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Jailing the Immigrant Poor: Hernandez v. Sessions

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JAILING THE IMMIGRANT POOR: *HERNANDEZ V. SESSIONS*

Michael K.T. Tan & Michael Kaufman[†]

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INTRODUCTION

Cesar Matias, a gay man from Honduras, fled to the United States more than a decade ago to escape severe persecution suffered because of his sexual orientation. He worked as a hair stylist and in a clothing factory in Los Angeles and rented a small, one-

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bedroom apartment. He never made enough money to save because he had to spend all his earnings on rent, groceries, clothing, and other necessities. Immigration authorities arrested Mr. Matias in March 2012 and locked him up in the city jail in Santa Ana, California, while his application for asylum was being decided. An immigration judge found that he posed no threat to the community and no significant flight risk, and ordered him released on a \$3,000 bond. Yet *more than four years* after his arrest, Mr. Matias was still locked up simply because he couldn't afford to make his bond.¹

It has long been recognized that the American money bail system is broken.² Every day hundreds of thousands of criminal defendants are in jail not because they pose a flight risk or danger to the community, but simply because they are too poor to pay for their release.³ Many reformers have called for an end to the reliance on money bail altogether.⁴ But at a minimum, detention systems that rely on money bail must include protections to ensure that people are not locked up because of their poverty. Indeed, there is a growing consensus in federal courts—in part due to the urging of the U.S. Department of Justice (“DOJ”) under the Obama administration—that locking up criminal defendants solely because of their inability to pay for their release is unconstitutional.⁵

¹ Hernandez v. Lynch, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *7-8 (C.D. Cal. Nov. 10, 2016); *see also* Michael Tan, *Immigrants Shouldn't Be Locked Up for Being Poor*, ACLU (Apr. 6, 2016, 5:00 PM), <https://perma.cc/Y6HG-LQK9>.

² *See, e.g.*, Robert F. Kennedy, Attorney Gen., U.S. Dep't of Justice, Address by Attorney General Robert F. Kennedy American Bar Association House of Delegates (Aug. 6, 1962), <https://perma.cc/Z6MX-NP2U> (“The problem of bail . . . [is] that the question of whether a man will be kept in jail pending trial or be free is directly influenced by how wealthy he is.”). For purposes of this article, “money bail” refers to a secured money bond—that is, an amount of money set by a government official that a person is obligated to pay as a condition of his or her pretrial release. The Immigration and Nationality Act (“INA”) and its implementing regulations use the term “bond” as opposed to “bail”—as is commonly used in the criminal justice context—to refer to a monetary condition of pretrial release. *See* 8 U.S.C. § 1226(a) (2017); 8 C.F.R. § 1236.1(d)(1) (2017).

³ *See, e.g.*, Ram Subramaniam et al., Vera Inst. of Justice, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 29-30 (2015).

⁴ *See, e.g.*, CRIMINAL JUSTICE POLICY PROGRAM HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 14-29 (2016).

⁵ *See infra* Part II; *see also* Statement of Interest of the United States, Varden v. City of Clanton, No. 2:15cv34-MHT-WC (M.D. Ala. Feb. 13, 2015), ECF No. 26, <https://perma.cc/65UE-2QRD>; *see also* Jones v. City of Clanton, No. 2:15cv34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015). In December 2017, Attorney General Jeff Sessions rescinded DOJ guidance to state and local governments adopting this position. *See* Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Rescinds 25 Gui-

Basic protections against such unlawful imprisonment are also lacking in the immigration detention system operated by the federal government. Immigration officials are not required to consider a person's financial circumstances when setting a bond, nor are they required to consider whether alternatives to money bail—such as electronic monitoring or reporting requirements—would permit the person's release.⁶ Moreover, where a bond is set, immigrants must post the full cash bond amount to be released, instead of being permitted to post—as is common in many criminal bail systems—other forms of collateral such as a deposit bond or property.⁷ Worse still, there is no mechanism for an immigrant detained on an unaffordable bond to ask an immigration judge to consider release on alternative conditions, regardless of the length of his detention.⁸ The result is that immigrants like Mr. Matias are routinely detained pending their removal cases—often for months, or even years—solely because they are unable to afford their bonds.

In November 2016, the ACLU won a path-breaking decision in the U.S. District Court of the Central District of California holding that the federal government's detention of immigrants based on their poverty alone violated both the Immigration and Nationality Act ("INA") and the U.S. Constitution. In *Hernandez v. Lynch*—or, as it is now known, *Hernandez v. Sessions*—the District Court granted a class-wide preliminary injunction requiring, for the first time in the history of the immigration system, basic procedures to ensure that immigrants are not incarcerated solely because they lack financial resources.⁹ In October 2017, the Ninth Circuit affirmed the preliminary injunction order in a ruling that stands to have far-reaching impact.¹⁰ Approximately one-fifth of the nation's immigration detainees are imprisoned in facilities in the Ninth Circuit.¹¹

Moreover, *Hernandez* has only taken on more significance in the wake of President Trump's Executive Orders on immigration enforcement. Executive Order No. 13767 on border security has

dance Documents (Dec. 21, 2017), <https://perma.cc/J6VX-FLYC> (rescinding, *inter alia*, the U.S. Dep't of Justice Dear Colleague Letter on Enforcement of Fines and Fees (Mar. 14, 2016)).

⁶ See *Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *5-6 (C.D. Cal. Nov. 10, 2016).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; see also *infra* Part III.

