

JOSE ARNULFO GUERRERO ORELLANA,)
)
Petitioner)
)
-VS-)
)
PATRICIA H. HYDE, et al,)
)
Respondents)

CA No. 25-12664-PBS
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BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
October 14, 2025, 4:07 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
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A P P E A R A N C E S:

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P R O C E E D I N G

THE CLERK: Court calls Civil Action 25-12664, Orellana v. Moniz, et al. Could counsel please identify themselves.

MR. McFADDEN: Good afternoon, your Honor. Dan McFadden from the ACLU of Massachusetts on behalf of the petitioner, Mr. Guerrero Orellana, who is present in the gallery with an interpreter.

THE COURT: Thank you.

MR. HART: Good afternoon, your Honor. Chris Hart with Foley Hoag, also on behalf of the petitioner.

MR. FLENTJE: Augustus Flentje with the Justice Department for the defendants.

THE COURT: Thank you.

MR. KHETARPAL: Good afternoon, your Honor. Anuj Khetarpal for the United States.

THE COURT: All right, thank you. We can be seated.

Let me start off by saying I very much appreciate the expedited and excellent briefing on the schedule, very tight schedule, over a holiday weekend. And it's an important issue, and we're trying to do it in an expedited way, but I understand it must have been a burden on everybody in this room to get it done. It's so technical and so difficult, the statutory scheme, that I appreciate the briefing.

So this is a motion for class cert, and I did get a

1 chance to read the reply yesterday afternoon. And the
2 government's brief was what, Friday afternoon I think it was
3 that you got it? Is that right, something --

4 MR. FLENTJE: Thursday.

5 THE COURT: Was it Thursday? And I had a chance to
6 read that as well. So why don't we start. I understand from
7 your opening remarks that your client has been released. Is
8 that right?

9 MR. McFADDEN: Yes, your Honor. Our client received
10 his bond hearing last Thursday. He was released on a bond of
11 \$3,500 last Friday.

12 THE COURT: For how much?

13 MR. McFADDEN: \$3,500, your Honor.

14 THE COURT: All right, thank you.

15 The other thing I wanted to know is, the motion for
16 class certification, I know there's at least one other case in
17 the country, maybe two others. What is the current status of
18 the litigation nationally?

19 MR. McFADDEN: My understanding, your Honor, is that
20 there is one other certified class.

21 THE COURT: It's already been certified?

22 MR. McFADDEN: Yes, your Honor. It's the *Rodriguez*
23 case in the Western District of Washington. My understanding
24 is, that is a geographically limited class to the Northwest
25 United States and would not overlap with this class. There

1 the, as I understand it, the court has granted partial summary
2 judgment on the statutory claim and has entered under Rule 54(b)
3 a partial final judgment on that claim, a declaratory judgment
4 on behalf of the class --

5 THE COURT: So it will be going immediately up to the
6 Circuit?

7 MR. McFADDEN: I guess it would be a question for the
8 government.

9 THE COURT: All right, let me ask the government. So
10 as far as you know, that's the only other case of this sort in
11 the country?

12 MR. McFADDEN: As I understand it, there are two other
13 putative class actions that had been pled in other locations,
14 your Honor, but to the best of my knowledge, classes have not
15 been certified in those cases.

16 THE COURT: All right, thank you. Nothing you know
17 that would conflict with this in any way, no national classes?

18 MR. McFADDEN: So there's a case in California, your
19 Honor, that I believe has been pled as a national class action.
20 My understanding is, their next hearing is in November, and
21 there is no class certified in that case at this time.

22 THE COURT: Okay, thank you.

23 What's your sense of the state of the litigation from
24 the government's point of view?

25 MR. FLENTJE: I think that is accurate. I wasn't

1 quite sure what the scope of the requested class in the case in
2 Los Angeles is. I can check that during the hearing, but --

3 THE COURT: Well, it's not critical. It's just I want
4 to -- it's so -- it's breaking, every day there's another case,
5 and I want to just stay current with where the case law is as
6 you hear it.

7 MR. FLENTJE: Sure. And the case in Washington does
8 have a certified class. It's limited to that area, and final
9 partial summary judgment --

10 THE COURT: So I was curious about that. Maybe we can
11 start there, which is -- because right now, neither side has
12 asked for that, and I'm only dealing with class cert, as far as
13 I'm concerned, so --

14 MR. McFADDEN: Yes, your Honor, currently there is
15 a --

16 THE COURT: -- the government can -- I'm sorry --
17 additional briefing on summary judgment, so I was just trying
18 to understand where you see the scope of the case is.

19 MR. McFADDEN: Yes, your Honor, currently there is
20 only pending the motion for class certification. If a class is
21 certified, I anticipate we likely would move promptly for at
22 least partial summary judgment at that time.

23 THE COURT: Okay. And I'm asking that because there
24 is a right to an immediate appeal on class cert decisions on an
25 interlocutory basis. Did you do that? Not you personally, but

1 did the DOJ do that in Washington?

2 MR. FLENTJE: No. I think we're -- the final
3 determination, I think, the final decision, partial summary
4 judgment in that case came down I think the day before our last
5 hearing, and I think no determination has been made yet on next
6 steps in that case.

7 THE COURT: Okay. All right, thank you. I just
8 wanted to make sure. Okay, so --

9 MR. FLENTJE: And I think it's a while before our
10 response to the complaint is due, so --

11 THE COURT: Wait a minute. Summary judgment is issued
12 before a response to the complaint? It couldn't be.

13 MR. FLENTJE: No, I'm talking about in this case.

14 THE COURT: Oh, in my case. Okay, all right, fine. I
15 was going to say, in the state of Washington, that would be
16 expedited.

17 All right, so why don't I hear from you on the motion
18 for class cert, in particular these statutory provisions that
19 I've never worked with before, rather than the 23(a) and (b)
20 factors.

