**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

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| HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of himself and all others similarly situated,<br><br>Petitioners,<br><br>v.<br><br>ELAINE DUKE, in her official capacity as Acting Secretary of U.S. Department of Homeland Security; THOMAS BROPHY, in his official capacity as Acting Director of Buffalo Field Office of Immigration and Customs Enforcement; JEFFREY SEARLS, in his official capacity as Acting Administrator of the Buffalo Federal Detention Facility, and JEFFERSON SESSIONS, in his official capacity as Attorney General of the United States,<br><br>Respondents. | Case No. 17-cv-721 (EAW) |

**PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLARIFICATION OF PRELIMINARY INJUNCTION**

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## INTRODUCTION

The petitioners respectfully request that this Court clarify its November 2017 preliminary injunction to remedy a serious problem that has arisen in bond hearings conducted pursuant to that injunction: immigration judges who have found that class members should be released on bond are setting large bond amounts without considering the detainees' current ability to pay the bond and without considering alternatives to money bond that nonetheless would assure the detainees' future appearances. As a result, several class members remain in detention because they are too poor to afford the bonds set in their cases and continue to suffer all the harms this Court sought to remedy when it ordered bond hearings for the class.

This Court's order, and the cases upon which it relied, are all premised on the fundamental notion that immigration detention must be reasonably related to the Government's legitimate interests in detention, that is, in preventing flight and danger to the community. Bond is only set in cases where an immigration judge has determined the person is not a danger, and the bond amount is intended to mitigate risk of future non-appearance. The Ninth Circuit—the only court of appeals to have addressed the issue—has held that immigration judges setting bond at hearings like the ones ordered by this Court must consider the detainee's ability to pay and alternative conditions of release. Similarly, the only district court in the Second Circuit to have addressed the issue has held that *Lora* bond hearings must include an examination of the detainee's ability to pay the bond. In light of these rulings and in light of the analysis underlying this Court's prior ruling, the petitioners request that the Court clarify its preliminary injunction accordingly.

## BACKGROUND

In its November 17 preliminary injunction decision, this Court ordered, *inter alia*, that the Government provide "members of the putative class who have been detained for six months or more with individualized bond hearings, in conformance with the Second Circuit's decision in *Lora*." *Abdi v. Duke*, ---F.3d---, 2017 WL 5599521, at *28 (W.D.N.Y. Nov. 17, 2017) (Dkt. No. 56). Most of those hearings were scheduled for December 18 and December 19, and petitioners' counsel appeared as counsel in seven of the hearings and observed several others. *See* Declaration of Kathryn Meyer ("Meyer Decl.") at ¶¶ 5, 8-9.[1] In the fourteen bond hearings that have been completed, the immigration judge granted release on bond in twelve instances. In those twelve instances, immigration judges set an average bond amount of $12,250, including bonds of $10,000 or more in ten of the twelve cases, and bonds of $15,000 in seven cases. *See id.* ¶ 7.

In at least five of the twelve cases where bond was set, the class member cannot afford to pay his bond and therefore remains in detention, *see* Declaration of Scout Katovich ("Katovich Decl.") ¶¶ 2-8, with all the attendant harms recognized by this Court in its preliminary-injunction ruling, *see Abdi*, 2017 WL 5599521, at *25 (unnecessary liberty deprivation causes serious health effects and prevents detainees from adequately preparing for asylum hearings). At the bond hearings in each of these five cases, the immigration judge did not inquire into the person's financial circumstances and did not address whether alternative conditions of release either by

[1] A total of twenty-one bond hearings have been scheduled by the Government pursuant to the preliminary injunction in this case. *See* Meyer Decl. ¶ 4. Fourteen hearings have been conducted so far; adjournments were requested, and granted, in seven cases that will be heard this month. *Id.* ¶¶ 5-6. Since the Government provided a list of bond hearings (pursuant to this Court's oral order on December 7, 2017, requiring the Government to turn over such information), class counsel was able to ensure that no class member appeared *pro se* at a bond hearing. *Id.* ¶ 7.

themselves or in conjunction with a lower bond amount would sufficiently address any flight risk. *See* Katovich Decl. ¶¶ 4-8. The immigration judges' failure to consider financial resources and alternative conditions of release follows directly from the Government's current policy, which "does not require [immigration judges] to consider a non-citizen's financial circumstances in setting the amount of a bond or whether non-monetary alternative conditions of release would suffice to ensure his future appearance." *Hernandez v. Sessions*, 872 F.3d 976, 983 (9th Cir. 2017).[2] As a direct consequence of this policy, an immigration judge at Batavia described one indigent class member as posing "some potential risk of flight but not enough to justify [he] be held without a bond," but then proceeded to set a $12,000 bond over counsel's objection that such a bond amount would be tantamount to continued detention and request that the judge reconsider the bond after considering the individual's ability to pay. Katovich Decl. ¶ 4.

