No. 19-35565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOLANY PADILLA, et al.
Plaintiffs-Appellees,

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APELLANTS

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
SARAH S. WILSON
Assistant United States Attorney
LAUREN C. BINGHAM
Senior Litigation Counsel
ARCHITH RAMKUMAR
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
202-616-4458

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INTRODUCTION

Congress has determined that inadmissible aliens who come to our country must be detained, without bond, pending proceedings to determine their admissibility. 8 U.S.C. § 1225(b). This includes aliens like Plaintiffs who were apprehended shortly after illegally crossing into the United States and processed for expedited removal. *Id.* § 1225(b)(1)(B)(ii). If these aliens express, and are found to have, a credible fear of persecution or torture, they "shall be detained for further consideration of the application for asylum." *Id*. Once found to have a credible fear, Plaintiffs are afforded the opportunity to have their asylum applications considered in removal proceedings under section 1229a. In removal proceedings, Plaintiffs have the right to be represented, to present (and subpoena) evidence in support of their case, and to appeal any adverse decisions first to the Board of Immigration Appeals (BIA) and then to the appropriate federal appellate court. Release during proceedings is at the discretion of the Secretary of Homeland Security (the Secretary), who has exclusive control over decisions regarding who can be paroled into the United States. *Id*. § 1182(d)(5)(A).

Despite this clear statutory command and the important governmental interests at stake in ensuring that aliens appear for their removal proceedings and do not enter the country without their entitlement to enter being determined, the district court concluded that as applied to any alien on U.S. soil who established a credible

fear, section 1225(b)(1)(B)(ii) is facially unconstitutional because any statute that provides for "no bond hearing at all" is unlawful on its face. *See* July 2 Order ("Op.") 14, ER1-20 (emphasis in original). The court issued a nationwide injunction requiring that *any* alien who entered the country unlawfully, had been placed in expedited removal proceedings, and found to have a credible fear of persecution, is categorically entitled to release into the United States unless the government provides the alien with a bond hearing within seven days of a request in which the government bears the burden of proving that the alien is a flight risk or a danger to the community. Op. 19-20. The court further required the government to provide same-day individualized written bond decisions, and verbatim recordings or transcripts of the bond hearing upon appeal. *Id*.

The district court's order is deeply flawed. First, section 1252(f)(1)—which "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2],"—is a clear bar to the district court's classwide order enjoining the operation of section 1225(b)(1)(B)(ii) as unconstitutional. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). Second, the district court's conclusion that section 1225(b)(1)(B)(ii) is facially unconstitutional simply because it provides for "no bond hearing at all," Op. 14, is contrary to decades of Supreme Court precedent affirming that at the border, the only process due is that provided by Congress, as well as recognizing the government's legitimate interests in the detention of aliens

for the limited period necessary to determine their admissibility or removability. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Demore v. Kim*, 538 U.S. 510, 523 (2003). Even disregarding these established principles, aliens who cross illegally into the United States would not be constitutionally entitled to release into the United States after only seven days have passed following a credible fear finding, or be entitled to more rigorous procedures than Congress provided for aliens with substantive ties to the United States, like lawful permanent residents. *Cf.* 8 U.S.C. §§ 1226(a), 1226(c). Finally, the district court erred in finding that a nationwide bar on the implementation of an act of Congress is in the public's interest. As this Court has already recognized, the injunction imposes immediate, substantive harm on the immigration system and comes at the expense of the government's interests. *See* Order Granting Emergency Stay in Part, Dkt. 18 (ER77-80).[1] The injunction must be vacated.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 2241, and Article I, § 9, clause 2 of the Constitution. *See* Third Amended Complaint (TAC), ER138 ¶ 8, *see also* Second Amended Complaint (SAC), ECF 26, ¶ 13. On April 5, 2019, the district court issued a preliminary injunction, to take effect thirty

[1] The government uses "Dkt." to refer to docket entries at this Court, and "ECF" to refer to docket entries at the district court.

days from the order ("April 5 Op."). ER21-39. On April 26, 2019, the government filed a motion to vacate the injunction, and the parties later stipulated to, and the district court granted, an order extending the government's time to appeal that preliminary injunction until July 5, 2019. *See* Order of May 20, 2019, ECF 129. On July 2, 2019, the district court issued an order denying the government's motion to vacate the injunction, and granting Appellees' motion to modify the injunction. *See generally* Op (ER1-20). The government filed a timely notice of appeal the next day of both the April 5 Order and the July 2 Order. Notice of Appeal, ER81-83; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

1. Whether the district court erred in holding that 8 U.S.C. § 1252(f)(1)'s bar on classwide injunctive relief against the operation of the Immigration and Nationality Act (INA) does not apply to its nationwide injunction enjoining the operation of section 1225(b)(1)(B)(ii) as unconstitutional;
2. Whether the district court erred in holding section 1225(b)(1)(B)(ii) unconstitutional as to aliens who have a credible fear of persecution or torture and entered the United States unlawfully, and requiring bond hearings within seven days;

3. Whether the district court erred in imposing heightened procedural requirements for the bond hearings it ordered, including that they be recorded or transcribed, that the government bear the burden of proof, and that same-day written bond decisions with particularized determinations at the conclusion of the bond hearing are required, where the statute does not afford Plaintiffs bond hearings at all, and these processes exceed the process Congress afforded aliens with more substantial ties to the United States;
4. Whether the district court erred in its analysis of whether a nationwide injunction is in the public interest given the burden imposed by the injunction, its likely impact on the immigration courts' ability to issue timely merits decisions, and the perverse incentive it creates for aliens to illegally cross into the United States rather than present themselves for inspection at a port of entry.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Legal Background.

a. The Detention and Removal of Aliens Apprehended Shortly After Illegally Entering the United States.

The INA, 8 U.S.C. § 1101 *et seq.*, governs admission of aliens into the United States. Section 1225 establishes procedures for certain aliens who are treated as

"applicants for admission," that is, aliens seeking entry or admission into the United States, either at a port of entry or by crossing the border unlawfully. *See* 8 U.S.C. § 1225(a)(1).[2] An immigration officer, upon encountering an applicant for admission, must first determine whether the alien is clearly and undoubtedly admissible to the United States. *Jennings*, 138 S. Ct. at 836; *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). If the alien is not, the officer must determine whether the alien is eligible for, and should be subject to, the expedited removal process by applying section 1225(b)(1). *Jennings*, 138 S. Ct. at 837; *Matter of M-S-*, 27 I. & N. Dec. at 510.

Section 1225(b)(1) permits the Secretary to apply expedited removal to aliens arriving at the ports of entry, and "certain other aliens," who are apprehended within two years of illegally entering the United States. *See* 84 Fed. Reg. 35409 (2019) (providing notice of Secretary's intention to expand expedited removal to the statutory limit).[3] Aliens subject to expedited removal "shall be detained" until removed. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Section 1225(b)(1)(A)(i) provides

[2] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

[3] At the time the class was certified and the injunctions at issue were entered, expedited removal applied to those aliens who were encountered within 100 miles of the border and were unable to prove that they had been in the United States for more than the prior 14 days. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01, 48879-80 (Aug. 11, 2004).

(subject to exemptions and additions not relevant here) that an applicant for admission is eligible for expedited removal when he engaged in fraud or made a willful misrepresentation in an attempt to gain admission to the United States or obtain another immigration benefit, 8 U.S.C. § 1182(a)(6)(C), or because he has no valid visa, passport, or other required travel document, *id.* § 1182(a)(7). If the immigration officer "determines" that an alien meets one of those criteria, the officer "shall order the alien removed from the United States without further hearing or review," unless the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture, or a fear of return to his or her home country. *Id.* § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(4). An alien who indicates an intention to apply for asylum, expresses a fear of persecution or torture, or a fear of return to his or her home country will be interviewed by an asylum officer to ascertain whether he has a "credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(ii); *see id.* § 1225(b)(1)(A)(ii). Pursuant to 8 C.F.R. § 208.30(f), an alien determined to have such a fear is referred for removal proceedings before an immigration judge under 8 U.S.C. § 1229a, and "shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii); *see Jennings*, 138 S. Ct. at 837 (aliens covered by section 1225(b)(1) are generally subject to mandatory detention during consideration of their application asylum in remval proceedings). The sole means of release is "temporary parole from § 1225(b) detention 'for urgent humanitarian

reasons or significant public benefit,' [under] § 1182(d)(5)(A)." *Jennings*, 138 S. Ct. at 834.

b. Detention and Removal of Aliens Arrested Inside the United States.

