals. Our people, by
17 definition, aren't criminals.

18 MS. SHINNERS: Well, right, they're not -- correct,
19 members of the class aren't subject to detention under 1226(c),
20 or else they would be excluded from the class. However, the
21 point is, is that petitioner is saying these procedures are
22 required. However, it's not a procedural due process claim
23 because they're not actually saying, "We need more procedures
24 to determine if this particular statute applies to us." What
25 they're saying is, they want to rewrite the statute and say,

1 "Congress says that we shall be detained for a removal
2 proceeding unless the government cannot show that we present a
3 danger or a flight risk," which is not what the statute says.
4 So what they're really making is a substantive due process
5 claim. They would have to show a fundamental liberty
6 interest --

7 THE COURT: I understand that -- I think there's no
8 appellate case law on point, am I right? But let's assume for
9 a minute someone has been here 20, 30 years, has American kids
10 and an American wife maybe, essentially never committed a
11 crime, so has been excluded, there's a strong argument for some
12 liberty interest. I'm not sure how you have to define it, how
13 many years you have to be here and that sort of thing. I mean,
14 I'd have to think about that. But taking an extreme case,
15 which a lot of these are, 20 years and no criminal record,
16 decent human beings, whatever, would you consider that courts
17 should say there's a liberty interest?

18 MS. SHINNERS: I think the question of whether -- I
19 mean, if we're talking about a procedural or a substantive due
20 process claim, you have to have a fundamental right, and we
21 don't believe there's a fundamental right to be free from
22 detention pending removal proceedings. So, again, the question
23 of whether there's a liberty interest at stake, you get into a
24 procedural due process analysis, and that due process analysis
25 is not appropriate here. However, if we did do a procedural

1 due process analysis --

2 THE COURT: What if you're right, it's substantive due
3 process? Let's assume that that's right, that you have a
4 substantive due process, a liberty interest to a bond hearing.

5 MS. SHINNERS: But it's not --

6 THE COURT: Has any court held that?

7 MS. SHINNERS: Sorry. That there's no interest in --

8 THE COURT: Has any court held that there's a liberty
9 interest for these people who have been here for a very long
10 time not to be detained for lengthy periods of time pending a
11 decision on removal? Judge Sykes, did she decide that -- I'm
12 sorry -- in the California case?

13 MS. SHINNERS: Yeah, no, understood, and I apologize,
14 your Honor. I didn't understand Judge Sykes to have made a due
15 process ruling.

16 THE COURT: Okay. Did anybody?

17 MS. SHINNERS: I would have to double-check that. I --

18 THE COURT: Well, I'll ask plaintiff that as well.
19 Has any appellate court said that there's a due process, a
20 substantive liberty interest for people who have been here a
21 long time without committing a crime?

22 MR. McFADDEN: Yes, your Honor. In fact, the Supreme
23 Court has said that multiple times. So I think, just to take a
24 step back, in the *Zadvydas* case, the Supreme Court said that
25 all persons within the United States have due process rights.

1 That has been repeated, you know, in a variety of cases, but
2 also, for example, in the *Mezei* case, the Supreme Court
3 specifically said that people who entered and are inside the
4 United States, regardless of how they entered, have due process
5 rights once they're inside the United States. That's the
6 distinguishing feature from the case you mentioned, the
7 *Thuraissigiam* case. That's a person who was arrested at the
8 border while they were arriving -- I think they were 25 yards
9 inside the border -- and there the Supreme Court said a person
10 at the border who is arriving has more limited due process
11 rights, at least in the field of their asylum claim. But the
12 Supreme Court has been clear that once you're inside the United
13 States, all people within our country do have due process
14 rights.

15 THE COURT: Is that *Zadvydas*? Is that how you're
16 pronouncing it? But that was a very different procedural
17 posture too. I mean, that was after there's a final notice of
18 removal and people were here for -- without a possibility of
19 removal, and they said, "Well, after six months, you may have
20 some rights here."

21 I'm struggling with whether or not any court has ruled
22 that if the government is right and the statute doesn't give
23 them the right to a bail hearing, whether or not any court has
24 ruled that there's a liberty interest for people who are
25 perhaps applicants for admission -- perhaps the Fifth Circuit,

1 you know, reasoning prevails -- that there's a due process
2 right for these people to have bail hearings.

