No. 16-56829

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XOCHITL HERNANDEZ, CESAR MATIAS, ET AL.,
Plaintiffs-Appellees,

v.

JEFFERSON SESSIONS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court, Central District of California,
No. CV 16-620-JGB

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

Plaintiffs are a class of individuals in removal proceedings whom immigration officials have determined are *not* a danger to the community or a flight risk that requires detention, and therefore have ordered their release on bond. Nonetheless, they remain detained, sometimes for years, because they lack the funds to pay the bond. Indeed, the government detained Plaintiff Cesar Matias for over *three and a half years* on a $3,000 bond he could not afford. Plaintiffs contend that the Constitution and the immigration statute require agency officials to consider ability to pay a bond, and also to consider non-monetary conditions of release, when making bond determinations.

The District Court's class-wide preliminary injunction order ("Order") requires immigration officials to consider these factors to ensure that class members are not detained solely based on their indigence. The Order was supported by detailed factual findings and a thorough, well-reasoned decision that correctly concluded that Plaintiffs are likely to prevail on the merits.

The government may not detain a noncitizen unless needed to prevent flight or danger to society. *Zadvydas v. Davis*, 533 U.S. 678, 690-92 (2001). The Constitution therefore does not permit detention due to poverty alone. As the government itself has recognized, under Supreme Court precedent, "a bail system that incarcerates indigent individuals without meaningful consideration of their

indigence and alternative methods of assuring their appearance at trial" "result[s] in the unnecessary incarceration of people." Such detention "based solely on inability to pay" violates the due process and equal protection guarantees of the Constitution.[1]

It follows that both the Constitution and the immigration statute, as properly construed to avoid serious constitutional concerns, require procedures to ensure that bond determinations take into account detainees' ability to pay and the suitability of alternatives to money bond. Consideration of ability to pay is also necessary to ensure that immigration officials set bond amounts that are reasonably related to the government's interest in preventing flight. Plainly, the amount of bond necessary to secure the appearance of an indigent person at their immigration hearing is different from the amount necessary to ensure a wealthy person's appearance. Likewise, absent consideration of alternative conditions of supervision, immigration authorities cannot determine if a money bond is needed to ensure appearance at all.

The government defends its unlawful bond procedures on the ground that it has "plenary" authority when it comes to immigration. Defendants' Opening Brief ("Br.") 30. But the Supreme Court and this Court have repeatedly recognized that immigration detention implicates fundamental liberty interests that trigger constitutional protections. Authority from both civil and criminal contexts prohibits

[1] *See* Supplemental Excerpts of Record ("SER") 36, 44 (Amicus Brief of United States, *Walker v. City of Calhoun*, Case No. 16-10521 (11th Cir. Aug. 18, 2016)), *available at* https://www.justice.gov/crt/file/ 887436/download.

incarceration based on indigence alone. The government also grossly mischaracterizes the modest relief the Order requires. The Order does not mandate anyone's release, "elevate" ability to pay as the "primary" or "dispositive" factor in setting bond, or adopt a "one size fits all approach." Br. 27, 36, 41. Rather, the Order simply requires that immigration officials consider, on an *individualized* basis, a class member's ability to pay a bond and whether there are alternative conditions that would address any concerns about flight risk while avoiding incarceration. Nor does the Order give Plaintiffs' counsel "veto authority" over custody review procedures. Br. 27. It merely orders the parties to meet and confer on implementation of the Order, a routine and utterly unremarkable requirement in cases involving injunctive relief.

The government's arguments that the federal courts lack jurisdiction to hear Plaintiffs' constitutional and legal claims are foreclosed by this Court's precedent. *See* Br. 30-34. Remarkably, the government fails entirely to address this Court's controlling holding in *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). There, this Court exercised jurisdiction over a challenge to the standards applicable in an immigration bond hearing, holding that while 8 U.S.C. § 1226(e) and § 1252(a)(2)(B) bar review of "discretionary" decisions, they do not apply to "constitutional claims or questions of law" concerning bond hearing procedures. *Id.* The Court also waived prudential exhaustion as to legal claims like those here. *Id.* at

1203 n.3. Moreover, exhaustion would be futile because, as Defendants concede, the BIA has held that immigration judges ("IJs") are not *required* to consider ability to pay and alternative conditions when setting bond. *See* Br. 35; *see also Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

The remaining preliminary injunction factors also favor Plaintiffs. The Plaintiff class will indisputably suffer irreparable injury if the injunction is reversed, since they will remain unlawfully detained on bonds set without regard to their ability to pay or alternative conditions. By contrast, the government cannot claim irreparable harm from the minimal costs of implementing the injunction, particularly given that the government *already* requires immigration officials to consider ability to pay in cases involving detained families. Finally, the public interest favors the Plaintiffs because the public has a powerful interest in ensuring that the government complies with the Constitution and immigration laws, and does not unnecessarily incarcerate individuals because of their poverty.

For these reasons, this Court should affirm the District Court's Order granting a class-wide preliminary injunction.

JURISDICTIONAL STATEMENT

The District Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 2241. This Court has appellate jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Does the Constitution require immigration officials to consider noncitizens' ability to pay a bond, and their eligibility for release on non-monetary conditions of supervision, when determining the appropriate conditions of their release?

2. Does the Immigration and Nationality Act ("INA") require immigration officials to consider noncitizens' ability to pay a bond, and their eligibility for release on non-monetary conditions of supervision, when determining the appropriate conditions of their release?

3. Do 8 U.S.C. § 1226(e) and § 1252(a)(2)(B) bar federal court review of Plaintiffs' constitutional and statutory challenges?

4. Are Plaintiffs required to present their challenges to the adequacy of the government's class-wide bond setting policies and practices to the Board of Immigration Appeals ("BIA") under the doctrine of prudential exhaustion?

STATEMENT OF THE CASE AND FACTUAL AND LEGAL BACKGROUND

The District Court's Order includes detailed factual findings establishing that Defendants have a class-wide policy and practice of failing to require immigration officials to consider ability to pay a bond and non-monetary alternatives when determining class members' conditions of release; that Defendants did not consider these factors in setting Ms. Hernandez's and Mr. Matias' bonds; and that Defendants routinely ignore these factors when making custody decisions.

I. THE GOVERNMENT'S POLICIES AND PRACTICES FOR SETTING BOND

The Plaintiff class is composed of immigration detainees in the Central District of California who have had bonds set under 8 U.S.C. § 1226(a). This statute authorizes immigration officials to release a noncitizen pending resolution of his or her removal case "on (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole." 8 U.S.C. § 1226(a). U.S. Immigration and Customs Enforcement ("ICE") makes the initial custody determination, which is subject to review at a bond hearing before an IJ. *See* 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 1003.19. To obtain release, the noncitizen "must demonstrate to the satisfaction of the officer that [his or her] release would not pose a danger to property or persons, and that [he or she] is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).[2]

If the person does not pose a danger and is likely to appear at future proceedings, the ICE officer or IJ determines whether the person may be released on recognizance, bond, or other conditions that would sufficiently address any risk of

[2] Under this Court's decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*"), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), certain noncitizens initially detained under color of other statutes become entitled to bond hearings under Section 1226(a) after their detention exceeds six months. At those hearings, the government bears the burden of proof "to justify a non-citizen's detention by clear and convincing evidence." *Id.* at 1087.

the person fleeing before adjudication of his or her immigration case. *See id.* at 39-40. Such conditions could include electronic monitoring, periodic reporting requirements, restrictions on travel, or enrollment in a substance abuse program. *See* ER032 n.20.[3] The IJ's bond determination is reviewable by the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i). If the ICE officer or IJ sets a cash bond, that bond must be a minimum of "$1,500 with security approved by . . . the Attorney General." 8 U.S.C. § 1226(a)(2)(A). The government requires detainees to post the full value of the bond in cash and does not accept alternative forms of collateral (such as a deposit bond or property bond) commonly available in the criminal justice system. ER013.

As the District Court determined, neither the ICE officer nor the IJ is currently required to consider a detainee's financial ability to pay when setting a bond. ER019; ER020 n.16. Nor are ICE officers or IJs currently required to determine whether conditions of supervision, alone or in combination with a lower bond, would suffice to allow for the person's release. *Id.* Instead, the BIA held in *Guerra* that immigration officials have "broad discretion in deciding the factors that he or she may consider in custody redeterminations." 24 I. & N. Dec. at 40. *Guerra* lists

[3] The government's supervision programs are highly effective. *See* SER172 (government report noting that, from FY2011 to FY 2013, more than 95 percent of participants in ICE's "full-service" Alternatives to Detention program appeared at their final scheduled removal hearings).

several factors an IJ may consider, but does *not* include ability to pay on the list. *Id.*[4] And in several unpublished decisions, the BIA has held that a person's financial circumstances are *irrelevant* to a bond determination. *See In re: Sandoval-Gomez*, 2008 WL 5477710, at *1 (BIA Dec. 15, 2008) ("[A]n alien's ability to pay the bond amount is not a relevant bond determination factor."); *In re: Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (same); *In re: Castillo-Leyva*, 2008 Immig. Rptr. LEXIS 10396, *1 (BIA Sept. 18, 2008) (same); *In re Serrano-Cordova*, 2009 Immig. Rptr. LEXIS 2444, *2 (BIA June 17, 2009) (same).