21 MR. McFADDEN: Yes, your Honor, and I'm happy to
22 address those. And just to set the stage, we are moving for
23 class certification for the class as defined in our papers.
24 This is a case that's very appropriate for class resolution.
25 As the Court is aware, every day many people are being arrested

1 inside the United States. The government is alleging that they
2 entered without inspection, and then the immigration
3 authorities are applying to them a uniform policy, now
4 expressed in a single decision of the BIA, the *Hurtado*
5 decision. That policy is causing all of these people to suffer
6 the same harm, the denial of consideration for release on bond.
7 The legality of that policy presents at least one common legal
8 question, and all of these people would benefit from the same
9 relief, a ruling that they are in fact eligible for bond and
10 are entitled to a bond hearing.

11 So this situation meets all the criteria for Rule 23
12 and, as your Honor referenced earlier, in the Western District
13 of Washington for a regional class; and the court there has
14 already concluded that this issue presents an issue that is
15 amenable to class certification.

16 We have also included some pretty careful limitations
17 in our class definition, designed to insure that people whose
18 most recent arrest is inside the United States but are being
19 held in a no-bond posture for some other reasons -- for
20 example, expedited removal -- are not being included in the
21 class to insure that we're presenting a unified issue for this
22 class.

23 And I just want to add, I think certification of class
24 is not just appropriate under the rule, but it's also important
25 for our legal system. As the Court is aware, we've seen a real

1 tidal wave of litigation since *Hurtado*. Just in the last two
2 weeks, we've identified at least 37 decisions on this issue in
3 this district alone. And so I think for purposes of both
4 conserving legal resources as well as judicial efficiency, it
5 would be appropriate to proceed collectively.

6 I also think it's really important for the absent
7 class members --

8 THE COURT: Can I stop you there. You define it more
9 broadly than the state of Massachusetts. It's basically anyone
10 who was detained by the office in Massachusetts, so could that
11 potentially pick up other people from other states?

12 MR. McFADDEN: So, your Honor, the proposed class
13 definition is "arrested or detained in Massachusetts," detained
14 in an area where the Immigration Court here has geographic
15 jurisdiction.

16 THE COURT: Yes, where is that? That's what I didn't
17 know.

18 MR. McFADDEN: That includes several surrounding
19 states, your Honor. It includes, I believe it's Maine,
20 New Hampshire, Vermont, and Rhode Island, I believe.

21 THE COURT: So it's quite a few states, not just
22 Massachusetts?

23 MR. McFADDEN: Yes, your Honor. The reason is that we
24 want to make sure that the Immigration Court here is not
25 applying inconsistent standards to similarly situated people.

1 And the Immigration Court, of course, is within the geographic
2 jurisdiction of this court. It's in Chelmsford, Massachusetts.

3 THE COURT: Thank you.

4 MR. McFADDEN: And I just wanted to add, I think it's
5 important to have a class certified because we have actually
6 class members who can't make it to court. Some people get to
7 court to file a habeas petition, and, you know, they can have
8 their individual rights adjudicated, but there are many people
9 who lack the resources -- they don't have counsel, they may not
10 understand they can come to court -- and the only relief for
11 them from this unlawful practice is going to be through a class
12 approach.

13 The government, as you mentioned, has raised two
14 statutes as arguable bars to class certification. We do not
15 view those statutes as precluding class certification. The
16 first limits class certification in certain circumstances.
17 That's 1252(e)(1)(B). That is a statute that is about
18 challenges to expedited removal under 1225(b)(1). That's right
19 there in the title of the statute, that subsection. The text
20 refers repeatedly to 1225(b)(1). There is legislative history
21 that we cited in our papers that says that statute is about
22 (b)(1) expedited removal, and we cited the *Innovation Law*
23 *Laboratory* case out of California from 2019 in our papers.
24 That's a case that ruled that this subsection is about
25 expedited removal (b)(1), not (b)(2), which is what we're

1 talking about in this case.

2 The government cited one case applying 1252(e)(1)(B).
3 That was the *M.M.V.* case that they cited, and that case also is
4 about expedited removal. So I think that it's pretty clear
5 that this statute is talking about challenges to the expedited
6 removal system. We are not creating such a challenge or
7 pursuing such a challenge in this case. People in expedited
8 removal are excluded expressly from our class, and so our
9 position is that that statute --

10 THE COURT: The *Innovation Lab* was reversed, right, or
11 at least --

12 MR. McFADDEN: I believe it was vacated as moot.

13 THE COURT: Vacated.

14 MR. McFADDEN: Yes, your Honor.

15 THE COURT: So there really is sparse case law on that
16 statutory provision.

17 MR. McFADDEN: We were not able to locate case law in
18 this circuit addressing that, your Honor.

19 THE COURT: Anywhere.

20 MR. McFADDEN: *Innovation Law Lab* I think was the best
21 recent case that we located. We also cited one other case in
22 our papers that interpreted the statute -- I'm sorry, let me
23 just find it -- and that was the *Padilla* case from the Western
24 District of Washington, 704 F. Supp 3d 1163. And that case
25 also found that 1252(e)(3) did not apply, but for a slightly

1 different reason. That case found that whatever it might apply
2 to, it doesn't bar detention claims.

3 So I think there are potentially two bases upon which
4 the Court could conclude that that statute is inapplicable,
5 either because it's about expedited removal, which we are not
6 challenging in this case, or, arguably, it did not cover
7 detention claims, which is what this case is of course about.

8 The other statute that the government has cited is
9 1252(f)(1). That is a limit on certain remedies, and that's a
10 statute that this Court has dealt with before in the *Brito* case,
11 and the First Circuit addressed that statute and its scope in
12 the *Brito* appeal. And the First Circuit held in *Brito* that the
13 declaratory relief remains available, notwithstanding 1252(f)(1),
14 so --

15 THE COURT: I said that, and so did the First Circuit.
16 What would it really look like? In other words, as you said,
17 there have already been 37 cases in this district. Let's say
18 the government didn't follow my ruling that I issued on the
19 case law suite, the opinion I issued, but it doesn't carry
20 contempt, right, because it's not an injunction?

