UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOSE L. VELESACA, *et al*,

Petitioners,

v. 20 CV 1803 (AKH)

CHAD WOLF, *et al*,

Respondents. TELECONFERENCE (PI)

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New York, N.Y.
March 30, 2020
2:32 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

NEW YORK CIVIL LIBERTIES UNION
Attorneys for Petitioners
BY: CHRISTOPHER T. DUNN
MEGAN SALLOMI
ROBERT A. HODGSON
-AND-
THE BRONX DEFENDERS
BY: THOMAS SCOTT-RAILTON
NIJI JAIN

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York
BRANDON M. WATERMAN
Assistant United States Attorney

(Remote teleconference)

THE COURT: Okay. The record is now open.

This is Judge Alvin Hellerstein, presiding over the case remotely, of *Jose L. Velesaca and Abraham Carlo Uzategui v. Thomas R. Decker*, 20 CV 1803.

The court reporter is Martha Martin. And Ms. Martin will now take the attendance of those who are present according to the information given to her before.

(Attendance taken by court reporter)

THE COURT: Here are the rules of engagement as it were. I have before me a motion for a preliminary injunction made by the plaintiff. I understand that there will be two speakers for the plaintiff, Robert Hodgson and Niji Jain. For the defendants, Thomas Decker, in his official capacity as New York field office director for U.S. Immigration and Customs Enforcement, Brandon Waterman, Assistant U.S. Attorney appears.

Do I have this all correct so far?

MR. HODGSON: Yes, your Honor.

THE COURT: Hearing no objection, I take it as correct.

Now, we're all on a conference call, and it's all remote, and so it presents great difficulties in listening, hearing, and speaking. Only one person can speak at a time, otherwise the voices can't be heard.

We'll lead with Mr. Hodgson. I'm not sure we're going

to need Ms. Jain. When Mr. Hodgson presents his remarks, I'm going to ask that you pause between paragraphs or complicated sentences in case I have questions. I may ask Mr. Waterman to comment here and there; but at the end of Mr. Hodgson's and, if any, Ms. Jain's remarks, Mr. Waterman will speak.

Now, I've read the materials and I'm prepared. And I'd like to offer these comments to begin with:

I do not believe that the Rehabilitation Act presents much of a difficulty, because what is being done is not because of any disability, but because of a general rule pertaining to everyone. And Ms. Jain's request is really for special treatment because someone is disabled. The law does not provide special treatment. So I'm mostly interested in the presentation that Mr. Hodgson will give.

And with regard to this, it seems to me that there is a substantial issue in terms of likelihood of success; namely, has there been a change in application of the law and regulations or not. There's a factual issue presented with regard to that and, to a lesser degree, is there irreparable damage. And on that issue, although the parties dispute the issue, I think it's pretty clear that the forced imprisonment of someone when that person should be released presents an irreparable damage to that person. The condition of a jail, no matter how good, cannot equal the conditions of life, both in terms of the responsibility of the person to those for whom he

is responsible and for his health and welfare, particularly in this time of the COVID-19 virus.

So the main issue is likelihood of success. That has various permutations. And with that introduction, I'll call upon Mr. Hodgson to speak.

MR. HODGSON: Thank you, your Honor, may it please the Court. We'd like to thank you as well, your Honor, for agreeing to hear this matter so quickly.

To begin, I'll just reiterate that the petitioners here were all arrested by ICE's New York field office and detained without any meaningful opportunity to be considered for relief, are seeking an injunction that simply orders ICE to give them the individualized assessments that are required by the INA, by ICE's own regulations, by the Constitution, and by the Rehabilitation Act. I want to note, as we noted in our brief, that the government has not argued that a no-release policy, which denies individualized assessments during ICE custody determinations would be lawful. It has not disputed our legal arguments regarding that.

On the facts, as your Honor points out, we do have a dispute about whether a new release policy exists. However, the petitioners' facts overwhelmingly show that such a policy does, in fact, exist; and none of the facts pointed to by the government undermines that establishment.

What is here and what has not been contested is that

97 percent of putative class members, whom the government itself deemed a low risk of flight and danger, have been denied the opportunity for release or bond during the New York field office's initial custody determination. This means that many, many people whom the government have no justification to detain, are stuck in prison, away from their families, without any meaningful opportunity to be considered for release in the middle of this dangerous pandemic, which is made significantly more dangerous by the conditions of detention, as your Honor noted.