Another provision, 8 U.S.C. § 1226(a), governs the detention and release of aliens arrested inside the United States who are not subject to the expedited removal procedures. Every alien detained under this section is individually considered for release on bond by the Department of Homeland Security (DHS) and served with a custody determination form. 8 C.F.R. § 236.1(c)(8). If the officer denies bond (or sets a bond the alien thinks is too high), the alien may ask an immigration judge for a redetermination. 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). The alien may appeal the immigration judge's custody redetermination to the BIA. 8 C.F.R. § 236.1(d)(3)(i). An alien who remains detained under section 1226(a) may obtain another custody determination whenever "circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). There is no limit to the number of bond hearings an alien may obtain on the basis of changed circumstances.

c. The BIA's Decisions in *Matter of X-K-* and *Matter of M-S-*.

Notwithstanding section 1225(b)(1)(B)(ii), under a BIA decision, *Matter of X-K-*, 23 I. & N. Dec. 731 (BIA 2005), aliens like Plaintiffs who entered the country illegally, were apprehended between ports of entry, placed in expedited removal, found to have a credible fear, and who would otherwise be subject to mandatory

detention under section 1225(b) were entitled to a bond hearing under section 1226(a). In *Matter of X-K-*, the Board found ambiguity in the statute and applicable regulations, and concluded that 8 C.F.R. § 1236.1(d)(1), which implements section 1226(a), applied to certain applicants for admission under section 1225(b). *Matter of X-K-*, 23 I. & N. Dec. at 736 ("Immigration Judges have jurisdiction 'to exercise the authority in section 236 of the Act [8 U.S.C. § 1226] … to detain the alien in custody, release the alien, and determine the amount of bond … as provided in § 1003.19.'") (quoting 8 C.F.R. § 1236.1(d)(1)). The BIA distinguished aliens who present themselves at a port of entry (who cannot receive a bond hearing even after they establish a credible fear) from those who are apprehended between ports of entry—i.e., aliens who have crossed the border illegally and been promptly apprehended—who may be treated as either subject to section 1225(b) or as subject to section 1226(a); the BIA further interpreted the existing regulations to provide for bond hearings in these circumstances. *See Matter of X-K-*, 23 I & N. Dec. at 734.

In 2018, the Supreme Court issued *Jennings*. The decision reversed this Court's holding that aliens detained under section 1225(b) were entitled to bond hearings, *Rodriguez v. Robbins*, 804 F.3d 1050 (9th Cir. 2015) ("*Robbins II*"). As relevant here, the Supreme Court found it "clear," that section "1225(b)(1) … mandate[s] detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for 'further consideration of the

application for asylum[.]'" *Jennings*, 138 S. Ct. at 842. "Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And [] § 1225(b)(1) [says nothing] whatsoever about bond hearings." *Id*. "In sum, [section] 1225(b)(1) … mandate[s] detention of aliens throughout the completion of applicable proceedings." *Id*.

Following *Jennings*, the Attorney General, exercising his authority as the head of the Executive Office for Immigration Review (EOIR), under 8 U.S.C. § 1103(a)(1) to give statutory terms "concrete meaning through a process of case-by-case adjudication," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), referred to himself a case involving bond hearings under *Matter of X-K-*. *See Matter of M-G-G-*, 27 I. & N. Dec. 469 (A.G. 2018). The Attorney General invited briefing on "[w]hether *Matter of X-K-* ... should be overruled in light of *Jennings v. Rodriguez*." *Id.* Although *M-G-G-* mooted out, *Matter of M-G-G-*, 27 I. & N. Dec. 475 (A.G. 2018), the Attorney General referred another case raising the same issue to himself for decision on October 12, 2018, and again requested briefs from interested amici. *See Matter of M-S-*, 27 I. & N. Dec. 476 (A.G. 2018).

On April 16, 2019, the Attorney General issued a precedential decision in *Matter of M-S-*. The "question presented" was "whether aliens who are originally placed in expedited [removal] proceedings and then transferred to full [removal]

proceedings after establishing a credible fear become eligible for bond upon transfer." *Matter of M-S-*, 27 I. & N. at 515. The Attorney General answered the question in the negative. *See id.* ("I conclude that such aliens remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States."). The starting point was the statutory text: "Section 235(b)(1)(B)(ii) provides that, if an alien in expedited proceedings establishes a credible fear, he 'shall be detained for further consideration of the application for asylum.'" *Id.* (quoting 8 U.S.C. § 1225(b)(1)(B)(ii)). The Attorney General rejected the argument that the word "for" in this phrase simply applied to the lead up to full removal proceedings: "[T]hat latter definition makes little sense in light of the surrounding provisions of the [INA]. If section 235(b)(1)(B)(ii) governed detention only 'in preparation for' … full proceedings, then another provision, [8 U.S.C. § 1226], would govern detention during those proceedings. [8 U.S.C. § 1226], however, permits detention only on an arrest warrant issued by the Secretary. The result would be that if an alien were placed in expedited proceedings, DHS could detain him without a warrant, but, if the alien were then transferred to full proceedings, DHS would need to issue an arrest warrant to continue detention. That simply cannot be what the Act requires." *Id.* at 515-16 (internal citations omitted). This reasoning followed directly from the Supreme Court's analysis in *Jennings*: "If respondents' interpretation of § 1225(b) were correct, then the Government could detain an alien

without a warrant at the border, but once removal proceedings began, the Attorney General would have to issue an arrest warrant in order to continue detaining the alien. To put it lightly, that makes little sense." 138 S. Ct. at 845. The Attorney General accordingly concluded that 8 U.S.C. § 1226, which confers discretion upon DHS to release aliens on bond once they are arrested pursuant to a warrant, applies to a "different class[] of aliens" than 8 U.S.C. § 1225, and because the latter provides for mandatory detention, the two provisions "can be reconciled only if they apply to different classes of aliens." *Matter of M-S-*, 27 I. & N. Dec. at 516.

The Attorney General observed that "[t]he conclusion that section [1225] requires detention does not mean that every transferred alien must be detained from the moment of apprehension until the completion of removal proceedings," as the INA has an "express exception": parole for "urgent humanitarian reasons or significant public benefit." *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)). The presence of this "express exception" countenanced the conclusion that the INA "cannot be read to contain an implicit exception for bond" because "'[t]hat express exception to detention implies that there are no *other* circumstances under which aliens detained under [§ 1225(b)] may be released.'" *Matter of M-S-*, 27 I. & N. Dec. at 517 (quoting *Jennings*, 138 S. Ct. at 844) (emphasis in original). The Supreme Court in *Jennings* concluded that, "[i]n sum, §§ 1225(b)(1) and (b)(2) mandate detention throughout the completion of applicable proceedings and not just until the moment those

proceedings begin," 138 S. Ct. at 845, the same holding the Attorney General reached: "For those reasons, the [*Jennings*] Court held, as I do here, that the [INA] renders aliens transferred from expedited to full proceedings after establishing a credible fear ineligible for bond." *Matter of M-S-*, 27 I. & N. Dec. at 517-18. The Attorney General further concluded that his interpretation of section 235 of the INA comported with the Act's "implementing regulations." *Id.* at 518.

"In conclusion, the statutory text, the implementing regulations, and the Supreme Court's decision in [*Jennings*] all le[d] to the same conclusion: that all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond." *Matter of M-S-*, 27 I. & N. Dec. at 518-19. "*Matter of X-K-* is therefore overruled." *Id.* at 519. The "effective date" of *Matter of M-S-* was "90 days" from April 16, *i.e.*, July 15, 2019, "so that DHS may conduct the necessary operational planning for additional detention and parole decisions." *Id.* n.8.

II. Procedural History.

a. Plaintiffs' Initial Complaints.

Plaintiffs are inadmissible aliens who illegally entered this country without inspection, were placed into expedited removal, and who have been found by an asylum officer to have a credible fear of persecution. SAC, ECF 26 ¶ 37. In Plaintiffs' SAC (on which Plaintiffs first requested preliminary injunctive relief), Plaintiffs challenged alleged delays in credible fear interviews, alleged delays in

bond hearings, and bond procedures. At the time of Plaintiffs' SAC, Plaintiffs were treated as if they were detained pursuant to 8 U.S.C. § 1226(a) pursuant to *Matter of X-K-*. Because Plaintiffs were treated as if they were statutorily entitled to a bond hearing, their bond hearing claims focused on the timing and sufficiency of the procedures employed at those hearings and in any subsequent bond appeal. They alleged a constitutional entitlement to bond hearings within seven days of request—after establishing a credible fear of persecution or torture—at which the government bore the burden of proof, recorded the bond hearing, produced a recording or transcript upon appeal, and produced a written decision containing particularized findings the same day as the hearing. ECF 26 ¶¶ 146-152.

b. Class Certification.

