UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In opposing the petitioners' motion for clarification, the Government has not disputed the petitioners' facts, which establish that detainees who were deemed eligible for release by an immigration judge remain detained, with imminent asylum hearings, simply because they are too poor to post the bond amount set for them. Nor has the Government seriously engaged with the substance of the petitioners' merits argument, which outlines why relevant precedent requires the *Lora* bond hearings ordered by this Court to include consideration of ability to pay and alternatives to money bond. Indeed, the Government ignores the petitioners' argument that the Second Circuit in *Lora* was concerned with precisely the type of prolonged and unnecessary detention that indigent class members find themselves subject to now, relegates directly-on-point Ninth Circuit precedent granting identical relief at identical bond hearings to a footnote, and ignores the only district court in the Second Circuit to have decided this exact issue.

Rather, the Government's opposition focuses on arguing that this Court lacks authority to order the relief requested on procedural and jurisdictional grounds. But these arguments are based on an incorrect understanding of what the petitioners seek—mere clarification of an existing injunction, not relief on any "new claim" and not a challenge to any particular bond outcome. The petitioners respectfully request that the Court issue the clarification as soon as practicable, as relief is necessary to ensure that class members do not continue to languish in unjustified detention while they prepare for their asylum hearings.

ARGUMENT

I. THE BOND HEARINGS CONDUCTED UNDER THIS COURT'S PRELIMINARY INJUNCTION MUST TAKE INTO ACCOUNT THE ASYLUM-SEEKER'S ABILITY TO PAY AND ALTERNATIVE CONDITIONS OF RELEASE.

As the petitioners argued in support of their motion for clarification, the combination of *Lora*, *Rodriguez*, and *Hernandez*[1] require that in bond hearings for arriving asylum-seekers conducted under this Court's preliminary injunction immigration judges consider the individual's financial circumstances and alternative conditions of release. *See* Mem. in Supp. of Mot. for Clarification (ECF No. 67-1) at 4-9. In its opposition, the Government does not engage with this argument, ignoring *Lora*'s primary concern of prolonged detention severed from any legitimate government goal, *see* 804 F.3d at 606, 613-14, 616, relegating the directly-on-point *Rodriguez* and *Hernandez* decisions to a footnote, *see* Gov. Opp. at 11 n.6,[2] and failing to acknowledge that the only district court in the Second Circuit to have addressed this exact issue has held that bond hearings for arriving asylum-seekers must include consideration of ability to pay, *see* Transcript of Oral Decision, *Celestin v. Decker*, No. 17-cv-2419 (S.D.N.Y. Jun. 14, 2017) (Abrams, J.),

[1] *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3562 (U.S. Mar. 25, 2016) (No. 15-1205), *cross-petition for cert. denied*, 136 S. Ct. 2494 (2016); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ["*Rodriguez I*"]; *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) ["*Rodriguez II*"], *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); and *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

[2] In its footnote, the Government incorrectly states that the preliminary injunction upheld in *Hernandez v. Sessions* does not require immigration judges to consider ability to pay at bond hearings for detainees who are in the same position as class members in this case, those receiving so-called "*Rodriguez* hearings," *see* Gov. Opp. at 12 n.6. In fact, the *Hernandez* injunction *does* provide exactly that relief to *Rodriguez* class members. *See Hernandez v. Lynch*, *Instructions and Guidelines to Immigration Judges*, at 1, Meyer Decl. Ex. B (ECF No. 67-2) ("The injunction applies to a class of 'all individuals who are or will be detained pursuant to [section 236(a) of the Immigration and Nationality Act (INA)] on a bond set by an [ICE] officer or an Immigration Judge in the Central District of California'" and "therefore applies to both initial bond hearings held under 236(a) as well as bond hearings held pursuant to *Rodriguez v. Robbins*.").

attached as Ex. A to Decl. of Kathryn Meyer (ECF No. 67-2). The Government's interest in disregarding these cases is perhaps no surprise, as their holdings apply directly here and their reasoning is sound.

Instead, the Government relies on two cases, *Alvarez v. Shanahan*, No. 15-cv-9122, 2016 WL 3406076 (S.D.N.Y. June 7, 2016), and *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006), to argue that an "immigration judge *may* consider an alien's ability to pay and alternatives to detention" but there is nothing "*requiring* him or her to do so." Gov. Opp. at 10 (emphasis in original). However, neither case undermines the petitioners' argument. As for *Alvarez*, the quotation that the Government includes, *see* Gov. Opp. at 12, is dicta because the immigration court held that the petitioner was both "a risk of flight and a danger to the community" and therefore could not be released no matter the conditions. *See* 2016 WL 3406076, at *2. And it is inapposite because that court was commenting on the more general question of whether section 1226(c) even "*authorizes* immigration judges to release aliens . . . on conditional parole," *see id.* (emphasis added), a threshold question answered in the affirmative by *Rodriguez v. Robbins*, 804 F.3d 1060, 1088 (9th Cir. 2015) [*Rodriguez II*], and conceded here by the Government when it confirmed that immigration judges "*may* consider . . . alternatives to detention," Gov. Opp. at 10.

