UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 16-00620-JGB (KKx)**	Date	November 10, 2016
Title	***Xochitl Hernandez et al. v. Loretta Lynch et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order: (1) DENYING Defendants' Motion to Dismiss (Dkt. No. 59); (2) GRANTING Plaintiffs' Motion for Class Certification (Dkt. No. 24); and (3) GRANTING Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 45) (IN CHAMBERS)**

Before the Court is: (1) a Motion to Dismiss filed by Defendants Jon Briggs, Christina Holland, Sandra Hutchens, James Janecka, David Jennings, Jeh Johnson, Mike Kreuger, Loretta Lynch, Juan P Osuna, Carlos Roja, and Sarah Saldana (collectively "Defendants") (Dkt. No. 59); (2) a Motion for Class Certification filed by Plaintiffs Xochitl Hernandez and Cesar Matias ("Plaintiffs") (Dkt. No. 24); and (3) a Motion for Preliminary Injunction filed by Plaintiffs (Dkt. No. 45). After considering the papers submitted in support of and in opposition to the motions and the arguments of counsel, the Court: (1) DENIES Defendants' Motion to Dismiss; (2) GRANTS Plaintiffs' Motion for Class Certification; and (3) GRANTS Plaintiffs' Motion for Preliminary Injunction.

I. PROCEDURAL HISTORY

A. Allegations and Claims in the Complaint

On April 6, 2016, Plaintiffs filed a putative class action Complaint against: (1) U.S. Attorney General Loretta Lynch; (2) Director of the Executive Office for Immigration Review Juan P. Osuna; (3) Secretary of the Department of Homeland Security Jeh Johnson; (4) Director

of Immigration and Customs Enforcement ("ICE") Sarah S. Saldana; (5) Field Office Director of the Los Angeles Field Office of ICE David Jennings; (6) Warden of the Adelanto Detention Facility James Janecka; (7) Jail Administrator of the Santa Ana City Jail Christina Holland; (8) Chief of the Santa Ana City Department Carlos Roja; (9) Captain of the Orange County Sheriff's Department ("OCSD") Jon Briggs; (10) OCSD Captain Mike Krueger; (11) OCSD Sheriff Sandra Hutchens. (Dkt. No. 1.) Plaintiffs sue each defendant in his or her official capacity and seek habeas, declaratory, and injunctive relief. (Id.)

The Complaint alleges Plaintiffs are currently awaiting removal proceedings. (Compl. ¶ 2.) At the time this action was filed, both Plaintiffs had been detained pending removal proceedings pursuant to the Immigration and Nationality Act ("INA") (specifically, 8 U.S.C. § 1226(a)). (Id. ¶¶ 2, 7-8.) Hernandez was detained at the Adelanto Detention Center in Adelanto, California, and Matias was detained in the Santa Ana City Jail in Santa Ana, California. (Id.) Both Plaintiffs were granted release on bond by U.S. Immigration Judges pending removal proceedings, but remained detained for prolonged periods of time because they could not afford to pay the amounts required for their bond. (Id.) Plaintiffs challenge the legality of various policies and practices by which U.S. immigration officials under the supervision of Defendants set bond for Plaintiffs and others similarly situated. (Id. ¶¶ 52-63.) Plaintiffs purport to represent a putative class of individuals in the Central District of California detained pending removal proceedings pursuant to 8 U.S.C. § 1226(a).[1] (Id. ¶¶ 35-50.)

Plaintiffs challenge the following four policies and practices. First, Plaintiffs allege U.S. immigration officials do not consider detainees' ability to pay when setting bond. (Id. ¶ 3.) Second, Plaintiffs allege immigration officials do not consider whether conditions of supervision, alone or in combination with a lower bond amount, would suffice to ensure detainees' appearance during removal proceedings. (Id.) Third, Plaintiffs allege immigration officials require detainees released on bond post the full cash bond amount to be released, instead of permitting them to post a deposit, property, or other assets as collateral. (Id.) Fourth, Plaintiffs allege immigration officials do not recognize a detainee's inability to post bond, despite having made good faith efforts to do so, as a "changed circumstance" warranting a new bond hearing pursuant to 8 C.F.R. § 1003.19(e). (Id. ¶ 29.) As a result of these policies and practices, Plaintiffs claim, "the government incarcerates Plaintiffs and others solely because they lack the financial means to post the full bond amount that Defendants have set." (Id. ¶ 3.) Moreover, Plaintiffs contend that they and those similarly situated have "remain[ed] detained for prolonged periods [of time] while their immigration cases are pending." (Id. ¶ 1.)

Plaintiffs contend the policies and practices described above violate: (1) the INA (specifically, 8 U.S.C. § 1226(a)); (2) the Due Process Clause of the Fifth Amendment to the U.S. Constitution; (3) the Equal Protection Guarantee of the Fifth Amendment to the U.S.

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[1] Plaintiffs seek certification of the putative class as a habeas corpus class, pursuant to 28 U.S.C. § 2241. (See Compl. ¶ 20; Class Cert Mot. at 9 n.4.) "While ordinarily disfavored, the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus." Rodriguez v. Hayes, 591 F.3d 1105, 1117 (9th Cir. 2010).

Constitution; and (4) the Excessive Bail Clause of the Eighth Amendment to the U.S. Constitution. (Id. ¶¶ 52-63.) Plaintiffs seek: (1) certification of the putative class; (2) declaratory judgment as to the illegality of these policies and practices; (3) writs of habeas corpus for Plaintiffs and an order directing Defendants to grant Plaintiffs new bond hearings; and (4) an injunction ordering Defendants to consider Plaintiffs' and putative class members' ability to pay, alternative forms of secured bond, and other conditions of supervision when setting bond, and to provide them with new bond hearings if they are unable to post bond after making good faith efforts to do so. (Id. at 15-16.)

B. Pending Motions

1. Plaintiffs' Motion for Class Certification

On April 22, 2016, Plaintiffs filed a Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23. ("Class Cert. Mot.," Dkt. No. 24.) In their Motion, Plaintiffs seek certification of a class of individuals encompassing "[a]ll individuals who are or will be detained pursuant to 8 U.S.C. § 1226(a) on a bond set by an U.S. Immigration and Customs Enforcement officer or an Immigration Judge in the Central District of California." (Id.) In support, Plaintiffs filed the following documents:

- Declaration of Michael Tan and eight accompanying exhibits (Dkt. No. 24-1);
- Declaration of Lauren Esterle (Dkt. No. 24-2);
- Declaration of Talia Inlender (Dkt. No. 24-3);
- Declaration of Michael Kaufman (Dkt. No. 24-4);
- Declaration of Matthew Sloan (Dkt. No. 24-5);
- Declaration of Xochitl Hernandez (Dkt. No. 24-6) and an accompanying exhibit;[2] and
- Declaration of Cesar Amilcar Matias Menjivar ("Matias Decl.," Dkt. No. 24-7).

On June 6, 2016, Defendants filed an Opposition and thirteen accompanying exhibits. (Dkt. No. 56, 56-1, 56-2, 56-3, 56-4, 56-5, 56-6, 56-7, 56-8, 56-9, 56-10, 56-11, 56-12, 56-13.)

On June 13, 2016, Plaintiffs filed a Reply. (Dkt. No. 63.)

2. Plaintiffs' Motion for Preliminary Injunction

On May 19, 2016, Plaintiffs filed a Motion for Preliminary Injunction, seeking a preliminary injunction "requir[ing] that immigration officials consider ability to pay when setting a bond amount and release on alternative conditions where appropriate, and set bond at no greater amount than necessary to ensure the person's appearance." ("Prelim. Inj. Mot.," Dkt.

[2] Plaintiffs filed a corrected version of Hernandez's declaration on April 26, 2016. (Dkt. No. 34.) The Court's citations to the declaration refer to this corrected version.

No. 45.) In support, Plaintiffs filed a Declaration of Alexis Warren and ten accompanying exhibits. (Dkt. No. 45-1, 45-2, 45-3, 45-4, 45-5, 45-6, 45-7, 45-8, 45-9, 45-10, 45-11.)

On June 6, 2016, Defendants filed an Opposition and thirteen accompanying exhibits. (Dkt. No. 55, 55-1, 55-2, 55-3, 55-4, 55-5, 55-6, 55-7, 55-8, 55-9, 55-10, 55-11, 55-12, 55-13.)

On June 13, 2016, Plaintiffs filed Replies to Defendants' Opposition.[3] (Dkt. No. 62, 64.)

3. Defendants' Motion to Dismiss

On June 10, 2016, Defendants filed a Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).[4] ("MTD," Dkt. No. 59.) In support, Defendants filed thirteen accompanying exhibits.[5] (Dkt. No. 59-1, 59-2, 59-3, 59-4, 59-5, 59-6, 59-7, 59-8, 59-9, 59-10, 59-11, 59-12, 59-13.) On July 11, 2016, Plaintiffs filed an Opposition. (Dkt. No. 67.) On July 18, 2016, Defendants filed a Reply and an accompanying exhibit. (Dkt. No. 68, 68-1.)

4. Supplemental Filings

On August 10, 2016, in response to an Order of this Court, Plaintiffs and Defendants filed supplemental briefs. (Dkt. No. 72, 73.) In addition, Plaintiffs filed a supplemental declaration by Michael Kaufman and two accompanying exhibits. ("Supp. Kaufman Decl. I," Dkt. No. 74, 74-1.)

On August 22, 2016, the Court held a hearing on the parties' motions.

On September 10, 2016, Defendants filed a status report stating Hernandez appeared for a bond hearing before Immigration Judge Ana Partida on August 23, 2016 and was subsequently released on bond on September 9, 2016. (Dkt. No. 78.) On September 12, 2016, Plaintiffs filed a response to the status report, a second supplemental declaration by Michael Kaufman ("Supp. Kaufman Decl. II"), and two accompanying exhibits. (Dkt. No. 79, 80, 80-1.) On September 16, 2016, Defendants filed a copy of the transcript of Hernandez's August 23, 2016 bond hearing.[6] (Dkt. No. 81, 81-1.)

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[3] The Replies appear to be identical. The Court therefore does not specify which of these replies it cites in its paginated references to them.

[4] Defendants filed a corrected version of the Motion on June 13, 2016. (Dkt. No. 60-1.) The Court's citations to the Motion refer to this corrected version.

[5] Defendants have filed the same thirteen exhibits in connection with all three of the motions currently before the Court. For purposes of simplicity, the Court refers to these exhibits as "Defs., Ex. No."

[6] On October 11, 2016, Defendants also filed a status report stating the Board of Immigration Appeals reversed a prior bond amount set for Hernandez. (Dkt. No. 82, 82-1.) The Board of Immigration Appeals' order has no bearing on the issues implicated in this action.

II. LEGAL AND FACTUAL BACKGROUND

A. Bond Determinations by U.S. Immigration Officials Under 8 U.S.C. § 1226(a)

8 U.S.C. § 1226(a) ("Section 1226(a)") authorizes the arrest and detention of noncitizens whom the U.S. Government ("Government") is seeking to remove from the United States. Under Section 1226(a), the U.S. Attorney General has discretion to either detain arrested noncitizens or release them on a bond of "at least $1,500" or "conditional parole," pending a decision on whether to deport them from the U.S.[7] The Attorney General shares the authority to detain or release noncitizens under Section 1226(a) with the Secretary of Homeland Security ("DHS"), who has the authority to "prescribe" bond in immigration proceedings. 8 U.S.C. §§ 1103(a), (g)(2).

When a noncitizen is detained under Section 1226(a), an ICE officer within DHS makes an initial custody determination as to whether the noncitizen should be released, and if so, whether on recognizance, bond, or other conditions. See 8 C.F.R. § 1236.1(d)(1). The noncitizen may then seek review of an ICE custody determination before a U.S. Immigration Judge at a "custody redetermination" hearing. Id. At the hearing, the Immigration Judge determines anew whether the noncitizen may be released on recognizance, bond, or other conditions. See 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 1003.19(d).

For an ICE official or an Immigration Judge to order release, the noncitizen detainee bears the burden of "demonstrat[ing] to the satisfaction of the officer that [his or her] release would not pose a danger to property or persons, and that [he or she] is likely to appear for any future proceedings." 8 C.F.R. § 1236.1(c)(8); In Re Adeniji, 22 I. & N. Dec. 1102, 1102 (BIA 1999). Noncitizens who present a danger to persons or property are ineligible for bond. In Re Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006). If the ICE officer or Immigration Judge determines that the detainee does not pose a danger and is likely to appear at future proceedings, the officer may then release the detainee on recognizance, bond, or other conditions that sufficiently address any concerns about flight risk. See 8 C.F.R. §§ 1236.1(c)(8), (d)(1). After an initial bond determination, a detainee's request for a subsequent bond redetermination can be considered only "upon a showing that the alien's circumstances have changed materially" since the prior bond determination. 8 C.F.R. § 1003.19(e). An Immigration Judge's bond determination is reviewable by the Board of Immigration Appeals ("BIA"). See 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i).