Plaintiffs filed a motion for certification of two nationwide classes: the credible fear class, and as relevant here, the bond hearing class. The Court granted the motion and certified both classes. ECF 102. The bond hearing class is defined as:

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

ECF 37 at 2. The Bond Hearing Class has two representatives, Bianca Orantes and Baltazar Vasquez. ECF 102 at 12. Both received bond hearings consistent with

Matter of X-K-, and were later released. ECF 102 at 3. Vasquez was released on $8,000 bond by stipulation at his bond hearing. ECF 36-1. His bond hearing was recorded. ECF 67. He waived appeal of his bond order. ECF 36-1. Orantes was denied bond at her initial bond hearing, and provided with a written decision denying bond. ECF 66 ¶ 20. She reserved appeal but did not file the appeal because she was paroled shortly after her bond hearing. ECF 68-1, 65 ¶ 27. Neither class representative has ever been subject to detention under section 1225(b)(1)(B)(ii) without a bond hearing, as provided for by *Matter of X-K-*.

c. The Initial Preliminary Injunction Order.

On September 20, 2018, Plaintiffs moved for a preliminary injunction on behalf of the bond hearing class. The impetus for this motion was the Attorney General's announcement of his intention to review *Matter of X-K-* in light of the Supreme Court's decision in *Jennings*. Plaintiffs noted that *Matter of X-K-* was to undergo "reconsider[ation]," but argued that "[p]roposed class members are eligible for bond hearings unless and until the decision is vacated." ECF 45, n.2. The government asked to stay proceedings, noting that the Attorney General's decision would likely impact resolution of the preliminary injunction motion. ECF 83. The district court denied the motion to stay, noting that it could address the Attorney General's decision "as needed." ECF 101.

On April 5, 2019, the district court granted Plaintiffs' motion for a preliminary injunction. The Order began with the regulatory entitlement under *Matter of X-K-*. *See* April 5 Op. at 2. ("[D]etained asylum seekers who are determined … to have a credible fear of persecution are entitled to request release from custody during the pendency of the asylum process."). The district court rejected that *Jennings* strongly implied that Plaintiffs no longer had any private interests to vindicate: "This is an oversimplified and inaccurate reading of [*Jennings*], which concerns 8 U.S.C. § 1225(b)(1), and quotes its language that '[a]ny alien … shall be detained pending a final determination of credible fear of persecution and, *if found not to have such a fear*, until removed.' The members of the Bond Hearing Class have been found 'to have such a fear' and that finding removes them from the detention requirements referenced in *Jennings*." *Id.* at 7 (emphasis in original) (quoting *Jennings*, 138 S. Ct. at 845). The district court concluded that Plaintiffs were likely to succeed on the merits, *see id.* at 7-15, and that the remaining preliminary injunction factors under *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)—irreparable harm, the balance of the equities, and the public interest—also favored granting the motion. *See id.* at 15-18.

As a result, the district court issued an injunction requiring the government to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;

> 2. Place the burden of proof on [DHS] in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions;
> 3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal;
> 4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing."

Id. at 19.

d. The Modified Preliminary Injunction.

Thereafter, in light of *Matter of M-S-*, which issued shortly after the injunction, Defendants moved to vacate the injunction. ECF 114. Plaintiffs then filed their TAC and moved to modify the injunction to enjoin section 1225(b)(1)(B)(ii) as interpreted by the Attorney General on two grounds. First, that the Attorney General improperly overruled *Matter of X-K-* as a procedural matter under the Administrative Procedure Act, and second, that section 1225(b)(1)(B)(ii) is facially unconstitutional as applied to the class. ECF 131. Plaintiffs did not seek modification of the injunction on the basis of any claim that *Matter of M-S-* is wrong as a matter of substantive law, or that Plaintiffs are *statutorily* entitled to bond hearings. *Id.*

The district court held oral argument on the motion to vacate and the motion to modify, and issued a decision on both motions on July 2, 2019. Op. 1-20. Although the court found no likelihood of success on Plaintiffs' claim that the Attorney General improperly reversed *Matter of X-K-* (Op. 15-16), the court concluded that it had authority to enjoin section 1225(b)(1)(B)(ii) (Op. 7-9); that

section 1225(b)(1)(B)(ii) was unconstitutional because it did not provide for bond hearings (Op. 12-14); and that the other injunctive factors again supported Plaintiffs (Op. 17-19). Accordingly, the district court "affirm[ed]" its previously-issued injunction (in Part A of the Order), and, in Part B of the Order, "modifie[d]" the injunction "to find that the statutory prohibition at Immigration and Nationality Act § 235(b)(1)(B)(ii) against releasing on bond persons found to have a credible fear of persecution if returned to their country and awaiting a determination of their asylum application violates the U.S. Constitution; the Bond Hearing Class is constitutionally entitled to a bond hearing (under the conditions enumerated [in the previous preliminary injunction]) pending resolution of their asylum applications." Op. 19-20. The district court ordered the injunction to take effect, as modified, 14 days from the date of its order.

e. Motion to Stay the Injunction.

On July 9, 2019, the government moved for an administrative stay of the injunction and a stay pending appeal. Dkt. 10. On July 12, the motions panel granted an administrative stay pending briefing of the motion to stay. Dkt. 14. On July 22, the motions panel granted the government's motion to stay in part. Dkt. 18. The panel held that "the government raises a serious question whether, under 8 U.S.C. § 1252(f)(1), the district court lacked the authority to enter Part B [enjoining section 1225(b)(1)(B)(ii)] of this classwide injunctive relief." *Id.* at 2. It also held that the

government had made a persuasive showing that the procedural requirements that the district court imposed in Part A of the injunction were "particularly burdensome," and that requiring the government to comply with these procedures would impose a hardship for the government. *Id*. at 3. With respect to Part B, the motions panel elected to preserve the status quo for the limited duration of this expedited appeal. *Id*. Thus, the motions panel stayed Part A of the injunction. *Id*.

SUMMARY OF THE ARGUMENT

This Court should vacate the district court's preliminary injunction. The injunction is statutorily barred and has no basis in law.

I. 8 U.S.C. § 1252(f)(1) prohibits entry of a classwide injunction against the operation of section 1225(b)(1)(B)(ii). This provision proscribes the imposition of any injunction that "restrain[s] the operation of" §§ 1221-1232 of the INA on a classwide basis. *Id*. The district court's attempts to avoid section 1252(f)(1) are inconsistent with the text and structure of that provision and are based on inapplicable cases and canons. Section 1252(f)(1) "is nothing more or less" than a restriction on a particular form of relief. *Reno v. Am.-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999). As a result, section 1252(f)(1) does not trigger a canon that would require this Court to impose an unnatural reading to avoid Congress's clear intent. Indeed, this Court has already held that the government "raises a serious question whether under 8 U.S.C. § 1252(f)(1) the district court

lacked authority to enter Part B of this classwide injunction." Dkt. 18. The district court lacked jurisdiction to enter the injunction and therefore it must be reversed.

II. The district court also concluded that a statute that provides for "no bond hearing at all" is unlawful on its face. Op. 14. But the district court did not engage in the proper analysis to make this finding as a matter of substantive due process. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739 747 (1987). "[D]etention during deportation proceedings [is] a constitutionally valid aspect of the deportation process," *Demore*, 538 U.S. at 523. The Supreme Court and this Court have upheld detention schemes where detention was mandatory or was expected to last far longer than the seven days at issue in this case. *See, e.g.*, *Demore*, 538 U.S. at 523; *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995); *Robbins II*, 804 F.3d at 1069-70. There is therefore absolutely no support for the injunction's requirement that bond hearings be conducted within seven days of request.

III. The additional procedures ordered by the district court, including the requirement that the government bear the burden of proof at the bond hearing, that each bond hearing be recorded, and the recording or verbatim transcript of the bond hearing be produced upon appeal, and that the immigration judge issue written decisions with "particularized determinations of individualized findings at the conclusion of the bond hearing," Op. 2, constitute more process than what is required

under section 1226(a) to vindicate an interest in a bond hearing that Congress expressly foreclosed.

IV. The balance of harms does not support the injunction. The injunction declares an act of Congress unconstitutional on its face and imposes a system for release that is contrary to the one designed by Congress. That constitutes "ongoing irreparable harm" that the government is suffering, as any time a statute is enjoined, "irreparable injury" occurs. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). The injunction imposes serious operational harms upon the government, and undermines "the public interest [in] the efficient administration of the immigration laws at the border," *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

For all of these reasons, the injunction must be reversed.

STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for an abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks, brackets, and ellipsis omitted).

ARGUMENT

This Court should vacate the district court's injunction**.**

I. Section 1252(f)(1) Bars the Injunction.

The injunction the district court entered suffers from the threshold deficiency that it transgresses the plain text of section 1252(f)(1), which proscribes the imposition of any injunction that "restrain[s] the operation of" §§ 1221-1232 of the INA, "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The statute thus clearly bars classwide injunctive relief that halts the operation of §§ 1221-1231, something the Supreme Court has unequivocally held on two separate occasions. *See Jennings*, 138 S. Ct. at 851 ("Section 1252(f)(1) thus prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2]."); *Reno*, 525 U.S. at 481-82 ("By its plain terms, and even by its title, that provision [section 1252(f)(1)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases.").

Plaintiffs do not dispute that the district court enjoined the operation of section 1225(b)(1)(B)(ii) on a classwide basis. The district court explicitly found that this provision "violates the U.S. Constitution" and granted relief that specifically contravenes the process Congress set forth in section 1225(b)(1)(b)(ii) for the detention of Plaintiffs. Op. 20. The district court readily conceded that "[t]here is

support for [the Government's] position in" *Jennings*, given the Supreme Court's description of section 1252(f)(1) as barring the very relief it ordered: classwide injunctive relief against the operation of §§ 1221-1231. *See* Op. 8. Yet, the district court nonetheless found that section 1252(f)(1) posed no obstacle for it to enjoin section 1225(b)(1)(B)(ii) by relying on inapplicable cases and interpretative canons. *See* Op. 8-10. But the gymnastics performed by the district court to justify this position and evade on-point Supreme Court precedent fall flat.

First, the district court relied on *Califano v. Yamasaki*, 442 U.S. 682 (1979). *See* Op. 8. *Califano* involved an entirely "different statutory scheme," *id.*; thus, assessing whether that decision "is applicable to a § 1252(f)(1) analysis," *id.*, is entirely immaterial, given that the Supreme Court has already analyzed section 1252(f)(1)—as opposed to a different, unrelated statute—and concluded that section 1252(f)(1) precludes classwide injunctive relief enjoining the operation of §§ 1221-1231. In any event, the district court's reliance on *Califano* is flawed on its own terms, as the pertinent statute in *Califano* simply involved an affirmative authorization of suits by "[any] individual," Op. 8, which was in turn interpreted as not barring class actions. That language is markedly different from a categorical *prohibition* on injunctive relief, with a narrow carve-out for application to "individual alien[s]." 8 U.S.C. § 1252(f)(1). The critical difference in the structure of the respective statutory schemes is dispositive, as "although the rule laid out in

[*Califano*] may be true as a general rule, it does not stop the Court from looking at a particular statute that uses the word 'individual' and determining that, even if the use of 'individual' does not always bar class actions, it does bar them in the particular statute at issue. And that is exactly what the [Supreme] Court found in *Reno*." *Hamama v. Adducci*, 912 F.3d 869, 878 (6th Cir. 2018). "It is telling" that the district court simply elected "not to engage with *Reno*." *Id.*; *see also Commerce-Pac., Inc. v. United States*, 289 F.2d 651, 655 (9th Cir. 1960) ("[T]he same word may have different meanings when used in different statutes. This is especially true where the statutes differ in form and substance, as is the situation here.").

Second, the district court relied on the "remand" decision rendered by this Court in the wake of *Jennings*. *See* Op. 8. But the district court misread that decision by conflating two entirely different concepts: whether section 1252(f)(1) withdraws subject matter jurisdiction, and whether section 1252(f)(1) authorizes classwide injunctive relief. As the district court itself seemed to recognize, the remand opinion issued by this Court addressed only the former: "[W]e have jurisdiction under 8 U.S.C. § 1252(f)(1)." Op. 8 (quoting *Rodriguez v. Marin*, 909 F.3d 252, 256-57 (9th Cir. 2018)). And conspicuously absent from the opinion below is any analysis of why this Court found that section 1252(f)(1) did not constitute a jurisdictional barrier. Critically, that conclusion regarding jurisdiction was based not on the authority to grant classwide injunctive relief, but rather on the ability of the class to

obtain *declaratory* relief. *See Marin*, 909 F.3d at 256 ("[E]ven if *Reno* … forecloses the argument that § 1252(f)(1) allows classwide injunctive relief, it does not affect classwide declaratory relief."). Were there any doubt on this score, this Court extinguished it in *Marin* by explicitly directing the district court to "decide in the first instance whether § 1252(f)(1) precludes classwide injunctive relief, and if so, whether the availability of declaratory relief only can sustain the class." *Id.* at 256 n.1. By omitting this critical language from its opinion, the district court distorted the holding in *Marin*, which simply recognized that the presence of a claim for classwide declaratory relief allowed the district court to exercise subject matter jurisdiction consistent with section 1252(f)(1). *Marin* did not imply, much less hold, that section 1252(f)(1) authorizes classwide injunctive relief. Rather, the ability to order classwide declaratory relief has no bearing on whether preliminary injunctive relief can be awarded, since "prior to final judgment, there is no established declaratory remedy comparable to a preliminary injunction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

The district court also found it "significant that § 1252(f)(1) is silent as to a prohibition on class actions when another subsection in the same provision expressly prohibits class actions." Op. 8 (quoting *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB, 2019 WL 2912848, at *7 (C.D. Cal. June 20, 2019)). But the significance the district court perceived is misplaced because the other subsection in

question, section 1252(e)(1)(B), performs an entirely different function than section 1252(f)(1). 8 U.S.C. § 1252(e)(1)(B), which is circumscribed on its face to "Judicial Review of Orders Under Section 1225(b)(1)," prohibits district courts from "certify[ing] a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." By contrast, section 1252(f)(1), which is broader and not confined to review of orders issued pursuant to section 1225(b)(1), does not eschew class certification; indeed, as this Court reasoned, section 1252(f)(1) does not proscribe "classwide declaratory relief," which presupposes the existence of a certified class. *Marin*, 909 F.3d at 256. Section 1252(f)(1) instead places limits on the type of *relief* that the class can obtain, an issue that section 1252(e)(1)(B) does not even purport to address. The incongruence between the two provisions demonstrates that the district court's reliance on 8 U.S.C. § 1252(e)(1)(B) was misplaced.

Finally, the district court cited "habeas jurisdiction" to conclude that the Government's reading of section 1252(f)(1) improperly contravenes the well-settled principle that habeas corpus jurisdiction is not revoked absent a "clear statement repealing the court's habeas jurisdiction." Op. 9. Once again, the district court blurred the lines between the existence of jurisdiction and the ability to award classwide injunctive relief. The fact that *Marin* concluded that section 1252(f)(1) "does not bar the habeas class action because it lacks a clear statement repealing the

court's habeas jurisdiction," Op. 9, proves nothing because here the district court issued a classwide injunction, the very remedy barred by the statute. *Marin*, 909 F.3d at 256.

More importantly, the district court misapplied the clear statement rule, which applies exclusively to statutes that "repeal habeas jurisdiction." *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001). In those circumstances, a "clear statement" from Congress evincing "intent" to repeal habeas jurisdiction is required. *Id.* But section 1252(f)(1) does not repeal habeas jurisdiction, and the district court never found it to repeal jurisdiction, so the clear statement rule is wholly irrelevant. *See Crater v. Galaza*, 491 F.3d 1119, 1124 (9th Cir. 2007) ("The plain text defeats any suggestion that [the statute] eliminates habeas jurisdiction entirely …. Where a habeas statute contains no explicit provision barring habeas review, habeas jurisdiction remains intact."). First, habeas jurisdiction is not repealed by a statute that limits relief to individual claims rather than class claims. *Hamama*, 912 F.3d at 879. As the Sixth Circuit explained, nothing in section 1252(f)(1) prevents "an individual from seeking habeas relief, whether injunctive or otherwise." *Id*. The rules governing habeas corpus actions do not provide for class actions, and the Supreme Court has explained that it has never decided whether class claims are even viable under the habeas statute. *See Schall v. Martin*, 467 U.S. 253, 260 n.10 (1984) ("We have never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief"). *A fortiori*, no clear

statement is needed before Congress limits classwide relief in habeas cases. Second, even if there is some way for a "class [to] seek[] a traditional writ of habeas corpus (which is distinct from injunctive relief)," *Hamama*, 912 F.3d at 879, that is not the relief granted here: here, the district court undeniably issued classwide injunctive relief, which the statute plainly precludes even in cases that relate to detention and therefore might be pled as habeas claims.

