v.

JEH CHARLES JOHNSON, *et al.*,

Defendants.

Civil Action No. 15-11 (JEB)

) are mothers and their minor children who escaped vi

and persecution in these countries to seek asylum in the United States. After entering th

country unlawfully and being apprehended, each was found to have a "credible fear" of

persecution, meaning there is a significant possibility that she will ultimately be granted

here. Although, in the past, individuals in this position were generally released while th

asylum claims were processed, Plaintiffs were not so lucky. Instead, for each family,

Immigration and Customs Enforcement determined that interim detention was the appro

course.

Chasing liberty, Plaintiffs turned to the courts. They filed suit on January 6, 201

naming the Secretary of the Department of Homeland Security and two ICE officials as

Defendants. The Complaint alleges that Plaintiffs' detention resulted from an unlawful

that DHS adopted in June 2014 in response to the immigration spike. Pursuant to that p

Plaintiffs claim, DHS is detaining Central American mothers and children with the aim

208.30(f); 8 U.S.C. § 1225(b)(1)(B)(ii). She may also petition for review of any removal order entered against her in the appropriate court of appeals. See 8 U.S.C. § 1252(a)-(b).

This case revolves around what happens to these aliens between their initial screening and these subsequent proceedings. Detention authority over such individuals is governed by 8 U.S.C. § 1226(a), which instructs:

> Pending a decision on whether the alien is to be removed from the United States[,] . . . the Attorney General—
>
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . . .

Per the Homeland Security Act of 2002, the Secretary of DHS shares the Attorney General's authority under § 1226(a) to detain or release noncitizens during the pendency of removal proceedings. See Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192. By regulation, the Secretary's authority is delegated to individual officers within Immigration and Customs Enforcement, a component of DHS. See 8 C.F.R. § 1236.1. For each noncitizen who passes the threshold "credible-fear" screening, an ICE officer is tasked with making an initial custody determination. The officer "may, in [his] discretion, release an alien . . . under the conditions at

In years past, say Plaintiffs, ICE did not generally detain families apprehended in the interior of the United States who were found to have a credible fear of persecution. Instead – as explained by experienced immigration practitioners – after an individualized assessment of their potential flight risk and danger to the community, the majority of such families was released on bond or their own recognizance. See, e.g., Pl. Mot., Exh. 1 (Declaration of Michelle Brané), ¶¶ 11-12; id., Exh. 4 (Declaration of Barbara Hines), ¶¶ 8-15. Plaintiffs claim that an abrupt about-face occurred in June 2014, when DHS adopted an unprecedented "No-Release Policy" in response to increased immigration from Central America. According to Plaintiffs, the No-Release Policy directs ICE officers to deny release to Central American mothers detained with their minor children in order to deter future immigration – that is, to send a message that such immigrants, coming *en masse*, are unwelcome. See Brané Decl., ¶¶ 12, 22-23; Hines Decl., ¶¶ 13-15. They claim that this policy led to ICE's denial of release in each of their cases.

On January 6, 2015, Plaintiffs brought a class-action suit in this Court, alleging, *inter alia*, that the No-Release Policy violates the Immigration and Nationality Act and the Due Process Clause of the Constitution. They further claim that the policy is contrary to law and arbitrary and capricious, and thus constitutes illegal agency action under the Administrative Procedure Act. Presently before the Court are Plaintiffs' Motions for a preliminary injunction barring the continued implementation of the No-Release Policy during the pendency of this suit, as well as for provisional class certification for purposes of the requested injunction. Defendants oppose both Motions and separately seek dismissal of the suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In keeping with the expedited nature of a preliminary-injunction proceeding, the parties filed briefs on an accelerated timetable, and the Court held a dn acn acsfor pur

II. Legal Standard

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. NRDC, Inc., 129 S. Ct. 365, 376 (2008). The plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he

III. Analysis

At the heart of Plaintiffs' suit is their assertion that DHS has adopted an unlawful detention policy aimed at deterring mass migration. In their Amended Complaint, this claim finds voice in five distinct grounds for relief. Four arise under the APA – specifically, Plaintiffs allege that DHS policy: (1) violates the INA and is thus contrary to law under § 706(2)(A) of the APA; (2) infringes on their rights to due process and is therefore contrary to law under § 706(2)(A); (3) deviates from DHS regulations, rendering it arbitrary and capricious under the APA; and (4) constitutes an arbitrary and capricious means of deterring mass migration. Plaintiffs also raise a freestanding due-process claim under the Fifth Amendment. Because the Court concludes that Plaintiffs' first theory, standing alone, warrants preliminary injunctive relief, it will focus its attention accordingly.