¹⁰ *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

¹¹ See generally Cmty. Initiatives for Visiting Immigrants in Confinement, *Immigration Detention Map & Statistics*, CIVIC, <https://perma.cc/K8NA-5VSV>.

promised an unprecedented expansion of immigration detention, under the banner of ending the immigration authorities' purported policy of "catch and release," and threatens the categorical detention of people who unlawfully cross the border, without any individualized consideration of whether they pose a danger or flight risk that warrants their incarceration.¹² In a new era of mass detentions and deportations, it has become all the more critical to ensure that basic safeguards are in place to protect immigrants from the arbitrary deprivation of liberty.

This Article proceeds in four parts. Part I explains how immigration bonds are currently set and why they routinely result in detention of the immigrant poor. Part II reviews the constitutional limits on detention based on indigency alone. Part III provides an overview of the *Hernandez* litigation and the district court's ruling. Part IV examines the President's Executive Order on border security and its implications for the future of the immigration detention system and the jailing of the immigrant poor.

I. HOW DO IMMIGRATION BONDS WORK?

The jailing of the immigrant poor has become an increasingly urgent issue in the last two decades with the expansion of mass immigration detention. Today, the government detains large numbers of immigrants in the hundreds of jails and jail-like facilities across the United States. But this practice is relatively new. "In 1980, fewer than 2,000 people were held in immigration detention nationwide" on any given day.¹³ "Between 1980 and 1990, the system more than tripled in size, to nearly 7,000 beds. And in the last two decades, it has exploded."¹⁴ Between 1995 and 2016, the average daily immigration detention population grew from approximately 7,500 to 33,300 persons.¹⁵ In the first half of 2016, the average daily population grew to record levels, hitting nearly 37,000 people in June 2016.¹⁶ This surge was fueled "by a sharp increase in the number of immigrants and asylum-seekers who [were] detained despite not having any history of criminal convic-

¹² See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); see also *infra* Part IV.

¹³ CARL TAKEI ET AL., AM. CIVIL LIBERTIES UNION, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 7 (2016).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 7-8.

tions.”¹⁷ “As of June 2016, the majority of immigration detainees—more than 20,000 people” on a given day—had no criminal record, and many of them were eligible for release on bond or conditions of supervision pending removal proceedings to determine their right to remain in the United States.¹⁸ In August of 2017, ICE held a daily average of 38,153 people in immigration detention.¹⁹ Reportedly, the Trump administration aims to eventually double detention capacity to 80,000 beds.²⁰

The statutes governing this massive prison system are notoriously byzantine. *Hernandez* specifically concerns people detained under Section 236(a) of the Immigration and Nationality Act (“INA”).²¹ The government generally applies Section 236(a) to the detention of noncitizens who are apprehended in the interior of the United States pending their removal proceedings. The statute provides that, “pending a decision on whether the alien is to be removed from the United States . . .”

the Attorney General—

- (1) may continue to detain the arrested alien; and
- (2) may release the alien on—
 - (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
 - (B) conditional parole²²

Pursuant to implementing regulations, U.S. Immigration and Customs Enforcement (“ICE”)—the arresting authority—makes the initial custody determination, which is subject to review at a bond hearing before an immigration judge (“IJ”).²³ To obtain release, the noncitizen “must demonstrate to the satisfaction of the officer that [his or her] release would not pose a danger to property or persons, and that [he or she] is likely to appear for any future

¹⁷ *Id.* at 8.

¹⁸ *Id.*

¹⁹ Libby Rainey, *ICE Transfers Immigrants Held in Detention Around the Country to Keep Beds Filled. Then It Releases Them, With No Help Getting Home*, DENVER POST (Sept. 17, 2017, 12:01 AM), <https://perma.cc/6WGW-3FP2>.

²⁰ Brian Bennett, *Not Just ‘Bad Hombres’: Trump Is Targeting Up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017, 12:00 PM), <https://perma.cc/S3TN-9CSK>.

²¹ INA § 236(a) (codified at 8 U.S.C. § 1226(a) (2017)).

²² *Id.* INA § 236(a) (codified at 8 U.S.C. § 1226(a)), contrast with two other statutes that govern detention pending removal proceedings: INA § 236(c) (codified at 8 U.S.C. § 1226(c) (2017)), which provides for the *mandatory* detention of noncitizens who are apprehended inside the United States and face removal based on certain crimes, and INA § 235(b) (codified at 8 U.S.C. § 1225(b) (2017)), which provides for the detention of noncitizens apprehended when arriving at a port-of-entry.

²³ See 8 C.F.R. §§ 1236.1(d)(1), 1003.19 (2017).

proceeding.”²⁴

If the person proves that he does not pose a danger and is likely to appear at future proceedings, the ICE officer or IJ determines whether the noncitizen may be released on his or her own recognizance, bond, or other conditions that would sufficiently address any risk of the immigration detainee fleeing before adjudication of his or her immigration case.²⁵ Such conditions could include electronic monitoring, periodic reporting requirements, restrictions on travel, or enrollment in a substance abuse program.²⁶ The IJ’s bond determination is reviewable by the Board of Immigration Appeals (“BIA”), the administrative appellate body within the Executive Office for Immigration Review.²⁷ By statute, if the ICE officer or IJ sets a cash bond, that bond must be a minimum of \$1,500 “with security approved by . . . the Attorney General.”²⁸

As a matter of policy and practice, neither the ICE officer nor the IJ is required to consider a detainee’s financial ability to pay when setting a bond.²⁹ Nor are ICE officers or IJs required to determine whether conditions of supervision, alone or in combination with a lower bond, would suffice to allow for the person’s release.³⁰ Instead, the BIA has held that an immigration official “has broad discretion in deciding the factors that he or she may consider in custody redeterminations.”³¹ And in several unpublished decisions, the BIA has held that a person’s financial circumstances are *irrelevant* to a bond determination.³² Not surprisingly then, immigration

²⁴ 8 C.F.R. § 1236.1(c)(8) (2017); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (“The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond.”). Under the Ninth Circuit’s decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), certain noncitizens initially detained under color of other statutes become entitled to bond hearings under Section 236(a) after their detention exceeds six months. At those hearings, the government bears the burden of proof “to justify a non-citizen’s detention by clear and convincing evidence.” *Rodriguez*, 804 F.3d at 1087.