The BIA instructs Immigration Judges to consider the following nine factors when "determining whether an alien merits release [on] bond, as well as the amount of bond that is appropriate": "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and

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[7] The statute also provides for the mandatory detention of noncitizens who are inadmissible or deportable by reason of having committed certain criminal offenses. See 8 U.S.C. § 1226(c). Defendants do not contend this provision supports detention of either Plaintiff.

whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." Guerra, 24 I. & N. Dec. at 40. According to the BIA, Immigration Judges possess "broad discretion in deciding the factors that he or she may consider" and "may choose to give greater weight to one factor over others, as long as the decision is reasonable." Id. "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." Id.

The Executive Office for Immigration Review also publishes an "Immigration Judge Benchbook" listing many of the same factors identified by the BIA as considerations during bond determinations.[8] See EOIR Immigration Judge Benchbook, Introductory Guides: Bond, at 6-7, available at https://www.justice.gov/eoir/immigration-judge-benchbook. The Benchbook also identifies a detainee's "ability to pay" as a "less significant" factor that is "not dispositive." Id. at 7.

The Ninth Circuit has held that the Government may not detain an individual pursuant to Section 1226(a) "for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008). "As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." Diouf v. Napolitano, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011). Hence, the Ninth Circuit requires the Government to automatically conduct bond hearings for individuals detained under Section 1226(a) every six months "so that [they] may challenge their continued detention as the period of . . . confinement grows." Rodriguez v. Robbins, 804 F.3d 1060, 1085, 1089 (9th Cir. 2015) (internal citation and quotation marks omitted), cert. granted sub nom. Jennings v. Rodriguez, 136 S. Ct. 2489 (2016). At these hearings, Immigration Judges are required to consider alternatives to detention when setting bond amounts. Id. at 1087-88. To distinguish these court-mandated hearings from initial bond determination proceedings, the Court refers to them as "Rodriguez hearings." Unlike at the initial bond determination stage, the burden rests upon the Government during Rodriguez hearings to prove "by clear and convincing evidence that an alien

[8] The Benchbook "was designed by Immigration Judges in collaboration with others for use by Immigration Judges . . . to assist Immigration Judges in continuing their duties in the immigration courts of this country on a daily basis." See EOIR Immigration Judge Benchbook, Introduction: Using the Benchbook, available at https://www.justice.gov/eoir/immigration-judge-benchbook. The Benchbook "is not designed to influence how a Judge decides a case or even to suggest a particular path to follow in resolving a case" and merely purports to be "a portal through which one can begin the journey for the correct answer on an issue in a case." Id. The Benchbook "stress[es] that a Judge should check the applicable law in their circuit prior to rendering a decision." Id.

is a flight risk or a danger to the community to justify denial of bond." Id. at 1087 (internal citation and quotation marks omitted).

In this action, Plaintiffs challenge the Government's initial bond determination procedures and do not challenge the Government's practices during Rodriguez hearings.

B. Bond Determination Practices in This District

Plaintiffs present three declarations regarding bond determination practices in this District and Defendants present no evidence disputing the content of these declarations. First, Plaintiffs submit the declaration of their counsel Michael Tan. Tan claims he received data from ICE on December 15, 2015 regarding the number of individuals detained in the "Los Angeles Area of Responsibility"[9] after having bond set by an ICE official or Immigration Judge pursuant to 8 U.S.C. § 1226(a).[10] (Tan Decl. ¶¶ 2, 5.) The data reflects that, as of October 2, 2015, there were at least 119 individuals detained in this District pursuant to 8 U.S.C. § 1226(a) for whom bond had been determined and who had not posted bond. (Id. ¶ 14, Ex. B.) The data also reflects that initial bond amounts set by ICE officials and Immigration Judges ranged from $1,500 to $100,000. (Id. ¶ 16, Ex. B.) Tan avers he is aware of cases in this District where Immigration Judges have set bond as high as $2.5 million. (Id. ¶ 17.)

Second, Plaintiffs submit a declaration by Lauren Esterle, a Staff Attorney and Georgetown University Law Center Detainee Rights Fellow at the Immigrant Defenders Law Center in Los Angeles California. (See Esterle Decl. ¶ 1.) Esterle avers she has represented individuals detained at the Adelanto Detention Facility in Adelanto, California in their removal proceedings. (Id. ¶ 3.) Esterle also avers she conducted "know-your-rights" presentations for recent arrivals to the facility, met with detained individuals to help identify possible bond eligibility, and met with detainees who requested follow-up consultations regarding Immigration Judges' bond orders. (Id. ¶ 5.) Esterle estimates she has conducted over 280 consultations with Adelanto detainees, has represented clients at approximately fifteen bond hearings, and has observed thirteen additional bond hearings at the Adelanto Immigration Court. (Id. ¶ 5, 10.)

Based on her work experiences, Esterle declares the following facts. ICE officials and Immigration Judges at the Adelanto Immigration Court set a wide range of bond amounts for individuals detained pursuant to 8 U.S.C. § 1226(a), ranging from $1,500 to $45,000. (Id. ¶ 10.) Detainees who are released on bond must post the full cash amount with ICE in order to be released from detention. (Id. ¶ 9.) During initial bond determinations under Section 1226(a), ICE officers and Immigration Judges are not required to consider either an individual's ability to

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[9] The ICE Los Angeles Area of Responsibility oversees all the immigration detention centers located in the Central District of California, including the Adelanto Detention Facility in Adelanto, California, the James A. Musick Facility in Irvine, California, the Santa Ana City Jail in Santa Ana, California, and the Theo Lacy Facility in Orange, California. (Tan Decl. ¶ 4.)

[10] ICE sent the data in response to a Freedom of Information Act request by the American Civil Liberties Union. (Tan Decl. ¶ 2, Ex. A.)

pay a bond or whether a lower bond, alternative bond (such as an appearance, deposit, or collateral bond) or non-monetary conditions of supervision would suffice to address flight risk concerns and permit the person's release. (Id. ¶¶ 11-12.) In fact, some Immigration Judges refuse to consider a person's financial circumstances, even when these circumstances are raised by a detainee's counsel. (Id. ¶ 13.) During Rodriguez hearings, Immigration Judges are also not required to and do not consider an individual's ability to pay when setting bond. (Id. ¶ 12.) In addition, "the immigration court" does not recognize a person's financial inability to post bond, despite having made good faith efforts to do so, as a "changed circumstance" warranting a new bond hearing under 8 C.F.R. § 1003.19(e). (Id. ¶ 18.) As a result, many individuals detained under Section 1226(a) who have been granted release on bond remain detained for extended periods of time because they cannot afford to pay the set bond amount. (Id. ¶¶ 14-15.)

Third, Plaintiffs submit a declaration by Talia Inlender, a Staff Attorney at the Immigrants' Rights Project at Public Counsel in Los Angeles California. (See Inlender Decl. ¶ 1.) Inlender has worked at Public Counsel since October 2008. (Id. ¶ 4.) Inlender's practice focuses on providing legal orientations, consultations, and direct legal representation to detained immigrants in DHS custody. (Id.) Inlender avers that during her employment with Public Counsel, she has represented noncitizens detained at the Santa Ana City Jail. (Id. ¶ 5.) Inlender claims she routinely consults with detainees to determine whether they are eligible for a bond hearing under Section 1226(a) and has represented detainees at approximately twenty such bond hearings. (Id. ¶ 9.)

Based on her work experiences, Inlender presents the following facts. ICE officials and Immigration Judges at the Los Angeles Immigration Court set a wide range of bond amounts for individuals detained pursuant to 8 U.S.C. § 1226(a), ranging from $1,500 to tens of thousands of dollars. (Id. ¶ 9.) Detainees who are released on bond must post the full cash amount with ICE in order to be released from detention. (Id. ¶ 8.) During initial bond determinations under Section 1226(a), ICE officers and Immigration Judges are not required to consider either an individual's ability to pay a bond or whether a lower bond, alternative bond or non-monetary conditions of supervision would suffice to address flight risk concerns and permit the person's release. (Id. ¶¶ 10-11.) Moreover, Immigration Judges routinely do not consider such factors. (Id. ¶ 12.) During Rodriguez hearings, Immigration Judges are also not required to and do not consider an individual's ability to pay when setting bond. (Id. ¶ 11.) In addition, a person's financial inability to post bond, despite having made good faith efforts to do so, is not considered a "changed circumstance" warranting a new bond hearing under 8 C.F.R. § 1003.19(e). (Id. ¶ 13.) As a result, many individuals detained under Section 1226(a) who have been granted release on bond remain detained at the Santa Ana City Jail because they cannot afford to pay the set bond amount. (Id. ¶ 12.)

C. Plaintiff Hernandez

Plaintiff Hernandez was born in Mexico in 1976. (Hernandez Decl. ¶ 2.) Hernandez immigrated to the U.S. in the late 1980s and has lived continuously in Los Angeles, California since her arrival. (Id.) She has five children and four grandchildren, all of whom are U.S. citizens. (Id. ¶ 3.) Prior to her arrest and detention by immigration authorities, Hernandez lived

in a house she rented with her children and grandchildren. (Id. ¶ 4.) Hernandez's children worked to pay for rent and other daily living expenses, but found it difficult to find steady work. (Id.) Hernandez reports that her family has little assets or savings. (Id.)

On February 24, 2016, while Hernandez was visiting a friend's house, Los Angeles Police Department ("LAPD") and ICE officials arrived at the house. (Id. ¶ 5.) The officials stated they were looking for a man they believed was in a gang. (Id.) The officials placed Hernandez and several inhabitants of the house in handcuffs and took them to an LAPD station. (Id.) At the station, Hernandez was asked questions about her identity, but was not charged with any crime. (Id.)

Later that day, Hernandez was transported to an ICE office in downtown Los Angeles. (Id. ¶ 6.) An ICE officer asked Hernandez some basic questions about her identity and immigration history, but did not mention whether she could be released on bond. (Id.) The officer did not ask Hernandez any questions about her financial circumstances, the amount of bond she could pay, or whether she could be released on conditions other than a money bond. (Id.) That same day, ICE initiated removal proceedings against Hernandez. (Defs., Ex. 3.)

On March 9, 2016, Hernandez appeared for a bond hearing in U.S. Immigration Court before Immigration Judge David Burke. (Hernandez Decl. ¶ 7; see also Defs., Ex. 7 (transcript of hearing).) Judge Burke did not ask any questions about Hernandez's ability to pay bond or her financial circumstances during the hearing. (Hernandez Decl. ¶ 7; see also Defs., Ex. 7.) Judge Burke also did not discuss whether Hernandez could be released on conditions other than a money bond. (Hernandez Decl. ¶ 7; see also Defs., Ex. 7.)

Several days after the hearing, Hernandez received Judge Burke's bond decision, dated March 17, 2016, in the mail. (Hernandez Decl. ¶ 8; Ex. A (copy of bond decision).) In the decision, Judge Burke found that while Hernandez was not a danger to the community, she was a "flight risk" because she was unlikely to be granted relief from removal and lived in a heavily gang-active area. (Id., Ex. A at 9.) Hence, Judge Burke set bond in the amount of $60,000, on the condition that Hernandez remained at least a quarter of a mile away from various gang-associated addresses and did not associate with the La Mirada street gang.[11] (Id.) Hernandez claims her family did not have the money or assets to pay the bond amount set by Judge Burke and that she consequently remained in detention at the Adelanto Detention Center after Judge Burke's decision. (Id. ¶ 9; Compl. ¶¶ 7, 41.)

On April 13, 2016, during a hearing before Judge Burke, Hernandez requested reconsideration of the bond decision on the grounds that she could not afford to pay it. (Defs., Ex. 6 at 33.) Judge Burke denied Hernandez's request because there were no "changed circumstances" since Hernandez's initial bond hearing. (Id. at 33-34.) In addition, Judge Burke

[11] The Government presented testimony at the bond hearing that Hernandez was an associate of the La Mirada street gang. (See Hernandez Decl., Ex. A. at 8; see also Defs., Ex. 7.)

remarked that he "did consider ability to pay" in his prior bond determination, but stated there were "significant issues" in her case that required bond in the amount he had set. (Id. at 33.)