21 MR. McFADDEN: That is true. The First Circuit made
22 that point in *Brito*, that unlike an injunction, declaratory
23 relief does not carry that type of coercive sanction, and
24 therefore that's one of the reasons it's not barred by
25 1252(f)(1). I think in this case, if the Court entered

1 declaratory relief, there are cases saying the government of
2 course is presumed to follow and comply with declaratory
3 relief. The immigration judges are officers of the court; they
4 are lawyers and not --

5 THE COURT: It gives them a big pressure point, but if
6 they don't follow it, it's not clear what the remedy is. I was
7 trying to think it through.

8 MR. McFADDEN: Yes, your Honor, and I think if the
9 Immigration Court did not follow the declaration in a
10 particular case, or there was a dispute about whether or not a
11 particular person was entitled to the relief articulated in the
12 declaration, then that individual could pursue an individual
13 habeas petition to enforce their rights as articulated --

14 THE COURT: And is it your view that would go to
15 individual judges all over New England, the states you listed?

16 MR. McFADDEN: Well, your Honor, I think that if they
17 pursued an individual habeas petition, it could go to different
18 places potentially. It might depend on where they are detained
19 at that time.

20 I'll just point out also that there is authority
21 suggesting declaratory relief is not the only potential relief
22 in this case. Certainly I think for class certification, it is
23 adequate to show that at least declaratory relief is available;
24 but there are cases saying that APA vacatur is available
25 potentially. There are also cases saying -- there's one case

1 saying that --

2 THE COURT: You want me to reverse the opinion of the
3 Bureau of Immigration Appeals, right? That's the vacatur that
4 you're seeking?

5 MR. McFADDEN: That's what vacatur would involve, yes,
6 your Honor.

7 THE COURT: Well, then I'd have to go to the APA.

8 MR. McFADDEN: Yes, your Honor, I think that --

9 THE COURT: That's a much harder issue for me. Has
10 anyone ever reversed a Bureau of Immigration Appeals decision
11 on an Administrative Procedure Act ground? I think I'd be
12 walking not thin ice, just in new territory.

13 MR. McFADDEN: Well, I just will mention, your Honor,
14 that in *Brito*, we did pursue an APA claim. This Court found
15 that because the policy had been deemed contrary to law for
16 other reasons, due process reasons in that case, that it also
17 violated the APA. The First Circuit did not reach that
18 conclusion on appeal, but it also didn't disturb it or suggest
19 it was inappropriate.

20 THE COURT: So you would say that because I found that
21 the statutory construction was in error, that's effectively the
22 same as saying there's an APA violation?

23 MR. McFADDEN: I think we could potentially make that
24 argument, your Honor. I think for present class certification
25 purposes, we don't need to flush out --

1 THE COURT: I don't need to do that now.

2 MR. McFADDEN: -- that relief would look like. But I
3 do think for -- it's a possibility. There's also the *Hamama*
4 case from the Fifth Circuit that says potentially some type of
5 group, class-based habeas relief that might be available. But,
6 again, I think for class certification purposes, as long as
7 declaratory relief is available, that's all the Court needs to
8 find to certify.

9 And I did just briefly want to address the
10 government's argument that somehow the class members would be
11 barred or precluded from bringing follow-on individual cases.
12 I'm not entirely sure where that argument is coming from. The
13 declaratory judgment statute does permit that, and the cases
14 the government cites don't really say that in this context. In
15 fact, the Supreme Court case they cite, the *Cooper* case, is a
16 case where the Supreme Court said it was permissible for the
17 class members to bring follow-on claims. That was a case where
18 there was a class action against a particular employer for
19 alleged discrimination. Some of the class members later
20 brought individual discrimination claims against the employer,
21 and the Supreme Court said that was permissible. The Supreme
22 Court's reasoning, I think, was that there are some things that
23 can be addressed on a common basis in a class action; some have
24 to wait for later individual enforcement. But that's
25 permissible. That's a feature of the class action system.

1 THE COURT: I had a factual question for you which the
2 government raised. So a lot of people are arrested without a
3 warrant, they're just seized off the street, and other people
4 are arrested with a warrant. I didn't make my opinion hinge on
5 that. However, we weren't certain whether as a practical
6 effect, if you were seized off the street, eventually a warrant
7 issues under 1226. We weren't sure how it worked.

8 MR. McFADDEN: Yes, your Honor, my understanding,
9 based on how I've seen these cases progress, is that if a
10 person is subject to a warrantless arrest and they are subject
11 to 1226 detention authority, then after the arrest, a warrant
12 is generated or must be generated.

13 THE COURT: Under 1226?

14 MR. McFADDEN: Yes, your Honor, and --

15 THE COURT: Well, it shouldn't be -- I had never felt
16 there's so much nuance before. In your view, it shouldn't
17 matter whether the warrant issues to arrest the person, or
18 whether the warrant is generated after the person is seized in
19 a warrantless arrest?

20 MR. McFADDEN: Not for the issues that are currently
21 before the Court, I don't think so, your Honor.

22 THE COURT: Because you're saying, if you're seized
23 without a warrant, eventually something called a "warrant"
24 issues under 1226?

25 MR. McFADDEN: Yes, your Honor. I think if you are

1 arrested inside the United States, 1226 applies. 1226 requires
2 the generation of a warrant, so if there's not one at the time,
3 then one is generated. The presence or absence of a warrant
4 doesn't change the fact that you're 1226. It's just a
5 statutory requirement for 1226 detainees. If a warrant is
6 never generated, that person might have an additional claim
7 that "In addition to not getting the bond hearing, I also
8 should be released because no warrant was generated." But that
9 would be an additional individual claim they could pursue
10 individually. It wouldn't affect the relief under the class.

11 THE COURT: Okay, thank you. And last but not least,
12 you want notice to go out.

13 MR. McFADDEN: Yes, your Honor, and I'm happy to
14 explain why I think that would be helpful.

15 THE COURT: It may be, but it would be something that
16 I would tell the government to do, just that "You have a right
17 to seek bond. Read this opinion." It wouldn't be to go to you
18 as lawyers, right? In other words, you don't want -- I'm
19 trying to figure out. You want me to be giving you a list of
20 everyone detained?