3 MR. McFADDEN: Yes, your Honor. So the First Circuit
4 certainly has. So, I mean, again --

5 THE COURT: The *Brito* line of cases, yes, so you would
6 just rely on that?

7 MR. McFADDEN: Well, I think, your Honor, what *Matter*
8 *of Hurtado* purports to require is that people arrested inside
9 the United States would be jailed for significant periods of
10 time with no detention hearing and no due process at all,
11 deprived of their liberty based solely on DHS's accusations in
12 the civil proceeding, and no court has ever ruled that that's
13 permissible. And the First Circuit in *Hernandez-Lara* and in
14 *Pereira Brito* said people exactly like that are in fact
15 entitled to process, they're entitled to a bond hearing with
16 strong procedural protections.

17 *Hernandez-Lara* was about a person who had entered
18 without inspection, like our class members, and was arrested
19 inside the United States. She was entitled to a bond hearing.
20 In *Pereira Brito*, two of the three class representatives and
21 many of the class members were people who had entered without
22 inspection as well.

23 And, as the Court mentioned, you know, *Demore v. Kim*
24 and *Zadvydas* are different. You know, the court did authorize
25 detention in those cases; but *Demore*, the person had already

1 had the process because they'd gone through a complete criminal
2 process resulting in a conviction, and so there was due process
3 provided that triggered the detention. And similarly *Zadvydas*,
4 that's a case about a person who had the complete removal
5 proceeding and ends up with a final order of removal, and then
6 there's detention while the government tries to effectuate the
7 order of removal.

8 But the Supreme Court has never suggested that people
9 arrested inside the United States can be deprived of their
10 liberty without any due process, which is what *Hurtado* purports
11 to require. That's the exact opposite of what the Fifth
12 Amendment says.

13 THE COURT: So let me ask you this, which is, I was
14 confused -- I'll use that word -- about your position in this
15 case because you didn't ask me to rule at this point on the due
16 process claim, other than in the context of denying the motion
17 to dismiss. I think I shouldn't ever presume to know what the
18 First Circuit will think, but you're asking me to present it to
19 them in three chunks. In other words, I'm supposed to rule on
20 vacatur for the *Hurtado* case, and possibly even recertify the
21 class, and not rule on due process. I think that's not how the
22 First Circuit, as I've seen them over the years, does business.
23 I mean, I think the logical way is to wait until they've ruled
24 on the statutory. And then I'm assuming -- I think they do
25 know because they very rarely order expedited briefing, I think

1 they do know how urgent this is; and for me to wait for that
2 statutory ruling and then hold this in abeyance. And if they
3 find that the statute means what I thought it meant and
4 disagrees with the Fifth, this is answered. If they feel the
5 other way, I would immediately jump into considering whether to
6 certify a class on the due process claim. But if they say it
7 means what the government says it means, then it's the same as
8 vacating *Hurtado*. I'd be reversed on that too. I mean, it's
9 the same relief. I just don't get your position. You want to
10 do it in sort of a three-step process.

11 MR. McFADDEN: Yes, your Honor, and I'm happy to
12 explain why that is.

13 THE COURT: Yes.

14 MR. McFADDEN: So, you know, initially we had moved
15 back in October for a class to be certified for all of the
16 claims --

17 THE COURT: Yes, you did.

18 MR. McFADDEN: -- and I know the Court had indicated
19 it wanted to see what happened, I think, with the declaration
20 and then address the other claims, if it became necessary to do
21 so.

22 THE COURT: Yes.

23 MR. McFADDEN: So you did enter the declaration. And
24 initially our class members, it seems, did in many cases get
25 bond hearings. But then the Department of Justice, through the

1 Chief Immigration Judge, sent an instruction to all the
2 immigration judges ordering them not to comply with those
3 declarations because the declarations did not vacate *Hurtado*.
4 And so what that means now is that many of the immigration
5 judges complied with that and are now not providing bond
6 hearings to our class members. One immigration judge in Boston
7 was actually continuing to provide bond hearings, and she was
8 abruptly removed from the detained docket and replaced with a
9 judge who would follow orders. So as a result, our class
10 members right now are not getting bond hearings in the Boston
11 Immigration Court, and that's resulting in many class members
12 being unlawfully detained without a bond hearing.

13 THE COURT: Well, can I stop you there. It's my
14 impression that those people, especially the ones with lawyers,
15 are rapidly coming to our court here, which is almost uniformly,
16 I think, granting habes, unless there's some procedural oddity
17 to it, and it's going right back to Immigration Court where
18 they're all getting bond, is that right, a host of them?