On August 23, 2016, several months after this action was filed, Hernandez appeared for a bond hearing before Immigration Judge Ana Partida. (Dkt. No. 78.) The hearing was conducted pursuant to the Ninth Circuit's decision in Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015). (See Supp. Kaufman Decl. II, Ex. A (copy of Judge Partida's decision).) On August 30, 2016, Judge Partida ordered Hernandez released from custody upon payment of a $5,000 bond and enrollment in the "Alternatives to Detention" program. (See Dkt. No. 78.) The decision did not discuss Hernandez's ability to pay bond. (See Supp. Kaufman Decl. II, Ex. A.) Hernandez was subsequently released upon payment of the bond amount on September 9, 2016 and was placed on ankle monitoring.[12] (Dkt. No. 78.)

D. Plaintiff Matias

Plaintiff Matias was born in Sonaguera, Honduras in 1978. (Matias Decl. ¶ 2.) Matias is a gay man and claims to have fled Honduras to escape severe persecution he had suffered on account of his sexual orientation. (Id.) Matias entered the U.S. in May 2005 and has since lived in Los Angeles continuously. (Id.) Prior to being arrested and detained by ICE, Matias worked as a hair stylist and at a clothing factory in Los Angeles. (Id. ¶ 3.) Matias claims to have no savings because he spent the money he earned on rent and basic necessities. (Id.) Matias also claims he does not own a home or any other significant assets. (Id.)

On March 29, 2012, Matias was taken into ICE custody and transferred to a processing center in downtown Los Angeles. (Id. ¶ 4.) An ICE officer interviewed Matias and informed him he would remain detained. (Id. ¶ 5.) When Matias asked if he could be released on bond, the officer told him to ask the Immigration Judge. (Id.) The officer did not ask Matias any questions about his financial circumstances or the amount of bond he could afford to pay. (Id.) The officer also did not inform Matias whether he could be released on conditions other than a money bond. (Id.) Matias was then detained at the Santa Ana City Jail. (Id. ¶ 4.)

On March 29, 2012, ICE initiated removal proceedings against Matias. (Defs., Ex. 10.) On November 8, 2012, Matias had a bond hearing in U.S. Immigration Court before Immigration Judge Lorraine J. Munoz. (Id. ¶ 6.) Judge Munoz did not ask any questions about Matias's ability to pay bond or his financial circumstances during the hearing. (Id.; see also Defs., Ex. 11 (transcript of hearing).) At the end of the hearing, Judge Munoz set bond at $3,000, but did not ask whether Matias could pay $3,000 or whether he would be willing to pay a smaller bond amount. (Matias Decl. ¶ 6.) Judge Munoz also did not state that she had considered whether Matias could be released on conditions other than a money bond. (Id.) Matias claims he did not have enough money to pay the $3,000 bond and did not know of anyone who could help him pay it. (Id. ¶¶ 7, 10.) Consequently, Matias remained detained at the Santa Ana City Jail. (Compl. ¶ 8.)

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[12] Plaintiffs do not challenge Judge Partida's bond determination.

On February 1, 2013, during a hearing before Judge Munoz, Matias requested to be released from detention to retrieve documents that would help his case. (Id.; Matias Decl. ¶ 7.) Judge Munoz refused to reduce his bond amount and stated the bond amount was "pretty generous." (Matias Decl. ¶ 7; see also Defs., Ex. 9 at 132 (transcript of hearing).) Judge Munoz also noted that she could not consider reducing the bond amount absent a formal motion. (Defs., Ex. 9 at 133.)

In August 2013, Matias received a letter from ICE. (Matias Decl. ¶ 8.) The letter stated ICE had determined that he could be released on a $3,000 bond and with electronic monitoring. (Id.) ICE officials did not question Matias about his ability to pay this bond amount before he received the letter. (Id.)

In August 2014, Matias requested that his bond amount be reset during a hearing before Judge Munoz because he "[did not] have money to pay for it." (Id. ¶ 9; Defs., Ex. 12 at 2 (transcript of hearing).) Judge Munoz stated the $3,000 bond amount was "reasonable" and did not lower it or order Matias's release on his own recognizance. (Matias Decl. ¶ 9.) Judge Munoz noted that the passage of time and Matias's inability to post bond were "not significant enough" to revise her original bond determination. (Defs., Ex. 12 at 2.)

On January 21, 2016, Matias appeared at another bond determination hearing before Judge Munoz. (Defs., Ex. 13 (transcript of hearing).) At the hearing, Judge Munoz questioned Matias and again found the original bond determination was reasonable. (Id. at 19.) Judge Munoz did not question Matias about his financial circumstances or indicate she had considered whether Matias could be released on conditions other than a money bond. (See id.)

On June 7, 2016 – four years and three months after he was first detained and several months after this action was filed – Matias was released from ICE custody after Community Initiatives for Visiting Immigrants in Confinement ("CIVIC"), a local community organization, raised funds to post Matias's $3,000 bond.[13] (Supp. Kaufman Decl. I ¶¶ 2-4.)

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[13] On May 2, 2012, Matias applied for asylum, withholding of removal, and protection under the Convention Against Torture. (Matias Decl. ¶ 12.) After proceeding before the Ninth Circuit, Matias's immigration case was remanded to Immigration Court for consideration of newly obtained evidence on August 4, 2016. (Supp. Kaufman Decl. I, Ex. A.)

III. DEFENDANTS' MOTION TO DISMISS[14]

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) allows parties to bring a motion to dismiss a complaint for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). As such, even though a defendant may bring a motion to dismiss for lack of subject matter jurisdiction, it is presumed that the court lacks jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. Id.

A jurisdictional attack under Rule 12(b)(1) may be either facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2003). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Id. Courts accept as true all factual allegations in the complaint in a facial attack. Lacano Investments, LLC v. Balash, 765 F.3d 1068, 1072 (9th Cir. 2014). However, courts do not accept legal conclusions in the complaint as true, even if "cast in the form of factual allegations." Id. Further, courts need not accept allegations which fail to state a claim to relief that is plausible on its face. Terenkian v. Republic of Iraq, 694 F.3d 1122, 1131 (9th Cir. 2012).

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air, 373 F.3d at 1039. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Id. In such a motion, the court need not presume the truthfulness of the plaintiff's allegations. Id. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)

B. Discussion

Defendants argue the Court lacks jurisdiction over Plaintiffs' claims on three grounds. First, Defendants argue Plaintiffs have failed to exhaust their administrative remedies because they did not seek a BIA decision on their bond determinations. (MTD at 17-18.) Second,

[14] Defendants' Motion to Dismiss argues both that the Court lacks jurisdiction over Plaintiffs' claims and that Plaintiffs fail to state a claim on the merits under Federal Rule of Civil Procedure 12(b)(6). When assessing Defendants' Motion to Dismiss, the Court only addresses Defendants' jurisdictional arguments and discusses the merits of Plaintiffs' claims when assessing their entitlement to preliminary injunctive relief.

Defendants argue 8 U.S.C. § 1226(e) and 8 U.S.C. § 1252(a)(2)(B) bar judicial review of bond determinations by Immigration Judges. (Id. at 19-21.) Third, Defendants argue Matias and Hernandez lack Article III standing to assert claims for injunctive relief. (Defs. Supp. Brief at 2-4.) The Court addresses each of these arguments in turn.

1. Administrative Exhaustion

a. Applicable Law

On habeas review, exhaustion is a prudential rather than jurisdictional requirement. Singh v. Holder, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011). Courts may require prudential exhaustion if: (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; or (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review. Puga v. Chertoff, 488 F.3d 812, 815 (9th Cir. 2007). Even if these factors weigh in favor of prudential exhaustion, waiver of exhaustion may be appropriate "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." Laing v. Ashcroft, 370 F.3d 994, 1000 (9th Cir. 2004) (citation and quotation marks omitted). When a petitioner fails to exhaust prudentially required administrative remedies and exhaustion is not excused, "a district court should either dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies[.]" Leonardo v. Crawford, 646 F.3d 1157, 1160 (9th Cir. 2011) (dismissing habeas petition because petitioner sought habeas review of Immigration Judge's adverse bond determination before appealing to the BIA and did not "demonstrate[] grounds for excusing the exhaustion requirement").

b. The Parties' Contentions

Defendants argue Plaintiffs have not exhausted their administrative remedies with respect to the bond determinations they challenge. (MTD at 17-19.) Defendants contend Plaintiffs' Complaint should be dismissed as premature and "[t]he BIA should have the opportunity to review the Immigration Judge's bond determination[s] in the first instance under the current standards." (Id. at 18.) In particular, Defendants maintain Plaintiffs' claim under 8 U.S.C. § 1226(a) should first be presented to the BIA because the BIA's interpretation of the statute is entitled to deference under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, (1984). (Id. at 18 n.4.)

Plaintiffs respond that they have met the three-factor test for waiving the exhaustion requirement. (MTD Opp. at 9.) First, Plaintiffs argue a "record of administrative appeal" is unnecessary to resolve Plaintiffs' claims because they turn on legal questions: namely, whether Defendants' policies and practice violate 8 U.S.C. § 1226(a) and various constitutional provisions. (Id.) Second, Plaintiffs argue relaxation of the exhaustion requirement in this case would not encourage future habeas petitioners to bypass the administrative scheme because the issues raised by this action will cease to arise once Plaintiffs' legal claims are resolved. (Id.)

Third, Plaintiffs argue exhaustion would be futile because the BIA has already determined that Immigration Judges are not required to consider detainees' ability to pay when setting bond amounts. (Id. at 10.) In support, Plaintiffs cite two unpublished BIA dispositions purportedly holding "that a person's financial circumstances are irrelevant to a bond determination." (Id.) Plaintiffs also note that the BIA's published decision in Guerra does not require Immigration Judges to consider any particular factor at bond hearings and lists nine discretionary factors that Immigration Judges may consider, none of which relate to an individuals' financial circumstances or alternative conditions of release. (Id.)

c. Analysis

The Court waives the exhaustion requirement in this matter. First, a record of administrative appeal is not necessary to resolve the purely legal questions presented by Plaintiffs' statutory and constitutional claims. See Singh, 638 F.3d at 1203 n.3. Second, the discreteness of the legal questions presented and Plaintiffs' request for classwide relief suggest that relaxing the exhaustion requirement in this case will not encourage future habeas petitioners to bypass the administrative scheme, as the issue here will not arise again (at least in this District) once the Court's ruling becomes final. See id.; El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 747 (9th Cir. 1991) ("[R]elaxing the exhaustion requirement would not significantly encourage bypassing the administrative process because the district court will have jurisdiction only in the rare case alleging a pattern or practice violating the rights of a class of applicants.") (citation and quotation marks omitted).

Third, the Court is sufficiently convinced that BIA review of Plaintiffs' bond determinations would be futile. Recourse to administrative remedies is considered "futile" where the agency's position on the question at issue "appears already set," and the Court can predict the "very likely" outcome. El Rescate, 959 F.2d at 747. District courts have found unpublished BIA holdings highly probative of whether the BIA has come to a decision on an issue. See Rivera v. Holder, 307 F.R.D. 539, 552 (W.D. Wash. 2015) (collecting cases). Here, Plaintiffs cite two unpublished BIA dispositions holding that a detainee's ability to pay a bond amount is irrelevant to bond determinations.[15] See In Re: Mario Sandoval-Gomez, File: A092 563 965 - IMP, 2008 WL 5477710, at *1 (DCBABR Dec. 15, 2008) (rejecting claim that bond amount was excessive because "an alien's ability to pay the bond amount is not a relevant bond determination factor"); In Re: Nelson Salvador Castillo-Cajura, File: A089 853 733 - TAC, 2009 WL 3063742, at *1 (DCBABR Sept. 10, 2009) (same). Moreover, as Plaintiffs note, an individual's ability to pay and alternative conditions of release are not listed among the nine

[15] At the hearing on this matter, Defendants' counsel represented that some unpublished BIA dispositions consider an individual's ability to pay and others do not. Defendants do not provide a comprehensive list of such decisions in their briefing. In any case, the Court is nonetheless persuaded that exhaustion would be futile because an individual's ability to pay and alternative conditions of release are not listed among the nine discretionary factors Immigration Judges are instructed to consider when making bond determinations under Guerra – a published BIA decision.

discretionary factors Immigration Judges are instructed to consider when making bond determinations under Guerra.[16] See 24 I. & N. Dec. 37, 38 (BIA 2006). The Court is therefore persuaded that requiring Plaintiffs to first seek review of their bond determinations before the BIA would be futile. El Rescate, 959 F.2d at 747.

Accordingly, the Court DENIES Defendants' Motion to Dismiss insofar as it seeks dismissal of this action for Plaintiffs' failure to exhaust administrative remedies.