The District Court also cited uncontroverted evidence introduced by Plaintiffs, including declarations from legal services providers, establishing that there is no requirement that ICE or IJs in the Central District consider an individual's ability to pay or alternatives at custody determinations. *See* ER012 (citing SER260-393). The record reflects that immigration officials routinely do not consider an individual's ability to pay in setting bond, and in some instances, expressly *refuse* to do so. ER012-013.; *see also* SER272 ¶ 13 (reporting that IJ refused to consider evidence of ability to pay, stating that it is "not relevant" to the bond determination).[5]

[4] The government confirms that the BIA has made clear that IJs are not required to consider ability to pay and alternatives—or indeed, any other particular factor—when setting bond. *See* Br. 35 (explaining that "when setting bond, the BIA explicitly has held [in *Guerra*] that no single factor is *mandatory* or dispositive") (emphasis added).

[5] Plaintiffs' complaint challenges two other bond-setting practices: the government's requirement that immigration detainees post the full value of the bond in cash; and

Based on government data submitted by Plaintiffs, the District Court also determined that as of October 2, 2015, there were at least 119 individuals who were still detained in the District despite having a bond set under Section 1226(a). ER012. Those bond amounts ranged from $1,500 to $100,000. *Id.* In other cases, IJs in the District had set bonds as high as $2.5 million. *Id.*

II. PLAINTIFFS XOCHITL HERNANDEZ AND CESAR MATIAS

A. Xochitl Hernandez

The District Court found the following facts as to Ms. Hernandez. Ms. Hernandez immigrated to the United States in the late 1980s and has lived continuously in Los Angeles since then. ER013. She has five children and four grandchildren, all U.S. citizens. Before her arrest by immigration officers, she lived in a house she rented with her family members. ER013-014. Ms. Hernandez's family worked to pay rent and other expenses, but experienced difficulties finding steady employment; the family has few assets or savings. *Id.*

In February 2016, while Ms. Hernandez was visiting a friend's house, police and ICE officials arrived and stated that they were looking for a suspected gang member. ER014. The officers did not locate the suspect, but arrested Ms. Hernandez

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the government's failure to treat good faith but unsuccessful attempts to pay bonds as a reason to reconsider the bond order. ER012-013 (citing declarations). Plaintiffs did not seek preliminary relief on those claims, and their merits are not at issue here. ER033 n.21.

and several other individuals who happened to be in the home at the time. The officers took Ms. Hernandez to a police station, where she was questioned about her identity. *Id.* Ms. Hernandez was never charged with, or convicted of, any crimes arising from this arrest. *Id.*; *see also* SER242-243.

That same day, Ms. Hernandez was transferred to an ICE facility, where an ICE officer interviewed her. ER014. The officer did not ask Ms. Hernandez about her financial circumstances, what bond amount she could afford, or whether she could be released on non-monetary conditions. *Id.*

On March 9, 2016, Ms. Hernandez appeared *pro se* before an IJ for a bond hearing. Like the ICE officer, the IJ did not ask her about her ability to pay bond, her financial circumstances, or whether she could be released on alternative conditions. *Id.* Several days later, she received the IJ's bond decision, which found that Ms. Hernandez was not a danger to the community. *Id.* The IJ nevertheless found her a "'flight risk' because she was unlikely to be granted relief from removal and lived in a heavily gang-active area." *Id*. Relying on those facts, the IJ ordered her release on $60,000 bond and certain conditions. *Id.*[6] Through counsel in her removal

[6] Contrary to the government's suggestions (*see* Br. 4-5), the IJ specifically found that Ms. Hernandez posed no danger to the community and had no gang-related convictions, nor was there any finding that she was a gang member. *See* SER 250-251.

proceedings, Ms. Hernandez appealed this decision to the BIA and argued that the IJ should have considered her ability to pay in setting bond. ER180-181, 196-198.

At a subsequent hearing on April 13, 2016, Ms. Hernandez, again appearing *pro se*, asked the IJ to reconsider her bond amount because she could not afford it. ER014. The IJ denied her request because there were no "changed circumstances" warranting reconsideration of the IJ's original decision. *Id.* The IJ also asserted that he "'did consider ability to pay'" at Ms. Hernandez's first bond hearing, but that there were "'significant issues'" in her case that justified her $60,000 bond. ER015 (citing ER271). The District Court found that other than the IJ's *ex post* statements, there is no evidence suggesting that he did in fact consider Ms. Hernandez's ability to pay. ER027.

On August 23, 2016, Ms. Hernandez appeared, now with counsel, before a different IJ for a bond hearing conducted pursuant to *Rodriguez III*, 804 F.3d at 1065. ER128-131. At this hearing, Ms. Hernandez testified that she and her family have limited financial resources, and indicated that she could only afford a $1,500 bond at most. ER094-095. A week later, the IJ set a $5,000 bond, conditioned upon Ms. Hernandez's enrollment in the "Alternatives to Detention" program. ER015. The decision did not address Ms. Hernandez's ability to pay bond. *Id.*[7]

[7] This Court has required that IJs consider individuals for release on alternatives to detention at *Rodriguez* bond hearings. *See Rodriguez III*, 804 F.3d at 1087-88.

Upon hearing of Ms. Hernandez's situation through this lawsuit, a community organization launched a fundraising drive to help her pay her bond. SER13-14 ¶ 4. With help from this fundraising drive, Ms. Hernandez paid her bond, *id*., and on September 9, 2016, she was released from detention with a requirement that she wear an electronic ankle monitor, SER51.

On September 30, 2016, the BIA decided Ms. Hernandez's appeal of her first bond decision. ER064-065. Although the agency remanded for the IJ "to reconsider the evidence presented" and set a new bond, it did not address her argument that the IJ should have considered her financial circumstances, or instruct the IJ to consider those circumstances on remand, despite the fact that she had raised the issue in her appeal. *Id.*

B. Cesar Matias

As to Mr. Matias, the District Court found the following based on the record evidence. Mr. Matias was born in Sonaguera, Honduras in 1978. ER015. He is a gay man and fled Honduras to escape severe persecution he had suffered on account of his sexual orientation. *Id.* He entered the United States in May 2005 and resides in Los Angeles, where he worked as a hair stylist and at a clothing factory. *Id.* Mr.

However, currently no such requirement applies to Section 1226(a) bond hearings over initial detentions.

Matias averred that he has no savings, and does not own a home or possess any significant assets. *Id.*[8]

On March 29, 2012, ICE arrested Mr. Matias following his conviction for possession of a controlled substance, for which he was given a deferred sentence and placed in a drug diversion program under California Penal Code § 1000. *See* ER015, 226. Under existing law, that conviction required his initial detention, *see* 8 U.S.C. § 1226(c)(1)(B), rendering him ineligible for a bond hearing until his detention had exceeded six months.[9] However, Mr. Matias remained in immigration detention for the next *four years and three months*. ER016.

During his lengthy detention, Mr. Matias had several bond hearings where, despite repeated pleas, he was given a bond amount that he could not afford. On November 9, 2012, Mr. Matias appeared for his first bond hearing before an IJ. The IJ did not ask him any questions about his ability to pay or his financial circumstances, and set a $3,000 bond. ER015. The IJ did not state that she had

[8] The government states that Mr. Matias's "true identity . . . [is] unknown" and suggests that he has presented misleading information concerning his name and nationality. Br. 8. But the IJ in his case plainly found such concerns insufficient to justify his detention, and ordered his release on a $3,000 bond. Moreover, the government recently joined in a motion to remand Mr. Matias's immigration case to the agency based on "newly obtained evidence as to Matias's identity, namely his passport and corrected birth certificate." SER58-63. Mr. Matias's case was remanded on August 4, 2016. SER59.

[9] After six months the government's authority to detain him shifted to Section 1226(a), under which he was eligible for bond hearings. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1135 (9th Cir. 2013) ("*Rodriguez II*").

considered whether he could be released on conditions other than a money bond. *Id.* Mr. Matias stated that he could not pay the bond, and thus remained incarcerated. *Id.*

On February 2, 2013, Mr. Matias appeared before the IJ again and asked to be released so that he could gather evidence that would help his case. ER016. The IJ refused to reconsider the conditions of his release. *Id.*[10] A year and a half later, in August 2014, Mr. Matias again asked the IJ to lower his bond amount because he "[did not] have money to pay for it." *Id.* The IJ responded that his bond amount was "reasonable," and stated that neither Mr. Matias's lengthy detention nor his financial circumstances were "significant enough" to constitute changed circumstances that would warrant revisiting the initial bond decision. *Id. See generally* 8 C.F.R. § 1003.19(e) (new bond hearing available only upon showing that "circumstances have changed materially"). The District Court found that this brief reference to Mr. Matias's poverty did not constitute actual consideration of his ability to pay. ER027.