19 MR. McFADDEN: Yes. So every District Judge in
20 Massachusetts, to my knowledge, that has addressed the issue
21 has agreed with your resolution of it and has agreed the *Matter*
22 *of Hurtado* is unlawful. Some people are able to access the
23 court and file habeas petitions, but, of course, that's very
24 difficult for many people who don't have a lawyer, they may
25 have a language barrier, and the government is often

1 transporting people very rapidly out of Massachusetts. And so
2 then they end up in someplace where it's very difficult for
3 them to access court backup counsel in Louisiana.

4 THE COURT: I ordered that notice be given in multiple
5 languages saying "You are entitled to a bond hearing." And it
6 was very short, and I tried to make it as plain and clear as it
7 could possibly be made clear. Are people getting those notices?

8 MR. McFADDEN: The government has represented to us
9 that they are complying with your order. So, you know, it's
10 obviously difficult for us to verify --

11 THE COURT: Have lawyers? I mean, you've got such an
12 aggressive immigration bar. Have you heard otherwise?

13 MR. McFADDEN: I have not, your Honor, no.

14 THE COURT: Okay, so I'm going to assume, because you
15 are very good at communicating with me when things aren't
16 working, that they're getting the notices and that people -- we
17 do get pro se filings in this court all the time, so I'm just
18 assuming that everybody understands what their rights are at
19 this point and can come to this court if an immigration judge
20 declines to hold a bail hearing. Now, I understand then that
21 creates a hiatus of what, probably a couple weeks, right?

22 MR. McFADDEN: Right, it does certainly lengthen the
23 period of detention while they wait for a separate federal case
24 to be resolved before they can go back and ask for the bond
25 hearing they were entitled to in the first place. It also is

1 quite difficult for unrepresented people to figure out how to
2 draft and file a habeas petition. It has to be done, I would
3 assume, by mail. And, of course, many of them are being
4 transferred away from Massachusetts while that process could
5 potentially be playing out. So it is quite difficult, I think,
6 for people to access the courts for people who are not
7 represented and not familiar with preparing legal filings.

8 The reason we thought APA relief would be appropriate
9 at this stage is the rationale stated by the Chief Immigration
10 Judge in her email, where she essentially said, "Don't follow
11 the declarations because the declarations didn't vacate *Matter*
12 *of Hurtado*." So if you were to vacate *Matter of Hurtado*, our
13 expectation is that would essentially undermine the reason
14 given for the instruction not to provide the bond hearings, and
15 that might trigger the Immigration Court here in Massachusetts
16 to begin providing bond hearings consistent with your
17 declaration, and so that's why we've been seeking vacatur.
18 There does seem to be a pretty good chance that that could
19 remedy things, at least in the interim until the First Circuit
20 issues a ruling, which they may hear argument next month, but
21 we don't know when the decision will come.

22 And we're very concerned that in the meantime, a lot
23 of our class members are really being deprived of liberty
24 without process required by law, in violation of the
25 Constitution and statutes, and in many cases without an

1 effective ability to remedy the situation. And that also puts
2 them under really tremendous pressure in the immigration system
3 when effectively the message they're getting is, "You're never
4 going to get out of jail." And so the price of admission, even
5 if you have a meritorious immigration case, the price of
6 admission to Immigration Court is basically consenting to one
7 to two years in jail. That puts tremendous pressure on people,
8 even with meritorious immigration cases, to abandon their cases
9 and accept deportation because spending a year or two years in
10 jail is simply not tenable for so many people.

11 THE COURT: And why would you -- I have never seen
12 anybody certify a class -- maybe it's happened -- on a vacatur.
13 I mean, it's coming up all the time now in various contexts
14 with rulings from the administration, but I'm not seeing people
15 certify a class. And I think that's messy because then it goes
16 up on appeal, and the First Circuit says, "What? You just
17 certified this on an interlocutory basis. What are you doing
18 here? Oh, and you haven't even dealt with the due process
19 issue?" They're going to look at me, like, "Haven't you been
20 around for a while? You know, this isn't how we do things."

21 MR. McFADDEN: So, your Honor, we -- oh, sorry. My
22 apologies.

23 THE COURT: Go ahead.

24 MR. McFADDEN: We had asked for essentially the vacatur
25 to be packaged in two different ways, your Honor. One would be

1 a general order of vacatur which has universal effect. I think
2 even the government assumes that under current law, a general
3 order of vacatur would have universal effect. And then,
4 second, you know, we are concerned, though, that if you issue
5 that order, the government could send some type of communication
6 to the immigration judges and tell them, oh, that only applies
7 to Mr. Guerrero Orellana or some very small subset of the
8 class, and similar to how they're administering instructions to
9 judges to date. And so we also wanted to make sure at least
10 our class members are covered, so we are asking for an order of
11 general vacatur, but separately for a class to be certified and
12 a separate order of vacatur specific to the class so that no
13 one can tell the immigration judges our class members aren't
14 covered by the general vacatur order.