Again, it is not contested here that many of these people will be released once they are able to get a bond hearing before an immigration judge, who's ostensibly using similar factors as ICE to determine the appropriateness of release: The risk of flight, and the risk of danger. The petitioners here have educed a record of establishing each of these facts, and they are not contested, because this is taken from the government's own data.

I do want to address what the government has presented as contradicting the existence of the no-release policy to show that it does not, in fact, do so.

First -- and now I'm pointing to the fact that the government points to the existence of a few exceptions from the rule as proof that the no-release policy, quote, does not exist. Of course, as we point out in our reply, the existence

of a few exceptions is neither logically nor legally sufficient to show that a broad policy doesn't exist. We've pointed to case law establishing this and simple logic establishing this.

Second, the few facts that are cited by ICE -- and I'm looking here to Mr. Joyce's declaration -- I'm sorry, I heard a beep, your Honor. Were you speaking?

THE COURT: Ignore the beep. There may be people coming into the call. This is open to the press. We've posted a number, and there may be people calling in who do not have to identify themselves.

Just continue.

MR. HODGSON: Yes, your Honor.

So the few facts that are cited in Mr. Joyce's declaration and the accompanying memorandum of law in support of the government's contention -- and again, this is a bare assertion that a no-release policy doesn't exist -- they only exist in a single paragraph of that declaration. I'm looking at paragraph 13 of the Joyce declaration which, again, appears to contain the entirety of ICE's basis for asserting that the no-release policy doesn't exist.

One of the facts that ICE points to is that about 2100 out of 2477 total arrests for the fiscal year 2019 involved people with a conviction or a pending charge in a criminal matter. Now, first, the text doesn't even purport to explain the precipitous drop in release rate that the plaintiffs have

established. Again, between 2013 and mid 2017, people were being released at the rate of about 40 percent during this initial custody determination. Post mid 2017, suddenly it's less than two percent.

The single fact of the number of people who either have a conviction or a pending charge in a criminal matter from 2019 does not show any comparison and, therefore, cannot explain this drop. And this is especially unpersuasive, given that the petitioners have submitted data showing that the number of people arrested without conviction is going up, not down, as a result of the Trump Administration's enforcement priority.

THE COURT: Where do I see that, Mr. Hodgson?

MR. HODGSON: Yes, your Honor.

That is both cited in our memorandum, but it is specifically sourced from ECF 14-6, which is a fact sheet regarding ICE enforcement activity in the New York City area. So it's the first page of ECF 14-6.

THE COURT: Whose declaration is that attached to?

MR. HODGSON: That is attached to my declaration, the declaration of Robert Hodgson in support of our preliminary injunction motion.

And again, this is undisputed. It is well-established that ICE's enforcement priorities changed with the Trump Administration. And, in fact, ICE began arresting more and

more people without criminal activity, without criminal convictions.

THE COURT: Starting what year?

MR. HODGSON: Starting in 2017 with the Trump Administration. And this coincides, of course, with the implementation of the no-release policy, with the fact that ICE reformatted its written assessment tool so that it could no longer recommend any form of release; it could no longer recommend bond, it could no longer recommend release. (inaudible) this happens in 2017.

THE COURT: I want to ask you one or two questions.

These are cases without criminal conviction. But the statistics that you're reciting earlier, a function on detention of any kind, including detentions after arrests or before conviction, is there a distinction to be made?

MR. HODGSON: I want to make sure I understand your Honor's question. It is true that, you know, the government is putting forward their data about people who have both convictions and pending charges in a criminal matter. So as you know, that includes a vast swath of people who do not have a conviction.

THE COURT: Yes. In fact, one of the two plaintiffs was detained after an arrest for petty larceny.

MR. HODGSON: Yes, your Honor. So she would fall into the government's number there, which, again, shows that these

are not people -- they seem to be using any association with the criminal justice system as a proxy for a danger, right, or risk of danger. But that is simply not the case when you are talking about people like Mr. Uzategui, who has a single pending petty larceny charge for allegedly shoplifting shoes because his daughter was being made fun of for her clothes at school. It is simply not plausible that this represents a danger.

THE COURT: Your point is that a mere arrest alone does not determine if a person is in danger of fleeing or in danger of endangering the community.

MR. HODGSON: That's correct, your Honor.

THE COURT: The government does not make a distinction in its -- in the static between convictions and pending charges.

MR. HODGSON: That's correct.