The district court nonetheless deemed the clear statement rule applicable based on decisions from "the Second and Third Circuits." Op. 9. But both decisions, *Liu v. INS*, 293 F.3d 36, 37 (2d Cir. 2002), and *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001), involved a wholesale repeal of habeas jurisdiction for "non-criminal aliens," directly implicating the clear statement rule. *See Liu*, 293 F.3d at 36 ("This appeal presents a single question: whether § 2241 also remains available to non-criminal aliens."). This is a far cry from section 1252(f)(1), which has no impact on the availability of § 2241 for individuals seeking release from custody, *see Hamama*, 912 F.3d at 879, and the district court's conclusion that "the clear statement rule applies even when a statute does not bar all judicial review," Op. 9, finds no support in either *Liu* or *Chmakov*.

Allowing the injunction to remain intact would flout Supreme Court holdings and create a Circuit split with the Sixth Circuit on this issue. This Court should vacate the injunction.

II. Plaintiffs Lack a Due Process Right to a Bond Hearing After Seven Days of Detention Pursuant to Section 1225(b)(1)(B)(ii).

The district court required bond hearings within seven days of request after concluding that section 1225(b)(1)(b)(ii) was invalid on its face for not providing bond hearings. But such a theory is directly contrary to *Demore*, which upheld a different statute that required immigration detention without bond, and is inconsistent with the law governing facial challenges. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. "The fact that [section 1225(b)(1)(B)(ii)] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id*. Thus, in order for the district court to reach the conclusion that it did—that section 1225(b)(1)(b)(ii) cannot be constitutionally applied to asylum-seekers who illegally cross the border—the district court needed to carefully examine the government's interests in the statute, and find that there was no set of circumstances under which section 1225(b)(1)(B)(ii) validly serves those interests. *Id.*

The district court failed to analyze Plaintiffs' claim under this framework, and instead conducted a loose procedural due process analysis under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to evaluate Plaintiffs' likelihood of success on the merits. Op. 12. But only after a claim "survives substantive due process

scrutiny," is the procedural due process analysis—to ensure that such government action is implemented in a fair manner—utilized. *Salerno*, 481 U.S. at 746. Despite this, the district court erroneously applied a far more rigorous analysis in analyzing the constitutionality of the statute prior to examining whether the government's interests under section 1225(b)(1)(B)(ii) foreclose Plaintiffs' claim to a substantive entitlement. Examined under the appropriate legal framework, section 1225(b)(1)(B)(ii) is undoubtedly facially valid and can be constitutionally applied well beyond the seven-day mark.

Even applying the district court's flawed procedural due process analysis, Plaintiffs have failed to demonstrate a likelihood of succeeding on their claim for bond hearings within seven days of a request. Individuals detained promptly after illegally crossing into the United States have no more due process interest in their release into the United States than arriving aliens. Even if Plaintiffs had a cognizable interest in a bond hearing (an interest that is expressly disclaimed by the statute), that interest would be insufficient to entitle them to a bond hearing after only seven days. In addition, the district court erred by enjoining section 1225(b)(1)(B)(ii) without considering the nature of the process afforded by statutory parole system that provides for discretionary release. It was erroneous for the district court to enjoin an act of Congress as procedurally insufficient without examining the release

procedures available under that act. The district court's order requiring bond hearings after seven days must be vacated.

a. The Supreme Court, as well as this Court, Has Repeatedly Affirmed the Government's Authority to Detain Aliens Without Bond Hearings During Removal Proceedings.

The district court's conclusion that section 1225(b)(1)(B)(ii) is facially unconstitutional simply because it provides for "no bond hearing at all," Op. 14 (emphasis in original), is contrary to centuries of Supreme Court precedent affirming the government's authority to hold aliens without bond during the limited period necessary to determine their removability. The Supreme Court's substantive due process analysis of executive immigration detention authority is limited to a deferential review of whether the statute continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527 (citing *Zadvydas*, 533 U.S. at 690); *see Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson v. Landon*, 342 U.S. 524, 540 (1952); *Wong Wing v. United States*, 163 U.S. 228, 235-36 (1896); *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Consistent with this established framework, the Supreme Court, and this Court, have repeatedly upheld the government's authority to detain aliens with far more substantial ties to the United States for significantly longer periods than the district court's seven-day release order. *See Barrera-Echavarria*, 44 F.3d at 1449-50; *Zadvydas*, 533 U.S. at 701 ; *Demore*, 538 U.S. at 531; *Robbins II*, 804 F.3d at 1069-70. In each case, the

government's interests—whether in the detention of criminal aliens, detention during removal preparations, or detention associated with the executive's plenary power in regulating entry—were sufficient to justify detention with "no bond hearing at all." Op. 14.

The district court attempted to distinguish *Demore* and *Zadvydas* by arguing that the government's interests in detaining criminal aliens or aliens with final orders of removal do not apply to the government's interest in detaining Plaintiffs. This is doubtlessly true, but fails to address whether the government has an interest in the very different detention scheme established by section 1225(b)(1)(B)(ii). Prior to declaring section 1225(b)(1)(B)(ii), unconstitutional the district court failed to engage in any meaningful review of the government's unique interests in ensuring that: [1] aliens detained at or near the border establish an entitlement to enter the country before being released into the country, and [2] aliens show up for their removal proceedings. It is well established that detention is a constitutionally valid part of the removal process. *Demore*, 538 U.S. at 523. Congress passed section 1225(b)(1)(B)(ii) in part as a response to findings that "thousands" of aliens arrive in the United States each year, seek "asylum immediately upon arrival," and when "released into the general population" "do not return for their hearings." H.R. Rep. No. 104-469, 117-18 (1995). Congress also determined that such incentives were mitigated "in districts … where detention capacity has increased and most [] aliens

can be detained." *Id*. Congress thus clearly viewed recently arrived asylum seekers as necessitating detention to ensure their appearance at removal proceedings, and viewed the executive as being in the best position to determine which individuals should be released during their proceedings pursuant to statutory parole authority. Those interests are sufficient to support detention under section 1225(b)(1)(B)(ii) for the finite duration of removal proceedings, and certainly for much longer than seven days to allow those proceedings to be concluded. *See Jennings,* 138 S. Ct. at 846 (quoting *Demore*, 538 U.S. at 529) ("In *Demore v. Kim,* we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has "a definite termination point": the conclusion of removal proceedings.")

The injunction is inconsistent with the government's interest in upholding the laws passed by Congress granting the Secretary exclusive authority to release aliens into the United States pending the completion of their removal proceedings pursuant to parole authority. 8 U.S.C. § 1182(d)(5)(A). By requiring bond hearings within seven days, the injunction effectively strips the executive of its parole authority. It incentivizes aliens to enter the United States unlawfully without documentation and to refrain from engaging with the parole process and to instead take advantage of the information asymmetry to obtain release through a bond hearing in which the government bears the burden of proof. In other words, the alien can avoid the

executive altogether by simply biding their time for one week so that they receive a bond hearing, at which they will be awarded release absent the government bearing the burden of proof at the hearing. Thus, the injunction allows an inadmissible alien to enter the United States due to the government's lack of information on an individual who recently arrived in the United States and evaded government authorities to do so. *Cf. Rossi v. United States*, 289 U.S. 89, 91-92 (1933) (allocating burden in part due to information asymmetry). The district court's nationwide constitutional mandate therefore creates an "unprotected spot in the Nation's armor," *Chew v. Colding*, 344 U.S. 590, 602 (1953), that Congress cannot close, and undermines the government's legitimate interest in border protection and security.

The district court's analysis striking down a statute was legally flawed. Examined under the appropriate legal framework, section 1225(b)(1)(B)(ii) satisfies the due process standard applicable to immigration cases and may be constitutionally applied to Plaintiffs.

b. Plaintiffs Lack a Sufficient Interest in Release During Removal Proceedings to Support a Due Process Claim for Bond Hearings After Only Seven Days.

The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see Kleindienst v. Mandel*, 408 U.S.

753, 765-766 (1972) (stating that a "legion" of Supreme Court cases confirm this point). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned." *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). This Court has consistently reaffirmed these principles in holding that unadmitted aliens physically present in the United States lack due process rights beyond any rights furnished by Congress. *E.g. Rodriguez v. Robbins*, 715 F.3d 1127, 1141 (9th Cir. 2013) ("*Robbins I*"); *Barrera-Echavarria*, 44 F.3d at 1450; *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004); *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004).