15 And we cited in our papers, there are a number of
16 cases that have certified classes on APA claims, including the
17 *Jacobo-Ramirez* case out of Nevada just in the last month; and
18 that was a case about *Hurtado* where the judge had certified a
19 class including APA claims. We don't think a class is
20 necessary for APA relief, but a general APA vacatur order
21 does --

22 THE COURT: If I vacate *Hurtado* -- this is where you
23 really get me in a bind -- I'm vacating it for the country. I
24 mean, it's not just like -- you don't vacate a rule and just
25 say, "Oh, it's only vacated for the Boston ERO," or whatever

1 the -- it's awkward, right, what you're asking me to do? I'm
2 just struggling with it. I'd be vacating it for the United
3 States of America, not just my class.

4 MR. McFADDEN: Yes, your Honor. So our contention is
5 that, yes, a general vacatur order would operate for all people
6 who are impacted by *Matter of Hurtado* because *Matter of Hurtado*
7 would be withdrawn as a source of legal authority that the
8 agency relies on. What that means, that the immigration judges
9 in the different geographic locations would then look to the
10 local authority that would govern how they address this question.
11 So here in Massachusetts, *Hurtado* would be gone, that side of
12 the equation would be empty, and the only thing left would be
13 your declaration that our class members are entitled to a bond
14 hearing.

15 I assume in the Fifth Circuit, the local immigration
16 courts there would say -- they would likely say, I imagine,
17 that they're bound by the law of the circuit, and they would
18 probably follow the Fifth Circuit, and that's what would
19 happen.

20 I think that the only potentially complicated scenario
21 that would arise would be if one of our class members from here
22 is transferred by the government into the Fifth Circuit, for
23 example. But the government in this case has already agreed
24 that transferring a class member after they become a class
25 member here in Massachusetts does not divest them of their

1 rights, so they would continue to have the same rights --

2 THE COURT: Do you know what happened to that person
3 when I told the lawyer in Texas to say they were a part of my
4 class? Do you know what happened down there?

5 MR. McFADDEN: I'm not sure, your Honor, no.

6 THE COURT: I'm not sure either, yes.

7 What about the government's point of view? I mean, it
8 was sort of troubling -- let's just use that word -- that the
9 Chief Administrative Immigration Judge said, "Oh, never mind,
10 don't follow it because she didn't vacate *Hurtado*." I mean,
11 that's sort of like -- she may disagree with it, but I did
12 rule.

13 MS. SHINNERS: Yeah, I mean, your Honor, that is
14 consistent. I mean, the email says that the Court's
15 declaratory judgment is not an injunction and does not purport
16 to vacate *Matter of Yajure Hurtado*. So I believe that's more
17 similar to what the email actually says. But, again, as we
18 said at the status conference, that is consistent with the
19 position that we've all along set forth, that a classwide
20 declaratory judgment is not coercive, and otherwise it would be
21 an injunction that would run afoul of Section 1252(f)(1).

22 THE COURT: And so if it's not an injunction, suppose
23 I just say, you know, by ruling this way, that means that
24 *Hurtado* is vacated? I'm not inclined to certify a separate
25 class on it, but just would that deal with the issue so the

1 immigration judges would feel free to follow it?

2 MS. SHINNERS: They would also be able to apply
3 1225(b)(2)(A). They just would not be -- they cannot rely on
4 *Yajure Hurtado* to do so, but they could, as noted in our
5 briefing, they could still apply 1225(b)(2)(A).

6 I think what I'm getting at is that plaintiffs are --
7 is that your Honor is correct that what makes the most sense
8 here, if the Court is not inclined to dismiss the APA claim at
9 this juncture, which I think is perfectly appropriate under
10 Section 704 --

11 THE COURT: I won't be dismissing either claim probably,
12 but I'm confused. I really want the First Circuit to have the
13 first stab at this.