[10] The IJ did not consider Mr. Matias for release on electronic monitoring at his February 2013 hearing, as the government asserts. Br. 21. That hearing was a hearing in Mr. Matias' removal case—not a bond hearing. Thus, although the IJ stated at the hearing that she was not "inclined" to release Mr. Matias on electronic monitoring, the IJ made clear that the question of Mr. Matias' custody was not properly before the court. *See* ER252-253 (IJ stating that "[t]here needs to be a motion [on release] and at this time there isn't one."); *see also* 8 C.F.R. § 1003.19(d) (bond hearings "shall be separate and apart from, and shall form no part of, any . . . removal hearing or proceeding").

On January 21, 2016, Mr. Matias appeared again for a bond hearing. Once again, the IJ did not inquire into his financial circumstances and found the bond amount reasonable. ER016.

In summer 2016, after the filing of this lawsuit, a different local community organization heard about Mr. Matias's plight and conducted a fundraising drive to pay his $3,000 bond. *Id.* The drive was successful, and on June 7, 2016—after four years and three months of custody—he left immigration detention. *Id.*

III. PROCEDURAL HISTORY

On April 6, 2016, Plaintiffs filed this class action lawsuit alleging that the government violated their constitutional and statutory rights by failing to consider their ability to pay a bond, and alternative conditions of release to a full cash bond, in determining the appropriate conditions for their release. Plaintiffs alleged that these failures violated the due process and equal protection guarantees of the Fifth Amendment, the Eighth Amendment, and detainees' statutory rights under Section 1226(a). ER318-319. Plaintiffs sought to certify a class of noncitizens in the Central District of California who are or will be detained under Section 1226(a) after being ordered released on a bond set under the government's unlawful bond-setting policies and practices. ER328.

On November 10, 2016, the District Court denied the government's motion to dismiss, granted Plaintiffs' motion for class certification, and granted a class-wide

preliminary injunction. *See* ER001-005 ("Order"). The Order was accompanied by a detailed memorandum opinion explaining the Court's reasoning. *See* ER006-046.

The Order required that ICE and IJs:

> [W]hen setting, re-determining, and/or reviewing the terms of any person's release, … (a) consider the person's financial ability to pay a bond; (b) not set bond at a greater amount than that needed to ensure the person's appearance; and (c) consider whether the person may be released on alternative conditions of supervision, alone or in combination with a lower bond amount, that are sufficient to mitigate flight risk.

ER032-033.

The District Court's opinion offered further clarification concerning the Order's scope. It explained that the injunction did not require the government "to use the least burdensome means of securing Class members," ER040 (citing *Rodriguez III*, 804 F.3d at 1087-88), or make ability to pay the "'dispositive factor' in bond determination." ER044 n.29. Rather, it merely requires that immigration officers "*consider* detainees' ability to pay and alternatives to detention when setting bond amounts." ER041 (emphasis in original). The District Court also recognized that, at initial bond hearings under Section 1226(a), "the noncitizen detainee bears the burden of 'demonstrat[ing] to the satisfaction of the officer that [his or her] release would not pose a danger to property or persons, and that [he or she] is likely to appear for any future proceedings.'" ER010 (quoting 8 C.F.R. § 1236.1(c)(8)).

The Order also required the parties to meet and confer on developing guidelines and instructions for ICE officers and IJs to implement the Order; required the government to submit a list of class members to Plaintiffs; and directed the government to conduct new bond hearings for current class members whose bonds were set without the benefit of the Order's protections. ER003-005.

On December 28, 2016, the District Court denied the government's *ex parte* application for a stay of all proceedings pending its interlocutory appeal of the preliminary injunction. ER048. The government renewed its application before this Court, which granted a stay of the preliminary injunction order and set an expedited schedule for briefing and argument. ER047.

SUMMARY OF ARGUMENT

This Court should affirm the class-wide preliminary injunction.

The District Court correctly applied Supreme Court and Ninth Circuit precedent in holding that it had jurisdiction over Plaintiffs' constitutional and statutory claims. ER022. This Court already has held that 8 U.S.C. § 1226(e) and § 1252(a)(2)(B) only bar review of discretionary decisions by the Attorney General; they do not bar constitutional and legal challenges to the government's procedures for bond hearings. *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). The government's reliance on *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), is misplaced. Unlike the petitioner in *Prieto-Romero*, Plaintiffs here do not challenge

the IJ's discretionary decision in setting their bonds at a specific amount. Rather, Plaintiffs challenge the government's *process* for making custody decisions as lacking safeguards that the Constitution and Section 1226(a) require.

Likewise, as the District Court held, Plaintiffs were not required to exhaust administrative remedies by raising their arguments to the BIA. ER018-020. *Singh* held that exhaustion is not statutorily mandated and should not apply as a prudential matter where to claims that raise questions of law and whose resolution will not encourage litigants to bypass the administrative scheme in the future. Moreover, administrative exhaustion would be futile because—as the government concedes (*see* Br. 35)—the BIA in *Matter of Guerra* already has made clear that immigration authorities are not required to consider ability to pay or non-monetary conditions when making custody decisions.

The District Court also correctly found that Plaintiffs are likely to succeed on the merits of their claims. ER034-044. The procedures required by the Order—namely, that immigration officials consider ability to pay and alternative conditions of release when making custody decisions—are necessary to ensure that class members are not impermissibly detained solely because they are poor, in violation of their Fifth and Eighth Amendment rights. Moreover, this Court has already recognized that consideration for release on non-monetary conditions is authorized under Section 1226(a), *see Rodriguez III*, 804 F.3d at 1088, and because Section

1226(a) is silent as to the factors that must be considered in a custody determination, the statute can and must be construed to require the Order's procedures to avoid serious constitutional problems. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Finally, the remaining preliminary injunction factors tip sharply in Plaintiffs' favor. There is no serious dispute that class members' ongoing detention, in violation of their constitutional and statutory rights, causes them irreparable harm. At the same time, the government presented virtually no evidence of harm that would result from the injunction. Instead, the government grossly mischaracterizes the Order's requirements in an attempt to argue that the injunction is unduly burdensome. But as the plain text of the Order makes clear, the injunction simply requires individualized consideration of class members' financial circumstances and suitability for release on alternative conditions—at bond hearings that can take mere minutes—to ensure they are not detained due to poverty alone. Finally, the public interest strongly favors affirmance of the Order, which is necessary to ensure that the government's custody procedures comply with the law.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). A district court abuses its discretion only when it bases its decision on "an erroneous legal standard or clearly erroneous factual findings." *Nader v. Brewer*, 386 F.3d

1168, 1169 (9th Cir. 2004). Appellate review of a decision regarding a preliminary injunction is both "'limited and deferential, and it does not extend to the underlying merits of the case.'" *Thalheimer*, 645 F.3d at 1115 (citation omitted). "As long as the district court got the law right, '[a preliminary injunction] will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Gregorio T. By & Through Jose T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (citation omitted).[11]

ARGUMENT

I. THE FEDERAL COURTS HAVE JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. 8 U.S.C. § 1226(e) and § 1252(a)(2)(B) Do Not Bar Federal Court Review of Plaintiffs' Claims.

The District Court correctly found that Sections 1226(e) and 1252(a)(2)(B) do not bar federal court review of Plaintiffs' "constitutional and legal" challenges to the procedures at custody determinations. *See* ER020-022. Section 1226(e) bars only

[11] The government suggests that because the District Court's injunction "impos[es] affirmative obligations," it is "disfavored." Br. 25. Even assuming that a heightened standard applies here, Plaintiffs have amply demonstrated that "the facts and law clearly favor the moving party." *See Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (affirming preliminary injunction that "required affirmative conduct"). And this Court has repeatedly affirmed preliminary injunctions that require a party to adopt procedural requirements to ensure compliance with the law. *See, e.g., Rodriguez II*, 715 F.3d at 1131 (requiring government to implement certain procedures at Section 1226(a) bond hearings); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002) (requiring defendants to adopt procedural mechanism for removing files that violated copyright statutes).

challenges to exercise of discretion—not constitutional and legal challenges to the policies or practices by which discretion is exercised. *See Singh*, 638 F.3d at 1202. ("[A]lthough the Attorney General's 'discretionary judgment [over bond decisions] . . . shall not be subject to review,' claims that the discretionary process itself was constitutionally flawed are 'cognizable in federal court'" (citation omitted)).

Plaintiffs' claims fall squarely under *Singh*. Plaintiffs challenge the government's established policy and practice of failing to require immigration officials to consider a detainee's ability to pay a bond or non-monetary conditions of release. ER019-20 & n.16. This Court and others have repeatedly found jurisdiction over such statutory and constitutional claims. *See Singh*, 638 F.3d at 1202 (Section 1226(e) does not bar legal challenge to standard of proof at prolonged detention bond hearings); *Rivera v. Holder*, 307 F.R.D. 539, 545-46 (W.D. Wash. 2015) (Section 1226(e) does not bar legal challenge brought by individual ordered released on $3,500 bond to IJs' failure to consider individuals for release on conditions of supervision); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 176-77 (D.D.C. 2015) (Section 1226(e) does not bar statutory and constitutional challenge to government's reliance on general deterrence as factor in custody decisions); *cf. Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003) ("The BIA has no discretion to make a decision that is contrary to law."). The government does not even acknowledge, much less distinguish, these rulings.