²⁵ *See Guerra*, 24 I. & N. Dec. 37, at 39-40.

²⁶ *Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *20 (C.D. Cal. Nov. 10, 2016).

²⁷ *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i) (2017).

²⁸ INA § 236(a) (codified at 8 U.S.C. 1226(a) (2017)).

²⁹ *Hernandez*, 2016 WL 7116611, at *5-6.

³⁰ *Id.*

³¹ *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

³² *See Matter of Sandoval-Gomez*, A 092 563 965, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008) (“[A]n alien’s ability to pay the bond amount is not a relevant bond determination factor.”); *Matter of Castillo-Cajura*, A 089 853 733, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009) (same); *Matter of Castillo-Leyva*, A 088 673 740, 2008

officials routinely do not consider an individual's ability to pay in setting bond, and in many instances, expressly refuse to do so.³³

Compounding this problem is the fact that immigration officials require that individuals ordered released on bond post the full amount of the bond in cash, or cash equivalents, to be released.³⁴ Immigration officials do not permit alternative forms of secured bonds commonly found in the criminal justice system. These include deposit bonds, where the noncitizen would post a percentage (such as 10%) of the bond as security and the total bond amount becomes due only if he fails to appear, as well as property bonds, where property valued at the full bond amount would be posted as security and would be forfeited if the person fails to appear.³⁵

Moreover, individuals who are unable to pay their bonds may remain detained for months or years while their cases are pending and are precluded from having their bonds reconsidered on the ground that they are unable to pay. While regulations permit a noncitizen to seek a new bond hearing "only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination,"³⁶ the immigration authorities do not recognize a person's inability to post bond, despite having made good faith efforts to do so, as a "changed circumstance" that warrants a new bond hearing.³⁷

Taken together, these practices have a predictable result. Immigrants are routinely detained not because they pose a flight risk or a threat to public safety, but solely because they lack the funds to make bail. For example, in *Hernandez*, the district court found that at the beginning of October 2015, "there were at least 119 individuals detained in" the Central District of California alone despite having a bond set under Section 236(a).³⁸ Their bond amounts

Immig. Rptr. LEXIS 10396, *1 (B.I.A. Sept. 18, 2008) (same); *Matter of Serrano-Cordova*, A 099 581 986, 2009 Immig. Rptr. LEXIS 2444, *2 (B.I.A. June 17, 2009) (same).

³³ *Hernandez*, 2016 WL 7116611, at *5-6.

³⁴ THE NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW & DEFENSE § 7:13 (2017) ("In practice, when an immigration bond is required, unlike in the criminal justice system, the full value of the bond must be posted either in cash, cashier's check, or United States Postal money order."); *see also* *Hernandez*, 2016 WL 7116611, at *5-6.

³⁵ PRETRIAL JUSTICE INST., GLOSSARY OF TERMS AND PHRASES RELATING TO BAIL AND THE PRETRIAL RELEASE OR DETENTION DECISION 3 (2015).

³⁶ 8 C.F.R. § 1003.19(e) (2017).

³⁷ *Hernandez*, 2016 WL 7116611, at *5-6.

³⁸ *Id.* at *5.

ranged from \$1,500 to \$100,000.³⁹ In other cases in the District, IJs had set bonds as high as \$2.5 million.⁴⁰

The detention practices in the Central District reflect long-standing trends nationwide. A recent study of immigration bonds by TRAC Immigration—a data research project housed at Syracuse University—found that, over a 20-year period, about one in five persons who received a bond remained detained at the conclusion of their removal case in immigration court, presumably because they were unable to post the bond amount.⁴¹ That number underreports the problem since it does not include people who remained incarcerated for weeks, months, or, like Mr. Matias, years before they are able to post bond but are ultimately released prior to the adjudication of their cases.⁴² TRAC Immigration also found that release decisions varied greatly, ranging from release on personal recognizance without bond to “bond amounts of a million dollars or more.”⁴³ In general, bond amounts have increased over time.⁴⁴

The arbitrary detention of people due to their poverty causes tremendous hardship. As the Supreme Court has recognized, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. . . . The time spent in jail is simply dead time.”⁴⁵ Moreover, detention significantly prejudices individuals’ access to and exercise of legal rights, hindering their “ability to gather evidence, contact witnesses, or otherwise prepare [their] defense.”⁴⁶ The vast majority of detainees—between 79-86% nationally—lack counsel in immigration proceedings.⁴⁷ Immigration

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Transactional Records Access Clearinghouse, *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?*, TRACIMMIGRATION (Sept. 14, 2016), <https://perma.cc/H92H-SYM3>. “For cases concluded during FY 2015, 13 percent remained detained even after the judge granted bond, down from 28 percent who had still been detained at the conclusion of their case in FY 2011 after bond was granted.” *Id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ As TRAC explains, “[t]he median bond amount set twenty years ago was \$3,000. By FY 2002 it rose to \$5,000 where it remained until FY 2014 when it increased to \$6,000. In FY 2015 the median bond amount was \$6,500 In FY 2015 fully half of all bonds set were between \$4,000 and \$10,000.” *Id.*

⁴⁵ *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972).

