No. 19-35565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOLANY PADILLA, et al.
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR APELLANTS

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INTRODUCTION

This Court should vacate the district court's extraordinary preliminary injunction declaring an Act of Congress facially unconstitutional.

Congress has decided that inadmissible aliens who arrive at our Nation's borders must be detained, without bond, pending proceedings to determine their admissibility. 8 U.S.C. § 1225(b). This includes aliens—like Plaintiffs—who are determined to have "a credible fear of persecution." *Id.* § 1225(b)(1)(B)(ii). Such aliens "shall be detained for further consideration of the application for asylum," *id.*, which occurs in removal proceedings under section 1229a. Despite this statutory command, the district court concluded that as to any alien on U.S. soil who passed a credible fear screening—no matter how brief their presence or whether they have any ties to this country—section 1225(b)(1)(B)(ii) is facially unconstitutional because any statute that provides for "no bond hearing at all" is unlawful on its face. ER14.

The district court's order is deeply flawed and must be reversed. Gov't Br. 22-55. Section 1252(f)(1) bars the classwide order enjoining the operation of section 1225(b)(1)(B)(ii). Gov't Br. 22-29. And Plaintiffs, who were apprehended after crossing the border illegally, lack the due process rights of aliens with far greater ties to this country, which must be balanced against the government's well-

recognized interests in the detention of aliens for the limited period to determine their admissibility. Gov't Br. 29-50.

In response, Plaintiffs advance various arguments which reduce to the unprecedented assertion that any alien on U.S. soil has due process rights that entitle them to be released if not given a bond hearing within *seven days* of request. Br. 23-40. That is plainly incorrect—even as to *lawful permanent residents* detained for over *six months* without bond, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process," *Demore v. Kim*, 538 U.S. 510, 523 (2003). Plaintiffs are not lawful permanent residents, but aliens apprehended after crossing the border illegally who any right to release. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). They cannot assert a constitutional entitlement to *release* into this country absent a bond hearing a mere *seven days* after request, and certainly are not entitled to more elevated procedures than Congress provided for aliens with significantly greater ties to the U.S., like lawful permanent residents. *Cf.* 8 U.S.C. §§ 1226(a), 1226(c).

Finally, the district court erred in finding that a nationwide bar on the implementation of an Act of Congress is in the public's interest. As this Court has already recognized, the injunction imposes immediate harm on the immigration system and comes at the expense of the government's interests. *See* ER77-80. The injunction must be vacated.

ARGUMENT

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

As Defendants have explained, the injunction is barred by the plain text of 8 U.S.C. § 1252(f)(1). Gov't Br. 22-29. The Supreme Court has held, on two occasions, that section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2]." *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018); Stay Op. 2. Plaintiffs nonetheless persist in asking this Court to ignore Supreme Court precedent and create a needless circuit split. Br. 15-23. Their efforts fall flat.

First, Plaintiffs argue that the Supreme Court's conclusion in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) that section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," is mere "dicta." Br. 17. Even accepting Plaintiffs' questionable characterization, they concede that this Court must give "due deference" to *Reno*. Br. 17. Plaintiffs' efforts to assail other, unrelated parts of *Reno*, *see* Br. 17, are distractions; they make no effort to demonstrate that the other portions of *Reno* have any bearing on whether section 1252(f)(1) bars classwide injunctive relief.

More importantly, Plaintiffs do not suggest that the identical language that the Supreme Court relied on in *Jennings* is dicta. That would not be credible, as the bar

on classwide injunctive relief effectuated by section 1252(f)(1) was included in the section of the opinion expounding instructions on "remand." 138 S. Ct. at 851. Plaintiffs try to dodge *Jennings* by arguing that neither *Jennings* nor *Reno* addressed the "exception clause" in section 1252(f)(1). Br. 17. That suggestion is nonsensical. In an identical context—a class action challenging detention (in part) under section 1225—*Jennings* unambiguously held that the so-called exception clause did *not* apply because section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief" against the operation of section 1225. *Jennings*, 138 S. Ct. at 851.

Next, Plaintiffs argue that *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018) implicitly supports their position. Br. 15-16. Plaintiffs' argument cannot be reconciled with the plain language of *Marin*, and indeed, Plaintiffs do not dispute that: (1) the conclusion in *Marin* "was based not on the authority to grant classwide injunctive relief, but rather on the ability of the class to obtain *declaratory* relief," Gov't Br. 24-25 (emphasis in original), Br. 16; (2) *Marin* explicitly cited *Reno* and highlighted the language "foreclos[ing] the argument that § 1252(f)(1) allows classwide injunctive relief," 909 F.3d at 256; and (3) *Marin* left the issue open by directing the district court to "decide in the first instance whether § 1252(f)(1) precludes classwide injunctive relief." *Id.* n.1. Plaintiffs' assertion that the "holding" in *Marin* that the presence of a claim for declaratory relief "does not bar subject-matter jurisdiction" "compel[s] the same result as to injunctive relief"' is thus at

odds with the opinion, a conclusion buttressed by the fact that Plaintiffs cannot cite a single portion of the opinion to support their novel interpretation of section 1252(f)(1) as a "limitation on standing." Br. 16. And Plaintiffs do not address the fact that "prior to final judgment, there is no established declaratory remedy comparable to a preliminary injunction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