21 MR. McFADDEN: Well, I think there's a couple pieces,
22 your Honor, and the first piece is that, yes, we definitely
23 think notice should go to the individual class members, and the
24 reason for that is that many of the class members are
25 unrepresented. Many may not speak English as a first language.

1 They could be in the class and then be distributed around the
2 country because ICE moves people around when they're in
3 detention. And so it's important that they be identified and
4 they get a notice so that they know to ask for a bond hearing
5 if they're in the class, and the court ultimately rules they're
6 entitled to a bond hearing.

7 I think identifying the folks, to us, is also important,
8 in part so that we can understand the implementation of any
9 judgment that the Court enters. We would like to be able to be
10 in contact with our class members and determine, at least for a
11 sample of them, are they actually --

12 THE COURT: Are there cases that have done that?

13 MR. McFADDEN: Well, I know just from our experience
14 in the *Brito* case, your Honor, that for the post-hearing class
15 members where there was some follow-up required, identification
16 of the class members was provided to class counsel as part of
17 that process.

18 THE COURT: I know I required notice, but the part I'm
19 not remembering is whether it then went to class counsel, a
20 list of everybody who was held without bond.

21 MR. McFADDEN: My memory is we did because I believe
22 we connected lawyers with --

23 THE COURT: I don't remember what I did, and I don't
24 remember if it was challenged. I don't remember. It's
25 something we could both go look at.

1 MR. McFADDEN: Yes, your Honor.

2 THE COURT: Okay, thank you.

3 All right, now, the government.

4 MR. FLENTJE: All right, thank you.

5 THE COURT: You found the statutory section that's
6 been unlitigated.

7 MR. FLENTJE: Well, I mean, these are complicated,
8 intertwined provisions, but the message of all these provisions
9 is a strong one from Congress, that Congress did not want class
10 relief when dealing with these authorities relating to
11 immigration, and it said that over and over again. And the
12 reason we're kind of inventing these new types of cases and new
13 types of relief is to avoid what the clear message from
14 Congress was: It didn't want classwide relief. It didn't want
15 a classwide restraint. It didn't even want a class certified.

16 So the first point is 1252(e)(1)(B). Congress said a
17 class could not be certified in, quote, "any action for which
18 judicial review is authorized under a subsequent paragraph."
19 The subsequent paragraph cites the very statute we are using to
20 detain these folks and says, "Judicial review of determinations
21 under Section 1225(b) --" that's the statute -- "can be
22 reviewed on a systemic basis in the District of Columbia."

23 So Congress was open to a challenge, a systemic
24 challenge, but it wanted to move quickly in the courts in D.C.,
25 not result in injunctive-type remedies, class-type remedies all

1 around the country.

2 And there's a backstop: There's habeas. The
3 petitioner had his habeas heard by you; you granted habeas
4 relief, and a bond hearing was granted. So there is a release
5 valve, so to speak, in habeas.

6 THE COURT: The thing that's troubling is, it's just
7 been inundating this court. I hear it from the Assistant U.S.
8 Attorneys. I hear it from my colleagues. I see it in the
9 published opinions. So is someone supposed to -- I don't know
10 how this even works -- move to certify a class in Massachusetts
11 but file it in the D.C. Circuit? I mean, how does this even
12 work?

13 MR. FLENTJE: Well, that's how 1232(e)(3) works, and
14 it's used a lot in the District of Columbia.

15 THE COURT: It could be in the District of Columbia,
16 but -- all right, so you're going to take my habeas people, for
17 whom I have propriety, the people picked up here or in the
18 surrounding New England states, and then you're telling them
19 they have to file in the District of Columbia? Is that it?

20 MR. FLENTJE: Again, if there were a systemic
21 challenge -- no, they can file an individual habeas right here.

22 THE COURT: But there are 37 of them. It keeps
23 happening as of, I think -- what's your current count? I'm
24 certainly hearing anecdotally --

25 MR. FLENTJE: And we'll get appellate answers that

1 will clear this up. This is how the detention cases in the
2 late '20-teens, *Hernandez-Lara*, that was an individual case.
3 It went to the First Circuit. The First Circuit issued a
4 ruling that provided guidance.

5 THE COURT: You said you had appealed one of these
6 cases, the individual habeas?

7 MR. FLENTJE: I don't know that we've appealed any
8 yet. We're certainly looking at that. I mean, this is
9 actually a new development, so it's happening all over the
10 country, and, yes, there's going to be appellate resolution.
11 And some of these cases we're winning, so I expect we'll see
12 appeals in those for sure.

13 THE COURT: Not many around here, but I'm sure you're
14 right elsewhere. Have you given me some of the ones that
15 you've won?

16 MR. FLENTJE: I mean, we cited a couple in our brief a
17 couple weeks ago. I think we won two or three since then, but,
18 you know, it's definitely --

19 THE COURT: It's evolving.

20 MR. FLENTJE: It's evolving, but, you know,
21 petitioners are winning more than we are right now in the
22 District Courts. But, again, like, we're trying to -- we want
23 an answer quickly. The answer will come from an appellate
24 court, and it's how do we get there? And Congress really made
25 it clear that for this situation, where someone is challenging

1 their detention, the way to do that is a habeas case. That's
2 how *Hernandez-Lara* worked. That provided guidance, and kind of
3 trying to fashion classwide relief or classwide declaratory
4 relief really is unworkable, and it's not what Congress wanted.
5 And I'll stress, like, petitioner's only argument on
6 1252(e)(1)(B) is to ignore the clear language of the statute.
7 And just last week this Court said, "Congress intends the words
8 it puts in the statute. It wants to give them ordinary meaning
9 and give effect to every word." Well, the key word here is
10 that Congress allowed suits challenging all of 1225(b) in a
11 systemic way in DDC; therefore, no class actions in other
12 courts. And that's quite clear from the statutory text.