⁴⁶ *Id.* at 533.

⁴⁷ *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 8 (2015); *see also* Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55,659, 55,659-60 (proposed Sept. 17, 2014)

detainees are at a distinct disadvantage as many are held in remote locations far from legal services and have limited ability to seek or pay for representation.⁴⁸ Yet having a lawyer makes a dramatic difference in a removal case. A recent study found that detained immigrants with counsel won “in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.”⁴⁹ Not surprisingly then, immigrants routinely give up meritorious defenses and acquiesce to removal because they cannot bear the prospect of lengthy imprisonment.⁵⁰

The setting of bonds without regard to ability to pay also creates a market for exploitative bail bonds companies. Families who lack the resources to pay a full cash bond frequently are forced to agree to usurious terms that, in the long run, drive the families deeper into poverty. Indeed, some companies have specifically targeted immigrant detainees and require onerous conditions including, in certain cases, that the released noncitizens wear ankle

(to be codified at 8 C.F.R. pt. 1003) (“Of the 265,708 initial case completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented.”).

⁴⁸ See HUMAN RIGHTS FIRST, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* 31 (2011) (“[A]lmost 40 percent of ICE’s total bed space is located more than 60 miles from an urban center.”); COMM’N ON IMMIGRATION, AM. BAR ASS’N, *REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5-9* (2010) (“[R]emote facilities . . . and the practice of transferring detainees from one facility to another—often more remote—location without notice stand in the way of retaining counsel for many detainees”.); Stacy Caplow et al., *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 369 (2011) (study of detainees in New York concluded that representation rates for detainees transferred out of state were dismal).

⁴⁹ Eagly & Shafer, *supra* note 47, at 9; see also Caplow et al., *supra* note 48, at 362-64 (explaining that from 2005 to 2011, non-detained immigrants with lawyers had successful outcomes 74% of the time, while detained immigrants without counsel prevailed 3% of the time); COMM’N ON IMMIGRATION, AM. BAR ASS’N, *supra* note 48, at 5-3 (“[T]he disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking.”).

⁵⁰ For example, in a major study of asylum seekers in the expedited removal process, the U.S. Commission on International Religious Freedom interviewed 45 asylum seekers who abandoned their asylum claims while in detention and found that a “substantial number reported that the conditions of their detention influenced their decision to withdraw their application for admission.” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS AND RECOMMENDATIONS* 52 (2005). The same study found that over a five-year period, detained claimants withdrew their asylum claims in immigration court at more than double the rate of non-detained or released claimants (13% versus 5%). U.S. COMM. ON INT’L RELIGIOUS FREEDOM, *REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS* 670 tbl.5.1 (2005).

monitors and pay exorbitant monthly fees for their use.⁵¹ The fact that some immigrants are able to post high bonds through bail bonds companies risks increasing bond amounts even further, as the those arrangements stand to distort what ICE and the IJ view as an “affordable” bond.⁵² Indeed, because they are motivated by profit, and not assessments of flight risk and danger, bail bond companies distort pretrial release decisions in general.⁵³

Arbitrary detentions cost U.S. taxpayers as well. In FY 2016 the average cost of detention per person per day was nearly \$187, or approximately \$2.3 billion for that year.⁵⁴ By contrast, alternatives to detention, which involve other forms of supervision, such as periodic check-ins and electronic monitoring, range in cost to taxpayers from “pennies to \$7 a day”⁵⁵ depending on the type of monitoring. The overuse of costly detention is especially irrational given the high rates of compliance reported in ICE’s Alternative to Detention (“ATD”) program. According to the Government Accountability Office, ICE reports a 99% appearance rate for individuals released under its “full-service” supervision program, which includes periodic office and home visits, monitoring, and case management services.⁵⁶

II. THE CONSTITUTIONAL AND STATUTORY LIMITS ON THE DETENTION OF THE IMMIGRANT POOR

The widespread detention of the immigrant poor violates the due process and equal protection guarantees of the Fifth Amendment, the Eighth Amendment Excessive Bail Clause, and the Immigration and Nationality Act. Although no court prior to *Hernandez*

⁵¹ See, e.g., Adolfo Flores, *Immigrants Desperate to Get Out of US Detention Can Get Trapped by Debt*, BUZZFEED NEWS (Jul. 23, 2016, 10:55 AM), <https://perma.cc/A6X7-W3MH>; Michael E. Miller, *This Company is Making Millions from America’s Broken Immigration System*, WASH. POST (Mar. 9, 2017), <https://perma.cc/3SGT-Y9NC> (“In exchange for their freedom, immigrants sign contracts promising to pay Libre \$420 per month while wearing the company’s GPS devices. But these contracts are the subject of lawsuits and allegations of fraud by immigrants . . . who claim they didn’t understand them.”); see also LIBRE BY NEXUS, <https://perma.cc/J8JX-UPEE> (last visited Nov. 30, 2017).

⁵² See JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 25 (2012).

⁵³ *Id.* at 17-20.

⁵⁴ CARL TAKEI ET AL., *supra* note 13, at 24.

⁵⁵ Chairwoman Mikulski Releases Summary of Emergency Supplemental Funding Bill, U.S. SENATE COMMITTEE ON APPROPRIATIONS (July 23, 2014), <https://perma.cc/ET5S-4WAH>.