Plaintiffs' remaining arguments tread familiar ground. They again argue that the construction of the word "individual" in an entirely "different statute," Br. 18-19, in *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) should control. *See* Dkt. 15-1 at 6. Examining how "individual" is interpreted in other contexts is unnecessary when, as here, the Supreme Court has definitively resolved the proper interpretation of section 1252(f)(1). In any event, Plaintiffs do not engage with the fact that the statute in *Califano* was an "affirmative authorization of suits," Gov't Br. 23, as opposed to a prohibition on injunctive relief with a narrow exception for individual aliens. This crucial difference, as opposed to any "alleged redundancy," Gov't Br. 19, is precisely why the Sixth Circuit rejected the very argument Plaintiffs advance here. *See Hamama v. Adducci*, 912 F.3d 869, 878 (6th Cir. 2018).[1]

[1] Plaintiffs' citation of cases interpreting the Prison Litigation Reform Act ("PLRA") is another red herring, as the relevant statutory language is even more far afield from section 1252(f)(1) than the statute in *Califano*. *See* Br. 18-19.

Nor does the proper construction of section 1252(f)(1) render section 1252(e)(1)(B) superfluous. Instead, as Defendants have explained, while section 1252(e)(1)(B) explicitly prohibits class actions, section 1252(f)(1) simply limits the *type* of relief a court can grant, but otherwise places no restrictions on class actions. *See* Gov't Br. 25-26; *Hamama*, 912 F.3d at 878 ("[T]here is a big difference between barring the certification of a class under Rule 23 and barring all injunctive relief."). Plaintiffs' only response is to protest that if Congress intended to "alter the relief available in class actions, it would have referred to class actions." Br. 21. But such a reference is unnecessary when the statute is crafted as a general prohibition on injunctive relief, which is exactly why the Supreme Court has interpreted section 1252(f)(1) as precluding classwide injunctive relief.

Plaintiffs also erroneously claim that the proper interpretation of section 1252(f)(1) would repeal "habeas jurisdiction" because "[m]ulti-party habeas relief has long been part of traditional habeas relief." Br. 21. They are wrong; the Supreme Court has "never decided whether" "petitions for habeas corpus relief" can be class actions, *Schall v. Martin*, 467 U.S. 253, 262 n.10 (1984), and the "classwide injunction" Plaintiffs seek "looks nothing like a typical writ," as it "applies to future class members, including individuals who were not in custody when the injunction was issued." *Jennings*, 138 S. Ct. at 858 (Thomas, J., concurring). For this reason, Plaintiffs' attempts to shoehorn application of the clear statement rule to this case

are unavailing, as "there is nothing in § 1252(f)(1) that suspends the writ of habeas corpus." *Hamama*, 912 F.3d at 879. Thus, the fact that section 1252(f)(1) eliminates a single type of habeas *relief*—classwide habeas relief—is, contrary to Plaintiffs' suggestion, a "distinction" that makes a world of "difference," as Plaintiffs remain free, as individuals, to seek "habeas relief, whether injunctive or otherwise," rendering the clear statement rule inapplicable. *Id*.

Plaintiffs finally ask this Court to reject Supreme Court precedent under the guise of avoiding "truly bizarre results" of courts issuing multiple "injunctive relief orders" in cases involving "multi-plaintiff joinder." Br. 17-18. As an initial matter, it is unnecessary to theorize whether "Congress could have … intended this," *id.* at 18, because the Supreme Court has already settled the question of what Congress intended: to prohibit "federal courts from granting classwide injunctive relief against the operation of" §§ 1221-1232. *Jennings*, 138 S. Ct. at 851. In any event, Plaintiffs' argument fails on its own terms. Classes are only certified when "joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), so multi-plaintiff joinder is an inapt analog. Additionally, the rules governing joinder explicitly provide for separate procedures for joined parties including "an order for separate trials." Fed. R. Civ. P. 20(b). If the Rules specifically contemplate separate trials, it follows *a fortiori* that separate "injunctive relief orders," far from being "truly absurd," are part and parcel

of the usual rules governing joinder, as opposed to the distinct rules applicable to class actions. Br. 18.