The district court erroneously distinguished these cases solely on the basis that Plaintiffs illegally entered the United States prior to being taken into immigration custody. But both Orates and Vasquez, the bond hearing class representatives, were intercepted within a few miles and hours of entering the United States, ECF 12 at 14; ECF 26 at ¶¶ 44, 46. They stand on no different constitutional footing from those who properly report to ports of entry—which are also within the United States, a proposition known as the entry doctrine. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Landon*, 459 U.S. at 32 ("[O]nce an alien gains

admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."). Plaintiffs therefore lack a due process right to release into the United States on bond during proceedings.

But, even assuming that Plaintiffs possess a liberty interest under the Due Process clause, that interest is not sufficient to facially invalidate section 1225(b)(1)(B)(ii) and mandate bond hearings within seven days of request following a positive credible fear determination. The district court relied on a single case, *United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014), to hold that "once an individual has entered the country, he is entitled to the protection of the *Due Process Clause*." *See* April 5 Op. 7 (emphasis in original). But neither the district court's reasoning, nor *Raya Vaca*, suggest that an unadmitted alien's presence in the United States instantaneously places them on equal footing, under the Due Process Clause, with United States citizens or entitles them to enter the United States prior to their entitlement to admission being determined. To say that a newly-arriving alien is entitled to protection under the *Due Process Clause* in a criminal proceeding does not establish a specific entitlement, and certainly does not place Plaintiffs on equal due process footing with citizens, or even lawful permanent residents. Rather, the Supreme Court has "stressed repeatedly" that "'[d]ue process is flexible[]' . . . and it 'calls for such procedural protections as the particular situation demands.'" *Jennings*, 138 S. Ct. at 852 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)).

Nothing in the district court's analysis demonstrates how Plaintiffs' brief and illegal presence in the United States entitles them to entry into the United States prior to their entitlement to entry being determined.

Moreover, the outcome in *Raya-Vaca* can be explained, in large measure, by the fact that the case arose in the context of criminal procedures. When it comes to "areas not implicating the government's plenary power to regulate immigration," the entry doctrine has less force as, for example, "non-admitted aliens in the criminal justice system may not be punished prior to an adjudication of guilt in conformance with due process of law, a Fifth and Sixth Amendment safeguard available to citizens and aliens alike." *Wong*, 373 F.3d at 973. Similarly, "[c]ourts have held that non-admitted aliens are entitled to *Miranda* warnings prior to custodial interrogations." *Id.* Because the defendant in *Raya-Vaca* was attacking a conviction for illegal reentry under 8 U.S.C. § 1326, as opposed to merely challenging aspects of his civil immigration detention like the Plaintiffs here, *Raya-Vaca* is inapposite and readily distinguishable as a "strictly limited exception[]" to the general entry doctrine. *Pena v. Lynch*, 815 F.3d 452, 456 (9th Cir. 2016); *see also id.* ("[I]n criminal cases, a defendant charged [with criminal reentry] has a due process right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction."). Challenges to criminal convictions are different and distinct from

challenges to civil immigration detention, as Congress only exercises substantial, plenary power over the latter.[4]

The only other justification for the district court's conclusion was a single sentence from *Zadvydas*: "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law . . . [O]nce an alien enters the country, [his/her] legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." ECF 91 at 9 (quoting *Zadvydas*, 533 U.S. at 693). But *Zadvydas* does not indicate that "entry" is equivalent to "presence." Instead, *Zadvydas* underscores that the critical inquiry in ascertaining what due process rights an alien has is whether or not the alien has *entered* under the law, even if he or she is physically *present* in the United States. Thus, "despite nine years' presence in the United States, an 'excluded' alien 'was still in theory of law at the boundary line and had gained no foothold in the United States,'" *id.* (quoting *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)), and similarly, an "alien 'paroled into the United States pending admissibility had not effected an 'entry.'" *Id.* (quoting *Leng May Ma v. Barber*, 357

[4] To the extent Plaintiffs argue that the statement in *Raya-Vaca* that "[e]ven an [unadmitted] alien who has run some fifty yards into the United States has entered the country," 771 F.3d at 1203, has relevance outside the criminal context, that assertion is simply incorrect, a conclusion buttressed by the fact that *Raya-Vaca* did not even acknowledge, let alone grapple with, the entry doctrine.

U.S. 185, 188-90 (1958)). Moreover, *Zadvydas* confirms that even where an alien has "entered" he may be detained without bond for an extended period consistent with a valid government interest. Thus, *Zadvydas* demonstrates that, entry status aside, the district court erred in its analysis of the strength of Plaintiffs' due process entitlement.

c. The Availability of Parole and Individual Habeas Petitions Reinforces the Facial Constitutionality of Section 1225(b)(1)(B)(ii).

Congress may provide for detention pending a determination of an entitlement to admission into the United States, and the process Congress provided for release—parole—is lawful, as the process Congress provides is the process due in these circumstances. Moreover, the flaws in the district court's constitutional analysis of section 1225(b)(1)(B)(ii) are exacerbated by the district court's failure to analyze the system of release designed by Congress. Unlike the mandatory detention provisions, "there is a specific provision authorizing release from § 1225(b) detention . . . . With a few exceptions not relevant here, the Attorney General may 'for urgent humanitarian reasons or significant public benefit' temporarily parole aliens detained under §[] 1225(b)(1)[.]" *Jennings*, 138 S. Ct. at 844 (quoting 8 U.S.C. § 1182(d)(5)(A)); *see also Matter of M-S-*, 27 I. & N. Dec. at 516-17 ("The conclusion that section 235 [8 U.S.C. § 1225] requires detention does not mean that every transferred alien must be detained from the moment of apprehension until the completion of removal proceedings . . . [Section 1182(d)(5)(A)] grants the Secretary

the discretion to parole aliens under its terms."); *Marin*, 909 F.3d at 255 (describing "humanitarian parole" under section 1182(d)(5) as an "exception[] to indefinite detention"). The district court's order includes only passing reference to parole and no substantive discussion of how the effective date of *Matter of M-S-* was likely to impact the detention or release of members of the bond hearing class.

The Secretary has routinely exercised his or her discretion to parole aliens on a case-by-case basis out of necessity as "[w]ithout question, ICE has insufficient detention resources to detain throughout removal proceedings all aliens amendable to detention under the immigration laws." Dkt. 16-2 at 5. The volume of aliens paroled is explained, in large measure, by the fact that ICE paroles aliens "whose continued detention is not in the public interest," a broad category that encompasses a number of "non-exhaustive … circumstances," one of which is consideration for parole "in light of available detention resources." *Id.*; *see also* 8 U.S.C. § 1182(d)(5)(A) (elucidating authority to parole aliens if parole serves a "significant public benefit"). Indeed, in view of the surge of migrants at the border, *see* H.R. Rep. No. 104-469 at 117-18, an explicit consideration in assessing whether to grant parole is whether "in light of available detention resources, detention of the subject alien would limit the ability of ICE to detain another alien whose release may

pose a greater risk of flight or danger to the community." Dkt. 16-2 at 4.[5] In conjunction with the four other categories of aliens eligible for parole, *see id.*, 8 C.F.R. § 212.5(b)(1)-(4), the number of aliens released from detention via discretionary authority of DHS—like parole—is voluminous. In "Fiscal Year 2019" alone "ERO [Enforcement and Removal Operations] has released more than 233,000 aliens pursuant to its discretionary authority." Dkt. 16-2 at 5. This is unsurprising and likely to continue, as "[i]n light of finite detention resources, it is expected that a significant number of" unadmitted aliens "will ultimately need to be paroled from custody." *Id.* There is accordingly no basis to "conclude that if § 1225(b)(1) mandates Plaintiffs' detention without bond hearings, it is likely unconstitutional," Dkt. 15-1 at 8, as the parole process provides an alternative means to end confinement.

Plaintiffs' concerns about the sufficiency of the protections afforded by the parole process are unsupported by the record and, at a minimum, premature. The government has not yet had the opportunity to apply its parole guidance to Plaintiffs for the amount of time necessary for an individual to become a class member under the new *Matter of M-S-* system. It was therefore not possible for the district court to

[5] Other considerations include whether the alien is the sole caretaker of a minor child, elderly family member, or family member with a serious illness, whether the alien will be an organ donor in the near future, or whether the alien has a disability rendering detention inappropriate or has been the victim of sexual abuse or assault. *See id.*

meaningfully evaluate whether that system affords sufficient protection—and indeed, the district court made no assessment of the parole process—and Plaintiffs' speculative concerns about future harm are insufficient to justify a nationwide injunction.