The government's reliance on Section 1252(a)(2)(B) is misplaced for the same reasons. Br. 32. Like Section 1226(e), Section 1252(a)(2)(B) does not apply to "claims of constitutional and legal error." *Singh*, 638 F.3d at 1202 ("Like § 1226(e), § 1252(a)(2)(B)(ii) restricts jurisdiction only with respect to the executive's exercise of discretion. It does not limit habeas jurisdiction over questions of law."); *see also Kucana v. Holder*, 558 U.S. 223, 251-52 (2010) (applying "presumption favoring judicial review of administrative action" to adopt narrow interpretation of Section 1252(a)(2)(B)(ii)).

The government relies on *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) (Br. 31-32), but it is entirely consistent with this Court's reading of Section 1226(e) in *Singh* and elsewhere. In *Prieto-Romero*, the petitioner challenged the IJ's discretionary decision to set bond at $15,000 instead of at a lower amount, and this Court found that Section 1226(e) barred it from "second-guess[ing] the IJ's discretionary determination of the bond amount." *Id*. at 1067. By contrast, Plaintiffs allege that as a matter of law—not as a matter of discretion—that the Constitution and Section 1226(a) require immigration officials to consider ability to pay and alternatives. Plaintiffs do not claim that IJs abused their discretion in setting the bond of any class member at a specific amount. Rather, Plaintiffs challenge the policies or practices by which the immigration authorities have determined class members'

conditions of release for lacking procedures mandated by the Constitution and Section 1226(a).

Moreover, *Prieto-Romero* addressed on the merits the petitioner's legal claim that a bond amount that prevented his release was *per se* unlawful under *Doan v. INS*, 311 F.3d 1160 (9th Cir. 2002). 534 F.3d at 1067. The Court could not have reached that issue if, as the government asserts, Section 1226(e) barred review of *all* challenges involving a bond order.[12]

For these reasons, Sections 1226(e) and 1252(a)(2)(B) do not bar federal court review of Plaintiffs' claims.

B. Plaintiffs Were Not Required To Exhaust Their Claims Before the Board of Immigration Appeals.

This Court has made clear that there is no statutory requirement that noncitizens exhaust administrative remedies before challenging their detentions. Rather, the exhaustion requirement is prudential. *Singh*, 638 F.3d at 1203 n.3. In *Singh*, this Court found prudential exhaustion unnecessary where, as here, the petitioner raised a legal challenge to the government's bond procedures. *Id*. (waiving

[12] The other cases the government cites are easily distinguishable. *See* Br. 28. Unlike the petitioner in *Torres-Aguilar v. INS*, 246 F.3d 1267 (9th Cir. 2001), Plaintiffs have raised, at a minimum, "colorable" constitutional and statutory claims. *Id*. at 1271. And *Delgado v. Quarantillo* is completely inapposite. 643 F.3d 52, 57 (2d Cir. 2011) (applying bar to judicial review of a reinstated order of removal to application for immigration relief that would render the reinstated order invalid).

exhaustion for constitutional challenge to the standard of proof at prolonged detention bond hearings).

As the District Court found, Plaintiffs easily meet the three-factor test applied in *Singh*. ER018-019. First, a record of administrative appeal would not help this Court resolve the legal questions of whether the statute and the Constitution require consideration of an individual's ability to pay and alternative conditions. *See Singh*, 638 F.3d at 1203 n.3. Second, "relaxation of the requirement in this case will not encourage future habeas petitioners to attempt to bypass the administrative scheme," *id*., because "'the district court will have jurisdiction only in the rare case alleging a pattern or practice violating the rights of a class of applicants.'" *El Rescate Legal Servs. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1991) (citation omitted). Moreover, once Plaintiffs' legal claims are resolved by this Court, they "should cease to arise." *Singh*, 638 F.3d at 1203 n.3; *accord Rivera*, 307 F.R.D. at 551-52. Third, "administrative review would not preclude the need for judicial review, because litigants would undoubtedly seek this court's determination of whether whatever standard the agency set was correct." *Singh*, 638 F.3d at 1203 n.3.

Moreover, requiring exhaustion would cause class members the irreparable injury of potentially months or even years (as with Mr. Matias) of detention without lawful process. *See Laing v. Ashcroft*, 370 F.3d 994, 1000-01 (9th Cir. 2004) (exhaustion may be waived where "irreparable injury may occur without immediate

judicial relief"); *Rianto v. Holder*, No. CV-11-0137-PHX-FJM, 2011 WL 3489613, at *2 (D. Ariz. Aug. 9, 2011) (waiving exhaustion where "irreparable injury" of "unauthorized" detention "may occur").

The government does not even cite, much less distinguish, *Singh*'s holding on exhaustion or, indeed, any other exhaustion case in support of its argument. Instead, the government argues only that exhaustion was not futile. Br. 22. But *Singh* excused exhaustion without consideration of futility.

In any event, exhaustion would be futile. As this Court has explained, "where the agency's position on the question at issue 'appears already set,' and it is 'very likely' what the result of recourse to administrative remedies would be, such recourse would be futile and is not required." *El Rescate*, 959 F.2d at 747 (citation omitted). Here the government *concedes* that the BIA has made clear that IJs are not required to consider ability to pay and alternatives—or indeed, any other particular factor—when setting bond. *See Matter of Guerra*, 24 I. & N. Dec. 37, at 40 (BIA 2005) (holding that IJs have "broad discretion in deciding the factors that he or she may consider in custody redeterminations"); Br. 19 (explaining that "when setting bond, the BIA explicitly has held [in *Guerra*] that no single factor is *mandatory* or dispositive", *id*. at 35 (emphasis added)).

Indeed, the BIA routinely ignores individuals' ability to pay when it reviews custody decisions under *Guerra*. *See, e.g.*, *In re: Sandoval-Gomez*, 2008 WL

5477710, at *1 (BIA Dec. 15, 2008) ("[A]n alien's ability to pay the bond amount is not a relevant bond determination factor."); *In re: Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (same); *In re: Castillo-Leyva*, 2008 Immig. Rptr. LEXIS 10396, *1 (BIA Sept. 18, 2008) (same); *In re Serrano-Cordova*, 2009 Immig. Rptr. LEXIS 2444, *2 (BIA June 17, 2009) (same). These are hardly "isolated" examples, as the government asserts. Br. 28. Instead, they reflect the rule in *Guerra*, which relieves immigration authorities of any obligation to consider ability to pay or alternative conditions when making custody decisions. Consistent with this authority, the District Court found that immigration officials in the Central District routinely do not consider ability to pay and alternatives to bond. *See* ER019-20 & n.16.[13]

Notwithstanding this authority, the government asserts that the fact that the BIA sustained Ms. Hernandez's bond appeal shows that exhaustion was not futile. Br. 22. But under this Court's precedents, the question is not whether the administrative body could afford *some* relief to the individual. Rather, the question

[13] The government cites bond appeals where the BIA may have considered the individual's financial circumstances, *see* Br. 29, and the Immigration Judge Benchbook's listing of ability to pay as a "less significant factor[]" that an IJ "*may* consider in setting bond." Br. 22 (emphasis added); Introductory Guides: Bond 7, *available at* https://www.justice.gov/eoir/immigration-judge-benchbook. But as the District Court held, these agency statements are irrelevant to whether the Constitution and Section 1226(a) *require* the IJ to consider an individual's ability to pay and release on non-monetary conditions. ER019-020.

is whether "the agency's position *on the question at issue* 'appears already set,'" such that recourse to administrative remedies would be futile. *El Rescate*, 959 F.2d at 747 (emphasis added) (citation omitted). Here, *Guerra* and other BIA decisions show that the agency has set its views on the legal questions at issue here.

Moreover, the BIA's decision on Ms. Hernandez's appeal *supports* Plaintiffs' argument that exhaustion is futile. Even though Ms. Hernandez raised the issue in her appeal, the BIA did not find that the IJ erred by failing to consider Ms. Hernandez's ability to pay when the IJ set a $60,000 bond, or instruct the IJ to consider her ability to pay on remand. ER064-065, 196-198. On remand, the IJ once again did not consider Ms. Hernandez's ability to pay in setting her bond amount. *See* ER128-131. To the contrary, the IJ set a $5,000 bond despite Ms. Hernandez's testimony that she and her family could afford at most a $1,500 bond. ER094. She posted the bond only because of the timely intervention of generous third parties.

In sum, there was no reason to require Plaintiffs to raise their arguments to the BIA before filing the instant class action.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The District Court correctly held that Plaintiffs are likely to succeed on their due process, equal protection, Eighth Amendment, and statutory claims.

A. The District Court's Order Requires Only That Immigration Authorities Consider Ability To Pay and Alternatives to a Money Bond for Individuals Already Found Eligible or Release.

Before turning to the substance of their legal claims, Plaintiffs begin by correcting the government's numerous and egregious mischaracterizations of the Order, which permeate its objections to each of Plaintiffs' legal claims. That the government must mischaracterize the Order to challenge it speaks volumes as to the strength of its arguments.

