From:	(b)(6); (b)(7)(C)
To:	OPLA HQ Personnel; OPLA Field Personnel
Subject:	Broadcast Message: Implementing Gayle v. Warden Monmouth Cnty. Corr. Inst. Within the Jurisdiction of the Third Circuit
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Disseminated on behalf of Adam V. Loiacono and Kenneth Padilla . . .

On September 3, 2021, the U.S. Court of Appeals for the Third Circuit issued *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, No. 19-3241, 2021 WL 4006189 (3d Cir. Sept. 3, 2021), holding that: (1) section 236(c) of the Immigration and Nationality Act (INA), which prohibits the release of certain noncitizens, satisfies due process "even where [the noncitizen] has a substantial and ultimately successful defense to removal"; (2) the government must prove by a preponderance of the evidence that the detainee is "properly included" within INA § 236(c) "as both a factual and a legal matter" at a bond hearing conducted pursuant to *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999); (3) the Executive Office for Immigration Review (EOIR) must make a contemporaneous record of the *Joseph* hearing available; and (4) INA § 242(f)(1) prohibits class-wide injunctive relief. In so holding, the Third Circuit affirmed the U.S. District Court for the District of New Jersey's summary judgment order in part, reversed in part, vacated the entry of injunctive relief, and remanded for entry of appropriate declaratory relief.

(b)(5)

(b)(5) The court recognized that the Supreme Court held that immigration detention need only "bear[] a reasonable relation to the purpose for which the individual was committed," and that INA § 236(c) passes muster under that standard because the "detention of deportable criminal [noncitizens] *pending their removal proceedings*" advances Congress's goal of preventing noncitizens with criminal histories from absconding while removal proceedings are pending and further ensures that the noncitizen will be successfully removed, if so ordered. *Gayle*, 2021 WL 4006189, at *4 (quoting *Demore v. Kim*, 538 U.S. 510, 527-28 (2003)). The court then noted more recent Supreme Court precedent, *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018), and *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019), to confirm that the mandatory detention of noncitizens, even those with potentially successful defenses to removal, does not violate due process.

However, the court placed the burden on the government to show by a preponderance of the evidence that a noncitizen falls within INA § 236(c) as both a factual and legal matter at a *Joseph* hearing. This ruling deviates from longstanding BIA precedent requiring only that DHS establish a "reason to believe" that a detainee is properly included under INA § 236(c). (b)(5)

(b)(5)

(b)(5) The *Gayle* court, applying the due process factors identified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and, in doing so, considering the liberty interests and substantial duration of detention for noncitizens, determined that the government's "reason to believe" standard improperly placed too heavy of a burden on the noncitizen. The court further held that EOIR must make a record of "sufficient completeness for adequate and effective appellate review" of a noncitizen's *Joseph* hearing due to "the substantial individual interest in liberty, the relatively high value of additional safeguards, and the minimal burden on [EOIR]." *Gayle*, 2021 WL 4006189, at *9. The requirement does not require a verbatim transcript; "'[a]lternative methods of reporting [the] proceedings are permissible' if they create 'an equivalent report of the events' . . . ." *Id.* (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971)).

With respect to INA § 242(f)(1), which limits the jurisdiction of federal class action suits, the Third Circuit agreed with the Sixth and Tenth Circuits and held that the statute prohibits classwide injunctions even when the class is composed entirely of noncitizens who are already in removal proceedings. *See Gayle*, 2021 WL 4006189, at *10 (citing *Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018), and *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999)). Only the Ninth Circuit has reached a different interpretation, and that case remains pending. *See Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134, 1151 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021).

In light of *Gayle*, OPLA attorneys should consider the following practice pointers regarding new or pending cases **within the jurisdiction of the Third Circuit**:

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Thank you,

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