13 Now, they say maybe it was a scrivener's error -- they
14 looked at the legislative history, a House report -- but the
15 best resource is the language of the statute. The language of
16 the statute says this type of challenge is in DDC.

17 The second problem is --

18 THE COURT: I guess the heading also says "Expedited
19 Removals"? I know, under statutory construction, the heading
20 is not supposed to govern, but it gives you a hint as to what
21 Congress is thinking.

22 MR. FLENTJE: Well, it is well established that the
23 heading is not supposed to govern. The operative language of
24 the statute is -- I mean, you'd have to ignore the different
25 term used in those two provisions. And, again, there's two

1 different scopes of what Congress was doing. Some cases were
2 entirely precluded, and those are where it's referring to
3 1225(b)(1). But for 1225(b), that broader reference, Congress
4 is simply saying that you can't certify a class. So it works a
5 little bit like 1252(f) where Congress said, for people who may
6 have more connection to the U.S., there's more individual
7 ability to file suit or to seek relief, but we don't want
8 systemic challenges going all over the country at the same time
9 and kind of preventing the Executive Branch from endeavoring to
10 manage immigration enforcement.

11 Now, to be sure, you'll get appellate review, and that
12 will provide guidance that as a precedential matter will
13 control. But the notion that we need a District Court remedy
14 that goes to the state of Massachusetts or, like, multiple
15 states -- and it's not clear how you can issue a declaratory
16 judgment that a judge in Maine in a habeas case has to apply in
17 that individual habeas case -- that's strange, if you want to
18 talk about unusual -- but if it goes up to the First Circuit,
19 we get a ruling from the First Circuit, then it makes sense.

20 THE COURT: I think all the states he mentioned were
21 in the First Circuit, I think, right? Was Vermont part of it?

22 MR. FLENTJE: No, but what he's envisioning is that
23 you issue the declaratory judgment, and then people in
24 New Hampshire, Vermont, Maine, Rhode Island, go in and file a
25 habeas case, they're class members, and now in their habeas

1 case, we can't defend the case.

2 THE COURT: You're right, one is the Second Circuit,
3 and the others are First Circuit, I think. Vermont, Vermont

4 MR. FLENTJE: I'm sorry. I might have misstated one
5 of the states. Vermont is Second Circuit. I'm talking about
6 states that are not in Massachusetts that are part of the --

7 THE COURT: So the simplistic reaction I had is, yes,
8 you're right, but I said that that statute doesn't apply, so
9 it's not under that statute, 1225.

10 MR. FLENTJE: Your Honor, again, we think that statute
11 applies and all --

12 THE COURT: I get that, I understand that, but it sort
13 of was a, a famous Latin phrase, *ipse dixit*. I mean, you said
14 changing decades of experience and a BIA opinion that surprised
15 everyone, and contrary to even, when I read *Jennings*, what the
16 Supreme Court thought it all was. So I'm struggling. Can you
17 just say it, and that means that it bans --

18 MR. FLENTJE: Again --

19 THE COURT: -- even if it's just flat out, in my view,
20 wrong?

21 MR. FLENTJE: In interpreting this exact statutory
22 provision, 1252, *Aleman Gonzalez* said 1252(f)(1), which
23 precludes restraint of the operation of those provisions, you
24 look at how the Executive Branch is operating them. You don't
25 look at the correct operation. You don't, you know, address

1 the merits before you decide on the relief in that way. *Aleman*
2 *Gonzalez* is very clear on that.

3 THE COURT: So your answer to me would be just
4 transfer the venue to the District of Columbia?

5 MR. FLENTJE: I think our answer to you is, don't
6 certify the class. A systemic challenge could be filed there.
7 This is a case by one individual who has gotten individual
8 relief. If this were just a habeas, the case would be over.
9 We could appeal, we're within our time to appeal, but the case
10 is over.

11 THE COURT: The concern I have is, if you're saying
12 the real issue is I don't have jurisdiction because of the
13 statute, wouldn't the right answer be to transfer it, the
14 request for class, to the District of Columbia?

15 MR. FLENTJE: You have habeas jurisdiction over this
16 case. You granted habeas.

17 THE COURT: Excuse me. You're not listening to me.
18 So there's been a request for class cert, and I think it meets
19 the requirements of 12(a) and 12(b). I have to admit, you've
20 raised a serious issue about the meaning of the statutory
21 provision, which my law clerk and I have been struggling over
22 what does it mean? So the (f) one doesn't bother me because
23 the First Circuit has ruled on it.

24 So if I end up agreeing with you on the meaning of
25 that section, wouldn't I just transfer this to the District of

1 Columbia and say, "You're the one who has jurisdiction over
2 this class"?

3 MR. FLENTJE: I -- I don't think so because until a
4 class is certified -- you can't certify a class. This is an
5 individual case, an individual habeas case that was filed in
6 the correct court. I think a new case would have to be filed
7 in DDC by someone who can invoke the statute in order to make a
8 systemic challenge. That's not to say --

9 THE COURT: Well, who's going to invoke it in D.C.?
10 You're going to ask this guy who's on bail who's probably --

11 MR. FLENTJE: No. We're not going to invoke the
12 statute. There's a lot of sophisticated litigants for advocacy
13 groups who are paying very close attention to these cases and
14 what the rulings are, and I have a feeling that that statute
15 would be invoked if it could be.

16 THE COURT: In other words, in your view, it would
17 have to be someone fighting the 1225, 1226 who lives in the
18 district?

19 MR. FLENTJE: I haven't thought through those issues.
20 All I know --

21 THE COURT: Neither have I, and that's why I'm pushing
22 you. It's a statute I've never seen before, effectively hasn't
23 been litigated.

24 MR. FLENTJE: I mean, it has severe time limits too,
25 so it might be too late to invoke that kind of a challenge, but

1 that doesn't mean --

2 THE COURT: What's the severe time limit?

3 MR. FLENTJE: Again, it's a special provision that
4 allows challenges to new policies affecting 1225(b), and I
5 believe it's within 60 days of the issuance of those policies.