Defendants mount a robust defense to that claim, erecting various jurisdictional and substantive obstacles to relief. Although the Court would ordinarily ensure its jurisdiction before turning to the merits, it is confronted here with an underlying factual issue common to both endeavors – namely, the very existence and nature of the DHS policy challenged by Plaintiffs. Defendants adamantly deny that any reviewable policy exists and maintain, as a consequence, that Plaintiffs' suit can proceed no farther.

Given this preliminary controversy, the Court will begin with a discussion of what, if any, policy is actually in place. Finding one extant, it will next move to an analysis of the myriad jurisdictional hurdles that impede Plaintiffs, including how provisional class certification figures into the mix. Having cleared these considerable shoals, the Court will last navigate the merits of injunctive relief.

A. Existence of a Policy

Plaintiffs sketch two variants of the policy they seek to enjoin. The first – that DHS adopted a categorical policy in June 2014 of denying release to all asylum-seeking Central American families in order to deter further immigration, see Pl. Mot. at 6-7 – is hotly disputed by Defendants as a factual matter. According to the Government, the evidence reveals that ICE releases some such families after their initial custody determinations, debunking Plaintiffs' claim of a blanket policy. See Def. Opp. & Mot. at 13-17.

This point has some force. According to records maintained by the ICE Statistical Tracking Unit, ICE released 32 of the 2,602 individuals booked into a family residential center between June 1, 2014, and December 6, 2014, as a result of individualized custody determinations. See Def. Reply, Exh. A (Amended Declaration of Marla M. Jones, ICE Officer, Statistical Tracking Unit), ¶ 6. Plaintiffs, moreover, expressly admit that DHS's alleged policy has not resulted in universal detention. See Am. Compl., ¶ 45 ("DHS has denied release to nearly every family that is detained at a family detention facility and has passed a credible fear interview.") (emphasis added); see also Pl. Mot., Exh. 5 (Declaration of Allegra McLeod, Associate Professor of Law at Georgetown University), ¶ 6 (referring to ICE's "nearly uniform" refusal to grant release) (emphasis added). Although these materials certainly do not reflect a

whether it will be bound by the law." Pl. Opp. & Rep. at 4; see Zadvydas v. Davis, 533 U.S. 678, 688 (2001) (Plaintiffs "challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion."); Sylvain v. Attorney Gen. of U.S., 714 F.3d 150, 155 (3d Cir. 2013) ("Nothing in 8 U.S.C. § 1226(e) prevents us from deciding whether the immigration officials had statutory authority to impose mandatory detention. . . . [W]hetnd t ofhe ex petn v. ', 533 U8.8 3d 152d ET 137.82Tm 5

made under 1226(a)].”). The Fifth Circuit, however, provided little explanation of its reasoning, and, as outlined above, the Court is not persuaded by such an expansive interpretation of § 1226(e). It thus declines to follow Loa-Herrera here.

2. *Standing*

Defendants next attack Plaintiffs’ standing to bring suit. To establish standing, a plaintiff “must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.” Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-472 (1982)). Standing is assessed “upon the facts as they exist at the time the complaint is filed.” Natural Law Party of U.S. v. Fed. Elec. Comm’n, 111 F. Supp. 2d 33, 41 (D.D.C. 2000).

The Government first notes that Plaintiffs’ alleged injury is the detention they experienced due to ICE’s initial denial of release. Yet, by the time their Amended Complaint was filed, eight of the ten named Plaintiffs had been released from detention as a result of IJ custody redeterminations. See Am. Compl., ¶¶ 65, 73, 81, 90. Defendants claim that such release means that Plaintiffs’ injuries are unredressable through injunctive relief. See Def. Opp. & Mot. at 11. Such a position, however, ignores the obvious flaw apparent on its face: the remaining two Plaintiffs had not yet been released when the Amended Complaint was filed. Because those two Plaintiffs – G.C.R. and J.A.R. – were still detained at the time suit was initiated, the status of the other Plaintiffs is immaterial. See Mendoza v. Perez, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (“To establish jurisdiction, the court need only find one plaintiff who has standing.”).