2. Judicial Review of Bond Determinations

a. Applicable Law

8 U.S.C. § 1226(e) bars judicial review of matters within the discretion of the Attorney General. The statute provides as follows:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). The Ninth Circuit has held that Section 1226(e) bars federal courts from entertaining claims that an Immigration Judge "set an excessively high bond amount" that the claimant could not afford. Prieto-Romero v. Clark, 534 F.3d 1053, 1067 (9th Cir. 2008). At the same time, "[a]lthough § 1226(e) restricts jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law." Leonardo, 646 F.3d at 1160 (internal citation and quotation marks omitted). In particular, "[i]t is now clear that 'a federal district court has habeas jurisdiction under 28 U.S.C. § 2241 to review *Casas–Castrillon* bond hearing determinations for constitutional claims and legal error.'" Id. (quoting Singh, 638 F.3d at 1200-01). "In addition, although the Attorney General's discretionary judgment . . . shall

[16] Defendants briefly argue the "ability to pay is a factor that is already considered in setting bond" because the Executive Office for Immigration Review's Immigration Judge Benchbook lists it as a factor to consider in bond determinations. (MTD at 2.) In addition, Defendants note one of the nine bond determination factors listed in Guerra is "employment history." (Id. at 2-3.) Defendants contend this factor "implicitly includes a consideration of ability to pay." (Id.) The Court is unpersuaded by both arguments. As an initial matter, the Benchbook does not purport to be a statement of law that binds Immigration Judges. See EOIR Immigration Judge Benchbook, Introduction: Using the Benchbook, available at https://www.justice.gov/eoir/immigration-judge-benchbook. Moreover, even if the ability to pay is a discretionary factor Immigration Judges may consider when determining bond under the Benchbook or Guerra, this is irrelevant to Plaintiffs' contention that both the ability to pay and alternatives to detention must be considered in bond determinations. Lastly, Defendants cite no authority supporting the proposition that immigration officials look at an individual's current financial circumstances when considering their "employment history" under Guerra.

not be subject to review, claims that the discretionary process itself was constitutionally flawed are cognizable in federal court on habeas . . . ." Singh, 638 F.3d at 1202 (internal citation and quotation marks omitted).

Like Section 1226(e), 8 U.S.C. § 1252(a)(2)(B) contains similar restrictions on judicial review. The statute provides as follows:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. §§ 1252(a)(2)(B)(i)-(ii). "Like § 1226(e), § 1252(a)(2)(B)(ii) restricts jurisdiction only with respect to the executive's exercise of discretion" and "does not limit habeas jurisdiction over questions of law." Singh, 638 F.3d at 1202.

b. The Parties' Contentions

Defendants argue the Court lacks jurisdiction over Plaintiffs' claims under both 8 U.S.C. § 1226(e) and 8 U.S.C. § 1252(a)(2)(B). (MTD at 19-21.) Defendants contend "[t]his Court has no jurisdiction to consider Plaintiffs' claims concerning the factors an Immigration Judge may consider in setting a bond, because the INA specifically bars judicial review of an Immigration Judge's bond determination" under both of these statutory provisions. (Id. at 19.) In support, Defendants cite the Ninth Circuit's decision in Prieto-Romero. (Id. at 20.) According to Defendants, Prieto-Romero held that "an Immigration Judge's decision to set a particular bond amount is not subject to judicial review." (Id.)

Plaintiffs respond that neither statutory provision bars judicial review of their claims. (MTD Opp. at 7-9.) Plaintiffs argue the Ninth Circuit has recognized that neither statute applies to statutory and constitutional claims like those brought by Plaintiffs. (Id.) Moreover, Plaintiffs argue Prieto-Romero is distinguishable from this action because the claimant in Prieto-Romero challenged an Immigration Judge's discretionary decision to set a particular bond amount and did not allege any legal or constitutional error. (Id. at 8.)

c. Analysis

The Court rejects Defendants' jurisdictional arguments. The Ninth Circuit has established that both constitutional claims and claims raising questions of law fall within the Court's habeas jurisdiction under 28 U.S.C. § 2241, despite the limiting language of 8 U.S.C. § 1226(e) or 8 U.S.C. § 1252(a)(2)(B). See Singh, 638 F.3d at 1202. In particular, the Ninth Circuit has held that federal courts have jurisdiction over habeas claims that "the [Attorney General's] discretionary process itself was constitutionally flawed." Id. Here, Plaintiffs seek habeas relief based on claims that the process used by immigration officials to set initial bond amounts is constitutionally and statutorily flawed because immigration officials do not consider, among other things, either the detainee's ability to pay or alternatives to detention. Unlike the claimant in Prieto-Romero, Plaintiffs do not directly contest the initial bond amount imposed in their cases, but rather challenge the legality of the process by which their bond amount was set. These claims fall squarely under the Court's habeas jurisdiction. See Singh, 638 F.3d at 1202; Leonardo, 646 F.3d at 1159 (affirming dismissal of due process challenge to bond determination for failure to exhaust administrative remedies, but holding that the Court had jurisdiction over this claim).

Accordingly, the Court DENIES Defendants' Motion to Dismiss insofar as it seeks dismissal of this action for lack of jurisdiction under 8 U.S.C. § 1226(e) and 8 U.S.C. § 1252(a)(2)(B).

3. Article III Standing and Mootness

Defendants argue that: (1) Matias lacks Article III standing to assert his claims for injunctive relief because he was released from ICE custody on June 7, 2016; and (2) Hernandez lacks Article III standing to assert her claims for injunctive relief because she was released from custody on September 9, 2016. (Defs. Supp. Brief at 2-4, 7-8; Doc. No. 78.) To establish Article III standing, a plaintiff must demonstrate that: (1) he suffered an injury in fact that is concrete, particularized, and actual or imminent (not conjectural or hypothetical); (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). A plaintiff's standing is assessed as of the time an action was initiated and is unaffected by subsequent developments. See D'Lil v. Best W. Encina Lodge & Suites, 538 F.3d 1031, 1036 (9th Cir. 2008). Hence, Matias's release from custody on June 7, 2016 – several months after this action was filed on April 6, 2016 – has no impact on his standing to seek injunctive relief. Similarly, Hernandez's release on September 9, 2016 also has no impact on her standing to seek injunctive relief.

Defendants' arguments are more properly raised under the mootness doctrine. Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (internal quotation marks omitted). A claim becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Haro v. Sebelius, 747 F.3d 1099, 1110 (9th Cir. 2014) (citation omitted). There is an exception to the mootness doctrine for legal violations

"capable of repetition, yet evading review." See Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975). Based on this exception, the Ninth Circuit has held that plaintiffs with mooted individual claims can maintain claims for injunctive relief where they "are challenging an ongoing government policy." See United States v. Howard, 480 F.3d 1005, 1010 (9th Cir. 2007). In particular, this mootness exception "applies to ongoing policies affecting pretrial detainees, because pretrial detention usually will be too brief for the challenged policy to be reviewed before becoming moot." Los Angeles Unified Sch. Dist. v. Garcia, 669 F.3d 956, 958 n.1 (9th Cir. 2012), certified question answered, 58 Cal. 4th 175 (2013).

Moreover, where a plaintiff's claim becomes moot while he seeks to certify a class, his action will not be rendered moot if his claims are "inherently transitory" (such that the trial court could not have ruled on the motion for class certification before his or her claim expired), as similarly-situated class members would have the same complaint. See Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090-91 (9th Cir. 2011) (describing how this "relation back" doctrine applies in class actions). The theory behind this rule is that such claims are "capable of repetition, yet evading review." See id.

Here, to the extent Defendants argue Plaintiffs' claims are moot, the Court rejects this argument and concludes Plaintiffs may continue to assert their claims on behalf of themselves and on behalf of the putative class. First, Plaintiffs may continue to assert their claims on behalf of themselves because they challenge an "ongoing government policy" and the issues they raise are "capable of repetition, yet evading review." See Howard, 480 F.3d at 1010; see also Gerstein, 420 U.S. at 110 n.11. Second, because their claims are "transitory" and may "evade review," Plaintiffs may continue to assert them on behalf of the putative class even after their release from custody. See Preap v. Johnson, No. 14-16326, 2016 WL 4136983, at *3 n.6 (9th Cir. Aug. 4, 2016) (holding claims of named plaintiffs on behalf of putative class of immigration detainees were not mooted by the named plaintiffs' release from custody and termination of removal proceedings because the claims are "transitory in nature and may otherwise evade review").

Accordingly, the Court DENIES Defendants' Motion to Dismiss insofar as it seeks dismissal of Plaintiffs' claims for mootness or lack of standing.

IV. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A. Legal Standard

Federal Rule of Civil Procedure 23 ("Rule 23") governs the litigation of class actions. A party seeking class certification must demonstrate the following prerequisites: "(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citing Fed. R. Civ. P. 23(a)). The party may not rest on mere allegations; it must provide facts to satisfy those requirements. See Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977) (citing Gillibeau v. Richmond, 417 F.2d 426, 432 (9th Cir. 1969)). Although not mentioned in Rule

23(a), the party seeking certification must also demonstrate that the class is ascertainable. See Keegan v. Am. Honda Motor Co., Inc., 284 F.R.D. 504, 521 (C.D. Cal. 2012).

After satisfying the five prerequisites of numerosity, commonality, typicality, adequacy, and ascertainability, a party must also demonstrate one of the following: (a) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (b) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (c) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. See Fed. R. Civ. P. 23(b)(1) to (3).

A trial court has broad discretion regarding whether to grant a motion for class certification. See Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010). However, a party seeking class certification must affirmatively demonstrate compliance with Rule 23—that is, the party must be prepared to prove that there are in fact sufficiently numerous parties and common questions of law or fact. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). A district court must conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." Id. Classes of aliens seeking habeas relief for their prolonged detentions have been certified in this Circuit. See Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2009).

Plaintiffs request that the Court certify a class encompassing "[a]ll individuals who are or will be detained pursuant to 8 U.S.C. § 1226(a) on a bond set by an U.S. Immigration and Customs Enforcement officer or an Immigration Judge in the Central District of California" ("Proposed Class"). (Class Cert. Mot. at 8-9.) Plaintiffs also request that they be appointed Class Representatives and that the American Civil Liberties Union ("ACLU") of Southern California, ACLU Immigrants' Rights Project, and Skadden, Arps, Slate, Meagher & Flom LLP be named Class Counsel. (Id. at 3 n.2.)

B. Discussion

1. Ascertainability

"In addition to the explicit requirements of Rule 23, an implied prerequisite to class certification is that the class must be sufficiently definite; the party seeking certification must demonstrate that an identifiable and ascertainable class exists." Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011); see also Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 163 (C.D. Cal. 2002) ("Once an ascertainable and identifiable class has been defined, plaintiffs must show that they meet the four requirements of Rule 23(a), and the two requirements of Rule 23(b)(3)."). "Courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-80 (S.D. Cal. 1999). A class is ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member" using objective criteria. Keegan, 284 F.R.D. at 521 (citation omitted).

The Court also notes that "[a] lack of ascertainability alone will generally not scuttle class certification." Red v. Kraft Foods, No. CV 10-1028-GW (AGRx), 2012 WL 8019257, at *6 (C.D. Cal. Apr. 12 , 2012).[17]

Plaintiffs argue the Proposed Class is ascertainable because membership is based on objective criteria – namely, whether individuals are detained pursuant to 8 U.S.C. § 1226(a) and whether a bond for those individuals has been set by an Immigration Judge or ICE officer in this District. (Class Cert. Mot. at 18-19.) Plaintiffs argue membership within the Proposed Class can be ascertained using records within Defendants' control. (Id.) In support, Plaintiffs cite data received from ICE on December 15, 2015 establishing the number of individuals detained pursuant to 8 U.S.C. § 1226(a) in the Los Angeles Area of Responsibility. (Tan Decl., Ex. B.) Defendants do not contest the ascertainability of the Proposed Class.

The Court finds the Proposed Class is sufficiently ascertainable. As Plaintiffs note, the Proposed Class can be ascertained using objective criteria and identified through a search of Defendants' records concerning individuals in ICE custody. The Court therefore concludes the Proposed Class is ascertainable.

2. Rule 23(a) Requirements

a. Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of individual class members is impracticable. See Fed. R. Civ. P. 23(a)(1). Additionally, there is no particular number cut-off, as the specific facts of each case may be examined. Ballard v. Equifax Check Servs., Inc., 186 F.R.D. 589, 594 (E.D. Cal. 1999). Courts have not required evidence of exact class size or the identities of class members to satisfy the requirements of Rule 23(a)(1). See Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993).