6 THE COURT: Yikes. So this is like a catch-22.

7 MR. FLENTJE: Well, it's a border enforcement measure
8 that's designed to kind of narrow and cabin systemwide,
9 systemic challenges to the enforcement of the immigration laws
10 that are covered by 1225.

11 THE COURT: Okay, I understand your position. Just on
12 two other just administrative kinds of issues --

13 MR. FLENTJE: I have some other merits points.

14 THE COURT: Oh, go for it. That's the one I'm
15 fascinated by, as you can tell, struggling with, but you're
16 welcome to go forward with the rest. I'm sorry. I did read
17 your brief.

18 MR. FLENTJE: I do want to say one thing about *Brito*.
19 I think it's important to look at Footnote 8 in the *Brito*
20 decision, and there the Court of Appeals said, "We're not
21 addressing the propriety of certifying a class in this
22 situation." Recall, when a class was certified in *Brito*, it
23 was before the 1252(f)(1) argument got accepted by the courts,
24 and this Court issued injunctive relief. So there was --

25 THE COURT: Yes, they said I couldn't do injunctive,

1 but I could do declaratory, right?

2 MR. FLENTJE: Well, injunctive relief was issued in
3 2019. *Brito* came later, and the Court of Appeals said you can
4 only issue declaratory relief.

5 THE COURT: Right.

6 MR. FLENTJE: But (Unclear) in that decision said
7 we're not going to consider whether a class would be
8 appropriate for declaratory relief because no one has raised
9 that point on appeal.

10 Now, that's the point that's at issue here, so now we
11 do need to think about that. And the most fundamental problem
12 here that I see -- well, first, you cannot issue complete
13 relief. At most, you can issue a declaratory judgment. Do
14 these 37 people who filed habeas cases want a declaratory
15 judgment? No. They want to be released like the petitioner.
16 But they want to certify a class where --

17 THE COURT: I think all 37 --

18 MR. FLENTJE: -- cannot get the relief the petitioner
19 got. They can't get it.

20 THE COURT: I think those 37 people were released,
21 most of them anyway.

22 MR. FLENTJE: I'm sure, yes, but add in the 37 who
23 come in the next two weeks. Once you certify a class, none of
24 those cases are going to be able to move. They're covered by
25 your class. You're certifying a class to issue a single

1 resolution, so you can't have individual habeas cases raising
2 the exact same issue once a class is certified.

3 THE COURT: Why?

4 MR. FLENTJE: Because it's claims splitting. One
5 person can't file two different cases asking for the same
6 thing, even the same claim.

7 THE COURT: Well, I'm not inviting this. I mean, at
8 least theoretically, I could be taking them all, and I could
9 just be releasing them under the order if I certified a class.

10 MR. FLENTJE: Well, there will be no order when you
11 certify the class. There will just be a class. So once you
12 certify a class, then I don't know what comes next. We're
13 going to need to --

14 THE COURT: Yes, I was asking -- that's one of the
15 administrative things. That was exactly the point I was going
16 to ask is, how does one see this working?

17 MR. FLENTJE: I don't think it does work, and I think
18 Congress understood that, and I think the Supreme Court
19 understood that. And that's the next piece of this: The
20 *Calderon* case, which we talk about in our brief from the
21 Supreme Court, 523 US 740, this is a really important case
22 that, you know, I think we're looking at in this context for
23 the first time. The Supreme Court said you can't file a
24 declaratory judgment action when what you really want is
25 habeas; you file a habeas. And your instinct two weeks ago

1 was, "I just grant the habe." And that's exactly how it was
2 all designed to work. They're trying to get around that
3 because of all these limitations on review, but the Supreme
4 Court has said, when you want release, you don't get a
5 declaratory judgment action saying the government's defense to
6 the habeas is invalid. That's the issue in *Calderon*. What you
7 do is, you have to file a habeas case. And, again, the lessons
8 from *Calderon* --

9 THE COURT: I think we did some research on it --

10 MR. FLENTJE: -- say a declaratory habeas can't go
11 forward.

12 THE COURT: I think we did research on it, and many
13 courts have permitted habeas class actions.

14 MR. FLENTJE: Well, again, a habeas class action is
15 different from what they want to do. They want a declaratory
16 judgment class action because they know they cannot get
17 classwide habeas relief. Classwide habeas relief would
18 restrain the operation of the statutes covered by 1152 --

19 THE COURT: I am worried about how it could work.
20 That was what I was going to ask you, how it would work,
21 because, well, theoretically I could be taking the tidal wave
22 of cases myself, but then I wouldn't be doing anything else.
23 I'm on trial on another case today. So that's one possibility.

24 Another possibility is that all the judges in these
25 various districts, Maine, New Hampshire, and Massachusetts,

1 would follow my opinion.

2 I share your concern about how it would work, not
3 sure, because I don't automatically get cases from
4 New Hampshire, Vermont, Maine, Rhode Island. Was there another
5 one? Was there Connecticut?

6 MR. FLENTJE: No, not Connecticut.

7 THE COURT: I'm not sure exactly how this would work.

8 MR. FLENTJE: Well, here's how it should work.

9 THE COURT: But let's say it was just Massachusetts.
10 Let's say it was just Massachusetts.

11 MR. FLENTJE: Individuals should challenge their
12 detention in individual habeas --

13 THE COURT: It's flooding the courts. I got another
14 one today. Every judge is getting it. It's flooding the U.S.
15 Attorney's Office. This is the classic kind of case where you
16 want a ruling.

17 MR. FLENTJE: From an appellate court.

18 THE COURT: Eventually I'm sure there will be --

19 MR. FLENTJE: My cocounsel kindly notices that a
20 notice of appeal has been filed in a case called *Diaz Martinez*.
21 Like, there's going to be an appellate --

22 THE COURT: That's Judge Sorokin's case?

23 MR. KHETARPAL: It is, your Honor.

24 MR. FLENTJE: But, like, waiting that period and, you
25 know, maybe there's a way to move that quicker, but I don't

1 think that warrants kind of working all these rules that were
2 designed to avoid what they are asking for, which is a class-
3 based remedy.