First, the government suggests that the Order establishes that Plaintiffs have a "constitutional right to release on bond." Br. 30. The Order does no such thing: it merely required immigration authorities to *consider* an individual's financial circumstances and suitability for release on non-monetary alternatives. *See* ER044 n.29 (under the Order, "an individual's ability to pay is not 'the dispositive factor' in bond determinations"; rather, it requires "only that the ability to pay must be considered in bond determinations").

Second, the government suggests that the District Court imposed a "presumption of release" or a requirement that the government use the "least burdensome means" of ensuring the individual's appearance in court. Br. 42. But the District Court *expressly* rejected this claim, finding that an injunction "does not require that [Immigration Judges] apply the least restrictive means of supervision"

when "it merely directs them to 'consider' restrictions short of detention." ER040-041 (quoting *Rodriguez III*, 804 F.3d at 1087-88).

Third, the government contends that the District Court somehow prohibited immigration officials from making individualized custody decisions based on the particular facts in each person's case. *See* Br. 33, 47-49 (asserting that Plaintiffs make a "one-size fits all" request for relief that is "inflexible"). But the opposite is true: the District Court's rule requires individualized consideration of a person's financial circumstances in setting bond and the suitability of alternative release conditions precisely to ensure that detention is "actually serv[ing]" legitimate government purposes in each person's case. *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008). Nothing about this requirement precludes immigration authorities from exercising discretion to consider facts relevant to assessing an individual's risk of flight or danger, as the government contends.

Finally, the government wrongly asserts that the District Court's Order "shift[s] the burden of inquiry from the [noncitizen] to the government." Br. 27. To the contrary, the Order expressly recognizes that class members bear the burden of demonstrating their fitness for release at initial bond hearings under Section 1226(a), ER010, and each class member has already met that burden because they have been ordered released on bond. Requiring immigration officials to consider certain factors in determining the *conditions of release* does not "shift" detainees' burden to

demonstrate *fitness for release*. And as with ability-to-pay determinations in any other context, class members will be required to provide evidence to enable immigration officials to make that determination.

B. The Government's Bond-Setting Policies and Practices Violate the Due Process Clause.

"Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Therefore, due process requires both that immigration detention be "'reasonabl[y] relat[ed]'" to its purposes of preventing flight and danger to the community, and that it be accompanied by adequate procedures to ensure those purposes are met. *See id*. at 690-91 (citation omitted); *accord Demore v. Kim*, 538 U.S. 510, 527 (2003); *Rodriguez III*, 804 F.3d at 1089 ("'[D]etention incidental to removal must bear a reasonable relation to its purpose.'") (citation omitted); *Casas-Castrillon*, 535 F.3d at 950; *Singh*, 638 F.3d at 1203. The government's detention of class members does not serve its purpose if it has alternative conditions—such as a lower bond, non-monetary conditions of release, or a combination of the two—that could ensure class members' appearance and allow them to gain their freedom. Therefore, due process requires procedures to ensure that bond determinations take into account detainees' ability to pay a bond and alternatives to money bond.

The Supreme Court has long recognized that "imprisoning a defendant solely because of his lack of financial resources" violates the Due Process Clause. *Bearden*

v. Georgia, 461 U.S. 660, 661-62 (1983) (holding that government cannot revoke criminal defendant's probation due to nonpayment of fine without determination that individual "had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist"). The Court has applied similar principles in civil matters. *See Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (holding that due process requires adequate procedures and specific findings as to individual's ability to pay child support before incarcerating him for civil contempt).[14]

Courts have also applied this principle to the pretrial criminal context, finding that bail schemes violate due process where they do not consider ability to pay and alternatives to money bond. For example, in *Pugh v. Rainwater*, the Fifth Circuit found that "[t]he incarceration of those who cannot [pay a money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id*. at 1057. As the court explained, at a

[14] *Bearden* followed from prior cases prohibiting incarceration beyond the statutory maximum solely because of an inability to pay a fine, *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970), and the conversion of a fine imposed under a fine-only statute into a jail term solely because of the defendant's indigence, *Tate v. Short*, 401 U.S. 395, 397-98 (1971). *See also United States v. Burgum*, 633 F.3d 810, 814-16 (9th Cir. 2011) (applying *Bearden* to hold that treating defendant's inability to pay restitution as aggravating sentencing factor was plain error); *United States v. Parks*, 89 F.3d 570, 572-73 (9th Cir. 1996) (applying *Bearden* to find due process violation when court added eight months of incarceration to defendant's sentence solely because he was financially unable to pay certain fines).

bail hearing, "[t]he ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial." *Id*. Thus, while a bail "requirement as is necessary to provide reasonable assurance of the accused's presence at trial is constitutionally permissible," "[a]ny requirement in excess of that amount would be inherently punitive and run afoul of due process." *Id*. Moreover, "in the case of an indigent, whose appearance at trial could reasonably be assured by . . . alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Id*. at 1058.[15]

Likewise, the government itself has recognized that incarcerating a pre-trial detainee solely because he cannot afford a money bond is not reasonably related to the government's legitimate goals. *See* SER35-36. As the government explained, bond systems that lack "meaningful consideration of [individuals'] indigence and

[15] *See also Jones v. City of Clanton*, No. 2:15cv34–MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) ("[T]he use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause . . . ."); *Walker v. City of Calhoun, GA*, No. 4:15–CV–0170–HLM, 2016 WL 361612, at *10-11, *14 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW-[WO], 2015 WL 10013003, at *1-2 (M.D. Ala. June 18, 2015) (granting temporary restraining order); *see also Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 767-68 (M.D. Tenn. Dec. 17, 2015) (holding that detaining misdemeanor probationers on money bail without inquiry into their ability to pay was unconstitutional and granting class-wide preliminary injunction); *see also Odonnell v. Harris Cnty., Tx.*, No. H-16-1414, 2016 WL 7337549, at *16-18 (S.D. Tx. Dec. 16, 2016) (denying motion to dismiss under Rule 12(b)(6)).

alternative methods of assuring their appearance at trial" "result[s] in unnecessary incarceration of people" that is "based solely on inability to pay" and therefore violates the Due Process Clause. SER36, 41.

The government's flawed immigration bond procedures violate these principles. The government's failure to consider class members' financial circumstances and eligibility for alternative conditions of release impermissibly results in their detention based solely on inability to pay. This is especially so where the government has recourse to a range of alternatives to bond that are highly effective. *See* SER172 (government report noting that, from FY2011 to FY2013, more than 95 percent of participants in ICE's "full-service" Alternatives to Detention program appeared at their final scheduled removal hearings).

Moreover, the government cannot explain how immigration officials can determine an appropriate bond amount that advances its interest in preventing flight without considering a noncitizen's ability to pay. The purpose of a bond is to deter flight. *See Guerra*, 24 I. & N. Dec. at 38. However, the degree to which a bond will mitigate flight risk necessarily depends on an individual's financial resources. While a $1,500 bond may serve as a significant deterrent for an indigent person, such as Ms. Hernandez or Mr. Matias, it would not deter a millionaire. Therefore, by ignoring class members' ability to pay, immigration officials set bond amounts that

result in the detention of class members based solely on their indigence and without any legitimate purpose.

The government does not dispute that its bond-setting procedures would violate due process if applied to citizens. Instead, it claims it has "plenary authority" over immigration detention, Br. 30, 47, ignoring that the government's "'plenary power'" over immigration is "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695 (citation omitted). For the same reasons, the government's suggestion that class members lack *any* due process rights is wholly without merit. *Compare* Br. 1 (arguing that "*to the extent that* aliens detained under 8 U.S.C. § 1226(a) have a liberty interest" (emphasis added)), and *id*. at 30-31 (suggesting that Plaintiffs "only [have] rights afforded to [them] by Congress"), *with id*. at 45 (conceding that Plaintiffs' liberty interests are "not insignificant").

The government fails to explain why the case law on indigency-based detention and its own position on criminal bail do not apply here. *See* Br. 45. Both the Supreme Court and this Court have routinely applied case law from the pretrial detention and other detention contexts to assess the constitutionality of immigration detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 690-91 (discussing, *inter alia*, *United States v. Salerno*, 481 U.S. 739, 746 (1987), and civil commitment cases); *Rodriguez III*, 804 F.3d at 1074-75 (same); *Singh*, 638 F.3d at 1204 (discussing civil

commitment cases); *see also Turner*, 564 U.S. at 447-48 (applying *Bearden* principles in civil proceeding).

The core principles at issue here—that detention must be reasonable in relation to its purpose and that it serves no purpose to detain people only because they are poor—are deeply rooted in due process jurisprudence. There is no basis to disregard them in the immigration context. It follows that due process requires procedures to prevent the impermissible incarceration of individuals based solely on their lack of financial resources.