Here, Plaintiffs argue the Proposed Class is sufficiently numerous to warrant class treatment. (Class Cert. Mot. at 10-12.) In support, Plaintiffs cite data received from ICE on December 15, 2015, showing that as of October 2, 2015, there were at least 119 individuals detained in this District pursuant to 8 U.S.C. § 1226(a) for whom bond had been determined and who had not posted bond. (Tan Decl. ¶ 14, Ex. B.) Moreover, Plaintiffs note that even if the exact number of detainees currently in the Proposed Class cannot be determined with precision, the Central District contains four immigration detention centers with a collective capacity to hold

[17] Courts have held that ascertainability may not be required with respect to a class seeking injunctive relief. See Dunakin v. Quigley, 99 F. Supp. 3d 1297, 1326 (W.D. Wash. 2015) ("Although the Ninth Circuit has not ruled on this issue, several other circuit courts have held that, due to the unique characteristics of a Rule 23(b)(2) class, it is improper to require ascertainability for a Rule 23(b)(2) class."), reconsideration denied, No. C14-0567JLR, 2015 WL 4076789 (W.D. Wash. July 1, 2015). However, the Court need not decide whether or not ascertainability is required here because the Proposed Class is ascertainable.

3,000 individuals. (Class Cert. Mot. at 11 (citing Tan Dec. ¶¶ 18-20).) Plaintiffs contend that the sheer number of individuals potentially in detention makes it likely that a sizeable number of detainees are likely to be Proposed Class members. (Id.) Defendants do not contest the numerosity of the Proposed Class.

The Court is convinced by both the December 2015 ICE data and the capacity of detention centers in this District that the Proposed Class is sufficiently numerous to warrant class treatment. Accordingly, the Court finds Plaintiffs have presented sufficient evidence to satisfy the numerosity requirement.

b. Typicality

The Court next turns to the typicality element of Rule 23(a). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Wolin v. Jaguar Land Rover North Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011) (quoting Hanon, 976 F.2d at 508). Thus typicality is generally satisfied if the plaintiff's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Moreover, satisfying the typicality prong requires, in the least, that "a class representative must be part of the class." General Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982).

i. The Parties' Contentions

Plaintiffs argue the typicality requirement is satisfied here because Hernandez and Matias have been subjected to the same alleged injury as all of the Proposed Class members: namely, immigration officials' failure to consider financial ability to pay, alternatives to a full cash bond, and alternative conditions of supervision during initial bond determinations pursuant to Section 1226(a). (Class Cert. Mot. at 15-16.)

Defendants argue Plaintiffs' claims are not typical of the Proposed Class members' claims because the Immigration Judges in Plaintiffs' cases considered their ability to pay when setting bond. (Class Cert. Mot. Opp. at 15-19.) Defendants note that Judge Burke claimed during an April 13, 2016 hearing with Hernandez that he had considered her ability to pay when issuing his March 17, 2016 initial bond determination. (Id. (citing Defs., Ex. 6 at 33-34).) In addition, Defendants note Judge Munoz stated during an August 2014 bond hearing that Matias's inability to pay his bond was "not significant enough" to revise Matias's original bond determination. (Id. (citing Defs., Ex. 12 at 2).) Consequently, Defendants argue Plaintiffs fail to establish they "possess the same injury and suffer[ed] the same injury" as members of the Proposed Class. (Id. at 17-18 (internal citation and quotation marks omitted).)

Plaintiffs respond that neither of the statements cited by Defendants show Immigration Judges considered Plaintiffs' ability to pay when determining their bond. (Class Cert. Mot. Reply at 5-6.) First, Plaintiffs argue "there is no record to support" Judge Burke's retrospective claim on April 13, 2016 that he took Hernandez's ability to pay into consideration in his March 17, 2016 bond decision. (Id. at 5.) Second, Plaintiffs argue Judge Munoz's August 2014 statement, when read in context, actually meant to convey that Matias's inability to pay his bond was not a "changed condition" that would warrant a new bond determination. (Pl. Supp. Brief at 9 n.3.) Rather than taking Matias's financial circumstances into account, Plaintiffs argue, Judge Munoz only meant to say that Matias's inability to pay his bond did not warrant a new bond determination pursuant to 8 C.F.R. § 1003.19(e). (Id.)

ii. Analysis

The Court concludes Plaintiffs have satisfied Rule 23(a)'s typicality requirement. The record of Plaintiffs' bond hearings demonstrates that immigration officials failed to consider Plaintiffs' financial ability to pay, alternatives to a full cash bond, and alternative conditions of supervision when setting their bonds. Moreover, the Court is unconvinced by Defendants' arguments to the contrary. First, as Plaintiffs argue, Judge Burke's March 17, 2016 written bond decision did not mention Hernandez's ability to pay when setting bond and instead discussed other factors, such as Hernandez's purported criminal gang affiliation and her limited prospects for relief from removal. (See Hernandez Decl., Ex A at 9.) In addition, there is no evidence in the record supporting Judge Burke's subsequent claim on April 13, 2016 that he had considered Hernandez's ability to pay when determining her bond.

Second, the Court agrees with Plaintiffs that Judge Munoz's brief reference to Matias's financial circumstances at his August 2014 bond hearing were meant to convey that Matias's inability to pay bond did not constitute a change in circumstance significant enough to warrant a new bond determination. This interpretation is supported by the record, which reflects that up to the time this statement was made, Judge Munoz repeatedly asked Matias if his circumstances had changed since his original bond determination. (Defs., Ex. 12 at 2.) When Matias raised the fact that he was unable to afford the original bond, Judge Munoz stated Matias's "inability to post the bond [is] not significant enough for me to change" the original bond determination. The Court therefore rejects Defendants' argument based on Judge Munoz's statement and finds Plaintiffs have shown they suffered the same alleged injury as members of the Proposed Class. Accordingly, the Court concludes Plaintiffs have met the typicality requirement.

c. Commonality

Courts have construed Rule 23(a)(2)'s commonality requirement permissively. See Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)). Nevertheless, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'"

which "does not mean merely that they have all suffered a violation of the same provision of law." Dukes, 131 S. Ct. at 2551 (citation omitted). The "claims must depend on a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. The common question or questions must also be "apt to drive the resolution of the litigation," which turns on the nature of the underlying legal claims in the case. Jimenez, 765 F.3d at 1165 (quoting Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952, 962 (9th Cir. 2013)). Thus commonality requires an understanding of the nature of the underlying claims. Id. (citing Parsons v. Ryan, 754 F.3d 657, 676 (9th Cir. 2014)).

Plaintiffs argue their claims raise the following five factual questions common to all Proposed Class members:

- Whether, as a general policy or practice, the Government does not require ICE officers and Immigration Judges to consider financial ability to pay when setting initial bond amounts pursuant to § 1226(a).

- Whether, as a general policy or practice, the Government requires immigration detainees to post in cash the full amount of their bonds to secure their release on bond.

- Whether, as a general policy or practice, ICE officers and Immigration Judges are not required to consider alternative forms of bonds to a full-cash bond, such as a deposit bond, or a property or collateral bond.

- Whether, as a general policy or practice, ICE officers and Immigration Judges are not required to consider alternative conditions of supervision.

- Whether, as general policy or practice, Immigration Judges do not recognize a person's financial inability to post bond, despite having made good faith efforts to do so, as a "changed circumstance" that entitles the person to a new bond hearing under 8 C.F.R. § 1003.19(e).

(Class Cert. Mot. at 17.) Plaintiffs also note that whether these policies and practices violate Section 1226(a), the Fifth Amendment, and the Eighth Amendment are legal questions common to all Proposed Class members. (Id. at 17-18.) Hence, Plaintiffs contend that if these policies and practices are found illegal, Proposed Class members will be entitled to the same relief: namely, "custody determination procedures that require consideration of financial ability to pay, alternative forms of bond, and alternative conditions of supervision, and a new bond hearing in the appropriate circumstances." (Id. at 18.) Given these common legal and factual questions, Plaintiffs contend they have satisfied the commonality requirement.

The Court concludes Plaintiffs have satisfied Rule 23(a)(2)'s commonality requirement because they have shown all Proposed Class members have been subjected to the same bond

determination policies and practices by Defendants. Consequently, the Proposed Class members' claims that these policies and practices are illegal could be disposed of in a "single stroke."[18] See Dukes, 131 S. Ct. at 2551 (citation omitted). Accordingly, the Court concludes the commonality requirement is satisfied.

d. Adequacy of Representation

Under Rule 23(a)(4), the named plaintiff must be deemed capable of adequately representing the interests of the entire class, including absent class members. See Fed. R. Civ. P. 23(a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). The adequacy inquiry turns on: (1) whether the named plaintiff and class counsel have any conflicts of interest with other class members, and (2) whether the representative plaintiff and class counsel can vigorously prosecute the action on behalf of the class. See Ellis, 657 F.3d at 985. Furthermore, pursuant to Rule 23(g), before appointing class counsel, the Court "must consider" the following matters:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class

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[18] Defendants argue Plaintiffs' "proposed class cannot be certified because it is overly broad." (Class Cert. Mot. at 18.) Defendants claim "[t]he burden is on Plaintiffs to identify a class whose ability to pay has not been considered by an Immigration Judge during their bond determinations." (Id.) Defendants argue Plaintiffs have "failed to meet their burden" because "potential class members would be impossible to identify without extensive and individualized fact-finding or mini-trials." (Id.)

It is unclear whether Defendants present this counter-argument with respect to the commonality requirement for class certification. In any case, the Court rejects this argument. Here, Plaintiffs have presented evidence in the form of declarations and unpublished BIA decisions showing Immigration Judges and ICE officials in this District do not consider individuals' ability to pay during initial bond determinations under 8 U.S.C. § 1226(a). See Esterle Decl. ¶¶ 11-12; Inlender Decl. ¶¶ 10-11; see also In Re: Mario Sandoval-Gomez, File: A092 563 965 - IMP, 2008 WL 5477710, at *1 (DCBABR Dec. 15, 2008) (rejecting claim that bond amount was excessive because "an alien's ability to pay the bond amount is not a relevant bond determination factor"); In Re: Nelson Salvador Castillo-Cajura, File: A089 853 733 - TAC, 2009 WL 3063742, at *1 (DCBABR Sept. 10, 2009) (same). Defendants have presented no evidence in rebuttal. For purposes of class certification, Plaintiffs' evidence suffices to establish that each Proposed Class member did not have his or her ability to pay considered during their bond determinations and consequently suffered the same alleged legal violation.

Fed. R. Civ. P. 23(g)(1)(A). The Court "may" also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs argue that they and their counsel would adequately represent the interests of Proposed Class members. (Class Cert. Mot. at 20-21.) In support, Plaintiffs present declarations establishing their counsel have sufficient resources to litigate this matter and extensive experience in immigration, habeas corpus, and class action litigation. (Id. (citing Sloan Decl. ¶¶ 3-8; Kaufman Decl. ¶¶ 3-25).) Moreover, Plaintiffs submit their own declarations, averring they are prepared to represent Proposed Class members and seek to help people who are detained and do not have enough money to pay their bonds. (Id. (citing Hernandez Decl. ¶¶ 12-13; Matias Decl. ¶¶ 13-14).)

Defendants argue Plaintiffs would not adequately represent the interests of Proposed Class members because they have both been released from custody.[19] (Defs. Supp. Brief. at 4, 9; Class Cert. Mot. at 19.) Defendants argue Plaintiffs' interests diverge from those of the Proposed Class and that Plaintiffs would consequently not adequately represent its interests. (Id.)

The Court concludes Plaintiffs and their counsel would adequately represent the interests of the Proposed Class. The record does not suggest Plaintiffs' counsel have any conflicts of interests with members of the Proposed Class. Moreover, the declarations by Plaintiffs' counsel clearly demonstrate they have sufficient resources, experience, and knowledge to litigate this matter on behalf of the Proposed Class, and have thoroughly investigated potential claims in this action. (See Sloan Decl. ¶¶ 3-8; Kaufman Decl. ¶¶ 3-25.) Lastly, the Court rejects Defendants' arguments that Plaintiffs' release would somehow render them unfit to represent the Proposed Class. Both Plaintiffs aver they seek to act in the best interests of the Proposed Class and Defendants do not identify any authority showing their release would render them unable to prosecute claims on behalf of the Proposed Class. Such a notion would be inconsistent with Ninth Circuit decisions permitting immigration detainees who have been released from custody to nonetheless assert claims on behalf of a class of detainees. See Preap, No. 14-16326, 2016 WL 4136983, at *3 n.6 (9th Cir. Aug. 4, 2016). Accordingly, the Court finds Plaintiffs and Plaintiffs' counsel would adequately represent the Proposed Class.

