

Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

YOLANY PADILLA, *et al.*,  
  
Plaintiffs-Petitioners,  
  
v.  
  
U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT, *et al.*,  
  
Defendants-Respondents.

Case No. 2:18-cv-00928-MJP

**PLAINTIFFS' MOTION FOR  
MODIFICATION OF THE EXISTING  
PRELIMINARY INJUNCTION**

Noted on Motion Calendar:  
June 14, 2019

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

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2 Plaintiffs Blanca Orantes and Baltazar Vasquez, on behalf of themselves and the certified  
3 Bond Hearing Class (together, “Plaintiffs”), move for modification of this Court’s preliminary  
4 injunction order, Dkt. 110, to enjoin the Attorney General’s recent decision in *Matter of M-S-*, 27  
5 I. & N. Dec. 509 (A.G. 2019). Plaintiffs ask this Court to preserve the most basic requirement of  
6 due process: a bond hearing before an impartial adjudicator to determine if their detention is  
7 justified. No other modification of the existing order is sought.

8 On April 16, 2019—approximately two weeks after the Court issued the preliminary  
9 injunction—the Attorney General issued *Matter of M-S-*, eliminating bond hearings for asylum  
10 seekers who, like Plaintiffs, entered the United States without inspection to seek protection and  
11 were initially placed in expedited removal proceedings but were referred for regular removal  
12 proceedings after being found by an immigration officer to have a credible fear of persecution or  
13 torture. If *Matter of M-S-* is permitted to go into effect, for the first time in nearly half a century  
14 asylum seekers who are present in the United States after having effected an entry will be locked  
15 up pending their removal proceedings—potentially for months or years—without ever receiving  
16 a bond hearing on whether their detention is justified.

17 The elimination of custody hearings for individuals who are present in the United States  
18 after having effected an entry violates the Due Process Clause of the U.S. Constitution. For more  
19 than a century, the Supreme Court has recognized that noncitizens who enter the United States—  
20 even unlawfully—are protected by due process. And for fifty years, the immigration courts have  
21 provided bond hearings to these individuals. The Attorney General’s decision in *Matter of M-S-*  
22 also violates the Administrative Procedure Act (APA) by invalidating the agency’s own bond  
23 hearing regulations without complying with the notice and comment requirement.

24 Modification of the preliminary injunction to enjoin *Matter of M-S-* is warranted to  
25 maintain the availability of bond hearings and protect the status quo. In the absence of immediate  
26 judicial intervention, Plaintiffs and members of the Bond Hearing Class will no longer be  
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1 entitled to bond hearings before a neutral adjudicator to determine if they pose a flight risk or  
2 danger to the community that justifies their continued civil detention. As a result, thousands of  
3 individuals with *bona fide* claims to asylum or other forms of protection face the prospect of  
4 months or years of imprisonment while their claims are adjudicated, even if they pose no flight  
5 risk or danger.

6 For Plaintiffs and members of the Bond Hearing Class, the stakes are enormous. As this  
7 Court has found, arbitrary imprisonment is an irreparable harm in itself, and one that takes a  
8 significant toll on detainees' medical and mental health. *See* Dkt. 110 at 15-16. This is  
9 particularly true for individuals like the Plaintiffs who have already experienced trauma. In  
10 addition, detention significantly impedes Plaintiffs' ability to successfully litigate their claims to  
11 protection, since most detainees are unable to obtain the assistance of counsel and therefore are  
12 forced to proceed *pro se*. *See id.* at 16.

13 Because Plaintiffs are likely to succeed on the merits of their due process and APA  
14 claims, will suffer irreparable injury from the discontinuation of bond hearings, and satisfy all  
15 other requirements for injunctive relief, this Court should maintain its preliminary injunction but  
16 modify it to enjoin *Matter of M-S-* to expressly safeguard Plaintiffs' right to individualized bond  
17 hearings.

## 18 BACKGROUND

### 19 I. Legal Framework Governing the Detention of Individuals Who Have Entered the 20 United States and Are Placed in Removal Proceedings

21 For nearly half a century, consistent with Supreme Court precedent, the law has afforded  
22 bond hearings to individuals placed in deportation proceedings after having entered the United  
23 States—including those who entered without inspection (also referred to as “EWIs”). *See*  
24 *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (establishing that noncitizens who enter the  
25 United States, even unlawfully, are protected by due process).

26 Until 1996, the Immigration and Nationality Act (INA) provided for two types of  
27 removal proceedings: “deportation” proceedings for those individuals who had entered the

1 United States (including EWIs), and “exclusion” proceedings for those individuals who were  
2 apprehended at the border before effectuating an entry. *See Judulang v. Holder*, 565 U.S. 42, 45-  
3 46 (2011); 5 Charles Gordon, et al., *Immigration Law and Procedure* § 63.01 (2019). The statute  
4 governing deportation proceedings provided for discretionary release on bond, and the  
5 implementing regulations provided for review of the agency’s decision to detain at a hearing  
6 before an immigration judge (IJ). *See* 8 U.S.C. § 1252(a)(1) (1994); 8 C.F.R. §§ 242.2(d), 3.19  
7 (1994).<sup>1</sup> In contrast, individuals placed in exclusion proceedings were not entitled to an IJ bond  
8 hearing; their only option for release was a “parole” review by the Attorney General. *See* 8  
9 U.S.C. §§ 1182(d)(5), 1225(b) (1994); 8 C.F.R. §§ 212.5(a), 235.3(b) (1994).

10 Congress enacted major changes to the immigration statute in 1996, replacing  
11 “exclusion” and “deportation” proceedings with a single “removal” proceeding. *See* 8 U.S.C. §  
12 1229. However, the detention scheme remained essentially the same. As before, noncitizens who  
13 had entered the United States, including EWIs, were generally entitled to bond hearings, while  
14 noncitizens apprehended at the border before effectuating an entry were limited to seeking  
15 release on parole. *See* 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1) (providing in general for IJ review of  
16 custody determinations pending removal proceedings); *id.* §§ 1003.19(h)(2)(i)(B), 1236.1(c)(11)  
17 (barring IJs from reviewing custody of “arriving” noncitizens stopped at border and certain  
18 others suspected of terrorism or charged with removability on criminal grounds, but not EWIs).  
19 Formerly classified as “excludable,” individuals stopped at the border are now classified as  
20 “arriving.” 8 C.F.R. § 1.2 (defining “arriving [noncitizen]” *inter alia*, as “an applicant for  
21 admission coming or attempting to come into the United States at a port-of-entry”); *see also* 8  
22 C.F.R. § 1235.3(c) (limiting noncitizens stopped at border to seeking release on parole).