Finally, this Court did not hold in *Singh* that the *Matter of Guerra* framework satisfies all due process requirements, as the government suggests. *See* Br. 42-43. *Singh* obviously did not resolve the issue presented here, as it is nowhere mentioned. Moreover, *Singh* imposed additional procedural safeguards, beyond what *Guerra* requires, to ensure due process at immigration bond hearings. *See Singh*, 638 F.3d at 1203-05 (requiring that government bear burden of proof at prolonged detention hearing by clear and convincing evidence); *see also Rodriguez III*, 804 F.3d at 1087-89 (requiring that IJs consider the person's length of detention and release on alternative conditions of supervision at prolonged detention hearings).[16]

[16] The government wrongly asserts that the mere fact that Ms. Hernandez and Mr. Matias had multiple bond hearings addressed the violation of their due process rights. Br. 46. As the District Court found, the IJs in their cases failed to consider their ability to pay at every bond hearing, consistent with agency practice. *See* ER012-013, 027. Nor does it matter that Plaintiffs had the opportunity to present

In sum, because Defendants' bond-setting policies and practices permit detention based solely on Plaintiffs' inability to pay, they violate due process.

C. The Government's Bond-Setting Policies and Practices Violate Equal Protection.

The Fifth Amendment prohibits the federal government from denying individuals the equal protection of the laws. U.S. Const. amend. V; *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 57 (2001). Here, the government's detention practices and policies deny release to people who cannot pay a money bond, while affording release to those who can. These practices—although facially neutral—result in detention that is "wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)). Such "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (citing *Williams* and *Tate*).

The government itself has acknowledged that "a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial" and "meaningful

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evidence of their financial circumstances. *See* Br. 45-46. Both Ms. Hernandez and Mr. Matias did so repeatedly, but their respective IJs ignored it. *See* ER013-016, 027.

consideration of alternatives, infringes on equal protection and due process requirements." SER36. Likewise, numerous federal courts have recently invalidated bond systems that—by failing to consider individuals' ability to pay—imprison poor people while letting those relatively rich go free.[17] This Court has also applied these principles to incarceration resulting from an individual's inability to pay bail. *MacFarlane v. Walter*, 179 F.3d 1131, 1138 (9th Cir. 1999) (holding that "the allowance of lesser early-release credits to defendants detained pre-trial in county jails because of financial inability to post bail" than to defendants "whose financial resources permitted them to wait to begin serving their time . . . post-sentencing, [at] a state correctional facility" violates equal protection), *vacated as moot*, *Lehman v. MacFarlane*, 529 U.S. 1106 (2000).

The government says nothing about its position on criminal bail or this body of equal protection case law. Instead, the government asserts that "indigent prisoners are not a suspect class" and therefore its policies or practices need only satisfy rational basis review. Br. 46 (citing *Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9th Cir. 1999) and *Tucker v. Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998)). But

[17] *See, e.g.*, *Jones*, 2015 WL 5387219, at *2-3; *Walker*, 2016 WL 361612, at *10-11, *14; *Pierce v. City of Velda City, Mo.*, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (issuing declaratory judgment); *Thompson v. Moss Point, Miss.*, No. 1:15cv182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) (same); *Cooper*, 2015 WL 10013003, at *1-2 (granting temporary restraining order); *see also Rodriguez*, 155 F. Supp. 3d at 767-68; *see also Odonnell*, 2016 WL 7337549, at *14-16 (denying Rule 12(b)(6) motion).

Rodriguez and *Tucker* applied rational basis review only because the plaintiffs' challenge did not implicate a "fundamental interest." As both *Rodriguez* and *Tucker* recognize, heightened scrutiny applies to wealth discrimination in civil cases that involve "fundamental interests." *Rodriguez*, 169 F.3d at 1180 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)); *Tucker*, 142 F.3d at 1299 (same).[18]

As this Court explained in *MacFarlane*, "*Bearden* controls the analysis of whether and under what circumstances an individual can be subjected to greater incarceration solely because of indigency" and requires "heightened scrutiny." 179 F.3d at 1139, 1141. Thus, *Bearden*

> requires a *careful inquiry* into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose…."

461 U.S. at 666-67 (emphasis added) (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)). This "careful inquiry" requires far more scrutiny than rational basis review. *Compare Rodriguez*, 169 F.3d at 1181.[19]

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[18] The government also broadly asserts that discrimination among noncitizens is subject to rational basis review, but the cases they cite are inapposite. Br. 47, 49. *Gebin v. Mineta*, 231 F. Supp. 2d 971, 975 (C.D. Cal. 2002) does not concern detention, and *Avramenkov v. INS*, 99 F. Supp. 2d 210, 218-19 (D. Conn. 2000) does not address indigency-based discrimination, where the Supreme Court has required heightened scrutiny.

[19] For example, despite the State's legitimate interests in deterrence and retribution, the Supreme Court in *Bearden* required that the State look to *alternative forms of*

The government's policies or practices do not meet this test. Plaintiffs' detention is a severe deprivation of liberty. They have been detained solely because they cannot afford to post their bonds, without consideration of alternatives that effectuate the government's purpose—the prevention of flight risk. And the government has recourse to a range of alternative conditions of supervision, alone or in combination with a lower bond, to ensure that they appear for removal proceedings.

Even assuming the rational basis test applies, the District Court rightly held that detention based solely on a lack of financial resources does not survive even this level of review. *See* ER041-043; *see also Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 (9th Cir. 2014) (upholding injunction of state policy that denied driver's licenses to one group of immigrants because court could "discern no rational relationship between Defendants' policy and a legitimate state interest"). As explained above, the government's policies or procedures result in detention solely because of poverty—a plainly invalid purpose for detention.

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punishment for nonpayment of a fine, and that it avoid incarcerating people based solely on their poverty. *Bearden*, 461 U.S. at 671-72. Similarly, in *M.L.B.*, the Court "*examined closely and contextually* the importance of the governmental interest advanced in defense of the intrusion"—there, the refusal to waive filing fees for indigents challenging the termination of parental rights. 519 U.S. at 116 (emphasis added); *see also id.* at 122 (rejecting State's fiscal justifications based on statistics showing that "appeals [in parental termination cases] are few, and not likely to impose an undue burden on the State" (citation omitted)).

Accordingly, the government's deficient bond-setting procedures violate equal protection.

D. The Government's Bond-Setting Policies and Practices Violate the Eighth Amendment.

The Eighth Amendment "Excessive Bail Clause prevents the imposition of bail conditions that are excessive in light of the valid interests the state seeks to protect by offering bail." *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) (citing *Salerno*, 481 U.S. at 754). The government therefore "may not set bail to achieve invalid interests, nor in an amount that is excessive in relation to the valid interests it seeks to achieve." *Id*. (internal citations omitted). Under the Bail Clause, and its federal statutory counterpart in the Bail Reform Act, "the amount of bail should not be used as an indirect, but effective, method of ensuring continued custody." *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all.").

The government does not dispute that the Excessive Bail Clause requires the procedures that Plaintiffs seek to ensure that bail is not excessive. Rather, it suggests that the Eighth Amendment does not apply to civil proceedings, relying on *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). *See* Br. 49-50. However, the Supreme Court subsequently held that the Eighth Amendment is *not* limited to criminal proceedings. *See Austin v. United States*, 509

U.S. 602, 607-08 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures). In *Austin*, the Court explained that, unlike other provisions of the Bill of Rights, the Eighth Amendment is not limited by its terms to criminal proceedings, and therefore should be applied in civil proceedings where it would serve the Amendment's purposes. *Id*.; *see also id*. at 609 n.5. Importantly, *Browning-Ferris* itself confirmed that applying the Excessive Bail Clause in civil immigration proceedings is consistent with its purpose. *See* 492 U.S. at 263 n.3 ("The potential for governmental abuse which the Bail Clause guards against is present" in both "a criminal case or in a civil deportation proceeding."). *Cf. Carlson v. Landon*, 342 U.S. 524, 539-40 (1952) (assuming that Excessive Bail Clause applied to immigration detention, but holding it did not prohibit the Attorney General's detention without bail of several members of the Communist Party pending the resolution of their deportation cases). This view finds further support in the Amendment's history. *See* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1254 n. 126, n. 128 (1987) ("bail or its close cousin, mainprize, commonly were used in civil proceedings" in the Founding era). Accordingly, the Eighth Amendment applies to immigration proceedings.[20]

[20] The government's observation that the Court did not "mention" the Excessive Bail Clause in *Demore* or *Zadvydas*, Br. 50, is irrelevant. The Court had no occasion to opine on the applicability of the Excessive Bail Clause given that the cases did not

Here, the Eighth Amendment requires immigration officials to consider a detainee's financial circumstances and non-monetary alternatives to ensure that the terms of release are not "excessive" in relation to their purpose. *Cf. Stack v. Boyle*, 342 U.S. 1, 52 n.3 (1951) (under the Eighth Amendment, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant" and "traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant," including "the financial ability of the defendant to give bail"). Where the government's interest in preventing flight can be addressed by release on bail, "bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754; *Stack*, 342 U.S. at 5 (stating that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment").[21] The evaluation of whether bail is "set at a sum greater than that necessary" to satisfy the government's interests,

include an Eighth Amendment challenge. Both concerned the government's detention of certain immigrants *without opportunity for release on bail*.

[21] Courts find bail amounts unconstitutionally excessive where lesser amounts or alternative conditions would prevent danger and mitigate flight risk. *See, e.g.*, *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (finding $500 bail excessive when defendant had no criminal history and was accused of minor violations); *Leisure*, 710 F.2d at 428 (finding bail of $1 million and $2 million cash was excessive and ordering release on lesser bond amounts and alternative conditions of supervision); *United States v. Beaman*, 631 F.2d 85, 86-87 (6th Cir. 1980) (finding $400,000 bond excessive and "should be . . . substantially less" based on "facts available in this case").