To achieve meaningful relief with respect to DHS's allegedly unlawful policy, accordingly, they sensibly ask this Court to provisionally certify a class. See Sosna v. Iowa, 419 U.S. 393, 401 (1975) (holding that a class action is not mooted by the "intervening resolution of the controversy as to the named plaintiffs"); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (Although "the claims of the named plaintiffs have since been rendered moot, . . . by obtaining class certification, plaintiffs preserved the merits of the controversy for our review."); accord DL v. D.C., 302 F.R.D. 1, 19 (D.D.C. 2013).[1] And, because certification ordinarily requires the existence of a live claim, Plaintiffs further argue that the proposed class is "inherently transitory." Pl. Reply at 7. Certification, therefore, should be deemed to "relate back" to the time the complaint was filed. See id. The Court turns first to whether class certification is appropriate under the circumstances presented here and then considers the question of relation back. Only in resolving these issues can Defendants' mootness argument be addressed.

a. Class Certification

To certify a class under Rule 23, a plaintiff must show that the proposed class satisfies all four requirements of Rule 23(a) and one of the three Rule 23(b) requirements. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548, 2551 (2011). Rule 23(a) states that a class may be certified only if: (1) it is so numerous that joinder of all members is impracticable ("numerosity"), (2) there are questions of law or fact common to the class ("commonality"), (3) the claims or defenses of the representative are typical of those of the class ("typicality"), and (4) the class representative will fairly and adequately protect the interests of the class ("adequacy of representation"). Plaintiffs must show, in addition, that: (1) the prosecution of separate actions

[1] Given the expedited nature of the instant proceedings, the parties have agreed to defer briefing on the merits of final class certification until after the resolution of Plaintiffs' request for preliminary injunctive relief.

by or against individual members of the class would create a risk of inconsistent adjudications, (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members. See Fed. R. Civ. P. 23(b)(1)-(3).

In deciding whether class certification is appropriate, a district court must ordinarily undertake a "rigorous analysis" to see that the requirements of the Rule have been satisfied. See Gen. Tel. Co. of SW v. Falcon, 457 U.S. 147, 161 (1982). "Rule 23 does not set forth a mere pleading standard." Wal-Mart, 131 S. Ct. at 2551. Rather, the party seeking class certification bears the burden of "affirmatively demonstrat[ing] his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. (emphasis in original).

Plaintiffs, however, seek only provisional class certification at this juncture. In granting such provisional certification, the Court must still satisfy itself that the requirements of Rule 23 have been met. See Berge v. United States clasTJ 0 Tc 0 Tw 9.94 0 TC-1(i(at)-t -2(e)Tw at)-6(eA)(ons)-6(ie

release on bond, recognizance, or other conditions, pursuant to 8 U.S.C. § 1226(a)(2) and 8 C.F.R. § 1236.1(c)(8), but (d) have been or will be denied such release pursuant to DHS's blanket policy of denying release to detained

limitations.'" Bynum v. District of Columbia, 214 F.R.D. 27, 32 (D.D.C. 2003) (quoting Gen.

35. No trace of a conflict exists here, and Plaintiffs are represented by very capable counsel from the American Civil Liberties Union and Covington & Burling LLP. Defendants, appropriately, do not dispute that these requirements have been met either.

iii. Commonality and Typicality

Rule 23(a)(2) – commonality – requires that Plaintiffs establish that "there are questions of law or fact common to the class." Class members' claims must depend on "a common contention [that] is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, 131 S. Ct. at 2551. In other words, the representative plaintiffs must show that the class members have "suffered the same injury." Id. (internal quotation marks omitted). As the D.C. Circuit recently explained, commonality is satisfied where there is "a uniform policy or practice that affects all class members."

Emphasizing that Plaintiffs have been unable to establish a categorical No-Release Policy, Defendants argue that a class action is an improper vehicle to challenge Plaintiffs' alternative articulation of the relevant policy – to wit, that ICE treats deterrence of mass immigration as a factor in making custody determinations. They point out that ICE officers can consider a number of factors in making such determinations and assert that "there is absolutely nothing in the record to indicate whether these national security concerns were a factor in any individual Plaintiff's custody determination and, even if they were, whether they were the reason ICE exercised its discretion to maintain custody." Opp. to Class Cert. at 13. Thus, argues the Government, Plaintiffs have "fail[ed] to show that these [individual] custody determinations involved sufficiently similar factual or legal questions to satisfy the typicality and commonality requirements of Rule 23." Id. at 15.