As for *Matter of Guerra*, the decision only stands for the proposition that under BIA precedent there is a list of "discretionary factors that may be considered in making bond determinations." *See* 24 I. & N. Dec. at 39. While the Government's discussion of *Matter of Guerra* highlights that there is indeed no bar to the consideration of ability to pay and alternatives to money bond—and that it would not burden the Government to do so, *see also* "Bond Redetermination Checklist – INA §236(a)" (ECF No. 76-2)—it does not in any way

preclude determination by a federal court that the concerns articulated in *Lora*, *Rodriguez*, and *Hernandez* affirmatively require the bond statute to be read to require such consideration.

II. THE COURT HAS AUTHORITY TO CLARIFY ITS PRELIMINARY INJUNCTION AS REQUESTED BY THE PETITIONERS.

A. The Clarification Sought by the Petitioners Falls Within the Amended Petition and this Court's Preliminary Injunction Order.

The Government's argument that the petitioners now seek entirely new relief that can only be presented in a new or amended petition, *see* Gov. Opp. at 4-6, misapprehends the petitioners' motion and the proceedings to date. In its preliminary injunction order, this Court required bond hearings for a putative subclass detained pursuant to section 1225(b) for longer than 6 months, echoing *Lora*'s holding that a detainee "'must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community.'" *Abdi v. Duke*, ---F. Supp. 3d---, 2017 WL 5599521, at *10 (W.D.N.Y. Nov. 17, 2017) (quoting *Lora*, 804 F.3d at 616). The petitioners now seek this Court's clarification that the bond hearings conducted pursuant to the preliminary injunction must include an examination of an individual's ability to pay and consideration of alternatives to money bond, as part of the immigration judge's assessment of the individual's risk of flight and the amount of bond needed "'to assure . . . appearance at a future removal hearing.'" Mem. in Sup. of Mot. for Clarification at 8 (quoting *Hernandez*, 872 F.3d at 991 n.19).[3]

[3] Petitioners may properly seek such relief in a motion to clarify this Court's preliminary injunction. *See N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984) ("Clarifications of orders previously issued, which may be obtained on motion or made *sua sponte* by the court, add certainty to an implicated party's efforts to comply with the order and provide fair warning as to what future conduct may be found contemptuous."); *Paramount Pictures Corp. v. Carol Pub. Grp., Inc.*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) ("the same objective of clarity supports the entry of a supplemental order" even when "the plaintiff, rather than the enjoined party . . . requests clarification").

Any assertion that this requested clarification constitutes a new claim is unfounded. In their Notice of Motion for Preliminary Injunction (ECF No. 38), the petitioners sought bond hearings at which "immigration judges shall order release on bond unless 'the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community.'" Notice of Motion (quoting *Lora*, 804 F.3d at 616). As the Ninth Circuit explained in *Hernandez*, determining the amount of bond needed to address risk of flight necessarily entails examining the detainee's ability to pay and the availability of alternatives:

> 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.

872 F.3d at 991. The preliminary injunction motion's request was similarly encompassed within the relief sought in the amended petition—namely, an order compelling the Government to provide subclass members with a bond hearing "where the Government bears the burden of justifying further detention by clear and convincing evidence." Am. Pet. ¶¶ 114-15.

The cases the Government cites, *see* Gov. Opp. at 5-6, do not support its position that amendment is necessary for petitioners to proceed with their claim regarding the procedural requirements of bond hearings already granted by this Court. Those cases all involve the denial of relief that was entirely unrelated to, or expressly excluded from, the original pleading. *See Ladd v. Dairyland Cty. Mut. Ins. Co. of Texas*, 96 F.R.D. 335, 338-39 (N.D. Tex. 1982) (certifying equitable restitution claims under Rule 23 and denying certification of personal injury protection and uninsured motorist claims not mentioned in the plaintiff's complaint); *Banks v. Annucci*, 48 F. Supp. 3d 394, 422 (N.D.N.Y. 2014) (denying motion for preliminary injunctive relief regarding miscalculation of sentence where complaint related only to conditions of

confinement); *Church of Holy Light of Queen v. Holder*, 443 F. App'x 302, 303 (9th Cir. 2011) (vacating as overbroad injunction enjoining regulations that "plaintiffs repeatedly represented to the court and in discovery that they were not challenging"); *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (affirming denial of preliminary injunction based on "new assertions of mistreatment that are entirely different from . . . inadequate medical treatment" claims in complaint); *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) (reversing grant of preliminary injunction where claimed harm was "directly contradictory to[] the injury for which [the movant sought] redress in the underlying complaint").