It is no surprise that this individual and other class members are unable to afford such high bonds. Each works daily at Batavia but earns only $1 per day. *See id.* ¶¶ 4-8. Most have virtually no assets to their names. *See id.* ¶¶ 4-5, 7-8. Most (but not all, *see id.* ¶ 8) have extended family or a network of friends in the U.S., but, even if it were appropriate to consider their assets in evaluating the detainee's ability to pay, those family members are often struggling to make ends meet themselves, support several others either in the U.S. or in their home countries, and

[2] This policy is evidenced by several decisions of the Board of Immigration Appeals ("BIA"). An individual's ability to pay and alternative conditions of release are not listed among the factors that the BIA instructs immigration judges to consider when making bond determinations. *See Matter of Guerra*, 24 I.&N. Dec. 37, 40 (BIA 2006). In fact, in several unpublished decisions, the BIA has explicitly rejected the notion that an immigration judge must take ability to pay into consideration when setting bond. *See In re Sandoval-Gomez*, 2008 WL 5477710, at *1 (BIA Dec. 15, 2008) ("[A]n alien's ability to pay the bond amount is not a relevant bond determination factor."); *In re Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (same); *In re Castillo-Leyva,* 2008 Immig. Rptr. LEXIS 10396, at *1 (BIA Sept. 18, 2008) (same); *In re Serrano-Cordova*, 2009 Immig. Rptr. LEXIS 2444, at *2 (BIA June 17, 2009) (same).

simply do not have access to the amounts required, *see id.* ¶¶ 4-7. The class members' indigence is exacerbated by the fact that the Government has a policy of requiring detainees who pay ICE directly to post the full cash value of their bonds and does not allow them to post a deposit, property, or other assets as collateral. *See* Meyer Decl. ¶ 10.[3]

Of the five individuals who have stated to counsel that they do not have the funds to post bond, four have impending hearing dates on their asylum cases scheduled between now and March 21, 2018 (January 24, February 9, February 15, and March 21). *See id.* ¶¶ 4, 5, 6, 8. The fifth lost his asylum hearing before an IJ and has an appeal pending at the BIA. *See id.* ¶ 7. Additionally, at least seven class members whose bond hearings were initially scheduled in December were adjourned to later this month. *See* Meyer Decl. ¶ 6.

## ARGUMENT

In its preliminary injunction, this Court ordered the Government to provide class members detained for six months or more with bond hearings that comply with the Second Circuit's ruling in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3562 (U.S. Mar. 25, 2016) (No. 15-1205), *cross-petition for cert denied*, 136 S. Ct. 2494 (Mem.) (2016). *See Abdi*, 2017 WL 5599521, at *28. In *Lora*, the Second Circuit held that a detainee "must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." 804 F.3d

[3] As a result of these detention practices, at least one individual whose bond was set at $10,000 is considering turning to Libre by Nexus, *see* Katovich Decl. ¶ 8, a company whose efforts to prey upon desperate detainees is well-documented, *see, e.g.*, Michael E. Miller, *This company is making millions from America's broken immigration system*, Washington Post, Mar. 9, 2017, *available at* http://wapo.st/2Ekp9xO (describing how Libre by Nexus charges twenty percent of bond plus fees, and then requires individuals released to be fitted with ankle monitors at a charge of $420 per month; neither the twenty percent nor the monthly charge goes towards paying down the bond).

at 616 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013) [hereinafter "*Rodriguez I*"]). The court reached this conclusion to "avoid serious constitutional concerns" raised by prolonged detention and thus established a "procedural safeguard"—i.e., the bond hearing—where the Government is required to justify the need for continued detention. *Lora*, 804 F.3d at 614.

*Lora* rested on the Second Circuit's recognition that prolonged confinement is permissible only when it serves the legitimate governmental interests in preventing flight and/or danger to the community, and that bond hearings before an immigration judge where the Government bears the burden would protect against confinement not in service of those goals. *See* 804 F.3d at 606, 613-14, 616. In doing so, the Second Circuit relied on the Supreme Court's recognition that for immigration detention to pass constitutional muster it should be "reasonabl[y] relat[ed]" to legitimate government goals and must be accompanied by "adequate procedural protections" to ensure that the Government's asserted justification "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (quotations omitted), *discussed in Lora*, 804 F.3d at 613-16.