14 MS. SHINNERS: Right. Your Honor is correct that that
15 makes sense, and that's going to give more appropriate -- I
16 mean, that's the government's position all along is that's how
17 these issues have been decided in the past, that's how they are
18 to be decided is appellate review. And then the Circuit Court
19 decision, the government, the BIA precedent is that the
20 Immigration Courts follow the decisions of the Circuit Courts
21 for cases that -- I believe it's "arise in the jurisdiction" or
22 that "take place in the jurisdiction."

23 So as petitioner's counsel pointed out, in the Fifth
24 Circuit, that would be the Fifth Circuit law. Here it would be
25 First Circuit law. And so what you're going to get from a

1 First Circuit decision is actually going to be more effective
2 than vacatur of *Yajure Hurtado*, and it wouldn't present the
3 problems of trying to coerce the government nationwide. And we
4 do think that a vacatur order, although it's not the same as an
5 injunction, like I said, immigration judges are still free to
6 apply 1225(b)(2)(A) without relying on *Yajure Hurtado*.

7 THE COURT: Do you agree, *Hurtado* is also effectively
8 a rule because everybody is applying it?

9 MS. SHINNERS: It is a published decision. I wouldn't
10 categorize it as a rule, but --

11 THE COURT: A published final agency action governing
12 bail. I mean, I guess it's not a rule, but it's a final agency
13 action, right?

14 MS. SHINNERS: Well, no, we don't agree it's a final
15 agency action in the context of adjudication. So while we
16 understand that it is a published decision and that it is meant
17 to be followed by the IJ's, a published decision is meant to
18 serve as precedent. So it's like an appellate court decision
19 that's meant to serve as precedent. However, it's not a final
20 agency action unless and until, for purposes of APA, unless and
21 until it's applied to the individual in the context of an
22 adjudication. So that this is different. This is different
23 from a rule because the way bond hearings are addressed or
24 request for bond hearings are addressed are over the course of
25 adjudication through the Immigration Court. And so it's not --

1 the question is what's the consummation of the decision-making
2 process for each detainee? And in this context --

3 THE COURT: Do you understand the hardship you're
4 putting on us, the courts? We've been swamped. I think
5 Mr. Farquhar once gave us statistics. I don't know if he's
6 still on the line, you know. I think everyone has been
7 swamped. I know his office has been swamped. I just recently
8 got a notice from someone who they were so swamped, she missed
9 one of our orders. I'm not saying she did that intentionally.
10 I mean, just the office is overwhelmed, we're overwhelmed, and
11 it creates this ridiculous situation where somebody gets picked
12 up. They want a bail hearing. They go to the court. They say
13 "no." Then they have to file a habeas here, and then we have
14 to issue rulings. The AUSA gets involved, and eventually the
15 person gets a bond hearing. And mostly they're being, as I
16 understand it, released.

17 Is that still right, Mr. Farquhar? They're mostly,
18 unless they have committed a crime or they're a flight risk,
19 they're mostly being released, right?

20 MR. FARQUHAR: Your Honor, I actually don't keep track
21 of what happens once they leave the District Court. Our role
22 is to really make sure that we respond to the habeas petition.
23 Then, once it reaches the administrative process, it's not
24 something that we actually keep statistics --

25 THE COURT: How many of the petitions have you kept

1 track of, a running tab?

2 MR. FARQUHAR: I'm sorry?

3 THE COURT: How many of these previous petitions have
4 been filed?

5 MR. FARQUHAR: Since September, your Honor, there have
6 been over a thousand.

7 THE COURT: Right, that's huge, and it's a huge volume
8 for our court, for them, and for the immigration bar, so --

9 MS. SHINNERS: Right, I understand, your Honor. Oh,
10 sorry, I didn't mean to interrupt.

11 THE COURT: So I'd be inclined to wait until the First
12 Circuit rules because I don't want to jump into complicated APA
13 issues. But I'm very wary of doing this three-step dance here.
14 So I'm struggling, I have to tell you, procedurally about what
15 to do here. Let me put it this way -- maybe you don't have the
16 authority to answer this, so I get it, you're in a tough
17 spot -- but if I said, "Yes, it's vacated, she's wrong, this
18 effectively vacates it," will they then start following it?