THE COURT: A detention determination by an immigration officer pursuant to 1226(a) would have to make that determination, that individualized determination, according to your contention, regardless of whether there is an arrest or simply a pickup of a person thought to be subject to removal.

MR. HODGSON: Yes, your Honor.

THE COURT: Continue please.

MR. HODGSON: So just to recap, those are the two reasons why this particular number -- and again, I'm pointing

to the very scant fact that the government can point to to purportedly explain this precipitous drop in release determination.

THE COURT: Let me just stop you, Mr. Hodgson.

I think you've made your point clear, and I understand it. There are other considerations with regard to likelihood of the merits. But I think this issue that you've just discussed is the seminal issue of the case.

And let me ask Mr. Waterman to comment.

MR. WATERMAN: Yes, your Honor.

So this is Brandon Waterman with the government.

I think, as we've set forth in the papers, and as the declaration of William Joyce, the deputy field office director for ICE's New York field office, has stated under penalty of perjury that there is no such policy of denying -- categorically denying release to all aliens subject to nonmandatory detention under 1226(a). Mr. Joyce has laid out in paragraph 12 -- as well as discussed in 13 -- how these initial custody determinations are made. And ICE has and does consider the individual circumstances with respect to these custody determinations.

Mr. Hodgson was referring to certain numbers and statistics about -- I think he was most recently about arrests that, I think, in this current administration, since 2017, have occurred without -- with individuals who don't have a criminal

history. But I don't think that the information that Mr. Hodgson relies on differentiates between whether those are initial arrests -- so that they would be 1226(a) aliens, meaning that they are being arrested in the first instance to being placed into removal proceedings -- as opposed to, for instance, aliens who are subject to final removal orders who might not have a criminal history, and this administration has determined to pick them up. I don't think there's a distinction in the numbers there.

THE COURT: Why is it important to drive a distinction?

MR. WATERMAN: Yes, your Honor.

So the importance would be when Mr. Hodgson is talking about an increase in number of arrests, aliens who are subject to a final removal order are not treated the same because they are detained under a different statute. Those individuals would be detained under 8 U.S.C. 1231, aliens subject to a final removal order, and would be detained pending their removal from the United States.

THE COURT: Are they also entitled to the same kind of determination as someone who is detained after an arrest?

MR. WATERMAN: No, your Honor, not with respect to 1226(a). 1226(a) applies generally to aliens who are being arrested and being placed into removal proceedings. Aliens who already have a final removal order have already gone through

that process, and they are being detained specifically for removal. So in a way, it wouldn't make sense for ICE to conduct that initial determination of whether to release them, because they are being detained specifically for purposes of being placed on a plane for removal.

I'm sorry.

THE COURT: Is it your point that the statistical information presented by David Hausman is incorrect?

MR. WATERMAN: The government has not had an opportunity to review all the data that Mr. Hausman relies on; and it has not certainly had any opportunity in the limited time that we've had to prepare for this to gather its own information and data to provide. But based on the information that the plaintiffs have provided, it's a general, broad amount of information that's not specific necessarily to their claims.

Again, my point is that even if there was an increase in arrests of aliens without criminal histories, they aren't necessarily 1226(a) detainees, they have to be aliens --

THE COURT: There may be a statistical flaw in the basis of information, but the comparison of statistical information is striking. For example, Mr. Hausman notes that between 2013 and 2017, 16 percent of detainees were released, and an additional 13 percent were released on bond.

In comparison, after June 6, 2017, until September 2019, two percent were released and .01 percent was released on

bond.

Now, the comparison between what is 29 percent and a little over two percent is striking. If there wasn't an error by lumping together detentions after arrests and detentions for people on removal, the same error can be supposed to have pervaded both sets of statistics, making them irrelevant, making such a possible flaw irrelevant.

It's the comparison that is striking. And that comparison has not been negated except by Mr. Joyce's conclusory denial. That's the most striking feature that I take from this. And I don't feel that the government has answered that.

MR. WATERMAN: And yes, your Honor, I understand the point. And I will again reiterate that this is certainly a preliminary stage of the proceedings where the government has not had a full opportunity to develop a record that it would ordinarily submit here.

THE COURT: (Inaudible) Mr. Waterman, that it's true, there's been very little time for anybody to deal with this. But how now should I deal with this situation where such a striking *prima facie* case has been presented? It may be that in time the government can respond and demolish that case, but I have to take the record where it stands now and make a judgment.

And among the issues I have to decide is whether there

has been a change in policy or practice after June of 2017. And on the information that has been presented, the change is glaring. It is very hard to rebut.