4 THE COURT: Thank you. All right, before we -- I know
5 you want to get to 23(a) and (b), which is more of a
6 traditional analysis, but I also want to understand, if I do
7 order notice, how would that even work?

8 MR. FLENTJE: Can I make one more point on the class
9 definition? I don't want to lose that.

10 THE COURT: Yes, of course.

11 MR. FLENTJE: They've defined 1225(b)(2) out of
12 existence in their class definition. They say it can't be used
13 at all. They define their class definition as people who are
14 not being held under several other statutes, but 1225(b)(2) has
15 some meaning. Now, you told us that it didn't mean what we
16 thought, but you've never told them what -- we don't know what
17 it means. And "seeking admission" seems something. There's
18 some scope to that statute, and that group cannot be in the
19 class definition. So if there's a class definition, I think
20 there has to be some --

21 THE COURT: It would have to be, you would say, an
22 explicit carveout for people seeking admission?

23 MR. FLENTJE: I mean, something has to go in to
24 acknowledge that that statute has some scope.

25 THE COURT: Well, that's interesting. Okay.

1 MR. FLENTJE: And then we can fight about the scope
2 and, you know, the class remedy or class whatever we're going
3 to do.

4 Notice, we think notice is -- well, first of all, it's
5 not necessary for a Rule 23 class, the kind of notice they
6 want. We also think it's premature. They essentially want
7 notice of a decision that hasn't been issued yet. I think we
8 should brief up notice if we're talking about an actual judgment
9 from the Court and not --

10 THE COURT: Of course, of course.

11 MR. FLENTJE: Okay, so I think it's premature, and
12 we'd like a chance to address that as we get closer to a merits
13 decision.

14 THE COURT: Of course. So how would you see this
15 working? Let's say I thought Rule of Civil Procedure 23
16 applied -- and I've got to work my way through that statutory
17 provision I've never seen before -- but let's assume for a
18 minute I think that a class can be certified or I think -- do I
19 at that point schedule a motion for summary judgment? Or would
20 you rather have a quick ruling based on what I ruled on the
21 habe for Mr. Orellana, and so then it could go straight up on
22 appeal?

23 MR. FLENTJE: I think we're entitled to move to
24 dismiss the complaint 60 days after it was served, so I think
25 that's step one.

1 THE COURT: You would rather wait for that. I was
2 foreseeing a -- I've already effectively ruled on a motion to
3 dismiss.

4 MR. FLENTJE: We can confer with plaintiffs maybe,
5 but --

6 THE COURT: Because I agree with you on one thing:
7 The key here is getting it up to the Circuit, and, in the
8 interim, providing relief to individuals. I think everyone
9 would have to agree with that because whatever happens in the
10 circuits will most certainly at some point be resolved by the
11 Supreme Court. So just for the rule of law, I'd like to do it
12 in an orderly way, but we shouldn't be holding people in
13 custody in the interim if they're entitled to bond.

14 MR. FLENTJE: One last thing on notice. I think
15 Rule 23 Advisory Committee notes from 2003 talks about notice
16 of a judgment, and it says, "Notice calculated to reach a
17 significant number of class members is normally adequate," and
18 talks about posting in a place where the class would be going,
19 which I assume would be the ICE facilities or whatever, so --

20 THE COURT: Well, I was thinking, for example, the
21 sheriff of Plymouth County or some of the places where they're
22 being held. There's one place, what's it, Sheffield? There
23 are various locations where they're being held in New England.

24 MR. FLENTJE: And I think there are a lot of notices
25 like that stemming from various class actions around the country,

1 so --

2 THE COURT: Yes, I agree, but it is premature to
3 actually talk about notice because I just have to work my way
4 through the statute. Is there anything else you'd like to say
5 at this point?

6 MR. FLENTJE: Uhm, no. I appreciate your time.

7 THE COURT: Thank you.

8 MR. McFADDEN: Thank you, your Honor.

9 THE COURT: That statute is difficult.

10 MR. McFADDEN: Yes, your Honor, and I think that if
11 you look at the case that we cited, the *Innovation Law Labs*
12 case, the court there did struggle with it, but ultimately
13 concluded that it was limited to expedited removal, and I think
14 that we --

15 THE COURT: That was D California, right?

16 MR. McFADDEN: Yes, your Honor. That was, I believe,
17 the Northern District of California.

18 THE COURT: And that was reversed.

19 MR. McFADDEN: I believe it was vacated as moot, yes,
20 your Honor.

21 THE COURT: Or as moot, yes. I'm just saying, there
22 isn't much out there.

23 MR. McFADDEN: And I just would mention a few things
24 about what we just heard about the statute, your Honor. One is
25 that it's supposed to be -- I mean, even to the extent it

1 applies, it's a claim-channelling statute for class actions.
2 We didn't hear any mechanism, though, that the government would
3 propose that would actually allow these claims to be channeled
4 to D.C., and so I don't --

5 THE COURT: It's already too late under the 60 days.

6 MR. McFADDEN: Well, I wouldn't concede that, your
7 Honor. But I do also think that our client is here; he had to
8 file his individual habeas here. It's very unclear how we were
9 supposed to bring a class action in D.C. under these
10 circumstances, and the government hasn't suggested that that
11 would be appropriate or that a transfer would be appropriate.
12 So it can't be that there's a claim-channeling statute that
13 doesn't actually channel.

14 I guess the other thing I would just mention is that
15 that might be a reason why the other case we cited regarding
16 the inapplicability of the statute to detention cases might be
17 appropriate. There's been a number of cases where the Supreme
18 Court and the First Circuit has said that certain types of
19 jurisdiction-limiting or claim-limiting statutes in the
20 immigration context are about substantive challenges to
21 immigration law, not about detention. And I think it may be
22 that it's appropriate to conclude that whatever this provision
23 of 1252 might apply to, the detention claims are not a piece of
24 it.