II. Plaintiffs Lack A Due Process Right To A Bond Hearing After Seven Days Of Detention Pursuant To Section 1225(b)(1)(B)(ii).

Individuals detained promptly after illegally crossing into the United States have no more due process interest in their release into the United States than arriving aliens at ports-of-entry. *Mezei*, 345 U.S. at 212, Gov't Br. 34-36. Even if Plaintiffs had a cognizable interest in a bond hearing (an interest disclaimed by statute), that interest would be insufficient to entitle them to a bond hearing with seven days. Even as to *lawful permanent residents* detained over *six months* without bond, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process," *Demore*, 538 U.S. at 523, and so Plaintiffs lack any entitlement to something more by virtue of their illegal entry and substantially lesser ties to this country. Gov't Br. 29-42.

Plaintiffs' argument to the contrary is that because they entered the country prior to being apprehended, "the Due Process Clause undisputedly protects them." Br. 23. However, as Defendants have explained, even if this contention is true, it does not end the inquiry and result in the relief that the district court awarded. After all, Plaintiffs are undisputedly receiving whatever process they are due in connection with their pursuit to remain in this country: they were screened by an asylum officer for a credible fear of persecution, after establishing a credible fear, they were referred

to removal proceedings in which they may make a claim for asylum, or any other relief for which they may be eligible. In removal proceedings, Plaintiffs have the right to be represented, to present evidence in support of their case, and to appeal any adverse decisions to the Board of Immigration Appeals (BIA) and then to the appropriate federal appellate court.

Plaintiffs ignore this in citing to cases that they claim support the proposition that there is a "bright line" between aliens apprehended at a port-of-entry and those who have entered the country, Br. 23, and that "this principle applies regardless of how long individuals have been present or the nature of their entry into the United States." Br. 24.[2] However, none of the cases support their argument, nor the district court's conclusion, that the Due Process Clause requires that they receive a bond hearing within seven days of request and to release any alien for whom detention

[2] *United States v. Raya-Vaca*, 771 F. 3d 1995 (9th Cir. 2014) is a criminal case, and in "areas not implicating the government's plenary power to regulate immigration," the entry doctrine has less force, *Wong v. United States*, 373 F.3d 952 (9th Cir. 2007). *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004) involved a minor, where due process required that the Notice to Appear initiating removal proceedings be served on the legal guardian, not only the minor. *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) challenged an attorney's ineffective assistance in an alien minor's immigration proceedings, where the court found that counsel was so ineffective as to deprive the minor of due process. In *Padilla-Agustin v. INS*, 21 F.3d 970 (9th Cir. 1994), the Court found that the notice given to the alien of the potential for summary dismissal of his appeal violated due process. In *Reyes-Palacios v. INS*, 836 F.2d 1154 (9th Cir. 1988), this Court found that the failure to inquire whether the alien waived his right to counsel violated due process, *see also Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985) (similar).

has exceeded seven days without a bond hearing. Instead, they address process due in removal proceedings, but no party disputes that Plaintiffs are receiving due process in those proceedings, as described above. As to the due process rights of aliens who have entered, however briefly, with respect to their detention during removal proceedings, the relevant authority is *Demore*, which instructs that even in the context of longtime permanent residents that detention for over six months during removal proceedings is constitutionally permissible. *Demore,* 538 U.S. at 520, *see also Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding that a former lawful permanent resident with a final order of removal may be detained for at least six months).

Plaintiffs also dispute that they are bringing a facial challenge to section 1225(b)(1)(B)(ii), because they are not challenging the statute's application to "arriving aliens" at a port-of-entry. This is misleading, as they are challenging the statute facially as to the certified class—those apprehended after crossing the border who have established a credible fear—and assert that each member of this class is entitled a bond hearing within seven days of request without regard to individual circumstances. And the district court required bond hearings across the board after concluding that section 1225(b)(1)(b)(ii) was invalid on its face as to that class. It is telling that Plaintiffs simply disclaim that they are making a facial challenge—and that the Court declared the statute unconstitutional on its face—rather than attempt

to show that there are "no set of circumstances exists under which the Act would be valid" as required for a facial challenge. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiffs also argue that the cases Defendants cite "concern individuals who, unlike Plaintiffs, were apprehended at the border, *prior to* entry." Br. 35 (citing *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Barrera v. Rison*, 44 F.3d 1441, 1448-50 (9th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 976 (1995); *Alvarez–Garcia v. Ashcroft*, 378 F.3d 1094, 1097-98 (9th Cir. 2004)). This misses the point. Plaintiffs, like the aliens in those cases, are applicants for admission, and the Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Aliens, like Plaintiffs, who entered the United States unlawfully for a brief time before apprehension and have never been admitted, are assimilated to the status of arriving aliens for constitutional purposes, and as such, are entitled only to the process that Congress has provided. *See, e.g.*, *Alvarez–Garcia*, 378 F.3d at 1097-98 ("As an excludable alien, Alvarez-Garcia, though she currently stands on United States soil, is classified as 'one who has never entered' the country."). Indeed, if it were otherwise, aliens who cross the border illegally would be entitled to greater protection under the Due Process Clause than aliens who