⁵⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30, 32 (2014).

has had occasion to consider the issue, longstanding precedent from both the criminal and civil detention contexts make clear that the Constitution requires certain basic procedures to prevent the impermissible incarceration of individuals based solely on their lack of financial resources.⁵⁷

A. *Due Process*

The Supreme Court has made clear that “[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.”⁵⁸ Due process requires that immigration detention be “reasonably relat[ed]” to the government’s legitimate interests in preventing flight and preventing danger to the community, and be accompanied by adequate procedures to ensure those purposes are met.⁵⁹ The government’s failure to consider immigrants’ financial circumstances and eligibility for alternative conditions of release impermissibly results in detention based solely on their inability to pay. Such detention is plainly not “reasonably related” to the government’s legitimate purposes.

The Supreme Court has long recognized that “imprisoning a defendant solely because of his lack of financial resources” violates the Due Process Clause.⁶⁰ For example, in *Bearden v. Georgia*, the Court held that a state cannot revoke a criminal defendant’s probation due to nonpayment of a fine without a determination that the individual “had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist.”⁶¹ The Court has applied similar principles in civil matters.⁶²

The federal government itself has recognized that this principle applies in the pretrial criminal context and has taken the position that detaining someone solely because he cannot afford a

⁵⁷ Since the district court’s ruling in *Hernandez*, at least one other district court has held that the Constitution requires IJs to consider ability to pay when setting bond amounts. See *Celestin v. Decker*, No. 17-CV-2419 (S.D.N.Y. June 14, 2017), ECF No. 26 (granting habeas petition).

⁵⁸ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁵⁹ See *id.* at 690-91 (internal quotation marks omitted); accord *Demore v. Kim*, 538 U.S. 510, 527 (2003).

⁶⁰ *Bearden v. Georgia*, 461 U.S. 660, 661 (1983).

⁶¹ *Id.* at 661-62. The rule of *Bearden* followed from prior cases prohibiting incarceration beyond the statutory maximum solely because of an inability to pay a fine, *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970), and the conversion of a fine imposed under a fine-only statute into a jail term solely because of the defendant’s indigence, *Tate v. Short*, 401 U.S. 395, 397-99 (1971).

⁶² See *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (holding that due process requires adequate procedures and specific findings as to the individual’s ability to pay child support before incarcerating him for civil contempt).

money bond is not reasonably related to the government's legitimate goals.⁶³ The lower courts have likewise found that bail schemes violate due process where they do not consider ability to pay and alternative conditions. For example, in *Pugh v. Rainwater*, the Fifth Circuit found that "[t]he incarceration of those who cannot [pay a money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."⁶⁴ As the court explained, at a bail hearing, "[t]he ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial."⁶⁵ Thus, while a bail "requirement as is necessary to provide reasonable assurance of the accused's presence at trial is constitutionally permissible," "[a]ny requirement in excess of that amount would be inherently punitive and run afoul of due process."⁶⁶ Moreover, "in the case of an indigent, whose appearance at trial could reasonably be assured by [an] alternate form[] of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."⁶⁷

The government's bond practices in the immigration context violate these principles. The detention of immigrants on bonds that are set without regard for their ability to pay does not advance the government's legitimate interests in preventing danger and flight,⁶⁸ and therefore violates their due process rights. This is especially so where the government has recourse to a range of alterna-

⁶³ See Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein at 12-13, *Walker v. City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (Case No. 16-10521).

⁶⁴ *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1058; accord *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *10-11, *14 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction); *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) ("[T]he use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause . . ."); *Cooper v. City of Dothan*, No. 1:15-cv-425-WKW, 2015 WL 10013003, at *1-2 (M.D. Ala. June 18, 2015) (granting temporary restraining order); see also *O'Donnell v. Harris Cty.*, No. 4:16-cv-01414, 2017 WL 1735453 (S.D. Tex. Apr. 28, 2017) (order granting preliminary injunction) (holding that the government's policy or practice of detaining misdemeanor defendants on secured money bail is unconstitutional); *O'Donnell v. Harris Cty.*, 227 F. Supp. 3d 706, 731-34 (S.D. Tex. 2016) (denying motion to dismiss under Rule 12(b)(6)); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 761, 767-69 (M.D. Tenn. 2015) (holding that detaining misdemeanor probationers on money bail without inquiry into their ability to pay was unconstitutional and granting class-wide preliminary injunction).

⁶⁸ See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

tives to bond that are highly effective.⁶⁹

Moreover, immigration officials cannot determine an appropriate bond amount without considering a noncitizen's ability to pay. The purpose of a bond is to deter flight risk.⁷⁰ However, the degree to which a bond will deter flight risk necessarily depends on an individual's financial resources. While a \$1,500 bond may serve as a significant deterrent for an indigent person like Mr. Matias, it would serve as little to no deterrent for a millionaire. Therefore, by ignoring immigrants' ability to pay, immigration officials set bond amounts that are necessarily arbitrary and bear no rational relationship to the purpose of setting bond, in violation of due process. Likewise, without consideration of whether someone should be released on alternative conditions of release, the authorities have no way of determining whether a bond even needs to be imposed in the first place.

B. *Equal Protection*

The Fifth Amendment prohibits the federal government from denying individuals the equal protection of the laws.⁷¹ The government's existing bond procedures deny release to one class of noncitizens who cannot pay a money bond, while affording release to noncitizens who can. These procedures—although facially neutral—result in detention that is “wholly contingent on one's ability to pay, and thus ‘visi[t] different consequences on two categories of persons.’”⁷² Such “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”⁷³

Applying these principles, numerous federal courts have recently invalidated bond systems that—by failing to consider individuals' ability to pay—imprison poor people while letting those relatively rich go free.⁷⁴ The federal government itself has acknowl-

⁶⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 56, at 30, 32.

⁷⁰ See *Matter of Guerra*, 24 I. & N. Dec. 37, 37-38 (B.I.A. 2006).

