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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

8 ARTURO MARTINEZ BAÑOS, et al.,

9 Plaintiffs-Petitioners,

10 v.

11 NATHALIE ASHER, et al.,

12 Defendants-Respondents.

Case No. C16-1454-JLR-BAT

**ORDER DIRECTING
SUPPLEMENTAL BRIEFING**

13 Plaintiffs propose a class defined as “All individuals who are placed in withholding only
14 proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained
15 or subject to an order of detention.” Dkt. 38 at 22. The definition appears to be overbroad in
16 three respects.

17 First, the Ninth Circuit’s recent decision in *Padilla-Ramirez v. Bible* forecloses plaintiffs’
18 argument all individuals in withholding only proceedings are entitled to custody hearings as soon
19 as they apply for withholding of removal. 862 F.3d 881, 884, 886 (9th Cir. 2017). Therefore, a
20 class of “all individuals” in withholding only proceedings includes people who are precluded
21 from relief under *Padilla-Ramirez*.

22 Second, two groups of non-citizens may apply for withholding of removal under §
23 1208.31(e): those who are subject to reinstated removal orders under 8 U.S.C. § 1231(a)(5) and

1 those who are subject to final administrative removal orders (“FAROs”) under 8 U.S.C. §
2 1228(b). *Padilla-Ramirez* held that reinstated removal orders are administratively final at the
3 time they are entered, notwithstanding the pendency of withholding only proceedings, and
4 therefore the Government’s detention authority lies in 8 U.S.C. § 1231(a). But no federal court
5 has issued a published decision regarding when a FARO is administratively final, and therefore it
6 is an open question whether those subject to FAROs and in withholding only proceedings are
7 detained under § 1231(a) or 8 U.S.C. § 1226(a). The parties’ briefing has not addressed this
8 issue and neither named plaintiff could represent a FARO sub-class. If § 1226(a) applies to such
9 individuals, they likely would be entitled to different relief than what plaintiffs now seek in light
10 of *Padilla-Ramirez*.

11 Third, the proposed class includes individuals who are not detained but are subject to an
12 order of detention. Judge Robart has determined that merely being subject to an order of
13 detention is insufficient to have standing to pursue this lawsuit. Dkt. 53 at 10.

14 Given these issues, the Court PROPOSES an amended class definition: “All individuals
15 who (1) were placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the
16 Western District of Washington after having a removal order reinstated, and (2) have been
17 detained for 180 days (a) without a custody hearing or (b) since receiving a custody hearing.”

18 The Court ORDERS the parties to respond to this sua sponte proposal and to address any
19 issues relevant to certifying such a class. Plaintiffs’ brief is due **September 25, 2017**, the
20 Government’s response is due **October 4, 2017**, and plaintiffs may file a reply by **October 6,**
21 **2017.**

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ORDER DIRECTING SUPPLEMENTAL BRIEFING- 2

1 The Clerk is directed to RE-NOTE the pending motions, Dkts. 23, 41, 57, for October 6,
2 2017.

3 DATED this 8th day of September, 2017.

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6 BRIAN A. TSUCHIDA
7 United States Magistrate Judge
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