This argument bears a striking resemblance to Defendants' objection to the named Plaintiffs' standing, and, for similar reasons, the Court rejects it here as well. While it is true that the reason for detention cannot be proven on an individualized basis – since ICE does not provide that information – the Government has nonetheless conceded that ICE is required to consider deterrence of mass migration "where applicable," and that it has been applying this factor in response to the surge in immigration on the southwestern border. See Def. Reply at 4. Plaintiffs, moreover, have provided ample evidence that nearly every Central American family apprehended since June 2014 has been detained, and they have further established a causal relationship between ICE's application of the disputed factor and the spike in detention. The Court can, therefore, conclude that "common questions of law and fact" unite the class members' claims – namely, ICE's consideration of mass immigration as a factor in its custody determinations.

That the exact role this allegedly impermissible factor played in any specific determination is unknowable does not destroy the fact that all (or nearly all) class members were subjected to a determination that included it. Otherwise, the Government could avoid the possibility of a class-action challenge simply by obfuscating the ati

unlawful would resolve all class members' claims "in one stroke," Wal-Mart Stores, 131 S. Ct. at 2251, while rendering the prospect of their release far more likely. Rule 23(b)(2) thus poses no obstacle to class certification.

b. Relation Back

One last class-related dispute remains. Certification is ordinarily appropriate only if the named plaintiff has

This rule applies here. The period of allegedly unlawful detention at issue in this case is weeks or months – *i.e.*, the period between ICE's initial denial of release and the point at which detained families are able to obtain IJ redeterminations. See Hines Decl., ¶ 21 (calculating the pe0 Td ( )Tj

'the operation of' the detention statutes, not injunction of a violation of the statutes." Rodriguez v. Hayes, 591 F.3d 1105, 1120 (9th Cir. 2010) (emphasis added); see also Gordon v. Johnson, 300 F.R.D. 31, 40 (D. Mass. 2014) ("[T]he court need not prohibit the operation of any part of the law to correct the government's incorrect application of it."). Put another way, "[w]here . . . a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of [the statute], and § 1252(f)(1) therefore is not implicated." Rodriguez, 591 F.3d at 1120 (internal quotations and citations omitted). As class-wide injunction in this case would not obstruct the "operation of" Section 1226(a) but merely enjoin conduct that allegedly violates that provision, 8 U.S.C. § 1252(f)(1) poses no bar to relief.

5. *Finality*

Notwithstanding their acknowledgment that ICE considers deterrence of mass immigration in making custody determinations, and that such consideration contributed to the near universal detention of Central American families since June 2014, Defendants also argue that Plaintiffs have failed to demonstrate the existence of a reviewable policy. The Court once again disagrees.

The Government first claims that Plaintiffs' "amorphous" description of "ICE's ongoing practice of considering certain factors in individualized custody determinations" does not suffice to establish "final agency action" for purposes of the APA. See Def. Reply at 16. Instead, it contends, Plaintiffs have merely described "a generalized agency decision-making process" that is not subject to review. Id. While it is true that a "'generalized complaint about agency behavior' . . . gives rise to no cause of action," Bark v. United States Forest Service, No. 12-1505, 2014 WL 1289446, at *6 (D.D.C. Mar. 28, 2014), Plaintiffs here attack particularized agency action – namely, ICE's consideration of an allegedly impermissible factor in making

immigration from that region. ICE's ability to detain such numbers, moreover, was substantially aided by the recent increase in family-detention facilities. See Def. Reply at 5 ("Defendants do not dispute that since June 2014 they have increased their capacity to house families during their

136, 141 (1967)). Rather, "Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions." Darby v. Cisneros, 509 U.S. 137, 146 (1993).

While it is true that an alien who is denied release by ICE may seek *de novo* review of that denial from an immigration judge, see 8 C.F.R. § 1003.19; 8 C.F.R. § 1236.1(d)(1), Defendants' reliance on this potential redetermination ignores the fact that it occurs weeks or months after ICE's initial denial of relief. It thus offers no adequate remedy for the period of unlawful detention members of the class suffer before receiving this review – the central injury at issue in this case.

Insofar as the Government alternatively argues that Plaintiffs are required to proceed in habeas rather than under the APA, they have not provided a compelling reason why this is so. APA and habeas review may coexist. See Davis v. U.S. Sentencing Comm'n, 716 F.3d 660, 666 (D.C. Cir. 2013); Goncalves v. Reno, 144 F.3d 110, 120 (1st Cir. 1998); Lee v. Reno, 15 F. Supp. 2d 26, 33 (D.D.C. 1998). And, although Congress has expressly limited APA review over individual deportation and exclusion orders, see 8 U.S.C. § 1252(a)(5), it has never manifested an intent to require those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA. Plaintiffs' case, therefore, may proceed under the latter statute.