⁷¹ U.S. CONST. amend. V; see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 57 (2001) (“[T]he equal protection guarantee [is] embedded in the Due Process Clause of the Fifth Amendment.”).

⁷² *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)).

⁷³ *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (citing *Williams*, 399 U.S. at 235; *Tate v. Short*, 401 U.S. 395, 397 (1971)).

⁷⁴ See, e.g., *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *10-11, *14 (N.D. Ga. Jan. 28, 2016); *Thompson v. Moss Point*, No. 1:15-cv-182LGRHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *2-3 (M.D. Ala. Sept. 14, 2015); *Cooper v.*

edged that “a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial” and “meaningful consideration of alternatives, infringes on equal protection and due process requirements.”⁷⁵

The immigration authorities’ bond practices do not meet this test. Immigration detention is a severe deprivation of fundamental liberty. The detention of immigrants because they cannot afford to post their bonds lacks any rational connection to their detention’s purported purpose—the prevention of flight risk. And again, the government has recourse to a range of alternative conditions of supervision, alone or in combination with a lower bond or other form of secured bond, to ensure that they appear for removal proceedings.

C. Eighth Amendment

The Eighth Amendment’s “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.”⁷⁶ The government therefore “may not set bail to achieve invalid interests, nor in an amount that is excessive in relation to the valid interests it seeks to achieve.”⁷⁷ Under the Bail Clause, and its federal statutory counterpart, the Bail Reform Act,⁷⁸ “the amount of bail should not be used as an indirect, but effective, method of ensuring continued custody.”⁷⁹

The Supreme Court has made clear that the Eighth Amendment is not limited to criminal proceedings.⁸⁰ In *Austin v. United*

City of Dothan, No. 1:15-cv-425-WKW, 2015 WL 10013003, at *1-2 (M.D. Ala. June 18, 2015) (“[T]he court finds that the motion for a temporary restraining order is due to be granted in part and denied in part.”); *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1, *3-4 (E.D. Mo. June 3, 2015) (issuing declaratory judgment); *see also* *O’Donnell v. Harris Cty.*, 227 F. Supp. 3d 706, 729-33 (S.D. Tex. 2016); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 761, 767-69 (M.D. Tenn. 2015).

⁷⁵ Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein, *supra* note 63, at 13.

⁷⁶ *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) (citing *United States v. Salerno*, 481 U.S. 739, 754 (1987)).

⁷⁷ *Id.* (internal citations omitted).

⁷⁸ 18 U.S.C. § 3142 (2017).

⁷⁹ *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983); *see also* *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (“[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all.”).

⁸⁰ *See Austin v. United States*, 509 U.S. 602, 607-09 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures).

States, the Court explained that, unlike other provisions of the Bill of Rights, the Eighth Amendment is not limited by its terms to criminal proceedings, and therefore should be applied in civil proceedings where it would serve the Amendment's purposes.⁸¹ Importantly, the Court has acknowledged that applying the Excessive Bail Clause in civil immigration proceedings is consistent with its purpose.⁸² This view finds further support in the Eighth Amendment's history.⁸³

Here, the Eighth Amendment requires immigration officials to consider a detainee's financial circumstances and alternatives to a full cash bond to ensure that the terms of release are not "excessive" in relation to their purpose.⁸⁴ 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."⁸⁵ The evaluation of whether bail is "set at a sum greater than that necessary" to satisfy the government's interests must consider a detainee's ability to pay a bond and the availability of alternatives to a full cash bond.⁸⁶ The government's failure to provide such procedures violates immigrants' Eighth Amendment rights.

D. *Immigration and Nationality Act*

Finally, the government's practices violate the INA. The plain language of Section 1226(a) contemplates that immigration authorities will consider the individual for release on "bond . . . or . . .

⁸¹ *Id.*; see also *id.* at 609 n.5.

⁸² See *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257, 263 n.3 (1989) ("The potential for governmental abuse which the Bail Clause guards against is present in both" "a criminal case or in a civil deportation proceeding."); cf. *Carlson v. Landon*, 342 U.S. 524, 537-40 (1952) (assuming that the Excessive Bail Clause applied to immigration detention, but holding that the Clause did not prohibit the Attorney General's detention without bail of several members of the Communist Party pending the resolution of their deportation cases).

⁸³ See Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1254 n.126, 1255 n.28 (1987) ("[B]ail or its close cousin, mainprize, commonly were used in civil proceedings [in the Founding era].").

⁸⁴ *Stack v. Boyle*, 342 U.S. 1, 5, 5 n.3 (1951) ("[The Eighth Amendment requires] the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant . . . [including] the financial ability of the defendant to give bail . . .").

⁸⁵ *United States v. Salerno*, 481 U.S. 739, 754 (1987); *Stack*, 342 U.S. at 5 ("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.").