Nonetheless, in the event that detention becomes "arbitrary" and "prolonged," *Marin*, 909 F.3d at 256, an individual alien can file an individual habeas petition to challenge the legality of his or her detention. *See, e.g.*, *Banda v. McAleenan*, No. C18-1841JLR, 2019 WL 2473815, at *1-*3 (W.D. Wash. June 12, 2019). Such claims brought by "individual alien[s]" are excepted from the bar on injunctive relief articulated in section 1252(f)(1) and thus do not suffer from the threshold defect present in Plaintiffs' classwide claim for injunctive relief in this case.

In sum, the presence of multiple safety valves bolsters the conclusion that section 1225(b)(1)(B)(ii) is constitutional.

III. The Remaining Procedural Requirements Imposed by the Injunction Are Unfounded.

At the time of the the initial preliminary injunction, Plaintiffs received bond hearings in accordance with section 1226(a). *See Matter of X-K-*, 23 I. & N. Dec. 731. In that preliminary injunction order, the district court enjoined the ordinary bond procedures as insufficient to vindicate Plaintiffs' *statutory* right to release on bond during the pendency of their proceedings and required heightened procedures. Those additional procedures include the requirement that the government bear the

burden of proof at the bond hearing, that each bond hearing be recorded, and that a recording or verbatim transcript of the bond hearing be produced upon appeal, and that the immigration judge issue written decisions with "particularized determinations of individualized findings at the conclusion of the bond hearing." April 5 Op. 19.[6] These additional procedures were imposed regardless of whether the alien waives appeal. After *Matter of M-S-* was issued, the district court declined to vacate the procedural enhancements, and failed to address whether these requirements remain necessary in light of the confirmation in *Matter of M-S-* of Congress's express prohibition on permitting Plaintiffs to be released on bond at all. The district court erred by enjoining the government to provide individuals who recently entered the United States illegally more process than Congress provided to aliens detained under section 1226(a) to vindicate an interest in a bond hearing that Congress expressly foreclosed.

a. At the outset, the district court erred by using the balancing test set out in *Mathews* in order to determine which procedures a bond hearing must follow. The Supreme Court "ha[s] never viewed *Mathews* as an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *see, e.g.*, *id.* (explaining that *Mathews* does not provide "the appropriate analyticial

[6] Implicit in the injunction's requirement that immigration judges issue a written decision at the conclusion of the bond hearing is that immigration judges are required to make bond decisions that same day, at the conclusion of the hearing.

framework" for judging the sufficiency of notice); *Medina v. California*, 505 U.S. 437, 443 (1992) (explaining that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which … are part of the criminal process"). The appropriate analytical framework for analyzing the due process claims here is instead established by *Mezei*: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned." 345 U.S. at 212.

b. In any event, the district court's analysis is flawed on its own terms. The precondition that DHS bear the burden of proof in bond hearings to "demonstrate why the class member[s] should not be released on bond," Op. 19, transgresses decades of Supreme Court precedent. Dating back to 1952, the Supreme Court has repeatedly reaffirmed the constitutionality of detention pending removal proceedings even though the government has not borne the burden of justifying that detention. *See Demore*, 538 U.S. at 531; *Zadvydas*, 533 U.S. at 701; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. And in *Flores*, the Supreme Court explicitly sanctioned the constitutionality of the "precursor to 8 U.S.C. § 1252(a)," 507 U.S. at 306—the single statute Plaintiffs cite as purportedly giving rise to a statutory right to a bond hearing, Dkt. 15-1 at 2—even though "Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General." 507 U.S. at 306. The elimination of that

presumption is fully consistent with requiring the alien to bear the burden of proof at his or her bond hearing.

The error the district court committed on this front becomes readily apparent when examining the latest Supreme Court decision to scrutinize this issue—*Jennings*. There, the majority rejected the argument that the canon of constitutional avoidance compelled an interpretation of the statute containing an implicit limit on detention, and further rebuffed the plaintiffs' request for the government to bear the burden of proof at bond hearings concerning aliens detained for six months or longer under 8 U.S.C. § 1226(a). 138 S. Ct. at 839, 843-44. Critically, even the three dissenting justices, all of whom had constitutional concerns about the statutory detention scheme, did not go as far as the district court did in placing the onus on the government to justify detention. Instead, those Justices simply stated that "bail proceedings should take place in accordance with customary rules of procedure and burdens of proof *rather than the special rules that the Ninth Circuit imposed*." *Id.* at 882 (Breyer, J., dissenting) (emphasis added). One such rule the Ninth Circuit erroneously mandated was the "the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk" because of the "canon of constitutional avoidance." *Robbins II*, 804 F.3d at 1074. Because the "customary rules of procedure and burdens of proof" in immigration proceedings is that the burden of proof is on the alien seeking bond,

every Justice in *Jennings* strongly implied that requiring immigration detainees to bear the burden of proof does not run afoul of the Constitution.

Criminal process does not provide a proper analogy to immigration processes, among other reasons because the Constitution generally guarantees significantly less extensive procedural protections in immigration proceedings than in criminal cases. *See, e.g.*, *INS v. Mendoza-Lopez*, 468 U.S. 1032, 1038 (1984). It is thus telling that, even in the criminal context, where the defendant enjoys heightened procedural protections, it is not impermissible for the burden to be placed on the defendant in cases where Congress provided for a presumption of detention. When a person is indicted for certain enumerated dangerous offenses, there is a rebuttable presumption in favor of detention pending trial, one that properly places the "burden of production to the defendant." *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008); *see also United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010) ("[W]hen the government presents an indictment … it is has fulfilled its burden to establish the presumption in favor of detention …. A defendant satisfies his burden of production when he come[s] forward with evidence that he does not pose a danger to the community or a risk of flight."); 18 U.S.C. § 3142(e)(3). Only if the "defendant proffers evidence to rebut the presumption of dangerousness" does the court then even consider the "four factors" in ascertaining whether "pretrial detention is" justified. *Hir*, 517 F.3d at 1086. And even then, "[t]he presumption is

not erased when a defendant proffers evidence to rebut it"; instead, "the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence." *Id.* The lesson from these cases is that when Congress makes a legislative judgment that detention is the default rule, not the exception, such a determination is permissible. *See Jennings*, 138 S. Ct. at 842 ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applications for admission until certain proceedings have concluded."); 18 U.S.C. § 3142(e)(3) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and safety of the community if the judicial officer finds that there is probable cause to believe that the person committed [a dangerous offense]."). By mandating that DHS bear the burden of proof in bond hearings, the district court improperly subverted that legislative judgment in favor of its own subjective view as to what due process required, rights that are not even enjoyed by United States citizens.

c. The same deficiency persists in requiring the bond hearings to be recorded, and requiring the government to produce the recording or a verbatim transcript upon appeal. *See* Op. 20. Once again, the district court invented rules out of whole cloth that outstrip the rights that United States citizens enjoy in criminal proceedings. In criminal trials, "[a] record of sufficient completeness does *not* translate

automatically into a complete verbatim transcript." *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971) (emphasis added); *United States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990) ("[A] failure to [produce a verbatim transcript] does not require a per se rule of reversal."). EOIR's own practice manual provides that as a general matter, bond hearings are "generally not recorded." Immigration Court Practice Manual, § 9.3(e)(iii).[7] This is a rule fully consistent with the fact that immigration hearings, by design, do not contain the same procedural protections as full-blown trials. *See Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997) ("[T]he rules of evidence are not applicable to immigration hearings."); *Baliza v. I.N.S.*, 709 F.2d 1231, 1233 (9th Cir. 1983) ("In the context of a deportation hearing this court has held that the only limitation upon its procedure [is] that a hearing, though summary, must be fair."); *see also Matter of Chirinos*, 16 I. & N. Dec. 276, 277 (BIA 1977) ("[T]here is no right to a transcript of a bond redetermination hearing. Indeed there is no requirement of a formal 'hearing'"). Tellingly, the opinion below is devoid of even a single mention of a case imposing similar procedural requirements in the context of immigration detention involving unadmitted, inadmissible aliens.

d. Requiring immigration judges to issue same-day written bond decisions with particularized determinations at the conclusion of the bond hearings is especially problematic from an operational standpoint. The immigration judge

[7] *Available at* https://www.justice.gov/eoir/page/file/1189481/download

normally only needs to prepare a Bond Memorandum as a record of the bond proceedings if the bond decision is appealed to the BIA. *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1115 (BIA 1999); Immigration Court Practice Manual, § 9.3(e)(iv). Instead, immigration judges rule orally, and issue form orders at the conclusion of bond hearings, which serves the goal of allowing aliens who have been granted a bond the ability to immediately present this order to their custodian, and also preserves scarce immigration court resources in cases where the parties do not intend to appeal. Immigration courts nationwide are facing an unprecedented backlog of cases. Dkt. 10-7 ¶ 12. This provision of the injunction would force immigration judges to devote precious docket time to writing decisions, furthering the backlog, to the detriment of aliens nationwide. *Id*. ¶ 19. There is no exception to this requirement for when aliens waive appeal, further demonstrating the waste of resources.