lawfully present for inspection at ports of entry, even though both are physically present on U.S. soil. That cannot be correct. Even if Plaintiffs are entitled to some additional process by virtue of their brief and unlawful presence in the U.S., it would not support the injunction, as "[d]ue process is flexible[]' . . . and it 'calls for such procedural protections as the particular situation demands.'" *Jennings*, 138 S. Ct. at 852 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). Nothing in the district court's analysis demonstrates how Plaintiffs' brief and illegal presence in the U.S. categorically entitles them to a bond hearing with procedures greater than those given longtime residents in section 1226(a). *See Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (explaining that Congress routinely makes rules concerning aliens that "depend on both the *character* and the *duration* of his residence") (emphasis added).

a. Substantive Due Process Does Not Require a Bond Hearing.

Plaintiffs lack a substantive due process interest in release into the country. Gov't Br. 31-33. But Plaintiffs argue that substantive due process prohibits their detention without a bond hearing, and dispute that the Supreme Court's substantive due process analysis of immigration detention is limited to a deferential review of whether the statute continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527, Br. 27-28. Plaintiffs instead assert that the government must establish that detention bears a "reasonable relation" to a valid government purpose. Br. 28. But it is well-established that detention pending removal proceedings is

reasonably related to the valid governmental purposes of ensuring that aliens show up for their removal proceedings, and do not pose a public safety risk. *Demore*, 538 U.S. at 523.

Plaintiffs argue that the government has "*no* legitimate interest" in detaining aliens that pose no risk of flight or danger, Br. 32, but aliens who do not pose a risk of flight or danger may be released through parole.[3] 8 U.S.C. § 1182(d)(5)(A). Then, Plaintiffs assert "[t]hat Defendants parole class members into the U.S. undermines their asserted interest in continued incarceration," Br. 33, but that Defendants utilize parole, which Congress placed within the Executive's discretion, in no way undercuts the Executive's interest in enforcing the laws that Congress enacts, nor ensuring that aliens who pose risks of flight or danger are detained.

Plaintiffs also argue that this valid government purpose must be accompanied by adequate procedural protections, and, with only one exception, "the Supreme Court has never upheld civil detention without an individualized bond hearing before a neutral decision-maker to ensure the person's imprisonment is actually serving the government's goals." Br. 28-29. But the Supreme Court *did* uphold detention without bond in *Demore* and that is binding. Moreover, this contention is not true—

[3] Plaintiffs also argue that DHS has developed effective alternatives to detention. Br. 34. This is completely irrelevant to the questions before this Court in evaluating whether section 1225(b)(1)(B)(ii) is constitutional, but in any case, DHS may—and does—utilize these alternatives to detention during the parole process.

the Supreme Court also upheld detention without an individualized hearing in *Zadvydas*, which held that due process concerns would arise only *after six months had passed* such that aliens may have a claim to release on a theory that their removal was not significantly likely. Such claims are raised through habeas, not in a bond hearing.

Plaintiffs again try to analogize this case—which involves Congress's categorical judgment that applicants for admission who lack ties to the U.S. be detained for removal proceedings, subject to parole—with cases in other contexts. Br. 28-30. Those cases are inconsistent with how the Supreme Court has treated immigration detention and are inapposite. *See, e.g.*, *Demore*, 538 U.S. 510, *Jennings*, 138 S. Ct. 830. Plaintiffs also argue that the Supreme Court placed great weight on the voluminous record before Congress in *Demore*, but ignore the similar evidence in this case that demonstrates that Congress intended the class here to be detained. *See* H.R. Rep. No. 104-469, 117-18.[4] Similarly, Plaintiffs argue that the Supreme Court emphasized the brief period of detention for most aliens in *Demore*, but fail to grapple with relevant Supreme Court and Ninth Circuit precedent that explains

[4] Plaintiffs argue that the legislative record "does not support that claim as to those who have established a *bona fide* asylum claim." First, the term "*bona fide*" does not appear anywhere in the statute; what Plaintiffs have shown is a "credible fear" of persecution, such that their claims have been referred to immigration court for adjudication, where, as discussed below, many of them will fail to appear or even file an application for asylum. *Infra* Section IV.

that constitutional concerns only become implicated after detention has become *prolonged*.

b. Procedural Due Process Does Not Require A Bond Hearing.