⁸⁶ *Salerno*, 481 U.S. at 753-54.

conditional parole.”⁸⁷ Moreover, under the canon of constitutional avoidance, a statute must be construed to avoid serious constitutional problems where “fairly possible.”⁸⁸ The Supreme Court and lower courts have repeatedly applied the avoidance canon to construe the immigration detention laws to require procedural protections.⁸⁹ Because Section 236(a) is silent about what immigration officials must consider when setting bond amounts,⁹⁰ the statute therefore can and must be construed to require consideration of ability to pay to avoid the serious constitutional concerns that would otherwise be presented. Indeed, the government itself has recognized that Section 236(a) can be construed to require immigration officials to consider ability to pay and release on alternative conditions of supervision: for certain families in immigration detention, the Department of Homeland Security (“DHS”) has instructed officers to “offer release with an appropriate monetary bond or other condition of release” and set “a family’s bond amount at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety.”⁹¹ Courts outside the immigration context have applied the canon to construe statutes to require consideration of ability to pay and alternatives to incarceration to avoid constitutional con-

⁸⁷ INA § 236(a) (codified at 8 U.S.C. § 1226(a) (2017)) (emphasis added); *see also* *Rodriguez v. Robbins*, 804 F.3d 1060, 1088 (9th Cir. 2015) (“[I]f DHS detains a non-citizen, an IJ is already empowered to ameliorat[e] the conditions by imposing a less restrictive means of supervision than detention.”) (quotation marks omitted), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015) (“§ 1226(a) unambiguously states that an IJ may consider conditions for release beyond a monetary bond.”).

⁸⁸ *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks omitted).

⁸⁹ *See, e.g., Zadvydas*, 533 U.S. at 689-90 (finding that, because of the constitutional concerns posed by indefinite detention, 8 U.S.C. § 1231(a)(6) limits a non-citizen’s post-removal-period detention to a period reasonably necessary to bring about that non-citizen’s removal from the United States); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Rodriguez*, 804 F.3d at 1078, 1086-89 (construing immigration detention statutes to require a bond hearing at six months under 8 U.S.C. § 1226(a)); *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011) (construing 8 U.S.C. § 1231(a) to require bond hearings for noncitizens detained for prolonged periods); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (construing § 1226(a) to require bond hearings for noncitizens with a petition for review and stay of removal); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (construing 8 U.S.C. § 1225(b) to not authorize indefinite immigration detention).

⁹⁰ *See* INA § 236(a) (codified at 8 U.S.C. § 1226(a)(2) (2017)) (authorizing “release” on a “bond of at least \$1,500 . . . or . . . conditional parole.”).

⁹¹ *See* Press Release, Jeh C. Johnson, Sec’y, U.S. Dep’t Homeland Sec., Statement by Jeh C. Johnson on Family Residential Centers (June 24, 2015), <https://perma.cc/QEW7-WZ5X>. Indeed, the government’s disparate treatment of detained families and single adult detainees arguably raises its own equal protection concerns.

cerns as well.⁹²

III. *HERNANDEZ V. SESSIONS*

Hernandez seeks to enforce these constitutional and statutory rights. The ACLU, along with pro bono attorneys from Skadden, Arps, Slate, Meagher & Flom LLP, filed *Hernandez* in the spring of 2016 on behalf of a class of noncitizens in the Central District of California who are or will be detained under Section 236(a) after being ordered released on a bond set under the government's bond policies and practices.⁹³ Plaintiffs allege that the government violated their constitutional and statutory rights by failing, among other things, to consider their ability to pay a bond, and alternative conditions of release to a full cash bond, in determining the appropriate conditions for their release.⁹⁴ Plaintiffs also moved for a class-wide preliminary injunction to redress these violations.⁹⁵

On November 10, 2016, the District Court denied the government's motion to dismiss, granted Plaintiffs' motion for class certification, and granted a class-wide preliminary injunction requiring immigration officials to consider noncitizens' ability to pay a bond and alternatives at custody determinations.⁹⁶ The order required that, "when setting, re-determining, and/or reviewing the terms of any person's release," ICE and IJs:

- must (a) consider the person's financial ability to pay a bond;
- (b) not set bond at a greater amount than that needed to ensure the person's appearance; and (c) consider whether the person may be released on alternative conditions of supervision, alone or in combination with a lower bond amount, that are sufficient to mitigate flight risk.⁹⁷

The order also required the parties to meet and confer on developing guidelines and instructions for ICE officers and IJs in applying the order's terms, and directed the government to conduct new

⁹² See *United States v. Keith*, 754 F.2d 1388, 1391 (9th Cir. 1985) (construing federal statute to require courts and the Parole Commission to "find that alternative punishments to incarceration" are insufficient "before imprisoning an offender who has not complied with a restitution order but has made sufficient bona fide efforts to pay" due to due process, equal protection, and Eighth Amendment concerns); *Pugh*, 572 F.2d at 1057 (construing state bail statute to require consideration of alternatives to money bail because of due process and equal protection concerns).

⁹³ *Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *1-2 (C.D. Cal. Nov. 10, 2016).

⁹⁴ *Id.* at *2.

⁹⁵ *Id.*

⁹⁶ *Id.* at *9-30.

⁹⁷ Order Granting Plaintiffs-Petitioners' Mot. for Class-Wide Prelim. Inj. at ¶ 1, *Hernandez v. Lynch*, No. 5:16-00620-JGB-KK (C.D. Cal. June 30, 2017), ECF No. 84.

bond hearings for current detainees whose bonds were set without the benefit of the order's protections.⁹⁸ The government filed an interlocutory appeal to the Ninth Circuit.⁹⁹

On October 2, 2012, the Ninth Circuit—in an opinion by Judge Stephen Reinhardt—affirmed the preliminary injunction order on due process grounds. Applying well-established case law, the court reaffirmed that although “[t]he government has legitimate interests in protecting the public and in ensuring that noncitizens in removal proceedings appear for hearings, . . . any detention incidental to removal must ‘bear[] [a] reasonable relation to [its] purpose.’”¹⁰⁰ “Detention of an indigent ‘for inability to post money bail’ is impermissible if the individual’s ‘appearance at trial could reasonably be assured by one of the alternate forms of release.’”¹⁰¹ As the court explained:

Given that the detainees have been determined to be neither dangerous nor so great a flight risk as to require detention without bond, the question before us is: Is consideration of the detainees’ financial circumstances, as well as of possible alternative release conditions, necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings? We conclude that the answer is yes.