19 MS. SHINNERS: I think, as we set forth, they could
20 then still apply 1225(b)(2)(A).

21 THE COURT: Well, that's a different story, but they
22 wouldn't be relying on --

23 MS. SHINNERS: No. It's my understanding they
24 wouldn't be relying on *Yajure Hurtado* to do so because it would
25 be vacated. I mean, currently it is vacated already by the

1 *Bautista* court, although we have sought a stay of that ruling,
2 so that's why we haven't said that this claim is -- we have
3 appealed and sought a stay of that ruling, so we're not arguing
4 the claim is moot, but I think the sense of urgency is a little
5 bit less. There is a stay motion pending on that *Bautista*
6 order. I think we've asked for a decision by March 12 from the
7 Ninth Circuit. I don't know if the Ninth Circuit will issue a
8 decision by that time on the stay, but at that point we will
9 know if the *Bautista* --

10 THE COURT: Well --

11 MS. SHINNER: -- stay order is going to be in effect.
12 Yes, your Honor, I'm sorry.

13 THE COURT: No, no. Did you ask for a particular time
14 for ruling from the First Circuit?

15 MS. SHINNERS: We haven't, but either party still
16 could ask for a ruling on the merits of the appeal. I mean, a
17 stay motion is a little bit more of a quicker process in the
18 Ninth Circuit, but in terms of asking, I mean, I think we're
19 not there yet because briefing will be completed on March 16th,
20 but I think either party could ask for a ruling. I don't know
21 what the First Circuit would do, but I have had expedited
22 appeals this past year in front of the First Circuit, and
23 they've moved relatively expeditiously in terms of issuing a
24 decision.

25 THE COURT: Good.

1 MS. SHINNERS: I do think your Honor is correct: I
2 don't think we want to wade into this issue when the First
3 Circuit ruling is going to provide more effective relief. I
4 mean, petitioner -- more effective relief, at least within the
5 First Circuit, than vacatur, and other circuits are also
6 addressing the question --

7 THE COURT: Is vacatur in the other circuits as well,
8 the Ninth, the Eighth, and the Sixth?

9 MS. SHINNERS: No. That -- that's not at issue in
10 those appeals, to my knowledge, and definitely not in the Ninth
11 and in the Sixth, and, no, I don't believe so in the Eighth.

12 THE COURT: And the Fifth, did they --

13 MS. SHINNERS: I do think it's --

14 THE COURT: -- did they address the applicability of --

15 MS. SHINNERS: No, I don't believe they did, no. I
16 mean, the underlying statutory interpretation is what is
17 centrally at the core, obviously, of petitioner's APA claim.
18 There are so many threshold reasons that I think I want to
19 point out again, that a vacatur of an APA or of a BIA decision,
20 petitioner says it's routinely done, but other than the
21 *Bautista* order, they haven't cited a single decision that does
22 so. And here we're talking about a core habeas claim. This is
23 a claim that's not about, like, what sort of -- it's about the
24 government's authority to detain mandatorily without a bond
25 hearing. It's about the actual authority. That is a core

1 habeas claim. It is not a question of what policies should the
2 government have in terms of who to detain or when, which are
3 some of the other cases that plaintiffs cite where courts say,
4 "Oh, you can have an APA claim and a habeas claim." Those are
5 those kind of cases where the question was, oh, the government
6 has a practice of exercising its discretion in a particular way
7 to detain people or to not release them on parole. The majority
8 of the cases that petitioner cites where a court did entertain
9 an APA claim, despite the availability of a habeas remedy, were
10 those kind of case. Here, the challenge to *Yajure Hurtado*, it
11 collapses into the core habeas claim as to whether or not this
12 type of detention without a bond hearing is authorized by the
13 statute, or the Constitution if we get there. That is a core
14 habeas claim, and the way these issues have been decided and
15 the way they are being decided is through appellate review.

16 THE COURT: I understand, but what you're not
17 recognizing is the unusual moment where we've had a thousand
18 habeas petitions that's really delaying release. Almost all
19 these people are getting out. It's just delaying the release,
20 and it's also putting a burden on the court.

21 So let me ask you this: Have notices been given to
22 all these people in the various languages as soon as they're
23 denied a bail hearing in habeas court, that they have a right
24 to run into Federal Court?

25 MS. SHINNERS: They have been being served with the --

1 have been served with the second notice. We have, and we were
2 discussing this with plaintiffs, the court said a timing
3 requirement was three hours. ICE is doing it as soon as
4 practicable, and usually it's the same day. But because of the
5 realities of the way the detained hearing works, it's not right
6 after the bond hearing is denied, but it is after the bond
7 hearing session is over, in which case the ICE officers --
8 essentially how it works, just to give you some background, is
9 the ICE counsel who's representing the government is either
10 present in the Immigration Court for the detained hearings or
11 is appearing remotely, and is not in the same room as the
12 detainees who are appearing remotely from their contract
13 detention facility. And so there could be a -- there's a
14 hearing session that the attorney is handling, and that session
15 itself could last two to three hours. And so at the end that
16 session, the ERO attorney reports who was denied a bond hearing,
17 reports to ICE. Then they're able to serve those people, you
18 know, sometimes serve the detainees by sending the ICE officer
19 to serve them and follow the various service requirements. But
20 we have served everyone -- or ICE reports that it has served
21 everyone who was originally served with the original notice and
22 has subsequently been denied a bond hearing or been transferred
23 out. So that notice has been complete, and they've been
24 serving it very soon after the bond hearing.