Salerno, 481 U.S. at 753-54, must take into account a detainee's ability to pay a bond and alternatives. The government's failure to provide such procedures violates Plaintiffs' Eighth Amendment rights.

E. The Immigration and Nationality Act Should Be Construed to Avoid the Above Constitutional Violations.

The District Court correctly held that Section 1226(a) is properly construed to require consideration of ability to pay and non-monetary alternatives. ER043. This is so for two reasons.

First, the plain language of Section 1226(a) permits immigration officials to order release on non-monetary conditions. 8 U.S.C. § 1226(a)(2) (providing for "release" on a "bond of at least $1,500 . . . *or* . . . conditional parole") (emphasis added); *see also Rivera*, 307 F.R.D. at 553 ("[Section] 1226(a) unambiguously states that an IJ may consider conditions for release beyond a monetary bond."). Indeed, this Court has *already* recognized that immigration officials have the authority to order release on alterative conditions under Section 1226(a). *See Rodriguez III*, 804 F.3d at 1088 (holding that immigration officials are "empowered to 'ameliorat[e] the conditions' by imposing a less restrictive means of supervision than detention").

Second, under the canon of constitutional avoidance, a statute must be construed to avoid serious constitutional problems where "'fairly possible.'" *Zadvydas*, 533 U.S. at 689 (citation omitted). The government does not dispute that Section 1226(a) is silent as to the factors that must be considered at custody

determinations. *See* 8 U.S.C. § 1226(a)(2). Thus, the statute can and should be construed to require an inquiry into ability to pay. Indeed, the government itself has recognized that Section 1226(a) can be construed to require immigration officials to consider ability to pay and release on alternative conditions of supervision: for certain families in immigration detention, DHS has instructed officers to "offer release with an appropriate monetary bond or other condition of release" and set "a family's bond amount at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety." *See* SER202 (Statement by Jeh C. Johnson on Family Residential Centers, June 24, 2014).

The District Court's construction of Section 1226(a) follows Supreme Court and Ninth Circuit precedent that has applied the avoidance canon to construe the immigration detention laws to require similar procedural protections. *See, e.g.*, *Zadvydas*, 533 U.S. at 689-90 (construing 8 U.S.C. § 1231(a)(6) to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States" because of the constitutional concerns posed by indefinite detention); *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (same); *Rodriguez III*, 804 F.3d at 1078, 1086-89 (construing immigration detention statutes to require a bond hearing at six months under Section 1226(a)); *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011) (construing Section 1231(a)(6) to require bond hearings for noncitizens detained for prolonged periods); *Casas*, 535 F.3d at 950

(construing Section 1226(a) to require bond hearings for noncitizens with a petition for review and stay of removal). As with the District Court's Order, these decisions interpret the immigration laws to require certain procedures because the underlying statutes are silent on what procedures apply.[22]

Outside the immigration context, courts (including this one) have applied the avoidance canon to construe statutes to require consideration of ability to pay and alternatives to money bail. *See Pugh*, 572 F.2d at 1057 (construing state bail statute to require consideration of alternatives to money bail because of due process and equal protection concerns); *United States v. Keith*, 754 F.2d 1388, 1391 (9th Cir. 1985) (construing federal statute to require courts and the Parole Commission to "find that alternative punishments to incarceration" are insufficient "before imprisoning an offender who has not complied with a restitution order but has made sufficient bona fide efforts to pay" due to constitutional concerns).[23]

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[22] *See also Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (construing deportation statute to require notice and a hearing due to constitutional concerns that would otherwise be present); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (same); *Woodby v. INS*, 385 U.S. 276 (1966) (construing immigration statutes to require a "clear, unequivocal and convincing" standard of proof for deportation hearings); *Jean v. Nelson*, 472 U.S. 846 (1985) (construing parole statute and regulations to prohibit discrimination based on race and national origin).

[23] The government cites to several decisions declining to apply constitutional avoidance, Br. 38-39, but the decisions involved unambiguous statutory language, weak constitutional claims, or both. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *United States v. Broncheau*, 645 F.3d 676, 686-87 (4th Cir. 2011). The government also cites to *Jean v. Nelson*, 472 U.S. at 854-55, Br. 40, but the Court there applied the

The government has no answer to this authority. Instead, it advances two different arguments against the District Court's interpretation of Section 1226(a). First, it claims that Section 1226(a) is unambiguous and forecloses reading the statute to require consideration of ability to pay and alternatives. Br. 40. Second, it claims that Section 1226(a) is ambiguous, but that the District Court erred by not deferring to the BIA's authoritative interpretation of the statute in *Matter of Guerra*. Br. 23. Each claim is without merit.

The government argues that 1996 Immigration Act amendments to Section 1226(a) foreclose reading the statute to require consideration of ability to pay. Specifically, the government asserts that Congress did not want ability to pay to be "dispositive" or the "primary factor" in determining the amount of an immigration bond because the 1996 Immigration Act increased the minimum bond from $500 to $1,500. Br. 34-35. But the District Court made clear that, under its interpretation of Section 1226(a), "an individual's ability to pay is not 'the dispositive factor' in bond determinations." ER044 n.29. Rather, it requires "only that the ability to pay must be considered in bond determinations." *Id*.

Moreover, nothing about Congress's decision to increase the statutory minimum bond amount indicates that it intended to bar consideration of ability to

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avoidance canon to construe the immigration laws, consistent with the District Court's Order. *See supra* n.23.

pay and alternatives. The government's main evidence for this argument, a 1996 House Conference report, offers no support for its position. Br. 36-37. Instead, the report shows that Congress's goal was to prevent officials from setting low bond amounts for the improper purpose of freeing up then-scarce bed space, irrespective of a detainee's level of flight risk. H.R. Rep. No. 104-469, 123-24 (1996) (expressing concern that INS set low bonds to free up "needed bed space" and "the INS is making a decision that the alien cannot be detained given its limited resources").

The government also asserts—in conflict with its claim that the statute is unambiguous—that this Court owes *Chevron* deference to the BIA's holding in *Matter of Guerra* that there are *no* mandatory factors that must be considered in custody determinations conducted under Section 1226(a). Br. 22. However, the Supreme Court and Ninth Circuit have made clear that courts owe no deference to an interpretation of a statute that would raise "grave constitutional doubts." *See Diouf*, 634 F.3d at, 1090 n.11 (explaining that the avoidance canon "applies at *Chevron* step one" as a means of determining congressional intent) (citing *Clark*, 543 U.S. at 382). Nor is there any danger that, as the government asserts, a future BIA decision may "trump" a construction of the statute by this Court under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *See* Br. 23. Because the avoidance canon applies at *Chevron* step one, a decision by this Court adopting Plaintiffs' construction would "leave[] no room for agency

discretion." *Brand X*, 545 U.S. at 982; *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815-16, 823 (9th Cir. 2016) (rejecting BIA's new interpretation of term "obstruction of justice" under *Chevron* step one because it raised serious constitutional concerns, notwithstanding *Brand X*).[24]

IV. PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE HARM, THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THEIR FAVOR, AND AN INJUNCTION IS IN THE PUBLIC INTEREST.

A. Plaintiffs Suffer Irreparable Harm From Their Detention.

As the District Court found, the Plaintiff class will suffer irreparable harm in the absence of a preliminary injunction. ER044-045. According to the government, as of December 2016, approximately 150 class members are detained pursuant to the government's unlawful policy and practice of detaining individuals without consideration of their ability to pay and alternative conditions of release. ECF No. 5-4 ¶ 5 (Declaration of Norma Bonales-Garibay in Support of Defendants' Emergency Motion for Stay of Injunction and Proceedings Pending Appeal) (hereinafter Bonales-Garibay Decl.). And it is undisputed that additional class members will be detained in the future, as the government continues to take

[24] The government cites, without explanation, Section 1225(b) and Section 1226(c) in support of its statutory arguments (Br. 38, 50), but neither statute is at issue in this case. The government also claims that the District Court's interpretation of Section 1226(a) "ignores the regulations covering bond" (Br. 40), but does not identify the regulations or explain the purported conflict.

noncitizens into custody under Section 1226(a) and put them into removal proceedings.

These individuals are currently being detained without consideration of their ability to pay bond or alternative conditions, in violation of their constitutional and statutory rights. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (same); *see also* 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948.1 (3d ed. 2017) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary.").

The injury to the Plaintiff class is all the more grave given that physical liberty is at stake. *See United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998) (the "unnecessary deprivation of liberty clearly constitutes irreparable harm"). "[I]mmigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors." *Rodriguez III*, 804 F.3d at 1073. The needless detention of individuals like Mr. Matias, who remained in immigration detention for more than four years due to his inability to pay his bond, indisputably causes them "major hardship." *Rodriguez II*, 715 F.3d at 1145; *Nat'l Ctr. for Immigrants Rights, Inc. v.*

I.N.S., 743 F.2d 1365, 1369 (9th Cir. 1984) ("The hardship from being unable to work to support themselves and their dependents, to obtain release bonds, and to pay for legal representation is beyond question."). In addition, as the government itself has acknowledged, detention has "many collateral consequences beyond the loss of liberty," like the failure to meet family obligations and the loss of employment opportunities. SER84. Such consequences carry "weighty mental and social burdens for the accused and for those closest to them." *Id*. These injuries amply establish the requisite harm.