Because Plaintiffs lack any substantive liberty interest in release into the U.S. after seven days, they lack any procedural due process right to a bond hearing after seven days. Gov't Br. 34-42. And even assuming entitlement to *some* process, the district court erred in failing to consider the process Congress provided through parole, which adequately safeguards any due process interest Plaintiffs have. *Id.*

Plaintiffs argue that the parole process denies them procedural due process because it creates an unacceptable risk of the erroneous deprivation of liberty. Br. 35. But the parole process adequately protects any liberty interest Plaintiffs may have. Parole is the "specific provision authorizing release from § 1225(b) detention .... the [Secretary] may 'for urgent humanitarian reasons or significant public benefit' temporarily parole aliens detained under §[] 1225(b)(1)[.]" *Jennings*, 138 S. Ct. at 844 (quoting 8 U.S.C. § 1182(d)(5)(A)); *see also Matter of M-S-*, 27 I. & N. Dec. at 516-17 ("The conclusion that [8 U.S.C. § 1225] requires detention does not mean that every transferred alien must be detained from the moment of apprehension until the completion of removal proceedings ... [Section 1182(d)(5)(A)] grants the Secretary the discretion to parole aliens"); *Marin*, 909 F.3d at 255 (describing

"humanitarian parole" under section 1182(d)(5) as an "exception[] to indefinite detention").

Plaintiffs cite out-of-circuit district court cases, such as *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) and *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017),[5] as evidence that parole fails to provide due process. But those cases involve a different class of aliens (namely, those who presented at ports-of-entry) than Plaintiffs, and only allege problems in certain locations. Furthermore, those cases are not final judgements, and the government disputes their characterizations of parole, which are not part of the record here. Fundamentally, though, the flaw remains that the district court included only passing reference to parole and no substantive discussion of how *Matter of M-S-* was likely to impact the detention or release of class members. Gov't Br. 39-41. As Defendants explained, because the government has just begun applying its parole guidance to this class, it was not possible for the district court to evaluate whether parole affords sufficient protection,

[5] Subsequently, the *Abdi* court de-certified the class because "Petitioners have failed to explain why the flexible notions of due process categorically *require* a bond hearing after the passage of six months' time," and "[t]he law is unsettled as to whether due process may require individualized bond hearings for those detained pursuant to § 1225(b). But assuming *arguendo* for purposes of this Decision and Order that it does, the six-month bright-line rule that this Court relied upon in granting its preliminary injunction and certification of the subclass is no longer viable." *Abdi v. McAleenan*, No. 1:17-CV-00721 EAW, 2019 WL 4621898, at *8 (W.D.N.Y. Sept. 24, 2019).

and so Plaintiffs' concerns are at best speculative and cannot support the affirmance of the injunction. Gov't Br. 41-42.

Plaintiffs do not contest that the Secretary has routinely exercised discretion to parole on a case-by-case basis out of necessity as "[w]ithout question, ICE has insufficient detention resources to detain throughout removal proceedings all aliens amenable to detention" Dkt. 16-2 at 5. ICE paroles aliens "whose continued detention is not in the public interest," a broad category encompassing "non-exhaustive … circumstances," one of which is consideration for parole "in light of available detention resources." *Id.*; *see also* 8 U.S.C. § 1182(d)(5)(A). Plaintiffs misconstrue Defendants' guidance in stating that "detention is unlawful whenever an individual poses no flight risk or danger that justifies it—*not* merely when the government happens to lack detention beds." Br. 38-39. But that is not what the guidance states. Rather, the guidance states that one consideration is whether "in light of available detention resources, detention of the subject alien would limit the ability of ICE to detain another alien whose release may pose a *greater* risk of flight or danger to the community." Dkt. 16-2 at 4 (emphasis added). Thus, ICE has the flexibility to parole aliens who pose lesser (not *no*) risk of fight or danger at any time in order to meet current needs, rather that the inflexible system that the district court ordered.

Moreover, in the event that detention becomes "arbitrary" and "prolonged," *Marin*, 909 F.3d at 256, an alien can file a habeas petition to challenge her detention. Gov't Br. 42. Such claims brought by "individual alien[s]" are excepted from the bar on injunctive relief in section 1252(f)(1). Plaintiffs argue that this does not satisfy the Due Process Clause because "the overwhelming majority of detained asylum seekers, who are generally pro se, do not speak English, and are unfamiliar with the legal system, cannot file habeas petitions." Br. 39 (citations omitted). But this Court has rejected any suggestion that alleged difficulties in pursuing relief through Congressionally-sanctioned channels means aliens can "bypass" those channels. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016). And the Supreme Court required that similarly situated aliens file habeas petitions—and bear the burden to show "good reason" that their removal was not significantly likely in the foreseeable future in *Zadvydas*. 533 U.S. 701.