B. Administrative Exhaustion Is Not Required or, in the Alternative, Should Be Excused.

The Government is also wrong that the petitioners need to exhaust their administrative remedies before seeking relief in this Court. *See* Gov. Opp. at 6-10. Because the petitioners do not seek new relief in their motion to clarify the preliminary injunction, the exhaustion requirement does not apply. In an analogous situation, district courts have concluded that a petitioner does not need to exhaust administrative remedies where the petitioner was moving to enforce an existing conditional writ of habeas corpus rather than bringing a new claim. *See, e.g.*, *Enoh v. Sessions*, No. 16-CV-85(LJV), 2017 WL 2080278, at *3 (W.D.N.Y. May 15, 2017) ("To the extent that Enoh challenges the government's compliance, it is not a new claim. For the same reason—i.e., because it is not a new claim—this Court need not wait for Enoh to exhaust his administrative remedies."), *appeal withdrawn*, No. 17-1236, 2017 WL 6947858 (2d Cir. Dec. 7, 2017); *see also Argueta Anariba v. Shanahan*, No. 16-CV-1928 (KBF), 2017 WL 3172765, at *4 n.3 (S.D.N.Y. July 26, 2017) ("[T]he *Lora* hearing—with the requisite due process—that the Court ordered to occur before the end of June 2016 has not occurred. There is no basis to assert a need for exhaustion of administrative remedies in such a circumstance."). Since the petitioners

here are seeking a form of enforcement clarifying the Government's obligations under the existing preliminary injunction, the same principle applies here.

In any event, even if administrative exhaustion were required, this Court should excuse such requirement because exhaustion would be futile since "the agency . . . has predetermined the issue." *Bastek v. Fed Crop Ins. Co.*, 145 F.3d 90, 94 n.4 (2d Cir. 1998); *see also Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 123 (2d Cir. 2007) (citing *Bastek*). As the *Hernandez* court held, exhaustion of petitioners' ability-to-pay claim would be futile because the BIA does not affirmatively require consideration of an individual's ability to pay in setting bond, *see* 872 F.3d at 989 (citing *In re Guerra*, 24 I. & N. Dec. 37, 28 (BIA 2006)), and the BIA has repeatedly concluded that ability to pay is irrelevant, *see Hernandez*, 872 F.3d at 989 (citing *In re: Sandoval-Gomez*, 2008 WL 5477710, at *1 (BIA Dec. 15, 2008) ("[A]n alien's ability to pay the bond amount is not a relevant bond determination factor."); *In re: Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (same); *In re: Castillo-Leyva*, 2008 Immig. Rptr. LEXIS 10396, *1 (BIA Sept. 18, 2008) (same); *In re Serrano-Cordova*, 2009 Immig. Rptr. LEXIS 2444, *2 (BIA June 17, 2009) (same)).[4]

In addition, exhaustion should be excused for the independent reason that requiring petitioners to exhaust administrative remedies would put them at risk of "the same imminent and irreparable injury that motivated this court to grant the preliminary injunction." *Able v. United States*, 870 F. Supp. 468, 471 (E.D.N.Y. 1994). Of the class members who are detained because of their inability to pay the bond set at their hearings, three have upcoming merits hearings in

[4] The Government submitted a declaration identifying class members who have not appealed their bond determinations or otherwise sought reconsideration from the immigration courts. *See* Decl. of Elizabeth Burgus (ECF No. 76-1) ¶¶ 7-8. However, because exhaustion would be futile, it is irrelevant to this Court's review of petitioners' claims whether subclass members pursued appeals of their bond determinations.

their asylum cases—scheduled for February 5, February 15, and March 21. *See* Decl. of Scout Katovich (ECF No. 67-3) ¶¶ 4(g), 8(f); Decl. of Paige Austin (ECF No. 78-1) ¶ 4(a).[5] As this Court recognized, class members face irreparable harm when "their continued detention . . . prevent[s] [them] from adequately preparing for their asylum hearings before an immigration judge." *Abdi*, 2017 WL 5599521, at *25; *see also Celestin*, 17 Civ. 2419, at 5–6 (concluding administrative exhaustion not required where detainee was likely to suffer irreparable harm because "he [was] deprived of his liberty and specifically s[ought] relief from detention so that he c[ould] gather evidence for his asylum hearing").