The only court to have specifically considered the question of whether *Lora* requires consideration of a detainee's ability to pay held that it does. Transcript of Oral Decision, *Celestin v. Decker*, No. 17-cv-2419 (S.D.N.Y. Jun. 14, 2017) (Abrams, J.), attached as Ex. A to Meyer Decl. That Court stated that "*Lora's* mandate that immigration judges provide procedural safeguards to avoid the serious constitutional concerns raised by indefinite detention requires an immigration judge in a *Lora* hearing to consider a detainee's financial circumstances in setting bail." *Id.* at 8. *Celestin* involved very similar circumstances: a habeas case filed by an arriving asylum-seeker where the district court originally granted a bond hearing and then ordered further

relief when the immigration judge who conducted the bond hearing had failed to take ability to pay into consideration and set a $10,000 bond that the indigent asylum-seeker could not afford to pay. *See id* at 12, 13. Because Mr. Celestin—like the class members here—had an imminent asylum merits hearing for which he could not adequately prepare while in detention, the Court invoked its inherent authority to set bail and lowered the bond amount to $2,000. *Id.* at 24.

Further reinforcing the conclusion that *Lora* requires an immigration judge to consider a detainee's ability to pay and alternative conditions of release are two cases from the Ninth Circuit. First, in *Rodriguez I*, a decision upon which both this Court and *Lora* relied, the Ninth Circuit affirmed a preliminary injunction requiring immigration judges at bond hearings to release individuals "on reasonable conditions of supervision, including electronic monitoring if necessary," unless the Government satisfied its burden of justifying continued detention. 715 F.3d at 1131, *discussed in Lora*, 804 F.3d at 606, 616. On appeal of the permanent injunction that followed, which required immigration judges to "consider restrictions short of detention," the Ninth Circuit again affirmed. *Rodriguez v. Robbins*, 804 F.3d 1060,1088 (9th Cir. 2015) ["*Rodriguez II*"]). Noting that immigration judges are empowered to impose conditions other than money bond, the court held that immigration judges conducting *Rodriguez* bond hearings were required to "decide whether any restrictions short of detention would further the government's interest in continued detention." *Id.*

Second, in October 2017, the Ninth Circuit affirmed a preliminary injunction ordering immigration judges to take ability to pay and alternative conditions of release into account when setting bond. *See Hernandez*, 872 F.3d at 982. Relying in large part on *Zadvydas*, the court recognized that "[i]f the Government is setting monetary bonds to ensure appearance at future proceedings, there is no legitimate reason for it not to consider the individual's financial

circumstances and alternative conditions of release." *Id.* at 994 (citing *Zadvydas*, 533 U.S. at 690). In its analysis the Ninth Circuit made two observations pertinent to the petitioner's request that this Court clarify its preliminary injunction. It noted that "[s]etting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings." *Id.* at 991. It also recognized "[t]he government's refusal to require consideration of financial circumstances is impermissible under the *Mathews* [*v. Eldridge*] test because the minimal costs to the government of such a requirement are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals' physical liberty." *Id.* at 993. The Ninth Circuit concluded that "the government's current policies" of not requiring immigration judges to take ability to pay into consideration "fail to provide 'adequate procedural protections' to ensure that detention of the class members is reasonably related to a legitimate governmental interest." *Id*. at 991.[4]

These cases illustrate how the bond hearings currently being conducted for class members at Batavia are not reasonably related to the Government's legitimate interest.[5] The

[4] The district court in *Hernandez* made explicit the connection between its holding and the rationale underlying the Ninth Circuit's decision in the *Rodriguez* decisions. *See Hernandez v. Lynch*, No. 16-00620 JGB (KKx), 2016 WL 7116611, at * 25 (C.D. Cal. Nov. 10, 2016). That court explained that the "Ninth Circuit considered bond determination hearings vital under due process norms because they 'require the government to justify denial of bond' . . . that is, to 'establish that the government has a legitimate interest reasonably related to continued detention.'" *Id.* (quoting *Rodriguez II*, 804 F.3d at 1077). The *Hernandez* district court applied the holding in *Rodriguez II* as well as other similar decisions in the Ninth Circuit establishing that detainees subject to prolonged detention are entitled to bond hearings to conclude that immigration judges must take ability to pay and alternatives to detention into consideration. *Id.*