III. The Procedural Requirements Imposed By The Injunction Are Unfounded.

In addition to requiring a bond hearing that appears nowhere in the statute, the district court erred by imposing additional procedural requirements in the injunction, which far exceed the procedures granted to aliens with far greater ties to the U.S.

a. There Is No Support For A Seven-Day Requirement.

Plaintiffs accuse Defendants of conflating the questions of whether Plaintiffs have a constitutional right to a bond hearing, and if so, when they must be held. Br.

41-42. Those questions are obviously connected. First, if Plaintiffs have no due process right to a bond hearing, the second question needs no answer. *See supra*. section II. Second, as Defendants have explained, any rights Plaintiffs have are tied to their status as aliens who recently crossed the border unlawfully who have not been admitted to the country. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned." *Mezei*, 345 U.S. at 212. And that is important to the resolution of both questions, as even if Plaintiffs are entitled to additional rights by virtue of their brief and unlawful presence, there is no support for the proposition that bond hearings must happen more quickly than bond hearings for longtime residents under 8 U.S.C. § 1226(a).

Contrary to Plaintiffs' suggestion, Br. 42, Defendants do not dispute that agency case law and regulations direct that bond hearings be conducted expeditiously—and Defendants maintain that for individuals eligible for bond, bond hearings are conducted expeditiously. But these regulations and cases are irrelevant to whether bond hearings are required at all—and do not support an inflexible requirement that bond hearings be conducted within seven days of request—*and otherwise the alien must be released without any screening for flight risk or dangerousness at all*. ER2. Plaintiffs rely on *Saravia v. Sessions*, 905 F.3d 1137, 1144 (9th Cir. 2018), Br. 41-42, but that case involved process due to alien minors, who were released and subsequently re-arrested. That bears no relation to the

situation here. Plaintiffs also continue to cite cases from elsewhere in the civil detention context—where U.S. citizens have been involuntarily confined for criminal or civil commitment purposes—which simply are not relevant to an entirely different class of people who have willingly come to our country knowing that they will be detained for at least some time. Plaintiffs accuse Defendants of mischaracterizing the district court's order as a "seven-day release order." But that is *exactly* what it is. Should detention exceed seven days after a request for a bond hearing without a bond hearing, the district court ordered Defendants to "release any class member whose detention time exceeds that limit." ER2.

Plaintiffs also allege that holding bond hearings quickly saves the public money. Br. 44-45. They do not acknowledge that the costs of this alleged money-saving would be the release of aliens who have not been screened for risk of flight or danger, and the explicit contravention of Congress's statutory scheme. 8 U.S.C. § 1225(b)(1)(B)(ii). Plaintiffs further allege that Defendants already reserve time on their dockets for bond hearings, Br. 45, but again do not acknowledge that the imposition of these bond hearings—which are contrary to the statute—take up immigration court docket space at a time when the immigration court system is perilously overburdened, and the requirement that they take place within seven days of request would mean that EOIR would need to reschedule other hearings, resulting in delays for all detained aliens. Dkt. 10-7, ¶¶ 10-12.

b. There Is No Support For Placing The Burden Of Proof On The Government.

The Supreme Court has repeatedly sanctioned immigration detention without the government bearing the burden of justifying detention, *see* Gov't Br. 44. In spite of that, Plaintiffs maintain that "[d]ue process … requires placing the burden of proof to justify detention on DHS" Br. 45, and argue that "[m]ost of the cases … do not address, let alone resolve, the question of burden." Br. 47. Critically, however, the aforementioned Supreme Court cases examined the constitutionality of detention pending removal proceedings generally, and in the process, rejected suggestions by dissenting Justices that reversing the burden of proof was necessary. *Compare Demore*, 538 U.S. at 552 (Souter, J., concurring in part and dissenting in part) ("Without any … heightened burden of proof … procedural rights would amount to nothing but mechanisms for testing group membership.") *with id.* at 521 ("Congress regularly makes rules that would be unacceptable if applied to citizens.") *and* Reno v. *Flores*, 507 U.S. 292, 342 (1993) (Stevens, J., dissenting) ("It is the government's burden to prove that detention is necessary, not the individual's burden to prove that release is justified.") *with id.* at 315 ("INS regulation 242.24 accords with … the Constitution."). Moreover, the Supreme Court has repeatedly eschewed relying on the very civil commitment cases Plaintiffs attach substantial importance to. *See Demore*, 538 U.S. at 549 (Souter, J., concurring in part and *dissenting* in part) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) and *Addington v. Texas*, 441 U.S. 418,

427 (1979)). This is because civil commitment cases involving U.S. citizens implicate different due process rights than cases involving immigration detention. *Demore*, 538 U.S. at 521.