C. The Merits

At long last, having hacked through the jurisdictional thicket, the Court enters the sunlit uplands that constitute the merits of Plaintiffs' request for a preliminary injunction. It will separately address each of the four prongs of that analysis.

1. *Likelihood of Success on the Merits*

To remind any reader whose attention may understandably have flagged: in Count One of their Amended Complaint, Plaintiffs allege that DHS's deterrence policy violates the INA and is thus "contrary to law" under the APA. See 5 U.S.C. § 706(2)(A). Likelihood of success, accordingly, turns on the strength of their argument that deterrence of mass immigration is an impermissible consideration in custody determinations made pursuant to 8 U.S.C. § 1226(a). This is where the rubber meets the road.

Although the statute is silent as to what factors may be considered in making such determinations, the Court must construe it with an eye toward avoiding "serious constitutional doubts." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009). It will first discuss how that maxim of statutory interpretation applies here, then analyze the due-process rights at stake, and last examine the Government's justification for detention.

a. Chevron vs. Constitutional Avoidance

As previously explained, § 1226(a) governs the detention of aliens awaiting standard removal proceedings, which group includes Plaintiffs here. It provides that "pending a decision on whether the alien is to be removed from the United States," the Attorney General "may continue to detain the arrested alien" or release the alien on bond or conditional parole. The Government notes that the statute contains no limitation on the Executive's discretion to detain, nor does it enumerate the factors that may be considered. They further point out that the Attorney General – the officer charged by Congress with the responsibility to interpret and administer the INA – was already expressly interpreting § 1226(a) to allow consideration of mass migration in Matter of D-J-. Because that construction of the statute is facially permissible,

trumps Chevron deference" where the argument for applying the canon is "serious.") (internal quotation marks omitted)

constitutional protections are unavailable to aliens outside of our geographic border," the Supreme Court has made clear that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including

immigration proceedings: "preventing flight" and "protecting the community" from aliens found to be "specially dangerous." 533 U.S at 690-92. It explained that because those potentially legitimate justifications were "weak" or "nonexistent" when applied to indefinite detention, such detention raised serious constitutional concerns. See id. at 690. The Court emphasized those same justifications in Demore v. Kim, 538 U.S. 510, 529-31 (2003), another seminal immigration case. Although the Demore Court upheld mandatory detention of certain criminal aliens under 8 U.S.C. § 1226(c), it justified such detention on the ground that such aliens, as a class, pose a demonstrated risk of flight and danger to the community. See 538 U.S. at 6 Aalaoei al j

States. Put another way, it maintains that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.

This appears out of line with analogous Supreme Court decisions. In discussing civil commitment more broadly, the Court has declared such "general deterrence" justifications impermissible. See Kansas v. Crane, 534 U.S. 407, 412 (2002) (warning that civil detention may not "become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil commitment") (quoting Kansas v. Hendricks, 521 U.S. 346, 372-74 (1997) (Kennedy, J., concurring); see id. at 373 ("[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."). It is certainly possible that this bar on employing general deterrence does not apply in the civil immigration context – *i.e.*, that some sort of immigration carve-out exists. The Court, however, is not persuaded why this should be so as a matter of logic. Its doubt is animated, in part, by Zadvydas, which grounds its analysis of immigration detention in principles derived from the wider civil-commitment context. See 533 U.S. at 690 (citing Hendricks, 521 U.S. 346 at 356 and Foucha, 504 U.S. 71 at 80).

Even assuming that general deterrence could, under certain circumstances, constitute a permissible justification for such detention, the Court finds the Government's interest here particularly insubstantial. It seeks to deter future mass immigration; but to what end? It claims that such Central American immigration implicates "national security interests," see Def. Reply at 4 (citing [illegible]

Oral Arg. Tr. at 30, 35. The Government has not, however, proffered any evidence that this reallocation of resources would leave the agency somehow short-staffed or weakened. Defendants

these countries to consider emigration as a viable, albeit extremely dangerous, life choice," id., ¶ 13, and states that DHS's assertions are "not empirically supported." Id., ¶ 20; see also Pl. Mot., Exh. 14 (Declaration of Nestor Rodriguez, scholar whose focus is Central American immigration), ¶ 14