3. Rule 23(b) Requirements

Plaintiffs seeks to certify the Proposed Class under both Rule 23(b)(1) and Rule 23(b)(2). (Class Cert. Mot. at 19-25.) The Court addresses the requirements for both provisions below.

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[19] Defendants also repeat the arguments they raised with respect to the typicality requirement: namely, that Plaintiffs had their ability to pay considered at their bond hearings and are therefore differently situated from Proposed Class members. (Class Cert. Mot. Opp. at 18-19.) The Court again rejects these arguments.

a. Rule 23(b)(2)

Plaintiffs seek certification under Rule 23(b)(2), which permits certification of a class seeking declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (Class Cert. Mot. at 19-22.) In the Ninth Circuit, "[i]t is sufficient to meet the requirements of Rule 23(b)(2) [when] class members complain of a pattern or practice that is generally applicable to the class as a whole." Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010) (internal citation and quotation marks omitted) (finding certification under Rule 23(b)(2) proper where "proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government"). This action concerns various policies and practices applicable to the entire Proposed Class that, if unlawful, subjects Proposed Class members to improperly derived bond determinations. The Rule's requirements are therefore satisfied here. See id.; Parsons v. Ryan, 754 F.3d 657, 689 (9th Cir. 2014) (Rule 23(b)(2) satisfied where state department of corrections established policies and practices that placed "every inmate in custody in peril" and all class members sought essentially the same injunctive relief) The Court therefore concludes Rule 23(b)(2)'s requirements are met.

b. Rule 23(b)(1)(A)

Plaintiffs also seek certification under Rule 23(b)(1)(A), which permits certification if separate actions by or against individual class members would risk "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." (Class Cert. Mot. at 22-24.) A "core example" of an action under Rule 23(b)(1)(A) is a "situation in which many individuals, all challenging a single government policy, bring separate suits for injunctive relief." Newberg on Class Actions § 4:11 (5th ed.). Certification is appropriate under Rule 23(b)(1)(A) because if each member of the proposed class litigated their claims individually there would be a risk that each individual case would impose a different standard on the defendants. See Ashker v. Governor of State of California, No. C 09-5796 CW, 2014 WL 2465191, at *7 (N.D. Cal. June 2, 2014) (certifying class of inmates claiming prison policy violated the Eighth Amendment pursuant to Rule 23(b)(1)(A)). The Rule's requirements are easily satisfied here because if each Proposed Class member challenged the policies and practices at issue individually, there is a risk of inconsistent adjudications that would subject Defendants to different rulings on the validity of these policies and practices. See id. The Court therefore concludes Rule 23(b)(1)(A)'s requirements are met.

c. Rule 23(b)(1)(B)

Plaintiffs additionally seek certification under Rule 23(b)(1)(B), which permits certification if separate actions by or against individual class members would risk adjudications that "as a practical matter, would be dispositive of the interests" of nonparty class members "or would substantially impair or impede [nonparties'] ability to protect their interests." (Class Cert. Mot. at 24-25.) Here, an adjudication on the merits of individual actions challenging the

policies and practices at issue would affect nonparty members of the Proposed Class because they are also subject to those policies or practices. See Gray v. Cty. of Riverside, No. EDCV 13-00444-VAP, 2014 WL 5304915, at *38 (C.D. Cal. Sept. 2, 2014) (finding requirements of Rule 23(b)(1)(B) satisfied where the ability of future plaintiffs to challenge the practice at issue would be inhibited under stare decisis by unsuccessful individual actions challenging the practice). Hence, the Court concludes Rule 23(b)(1)(B)'s requirements have also been met.

Accordingly, the Court GRANTS Plaintiffs' Motion for Class Certification, certifies the Proposed Class (hereinafter, the "Class") pursuant to Federal Rules of Civil Procedure 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2), appoints Plaintiffs as Class Representatives, and appoints the ACLU of Southern California, ACLU Immigrants' Rights Project, and Skadden, Arps, Slate, Meagher & Flom LLP as Class Counsel.

V. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 690 (2008) (citations omitted). A preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Towery v. Brewer, 672 F.3d 650, 657 (9th Cir. 2012). The Ninth Circuit has adopted a "sliding scale" test for preliminary injunctions. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. Id. For example, "serious questions" as to the merits of a case, combined with a showing that the hardships tip sharply in the plaintiff's favor, can support the issuance of an injunction, assuming the other two elements of the Winter test are also met. Id.

B. Discussion

Plaintiffs request that the Court issue a Class-wide preliminary injunction requiring ICE and the Executive Office of Immigration Review ("EOIR"), when setting, re-determining, and/or reviewing the terms of any person's release under 8 U.S.C. § 1226(a) in this District, to: (a) consider the person's financial ability to pay a bond; (b) not set bond at a greater amount than that needed to ensure the person's appearance; and (c) consider whether the person may be released on alternative conditions of supervision,[20] alone or in combination with a lower bond

[20] Plaintiffs submit evidence showing possible alternative conditions of supervision could include Global Positioning System tracking, periodic in-person and telephonic reporting, and home visits. (Warren Decl., Ex. E at 121-24.)

amount, that are sufficient to mitigate flight risk.[21] (Prelim. Inj. Mot. at 23; Dkt. No. 45-12 (Proposed Order).) Plaintiffs' proposed preliminary injunction order requires Defendants to instruct all ICE officials and Immigration Judges in this District to consider such factors during initial bond determinations pursuant to 8 U.S.C. § 1226(a). (Dkt. No. 45-12 at 1-2.) The proposed order also requires the EOIR to "provide each class member currently detained in the District with a new custody redetermination hearing where the [Immigration Judge] decides whether the class member should be released on his or her own recognizance or released on a money bond and/or other conditions of supervision" based on the factors listed above within 45 days of the order's issuance.[22] (Id. at 2.)

The Court addresses the requirements for preliminary injunctive relief below.

1. Likelihood of Success on the Merits

Plaintiffs argue immigration officials' failure to consider Class members' financial circumstances and release on alternative conditions of supervision in initial bond determinations violates three constitutional guarantees: (1) the Due Process Clause of the Fifth Amendment; (2) the Equal Protection Guarantee of the Fifth Amendment; and (3) the Excessive Bail Clause of the Eighth Amendment. (Prelim. Inj. Mot. at 10-17.) In addition, Plaintiffs argue that under the canon of constitutional avoidance, Section 1226(a) "can and should be construed to require that immigration officials consider detainees' financial circumstances and release on alternative conditions of supervision when making custody determinations, and set bond at no amount greater than necessary to ensure the person's appearance." (Id. at 17-19.) The Court looks to Plaintiffs' likelihood of success on each of these four theories below.[23]

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[21] Plaintiffs do not seek preliminary injunctive relief with respect to their claims that immigration officials: (1) unlawfully require detainees to post in cash the full bond amount to be released, instead of permitting them to post a deposit, property, or other assets as collateral; and (2) unlawfully deny detainees a new bond hearing even if they make a good faith effort to pay the bail amount set for their release. (Prelim. Inj. Mot. at 2 n.2.)

[22] The Court notes that the fact that Immigration Judges have presumably been holding Rodriguez hearings periodically for each Class member has no bearing on Plaintiffs' request that each Class member be provided a new custody redetermination hearing. While Immigration Judges are required to consider alternative conditions of release when determining bond at Rodriguez hearings, there is no evidence in the record showing they are required to consider detainees' ability to pay bond. In fact, Plaintiffs present evidence suggesting Immigration Judges routinely do not consider the ability to pay at Rodriguez hearings. (See Esterle Decl. ¶ 12; Inlender Decl. ¶ 11.) Hence, if immigration officials are legally required to consider both the ability to pay and alternative conditions of release when setting bond, a requirement that Immigration Judges take such factors into account during new custody redetermination hearings for each Class member is the appropriate remedy here.

[23] Of Plaintiffs' three constitutional theories, the Court finds Plaintiffs most likely to prevail on their argument under the Due Process Clause of the Fifth Amendment.

a. Due Process Challenge

i. Applicable Law

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999). Second, the court "examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Vasquez v. Rackauckas, 734 F.3d 1025, 1042 (9th Cir. 2013).

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotations and citation omitted). "[T]he determination of what procedures satisfy due process in a given situation depends upon an analysis of the particular case in accordance with the three-part balancing test outlined in Mathews v. Eldridge . . . ." Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 983 (9th Cir. 1998) (internal citation, quotation marks, and alterations omitted). In Mathews, the Supreme Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

"The Supreme Court has repeatedly reaffirmed the principle that 'due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both particularly important and more substantial than mere loss of money.'" Singh v. Holder, 638 F.3d 1196, 1204 (9th Cir. 2011) (quoting Cooper v. Oklahoma, 517 U.S. 348, 363 (1996)). In particular, the U.S. Supreme Court has noted that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690 (2001). Hence, in the immigration detention context, the U.S. Supreme Court has instructed that such detention must "bear[] a reasonable relation to the purpose for which the individual was committed." Id. (internal citation, quotation marks, and alterations omitted).

As noted in Section II.A., the Ninth Circuit held in Rodriguez v. Robbins, 804 F.3d 1060, 1089 (9th Cir. 2015), that the Government must periodically conduct bond hearings for individuals detained under Section 1226(a) every six months "so that [they] may challenge their continued detention as the period of . . . confinement grows." The Ninth Circuit's holding in Rodriguez[24] relied on a number of precedents dating back to Casas-Castrillon v. Dep't. of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008). In Casas, the Ninth Circuit noted that "prolonged detention [under Section 1226(a)] without adequate procedural protections would raise serious constitutional concerns" because "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" Casas-Castrillon, 535 F.3d at 950 (quoting Zadvydas, 533 U.S. at 690). Hence, in Casas the Ninth Circuit held that "[b]ecause the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' . . . § 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing." Id. at 951 (emphasis in original). The Ninth Circuit instructed that under Section 1226(a), an alien detained for a "prolonged period" of time "is entitled to release on bond unless the government establishes [at a bond hearing] that he is a flight risk or will be a danger to the community." Id. (internal citation and quotation marks omitted).

In Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011), the Ninth Circuit clarified the procedural requirements for the bond hearings required by Casas. The Ninth Circuit held that "due process requires a contemporaneous record of *Casas* hearings," and that the Government bears the burden of proving "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." Id. at 1203, 1208. To evaluate whether the Government has met its burden and for purposes of bond assessment, the Ninth Circuit instructed Immigration Judges to consider the factors set forth by the BIA in In re Guerra, 24 I. & N. Dec. 37 (BIA 2006), in particular "the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." Singh, 638 F.3d at 1206 & n.5 (quoting Guerra, 24 I. & N. Dec. at 40).

Finally, in Rodriguez, the Ninth Circuit shed further light on the procedures required by Casas and Singh. The Ninth Circuit held that individuals detained under Section 1226(a) are "entitled to automatic bond hearings after six months of detention" and that the Government must periodically conduct such hearings every six months for individuals detained for twelve months or more. 804 F.3d at 1085, 1089. The rationale of the six-month requirement is straightforward: the Ninth Circuit found that detention under Section 1226(a) becomes "prolonged" after six months. Id. at 1077. Because "the risk of an erroneous deprivation of liberty [at the six-month mark] in the absence of a hearing before a neutral decisionmaker is substantial," "the private interests at stake are profound," and "the same constitutional

[24] The Ninth Circuit has issued multiple opinions in the Rodriguez case over the past several years. The Court's references to "Rodriguez" refer to the decision issued on October 28, 2015.

concerns arise when detention approaches another prolonged period," the Ninth Circuit required bond hearings to be conducted at six-month intervals. Id. at 1074, 1077, 1089 (internal citation and quotation marks omitted). Citing Singh, the Ninth Circuit held that the Government has the burden of proof at these hearings of showing by clear and convincing evidence that an alien is a flight risk or a danger to the community. Id. at 1087. The Ninth Circuit also affirmed a permanent injunction requiring Immigration Judges to consider alternatives to detention when making bond determinations at these hearings. Id. at 1087-88.

None of the decisions discussed above directly address the issue presented by Plaintiffs: namely, whether due process requires immigration officials to consider detainees' financial circumstances or alternative conditions of release during initial bond determinations. Plaintiffs ask the Court to look to various decisions governing the consideration of indigence in the criminal context for instruction as to this question. (Prelim. Inj. Mot. at 14-21.) The Court summarizes those decisions below.