Plaintiffs protest that in *Zadvydas*, the Supreme Court "found" that "serious constitutional questions" were raised "precisely because" the procedures "imposed the burden of proof on the noncitizen." Br. 47. *Zadvydas* suggests no such thing. Instead, the Supreme Court observed that the "*alien bears the burden* of proving he is not dangerous," and underscored that the "constitutional problem[s]" that arose occurred because of the "indefinite, perhaps permanent," length of detention. *Id.* at 691-92 (emphasis added). No such potentially indefinite detention occurs during removal proceedings which have a definite "termination point," *id.* at 697. And though Plaintiffs assert, without support, that "at the time *Flores* was decided, the government bore the burden of proof at bond hearings to justify continued detention," Br. 47-48, they do not refute that *Flores* explicitly affirmed an immigration detention scheme eliminating the "presumption of release pending deportation," 507 U.S. at 306, nor do they offer any rejoinder to the fact that the eradication of such a presumption cannot be reconciled with the Government bearing the burden of proof at bond hearings. *See* Gov't Br. 44-45.

Similarly, Plaintiffs argue that *Jennings* "does not address whether the government is constitutionally required to bear the burden of proof," Br. 48,

conspicuously overlooking that the Ninth Circuit, like the district court in this case, placed the burden of proof on the Government, yet even the *dissenting* Justices in *Jennings* found that this went too far. *See* 138 S. Ct. at 882 (Breyer, J., dissenting) ("I believe that those bail proceedings should take place in accordance with customary rules of procedure and burdens of proof, *rather than the special rules that the Ninth Circuit imposed*." (emphasis added)). Plaintiffs' only response, in a footnote, is that the "customary rules and burdens for civil detention place the burden of proof on the Government." Br. 48 n.20. But Plaintiffs' premise—that the opinion was referring to the rules attendant to "civil detention," *id.*— is flawed; the only way to understand the dissenting opinion in *Jennings* is that the dissenting Justices believed bond hearings should occur as they customarily do in immigration detention. Otherwise, there would have been no need for the dissenting Justices to disavow the "special rules that the Ninth Circuit imposed," 138 S. Ct. at 882 (Breyer, J., dissenting), which included placing the burden of proof on the government. Tellingly, Plaintiffs do not even grapple with this language in the dissenting opinion.

Plaintiffs further miss the point by contending that the "statutory presumption of detention" applicable to defendants indicted for dangerous offenses is irrelevant because "Plaintiffs … are not detained based upon dangerous offenses." Br. 49. Though the bases for detention are different, the statutory presumption of detention is the same in both contexts, a fact made unequivocally clear in *Jennings*. *See* 138

S. Ct. at 842. Thus, even though criminal proceedings are an imperfect analog, the identical statutory presumptions in favor of detention compel the same conclusion that placing the burden of proof on both criminal defendants indicted for dangerous offenses and unadmitted aliens is constitutionally permissible. *See* Gov't Br. 47.

Plaintiffs finally take issue with the information asymmetry[6] the injunction creates in placing the burden on the government, arguing, based on a number of regulations, that the government can obtain all necessary information in one week. Br. 46-47. That argument ignores clear record evidence showing that the seven-day time frame is insufficient for the government to be adequately prepared for a bond hearing, *see* Dkt. 10-6 at 6-7, and, in conjunction with the surge in illegal immigration over the southern border, *see* Gov't Br. at 50-51, the information asymmetry is readily apparent. *Cf. Rossi v. United States*, 289 U.S. 89, 91-92 (1933) (allocating burden in part due to information asymmetry).

c. There Is No Support For The Remaining Requirements.

Plaintiffs' remaining arguments are equally unfounded. Plaintiffs do not dispute that even U.S. citizens in criminal proceedings are not entitled to a "complete verbatim transcript," *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971), Br. 51.

[6] Indeed, if an alien entering unlawfully is treated more favorably than an alien who arrives at a port of entry, that creates a perverse incentive for aliens to cross the border unlawfully, the very state of affairs Congress sought to end with its 1996 amendments to the immigration laws. H.R. Rep. No. 104-469 at 225-26. But that is precisely what the district court has done.

Contrary to Plaintiffs' assertions, *Mayer* never mandated that the government "must provide alternative records of proceedings," Br. 51. Instead, the Supreme Court simply suggested that the government "*may* find other means" for "affording adequate … review." 404 U.S. at 194 (emphasis added). In this case, the existing procedures are more than sufficient, as Plaintiffs take no issue with the fact that immigration hearings lack the same procedural protections as full-blown trials. *See Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997). And although Plaintiffs assert that *United States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990) supports their position, they neglect to mention that *Carrillo* held that the failure "to record verbatim all proceedings in open court" "does not require a per se rule of reversal."