MR. WATERMAN: I understand your Honor's point.

And I think, again, our papers set forth the reasons why we believe that the plaintiffs' numbers and inferences you draw would be incorrect.

We do believe that at all times there is an exercise of discretion, and the numbers would demonstrate that. Even on that risk classification assessment software that the plaintiffs rely heavily on, the majority of cases now are referred to a supervisory detention officer who then makes that ultimate determination of whether to release or to detain. And even the numbers show that discretion is being exercised, and individuals do ultimately get released, even though it may be a small number of individuals.

And if I may, as well --

THE COURT: I studied that table, and it's hard for me to draw anything from it. It may be that before this period of 2017 -- well, let me just recite the statistics.

What this table shows -- and it's paragraph 20, table 3 of the Hausman declaration -- is that through 2016, the numbers of determinations made by supervisors were hardly any. In 2017, there are 72 out of 244 total decisions of release or not release made by supervisors. That's about 30 percent. In

2018, it becomes 88 percent; and similarly, in 2019, it's 88 percent.

The inference that I think is reasonably to be drawn from this is that the decisions not to release are kicked up to supervisors rather than made by the immigration officers. But the conclusion is no different.

So what I come to draw from this -- and I don't do this yet competently. What I come to draw from this is that the algorithm used by the government either has changed significantly or, if it points to a situation where previously there would have been a release, the issue is kicked up to a supervisor who purportedly, in the exercise of discretion, holds no release.

But it doesn't change the dramatic contrast that Mr. Hausman offers in what happened before June 6, 2017, and what happened afterwards. The fact that supervisors, rather than immigration officers, are making the determination of no release, to me, is either not relevant or an illustration of just what Mr. Hausman is trying to bring out.

I think we've plumbed this issue enough. I'd like to go on to another issue, unless, Mr. Waterman, I've not given you an opportunity to say something you want to say.

MR. WATERMAN: Yes, your Honor.

This, again, is Brandon Waterman.

I can certainly get into it now or at my point, but I

can offer your Honor some numbers for recent custody redeterminations as we hinted to in our papers in light of the current circumstances.

THE COURT: But I don't have this on the record. You said a number of things that really are not documented. You say that a greater number of people are being detained after some kind of a criminal transaction. But we don't know what the criminal transaction is; and if it's an arrest, as I said before, I don't think it's really relevant to our purposes.

You've also said that there's been an increased number of people who don't show up when they are supposed to show up, but that's not documented either. And, of course, the fact that there are numbers of people who don't show up does not change the obligation under the statute of regulations to make an individualized determination of the individual detainee.

You've also made the point that during this COVID virus problem, which is really just a problem of two months -- it doesn't seem that way, it seems forever, but it's really just a month or two months -- that there have been far fewer detentions, that's to be expected. But, again, I don't think that changes the picture.

I think I've got the points, Mr. Waterman. I'd like to assess them and evaluate them.

But I'd like to go on to another issue. And I'll ask Mr. Hodgson to comment on this:

Let's suppose that you are right, Mr. Hodgson, in your argument that there has been a significant change. Does the statute 8, U.S.C., Section 1252(f) allow me to enjoin the government for the benefit of some class that has not yet been served by it?

Just another word on this. Section 242 of the Immigration and Naturalization Act, 8, U.S.C., Section 1252(f), provides generally that injunctions are allowed against the implementation of the immigration and removal sections of the immigration act only with respect to individuals and not to the class as a whole. I'm looking for the exact words of the statute, but that, I think, is a fair summary of it.

So Judge Nathan argued in the *Vasquez* case very recently -- ruled rather, not argued -- that she cannot give an injunction as to the class as a whole. Does that apply here, Mr. Hodgson? Am I, regardless of whether you're right or wrong, limited to giving relief to Mr. Velesaca and Mr. Uzategui, or can I give it to the class?

MR. HODGSON: It does not apply, your Honor. You can give relief to the class exactly as requested. And, in fact, the government does not dispute that Section 1252(f)(1) would not prevent you from simply ordering an injunction that directs ICE to follow the law.

Sorry.

THE COURT: Why is that?

MR. HODGSON: Because the language of 1252(f)(1) only applies to injunctions that would enjoin or restrain the operation of the law. And as Judge Nathan pointed out in *Vasquez-Perez*, that only applies when you are not, in fact, enforcing the law. The government does not contend -- in fact, it concedes -- that 1252(f)(1) permits this Court to issue an injunction that directs ICE to follow the law that wouldn't enjoin or restrain the law.