23  
24 <sup>1</sup> The government first provided bond hearings before special inquiry officers in 1969. *See* 34  
25 Fed. Reg. 8037 (May 22, 1969). It later replaced special inquiry officers with immigration judges  
26 in 1973. *See* 38 Fed. Reg. 8590 (Apr. 4, 1973) (amending 8 C.F.R. § 1.1 to define “immigration  
27 judge” as interchangeable with “special inquiry officer”); *see also* 48 Fed. Reg. 8038 (Feb. 25,  
1983) (establishing the Executive Office for Immigration Review).

1 The creation of expedited removal in the 1996 amendments did not disrupt the well-  
2 settled entitlement of those who had already entered to bond hearings. *See* 8 U.S.C. § 1225(b)(1).  
3 Congress applied the expedited removal process to certain noncitizens apprehended at the border  
4 without proper documents, 8 U.S.C. § 1225(b)(1)(A)(i), but authorized the Attorney General to  
5 expand the expedited removal provisions to certain persons who are apprehended inside the  
6 country and cannot demonstrate that they have been present for a continuous two-year period. 8  
7 U.S.C. § 1225(b)(1)(A)(iii). In all cases, Congress protected the right to a fair adjudication of  
8 *bona fide* asylum claims: individuals in expedited removal who express a fear of persecution and  
9 pass a credible fear interview are referred for regular removal proceedings before an IJ to  
10 consider their asylum claim. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(ii); 8 C.F.R. §§  
11 208.30(f), 1235.6(a)(ii), (iii).

12 Even when the government began applying these new “expedited removal” proceedings  
13 to EWIs in 2004, 69 Fed. Reg. 48,877-01 (Aug. 11, 2004), regulations provided that those  
14 persons referred for regular removal proceedings after entering the United States without  
15 inspection and then passing a credible fear screening were entitled to IJ bond hearings. *See*  
16 *Matter of X-K-*, 23 I. & N. Dec. 731, 732, 734-35 (BIA 2005) (reading 8 C.F.R. §§  
17 1003.19(h)(2), 1236.1(c)(11), (d), as clearly authorizing bond hearings for such individuals).

## 18 **II. *Matter of M-S-***

19 The Attorney General’s decision in *Matter of M-S-* purports to eliminate the right to a  
20 bond hearing for all asylum seekers who entered without inspection and subsequently  
21 demonstrated a credible fear of persecution or torture. If permitted to take effect, these  
22 individuals will be denied the basic due process of a bond hearing for the first time since bond  
23 hearings were implemented fifty years ago.

24 In *Matter of M-S-*, the Attorney General reversed *Matter of X-K*, in which the Board of  
25 Immigration Appeals (BIA) held that EWIs who are referred to regular removal proceedings  
26 after having initially been placed in expedited removal are entitled to bond hearings under the  
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1 regulations. 27 I. & N. Dec. at 509-10. Citing the Supreme Court's decision in *Jennings v.*  
2 *Rodriguez*, 138 S. Ct. 830 (2018), the Attorney General held that when individuals who are  
3 initially placed in expedited removal are referred for full removal proceedings before an IJ, their  
4 detention continues to be governed by the expedited removal detention provision, 8 U.S.C. §  
5 1225(b)(1)(B)(ii), and not 8 U.S.C. § 1226, the statute that generally governs detention pending  
6 regular removal proceedings. *Matter of M-S-*, 27 I. & N. Dec. at 515-17 (citing *Jennings*, 138 S.  
7 Ct. at 839, 844-45). Moreover, the Attorney General held that the expedited removal detention  
8 provision, 8 U.S.C. § 1225(b)(1)(B)(ii), permits release in only one circumstance: under a  
9 discretionary grant of parole by the Secretary of Homeland Security. *Matter of M-S-*, 27 I. & N.  
10 Dec. at 516-17 (citing *Jennings*, 138 S. Ct. at 844, and 8 U.S.C. § 1182(d)(5)). Thus, the  
11 Attorney General concluded that the bond hearing regulations that the Board relied upon in  
12 *Matter of X-K* cannot authorize bond hearings for individuals initially placed in expedited  
13 removal without violating the detention statute. *Id.* at 518.

14         The result of *Matter of M-S-* is that thousands of individuals who are pursuing *bona fide*  
15 claims for protection in regular removal proceedings will be detained for months and sometimes  
16 years without ever receiving a bond hearing simply because they were initially placed into  
17 expedited removal proceedings. In Fiscal Year 2017 alone, more than 42,000 such individuals  
18 were entitled to bond hearings. *See* U.S. Citizenship and Immigration Services, Credible Fear  
19 Workload Report Summary, FY2017 Inland Caseload (Apr. 24, 2018), [https://www.uscis.gov/  
20 sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_FY17\\_CRFand  
21 RFstatsThru09302017.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CRFandRFstatsThru09302017.pdf). By Plaintiffs' estimate, half of such individuals who are detained are  
22 found by an IJ to pose no flight risk or danger to the community and granted release on bond.  
23 Declaration of David Hausman (Hausman Decl.) ¶ 9; *see also* Transactional Records Access  
24 Clearinghouse (TRAC) Immigration, *Three-fold Difference in Immigration Bond Amounts by  
25 Court Location*, Tbl. 2 (Jul. 2, 2018), <http://trac.syr.edu/immigration/reports/519/> (showing that  
26 47.1% of IJ bond decisions in the first 8 months of FY2018 granted release on bond).