25 So I think beyond that, your Honor, I just wanted to

1 address a couple other things that the government mentioned.
2 The government mentioned *Brito* Footnote 8 about whether or not
3 declaratory relief is permissible. That is a question that was
4 addressed in the class certification decision in the Western
5 District of Washington and then in the ultimate partial summary
6 judgment, which did issue a declaration. And as that court
7 noted, under Rule 23, it's disjunctive; it could be either
8 injunctive relief or declaratory relief, and so there's no bar
9 to us pursuing a declaratory relief class.

10 The *Calderon* case the government relies on is from
11 1998, and certainly since then, the First Circuit has said
12 declaratory relief is appropriate in this circumstance and did
13 not seem to feel that *Calderon* was any bar to that.

14 THE COURT: But I'm still struggling with how this
15 would all work. Let's say I say it's unlawful and somebody is
16 arrested on the Maine border, does it then get transferred to
17 me in D Mass., or is the Maine judge required to follow the
18 class action ruling, or does the case get transferred here?
19 I'm just not sure.

20 MR. McFADDEN: Yes, your Honor, I guess a couple of
21 things to say on that. One is that your declaratory judgment
22 would be about people who are in the immigration courts here in
23 Massachusetts, the Transfer Immigration Court and Boston
24 Immigration Court. And so in the first instance, if a
25 declaratory judgment issued, it would be for the Immigration

1 Court to apply that in the case. When the person said, "I
2 would like a bond hearing," the Immigration Court would say, "I
3 see you meet the class definition." Therefore, they are
4 presumed to follow the declaratory judgment of --

5 THE COURT: What if they don't?

6 MR. McFADDEN: At that point, your Honor, then an
7 individual habeas would be permissible. The declaratory
8 judgment would be an articulation of the person's rights that
9 could then be applied in the individual habeas. I heard the
10 government say that every individual habeas would have to stop
11 as soon as this Court certifies a class action. I don't
12 think --

13 THE COURT: I don't think that's correct, but I do
14 think that the mechanics of this would be complicated, so --

15 MR. McFADDEN: The other thing I would just mention,
16 your Honor, is that I heard the government talk about the
17 border and 1225(b)(2). The government seems to be concerned
18 that a person whose most recent arrest occurred at the physical
19 border while they were arriving in the United States, and then
20 they're continuously detained, would somehow end up in the
21 class. We don't think those people are in the class as it's
22 currently structured; but if a carveout to remove those people
23 clearly would be appropriate, we could submit written language --

24 THE COURT: He suggested, to make it clear, that
25 somebody seeking admission would not be included in the class.

1 MR. McFADDEN: We could propose in writing by the end
2 of the day tomorrow, your Honor, language --

3 THE COURT: I'm not moving that fast. I mean,
4 someone's -- this is hard stuff. So I'd be happy to see
5 whatever language you're proposing because I think the
6 government's suggestion makes sense there.

7 MR. McFADDEN: We can certainly submit proposed
8 language, your Honor.

9 And I guess the other thing I would just mention is
10 that the government, they're arguing that we should wait for
11 the appeals process here. You know, that could take a year or
12 two years for an appeal to be briefed, decided, and finally
13 decided. I think that in the meantime, though, we have
14 hundreds of thousands of people here in Massachusetts who are
15 being arrested and being unlawfully detained arbitrarily
16 without a bond hearing.

17 THE COURT: Is it? It can't be that high just in
18 Massachusetts. Hundred of thousands?

19 MR. McFADDEN: Not hundreds of thousands. Hundreds or
20 thousands.

21 THE COURT: Oh, all right.

22 MR. McFADDEN: Yes, your Honor. But we have many
23 people here in Massachusetts being arrested right now who are
24 being denied a bond hearing, are being arbitrarily detained,
25 and a decision from an Appeals Court two years from now is not

1 going to help this person. And so it's really imperative to
2 get some type of relief in place right now for these people,
3 many of whom are not able to come to court to file a habeas.
4 The class is going to be their mechanism to get relief from
5 unlawful detention.

6 THE COURT: All right, thank you. That you very much.
7 So I'll take this under advisement. We'll move as fast as we
8 can, but it's complicated stuff, and I have been very much
9 appreciative of the supplemental notice of additional
10 authorities, which I'm happy to take from both sides. And if I
11 do any kind of follow-up hearing -- I forget, did you tell me
12 you come up from D.C.?

13 MR. FLENTJE: Yes, I did.

14 THE COURT: We could do some of this on Zoom. This
15 has been of such importance, I've been making them public. You
16 know, everything is public, but I could do it Zoom public if
17 just some quicker set of issues arises.

18 MR. FLENTJE: I'm sure, if there's like a status
19 conference, that would be appreciated.

20 THE COURT: That's what I thought.

21 MR. FLENTJE: Only come up for merits.

22 THE COURT: Because right now in particular with the
23 shutdown looming, in fact in effect --

24 MR. FLENTJE: It's happening.

25 THE COURT: -- I don't want to make you spend money to

1 come up here on statuses or that sort of thing, and I'm sure
2 the local AUSA would be happy to facilitate that.

3 MR. KHETARPAL: Yes, your Honor.

4 THE COURT: Do you know, have -- I don't foresee
5 anything happening other than in individual habe cases that
6 would be of that immediacy.

7 MR. McFADDEN: Not that I can think of at the moment,
8 your Honor.

9 THE COURT: So I do have to respect the fact that
10 unless liberty is at stake, I won't be making the government
11 fly up here for any more. And if we need something, we'll do a
12 quick Zoom, okay?

13 All right, thank you very much, and thank you again
14 for ruining your weekend.

15 THE CLERK: All rise.

16 (Adjourned, 4:57 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 41 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action 25-12664-PBS,
Guerrero Orellana v. Patricia H. Hyde, et al, and thereafter by
me reduced to typewriting and is a true and accurate record of
the proceedings.

Dated this 18th day of October, 2025.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER