No. 19-35565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOLANY PADILLA, et al.,

Plaintiffs-Appellees,

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:18-cv-00928
Honorable Marsha J. Pechman

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Matt Adams
Leila Kang
Aaron Korthuis
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue Suite 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org
leila@nwirp.org
aaron@nwirp.org

Trina A. Realmuto
Kristin Macleod-Ball
AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street, Suite 18
Brookline, MA 02446
(857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

Judy Rabinovitz
Michael Tan
Anand Balakrishnan
ACLU IMMIGRANTS' RIGHTS
PROJECT
125 Broad Street, 18th floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org
mtan@aclu.org
abalakrishnan@aclu.org

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Decisions

Regulations

Other Authorities

I. INTRODUCTION

This appeal challenges the detention of asylum seekers without the most basic form of due process: a constitutionally-adequate bond hearing to determine if incarceration is justified. For at least a half-century, consistent with Supreme Court precedent, the government has provided asylum seekers who have entered the United States a bond hearing before an immigration judge ("IJ") to determine whether to detain or release them pending a decision on their asylum claims. The Attorney General recently upended this longstanding status quo by eliminating bond hearings for Plaintiffs and class members ("Plaintiffs"). In *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), the Attorney General held that 8 U.S.C. § 1225(b)(1)(B)(ii) requires Plaintiffs' detention—without a bond hearing—unless the Department of Homeland Security ("DHS") grants discretionary release on parole. *Id*. at 515-17.

Plaintiffs are individuals who were apprehended *after* entering the United States; who have been determined by DHS to have a credible fear of persecution or torture—meaning they have a "significant possibility" of prevailing on their protection claims, 8 U.S.C.§ 1225(b)(1)(B)(v)—and who are detained pending removal proceedings on their applications for relief. Yet, as a result of *Matter of M-S-*, Plaintiffs face months or even years of incarceration, even where they pose no flight risk or danger that justifies their imprisonment.

Recognizing the irreparable injury to Plaintiffs and appropriately weighing the other factors, the district court entered a preliminary injunction preserving bond hearings on due process grounds. In addition, the Court required that the bond hearings include constitutionally-required procedural protections. The district court's order is compelled by the record and the Supreme Court and this Court's precedent. For these reasons, the preliminary injunction should be affirmed.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2241 and the Suspension Clause, U.S. Const., Art. I, § 9, clause 2. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

III. STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that 8 U.S.C. § 1252(f)(1) does not bar it from enjoining a statute deemed unconstitutional as applied to Plaintiffs?

2. Whether the district court correctly determined that Plaintiffs are likely to prevail on their claim that the Constitution requires a bond hearing to determine if their continued detention is justified?

3. Whether the district court properly required that the Executive Office for Immigration Review ("EOIR") conduct the bond hearings within seven days of

a request, place the burden of proof on DHS, record and produce the recording or transcript upon appeal, and produce written decisions with particularized findings?

IV. STATEMENT OF THE CASE

A. Legal Background

For at least half a century, consistent with Supreme Court precedent, the government has provided bond hearings to individuals placed in deportation proceedings after having entered the United States—including those who entered without inspection. Indeed, for more than a century noncitizens who enter the United States, even unlawfully, have been protected by due process. *See Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

From 1952 until 1996, the Immigration and Nationality Act ("INA") provided for two types of removal proceedings: "deportation" proceedings for individuals who had entered the United States and "exclusion" proceedings for individuals apprehended at the border before effectuating an entry. *Judulang v. Holder*, 565 U.S. 42, 45-46 (2011); 5 Charles Gordon, et al., *Immigration Law and Procedur*e § 63.01 (2019). The statute governing deportation proceedings provided for discretionary release on bond, and the implementing regulations provided review of the agency's decision to detain at a hearing before an IJ. *See* 8 U.S.C. §

1252(a)(1) (1994); 8 C.F.R. §§ 242.2(d), 3.19 (1994).[1] In contrast, individuals placed in exclusion proceedings were not entitled to a bond hearing; their only option for release was a "parole" review by the Attorney General. *See* 8 U.S.C. §§ 1182(d)(5), 1225(b) (1994); 8 C.F.R. §§ 212.5(a), 235.3(b) (1994).

In 1996, Congress replaced "exclusion" and "deportation" proceedings with a single "removal" proceeding. *See* 8 U.S.C. § 1229a. However, the detention scheme remained essentially the same. As before, noncitizens who had entered the United States were generally entitled to bond hearings, while noncitizens apprehended at the border before effectuating an entry were limited to seeking release on parole. *See* 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1); 1003.19(h)(2)(i)(B), 1236.1(c)(11). Formerly classified as "excludable," individuals stopped at the border are now classified as "arriving." 8 C.F.R. § 1.2 (defining "arriving [noncitizen]" *inter alia*, as "an applicant for admission coming or attempting to come into the United States at a port-of-entry"); *see also* 8 C.F.R. § 1235.3(c) (limiting arriving noncitizens to seeking release on parole).

Congress also created the expedited removal process in 1996, *see* 8 U.S.C. § 1225(b)(1), applying that process to certain noncitizens apprehended at the border

[1] The government first provided bond hearings before special inquiry officers in 1969. *See* 34 Fed. Reg. 8037 (May 22, 1969). It later replaced special inquiry officers with IJs in 1973. *See* 38 Fed. Reg. 8590 (Apr. 4, 1973); *see also* 48 Fed. Reg. 8038 (Feb. 25, 1983) (establishing EOIR).

without proper documents, *id*. § 1225(b)(1)(A)(i). Congress authorized the Attorney General to expand expedited removal to certain persons who are apprehended inside the country and cannot demonstrate that they have been present for a two-year period. *Id*. § 1225(b)(1)(A)(iii). In all cases, Congress protected the right to a fair adjudication of *bona fide* asylum claims: individuals in expedited removal who express a fear of persecution or torture and pass a credible fear screening are referred for removal proceedings before an IJ to consider their claims for asylum and other relief. *See id*. §§ 1225(b)(1)(A)(ii), (b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 1235.6(a)(ii)-(iii).

The creation of expedited removal did not disrupt the well-settled rule that people who had already entered were entitled to bond hearings. In 2004, when the government began applying expedited removal to noncitizens who had already entered the country, 69 Fed. Reg. 48,877 (Aug. 11, 2004), regulations provided that those persons who had entered the country and were subsequently referred for removal proceedings after passing a credible fear screening were entitled to IJ bond hearings. *See Matter of X-K-*, 23 I. & N. Dec. 731, 732, 734-35 (BIA 2005) (construing 8 C.F.R. §§ 1003.19(h)(2), 1236.1(c)(11), (d)).

On April 16, 2019, the Attorney General issued *Matter of M-S-*, which purports to eliminate bond hearings for all asylum seekers who enter without inspection and demonstrate a credible fear of persecution or torture, and thus have

been referred for regular removal proceedings. If permitted to take effect, it will deny these individuals a bond hearing for the first time in at least a half-century.

In *Matter of M-S-*, the Attorney General reversed *Matter of X-K-*, a Board of Immigration Appeals ("BIA") decision holding that asylum seekers who enter without inspection and who establish a credible fear are entitled to bond hearings. 27 I. & N. Dec. at 509-10. Citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 839, 844-45 (2018), *Matter of M-S-* held that 8 U.S.C. § 1225(b)(1)(B)(ii) governs the detention of these individuals after they are transferred from expedited removal to IJ removal proceedings, and not 8 U.S.C. § 1226, the statute that generally governs detention pending regular removal proceedings. 27 I. & N. Dec. at 515-17. Moreover, *Matter of M-S-* held that § 1225(b)(1)(B)(ii) permits Plaintiffs' release only under a discretionary grant of parole by DHS pursuant to 8 U.S.C. § 1182(d)(5). 27 I. & N. Dec. at 516-17.

The result of *Matter of M-S-* is that thousands of individuals pursuing *bona fide* claims for protection in removal proceedings will be detained for months and even years without ever receiving a bond hearing, simply because they were initially placed into expedited removal proceedings. In Fiscal Year 2017 alone, more than 42,800 such individuals were entitled to bond hearings. *See* USCIS, Credible Fear Workload Report Summary, FY2017 Inland Caseload, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National

%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf. By Plaintiffs' estimate, half of such individuals who are detained are found by an IJ to pose no flight risk or danger to the community and granted release on bond. Supplemental Excerpts of Record ("SER") 124 ¶9.

That number will only grow, as the government has massively expanded the number of class members who face detention without a bond hearing under *Matter of M-S-*. Just last month, DHS extended application of the expedited removal provisions of § 1225(b)(1) to all noncitizens located anywhere in the United States unless they can prove they have resided here for more than two years since their most recent entry without admission or parole. 84 Fed. Reg. 35,409-01 (July 23, 2019). Prior to this announcement, expedited removal applied only to individuals apprehended within 100 miles of the border and who had been present in the country for less than 14 days. The dramatic expansion of expedited removal, combined with *Matter of M-S-*, subjects thousands of additional asylum seekers to detention without a bond hearing. *See id*. at 35,411.

B. Procedural History

Plaintiffs filed this class action lawsuit prior to *Matter of M-S-*, to enforce, among other things, their right to a constitutionally-adequate bond hearing. *See* ER58; Dist. Ct. Dkt. 26 ¶148; *id.* ¶¶146-165 (Second Amended Complaint ("SAC")) (alleging that Defendants violated Plaintiffs' constitutional right to a

prompt "bond hearing that is fair and comports with due process"). At the time Plaintiffs filed their SAC, they were entitled to a bond hearing pursuant to *Matter of X-K-*.

The district court granted Plaintiffs' motion for class certification on March 6, 2019. As to Plaintiffs' bond claims, the court certified a nationwide class of:

> All detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording of the hearing within seven days of requesting a bond hearing.

SER 111.

On April 5, 2019, the court granted Plaintiffs' motion for a preliminary injunction. Excerpts of Record ("ER") 22. The court found that Plaintiffs have "[a] constitutional right to press their due process claims, including their right to be free from indeterminate civil detention, and their right to have the bond hearing conducted in conformity with due process." ER27. The court determined that the "Constitution does not require" Plaintiffs to "endure such a no-win scenario" of deciding between "indeterminate detention" with an "inequitable burden of proof and procedural deficiencies" and "be[ing] deported back to a homeland where they have already been found to have a credible fear of injury or death." ER29. The court ordered that, within 30 days, Defendant EOIR must provide Plaintiffs bond hearings within seven days of a request. ER34, 39. In addition, the court ordered

that the government (1) bear the burden of justifying continued detention, (2) record the bond hearings and produce either the recording or verbatim transcript on appeal, and (3) that IJs produce a written decision with particularized determinations. ER39.

Eleven days after the injunction issued, the Attorney General issued *Matter of M-S-*, while delaying its implementation for 90 days in light of its "significant impact . . . on detention operations." *See* 27 I. & N. Dec. at 519 n.8. Plaintiffs subsequently moved to amend their complaint and modify the injunction to squarely challenge *Matter of M-S-* on due process grounds. ER155-57, ¶¶117-29, 142-46; ER69; ER71-72.[2]

On July 2, 2019, the district court granted the motion to modify the injunction and "divide[d] the modified injunction into two parts to facilitate appellate review." ER19. The court found that Plaintiffs are likely to succeed on their claim that they are constitutionally entitled to bond hearings (Part B). ER20. Additionally, the court reaffirmed that Defendants must provide the procedural protections from its prior April 5, 2019, order (Part A), including conducting the bond hearings within seven days of request (A.1); placing the burden of proof on DHS (A.2); recording the hearing and producing the recording or a transcript on

[2] Plaintiffs also challenged, *inter alia*, the Attorney General's interpretation of § 1225(b)(1)(B)(ii). *See* ER157-58 ¶¶130-35. However, Plaintiffs do not seek preliminary relief on this basis.

appeal (A.3); and producing a written decision with particularized determinations (A.4). ER19-20.

Defendants appealed and requested a stay of both parts of the preliminary injunction. ER81-83. This Court denied the request to stay Part B and granted the request to stay Part A. ER78-79.

V. SUMMARY OF ARGUMENT

"Arbitrary civil detention is not a feature of our American government. . . . Civil detention violates due process outside of 'certain special and narrow nonpunitive circumstances.'" *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). Applying the Supreme Court and this Court's precedent, the district court appropriately concluded that Plaintiffs are entitled to the basic due process of a bond hearing with constitutional safeguards. This Court should affirm the preliminary injunction; maintain the bond hearings that asylum seekers detained after entering the country have received for at least a half-century; and ensure that those hearings comport with due process requirements.

The district court correctly determined that 8 U.S.C. § 1252(f)(1) does not bar the class-wide injunction. This Court's precedent and § 1252(f)(1)'s plain language provide that only individuals who have been placed in removal proceedings have standing to seek to enjoin an immigration detention statute on

constitutional grounds. The class members here satisfy that requirement as they are all subject to removal proceedings.

By contrast, Defendants' sweeping interpretation of § 1252(f)(1) to bar all class actions to enjoin unconstitutional action under 8 U.S.C. §§ 1221-1231 would produce absurd results, such as barring multi-plaintiff actions seeking the same relief. Defendants' reading also defies the requirement that Congress speak clearly both when curtailing traditional equitable powers and when restricting the federal courts' habeas powers. Similarly, Defendants offer no plausible explanation for why Congress would explicitly mention Rule 23 and reject class actions for different claims in the same legislation and section of the INA, but then fail to do so in § 1252(f)(1). Defendants' reading of § 1252(f)(1) should be rejected.

On the merits, the district court correctly concluded that class members—all of whom were apprehended *after* they entered the country, passed a credible fear screening, and were transferred to regular removal proceedings—are entitled to the Fifth Amendment Due Process Clause's protections against arbitrary detention. To vindicate this right, the district court required Defendants to continue providing bond hearings—as they have done for decades—where an IJ can determine if the asylum seeker poses a flight risk or a danger, or can be safely released to the community. That hearing requirement flows from a long line of Supreme Court and Ninth Circuit cases establishing that immigration detention violates due

process when it lacks a reasonable relation to valid government purposes and adequate procedures to ensure detention is serving those goals. By contrast, Defendants' parole process—which provides only for discretionary determinations by Immigration and Customs Enforcement ("ICE") officers (the jailing authority), without any hearing, record, or opportunity to appeal—does not satisfy the Due Process Clause.

Defendants assert that asylum seekers who seek admission and are apprehended after entering the United States lack due process rights and are entitled only to the procedures provided in the INA. But that argument disregards the Supreme Court and this Court's clear precedent that individuals detained after entering the United States enjoy due process protections, regardless of their manner of entry or length of time in this country. Defendants cite the single instance where the Supreme Court authorized mandatory detention without a bond hearing, *Demore v. Kim*, 538 U.S. 510 (2003). But the asylum seekers in the Plaintiff class bear no resemblance to the noncitizens in *Demore*: a narrow subset of individuals who conceded they were deportable, and whom Congress had singled out through a statutorily-enumerated set of crimes as categorical flight risks and dangers based on an extensive legislative record. Indeed, Defendants concede that Congress provided for the discretionary release of class members through the

parole process, thus undermining any argument that Congress required their detention throughout their asylum proceedings. *See* 8 U.S.C. § 1182(d)(5).

Furthermore, the district court correctly required that Defendants (1) provide bond hearings within seven days of a request; (2) bear the burden of proof; (3) provide a record for appeals; and (4) issue individualized, written decisions. The Supreme Court, this Court, and the immigration court system have long recognized that due process demands timely hearings. Placing the burden on DHS in bond hearings follows from the Supreme Court and this Court's civil detention precedents, which require the government, and not the individual, to bear the risk of error when it comes to deprivations of liberty. Finally, a long line of case law supports the requirement that Defendants produce a record of the hearing and written decisions in order to protect individuals' appellate rights.

The district court also correctly determined that Plaintiffs face irreparable harm. Defendants' policy of detaining Plaintiffs without a bond hearing violates their constitutional rights and unnecessarily deprives them of liberty. In addition, such detention irreparably harms Plaintiffs' physical and mental health; re-traumatizes asylum seekers like Plaintiffs, who have recently fled persecution or torture; and impairs their ability to obtain legal representation and present their immigration cases.

Finally, the district court properly weighed the balance of equities and public interest in Plaintiffs' favor. The public interest compels protecting Plaintiffs' constitutional rights. This Court has already rejected Defendants' argument that an order enjoining a statute always causes the government irreparable injury. Defendants cannot show any hardship from being required to maintain the status quo and provide bond hearings to asylum seekers detained inside the country, as they have for at least a half-century. Nor can Defendants demonstrate hardship regarding the hearing procedures based on evidence they present for the first time on appeal, despite ample opportunity to introduce it before the district court. In any case, the new evidence does not tip the balance in Defendants' favor. Accordingly, this Court should affirm the preliminary injunction.

VI. STANDARD OF REVIEW

This Court reviews a decision to grant a preliminary injunction for abuse of discretion. *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017). This review is "limited and deferential." *Id*. (citation omitted). Legal conclusions are reviewed *de novo*; factual findings, for clear error. *Id.* The scope of the injunction is reviewed for abuse of discretion. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015).

VII. ARGUMENT

A. 8 U.S.C. § 1252(f)(1) Does Not Prohibit the Injunction.

Section 1252(f)(1) provides that "no court . . . shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1231], other than with respect to the application of such provisions to *an individual [noncitizen] against whom proceedings under such part have been initiated*." 8 U.S.C. § 1252(f)(1) (emphasis added). As the district court recognized, ER8-10, it follows from the reasoning of *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018), that § 1252(f)(1) does not bar the instant injunction because all the Plaintiffs are currently in removal proceedings and therefore exempted from the statute. *See also Arroyo v. Dep't of Homeland Sec.*, No. 19-815-JGB(SHKx), 2019 WL 2912848, at *7 (C.D. Cal. June 20, 2019) (applying *Marin* to permit injunctive relief).

Section 1252(f)(1) does not apply where, as here, "[a]ll of the individuals in the . . . class are 'individual[s] against whom [removal] proceedings . . . have been initiated.'" *Marin*, 909 F.3d at 256 (second alteration in original) (quoting § 1252(f)(1)). By its plain terms, § 1252(f)(1) limits who has standing: it prohibits those who are not yet in removal proceedings from seeking injunctive relief for constitutional challenges to the INA, but permits those whom the government is already seeking to remove to bring such challenges. *See American Immigration Lawyers Ass'n ("AILA") v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000)

(construing § 1252(f)(1) and explaining that "Congress meant to allow litigation challenging the new system by, and only by, *[noncitizens] against whom the new procedures had been applied*." (emphasis added)). Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in proceedings, brought preemptive challenges to the enforcement of certain immigration statutes. *See, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 47-51 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487-88 (1991); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1026 (5th Cir. Unit B 1982). By contrast, Plaintiffs here are all in removal proceedings and thus may seek injunctive relief.

Defendants complain that *Marin* addressed only subject matter jurisdiction and directed the district court to decide the availability of class-wide injunctions on remand. Gov't Br. 24. However, this Court's reasons for holding that § 1252(f)(1) does not bar subject-matter jurisdiction—namely, that it is a limitation on standing—compel the same result as to injunctive relief. Notably, Defendants ignore that this Court ordered that the class-wide preliminary injunction in *Marin* remain in place pending the district court's review of the plaintiffs' constitutional claims. *See* 909 F.3d at 256 & n.1.

Notwithstanding this Court's holding in *Marin*, Defendants claim that § 1252(f)(1)'s reference to "an individual alien in removal proceedings" bars class

injunctions altogether, relying entirely upon dicta in *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 481-82 (1999), and cited in *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). Gov't Br. 22. But neither *AADC* nor *Jennings* addressed § 1252(f)(1)'s exception clause. *AADC* was not a class action, and its perfunctory reference to § 1252(f)(1) held only that the statute was not an affirmative grant of subject matter jurisdiction. *AADC*, 525 U.S. at 481-82. The Court had no occasion to consider the meaning of the exception clause and its effect on the availability of class-wide injunctive relief. "Supreme Court dicta should be given 'due deference,' but it is the Court's holding that is ultimately binding." *Nu Image, Inc. v. Int'l All. of Theatrical Stage Emps.*, 893 F.3d 636, 642 (9th Cir. 2018) (citation omitted). Indeed, the Supreme Court itself has rejected the government's reliance on dicta in *AADC*. *Compare AADC*, 525 U.S. at 487 (asserting habeas review unavailable post-1996 immigration laws) *with INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001) (holding habeas remains available under those laws).

More importantly, "traditional equitable powers can be curtailed only by an unmistakable legislative command." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2008). Here, no such command exists. Indeed, in contrast to Plaintiffs' plain text reading of § 1252(f)(1) as a limitation on standing, Defendants' interpretation leads to truly bizarre results. Under their view, courts could not grant injunctive

relief even to two individuals suing together, because if "an individual alien" limits injunctive relief to only one individual at a time, then it applies not only to class actions, but to all forms of multi-plaintiff joinder. Conversely, if class members filed dozens of separate but materially indistinguishable lawsuits challenging detention without a bond hearing, Defendants' interpretation of § 1252(f)(1) would prohibit a court that consolidated these cases from issuing one global order, instead requiring the court to issue dozens of identical "individual" injunctive relief orders. Congress could not have intended this. It would have to write far clearer language to displace Rule 23, particularly where the result would encourage such inefficiencies and produce truly absurd outcomes. *United States v. Wilson*, 503 U.S. 329, 334 (1992).

Moreover, the Supreme Court has instructed courts not to construe references to "any individual" or "any plaintiff" as eliminating judicial authority under Rule 23. *See* ER8; *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("The fact that the statute speaks in terms of an action brought by 'any individual' . . . does not indicate that the usual Rule providing for class actions is not controlling . . . ."). For example, the Supreme Court upheld class-wide injunctive relief under the Prison Litigation Reform Act ("PLRA"), despite a provision stating "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff

or plaintiffs." *Brown v. Plata*, 563 U.S. 493, 531 (2011) (quoting 18 U.S.C. § 3626(a)(1)(A)); *see also Shook v. El Paso Cty.*, 386 F.3d 963, 970 (10th Cir. 2004) (finding § 3626(a)(1)(A) does not limit class-wide relief where "[t]he text of the PLRA says nothing about the certification of class actions").

Defendants lean heavily on *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018), which found *Califano* distinguishable because the phrase "an individual alien"—as opposed to "an alien"—purportedly requires that "individual" be given distinct meaning, and thus should be read to bar class-wide relief. *Id*. at 877-78. But that alleged redundancy should not override the prohibition on absurd results, particularly where it does not render any other provision of the statute superfluous.[3] *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." (internal quotation omitted)); *id*. at 1087 (rejecting reading that led to "improbable" result).

Defendants further note that *Califano* involved a different statute than § 1252(f)(1), Gov't Br. 23-24, but its holding did not turn on the statute at issue. Instead, *Califano* held the word "individual" did not constitute an "express

[3] Nor does *Marin*'s construction of § 1252(f)(1) render the term "individual" redundant. Congress used "individual" to stop organizational plaintiffs from pursuing injunctions on behalf of people not in removal proceedings. *See supra* at 15-16. *Marin*'s reading of the plain language effects Congress's intent.

limitation of class relief" sufficiently clear to abrogate the availability of Rule 23. 442 U.S. at 699-700. In fact, *Califano* made clear that "class relief has never been thought to be unavailable under" the "wide variety of federal jurisdictional provisions [that] speak in terms of individual plaintiffs . . . ." *Id*. at 700 (citing examples). Defendants emphasize that the statute in *Califano* affirmatively authorized lawsuits, whereas § 1252(f)(1) is a limit on relief. Gov't Br. 23. But that is beside the point: the question is what relief § 1252(f)(1) bars and for whom. Again, § 1252(f)(1) limits standing and only bars injunctions for noncitizens who are not in removal proceedings; it otherwise leaves courts free to grant injunctive relief, including in class actions.

In addition, Congress speaks unequivocally when it wants to prohibit class relief in immigration cases. ER8. A neighboring subsection of § 1252(f)(1), adopted at the same time by the same Congress, proves this point. With respect to the expedited removal provisions, § 1252(e)(1)(B) bars courts from "certify[ing] a class under Rule 23 . . . in any action for which judicial review is authorized under a subsequent paragraph of this subsection." Section 1252(f)(1) cannot be read to create a *sub silentio* ban on class actions for injunctive relief when the same Congress in the same session explicitly imposed such a ban in a different section. *See Rodriguez*, 591 F.3d at 1119 (construing § 1252(f)(1) narrowly in light of § 1252(e)'s breadth); *AILA*, 199 F.3d at 1359 (noting that § 1252(e) contains a "ban

on class actions" while § 1252(f)(1) contains a different limitation); *Arroyo*, 2019 WL 2912848, at *7. Defendants argue that its reading is consistent with § 1252(e)(1)(B)'s bar on class actions because § 1252(f)(1) still permits class-wide declaratory relief. Gov't Br. 26. But if § 1252(f)(1) intended to alter the relief available in class actions, it would have referred to class actions. Read in context with its neighboring provisions, § 1252(f)(1) does not bar class relief at all, but instead limits suits for injunctive relief to individuals who are in removal proceedings.

Finally, § 1252(f)(1) does not bar class-wide injunctive relief in this case "because it lacks a clear statement repealing the court's habeas jurisdiction." *Marin*, 909 F.3d at 256 (citing *St. Cyr*, 533 U.S. at 298).[4] Multi-party habeas relief has long been part of traditional habeas relief—a fact of which Congress was undoubtedly aware when it enacted § 1252(f)(1) in 1996. *See, e.g.*, *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779); *see also, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393-94, 404 (1980) (holding class representative could appeal denial of nationwide certification of class habeas); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202 (9th Cir. 1975) (permitting "joint or class application for a writ of habeas corpus").[5] Yet Congress tellingly did not include a

[4] Plaintiffs invoke the courts' habeas corpus authority. ER138 ¶8.
[5] This Court has long permitted habeas class actions under Rule 23.

clear statement abrogating habeas relief in § 1252(f)(1).

Defendants assert that *St. Cyr*'s clear statement rule applies only to statutes that eliminate habeas jurisdiction, and not statutes that eliminate habeas relief. Gov't Br. 27-28.[6] But this is a distinction without a difference. Defendants' construction of § 1252(f)(1) effectively would eliminate all multi-party habeas petitions, even though Congress has not written a clear statement requiring that result. Defendants rely on *Hamama*, which held that § 1252(f)(1) did not eliminate habeas relief because it precluded only class-wide injunctive relief and did not bar a class "from seeking a traditional writ of habeas corpus." 912 F.3d at 879. But that does not address Plaintiffs' central argument: that, because multi-party injunctive relief *is* part of the traditional relief available under habeas, a clear statement is needed. And even under the Sixth Circuit's reasoning, the district court's orders can be affirmed: a grant of traditional habeas relief at a minimum would include an order of the conditional release of Plaintiffs if Defendants do not provide adequate bond hearings. *See, e.g., Chin Yow v. United States*, 208 U.S. 8, 13 (1908).

[6] Defendants cite *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007), Gov't Br. 27, but *Crater* held that 28 U.S.C. § 2254(d)(1) did not violate the Suspension Clause because it "merely set[] forth standards" for habeas relief, rather than eliminate a form of habeas relief altogether. 491 F.3d at 1124.

B. Plaintiffs Have a Due Process Right to a Bond Hearing.

1. Plaintiffs Have Due Process Rights.

Because Plaintiffs entered the country prior to being apprehended, the Due Process Clause undisputedly protects them. *See* ER13, 26-27. Plaintiffs challenge only the application of § 1225(b)(1)(B)(ii) to individuals who, like themselves, were detained after entering the United States and passing a credible fear screening, and not its application to "arriving noncitizens"—those who are detained at a port-of-entry before entering the country. Thus, contrary to Defendants' argument, Gov't Br. 29, Plaintiffs are not raising a facial challenge to the statute and need not show that it is unconstitutional in all its applications.

Supreme Court and Ninth Circuit immigration cases long have established a bright line between individuals apprehended at a port-of-entry, and those who are detained after having entered the country, even unlawfully. "[O]nce [a noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (due process protects every person within the United States, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory"); *Thuraissigiam v. Dep't of Homeland Sec.*, 917 F.3d 1097, 1111 n.15 (9th Cir. 2019) ("[P]resence

matters to due process."); *United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014) ("The Supreme Court has categorically declared that once an individual has entered the United States, he is entitled to the protection of the Due Process Clause."); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1108 (9th Cir. 2001) ("[O]nce [a noncitizen] has 'entered' U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights.").

This principle applies regardless of how long individuals have been present or the nature of their entry into the United States. *See, e.g.*, *Raya-Vaca*, 771 F.3d at 1203 ("[e]ven [a noncitizen] who has run some fifty yards into the United States has entered the country" and has due process rights); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1153, 1160-62 (9th Cir. 2004) (due process for noncitizen apprehended same day as unlawful entry); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1019, 1023-27, 1032-34 (9th Cir. 2004) (requiring due process for child found alone in international airport); *Padilla-Agustin v. INS*, 21 F.3d 970, 972, 974-77 (9th Cir. 1994) (requiring due process for noncitizen apprehended shortly after crossing border), *abrogated on other grounds by Stone v. INS*, 514 U.S. 386 (1995); *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155-56 (9th Cir. 1988) (same);

Rios-Berrios v. INS, 776 F.2d 859, 860, 863 (9th Cir. 1985) (same).[7]

The government has acknowledged to the Supreme Court that noncitizens who enter the country unlawfully, even for very brief periods of time, have due process rights:

> JUSTICE BREYER: A person who runs in illegally, a person who crosses the border illegally, say, from Mexico is entitled to these rights when you catch him.
>
> [Government Counsel]: He's entitled to procedural due process rights.

Tr. of Oral Argument at 25:18-22, *Clark v. Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-7434), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2004/03-878.pdf.

In an apparent change of position, Defendants now assert that because Plaintiffs are seeking admission to the United States, they lack due process rights to challenge their detention, despite being apprehended after entering the country. *See* Gov't Br. 34-35 (asserting that "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned.'" (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). But *Mezei* itself makes clear that "[noncitizens] who have once passed through our gates, *even illegally*, may be

[7] Although Defendants emphasize that *Raya-Vaca* is a criminal case, Gov't Br. 37-38, "criminal detention cases provide useful guidance in determining what process is due non-citizens in immigration detention." *Hernandez*, 872 F.3d at 993.

expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." 345 U.S. at 212 (emphasis added). *Accord* ER13, 26-27. Defendants misleadingly suggest that *Zadvydas* undermined this longstanding principle. *See* Gov't Br. 38 (citing *Zadvydas*'s reliance on *Kaplan v. Tod*, 267 U.S. 228 (1925), and *Leng May Ma v. Barber*, 357 U.S. 185 (1958)). But *Zadvydas reaffirmed* that individuals apprehended after entry have due process rights. *See* 533 U.S. at 693.[8]

Defendants similarly misinterpret this Court's precedent, arguing that it has applied *Mezei* to individuals who have not been admitted and are detained after entering the country. *See* Gov't Br. 35. But again, all the cases Defendants cite concern individuals who, unlike Plaintiffs, were apprehended at the border, *prior to* entry, and all affirm that the Due Process Clause protects noncitizens who are apprehended *after* entering the country. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1132, 1140 (9th Cir. 2013); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1442-43, 1448-49 (9th Cir. 1995); *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1095, 1097

[8] Moreover, although individuals who are apprehended prior to effecting an entry may lack due process rights regarding *admission*, they still have due process rights against arbitrary *detention*. *See Zadvydas*, 533 U.S. at 690 (holding that even noncitizens who have lost all legal rights to reside in the U.S. have due process rights to "[f]reedom from . . . physical restraint."). *See also Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004) ("non-admitted [noncitizens]" are "not categorically exclude[d] from all constitutional coverage"). However, Plaintiffs do not rely on this argument here.

(9th Cir. 2004); *Kwai Fun Wong*, 373 F.3d at 958, 970-71.[9]

Finally, Defendants suggest that *Landon v. Plasencia*, 459 U.S. 21 (1982), held that constitutional rights depend upon the depth of an individual's connections to the country. Gov't Br. 35-36. But *Plasencia* did not involve noncitizens detained after entering the country. It established that rule for a lawful permanent resident *arriving* at a port-of-entry, and therefore only *expanded* due process rights for that group of individuals based on their pre-existing ties. 459 U.S. at 32-34. Defendants also cite *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but as this Court has held, *Verdugo* does not undermine Plaintiffs' rights, as "persons" who have entered the country, to protection by the Due Process Clause. *Wang v. Reno*, 81 F.3d 808, 817 (9th Cir. 1996).[10]

2. Substantive Due Process Requires a Bond Hearing.

Substantive due process prohibits Plaintiffs' detention without a bond hearing.[11] "Freedom from imprisonment—from government custody, detention, or

[9] Critically, at the time *Rodriguez* was decided, asylum seekers like Plaintiffs were still receiving bond hearings under *Matter of X-K-*. The *only* asylum seekers detained without a bond hearing under § 1225(b)(1)(B)(ii) were those arriving at ports of entry. Thus, *Rodriguez* had no occasion to decide the constitutionality of detaining Plaintiffs without a bond hearing.

[10] Moreover, *Verdugo* involved whether the Warrant Clause of the Fourth Amendment applied *in Mexico*. *See* 494 U.S. at 261, 264.

[11] Contrary to Defendants' assertion, Gov't Br. 29-30, this Court applies both substantive and procedural due process to determine what detention procedures are required. *See, e.g.*, *Hernandez*, 872 F.3d at 990-94. In any event, even assuming

other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690; ER13, 26. Immigration detention, like all civil detention, is justified only where "a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)); *see also United States v. Salerno*, 481 U.S. 739, 747 (1987). The purpose of immigration detention is to effectuate removal should an individual ultimately lose her immigration case, and to protect against danger and flight risk during that process. *Zadvydas*, 533 U.S. at 690-91.

Defendants assert that, in the immigration context, due process requires merely a "deferential review" of whether detention serves a government purpose. Gov't Br. 31. But that is not the law. Instead, "any detention incidental to removal must 'bear[ ] [a] *reasonable* relation'" to valid government purposes, *Hernandez*, 872 F.3d at 990 (quoting *Zadvydas*, 533 U.S. 690) (emphasis added), and be accompanied by "*adequate* procedural protections to ensure that the government's asserted justification . . . outweighs the individual's constitutionally protected interest" in liberty. *Id.* at 990 (internal quotation marks omitted) (emphasis added);

Defendants' detention policy "survives substantive due process scrutiny, it must still be implemented in a fair manner," consistent with procedural due process. *Salerno*, 481 U.S. at 746.

accord ER16.[12]

If *Matter of M-S-* were to take effect, the only procedure available to Plaintiffs to challenge their detention would be a discretionary parole determination made by a DHS officer. However, with only one exception—*Demore v. Kim*, 538 U.S. 510 (2003), a case which Defendants concede is distinguishable, *see* Gov't Br. 32—the Supreme Court has never upheld civil detention as constitutional without an individualized hearing before a neutral decision-maker to ensure the person's imprisonment is actually serving the government's goals. *See, e.g.*, *Salerno*, 481 U.S. at 750 (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on dangerousness, where the government bears the burden of proof by clear and convincing evidence); *Hendricks*, 521 U.S. at 357-58 (upholding civil commitment when there are "proper procedures and evidentiary standards," including an individualized hearing on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79

[12] The cases Defendants cite at Gov't Br. 31 are distinguishable. *Reno v. Flores*, 507 U.S. 292 (1993), found that the claim there did not implicate the fundamental right to physical liberty, as it involved minors whom the Court deemed were always in some form of custody; in any event, the minors in that case were entitled to bond hearings. *Id*. at 302-03, 308-09. The individuals in *Carlson v. Landon*, 342 U.S. 524 (1952), also received bond determinations, but were detained in light of Congress's judgment that the Communist Party posed a heightened risk to national security. *Id*. at 528 n.5, 541-42. Finally, *Wong Wing v. United* States, 163 U.S. 228 (1896), concerned the constitutional limits on imprisonment at hard labor for individuals who had entered the country unlawfully, holding that such punishment could only be imposed after a criminal, not a civil, process. *Id*. at 237-38.

(1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279-81 (1984) (upholding detention pending a juvenile delinquency determination where the government proves dangerousness in a fair adversarial hearing with notice and counsel).

Indeed, the Supreme Court has required individualized hearings for far lesser interests, including for criminals facing revocation of parole (despite their having already been sentenced to the full term of their confinement), *see Morrissey* v. *Brewer*, 408 U.S. 471, 485-86 (1972), and even for property deprivations, *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano*, 442 U.S. at 696-97 (in-person hearing required for recovery of excess Social Security payments); *see also Zadvydas*, 533 U.S. at 692 (criticizing the administrative custody reviews in that case and noting that "[t]he Constitution demands greater procedural protection even for property").

Although the Supreme Court upheld immigration detention without a bond hearing in *Demore*, that case is clearly distinguishable. *See* ER14. First, the statute in *Demore* imposed mandatory detention on a subset of noncitizens who were deportable for having committed an enumerated list of crimes, based on Congress's determination that they posed a categorical bail risk. *See* 8 U.S.C. §

1226(c). The Court emphasized that this "narrow detention policy" was reasonably related to the government's purpose of effectuating removal and protecting public safety. *Demore*, 538 U.S. at 526-28. By contrast, the detention statute here applies broadly to individuals with no criminal records and who all have been found to have *bona fide* claims to protection in the United States, which they will have to litigate in immigration court. *Cf. Zadvydas*, 533 U.S. at 691 (concluding indefinite detention raised due process concerns because the detention statute did "not apply narrowly to 'a small segment of particularly dangerous individuals,' . . . but broadly to [noncitizens] ordered removed for many and various reasons, including tourist visa violations" (quoting *Hendricks*, 521 U.S. at 368)).

Second, *Demore* placed great reliance on the voluminous record before Congress, which showed that the population of "criminal aliens" targeted by the mandatory detention statute posed a heightened categorical risk of flight and danger to the community. *See* 538 U.S. at 518-21 (citing studies and congressional findings regarding the "wholesale failure by the INS to deal with increasing rates of criminal activity by [noncitizens]"). In contrast, Congress made no comparable findings regarding the population at issue here—that is, individuals who have all been screened by DHS and found to have a credible fear of persecution or torture. Indeed, for more than 20 years Defendants read the statute as making clear that Congress continued to authorize bond hearings for asylum seekers who were

apprehended after entering the country without inspection. *See supra* Section IV.A. Moreover, even though Defendants now interpret the statute to bar bond hearings for Plaintiffs, they continue to recognize that Congress continues to permit their release from custody. *See* 8 U.S.C. § 1182(d)(5).

Third, *Demore* emphasized what the Court understood to be the brief period of time that mandatory detention typically lasts. *See* 538 U.S. at 529-30 (noting mandatory detention lasts about 45 days in 85% of cases and about 5 months for those 15% of cases where individuals seeks appeal to BIA). In contrast, asylum seekers can expect to spend a median time of nearly six months for their protection claims to be adjudicated before the IJ and nearly a year in cases involving an appeal to the BIA, *see* SER124 ¶8, along with any additional needed time for judicial review.

Defendants assert two interests to purportedly justify Plaintiffs' detention without a bond hearing: an interest in ensuring that "[1] aliens detained at or near the border establish an entitlement to enter the country before being released into the country, and [2] aliens show up for their removal proceedings." Gov't Br. 32. But neither interest is sufficient to justify incarcerating Plaintiffs without due process.

First, Defendants have *no* legitimate interest in detaining individuals who pose no flight risk or danger—even if they await a final determination on their

right to remain. *See Hernandez*, 872 F.3d at 994. This is especially true given that asylum officers already have determined that Plaintiffs and class members have *bona fide* protection claims, which give them the right to remain in the United States while their applications for protection are adjudicated. *See* H.R. Rep. No. 104-469, pt.1, at 158 (1995) ("If the [noncitizen] meets [the credible fear] threshold, the [noncitizen] is permitted to remain in the United States to receive a full adjudication of the asylum claim . . . .").

Second, Defendants' account of their interests ignores the parole process, which continues to apply to these individuals. Even under *Matter of M-S-*, class members are still eligible for release on parole *prior to* a determination that they have the right to remain in the U.S. 27 I. & N. Dec. at 516. But that determination is made by ICE custody officers, rather than an IJ who conducts a hearing. *See infra* Section VII.B.3. That Defendants parole class members into the U.S. undermines their asserted interest in continued incarceration.

Third, Defendants assert that Congress in 1996 "viewed recently arrived asylum seekers as necessitating detention to ensure their appearance at removal proceedings." Gov't Br. 33. But the legislative record Defendants cite does not support that claim as to those who have established a *bona fide* asylum claim and does not even begin to approach the voluminous record in *Demore*, which relied on several studies and congressional findings. *See* 538 U.S. at 518-21. The record

refers only to arriving asylum seekers who have simply declared an intent to seek asylum. *See* H.R. Rep. No. 104-469, pt. 1, at 117 (referring to "[t]housands of smuggled [noncitizens who] arrive in the United States each year with no valid entry documents and *declare* asylum immediately upon arrival" (emphasis added)). It does not address the subset of those individuals apprehended after entry who have further been screened to present a *bona fide* asylum claim. Indeed, prior to 1996, there was no screening procedure to determine if asylum seekers raised *bona fide* claims. Congress' concerns thus do not apply to Plaintiffs.

Defendants also ignore sweeping changes in the immigration system that render the prior concerns obsolete. Prior to 1996, the government routinely released individuals to clear bed space, raising concerns in Congress that individuals who might otherwise be detained were released irrespective of danger or flight risk. *See id*. (noting "lack of detention space"). However, DHS since has expanded its detention capacity to unprecedented levels. *See* ICE, Detention Statistics, https://www.ice.gov/detention-management (last visited Aug. 28, 2019) (reporting approximately 54,350 adults in ICE custody on any given night).

Furthermore, DHS has developed effective alternatives to detention. In particular, DHS's "Intensive Supervision Appearance Program—which relies on various alternative release conditions—has resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings." *Hernandez*, 872 F.3d

at 991.

Finally, Defendants' own data show that over the last decade—during which bond hearings have been available—the vast majority of asylum seekers who establish credible fear appear for their court hearings, even without the use of sophisticated alternatives to detention in many cases. *See* ECF 15-5 ¶8 (a minimum of 87.6% of such asylum seekers appeared for court). Plaintiffs do not pose any heightened flight risk that could justify their imprisonment without a bond hearing.[13]

3. Procedural Due Process Requires a Bond Hearing.

Procedural due process likewise requires individualized bond hearings before an IJ. ER12-17 (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). First, Plaintiffs have a profound interest in preventing their arbitrary detention. *See supra* Section VI.B.2. Second, the parole process creates an unacceptable risk of the erroneous deprivation of Plaintiffs' liberty.

Defendants assert that the parole process provides due process, *see* Gov't Br.

[13] The other cases Defendants cite are inapposite. *See* Gov't Br. 31-32. *Barrera-Echavarria* concerned a noncitizen with a final order of exclusion—not persons who have entered the U.S. to pursue *bona fide* asylum claims. *See* 44 F.3d at 1442, 1448-50. In *Rodriguez v. Robbins ("Robbins II")*, the Court *required* bond hearings to address the serious due process concerns presented by prolonged detention. 804 F.3d 1060, 1069-70, 1081-84 (9th Cir. 2015). And *Zadvydas* provided an even stronger remedy than the bond hearings Plaintiffs seek here: the *release* of individuals whose removal is not reasonably foreseeable. *See* 533 U.S. at 699-701.

39-41, but that process is inadequate on its face.[14] The parole process consists merely of a custody review conducted by low-level Immigration and Customs Enforcement ("ICE") detention officers. *See* 8 C.F.R. § 212.5. It includes no hearing before a neutral decision maker, no record of any kind, and no possibility for appeal. *See id*. Instead, ICE officers make parole decisions—that can result in months or years of incarceration—by merely checking a box on a form that contains no factual findings, no specific explanation, and no evidence of deliberation. *See, e.g.*, *Abdi v. Duke*, 280 F. Supp. 3d 373, 404-05 (W.D.N.Y. 2017); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 324-25, 341 (D.D.C. 2018). As *Zadvydas* recognized, "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." 533 U.S. at 692 (internal quotation marks omitted). *See also Morrissey*, 408 U.S. at 486-87 (requiring a neutral decision-maker for parole revocation hearings); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (due process is not satisfied by parole reviews, but requires an "impartial adjudicator" to review detention since, "[d]ue to political and community pressure, the INS . . . has every incentive to continue to detain").

In addition, parole reviews fail to provide due process in practice.

[14] Although Defendants claim that the district court ignored the parole process, *see* Gov't Br. 39, the district court considered that process and held that bond hearings were nonetheless required. *See* ER3-5, 16.

Government data and recent court rulings confirm that the current administration has eviscerated the parole process and used it to rubberstamp asylum seekers' arbitrary detention. For example, in *Damus v. Nielsen*, government statistics showed that from February to September 2017, three of the defendant ICE Field Offices *denied 100% of parole applications*, and the two other defendant Field Offices *denied 92% and 98% of applications*— despite the fact that (1) only a few years ago, those same Field Offices *granted* more than 90% of parole applications, and (2) there has been no change in the types of individuals seeking asylum in the United States. 313 F. Supp. 3d at 339-40. *Damus* also cited evidence of ICE officers informing attorneys that "there is no more parole" and that the agency is "not granting parole." *Id*. at 340 (internal quotation marks and citations omitted). Indeed, the government's own submissions revealed that ICE was providing sham parole reviews. *See, e.g.*, *id*. at 341 (citing examples of an asylum seeker denied parole due solely to her status as a "recent entrant," even though all asylum seekers who pass a credible fear screening are recent entrants; asylum seekers denied parole interviews; and asylum seekers who received "boilerplate" parole denials only one day after receiving notice of the right to apply); *see also Abdi*, 280 F. Supp. 3d at 404-05 (asylum seekers were "*never* provided with any paperwork explaining how to seek parole" and were "denied multiple requests for parole via perfunctory form denials"); *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 145-49

(D.D.C. 2018) (citing arbitrary parole denials); Human Rights First, *Judge and Jailer: Asylum Seekers Denied Parole in Wake of Trump Executive Order* 1-2, 6-15 (Sept. 2017), https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf (same).

In contrast, bond hearings provide a critical check on arbitrary detention. For example, IJs granted bond to nearly half of the individuals who entered without inspection, applied for asylum or other protection, and sought a bond hearing, concluding that they posed no flight risk or danger. SER124 ¶9.

Defendants rely on new "interim guidance" on parole, Gov't Br. 40-41, but that guidance is even *less* protective than its existing directive for arriving asylum seekers.[15] The interim guidance states merely that detention "may not be in the public interest . . . where, *in light of available detention resources*, detention of the subject alien would limit the ability of ICE to detain another alien whose release may pose a greater risk of flight or danger to the community." ECF 16-2 at 4-5 (emphasis added). But detention is unlawful *whenever* an individual poses no flight risk or danger that justifies it—*not* merely when the government happens to lack

[15] *Compare* ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture ¶6.2, https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_ found_credible_fear.pdf (providing for parole where an asylum seeker establishes her identity and shows she poses no flight risk or danger).

detention beds. *See Zadvydas*, 533 U.S. at 690; *Hernandez*, 872 F.3d at 994.[16]

Nor does the mere availability of habeas review satisfy the Due Process Clause, as Defendants suggest. Gov't Br. 42. The government has an obligation to provide due process regardless of whether a detainee files a habeas petition. *See Sopo* v. *Attorney Gen.*, 825 F.3d 1199, 1217 n.8 (11th Cir. 2016). In other civil detention contexts, the Supreme Court has made clear that due process obligations exist separate and apart from habeas corpus. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality) (setting forth distinct due process hearing requirements even though "[a]ll agree suspension of the writ has not occurred here"). The Court has never excused the government from its due process obligations because the courts can consider habeas petitions. Defendants' duty to provide due process is particularly critical here: as a practical matter, the overwhelmingly majority of detained asylum seekers—who are generally *pro se*, do not speak English, and are unfamiliar with the legal system, *cf.* SER19-20 ¶¶9-10, 23-24 ¶¶15-17, 34-35 ¶16, cannot file habeas petitions, *see Doe v. Gallinot*,

[16] Defendants cite statistics—that were not presented to the district court—noting that DHS released a large number of noncitizens in its discretion in FY2019, but those statistics do not address the number of people it released *through the parole process*. *See* Gov't Br. 41. Courts examining Defendants' actual parole practices have found ICE Field Offices to have stopped granting parole. *See supra* Section VII.B.3. Moreover, Defendants' "interim guidance" indicates their intention to detain all asylum seekers and only release them if they run out of bed space, instead of providing the individualized reviews of flight risk and danger that due process requires.

657 F.2d 1017, 1023 (9th Cir. 1981).

Finally, Defendants lack any legitimate interest in denying Plaintiffs bond hearings and detaining individuals who pose no flight risk or danger to the community. *See Hernandez*, 872 F.3d at 994. Nor can administrative cost justify denying bond hearings. *See id*. Defendants have provided bond hearings pursuant to *Matter of X-K-* for more than a decade, and even more generally for at least 50 years. Defendants cannot seriously argue that providing bond hearings it has provided for years imposes excessive burdens. Indeed, Defendants share an interest in maintaining bond hearings and ensuring accurate custody determinations.

C. Due Process Demands that Defendants Promptly Afford Bond Hearings in which DHS Bears the Burden of Proof and Basic Procedural Protections Apply.

This Court should also affirm the district court's decision to require that Defendants conduct bond hearings with basic due process protections, including: (a) a prompt hearing; (b) placement of the burden of proof on DHS; (c) a record or transcript of the hearing for appeal; and (d) individualized, written decisions regarding the bond decision.

As a threshold matter, the district court correctly adopted the *Mathews* balancing test to assess these claims. Defendants contend otherwise, Gov't Br. 43-44, but this Court has repeatedly applied *Mathews* to determine the procedures for bond hearings for noncitizens. *See Singh v. Holder*, 638 F.3d 1196, 1208-09 (9th

Cir. 2011); *Hernandez*, 872 F.3d at 993-94.[17] Moreover, the cases that Defendants cite instead of *Mathews* are entirely inapposite. *Dusenberry v. United States*, 534 U.S. 161 (2002), applied a different due process analysis long used to assess "the adequacy of the method used to give notice." *Id*. at 168. And *Medina v. California*, 505 U.S. 437 (1992), applied a different test for state procedural rules in criminal cases. *Id*. at 443. Under this Court's rulings, *Mathews* governs Plaintiffs' claims, and the district court was thus correct in applying that decision.

1. The District Court Properly Concluded that Due Process Requires a Prompt Bond Hearing.

The district court's first injunction order correctly applied *Mathews* to require that bond hearings be held promptly, within seven days of a request. The court first found that Plaintiffs have a fundamental interest in freedom from arbitrary detention. ER26-27; *see also supra*, Section VII.B.2. Second, the court found an unacceptable risk of erroneous deprivation absent a timeline for providing hearings. ER32-34. Third, the court correctly concluded that a seven-day timeline was warranted. ER35.

Defendants do not address the court's reasoning, as they instead conflate two separate questions: whether Plaintiffs have a constitutional right to a bond hearing,

[17] Defendants are again wrong to argue that further procedures are not warranted because Plaintiffs are only entitled to "'[w]hatever the procedure authorized by Congress.'" Gov't Br. 44 (citing *Mezei*). As Plaintiffs were detained after entering the country, they are entitled to due process protections. *Supra* Section VII.B.1.

and—if so—when those bond hearings should be held. But as set forth above, Plaintiffs *do* have a due process right to a bond hearing. *See supra*, Sections VII.B.2-VII.B.3. And this Court recently reaffirmed that "due process requires 'the opportunity to be heard at a meaningful time.'" *Saravia v. Sessions*, 905 F.3d 1137, 1144 (9th Cir. 2018) (quoting *Mathews*).

Defendants moreover have not contested the district court's factual findings or Plaintiffs' voluminous evidence of delays of many weeks and even months in providing bond hearings. That evidence demonstrates Defendants erroneously prolong the detention of asylum seekers who are neither flight risks nor dangerous, and further underscores the need for the district court's timeline. *See. e.g.*, ER37; SER 3 ¶5, 7 ¶7, 12 ¶5, 54 ¶6, 60 ¶6, 76 ¶13, 86 ¶4.

Nor have Defendants addressed the district court's reliance on agency regulations and case law establishing that bond hearings must be conducted in an expedited fashion. Those authorities long have recognized that prompt hearings are critical "when every day represents . . . an unwarranted delay in the release of a[] [noncitizen]." *Matter of Valles-Perez*, 21 I. & N. Dec. 769, 772 (BIA 1997); *see also, e.g., id.* ("When an [individual] is detained, the district directors, the Immigration Courts, and this Board give a high priority to resolving the case as expeditiously as possible."); *Matter of Chirinos*, 16 I. & N. Dec. 276, 277 (BIA 1977) ("Our primary consideration in a bail determination is that the parties be able

to place the facts as promptly as possible before an impartial arbiter."); 8 C.F.R. § 1003.47(k) (noting the "expedited nature" of bond hearings); Imm. Court Practice Manual § 9.3(d) (2018) (courts should schedule bond hearing for "the earliest possible date"). The district court found "[f]urther guidance . . . in the Congressional mandate" requiring prompt IJ review of DHS's determination that an individual lacks a credible fear of persecution or torture. ER33 (citing 8 U.S.C. § 1225(b)(1)(B)(III)(iii)). That expeditious timeline also supports a prompt hearing to limit the length of detention before an IJ's independent review.

The Supreme Court likewise has made clear that civil and criminal detention requires an expeditious hearing to test the legality of a person's detention. For example, in *Foucha*, the Court held that a state civil commitment process violated due process because it lacked a "prompt detention hearing." 504 U.S. at 81. Similarly, in *County of Riverside v. McLaughlin*, the Court held that the Fourth Amendment requires a "prompt" probable cause hearing within 48 hours of arrest. 500 U.S. 44, 56 (1991).

This Court itself recently affirmed a preliminary injunction imposing a seven-day deadline to hold custody hearings for immigrant minors that DHS re-arrests following the minor's release. *See Saravia*, 905 F.3d at 1143. That decision follows a long line of cases addressing other forms of civil detention that further support the timeline ordered here. *See, e.g.*, *Gallinot*, 657 F.2d at 1025 (holding

that due process requires an expeditious hearing over civil commitment, within seven days); *Project Release v. Prevost*, 722 F.2d 960, 975 (2d Cir. 1983) (upholding constitutionality of New York state civil commitment process that provided for hearing within five days of a request); *United States v. Shields*, 522 F. Supp. 2d 317, 337 (D. Mass. 2007) (requiring government to provide a probable cause hearing for civil commitment of sexually dangerous persons within 48 hours).

Defendants do not respond to these authorities. Instead, they mischaracterize the seven-day timeline as a "seven-day release order," Gov't Br. 31, "falsely equat[ing] the bond hearing requirement to mandated release from detention." *Robbins II*, 804 F.3d at 1077.[18] Defendants also claim that courts "have repeatedly upheld the government's authority to detain aliens . . . for significantly longer periods than the district court's seven-day release order." Gov't Br. 31 (citing cases). But *Demore* is distinguishable, and the other decisions do not address claims for prompt bond hearings. *See supra* Section VII.B.2.

Finally, the government's interest in denying bond hearings cannot outweigh the other *Mathews* factors. *See* 424 U.S. at 335. Prompt bond hearings save the government money by facilitating prompt release. *See Hernandez*, 872 F.3d at 996

[18] The district court's order only mandates release in the event that Defendants fail to comply with the timeline for bond hearings. ER19.

("The costs to the public of immigration detention are 'staggering': $158 each day per detainee, amounting to a total daily cost of $6.5 million."). They are also not a significant administrative burden. Defendants already reserve time each week for bond hearings on the IJs' schedules. *See* SER101 ¶13; 107¶13. Defendants' own evidence thus demonstrates that they are equipped to schedule bond hearings promptly through the existing system they have in place. Moreover, if every class member is entitled to a bond hearing, whether the bond hearing takes place within seven days or four weeks does not alter the number of hearings required.

2. The District Court Properly Concluded that Due Process Requires DHS to Bear the Burden of Proof.

Due process further requires placing the burden of proof to justify detention on DHS. Indeed,

> the Supreme Court has consistently adhered to the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual. Rather, when a fundamental right, such as individual liberty, is at stake, the government must bear the lion's share of the burden.

Tijani v. Willis, 430 F.3d 1241, 1245 (9th Cir. 2005) (Tashima, J., concurring). Judge Tashima's observation is supported by Supreme Court precedent requiring the government to bear the burden of proof in justifying civil detention. *See Foucha*, 504 U.S. at 82 (civil detention statute unconstitutional in part because "the statute places the burden on the detainee to prove that he is not dangerous"); *Salerno*, 481 U.S. at 741 (finding civil detention statute constitutional because it

required government to justify detention "by clear and convincing evidence after an adversary hearing"); *Hendricks*, 521 U.S. at 353, 364 (same, where "beyond a reasonable doubt" standard applied). For example, in *Addington v. Texas*, the Court invalidated indefinite civil confinement based upon a mere preponderance of the evidence of mental illness, requiring the state to justify confinement under a heightened standard of proof. 441 U.S. 418, 427 (1979). The Court deemed it improper to ask "[t]he individual . . . to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id*. This is particularly true where the government is "the party which has traditionally been responsible for [the burden] and which has the greater resources to elicit the necessary facts." ER34.

The district court correctly relied on this well-established precedent to find the first two *Mathews* factors favor Plaintiffs. ER31-32, 34. Defendants complain that the district court's injunction "incentivizes aliens" to take advantage of an alleged "information asymmetry" to obtain release because the government bears the burden of proof. Gov't Br. 33. But that argument entirely ignores what actually takes place prior to and during bond hearings. By the time a bond hearing occurs, DHS officers already have examined the asylum seeker's identity documents, taken their fingerprints to run them through relevant databases, and questioned the noncitizen about their reasons for coming to the United States and their claim to

protection in this country. *See* 8 C.F.R. § 208.30, 235.3(b)(2)-(4). And in every case, DHS has already determined that the individual has demonstrated a significant possibility of obtaining immigration relief. Those interactions produce information directly relevant to a noncitizen's request for bond. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *Matter of Andrade*, 19 I. & N. Dec. 488, 490 (BIA 1987).

Finally, bond hearings also often involve a different type of asymmetry that Defendants fail to mention: *pro se*, poor, non-English speaking, detained asylum seekers versus government attorneys well-versed in immigration law and court procedures. This too supports placing the burden on the government. *See Santosky v. Kramer*, 455 U.S. 745, 762-64 (1982) (placing heightened burden on government in parental termination hearing because, *inter alia*, the parents were "often poor, uneducated, or members of minority groups").

Most of the cases Defendants cite do not address, let alone resolve, the question of burden. Gov't Br. 44 (citing *Demore*, *Zadvydas*, *Flores*, and *Carlson*). In *Zadvydas*, the Supreme Court found that the government's post-final-order custody review procedures raised serious constitutional questions precisely because they imposed the burden of proof on the noncitizen. 533 U.S. at 692. And

at the time *Flores* was decided, the *government* bore the burden of proof at bond hearings to justify continued detention. Gov't Br. 44.[19]

Jennings is not to the contrary, as it does not address whether the government is constitutionally required to bear the burden of proof. *Jennings* held only that the *statute*, 8 U.S.C. § 1226(a), does not place the burden of proof on the government by clear and convincing evidence, while declining to address the constitutional issue on the merits. *Jennings*, 138 S. Ct. at 847, 851.[20] Indeed, following *Jennings*, numerous courts have held that due process requires DHS to bear the burden of justifying a noncitizen's detention under § 1226(a). *See, e.g.*, *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018); *Martinez v. Decker*, No. 18-cv-6527, 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018).

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[19] Defendants incorrectly suggest that noncitizens have borne the burden of proof at bond hearings since 1952. *See* Gov't Br. 44. Instead, from the at least the 1970s to the late-1990s, agency precedent made clear the burden remained on the government. *See Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976). Moreover, Congress did not shift the burden, as Defendants claim; the INS unilaterally amended its regulations in 1997 to require noncitizens to prove that they do not present a flight risk or a danger to gain release, 62 Fed. Reg. 10,312, 10,360 (Mar. 6, 1997) (interim rule); 8 C.F.R. § 236.1(c)(2) (1998), and EOIR subsequently adopted this same standard for bond hearings. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112-13 (BIA 1999).

[20] Although the dissent in *Jennings* stated that "bail proceedings should take place in accordance with the customary rules of procedure and burden of proof rather than the special rules that the Ninth Circuit imposed," 138 S. Ct. at 882 (Breyer, J., dissenting), the customary rules and burdens for civil detention place the burden of proof *on the government*. *See supra* at 45-46.

Defendants cannot draw support from two criminal cases where the burden of proof was placed on criminal defendants. Gov't Br. 46 (citing *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008), and *United States v. Stone*, 608 F.3d 949, 945 (6th Cir. 2010)). Both cases address a statutory presumption of detention for defendants indicted with federal terrorism offenses, and bear no relation to the correct burden of proof in bond hearings for Plaintiffs, who are not detained based upon dangerous offenses, and who have all been found to have *bona fide* asylum claims.

3. Due Process Demands Recording, Transcripts, and Contemporaneous Written Decisions.

Finally, due process requires a recording or transcript and contemporaneous written decision at Plaintiffs' bond hearings. Defendants' failure to provide a recording or verbatim transcript substantially interferes with Plaintiffs' right to appeal adverse bond decisions. *See Singh*, 638 F.3d at 1208 (private interest is "fundamentally affected by the BIA's refusal to provide transcripts or an adequate substitute" created contemporaneously with the hearing). The district court correctly found that detained asylum seekers lack access to the information they need to even identify erroneous findings, let alone a record to substantiate allegations of errors on appeal. ER36; *see also* SER8 ¶8, 12-13 ¶10, 34 ¶15, 49-50 ¶ 19, 83 ¶10; *see also Bergerco, U.S.A. v. Shipping Corp. of India*, 896 F.2d 1210, 1215 (9th Cir. 1990) ("[T]he unavailability of a transcript may make it impossible

for the appellate court to determine whether the defendant's substantive rights were affected.").

The same is true for contemporaneous written decisions containing individualized findings for an adverse bond determination. "Written findings issued *after* the notice of appeal is filed are of little benefit to this class" because they arrive too late to determine whether an appeal is warranted in the first place and to articulate the bases for appeal so as to avoid summary dismissal by the BIA. ER30-31 (citing 8 C.F.R. § 1003.3(b) and *Matter of Keyte*, 20 I. & N. Dec. 158, 159 (BIA 1990)). This problem is especially acute for individuals who appear at bond hearings *pro se* and subsequently consult with an attorney, as potential appellate counsel have no way to assess the appeal's potential. *See*, *e.g.*, SER12-13 ¶10, 49-50 ¶19, 56 ¶13.

Moreover, as this Court previously held, Defendants' *post hoc* bond memorandum fails to satisfy due process. First, because IJs create the memorandum weeks after the hearing, "it may become subject to the very natural weight of its conviction, tending to focus on that which supports its holding." *Singh*, 638 F.3d at 1208 (citation omitted); *see also* SER23 ¶16, 39 ¶10. Second, the memorandum, without more, is insufficient as a record of the hearing because "it is not the functional equivalent of a transcript." *Singh*, 638 F.3d at 1208.

Defendants do not dispute "that the current practices negatively impact [Plaintiffs'] ability to effectively appeal" adverse bond decisions. ER29 (emphasis omitted). Instead, they assert that the procedural protections are either not required by law or are "problematic from an operational standpoint." Gov't Br. 47-49.

However, Defendants' cases establish that a verbatim transcript or adequate alternative *is* required. ER30. In *United States v. Carrillo*, this Court affirmed that a criminal defendant has "a right to a record on appeal which includes a complete transcript of the proceedings at trial." 902 F.2d 1405, 1409 (9th Cir. 1990). In *Mayer of Chicago*, the Supreme Court held that a while a "record of sufficient completeness does not translate automatically into a complete verbatim transcript," the government must provide alternative records of proceedings that "afford[] adequate and effective appellate review." 404 U.S. 189, 194 (1971) (internal quotation marks omitted). Defendants' current policy provides *no* such substitute for a verbatim transcript. Gov't Br. 48 (citing agency practice manual and guidance to assert that bond hearings are not recorded or transcribed). Moreover, Defendants do not argue that providing a recording or verbatim transcript would impose an administrative burden. *See id*. Nor can they, for immigration courts already must be "equipped with recording devices and routinely record merits hearings." *Singh*, 638 F.3d at 1209.

Defendants' challenges to the contemporaneous written decision also lack merit. IJs are already required to provide parties with the basis for bond decisions "orally or in writing." 8 C.F.R. § 1003.19(f). Thus, the court can simply transcribe the oral findings made at the end of each hearing. Furthermore, Defendants have not demonstrated that any alleged harm to the government outweighs the risk of erroneous deprivation of Plaintiffs' liberty, to which the right to appeal a bond determination is critical.

D. Plaintiffs Face Irreparable Harm Absent a Preliminary Injunction.

"Plaintiffs have succeeded in demonstrating 'irreparable harm' in the absence of injunctive relief." ER18. Were Defendants permitted to detain them without a bond hearing, Plaintiffs would be subject to "substandard physical conditions, low standards of medical care, lack of access to attorneys and evidence as Plaintiffs prepare their cases, separation from their families, and re-traumatization of a population already found to have legitimate circumstances of victimization." ER17; *see also* ER35-37. The extensive record evidence and this Court's precedent support these findings.

First, "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez*, 872 F.3d at 994

(citation and internal quotation marks omitted).[21] The "unnecessary deprivation of [Plaintiffs'] liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998).

Plaintiffs also face irreparable harm based on the circumstances of their detention. ER17, 35-37; *see also* SER15 ¶3 (documenting "systemic, sub-human conditions in immigration custody"); SER66 ¶5 (client faced irreversible physical harm while detained); SER37 ¶6 (clients denied access to sanitary products and blankets and were detained in locations that used tear gas against noncompliant detainees); SER60 ¶6 (clients vulnerable to "medical crisis" and subject to "horrible food and living conditions"); SER75-76 ¶¶4, 10 (Plaintiff faced unsanitary detention conditions and poor treatment from immigration officers); *Hernandez*, 872 F.3d at 995 (noting the "subpar medical and psychiatric care in ICE detention facilities").[22]

These harms are even more severe for individuals, like Plaintiffs, seeking protection from persecution and torture. Detention re-traumatizes vulnerable

[21] Defendants cite *Clark v. Smith*, 967 F.2d 1329 (9th Cir. 1992) to contest this harm, but again that case involved an excludable noncitizen, and not an individual detained after entering the United States. *See id*. at 1330.