**ARGUMENT**

1  
2 Plaintiffs ask this Court to modify the existing preliminary injunction to expressly enjoin  
3 *Matter of M-S-* and specifically require that Defendants continue to provide bond hearings. The  
4 party moving for a preliminary injunction must show: (1) a likelihood of success on the merits,  
5 (2) irreparable harm absent injunctive relief, (3) that the balance of equities favors injunctive  
6 relief, and (4) that an injunction serves the public interest. *Winter v. Natural Res. Def. Council,*  
7 *Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit uses a “sliding scale,” approach, such that where  
8 the balance of hardships tips strongly in the movant’s favor, she need only show that her claims  
9 raise “serious questions going to the merits” and that the other two elements are met. *See, e.g.,*  
10 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

11 Because Defendants must follow the Constitution and maintain the status quo—that is,  
12 continue to provide individualized bond hearings—Plaintiffs merit a prohibitory injunction. *See*  
13 *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (noting that an injunction that  
14 “prevents future constitutional violations” is “a classic form of prohibitory injunction”).  
15 Plaintiffs can demonstrate not only serious questions going to the merits, but a likelihood of  
16 success on those merits, satisfying both the “sliding scale” and traditional inquiries.

17 This Court retains inherent authority to modify a preliminary injunction order based on  
18 changed circumstances, including a change in law. *Sys. Fed’n No. 91 v. Wright*, 364 U.S. 642,  
19 647 (1961). “A party seeking modification . . . of an injunction bears the burden of establishing  
20 that a significant change in facts or law warrants revision . . . of the injunction.” *Sharp v. Weston*,  
21 233 F.3d 1166, 1170 (9th Cir. 2000).

22 **I. Plaintiffs Likely Will Succeed on the Merits.**

23 **A. *Matter of M-S-* Violates Plaintiffs’ Rights to Due Process.**

24 *Matter of M-S-*’s elimination of bond hearings violates Plaintiffs’ substantive and  
25 procedural due process rights. As this Court has recognized, because Plaintiffs all have entered  
26 the country, they are entitled to due process protections under longstanding Supreme Court and  
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1 Ninth Circuit precedent. *See* Dkt. 91 at 9-10; Dkt. 110 at 6-7 (citing *United States v. Raya-Vaca*,  
2 771 F.3d 1995, 1202 (9th Cir. 2014)); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)  
3 (“[O]nce [a noncitizen] enters the country, the legal circumstance changes, for the Due Process  
4 Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their  
5 presence here is lawful, unlawful, temporary, or permanent.”); *Mathews v. Diaz*, 426 U.S. 67, 77  
6 (1976) (due process protects every person within the United States, “[e]ven one whose presence  
7 in this country is unlawful, involuntary, or transitory”); *Thuraissigiam v. U.S. Dep’t of Homeland*  
8 *Sec.*, 917 F.3d 1097, 1112 n.15 (9th Cir. 2018) (“[P]resence matters to due process.”); *Bayo v.*  
9 *Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010) (en banc) (explaining that, once the noncitizen  
10 “crossed the border,” he “became entitled to certain constitutional rights, including the right to  
11 due process”); *Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008) (similar); *Kim Ho Ma v.*  
12 *Ashcroft*, 257 F.3d 1095, 1108 (9th Cir. 2001) (“[O]nce [a noncitizen] has ‘entered’ U.S.  
13 territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment  
14 rights.”).

15 This principle applies regardless of how long individuals have been present or the nature  
16 of their entry to the United States. Indeed, the Ninth Circuit has routinely applied this rule to  
17 noncitizens who only recently entered the country. *See, e.g., Flores-Chavez v. Ashcroft*, 362 F.3d  
18 1150, 1153, 1160-62 (9th Cir. 2004) (due process for noncitizen apprehended same day as  
19 unlawful entry); *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (requiring due process for  
20 child found alone in international airport); *Padilla-Agustin v. INS*, 21 F.3d 970, 972, 974-77 (9th  
21 Cir. 1994) (requiring due process for noncitizen apprehended shortly after crossing border),  
22 *abrogated on other grounds by Stone v. INS*, 514 U.S. 386 (1995) (same); *Reyes-Palacios v. INS*,  
23 836 F.2d 1154, 1155-56 (9th Cir. 1988) (same); *Rios-Berrios v. INS*, 776 F.2d 859, 860, 863 (9th  
24 Cir. 1985) (same).

25 Significantly, the government has repeatedly acknowledged in prior cases that  
26 noncitizens who have entered the country unlawfully, even for very brief periods of time, have  
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1 due process rights. For example, at oral argument before the Supreme Court in *Clark v.*  
 2 *Martinez*, the Court specifically asked the Deputy Solicitor General for the position of the United  
 3 States on the procedural due process rights of unlawful entrants apprehended after crossing the  
 4 border:

5 JUSTICE BREYER: A person who runs in illegally, a person who crosses  
 6 the border illegally, say, from Mexico is entitled to these rights when you  
 catch him.

7 [Government Counsel]: He’s entitled to procedural due process rights.

8 Transcript of Oral Argument at 25, *Clark v. Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-  
 9 7434).

10 Moreover, as a practical matter, expedited removal does not apply only to individuals  
 11 who recently entered the country. As the BIA has recognized, some individuals “may have been  
 12 living, working, and raising a family in the United States for many years, but were either absent  
 13 for some part of the 14 days preceding their apprehension by the [Department of Homeland  
 14 Security (“DHS”)] or were unable to provide adequate evidence to prove their continuous  
 15 physical presence for that period.” *Matter of X-K-*, 23 I. & N. Dec. at 736. And indeed, although  
 16 it would raise serious due process concerns to do so, the statute purports to allow the agency to  
 17 expand expedited removal to individuals who have been living in the United States for up to two  
 18 years. 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

19 **1. Substantive Due Process Requires an Individualized Hearing Before a**  
 20 **Neutral Decision-maker on Flight Risk and Danger to the Community.**

21 “Freedom from imprisonment—from government custody, detention, or other forms of  
 22 physical restraint—lies at the heart of the liberty” protected by the Due Process Clause.  
 23 *Zadvydas*, 533 U.S. at 690. The Supreme Court in *Zadvydas* affirmed the due process  
 24 requirement that immigration detention, like all civil detention, is justified only where “a special  
 25 justification . . . outweighs the ‘individual’s constitutionally protected interest in avoiding  
 26 physical restraint.’” *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)); *see also*  
 27 *United States v. Salerno*, 481 U.S. 739, 747 (1987) (substantive due process prohibits detention

1 that is “excessive in relation to [the government’s] regulatory goal”). The purpose of  
2 immigration detention is to effectuate removal, and to protect against danger and flight risk  
3 during that process. *Zadvydas*, 533 U.S. at 690-91. Immigration detention violates due process  
4 unless it is reasonably related to these legitimate purposes. *Id.* at 690; *see also Hernandez*, 872  
5 F.3d at 990. Moreover, detention must be accompanied by adequate procedural safeguards to  
6 ensure that those purposes are served. *Zadvydas*, 533 U.S. at 690-91; *see also Hernandez*, 872  
7 F.3d at 990.

8 Defendants’ elimination of bond hearings means that the only procedure available to  
9 Plaintiffs to challenge their detention is a discretionary parole determination made by a DHS  
10 officer. However, with only one exception—*Demore v. Kim*, 538 U.S. 510 (2003), a case which  
11 is clearly distinguishable, *see infra* pp. 10-11—the Supreme Court has never upheld civil  
12 detention as constitutional without an individualized hearing before a neutral decision-maker, to  
13 ensure that the person’s imprisonment is actually serving the government’s goals. *See, e.g.*,  
14 *Salerno*, 481 U.S. at 750 (upholding pretrial detention where Congress provided “a full-blown  
15 adversary hearing” on dangerousness, where the government bears the burden of proof by clear  
16 and convincing evidence); *Hendricks*, 521 U.S. at 357-58 (upholding civil commitment when  
17 there are “proper procedures and evidentiary standards,” including an individualized hearing on  
18 dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual’s entitlement to  
19 “constitutionally adequate procedures to establish the grounds for his confinement”); *Schall v.*  
20 *Martin*, 467 U.S. 253, 277, 279-81 (1984) (upholding detention pending a juvenile delinquency  
21 determination where the government proves dangerousness in a fair adversarial hearing with  
22 notice and counsel).

23 Indeed, the Supreme Court has required individualized hearings for far lesser interests,  
24 including for criminals facing revocation of parole (despite their having already been sentenced  
25 to the full term of their confinement), *see Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972), and  
26 even for property deprivations, *see, e.g., Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to  
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1 provide in-person hearing prior to termination of welfare benefits was “fatal to the constitutional  
2 adequacy of the procedures”); *Califano v. Yamasaki*, 442 U.S. 682, 696-97 (1979) (in-person  
3 hearing required for recovery of excess Social Security payments); *see also Zadvydas*, 533 U.S.  
4 at 692 (criticizing the administrative custody reviews in that case and noting that “[t]he  
5 Constitution demands greater procedural protection even for property”).

6         Although the Supreme Court upheld immigration detention without a hearing in *Demore*  
7 *v. Kim*, that case is clearly distinguishable. First, the statute in *Demore* imposed mandatory  
8 detention on a subset of noncitizens who had committed an enumerated list of crimes, based on  
9 Congress’s determination that they posed a categorical bail risk. *See* 8 U.S.C. § 1226(c). The  
10 Court emphasized that this “narrow detention policy” was reasonably related to the government’s  
11 purpose of effectuating removal and protecting public safety. 538 U.S. at 526-28. By contrast,  
12 the detention statute here applies broadly to individuals with no criminal records and who all  
13 have been found to have *bona fide* claims to protection in the United States. *Cf. Zadvydas*, 533  
14 U.S. at 691 (stating that the government’s indefinite detention policy raised due process concerns  
15 because the detention statute did “not apply narrowly to ‘a small segment of particularly  
16 dangerous individuals,’ . . . but broadly to [noncitizens] ordered removed for many and various  
17 reasons, including tourist visa violations” (quoting *Hendricks*, 521 U.S. at 368)).

18         Second, in reaching its conclusion, the Court in *Demore* placed great reliance on the  
19 voluminous record before Congress, which showed that the population of “criminal aliens”  
20 targeted by the mandatory detention statute posed a heightened categorical risk of flight and  
21 danger to the community. *See* 538 U.S. at 518-21 (citing studies and congressional findings  
22 regarding the “wholesale failure by the INS to deal with increasing rates of criminal activity by  
23 [noncitizens]”). In contrast, Congress made no such findings regarding the population at issue  
24 here—that is, individuals who have all been screened by DHS and found to have a credible fear  
25 of persecution or torture. Indeed, Congress instead permitted their release from custody. *See*  
26 8 U.S.C. § 1182(d)(5).

1 Third, the Supreme Court placed great emphasis on what it understood to be the brief  
2 period of time that mandatory detention typically lasts. *See id.* at 529 (noting that mandatory  
3 detention lasts about 45 days in 85% of cases and about 5 months for those 15% of cases where  
4 individuals seeks appeal to BIA). In contrast, asylum seekers can expect to spend a median time  
5 of nearly six months for their protection claims to be adjudicated before the IJ and nearly a year  
6 in cases involving an appeal to the BIA, *see* Hausman Decl. ¶ 8, along with any additional  
7 needed time for judicial review.

8 Under *Matter of M-S-*, Plaintiffs would only qualify for release on parole. *See* 27 I. & N.  
9 Dec. at 516-18. However, parole reviews are not an adequate substitute for an individualized  
10 hearing. In contrast to a bond hearing before an IJ, the parole process consists merely of a  
11 custody review conducted by low-level Immigration and Customs Enforcement (ICE) detention  
12 officers. *See* 8 C.F.R. § 212.5. It includes no hearing before a neutral decision maker, no record  
13 of any kind, and no possibility for appeal. *See id.* Instead, ICE officers make parole decisions—  
14 that can result in months or years of additional incarceration—by merely checking a box on a  
15 form that contains no factual findings, no specific explanation, and no evidence of deliberation.  
16 *See, e.g., Abdi v. Duke*, 280 F. Supp. 3d 373, 404 (W.D.N.Y. 2017); *Damus v. Nielsen*, 313 F.  
17 Supp. 3d 317, 324-25, 341 (D.D.C. 2018). As the Supreme Court recognized in *Zadvydas*, “the  
18 Constitution may well preclude granting an administrative body the unreviewable authority to  
19 make determinations implicating fundamental rights.” 533 U.S. at 692 (internal quotation marks  
20 omitted); *see also Morrissey*, 408 U.S. at 486-87 (requiring a neutral decision-maker for parole  
21 revocation hearings); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (due process  
22 is not satisfied by parole reviews, but requires an “impartial adjudicator” to review detention  
23 since, “[d]ue to political and community pressure, the INS, an executive agency, has every  
24 incentive to continue to detain [certain noncitizens]”); *accord Cruz-Taveras v. McElroy*, No. 96  
25 CIV 5068, 1996 WL 455012, at \*6-7 (S.D.N.Y. Aug. 13, 1996); *Thomas v. McElroy*, No. 96 Civ  
26 5065, 1996 WL 487953, at \*3 (S.D.N.Y. Aug. 27, 1996).

1 In addition, parole reviews fail to provide due process in practice. Government data and  
2 reports from service providers confirm that, under the Trump administration, the parole process  
3 has been largely eviscerated, and ICE uses the parole process to rubberstamp asylum seekers'  
4 arbitrary detention. For example, in *Damus v. Nielsen*, government statistics showed that from  
5 February to September 2017, three of the defendant ICE Field Offices *denied 100% of parole*  
6 *applications*, and the two other defendant Field Offices *denied 92% and 98% of applications*—  
7 despite the fact that (1) only a few years ago, those same Field Offices *granted* more than 90% of  
8 parole applications, and (2) there has been no change in the types of individuals seeking asylum  
9 in the United States. *Damus*, 313 F. Supp. 3d at 339-40. These blanket parole denials contrast  
10 starkly with bond hearings, where IJs routinely release asylum seekers from detention upon  
11 finding that they pose no flight risk or danger to the community. *See* Hausman Decl. ¶ 9.

12 This data has been confirmed by the courts. For example, the court in *Damus* cited  
13 evidence of ICE officers informing immigration attorneys that “there is no more parole” and that  
14 the agency is “not granting parole.” *Damus*, 313 F. Supp. 3d at 340 (internal quotation marks and  
15 citations omitted). Indeed, the government’s own submissions revealed that ICE was providing  
16 sham parole reviews. *See, e.g., id.* at 341 (citing example of plaintiff denied parole due solely to  
17 her status as a “recent entrant” to the U.S., despite the fact this characteristic applies  
18 categorically to asylum seekers who pass a credible fear screening); *id.* (citing plaintiffs who  
19 “received letters advising them of the right to apply for parole only one day prior to receiving  
20 nearly identical boilerplate letters informing them of parole denial”); *id.* (citing asylum seekers  
21 who were never provided a parole interview by ICE, as required by ICE’s own parole directive);  
22 *id.* (finding that ICE’s “summary and often boilerplate” parole denials failed to show  
23 individualized parole determinations). *See also Abdi*, 280 F. Supp. 3d at 404-05 (citing evidence  
24 that asylum seekers were “never provided with any paperwork explaining how to seek parole”  
25 and were “denied multiple requests for parole via perfunctory form denials”); Human Rights  
26 First, *Judge and Jailer: Asylum Seekers Denied Parole in Wake of Trump Executive Order 1*, 11-

1 15 (Sept. 2017), [https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-](https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf)  
2 report.pdf (citing arbitrary parole denials).

3 In sum, parole reviews do not provide the process that Plaintiffs and class members are  
4 due. Instead, substantive due process requires that Plaintiffs receive an individualized bond  
5 hearing, before a neutral decision-maker, to determine if their detention is justified.

## 6 **2. Procedural Due Process Requires an Individualized Bond Hearing.**

7 For many of the same reasons, procedural due process likewise requires individualized  
8 bond hearings before an IJ. In assessing the sufficiency of the government’s custody review  
9 procedures, this Court must consider three factors:

10 First, the private interest that will be affected by the official action; second,  
11 the risk of an erroneous deprivation of such interest through the procedures  
12 used, and the probable value, if any, of additional or substitute procedural  
13 safeguards; and finally, the Government’s interest, including the function  
involved and the fiscal and administrative burdens that the additional or  
substitute procedural requirement would entail.

14 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

15 Parole reviews do not provide due process under a *Mathews* analysis. First, Plaintiffs  
16 have a profound interest in preventing their arbitrary detention. *See Zadvydas*, 533 U.S. at 690  
17 (“Freedom from imprisonment . . . lies at the heart of the liberty” protected by the Due Process  
18 Clause); *see also Hernandez*, 872 F.3d at 993; Dkt. 110 at 6; *supra* Section I.A.

19 Second, the parole process creates an unacceptable risk of the erroneous deprivation of  
20 Plaintiffs’ liberty. As set forth above, the parole process permits low-level ICE officers to  
21 authorize months or even years of incarceration by checking a box on a form that contains no  
22 factual findings, no specific explanation, and no evidence of deliberation. *See supra* Section  
23 I.A.1. Indeed, as several courts have found, ICE is no longer providing individualized reviews of  
24 flight risk and danger, but instead using the parole process to rubberstamp arbitrary detention.  
25 *See Damus*, 313 F. Supp. 3d at 339-43; *Abdi*, 280 F. Supp. 3d at 403-10; *Aracely R. v. Nielsen*,  
26 319 F. Supp. 3d 110, 145-57 (D.D.C. 2018). In contrast, bond hearings provide a critical check  
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1 on arbitrary detention. For example, nearly half of the individuals who entered without  
2 inspection, applied for asylum or other protection, and sought a bond hearing were found by an  
3 IJ to pose no flight risk or danger to the community and granted release on bond. Hausman Decl.  
4 ¶ 9; *see also* TRAC Immigration, *Three-fold Difference in Immigration Bond Amounts by Court*  
5 *Location*, Tbl. 2 (July 2, 2018), <http://trac.syr.edu/immigration/reports/519/> (47.1% of  
6 immigration court bond decisions in the first 8 months of FY2018 granted release on bond).

7 Finally, the government lacks any countervailing interest in denying Plaintiffs' bond  
8 hearings. The government has no legitimate interest in detaining individuals who pose no flight  
9 risk or danger to the community. *See* Dkt. 110 at 15; *Hernandez*, 872 F.3d at 994. Thus,  
10 administrative cost is the only possible factor that could weigh against providing bond hearings.  
11 *See id.* Yet the government has provided bond hearings to asylum seekers initially placed in  
12 expedited removal proceedings pursuant to *Matter of X-K-* for more than a decade, and more  
13 generally to noncitizens who have entered the U.S. for nearly the past 50 years. The government  
14 cannot seriously argue that providing bond hearings it has provided for years imposes excessive  
15 burdens on the agency. Indeed, the government itself has an interest in maintaining bond  
16 hearings and ensuring accurate custody determinations. *See Matter of X-K-*, 23 I. & N. Dec. at  
17 736 (explaining that "some [noncitizens] may demonstrate to the Immigration Judge a strong  
18 likelihood that they will be granted relief from removal and thus have great incentive to appear  
19 for further hearings"). This is particularly true given that the government already has determined  
20 that Plaintiffs and class members have *bona fide* protection claims, which gives them the right to  
21 remain in the United States while their applications for protection are considered in immigration  
22 proceedings. *See* H.R. Rep. No. 104-469, pt.1, at 158 (1996) ("If the [noncitizen] meets [the  
23 credible fear] threshold, the [noncitizen] is permitted to remain in the United States to receive a full  
24 adjudication of the asylum claim . . .").

**B. *Matter of M-S*- Violates the APA.**

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Finally, the Attorney General's invalidation, without notice and comment, of the regulations governing bond hearings violates the rulemaking requirements of the APA. The APA expressly requires notice and an opportunity to comment prior to agency decisions to amend or repeal a rule. Section 551(5) defines "rule making" to mean "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (emphasis added). The APA requires that notice of proposed rulemaking shall be published in the Federal Register; that there be at least a 30-day period between notice and effective date; and that interested persons be given an opportunity to participate. 5 U.S.C. § 553(b)-(d).

As the BIA explained in *Matter of X-K*-, the existing regulations entitle Plaintiffs to bond hearings. *See* 23 I. & N. Dec. at 731-32, 734-35. Specifically, the regulations give IJs general authority to hold bond hearings for individuals in removal proceedings, at any time prior to the entry of a final order of removal, except for specifically excluded classes of noncitizens.

8 C.F.R. § 1236.1(d) provides that:

Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter.

*Id.*

8 C.F.R. § 1003.19(h)(2)(i), in turn, excludes specific classes of individuals from the immigration judge's general custody jurisdiction. The regulation provides that:

an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

- (A) Aliens in exclusion proceedings;
- (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;
- (C) Aliens described in section 237(a)(4) of the Act;
- (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act . . . and

1 (E) Aliens in deportation proceedings subject to section 242(a)(2) of the  
Act (as in effect prior to April 1, 1997 . . . ).

2 *Id.* Critically, this list of exclusions does *not* include Plaintiffs—namely, persons who entered  
3 without inspection and who were initially subject to expedited removal but passed a credible or  
4 reasonable fear screening and were placed in removal proceedings.

5 The regulatory history reinforces the plain meaning of § 1003.19(h)(2)(i). The regulation  
6 the agency initially proposed in 1997 *eliminated* IJ jurisdiction over bond hearings for EWIs. *See*  
7 62 Fed. Reg. 444, 483 (Jan. 3, 1997) (providing that that “an immigration judge may not exercise  
8 authority” over bond for “inadmissible aliens in removal proceedings,” including EWIs).  
9 However, the agency *deleted* that language from the final rule, thereby maintaining IJ bond  
10 jurisdiction over EWIs. *See* 8 C.F.R. § 1003.19(h)(2)(i).<sup>2</sup>

11 The Attorney General’s contrary reading of the regulations in *Matter of M-S-* lacks merit.  
12 The Attorney General cites 8 C.F.R. § 208.30(f)’s statement that “parole” of an individual who  
13 establishes a credible fear of persecution “may be considered only in accordance with section  
14 212(d)(5) of the Act and [8 C.F.R.] § 212.5.” 8 C.F.R. § 208.30(f). But as the Attorney General  
15 himself acknowledges, that regulation is *silent* on whether such an individual is eligible for a  
16 bond hearing. *See Matter of M-S-*, 27 I. & N. Dec. at 518. Moreover, the agency had previously  
17 recognized that, as “applicants for admission,” EWIs were eligible to seek release on either  
18 parole *or* bond. *See* Paul W. Virtue, Memorandum on Authority to Parole Applicants For  
19 Admission Who Are Not Also Arriving Aliens, Legal Op. No. 98-10 (INS), 1998 WL 1806685,  
20 at \*2 (Aug. 21, 1998).

21 The Attorney General also cites a 2004 Federal Register notice that purports to deem  
22 EWIs who establish a credible fear ineligible for bond hearings. *Matter of M-S-*, 27 I. & N. Dec.  
23 at 518 (citing 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004)). But the notice fails to acknowledge  
24 the regulation rendering EWIs eligible for bond hearings, 8 C.F.R. § 1003.19(h)(2)(i), which the  
25 BIA subsequently applied in *Matter of X-K-*.

26 \_\_\_\_\_  
27 <sup>2</sup> *See also* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 No. 5 Interpreter  
Releases 209, 215 (Feb. 3, 1997) (discussing regulatory history).

1 Furthermore, even assuming that the regulations are not compatible with the statute, that  
2 does not entitle the agency to effectively rewrite the regulations without complying with the  
3 required rulemaking procedures. *Matter of M-S-* effectively modifies the regulations to exclude  
4 an additional class of individuals from the IJ’s custody jurisdiction—EWIs who are in regular  
5 removal proceedings after having been initially placed in expedited removal. But the only legal  
6 process to substantively amend a rule is through notice and comment rulemaking. *See Perez v.*  
7 *Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (explaining that the APA “mandates that  
8 agencies use the same procedures when they amend or repeal a rule as they used to issue the rule  
9 in the first instance”).

10 Nor can the government somehow waive its rulemaking obligations by claiming that the  
11 regulations were void *ab initio*. As the D.C. Circuit has explained:

12 The . . . argument that notice and comment requirements do not apply to  
13 “defectively promulgated regulations” is untenable because it would permit  
14 an agency to circumvent the requirements of § 553 merely by confessing  
15 that the regulations were defective in some respect and asserting that  
modification or repeal without notice and comment was necessary to correct  
the situation.

16 *Consumer Energy Council v. Federal Energy Regulatory Comm’n*, 673 F.2d 425, 447 n.79 (D.C.  
17 Cir. 1982). *See also Nat’l Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 371-72  
18 (D.D.C. 1985) (“It would significantly erode the usefulness of the APA if agencies were  
19 permitted unilaterally to repeal regulations dealing with the substantive rights of individuals  
20 under federal statutes, by declaring that the earlier regulations were just a mistake.”).

21 Moreover, rulemaking here would serve a useful purpose. In deciding *Jennings*, the  
22 Supreme Court expressly declined to consider the due process implications of its ruling. *See* 138  
23 S. Ct. at 851 (limiting its holding to statutory questions and remanding to court of appeals to  
24 address the constitutional issues). Although the Court held that the detention statute, 8 U.S.C. §  
25 1225(b)(1), permits only release on parole under § 1182(d)(5), *Jennings*, 138 S. Ct. at 844, it did  
26 not consider what kind of parole process was required under those statutes, especially in light of  
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1 the serious constitutional problems that are raised by detaining Plaintiffs and class members  
2 without bond hearings. *See supra*, Section I.A. A rulemaking process would give the public the  
3 opportunity to propose, and the agency the opportunity to consider, alternative ways of  
4 implementing the parole authority to potentially ameliorate these constitutional problems. *Cf.* 66  
5 Fed. Reg. 56,967, 56,968 (Nov. 14, 2001) (amending the custody review process for individuals  
6 detained after receiving a final order of removal in light of constitutional concerns addressed in  
7 *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

8 For these reasons, *Matter of M-S-* violates the APA.

9 **II. Plaintiffs and Members of the Bond Hearing Class Will Suffer Irreparable Harm**  
10 **Absent a Preliminary Injunction.**

11 Detention without a bond hearing will cause Plaintiffs and members of the Bond Hearing  
12 class irreparable harm for multiple reasons. *See* Dkt. 45 at 20-23; Dkt. 110 at 15-17. First, “[i]t is  
13 well established that the deprivation of constitutional rights unquestionably constitutes  
14 irreparable injury.” *Hernandez*, 872 F.3d at 994 (internal quotation marks and citation omitted);  
15 *see also* Dkt. 110 at 15.

16 Second, the “unnecessary deprivation of [Plaintiffs’] liberty clearly constitutes irreparable  
17 harm.” *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998). As the Supreme Court has  
18 explained, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It  
19 often means loss of a job; it disrupts family life; and it enforces idleness . . . . The time spent in  
20 jail is simply dead time . . . .” *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). *See also*  
21 *Hernandez*, 872 F.3d at 995 (noting the “the economic burdens imposed on detainees and their  
22 families as a result of detention, and the collateral harms to children of detainees whose parents  
23 are detained”).

24 Third, Plaintiffs suffer irreparable harm from the circumstances of detention.  
25 “[I]mmigration detainees are treated much like criminals serving time: They are typically housed  
26 in shared jail cells with no privacy and limited access to larger spaces or the outdoors.”  
27 *Rodriguez v. Robbins* (“*Rodriguez III*”), 804 F.3d 1060, 1073 (9th Cir. 2015), *rev’d on other*

1 grounds by *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). See also *Hernandez*, 872 F.3d at 995  
2 (noting the “subpar medical and psychiatric care in ICE detention facilities”); Dkt. 110 at 15  
3 (noting irreparable harms of “physical and psychological trauma (e.g., malnutrition, poor  
4 medical care, depression[)]”); Dkt. 49 ¶ 3 (documenting “systemic, sub-human conditions in  
5 immigration custody”); Dkt. 55 ¶ 5 (client faced irreversible physical harm while detained); Dkt.  
6 51 ¶ 6 (clients denied access to sanitary products and blankets and were detained in locations that  
7 used tear gas against noncompliant detainees); Dkt. 54 ¶ 6 (clients vulnerable to “medical crisis”  
8 and “horrible food and living conditions”).

9 Fourth, these harms are even more severe for individuals seeking protection from  
10 persecution. Detention often re-traumatizes vulnerable individuals who have only recently  
11 escaped persecution and may cause mental disorders such as post-traumatic stress disorder  
12 (“PTSD”). See Dkt. 110 at 16 (citing “panic attacks, depression, and exacerbation of pre-existing  
13 trauma” caused by prolonged detention); see also Declaration of Allen Keller ¶¶ 11-12.  
14 Moreover, detention often causes related physical symptoms, including pain, headaches, and  
15 gastrointestinal issues, for which detention centers are poorly equipped to offer medical care. *Id.*  
16 ¶¶ 13-14. See also Dkt 50 ¶ 13 (client suffered “panic attacks, loss of consciousness, loss of  
17 appetite, and severe nightmares”); Dkt. 52 ¶ 18 (detainees experience anxiety and psychological  
18 and emotional harm); Dkt. 53 ¶ 7 (clients suffer depression and hopelessness); Dkt. 60 ¶ 7  
19 (detainees who previously were tortured, wrongfully imprisoned, or sexually assaulted  
20 experience exacerbation of prior trauma); Dkt. 58 ¶ 6 (detention exacerbates PTSD for many  
21 individuals). Indeed, in some cases, detention may coerce Plaintiffs into abandoning meritorious  
22 claims to protection. See Dkt. 110 at 16-17; see also Dkt. 46 ¶¶ 4, 6 (noting large number of  
23 detainees who abandon their claims after passing credible fear interview due to detention); Dkt.  
24 58 ¶ 6 (many “give up hope and abandon their asylum cases” due to “hardship of prolonged  
25 detention”); accord Dkt. 59 ¶ 5.

1 Fifth, Plaintiffs and class members indisputably suffer irreparable harm by being unable  
2 to adequately prepare their immigration cases. *See* Dkt. 46 ¶ 4 (detention prevents individuals  
3 from contacting witnesses and obtaining support documents); ¶ 6 (detainees have no access to  
4 “phone numbers, names and other vital information required for the proper identification and  
5 preparation of witnesses and of persons who could help obtain evidence from the home  
6 country”); Dkt. 49 ¶¶ 14, 17-19 (individuals face challenge in meeting burden of proof for  
7 asylum applications because law libraries in detention center rarely contain relevant and updated  
8 materials).