25 THE COURT: And giving them access to a phone?

1 MS. SHINNERS: And giving them access to a phone. I
2 mean, that's part of the logistical issue, but, yes, and then
3 giving them access to the phone in accordance with the Court's
4 order.

5 THE COURT: And do you have a sense that every single
6 one of these immigration judges has denied bond based on the
7 instruction from the Chief Judge?

8 MS. SHINNERS: At this point I -- I -- well, right
9 now, yeah, *Yajure Hurtado* is vacated, so I think we're in a
10 different posture right now. I do understand that --

11 THE COURT: I missed it. You view *Hurtado* as having
12 been vacated?

13 MS. SHINNERS: Well, it has been by the *Bautista*
14 court, so no one is relying on it right now.

15 THE COURT: No one is relying on it. So has someone
16 informed the Chief Judge of that fact?

17 MS. SHINNERS: To my knowledge, I -- yes, to my
18 knowledge, yes.

19 THE COURT: So is this a moot point?

20 MS. SHINNERS: Well, that's what I was saying earlier,
21 your Honor. Because we have appealed and sought a stay of that
22 order, we haven't said that the petitioner's request is moot.
23 However, there is not -- currently *Yajure Hurtado* is vacated.
24 We've sought a stay of that decision vacating *Yajure Hurtado*.
25 That's the one that we've asked for a decision for by

1 March 13th. So right now, however, it is vacated, so an order
2 from this Court is not going to additionally -- I mean, it's
3 already vacated out of the Ninth.

4 THE COURT: Oh, I see. So you'll let me know if the
5 Ninth Circuit stays that. Otherwise, it is the law here.

6 MS. SHINNERS: Well, right, it's -- I mean, they're
7 not -- they are not to rely on it is my understanding. They
8 may still be denying bond hearings based on 1225(b)(2)(A) but
9 not in reliance on *Yajure Hurtado*.

10 So again, though, that leads me back to my point, that
11 if the First Circuit agrees with your Honor, then that ruling
12 from the First Circuit is going to provide the law for the IJ's
13 to follow in accordance with the BIA precedent. So that's
14 another reason it doesn't make sense to vacate *Yajure Hurtado*,
15 especially given these issues with whether an APA claim is
16 appropriate in this context and whether the relief is
17 appropriate.

18 THE COURT: Okay, now, let's assume for a minute that
19 the First Circuit agrees with the Fifth Circuit -- I'm not
20 assuming that at all, but if that is the case, I would want to
21 jump immediately into the due process stage of the case and
22 consider whether to certify a class on that. So I don't view
23 this case as done. If, however, it agrees with my statutory
24 interpretation, unless the Supreme Court stays it, I think the
25 case is over. I don't know that I would also decide a due

1 process claim. I'm not sure I would need to. So I'm just
2 understanding that this is a fast-moving litigation on many
3 fronts and trying to figure out what the best way to do it is.
4 I will not be dismissing the due process claim. I'm not sure
5 whether it's even ripe to do the vacatur if, as you say, the
6 Ninth Circuit is applicable, and if they're not following it
7 anyway. At least that's your representation. But if that gets
8 stayed, then it's back on my plate.

9 What do you suggest, Mr. McFadden?

10 MR. McFADDEN: Yes, your Honor, I just wanted to
11 briefly touch on the vacatur order out of the Central District
12 of California in the *Maldonado Bautista* case. So I think that
13 this Court should proceed, even though that vacatur order also
14 has entered in mid-February. One reason is that the government
15 says the government has filed an emergency motion in the Ninth
16 Circuit to stay that vacatur order, and a decision could issue,
17 and at that point, if no vacatur order is in place from this
18 Court, then there would be a gap in coverage for our class
19 members.