In conclusion, these additional procedures are unnecessary even for aliens with a statutory right to a bond hearing. "Congress did not want detention hearings to resemble mini-trials." *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986). The statute governing removal proceedings explicitly requires a "complete record . . . of all testimony and evidence produced." 8 U.S.C. § 1229a(b)(4)(C). The statute governing custody, in contrast, contains no specific directives. *See generally* 8 U.S.C. § 1226. The implementing regulations codify the distinctions between the

two types of proceedings. *See, e.g.*, 8 C.F.R. § 1003.19(d) (consideration of custody matters "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding"); *accord Matter of Guerra*, 24 I. & N. Dec. 37, 40 n.2 (BIA 2006) ("Bond proceedings are separate and apart from the removal hearing"). Accordingly, these additional procedural protections should be vacated.

IV. The Balance of Harms Does not Support Entry of a Nationwide Preliminary Injunction.

The injunction declares an act of Congress unconstitutional on its face and imposes a court-created system for release that is contrary to the one designed by Congress after careful deliberation. *See generally* H.R. Rep. No. 104-469 at 117-18. By itself, that constitutes "ongoing irreparable harm" that the Government is suffering, as any time a statute is enjoined, "irreparable injury" occurs. *King*, 567 U.S. at 1301. The extent of this injury is seen in the debilitating effect the injunction has on the political branches' efforts to combat illegal immigration and to dedicate resources to completing cases pending in immigration court.

The injunction, by treating individuals who enter unlawfully more favorably than those who lawfully present at a port of entry, encourages aliens to "enter[] without inspection" to "take advantage of the greater procedural and substantive rights afforded" by the injunction, contravening the purpose of section 1225(b)(1). *See Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010). Indeed, the injunction constitutionalizes these very harms, erecting an immigration scheme whereby the

Constitution commands that the Nation assume the risks of allowing release into the United States of aliens arriving at our borders, even before a determination of their admissibility is made, contrary to the decisions of the political branches to whom such decisions are assigned under our constitutional scheme. *See Mandel*, 408 U.S. at 765-766.

Plaintiffs' efforts to minimize these harms are unavailing. As an initial matter, the sole evidence Plaintiffs submit in response consists of a single declaration, that attempts to second-guess publicly-available Congressional findings. *See* Reichlin-Melnick Decl., Dkt. 15-5, ¶¶ 1-17. Based on the declaration, Plaintiffs first assert "the vast majority of asylum seekers who establish credible fear appear for their court hearings." Dkt. 15-1 at 16. But the data underpinning this assertion is suspect, as, without explanation, it examines data "over the past decade," Reichlin-Melnick Decl. ¶ 8, instead of data limited to "recent years" corresponding to the "significant increase in the number and percentage of aliens who seek admission or unlawfully enter the United States and then assert an intent to apply for asylum." 83 Fed. Reg. at 55944. And Plaintiffs' declarant concedes that the figures he relies on are subject to multiple caveats. *See* Reichlin-Melnick Decl. ¶ 8 n.1. Thus Plaintiffs do not actually dispute that in fiscal year 2018, in "approximately 31% of all initial completions in FY 2018 that originated from a credible-fear referral," the alien

"failed to appear at a hearing," 83 Fed. Reg. at 55946, a figure different from the one Plaintiffs rely on and one that constitutes a "significant proportion" of all cases. *Id.*

More generally, Plaintiffs' myopic focus on whether those who establish a credible fear appear for their hearing misses the larger point. The pertinent question is not simply whether those who are found to have a credible fear appear at their hearing, but rather, whether those positive credible fear determinations ultimately ripen into successful asylum grants. And the answer to this latter question is a resounding no, based on a variety of issues independent of whether aliens actually appear for their hearings. For example, in "40% of all initial completions originating with a credible-fear referral," the alien did not even file "an application for asylum." 83 Fed. Reg. at 55946. In conjunction with in absentia removal orders based on failure to appear, "in nearly half of the cases completed by an immigration judge in FY 2018 involving aliens who passed through a credible-fear referral, the alien failed to appear at a hearing or failed to file an asylum application." *Id.* These figures, which are fully "consistent with trends from FY 2008 through FY 2018" are unaddressed by Plaintiffs' declarant, and contribute significantly to the miniscule percentage of positive credible fear determinations that turn into asylum grants—17%. 83 Fed. Reg. at 55935.

Plaintiffs have no answer to this data—indeed, their Declarant readily acknowledges the 17% figure, *see* Reichlin-Melnick Decl. ¶ 12—other than to

accuse the government of painting a "distorted picture of current asylum grant rates" because "due to the size of the immigration court backlogs, it will take years to determine the ultimate asylum grant rate[s] for current asylum seekers." *Id.*, ¶¶ 13, 15. This criticism misses the mark, as the figures in the Federal Register are based on "completed cases." 83 Fed. Reg. at 55935. Moreover, Plaintiffs' apparent disagreement with this data improperly invades the province of the agency; courts are required to "defer to the agency's interpretation of … data so long as the agency provides a reasonable explanation for adopting its approach." *Alaska Oil & Gas Ass'n v. Pritzger*, 840 F.3d 671, 679 (9th Cir. 2016). Such an explanation, consistent with the underlying data, was clearly provided here. *See also Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) ("It is not our role to ask whether we would have given more or less weight to different evidence, were we the agency …. Such judgments are entitled to particularly deferential review.").

The injunction further imposes clear operational harms. In order to schedule bond hearings within the required time, immigration courts will almost certainly have to cancel and postpone other hearings to ensure adequate docket space for bond hearings. *See* Declaration of Assistant Chief Immigration Judge Daniel Weiss Dkt. 10-7 ¶¶ 10-11. This would adversely impact all detained aliens by increasing their time in detention—compliance with the injunction would require delaying other hearings to ensure docket space for the bond hearings within the timeframe

mandated by the district court. *Id*. And the requirement that immigration judges issue a written decision with particularized determinations the same day as the conclusion of each bond hearing places an enormous burden on the immigration court system as a whole, as additional docket space must be allocated to writing decisions, further exacerbating the already unprecedented backlog of nearly a million cases. *Id.*, ¶¶ 19-20. Although Plaintiffs derisively refer to these burdens as being "exaggerate[d]," Dkt. 15-1 at 17, they offer no evidence to back up their unsubstantiated claim.

Against all this, the district court concluded, without making any findings, that "[t]he deprivation of [Plaintiffs'] constitutional rights, the physical/emotional/psychological damage engendered by their indefinite detention, the separation from their families, and the negative impact on their ability to properly prepare their cases," outweighed the government's interest in the enforcement of the immigration laws. Op. 18. But the potential difficulties that come from being lawfully detained are but a consequence of seeking admission to the United States, *see Clark v. Smith*, 967 F.2d 1329, 1331 (9th Cir. 1992), that aliens with far greater due process rights than plaintiffs must endure. *See Demore*, 538 U.S. at 523. Those non-cognizable harms cannot outweigh the harm the injunction does to the clear Congressional command of section 1225(b)(1)(B)(ii) and "the public interest [in] the efficient administration of the immigration laws at the border," *Innovation Law Lab*

924 F.3d at 510. Plaintiffs have identified no other basis for irreparable harm. *See* Dkt. 15-1 at 20.

CONCLUSION

The Court should vacate the district court's orders granting preliminary injunctive relief.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
SARAH STEVENS WILSON
Assistant United States Attorney
By: /s/ *Lauren C. Bingham*
LAUREN C. BINGHAM
Senior Litigation Counsel
By: /s/ *Archith Ramkumar*
ARCHITH RAMKUMAR
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel.: 202-616-4458
Email: lauren.c.bingham@usdoj.gov

Attorneys for Defendants-Appellants

Dated: July 31, 2019

STATEMENT OF RELATED CASES

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

By: */s/ Lauren C. Bingham*

LAUREN C. BINGHAM
Senior Litigation Counsel
United States Department of Justice
Civil Division

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Lauren C. Bingham*
LAUREN C. BINGHAM
Senior Litigation Counsel
United States Department of Justice
Civil Division

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because it contains 13,268 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

By: */s/ Lauren C. Bingham*
LAUREN C. BINGHAM
Senior Litigation Counsel