The government's brief barely acknowledges the harm to the class members, and states only that "the class size is decreasing, in part, as [noncitizens] bond out" of detention, citing a declaration from a government official. Br. 27 (citing Bonales-Garibay Decl. ¶ 5). But this declaration does not explain *why* the class size has supposedly decreased, much less that this decrease was due to class members bonding out. As the government's declarant admits, the reduction could be due to the removal of class members, (Bonales-Garibay Decl. ¶¶ 5-7), or the result of transfers and other fluctuations in the detainee population in the Los Angeles area. And there is no evidence that this reduction was the result of IJs and ICE setting bonds that account for noncitizens' ability to pay.

Meanwhile, numerous class members—like Mr. Matias and Ms. Hernandez—face months and years of unnecessary detention because of the government's

unlawful bond-setting policies and practices. "There is no way to calculate the value of such a constitutional deprivation or the damages that result" from wrongly detaining such individuals. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998).

B. Any Harm to the Government Pales in Comparison to the Injury to the Plaintiff Class.

The government states that "[t]he harm to the government in implementing the Order would far outweigh any harm to Plaintiffs," Br. 25, but it offered no evidence to the district court supporting its claims of injury, *see* ER040 n.27, and proffers little more than bare allegations and hyperbole to this Court. As the District Court rightly found, the government's claims of injury are meritless. *Id*. at 40.

First, like its merits arguments, the government's claims that the preliminary injunction will "upend[]" custody determinations rely on a serious misreading of the District Court's Order. *See* Br. 25-27, 33-34. As explained above, the Plaintiff class is limited to individuals whom ICE or IJs have *already* determined are eligible for release; the only question, therefore, is what bond amounts to set and what conditions to impose. As to that determination, the preliminary injunction does not "dictate a one-size fits all approach" in making bond determinations or make ability to pay the "primary factor" in setting bonds, and does not compel ICE officers or IJs to reach any particular result in a given detainee's case. Br. 33-34. The Order simply imposes the modest requirement that ICE officers and IJs *consider* ability to pay and

alternatives when making bond determinations, in combination with any other factors that the decision-maker finds relevant.

Indeed, the government's own arguments and current practices underscore that the District Court's limited remedy will not "upend[]" the existing system. Br. 27. For one, the government insists that its officers and IJs *already* have "discretion" to consider ability to pay. Br. 35-36, 40-41. It cannot be unduly burdensome to require immigration officials to consider factors that they already have the discretion to consider. What is more, DHS has previously directed immigration officers to consider ability to pay and alternatives for certain families in detention. *See* SER202-203. That the government is *already* evaluating such factors in certain cases only highlights that the District Court's order can be implemented effectively without "upset[ting] the status quo" or "usurp[ing] the discretion and authority" bestowed on ICE and IJs to set bonds. Br. 25.

Second, the government makes the puzzling assertion that the Order "grant[s] unprecedented power to Plaintiffs' counsel." Br. 25. To do what, the government does not say, but this may refer to the Order's unremarkable requirement that the parties meet and confer on how immigration officials should implement the Order's requirements. *See* ER003-004. There is nothing unusual about parties meeting and conferring on the implementation of injunctive orders, and in any event Plaintiffs lack the power to compel the government to do anything. Any disputes concerning

the implementation of the preliminary injunction would be resolved by the District Court, not unilaterally by Plaintiffs' counsel.[25]

Third, the government greatly overstates the diversion of "time, resources, and personnel" the Order may cause. Br. 26. After submitting *no* evidence to the District Court on this point, on appeal the government proffers a short declaration from an ICE official with vague, conclusory statements that compliance with the Order "will be more time consuming" and that "[t]he guidance *may* require exceptions to the individual's Risk Classification Assessment." Bonales-Garibay Decl. ¶¶ 10-12 (emphasis added). These nebulous statements do not demonstrate any concrete harm to the government, much less harm that outweighs the injury to the Plaintiff class. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (government cannot demonstrate harm based on "assumptions and 'blithe assertion[s]'") (citation omitted).

In fact, implementation of the injunction will pose little burden. Rather than full-blown "mini-trials" on detainees' ability to pay (Br. 44), the Order merely

[25] *Heckler v. Lopez*, 463 U.S. 1328 (1983) (Rehnquist, J.) is inapposite. Br. 26. That decision stayed part of an injunction that would have required the government to redistribute monetary benefits to at least 34,000 class members, a remedy that dwarfs the District Court's relatively limited injunction in this case. *Heckler*, 463 U.S. at 1330, 1334. Moreover, *Heckler* relied heavily on its view that the plaintiffs had improperly circumvented certain mandatory exhaustion requirements. *Id.* at 1335-37. Here, exhaustion is only prudential and should be waived. *See supra* Argument I.B.; ER018-20.

requires immigration officials to conduct meaningful inquiries into their ability to pay and alternative conditions of release. Such inquiries would, at most, briefly extend the length of custody determinations. Moreover, nothing in the Order requires ICE officers and IJs to automatically credit a noncitizen's "claimed inability to pay," as the government suggests. Br. 44-45. IJs can evaluate a class member's ability to pay based on the evidence submitted and by assessing the credibility of his or her testimony, as IJs routinely do at bond and other hearings. *See, e.g.*, *Matter of V-T-S-*, 21 I. & N. Dec. 792, 796-97 (BIA 1997).

And while the Order requires the government to conduct new hearings for the 150 or so individuals whose bonds were set without the benefit of the Order's protections, that remedy pales in comparison to the harm of keeping indigent noncitizens locked up based on their poverty. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("'Faced with… a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly' in favor of the latter.") (citation omitted).

C. The Public Interest Favors an Injunction.

The public interest similarly weighs in favor of Plaintiffs. The preliminary injunction *advances* the public interest in several important ways. *First*, the public has a powerful concern with ensuring that the government fulfills its constitutional

obligations "because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). The public shares the same stake in ensuring that "federal statutes are construed and implemented in a manner that avoids serious constitutional questions." *Rodriguez II*, 715 F.3d at 1146.

Second, courts define "public interest" broadly and consider both the hardship to parties and non-parties to the litigation, as well as "the indirect hardship to their friends and family members." *Golden Gate Rest. Ass'n*, 512 F.3d at 1126. Many class members who are currently detained have family members who depend on them for income and support. *See, e.g.*, ER013-015. Preliminary relief would prevent the unlawful detention of numerous current and future class members and mitigate the harm that their families and communities would suffer.

Third, the requested relief will save the government resources by preventing costly and unnecessary detention. For instance, in FY2013 the average cost of detention per person per day (not including agency-wide overhead expenditures), was $158. *See* SER160 (report from Government Accountability Office ("GAO")). In contrast, the average daily cost of supervision for the government's alternatives program was a mere $10.55. *Id.*

In response, the government suggests that "implementation of the district court's injunction would . . . increase the number of aliens who fail to show up in immigration court," relying on a statistical report from the Executive Office for

Immigration Review ("EOIR"). Br. 37 (citing EOIR, *FY 2015 Statistical Yearbook* at P3, http://tinyurl.com/hjeqqf2). But a more thorough analysis of the government's own data concluded that in FY2015, *86 percent* of noncitizens who were released after an IJ bond hearing made their subsequent court appearances. *See* Transactional Records Access Clearinghouse ("TRAC"), *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, *available at*, http://trac.syr.edu/immigration/reports/438/. This rate represents a dramatic increase from previous years. *Id.*[26] What is more, the GAO reports that more than 95 percent of participants in ICE's "full-service" Alternatives to Detention program—which includes periodic office and home visits, monitoring, and case management services—appeared at their final scheduled removal hearings. SER172. The Order's requirement that immigration officials consider release on these highly effective programs will, if anything, increase rates of appearance over the current system that relies heavily on money bond.

[26] The TRAC report explains that the government's inflated nonappearance rates resulted from flaws in its method of determining who had failed to appear, as well as its baseless exclusion of a large group of cases from its denominator. *Id.* at footnote 7.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order granting a class-wide preliminary injunction.

Respectfully submitted,

ACLU OF SOUTHERN CALIFORNIA

Dated: March 1, 2017

s/ Michael Kaufman
MICHAEL KAUFMAN
Counsel for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioners-Appellees hereby state that they know of no other action previously filed or currently pending in this Court that is related to the herein action.

Dated: March 1, 2017

s/ Michael Kaufman
MICHAEL KAUFMAN
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,845 words.

Dated: March 1, 2017

s/ Michael Kaufman
MICHAEL KAUFMAN
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2017, I caused to be electronically filed the foregoing PLAINTIFFS-APPELLEES' ANSWERING BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michael Kaufman
MICHAEL KAUFMAN
Counsel for Plaintiffs-Appellees