The U.S. Supreme Court has held as a general matter that due process requires some consideration of indigency when courts decide whether to imprison defendants for failure to pay fines imposed during criminal sentencing. In Bearden v. Georgia, 461 U.S. 660, 672 (1983), the Supreme Court held that a state could not revoke probation and thereby incarcerate an indigent defendant based solely upon non-willful failure to pay a fine or restitution. If the failure to pay was willful, a state could resort to "imprisonment as a sanction to enforce collection." Id. at 668. However, if the defendant was making a reasonable, good faith attempt to pay the fine or restitution and was unable to do so by reason of indigency, it would be "fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." Id. at 668-69. Hence, the Court held that before a court revokes a defendant's probation for nonpayment, the court must inquire into the reason for the nonpayment. Id. at 672. "If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment." Id. The Court noted that a sentencing court could only imprison probationers who made sufficient bona fide efforts to pay if it "determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence." Id. In so holding, the Court noted that "due process and equal protection principles converge" in the context of individuals indebted by virtue of their criminal histories. Id. at 665. Although Bearden does not precisely address the question before this Court, it underscores courts' duty to be mindful of indigency, alternatives to detention, and relevant state interests when considering whether to incarcerate an individual for failure to pay a monetary sum.

The Fifth Circuit discussed indigency in the specific context of bonds when assessing the constitutionality of Florida's pretrial bail scheme in Pugh v. Rainwater. 572 F.2d 1053, 1055 (5th Cir. 1978) (en banc).[25] The bail scheme allowed for six different types of pretrial release in non-

[25] On October 1, 1981, the Fifth Circuit was divided into two circuits: the Eleventh and the "new Fifth." Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Nonetheless, (continued . . .)

capital cases, of which cash bail was one option. Id. at 1055-56. While the Fifth Circuit ultimately rejected a constitutional challenge to the bail scheme, it discussed general constitutional principles governing the calculation of bail. The Fifth Circuit noted that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Id. at 1057 (internal quotation marks omitted). The Fifth Circuit stated that "[a]ny [bail] requirement in excess of th[e] amount" that is "necessary to provide reasonable assurance of the accused's presence at trial" would "be inherently punitive and run afoul of due process requirements." Id. Moreover, "[t]he incarceration of those who cannot [pay bond], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Id. Hence, the Fifth Circuit stated, a "master bond schedule" that automatically sets a particular bond amount for any given offense would be unconstitutional. Id. & n.6.

Citing both Pugh and Bearden, a number of federal district courts have held that state laws automatically setting a particular monetary bail amount for a person's release from detention without individualized considerations of indigency violate the Due Process Clause of the Fourteenth Amendment. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 2015 WL 9239821 at *6-*9 & n.10 (M.D. Tenn. 2015), appeal dismissed (Mar. 15, 2016) (granting class-wide preliminarily injunction enjoining state policy requiring monetary payment for probationers to obtain release pending a revocation hearing "without an inquiry into the individual's ability to pay the bond and whether alternative methods of ensuring attendance at revocation hearings would be adequate"); Jones v. The City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment"); Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003, at *1-*2 (M.D. Ala. June 18, 2015) (finding allegations that city's post-arrest detention scheme featured preset and undifferentiated bond amounts for misdemeanor crimes warranted temporary restraining order); see also Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").

The Government has itself argued elsewhere that several of these district court decisions were correctly decided. On August 18, 2016, the Government submitted an amicus curae brief to the Eleventh Circuit in connection with the appellate proceedings in Walker v. City of Calhoun, GA, No. 4:15–CV–0170–HLM, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). (See Supp. Kaufman Decl. II, Ex. B.) In Walker, a federal district court preliminarily enjoined a Georgia city from mandating payment of pre-fixed bail amounts for different offenses. See Walker, 2016 WL

(. . . continued)
Pugh remains good law. In Bonner, the newly-created Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit issued prior to September 30, 1981. Id. at 1209.

361612, at *10-11, 14. In its amicus brief on appeal, the Government urged the Eleventh Circuit to "affirm the district court's holding that a [state] bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial." (See Supp. Kaufman Decl. II, Ex. B at 32.) In support, the Government cited Pugh, Bearden, and a number of the aforementioned district court decisions. (Id. at 21-29.)

ii. The Parties' Contentions

Plaintiffs contend they have established a substantial likelihood of success on the merits of their due process claim. (Prelim. Inj. Mot. at 10-13.) Plaintiffs argue "[t]he Due Process Clause requires that immigration detention be 'reasonably relat[ed]' to its purposes of preventing flight and preventing danger to the community, and be accompanied by adequate procedures to ensure those purposes are met." (Id. (quoting Zadvydas, 533 U.S. at 690-91).) Plaintiffs contend that immigration officials' failure to consider the financial circumstances of detainees and alternative conditions of release when making bond determinations results in the detention of individuals solely for their inability to pay bond. (Id.) Such detention, Plaintiffs argue, "is not 'reasonably related' to the government's legitimate purposes." (Id. at 11.) In support, Plaintiffs cite Bearden for the general proposition that "the Due Process Clause prohibits the detention of noncitizens merely because they lack sufficient financial means." (Id.) In addition, Plaintiffs claim Pugh and several of the aforementioned district court decisions establish that bond schemes violate due process where they do not consider ability to pay and alternative conditions. (Id. at 12.)

Defendants briefly respond that "'[w]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.'" (Prelim. Inj. Mot. Opp. at 20 (quoting Demore v. Kim, 538 U.S. 510, 528 (2003)).) Moreover, apparently seeking to distinguish Pugh and the aforementioned district court decisions from this matter, Defendants note that "[n]ot every potential loss of a civil liberty requires the full panoply of procedural guarantees that would be available to a criminal at a criminal trial." (Id.) Lastly, Defendants maintain that "[g]ranting Plaintiffs' motion would directly conflict with decades of Supreme Court precedent recognizing the Executive's plenary authority in the realm of immigration policy." (Id. at 14.)

iii. Analysis

The Court finds Plaintiffs have established a substantial likelihood of success on the merits of their due process claim. Although specific to instances of prolonged detention, the Ninth Circuit's decisions in Casas, Singh, and Rodriguez arise from the general principle of due process that detention must "bear[] a reasonable relation to the purpose for which the individual was committed." Zadvydas, 533 U.S. at 690 (internal citation, quotation marks, and alterations omitted). In each of these decisions, the Ninth Circuit established various procedural safeguards governing bond determination hearings "to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." See Singh, 638 F.3d at 1203 (internal citation and quotation marks omitted). The Ninth Circuit considered bond determination hearings vital under due process

norms because they "require the government to justify denial of bond with clear and convincing "evidence that an alien is a flight risk or danger to the community" – that is, to "establish that [the government] has a legitimate interest reasonably related to continued detention." Rodriguez, 804 F.3d at 1077 (internal citation and quotation marks omitted). The underlying rationale of Casas, Singh, and Rodriguez – namely, the need for procedures to ensure detention under Section 1226(a) is justified by a legitimate governmental interest that outweighs individuals' personal liberty interest – is instructive here.

The Court also finds Bearden, Pugh, and the aforementioned district court decisions in the bail context relevant. Both Bearden and Pugh addressed situations where an individual's inability to pay a set fine or bail amount would result in the person's detention. Both Bearden and Pugh interpreted due process to require courts to consider and balance both the relevant state interest and the individual's indigency when setting such a fine or bail amount. In Bearden, the Supreme Court instructed sentencing courts to consider a probationer's ability to pay, alternatives to imprisonment, and "the State's interest in punishment and deterrence," prior to revoking probation and imprisoning the probationer for failure to pay fines or restitution. Bearden, 461 U.S. at 672. "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." Id. at 672-73. Similarly, in Pugh, the Fifth Circuit instructed that bail determinations "must be based upon standards relevant to the purpose of assuring the presence of [each individual] defendant" – assurance of the defendant's presence being the relevant state interest – and must take indigency and alternative conditions of release into account. Pugh, 572 F.2d at 1057 (internal quotation marks omitted). In particular, the Fifth Circuit found that a "master bond schedule" that did not take such factors into account would not stand constitutional muster because it would not tailor bail to the amount necessary to assure the state's interest in the presence of each individual in subsequent proceedings. Id. As noted previously, several federal district courts have adopted Pugh's reasoning when examining state bail schemes and the Government itself has endorsed such reasoning. In short, Bearden, Pugh, and these district court decisions stand for the general proposition that when a person's freedom from governmental detention is conditioned on the payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest. The Court also notes that all of these decisions are consistent with the Supreme Court's instruction in Mathews v. Eldridge that courts assessing procedural due process claims must look to the individual interest, the state interest, and whether the government applies procedures that carry a risk of erroneous deprivation of the individual interest. See Mathews, 424 U.S. at 335.

Together, both of these lines of cases and the Supreme Court's three-factor test in Mathews v. Eldridge establish that immigration officials setting a bond amount under Section 1226(a) must look to detainees' financial situation and alternatives to detention to satisfy the Due Process Clause. First, the private interest affected by detention under Section 1226(a) is of course individuals' freedom from imprisonment, which "lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas, 533 U.S. at 690. Second, the "Government's interest" with respect to detention under Section 1226(a) is the appearance of detainees at removal proceedings and protection of the community from such detainees, if needed. Rodriguez, 804 F.3d at 1077; Mathews, 424 U.S. at 335. Third, the Court finds immigration

officials' failure to consider an individual's ability to pay and alternatives to detention when setting bond under Section 1226(a) renders the bond determination process prone to "the risk of erroneous deprivation" of detainees' liberty interest.[26] See Mathews, 424 U.S. at 335. Casas, Singh, and Rodriguez instruct that due process requires procedures that ensure detention under Section 1226(a) is justified by a legitimate governmental interest that outweighs individuals' personal liberty interest. The bond determination practices challenged here do not meet this bar. Much like the "master bond schedule" described in Pugh, a bond amount determined without individualized consideration of a person's financial circumstances and alternative conditions of release is not sufficiently tailored to assure the government's interest in the person's presence in future proceedings. See Pugh, 572 F.2d at 1057. Rather, setting a bond amount without considering individuals' ability to pay it or alternative conditions of release merely results in the detention of persons who cannot afford to pay the bond amount, even when a more affordable bond amount or alternative conditions of release might guarantee their appearance in future proceedings. Bearden and Pugh hold in analogous contexts that procedures that fail to account for such factors do not adequately balance state interests against an individual's interest in freedom from imprisonment. Consequently, the Court finds Defendants' bond determination practices fail to adequately balance state and individual interests when setting bond amounts and do not satisfy due process requirements.[27]

Furthermore, the Court rejects Defendants' argument that the government is not required "to employ the least burdensome means" of securing immigration detainees.[28] The Ninth Circuit rejected an identical argument by the Rodriguez defendants opposing a request for an injunction requiring Immigration Judges to consider alternatives to detention when determining whether to set bond during Rodriguez hearings. 804 F.3d at 1087–88. The Ninth Circuit rejected this argument, reasoning "the injunction does not require that [Immigration Judges] apply the least restrictive means of supervision; it merely directs them to 'consider' restrictions short of detention." Rodriguez, 804 F.3d at 1087–88. The Court finds similar reasoning applicable here. Plaintiffs do not request that Defendants be required to use the least burdensome means of securing Class members. Plaintiffs only request that immigration officials

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[26] This "risk of erroneous deprivation" is particularly acute because detainees for whom bond is set have already "demonstrate[d] to the satisfaction of the [immigration] officer that [their] release would not pose a danger to property or persons, and that [they are] likely to appear for any future proceedings." 8 C.F.R. § 1236.1(c)(8).

[27] Defendants do not present any contentions or evidence regarding "the fiscal and administrative burdens" of considering the ability to pay and alternatives to detention when setting bond. See Mathews, 424 U.S. at 335.

[28] In addition, to the extent Defendants argue Bearden and Pugh are inapplicable here because they are from the criminal context, the Court rejects this argument. Although each of these decisions pertain to criminal cases, they set forth general principles of due process that the Court finds instructive here.

be required to consider detainees' ability to pay and alternatives to detention when setting bond amounts.

The Court also rejects Defendants' appeal to the plenary power of Congress and the Executive over matters of immigration law. Although "'Congress has ' plenary power' to create immigration law, and . . . the judicial branch must defer to executive and legislative branch decisionmaking in that area, ... that power is subject to important constitutional limitations.'" Kwai Fun Wong v. United States, 373 F.3d 952, 974 (9th Cir. 2004) (quoting Zadvydas, 533 U.S. at 695); see also Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . ."). Indeed, particularly with respect to bond determination procedures, the Ninth Circuit's holdings in Casas, Singh, and Rodriguez establish that the power of Congress and the Executive Branch over matters of immigration law is subject to due process requirements.