THE COURT: Excuse me.

Do you so concede, Mr. Waterman?

MR. WATERMAN: The government would agree only to the extent that the order or the injunction would be that ICE conduct its initial custody determinations consistent with Section 1226(a) in the implementing regulations. Anything that goes beyond that, we would argue, as we did in the papers, that that would be enjoining or restraining those provisions and would be barred by 1252(f)(1).

THE COURT: Let's suppose I held that the government was changing this policy without saying so, the *Accardi* doctrine. Would I be not allowed to issue an injunction as to the class? What's the government's position?

MR. WATERMAN: Yes.

And this is Brandon Waterman, for the government.

If your Honor were to determine that there is a -- number one, that there is a policy in place here, and that

policy is unlawful, I think the whole point of an APA claim, if you find that that policy is unlawful, would be to enjoin or set aside that policy.

And so the relief obviously that would flow from that is really that ICE would have to follow the law, basically 1226(a) and its implementing regulations. And that would be the extent, generally, of the relief a court would grant, is setting aside the unlawful policy and telling the government to follow the law.

THE COURT: So if I understand you correctly, if I were to find that from around June of 2017, ICE has not followed the law, not given individual determinations, created an algorithm that is contrary to its obligations under law, I can enjoin those practices as to a class?

MR. WATERMAN: I think that's correct, yes, your Honor. 1252(f)(1) would only prevent the Court from issuing class-wide injunctive relief that would enjoin or restrain the operation of the INA provision.

THE COURT: Yes. And I think the plaintiffs are arguing that what the government has been doing is contrary to the law. And so I think you both agree that if I so find, and I'm correct, that I can give an injunction applicable to the class.

That's so, right, Mr. Hodgson?

MR. HODGSON: This is Mr. Hodgson.

Yes, your Honor. Absolutely.

THE COURT: That's so, Mr. Waterman, isn't that so?

MR. WATERMAN: Again, this is Mr. Waterman.

Yes, but, again, with reservation, your Honor. It depends on exactly what relief we are talking about.

The plaintiffs, in their moving brief, had a suggestion of requesting release as an option. It is the government's position that if this Court were to order release, that would certainly restrain or enjoin the operation of 1226, and that would not be permissible under 1252(f)(1).

It would also be the government's position that anything additional to what the statute and the regulations require -- such as timelines or other criteria -- that ICE must consider, that would also be beyond what the statute and the regulations provide and would also be barred by (f)(1).

I don't think the plaintiffs made any statement regarding either of those in their reply. They say only that they'd be seeking the follow-the-law type of order, directing ICE to comply with 1226(a) and its implementing regulations, period.

THE COURT: Yes. I think I would agree with that.

And that's a very good introduction to the subject I want to deal with next: What is the appropriate remedy, assuming that I accept the proposition of Mr. Hodgson?

A couple of words on that.

We all know that there's a difference in the standard in obtaining a preliminary injunction, comparing an injunction that stops an illegal act, as an injunction that requires an act to be done, the latter being a mandatory injunction. And there is a distinction between enjoining a practice and freeing an individual as if it were a *habeas corpus*.

So this is not a *habeas corpus*. And I am not really interested in ordering the INA or ICE to do anything other than follow the law.

So the propositions that I am going to suggest to both of you is that the proper scope of an injunction would be to enjoin ICE -- and here I have problems, I could say, from not following its practices between 2013 and 2017, or for following an algorithm which has changed the determinations or something of that nature.

I'm having trouble defining just what relief I can give. But, Mr. Hodgson, I'm not interested in giving relief that would release anybody, nor in issuing a mandatory injunction. So it's got to be a negative injunction, and now how to phrase it.

MR. HODGSON: Certainly, your Honor.

So as you said, this would be an order that would direct ICE to follow the law, which, as this Court has interpreted and as no one here disputes, requires ICE to make an individualized determination based on the factors laid out

in its own implementing regulations, which are --

THE COURT: The way you word it is a mandatory injunction, "follow the law." "Give an individualized determination." Those are mandatory statements.

How can you phrase it in a classic injunctive way? Don't do this, don't do that.

MR. HODGSON: Then it would be to set aside the no-release policy, and to stop its practice of failing to give individualized assessments based on flight and danger as required by the law. So to set aside the no-release policy as it existed since mid 2017, and to stop the illegal practice of failing to give people the individualized assessments required by law pursuant to its own law and regulation.