[5] Additional related case law on indigence and due process confirms that *Lora*—a case animated by the due process concerns raised by prolonged, arbitrary detention—should be interpreted to require immigration judges to take financial considerations into account so that no class member remains detained solely because of his poverty. *See, e.g*., *Bearden v. Georgia*, 461 U.S. 660,

purpose of money bond is to deter flight. As the Government itself "agree[d]" in *Hernandez*, a bond should be "reasonably calculated to assure an alien's appearance at a future removal proceeding." *Hernandez*, 872 F.3d at 991 n.19. But the extent to which a bond will mitigate flight depends in large part on an individual's financial circumstances because, as the Ninth Circuit explained, "the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance." *See id.* at 991. Without evaluating an individual's ability to pay and setting bond at an amount no greater than necessary to assure future appearances, money bond ceases to function as a means to deter flight and instead becomes a bar to release that bears no relationship to the Government's legitimate interests. *See Celestin*, No. 17-cv-2419, at 8 ("As the government recognized at oral argument, setting bond in an amount a person cannot pay would essentially be a denial of bond.").

Similarly, alternative conditions of release, either by themselves or in conjunction with a lower money bond, could ameliorate any risk of flight a detainee poses. *Cf. Rodriguez II*, 804 F.3d at 1088 (noting that immigration judges who take into account alternative conditions of release may find conditions short of detention satisfy the government's interest). Indeed, the Government's conditional supervision program, called ISAP II (Intensive Supervision Appearance Program), which relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, and in-person reporting to supervise

673-74 (1983) (observing that the Due Process Clause prohibits "imprisoning . . . a person solely because he lacks funds" and holding that the Government cannot revoke a criminal defendant's probation due to nonpayment of fine without determining if that individual "had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist"); *see also Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [pay bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.").

participants, has resulted in a 99% attendance rate in all immigration proceedings and a 95% attendance rate at final hearings. *See* U.S. Gov't Accountability Office, *GAO 15-26, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, 10-11, 30 (Nov. 2014), https://www.gao.gov/assets/670/666911.pdf. At Batavia, immigration judges' failure to take detainees' ability to pay and alternative conditions of release into account renders the bond hearings conducted under this Court's injunction critically deficient because those hearings fail to prevent prolonged detention that bears no reasonable relationship to flight risk.

Clarifying that the Court's November 17 order requires immigration judges to consider alternative conditions of release and ability to pay would remedy this deficiency. It is relevant that, under *Hernandez*, arriving asylum-seekers in identical situations as the class members in this case (except for the fact that they are detained in the Central District of California) are now being provided such bond hearings, where immigration judges must take ability to pay and alternative conditions of release into consideration. *See Hernandez v. Lynch, Instructions and Guidelines to Immigration Judges*, at 1, attached as Ex. B to Meyer Decl. (instructions provided by the Government to immigration judges, stating that the *Hernandez* injunction applies to individuals who receive "*Rodriguez*" bond hearings). Now that the Government has already developed guidance for immigration judges on how to conduct bond hearings that take ability to pay and alternative conditions of release into account, requiring the Government to follow similar instructions at the Batavia immigration court will be a minimal additional burden on the

Government. By contrast, such a measure could mean the difference between freedom and incarceration for the class members in this action.[6]

## CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Court clarify its preliminary-injunction order to require immigration judges conducting bond hearings under the injunction to consider alternative conditions of release and an individual's ability to pay in order to determine whether bond is necessary and, if so, to set bond no higher than necessary to ensure the person's return. For those bond hearings that have already occurred where immigration judges did not take ability to pay and alternatives to detention into account and where the individual remains detained, the petitioners request that the Court order those bond hearings to be reopened for the limited purpose of requiring immigration judges to conform their decisions to this Court's order.

[6] Requiring immigration judges to conduct a meaningful inquiry into class members' ability to pay is also consistent with those judges' statutory obligation to develop the factual record. *See Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) ("Unlike an Article III judge, an IJ is not merely the fact finder and adjudicator, but also has an obligation to establish and develop the record"). An obligation on IJs to affirmatively inquire into the individual's financial circumstances and to make an individualized assessment of the person's ability to pay falls well within their obligation to "develop[] a sound and useful record." *Id.* That IJs must make such an on-the-record inquiry is also supported by *Bearden*, where the Supreme Court held that fundamental fairness required the defendant to remain on probation because the trial court "made no finding" that Bearden failed to pay for any reason other than his indigence and made no finding that alternatives to imprisonment were inadequate to satisfy the State's interests. *See Bearden v. Georgia*, 461 U.S. 660, 673-4 (1983).

Respectfully Submitted,

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