Accordingly, the Court concludes Plaintiffs have established a substantial likelihood of success on the merits of their due process claim.

b. Equal Protection Challenge

i. Applicable Law

The Fifth Amendment prohibits the federal government from denying individuals equal protection of the laws. U.S. Const. amend. V; see Tuan Anh Nguyen v. INS, 533 U.S. 53, 57 (2001). The question of whether a person has been denied equal protection turns on "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants." See Bearden, 461 U.S. at 665. The Equal Protection Clause of the Fourteenth Amendment generally prohibits "punishing a person for his poverty." Id. at 671. At the same time, because indigent persons are not a suspect class, a law treating indigent individuals differently need only pass a "rational basis test": that is, the law "must [be] rationally related to a legitimate governmental interest." Rodriguez v. Cook, 169 F.3d 1176, 1180 (9th Cir. 1999).

Many of the same decisions in the criminal bail context cited by the Court when addressing Plaintiffs' due process claim also hold that the failure to consider an individual's financial situation in bail determinations denies the individual equal protection of the laws. See Pugh, 572 F.2d at 1056; Jones, 2015 WL 5387219, at *2-3; Walker v. City of Calhoun, GA, No. 4:15–CV–0170–HLM, 2016 WL 361612, at *10-11, 14 (N.D. Ga. Jan. 28, 2016) (granting preliminary injunction enjoining Georgia city from mandating payment of pre-fixed bail amounts for different offenses); Pierce v. City of Velda City, MO, No. 4:15-cv-00570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (declaring secured bail schedule violates Fourteenth Amendment's Equal Protection Clause); Thompson v. Moss Point, MS, No. 1:15-cv-00182-LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 16, 2015) (same); Cooper, 2015 WL 10013003, at *3-4 (M.D. Ala. June 18, 2015); Providence Cmty. Corr., Inc., 2015 WL 9239821, at *1, *6-*7. The reasoning underlying these decisions is simple: state policies that release individuals on bail

without considering their financial circumstances "visit different consequences on two categories of persons" and disproportionately result in the detention of indigent individuals. See M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (internal citation, quotation marks, and alterations omitted).

As noted above, the Government endorsed many of these district court decisions in its August 18, 2016 amicus curae brief to the Eleventh Circuit in connection with the appellate proceedings in Walker. (See Supp. Kaufman Decl. II, Ex. B.) In its amicus brief, the Government argued that "fixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for ability to pay and alternative methods of assuring future appearance . . . unlawfully discriminate based on indigence" because the "use of such schedules effectively denies pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk, and even if alternative methods of assuring appearance (such as an unsecured bond or supervised release) could be imposed." (Id. at 26.)

ii. The Parties' Contentions

Plaintiffs argue immigration officials' failure to consider Class members' financial situation and alternative conditions of release when setting bond violates the Fifth Amendment's Equal Protection guarantee. (Prelim. Inj. Mot. at 14-15.) Plaintiffs note that immigration officials' failure to consider such factors results in the detention of indigent individuals who cannot afford to pay the bond that is set in their cases. (Id.) Plaintiffs contend that "[b]ecause the [G]overnment's policies or practices result in detention based solely on [Class members'] inability to pay, they constitute impermissible discrimination in violation of the Fifth Amendment." (Id.)

Defendants respond that "[d]iscrimination within a class of aliens may be permissible if it is rationally related to achieving a valid governmental objective." (Prelim. Inj. Mot. Opp. at 19.) Defendants contend the Government has a rational basis for setting bonds according to its current policies and practices. (Id.) Defendants claim current bond determination practices are necessary to "ensur[e] the appearance of aliens at future immigration proceedings." (Id.)

iii. Analysis

The Court concludes Plaintiffs have demonstrated a likelihood of prevailing on their equal protection claim. As Plaintiffs argue, immigration officials' failure to consider financial circumstances and alternative conditions of release when setting bond amounts disproportionately impact the indigent. Because these factors are not considered, indigent individuals are given bond amounts they cannot afford and must remain detained, while those who can afford bond are released. In short, Defendants' bond determination practices "visit different consequences on two categories of persons" and thereby violate the Equal Protection guarantee of the Fifth Amendment. See M.L.B., 519 U.S. at 127.

Moreover, the Court does not agree that such practices are rationally related to a governmental interest. As the Court reasoned when addressing Plaintiffs' due process claim, the detention of individuals who cannot afford to post the bond set in their cases is not tailored to the governmental interest in question – namely, ensuring detainees' appearance in future

proceedings. Setting a bond amount without considering individuals' ability to pay it or alternative conditions of release merely results in the detention of persons who cannot afford to pay the bond amount, even when a more affordable bond amount or alternative conditions of release might guarantee their appearance in future proceedings. Failing to consider such factors when setting bond therefore does not "rationally" serve the Government's interest in ensuring detainees' future appearance. See Cook, 169 F.3d at 1180. Hence, the Court concludes Plaintiffs have a strong likelihood of prevailing on their equal protection claim.

c. Excessive Bail Challenge

The Eighth Amendment's Excessive Bail Clause provides that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. "The Excessive Bail Clause prevents the imposition of bail conditions that are excessive in light of the valid interests the state seeks to protect by offering bail." Galen v. Cty of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007) (internal citation omitted). In order to prevail on an excessive bail claim, a plaintiff must show that the bail conditions are excessive for the purpose of achieving "the valid state interests for which bail is intended to serve for a particular individual." Id. However, "[t]he mere fact that [a plaintiff] may not have been able to pay the bail does not make it excessive." White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968). Where the government's interest in preventing danger or flight can be addressed by release on bail, "bail must be set by a court at a sum designed to ensure that goal, and no more." United States v. Salerno, 481 U.S. 739, 754 (1987); Stack v. Boyle, 342 U.S. 1, 5 (1951) (stating that "bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment"). The U.S. Supreme Court has indicated the Excessive Bail Clause applies to immigration proceedings and is not confined to the criminal context. See Carlson v. Landon, 342 U.S. 524, 539-40 (1952); Browning-Ferris Indus .of VT, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989) (explaining that "potential for governmental abuse which the Bail Clause guards against" is implicated "when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding").

Plaintiffs contend they are likely to succeed on their excessive bail claim because bond amounts imposed by immigration officials do not take into account Class members' financial circumstances and alternatives to detention. (Prelim. Inj. Mot. at 15-17.) For largely the same reasoning described with respect to Plaintiffs' other constitutional claims, the Court concludes Plaintiffs have shown a substantial likelihood of prevailing as to this claim. As noted previously, the fact that immigration officials do not consider individuals' financial circumstances and alternatives to detention when setting bond results in bond amounts that are "higher than an amount reasonably calculated" to ensure detainees' appearance during removal proceedings. See Landon, 342 U.S. at 539-40. Accordingly, the Court concludes Plaintiffs have shown a substantial likelihood of prevailing on their claim under the Excessive Bail Clause.

d. Constitutional Avoidance

Plaintiffs argue that because they have shown immigration officials' failure to consider detainees' financial circumstances and alternatives to detention when setting bond amounts

under 8 U.S.C. § 1226(a) is unconstitutional, the statute itself must be construed under constitutional avoidance doctrine to require that immigration officials consider such factors when making bond determinations. (Prelim. Inj. Mot. at 17-19.)

Under the statutory canon of constitutional avoidance, "when an Act of Congress raises 'a serious doubt' as to its constitutionality," courts must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Zadvydas, 533 U.S. at 689; Jones v. United States, 526 U.S. 227, 239 (1999) (holding that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"); Clark v. Martinez, 543 U.S. 371, 382 (2005) (same). This canon "is not a method of adjudicating constitutional questions" but rather "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." Clark, 543 U.S. at 381.

The Court concludes Plaintiffs are likely to prevail on the merits of their claim under the constitutional avoidance doctrine. Defendants do not cite and the Court cannot find any evidence in the text or legislative history of 8 U.S.C. § 1226(a) suggesting the statute is not susceptible to Plaintiffs' proposed construction.[29] Hence, because the Court finds Plaintiffs are likely to prevail on the merits of their constitutional challenges to Defendants' policies and practices, the Court finds Plaintiffs are also likely to succeed on their claim that 8 U.S.C. § 1226(a) must be construed to require consideration of detainees' financial circumstances or alternatives to detention in initial bond determinations. See Zadvydas, 533 U.S. at 689.

2. Likelihood of Irreparable Harm

A plaintiff must demonstrate that he is likely to suffer irreparable harm in the absence of a preliminary injunction. See Winter, 555 U.S. at 20. Moreover, the Ninth Circuit has cautioned that "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." Caribbean Marine Servs. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). As a general rule, a plaintiff seeking injunctive relief must demonstrate that "remedies available at law, such as monetary damages, are inadequate to compensate" for the injury. Herb Reed Enters., LLC v. Fla. Entm't Mgmt., 736 F.3d 1239, 1249 (9th Cir. 2013). "It is well established

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[29] Defendants argue this interpretation of 8 U.S.C. § 1226(a) is inconsistent with congressional intent. Defendants note that Congress amended the statute in 1996 to increase the minimum statutory bond for aliens from $500 to $1,500. (Prelim. Inj. Mot. Opp. at 21-22.) Defendants argue this shows "Congress did not want ability to pay to be the dispositive factor in determining the amount of an immigration bond." (Id. at 21.)

The Court rejects this argument. Under Plaintiffs' construction of 8 U.S.C. § 1226(a), an individual's ability to pay is not "the dispositive factor" in bond determinations. Rather, Plaintiffs argue only that the ability to pay must be considered in bond determinations. Moreover, the 1996 increase in the minimum statutory bond does not establish Congress intended that 8 U.S.C. § 1226(a) not include consideration of the ability to pay.

that the deprivation of constitutional rights unquestionably constitutes irreparable injury." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012).

Plaintiffs argue that Class members will suffer irreparable harm in the absence of a preliminary injunction because they have been deprived of their constitutional rights by having their bond amounts calculated according to the policies and practices at issue.[30] (Prelim. Inj. Mot. at 19.) The Court agrees and concludes Plaintiffs have demonstrated a likelihood of irreparable harm. See Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013) (noting "it follows from our conclusion that the government's reading of [immigration detention statutes] raises serious constitutional concerns that irreparable harm is *likely*, not just possible in the absence of preliminary injunctive relief") (internal quotation marks omitted).

3. The Balance of the Equities

The Court concludes the balance of the equities favors granting a preliminary injunction. Plaintiffs have shown that the Class will suffer irreparable injury if the preliminary injunction is not granted. Conversely, Defendants have not claimed they will suffer any injury other than being required to "create a new policy that is . . . detrimental to the public interest and contrary to legislative intent." (Prelim. Inj. Mot. Opp. at 25.) Under such circumstances, the balance of the equities weighs in favor of granting a preliminary injunction. See Rodriguez v. Robbins, 715 at 1145 (finding balance of equities favored granting a preliminary injunction where "[t]he government provide[d] almost no evidence that it would be harmed in any way by the district court's order, other than its assertion that the order enjoins 'presumptively lawful' government activity"); Zepeda v. I.N.S., 753 F.2d 719, 727 (9th Cir.1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.").

4. The Public Interest

Lastly, the Court finds the public interest favors grant of a preliminary injunction because "[t]he public interest . . . benefits from a preliminary injunction that ensures that federal statutes

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[30] Defendants also argue Plaintiffs cannot demonstrate irreparable harm because "[w]here a harm is self-inflicted, that harm cannot be a basis for injunctive relief." (Prelim. Inj. Mot. Opp. at 24.) Defendants go on to argue "[e]vading immigration authorities, associating with criminal gang members, and using a fraudulent identity can result in a higher bond determination." (Id.) Even assuming these propositions are true, the injuries Plaintiffs allege – namely, having their bond determined according to unconstitutional policies and practices – are attributable to Defendants and not to Plaintiffs.

Defendants also raise the fact that Plaintiffs have been released from custody. (Defs. Supp. Brief at 2, 7-8; Dkt. No. 78.) However, as the Court noted previously, such developments do not affect Plaintiffs' ability to seek injunctive relief because the violations they allege are "capable of repetition, yet evading review." See Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975).

are construed and implemented in a manner that avoids serious constitutional questions." Rodriguez v. Robbins, 715 F.3d at 1146.

VI. CONCLUSION

For the foregoing reasons, the Court (1) DENIES Defendants' Motion to Dismiss; (2) GRANTS Plaintiffs' Motion for Class Certification; and (3) GRANTS Plaintiffs' Motion for Preliminary Injunction. As set forth further in the Order concurrently filed herewith, the Court GRANTS Plaintiffs' request for preliminary injunctive relief and ORDERS the parties to meet and confer regarding compliance with this Order.

IT IS SO ORDERED.