A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government’s legitimate interests. Since the government’s purpose in conditioning release on the posting of a bond in a certain amount is to “provide enough incentive” for released detainees to appear in the future, we cannot understand why it would ever refuse to consider financial circumstances: 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. Nor can we understand why the government would refuse to consider alternatives to monetary bonds that would

⁹⁸ *Id.* at ¶¶ 2-6.

⁹⁹ Docketing Letter, *Hernandez v. Lynch*, 872 F.3d 976 (9th Cir. 2017) (No. 16-56829), ECF No. 1. (The Ninth Circuit stayed the preliminary injunction pending appeal); Order Granting Stay, *Hernandez v. Lynch*, 872 F.3d 976 (9th Cir. 2017) (No. 16-56829), ECF No. 9.

¹⁰⁰ *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

¹⁰¹ *Id.* (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)).

also serve the same interest the bond requirement purportedly advances

Setting 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. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government's current policies fail to provide "adequate procedural protections" to ensure that detention of the class members is reasonably related to a legitimate governmental interest.

Indeed, as the court illustrated, "[b]y maintaining a process for establishing the amount of a bond that . . . fails to consider the individual's financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release, the government risks detention that accomplishes 'little more than punishing a person for his poverty.'"

IV. WHERE DO WE GO FROM HERE? MASS IMMIGRATION DETENTION IN THE TRUMP ERA

The Ninth Circuit's ruling in *Hernandez* comes at a critical time in the history of the immigration detention system. As part of its plans to ramp up immigration enforcement, the Trump administration has pledged to expand immigration detention on an unprecedented scale. Issued in the first week of the administration, Executive Order No. 13767, "Border Security and Immigration Enforcement Improvements," declares that "[i]t is the policy of the executive branch to . . . detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations."¹⁰² To implement this new policy, the Order directs the Secretary of Homeland Security to "take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico."¹⁰³

The Order portends changes that are arguably even crueler than the government's existing detention practices, insofar as they may dispense altogether with individualized consideration of flight

¹⁰² Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017).

¹⁰³ *Id.* at 8794.

risk and danger for large classes of noncitizens. The Order provides that:

The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as “catch and release,” whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.¹⁰⁴

In late February 2017, the Secretary of Homeland Security issued a memorandum on the implementation of the Executive Order.¹⁰⁵ Like the Order, the memorandum calls for the end of “catch and release,” which it defines as “[p]olicies that facilitate the release of removable aliens apprehended at and between the ports of entry, which allow them to abscond and fail to appear at their removal hearings.”¹⁰⁶ The memorandum further provides that, upon the deployment of sufficient agency personnel and establishment of new processing and detention facilities in the Southwest border region, the release of noncitizens “apprehended or encountered after illegally entering or attempting to illegally enter the United States” shall be limited only to certain enumerated circumstances.¹⁰⁷

Although the precise impact of the memorandum remains unclear, it suggests that, upon the expansion of its detention capabilities, DHS will seek to categorically detain border crossers, without individualized consideration of flight risk and danger. Thus, many noncitizens will likely be detained without the possibility of release by ICE—except in perhaps extreme humanitarian cases—and will only be able to seek release from the IJ at a bond hearing. Moreover, at the bond hearing, ICE assumedly will oppose release categorically, or demand a high bond, based on the policy rationales set forth in the Executive Order. Indeed, DHS recently pursued a comparable “no release” policy under the Obama administration

¹⁰⁴ *Id.* at 8795.

¹⁰⁵ Memorandum from John Kelly, Sec’y of U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Cmm’r, U.S. Customs & Border Protection, et al., Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), <https://perma.cc/EKM2-KXFK>.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.*

in response to the increase in women and children seeking asylum from Central America in the summer of 2014—a policy that was ultimately enjoined by a federal court in a nationwide class action brought by the ACLU.¹⁰⁸ Should DHS pursue the categorical detention of migrants in the name of ending “catch and release,” it will be critical to defend the bedrock due process requirement that—outside certain narrow circumstances—the government may not deprive an individual of liberty absent an individualized determination of flight risk and danger.¹⁰⁹ *Hernandez* and other litigation defending these basic rights will become all the more important in this period of retrenchment.

CONCLUSION

The *Hernandez* case comes at a critical juncture. Across the country, state and local criminal justice systems are moving away from pre-trial systems that rely on money bonds that result in the detention of people based on their poverty alone. Where money bonds are still utilized, a string of court decisions have enforced critical constitutional protections to ensure that a defendant’s ability to pay, and the suitability of non-monetary conditions of release, are considered when determining an appropriate bond amount. As these decisions and the Department of Justice have recognized, detention based on poverty alone is arbitrary and unconstitutional.

Hernandez seeks to enforce these core constitutional protections in the immigration system, where they are sorely lacking. Every day, hundreds, if not thousands, of immigrants like Cesar Matias remain locked up for months and years, not because they present a danger or serious risk of flight, but simply because they lack the resources to pay a bond. As the Trump administration threatens to greatly expand the immigration system, it is all the more critical to establish protections that will prevent further arbitrary and unnecessary detentions of the immigrant poor.

¹⁰⁸ See *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 189-91 (D.D.C. 2015) (enjoining DHS from detaining migrant families to deter further migration from Central America).

¹⁰⁹ See *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention of criminal defendants only with individualized findings of dangerousness or flight risk at bond hearings). *But see Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the mandatory detention of immigrants who concede they are deportable based on certain criminal convictions, for the brief period necessary for removal proceedings).