Plaintiffs finally argue that creating verbatim transcripts and same-day written decisions would not "impose an administrative burden." Br. 51-52. This argument, however, goes to whether the balance of harms supports vacatur, not to whether the injunction is correct on the merits. Indeed, Plaintiffs have no answer to the fact that "Congress did not want detention hearings to resemble mini-trials," *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986), and, accordingly, the statute governing detention does not impose the same procedural requirements as the statute governing removal proceedings. Gov't Br. 49. In any event, Plaintiffs are incorrect; Defendants submitted record evidence showing that same-day written bond decisions would

exacerbate an already substantial backlog in the immigration courts, "to the detriment of aliens nationwide." *Id.* (citing Dkt. 10-7, ¶ 19).

IV. The Balance Of Harms Weighs In Favor Of Vacating The Injunction.

The injunction declares an act of Congress unconstitutional and impinges upon the ability of the executive branch to combat illegal immigration. This tangible, irreparable harm necessitates vacating the injunction. Gov't Br. 50-54.

Plaintiffs assert first that *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) does not stand for the proposition "that the government suffers irreparable injury any time a statute is enjoined." Br. 55 (emphasis omitted). The plain language of *King* belies this assertion: "*[a]ny time*" a statute is enjoined, "a form of irreparable injury ensues." *King*, 567 U.S. at 1301 (emphasis added). Plaintiffs attempt to evade this holding by relying on a footnote, *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014), but even *Latta* recognized precedent that the invalidation of a statute constitutes irreparable harm, and thus the proposition in *King* is unremarkable. *See id.* at 500 ("[T]here is some authority suggesting that 'a state suffers irreparable injury *whenever* an enactment of its people or their representatives is enjoined.'" (emphasis added) (citation omitted). Plaintiffs alternatively contend that the result in *King* was driven by "specific concrete harms" that "would arise absent a stay." Br. 55. That assertion is irreconcilable with the

language of *King*, but, in any event, Defendants similarly submitted evidence of concrete harms that would occur without a stay. *See* Gov't Br. 53-54.

Plaintiffs also suggest that Defendants impermissibly relied on "evidence that was never provided to the district court" "for the first time on appeal." Br. 56; *id.* at 57 n.23. That suggestion is misguided. In direct response to a declaration that Plaintiffs themselves *submitted for the first time on appeal* in opposition to Defendants' stay motion, Defendants cited statistics publicly available in the Federal Register. *See* Gov't Br. 51-52 (responding to Reichlin-Melnick declaration); Br. 56 (noting "statistics" cited in Federal Register). Such statistics, which are equally available to Plaintiffs, are a far cry from new affidavits submitted to "enlarge the record on appeal," Br. 56, and more importantly, Plaintiffs cite no authority for the proposition that a party is precluded from responding to new evidence submitted on appeal. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998).

Plaintiffs further argue that Defendants do not explain how the injunction harms the "political branches' efforts to combat illegal immigration," Br. 56, ignoring the perverse incentives the injunction creates for illegal entry. *See* Gov't Br. 50-51. Plaintiffs contend that they "have good reason for taking a longer view" of relevant statistics, Br. 58, but that purported justification cannot override the agency's decision to rely on clear recent data demonstrating a dramatic rise in the number of "aliens who seek admission or unlawfully enter the United States and

then assert an intent to apply for asylum." 83 Fed. Reg. at 55944. And Plaintiffs' continued complaint that the Government has not accounted for "pending" cases, Br. 58, fails to account for the undisputed fact that the "figures in the Federal Register are based on completed cases." Gov't Br. 53. Nor do Plaintiffs refute that in 40 % of all credible-fear referrals, an asylum application was not even submitted, a stark figure illustrating why the injunction is likely to only exacerbate that, and, in turn, the crisis at the southern border. *See id.* at 52.[7]

In response to the evidence Defendants submitted with their stay motion demonstrating the enormity of the burdens imposed by the procedural requirements mandated by the injunction, Plaintiffs simply fault the evidence for not being sufficiently "clear" or specific. Br. 59. Defendants have articulated, however, how the injunction will create additional delays in hearings and adjudications, further straining the immigration docket.

Finally, Plaintiffs largely copy verbatim the slew of harms they asserted below as constituting irreparable harm stemming from detention of any length. Br. 52-55. But they do not even address the fact that these harms are simply a "consequence of

[7] Plaintiffs claim that "Defendants' concerns about court appearance are overstated," Br. 58, but Defendants stated that the "pertinent question is not simply whether those who are found to have a credible fear appear at their hearing, but rather, whether those positive credible fear determinations ultimately ripen into successful asylum grants." Gov't Br. 52.

seeking admission to the United States," and are accordingly not cognizable. *Clark v. Smith*, 967 F.2d 1329, 1331 (9th Cir. 1992).

CONCLUSION

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

Respectfully submitted,

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Dated: September 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because it contains 6,998 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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