C. Section 1226(e) Does Not Bar Review of the Petitioners' Claim.

The Government also argues that section 1226(e) creates a jurisdictional bar preventing this Court from ordering the requested relief. *See* Gov. Opp. at 6-7. Contrary to the Government's assertion, the petitioners' motion is reviewable despite section 1226(e) for the same reason that the Ninth Circuit found the claims in *Hernandez* to be reviewable and that this Court found the petitioners' parole claims reviewable despite section 1225(a)(2)(B)(ii)—i.e., the petitioners are challenging the legality of bond hearing procedures, not bond outcomes. *See Hernandez*, 872 F.3d at 988 (finding that plaintiffs' challenge is justiciable because they "claim that the discretionary process itself was constitutionally flawed at their initial bond

[5] Since the petitioners' motion was filed, at least one additional bond hearing has been held pursuant to the preliminary injunction. At that hearing, bond was set in the amount of $15,000, an amount the asylum seeker, Mr. Suleiman Khalif Ahmed, is unable to afford. *See* Austin Decl. ¶¶ 2, 4. In addition, two individuals described in the petitioners' opening papers have been released from custody upon payment of bond. Nana Owusu was able to post bond through the company Libre by Nexus but is concerned about his ability to pay the $420 monthly fee for ankle monitoring. *Id.* ¶ 5. Denel Thomas was released after finding a bond company that allowed his family and friends to post their home as collateral in addition to funds raised. *Id.* ¶ 6. While Mr. Owusu and Mr. Thomas would no longer benefit from an order clarifying this Court's injunction, their experience with predatory bond companies demonstrates remaining subclass members' pressing need for relief.

determinations") (internal quotation omitted); *Abdi*, 2017 WL 5599521, at *5 (finding petitioners' parole challenge reviewable because "[a] decision in favor of Petitioners would not compel a particular result with respect to parole, but rather would impact only the execution of the policies and procedures surrounding the ultimate parole decision"). Specifically, the petitioners do not challenge the bond set for any individual class member; nor do they assert that bond must be set at an amount that the individual bond seeker can afford to pay; nor do they, as the Government claims, Gov. Opp. at 7, "disagree[] with how immigration judges[] exercise their discretion in weighing evidence." Rather, they seek clarification from this Court on a legal issue relating to procedure at bond hearings. Such legal questions are reviewable under section 1226(e). *See Hernandez*, 872 F.3d at 988; *Hassan v. Holder*, No. 11 Civ. 7157 (LGS), 2014 WL 1492479, at *9 (S.D.N.Y. Apr. 15, 2014) ("While, under 8 U.S.C. § 1226(e), federal jurisdiction over 28 U.S.C. § 2241 habeas petitions 'does not extend to review of discretionary determinations by the IJ and the BIA,' jurisdiction does properly extend to review of 'purely legal statutory and constitutional claims.'") (quoting *Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 153 n.5 (2d Cir. 2006)).

D. The Government's Standing Argument Regarding Mr. Barrios Ramos Is Without Merit.

Finally, the Government is wrong that "Mr. Barrios Ramos lacks the requisite standing to bring Petitioners' new claims on behalf of the subclass." Gov. Opp. at 13. Again, the petitioners' motion does not raise any "new claims" but rather seeks clarification regarding the bond procedures required under this Court's previous order. *See* discussion *supra*, at Section II(A)-(B). This Court has already held that Mr. Barrios Ramos has standing as a class representative to pursue the petitioners' bond claim, despite having been released on parole. *See Abdi v. Duke*, --- F. Supp. 3d---, 2017 WL 6507248, at *7-8 (W.D.N.Y. Dec. 19, 2017). The Government's

reassertion of the same general arguments against Mr. Barrios Ramos's standing and status as a class representative here must fail for the same reasons they failed previously. *See id.* at *7 (noting, *inter alia*, that a "plaintiff may still litigate a class action despite the loss of [his or her] personal stake if the claims are 'capable of repetition, yet evading review'" and holding that this exception applied to Mr. Barrios Ramos) (citations omitted).

The Government's citations to the general standing requirements articulated in *Raines v. Byrd*, 521 U.S. 811 (1997), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *see* Gov. Opp. at 13, are inapposite because those cases do not involve class claims that are "capable of repetition, yet evading review." Its other cited case, *Davis v. FEC*, 554 U.S. 724 (2008), does involve such claims, *see id.* at 735, and also includes a succinct explanation why Mr. Barrios Ramos still has standing to seek the various forms of relief requested by the petitioners related to the bond subclass: the standing inquiry turns on whether the "party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*," *id.* at 734 (emphasis added). When this suit was filed, Mr. Barrios Ramos was detained at Batavia, *see* Am. Pet. ¶ 7, and, as this Court has already decided, he had the standing to bring the bond claim that is the subject of the petitioners' current motion, *see Abdi*, 2017 WL 6507248, at *7-8.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant their motion for clarification.

Respectfully Submitted,

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