20 The other reason is that it is true, as far as we're
21 hearing, after the vacatur order entered in California, it was
22 true that it appears the Immigration Courts here in Massachusetts
23 are still not providing bond hearings to the class members; and
24 I would just say, we don't exactly understand why that is.
25 Earlier in the California case --

1 THE COURT: It just makes the issue effectively moot
2 until the Ninth Circuit rules because they're relying basically
3 on the statute, not on that decision.

4 MR. McFADDEN: So I guess I don't think so, your
5 Honor, because earlier in the California case, the government
6 was making arguments that the California decision, because of
7 the nature of the case being in habeas, that it did not have
8 geographic scope in terms of its effect beyond the Central
9 District of California. And so one concern we have is, it may
10 be that the Immigration Courts here in Massachusetts are not
11 providing bond hearings because there's something about the
12 geographic location of that decision that is causing them to
13 disregard the rights of the class members to bond hearings. So
14 in that instance, a decision locally actually would be quite
15 helpful because the immigration judges would -- if that's the
16 reason why they're not doing it, the immigration judges would
17 be more likely in that circumstance to grant the bond hearings.
18 It is somewhat unfathomable to me that an immigration judge
19 faced with a final declaration of an Article III court, you
20 know, where the separation of powers says the court has the
21 authority to enter that, the declaratory judgment statute says
22 the court has the authority to enter that, they're issuing
23 claim preclusion against the government because the government
24 is a party in this litigation with the class members, and that
25 also indicates that the Court's declaration is the law. And it

1 would really be --

2 THE COURT: It would have to be a lot broader --

3 MR. McFADDEN: But there's nothing on the other side
4 of the ledger if they would just ignore your declaration.

5 THE COURT: So under the doctrine of judicial
6 estoppel, the government at this point is estopped from saying
7 *Hurtado* is applicable. However, what she is doing is reserving
8 the position that they're still going to apply 1225(b)(2),
9 which does seem to be in direct contradiction to my order.

10 So it's a complex procedural process -- let's just put
11 it that way -- but one thing that I'm not doing is certifying a
12 separate class on *Hurtado*, and it even may be moot, and I'm
13 going to wait to see how some of these Circuit cases play out.
14 In the meantime, this court is taking care of everyone who gets
15 here. We are right on top of it. Every single judge has a
16 procedure. The government, Mr. Farquhar's operation, has been
17 fantastic in getting us -- you know, there have been a few
18 glitches, I've seen one of them myself, but for the most part
19 have been fantastic about immediately getting back to us about
20 whether they fall in the class. So, I mean, we have a process.
21 I mean, we're not ignoring the due process rights of the
22 immigrants. To the contrary, we're quite cognizant of the
23 statutes involved here. But it is a procedural precedent, so
24 let me think about it some more. And I would love it -- and
25 you've been great about this -- is supplementing as cases come

1 down. Especially I will be waiting by -- what did you say,
2 March 12th? == what is the Ninth Circuit going to do? I don't
3 know. Otherwise what, the Solicitor General then goes up on
4 appeal and says, "They haven't gotten back to us"?

5 MS. SHINNERS: Well, I'm not sure what's going to
6 happen. I can't represent what's going to happen after
7 March 12th. That is when we requested a decision by. We'll
8 see, I think, at that point whether the Ninth Circuit does
9 issue a decision by that time.

10 THE COURT: You know, these are thorny issues. It's
11 sort of a little rough to say to a circuit "Give them a
12 deadline." It's usually the other way around, but that's your
13 problem.

14 So, anyway, I will take this under advisement, and I
15 look forward to hearing as these cases percolate and make a
16 decision as to what I do. Thank you to everyone.

17 MS. SHINNERS: Thank you.

18 MR. McFADDEN: Thank you, your Honor.

19 THE COURT: Thank you.

20 (Adjourned, 10:27 a.m.)

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C E R T I F I C A T E

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2
3 UNITED STATES DISTRICT COURT)
4 DISTRICT OF MASSACHUSETTS) ss.
5 CITY OF BOSTON)

6
7 I, Lee A. Marzilli, Official Federal Court Reporter,
8 do hereby certify that the foregoing transcript, Pages 1
9 through 39 inclusive, was recorded by me stenographically at
10 the time and place aforesaid in CA No. 25-12664-PBS, Jose
11 Arnulfo Guerrero Orellana v. Moniz, et al, and thereafter by me
12 reduced to typewriting and is a true and accurate record of the
13 proceedings.

14 Dated this 10th day of March, 2026.

15
16
17
18
19 /s/ Lee A. Marzilli

20 _____
LEE A. MARZILLI, CRR
21 OFFICIAL COURT REPORTER
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25