[22] In the modified preliminary injunction, the district court found that "[a]ll the harms attendant upon [Plaintiffs'] prolonged detention cited in the original ruling on Plaintiffs' request for injunctive relief remain applicable . . . ." ER17. The initial preliminary injunction, in turn, relied upon record evidence in the form of declarations by Plaintiffs and attorneys representing class members. *See* ER35-37; *see also* SER1-97.

individuals who have only recently escaped persecution and may cause mental disorders such as post-traumatic stress disorder and related physical symptoms for which detention centers are not equipped to offer medical care. *See* SER130-31 ¶¶11-14; *see also* SER33 ¶13 (client suffered "panic attacks, loss of consciousness, loss of appetite, and severe nightmares"); SER49 ¶18 (detainees experience anxiety and psychological and emotional harm); SER54 ¶7 (clients suffer depression and hopelessness); SER91-92 ¶7 (detainees who previously were tortured, wrongfully imprisoned, or sexually assaulted experience exacerbation of prior trauma); SER81-82 ¶6 (detention exacerbates PTSD for many individuals); SER78 ¶17 (Plaintiff felt "hopeless, lost, and overwhelmed"). Detention may also cause some class members to abandon meritorious claims to protection. *See* ER17, 29, 36-37; SER2-4 ¶¶4-6, 81 ¶6, 87 ¶5.

Finally, Plaintiffs suffer irreparable harm due to being unable to adequately prepare their immigration cases. *See* SER3-4 ¶¶4, 6 (detention prevents individuals from contacting witnesses and obtaining support documents); SER23-25 ¶¶14, 17-19. Detained individuals are far less likely to obtain legal representation and, therefore, far less likely to prevail in their cases. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, 50 (2015); SER124-25 ¶¶7, 10 (between January 1, 2010 and February

1, 2019, individuals who were released from detention and who applied for protection were *five times more likely* to prevail on their claims).

E. The Public Interest and Balance of Equities Favored Granting a Nationwide Injunction.

Finally, "the balance of equities and the public interest favor granting injunctive relief to Plaintiffs." ER19. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted); *see also* ER19. Defendants' countervailing concerns do not outweigh these interests: "[f]aced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." ER18 (quoting *Hernandez*, 872 F.3d at 996).

Defendants argue, citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), that the government suffers irreparable injury *any time* a statute is enjoined. Gov't Br. 50. But "[n]o opinion from [this] Court adopts that view." *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014). Moreover, *King* did not base its findings of irreparable injury solely on the fact that a statute was enjoined, but rather found that specific concrete harms would arise absent a stay. *See King*, 567 U.S. at 1301 (discussing "ongoing and concrete harm to Maryland's law enforcement and public safety interests").

Defendants also raise arguments based on evidence that was never provided to the district court, despite ample opportunity to do so. *Compare* Gov't Br. 51-53 (citing statistics reported in 83 Fed. Reg. 55934 (Nov. 9, 2018)) *with* SER143-170 (opposing modification of preliminary injunction and failing to mention any risk that more individuals enter the United States without inspection, asylum grant rates, court appearance rates, or 83 Fed. Reg. 55934). But this Court's role is limited to reviewing the district court's decision for abuse of discretion, based upon the record before the district court. *See Hernandez*, 872 F.3d at 987. The Court should not consider arguments reliant on statistics and evidence presented for the first time on appeal. *See* Fed. R. App. P. 10(a); Circuit Rule 10-2; *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (rejecting government efforts to "enlarge the record on appeal" because affidavits submitted "were not part of the evidence presented to the district court").

Even if the Court did look beyond the record before the district court, Defendants' arguments would not tip the balance of hardships in their favor. Defendants complain that the injunction has a "debilitating effect . . . on the political branches' efforts to combat illegal immigration." Gov't Br. 50. However, they have not—and cannot—show how permitting asylum seekers who have entered the United States to apply for bond before an IJ would now encourage

more unlawful entries into the country. As with this Court's recent decision in another case involving asylum seekers, providing bond hearings:

> has no direct bearing on the ability of [a noncitizen] to cross the border outside of designated ports of entry: That conduct is already illegal. . . . The TRO does not prohibit the Government from combating illegal entry into the United States, and vague assertions that the Rule may "deter" this conduct are insufficient.

E. Bay Sanctuary Covenant v. Trump, No. 18-17274, 2018 WL 8807133, at *23 (9th Cir. Dec. 7, 2018). It is not clear how continuing Defendants' half-century practice of providing class members with bond hearings, or ensuring that those bond hearings comport with due process, would prevent "combat[ting]" unlawful immigration.

Defendants cite data indicating that certain noncitizens who pass credible fear interviews may not appear for immigration court hearings or ultimately win their asylum cases, but do not address how this shows irreparable harm. Gov't Br. 51-53.[23] Even if this newly-introduced data were relevant, it is inaccurate and

[23] Defendants' suggestion that this Court should defer to the agency's interpretation of data is bizarre. *See* Gov't Br. 53 (citing two cases regarding deference to agency "interpretation of complex scientific data," *Alaska Oil & Gas Ass'n*, 840 F.3d 671, 679 (9th Cir. 2016), under the Endangered Species Act). In this case, the "data" in question are several statistics referenced in an unrelated Federal Register notice, provided without the dataset from which they were created. There is no indication that this data was considered, let alone relied upon, in the agency's determination to eliminate class members' right to a bond hearing, or even in contesting the preliminary injunction before the district court. That

misleading, as Plaintiffs have previously explained. *See* ECF No. 15-1 at 16, 18. Defendants challenge Plaintiffs' assessment of their statistics because it looks to appearance data from beyond FY2018 and explains how asylum grant rates are more accurately assessed once a larger percentage of asylum cases have been adjudicated. But Plaintiffs have good reason for taking a longer view: data from recent years have higher proportion of cases that are still pending and a smaller pool of cases that have been decided. Moreover, those decided cases are disproportionately failures to appear and asylum denials, because those types of decisions are issued more quickly than decisions on the merits and asylum grants. *See, e.g.*, ECF No. 15-5.

In any event, Defendants' concerns about court appearance are overstated. The preliminary injunction does not compel any individual's *release*, but only that they receive a constitutionally-adequate *bond hearing*. Where an individual presents a flight risk—because they lack a meritorious claim for relief or for any other reasons—nothing prevents an IJ from ordering her continued detention.

Finally, Defendants argue, again based on new evidence, that they will be irreparably harmed by the injunction's procedural protections. *See* Gov't Br. 53-54 (relying upon ECF No. 10-7, declaration submitted for the first time on appeal with

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Defendants' counsel now discusses this data on appeal does not provide a basis for deference.

stay motion). As an initial matter, Defendants do not argue that Part B of the injunction—which merely preserves the status quo of bond hearings, *see* ER20—imposes unreasonable burdens on the agency. Nor could they, given that they have provided bond hearings to asylum seekers detained after entering the U.S. for at least 50 years. And even if the Court considers Defendants' new evidence, Defendants do not explain why these alleged harms outweigh Plaintiffs' constitutional rights. Defendants argue, without any evidence, that requiring prompt hearings "would adversely impact all detained aliens by increasing their time in detention." Gov't Br. 53. But even assuming the injunction initially required rescheduling some cases, it is unclear why those rescheduled cases necessarily would affect other detainees.[24] Similarly, Defendants do not articulate how much "additional docket space" will be necessary to transcribe the oral findings required at the end of a bond hearing. *See* Imm. Court Practice Manual § 4.16(g) (2018) (outlining already-existing procedure to produce written records of

[24] For example, Defendants could reschedule fast-tracked cases of non-detained immigrants. *See* Aura Bogado, *Leaked Immigration Court Official's Directive Could Violate Rules That Protect Families From Deportation*, REVEAL (Aug. 19, 2019), https://www.revealnews.org/article/leaked-immigration-court-officials-directive-could-violate-rules-that-protect-families-from-deportation/ (discussing fast-tracking of cases involving non-detained families seeking asylum). Notably, Defendants do not explain how many cases they would need to reschedule to comply with the injunction's timing provision; Defendants records indicate that IJs already set aside time to hear the majority of bond hearings within two weeks. *See* SER 101 ¶13, 107 ¶13; ECF No. 10-7 ¶17.

oral decisions). Defendants do not argue that they are harmed by the requirement that DHS bear the burden of proof or that they record or provide a transcript of bond hearings.

In sum, the public interest and balance of hardships tip strongly in Plaintiffs' favor.

VIII. CONCLUSION

The Court should affirm the preliminary injunction.

Dated: August 28, 2019

s/ Matt Adams
Matt Adams, WSBA No. 28287

s/ Leila Kang
Leila Kang, WSBA No. 48048

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue, Suite 400
Seattle, WA 98104
Telephone: (206) 957-8611
Facsimile: (206) 587-4025

s/ Trina Realmuto
Trina Realmuto

s/ Kristin Macleod-Ball
Kristin Macleod-Ball

AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street, Suite 18
Brookline, MA 02446
Telephone: (857) 305-3600

s/ *Judy Rabinovitz*
Judy Rabinovitz

s/ *Michael Tan*
Michael Tan
Email: mtan@aclu.org

s/ *Anand Balakrishnan*
Anand Balakrishnan

ACLU IMMIGRANTS'
RIGHTS PROJECT
125 Broad Street, 18th floor
New York, NY 10004
Telephone: (212) 549-2618

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellees state that they know of no related cases pending in this Court.

Dated: August 28, 2019

s/ Aaron Korthuis
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Ave Ste 400
Seattle, WA 98104
206-816-3872
aaron@nwirp.org

Attorney for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Circuit Rule 32-1(a) because this brief contains 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word's Times New Roman 14-point font.

Dated: August 28, 2019

s/ Aaron Korthuis

Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Ave Ste 400
Seattle, WA 98104
206-816-3872
aaron@nwirp.org

Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 28, 2019

s/ Aaron Korthuis
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Ave Ste 400
Seattle, WA 98104
206-816-3872
aaron@nwirp.org

Attorney for Plaintiffs-Appellees