9 In particular, detention severely limits an individual’s ability to litigate his removal case  
10 by making it “more difficult to retain or meet with legal counsel.” *Rodriguez III*, 804 F.3d at  
11 1073. The overwhelming majority of immigration detainees—nearly 80 percent—are  
12 unrepresented. 79 Fed. Reg. 55,659, 55,660 (Sept. 17, 2014). Yet having a lawyer in removal  
13 proceedings is critical to defending one’s right to remain in the United States. A nationwide  
14 study of government data found that, between 2007 and 2012, *39 percent* of immigrants who  
15 were released from detention and were represented by attorneys won their removal cases,  
16 compared to *two percent* of detained immigrants who were pro se. Ingrid V. Eagly and Steven  
17 Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 50  
18 (2015).

19 Not surprisingly, then, release from detention had a decisive impact on individuals’  
20 immigration cases. Between January 1, 2010 and February 1, 2019, the grant rate for such  
21 individuals who were released from detention and who applied for asylum, withholding, or CAT  
22 was 30% as compared to a less than 6% grant rate for those who were detained throughout their  
23 proceedings. That is, individuals released from detention were *five times more likely* to prevail on  
24 their claims. *See* Hausman Decl. ¶¶ 7, 10.

25 The challenges experienced by the named Plaintiffs bring these irreparable harms into  
26 sharp focus. Detained for over two months, Plaintiff Orantes suffered significant emotional  
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1 distress and considered giving up her case due to prolonged confinement and separation from her  
2 son. Dkt. 57 ¶¶ 13, 17. She also faced unsanitary detention conditions and dehumanizing  
3 treatment from detention officers. *Id.* ¶¶ 4, 10. Similarly, Plaintiff Vasquez endured unsanitary  
4 conditions in detention and had to be hospitalized for four days due to illness from the food  
5 served in detention. Dkt. 61 ¶ 3. He suffered from feelings of depression and isolation,  
6 particularly from being unable to maintain contact with his wife. *Id.* ¶¶ 5, 12. After passing his  
7 credible fear interview and waiting to receive a bond hearing, Plaintiff Vasquez faced difficulty  
8 in communicating with those outside of detention to gather evidence in support of his case. *Id.* ¶  
9 9. These experiences underscore the irreparable harms that Plaintiffs will face if they are re-  
10 detained without a bond hearing pending their removal proceedings.

11 **III. The Balance of Hardships Tip Sharply in Plaintiffs' Favor, and a Preliminary**  
12 **Injunction is in the Public Interest.**

13 The balance of equities and the public interest weigh heavily in favor of a preliminary  
14 injunction halting the implementation of *Matter of M-S-*. A preliminary injunction would  
15 “serve[] the interests of the general public by ensuring that the government’s initial bond  
16 determination procedures comply with the Constitution.” *Hernandez*, 872 F.3d at 996. Moreover,  
17 “any additional administrative costs to the government are far outweighed by the considerable  
18 harm to Plaintiffs’ constitutional rights in the absence of the injunction.” *Id.* at 995-96. When  
19 “[f]aced with . . . a conflict between financial concerns and preventable human suffering, [courts]  
20 have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.”  
21 *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). *Accord* Dkt. 110 at 17-18. The Court  
22 should also “consider . . . the indirect hardship” that detention causes “friends and family  
23 members.” *Hernandez*, 872 F.3d at 996 (internal quotation marks and citation omitted); *see also*  
24 *id.* (noting the “financial and psychological strain” that unnecessary detention imposes on the  
25 families of detainees); Dkt. 110 at 18. Any additional administrative burden from a preliminary  
26 injunction are limited here: the government has provided bond hearings to Plaintiffs for a half-  
27 century, continued to do so for more than a year after the Supreme Court’s decision in *Jennings*,

1 and the Attorney General ordered that they continue to do so for at least 90 days after he issued  
2 his decision in *Matter of M-S-*. 27 I. & N. Dec. at 519 n.8.

3 Moreover, the government has ample tools at its disposal to ensure that individuals  
4 appear for removal proceedings. See *Hernandez*, 872 F.3d at 991 (noting that “demonstrated  
5 effectiveness of [conditions of supervision] at meeting the government’s interest in ensuring  
6 future appearances”). Indeed, as the Ninth Circuit has found, ICE’s “Intensive Supervision  
7 Appearance Program—which relies on various alternative release conditions—resulted in a 99%  
8 attendance rate at all [immigration court] hearings and a 95% attendance rate at final hearings.”  
9 *Id.*<sup>3</sup> See also Declaration of Michelle Brane ¶¶ 6-27. The social science literature confirms that  
10 individuals seeking protection from persecution are highly motivated to appear for court  
11 proceedings and generally can be supervised safely in the community. *Id.*

12 Finally, “the general public’s interest in the efficient allocation of the government’s fiscal  
13 resources favors granting the injunction.” *Hernandez*, 872 F.3d at 996. As the Ninth Circuit has  
14 explained:

15 The costs to the public of immigration detention are “staggering”: \$158 each  
16 day per detainee, amounting to a total daily cost of \$6.5 million. Supervised  
17 release programs cost much less by comparison: between 17 cents and 17  
18 dollars each day per person . . . [R]educed detention costs can free up  
19 resources to more effectively process claims in Immigration Court.

20 *Id. Accord* Dkt. 110 at 18. In sum, the balance of hardships and public interest strongly favor a  
21 modification of the preliminary injunction order.

## 22 CONCLUSION

23 The Court should grant Plaintiffs’ motion to modify the preliminary injunction order to  
24 enjoin *Matter of M-S-* and preserve individualized bond hearings for the Bond Hearing Class.

25 RESPECTFULLY SUBMITTED this 28th day of May 2019.

26 \_\_\_\_\_  
27 <sup>3</sup> *Accord* U.S. Gov’t Accountability Off., GAO-15-26, Alternatives to Detention: Improved Data Collection and  
Analyses Needed to Better Assess Program Effectiveness 30 (2014), <https://www.gao.gov/assets/670/666911.pdf>.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: None.

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