THE COURT: Mr. Waterman.

MR. WATERMAN: Yes.

This is Mr. Waterman, for the government.

Seriously, I'd have to see what the language Mr. Hodgson is proposing and figure out whether that still falls within a mandatory injunction or not.

But I tend to agree that to the extent the Court is issuing injunctive relief, obviously the general type of relief that's issued in an APA action where a policy or practice is found unlawful would be to set aside that policy or practice. And it kind of kicks back to the agency to determine whether it's got a different policy or practice with justifications for

that.

THE COURT: What would be the scope of an injunction? Would it be nationwide? Would it be focused only on the field office? Would it be focused only on the two individual plaintiffs?

MR. HODGSON: Your Honor, this is Mr. Hodgson.

It would apply to our entire putative class; so it would be limited to those processed through the New York field office and held pursuant to Section 1226(a).

THE COURT: What about the future?

MR. HODGSON: It would include future class members as described in the class, the proposed class.

THE COURT: In the field office.

MR. HODGSON: Yes. This is all -- all of our data and all of our case is about the practices as the New York field office since mid 2017.

THE COURT: How do we define the scope of the New York field office? Is there a geographical definition?

MR. HODGSON: Well, it is everyone whose case is processed through the office there. So it defines itself in that way. Everyone who is arrested in a certain area and then processed either in New York City or at one of the same -- the field office's satellite offices, and then detained in the area.

THE COURT: Where are the satellite offices?

MR. HODGSON: So I believe this is described in the Joyce declaration. There is an office in Newburgh, where they do some of the initial processing for folks who are arrested outside of the city. And I do believe that ICE does some processing on-site, for example, at the Orange County Jail, before people are detained there.

So, again, this is all done under the supervision of the New York field office. Most frequently people are brought to New York City to be processed, but some of these determinations are made at these offices all under the supervision and direction of the New York field office.

THE COURT: And Mr. Waterman, let's suppose we figure out the right words, I issue the injunction, and there's no change by ICE. Of course, you would appeal.

What about the people in jail, what should happen to them? Let's suppose there are people in jail at the present time who should not be there.

MR. WATERMAN: Yes, your Honor.

This is Brandon Waterman, for the government.

If I could just -- I'll answer that question, but I also wanted to address the scope issue real quick as well.

THE COURT: Do the scope first.

MR. WATERMAN: Sure.

And so I agree with Mr. Hodgson that this is a New York field office-specific issue. And so the entire complaint

challenges a policy out of the New York field office. So the scope would be limited only to the New York field office, which would, I think, just generally encompass any alien that's in the removal proceedings here in New York City at Varick Street, the detained docket. So these are detained aliens under Section 1226(a) out of the New York field office.

And one point about scope though I think is important, and I don't know that it was addressed in the plaintiffs' filings. So once an alien receives a bond hearing, the government doesn't view them as properly contained within the scope of this case, because they are not detained as a result of the -- or on a, quote, no-release policy by ICE.

THE COURT: Thank you for bringing it up, Mr. Waterman, because I thought about that.

So Mr. Velesaca has been given an individualized hearing by an immigration judge. Isn't his recourse an appeal, the Board of Immigration Appeals, Mr. Hodgson?

MR. HODGSON: Not on the claim, your Honor, no.

THE COURT: Why not?

MR. HODGSON: He was entitled to an initial custody determination by ICE that complied with the law. He didn't get it.

THE COURT: That's agreed. He didn't get it (inaudible) fixed. He got it later on.

MR. HODGSON: To be clear, your Honor, he may have

multiple remedies to pursue regarding the determination of his bond hearing. But anyone who got an initial custody determination by ICE is entitled to have that custody determination redone, in light of this Court's ruling with the no-release policy set aside.

THE COURT: I would assume that the initial determination of the immigration officer has some effect on the determination by the immigration judge. And I don't know that that can be held.

MR. HODGSON: Your Honor, respectfully, the regulation that creates this process, the initial custody determination process, contemplates that it can be redone by ICE, regardless of the outcome of an immigration judge's bond hearing. And it is a process that, you know, ICE uses its own criteria, it's a separate determination made by ICE based on the evidence before it at that time when it's made.

As we've shown in our record, many things happen between the time a person gets their initial custody determination and when they appear before a judge. In fact, the harms of detention often contribute to a person not being able to put forward their case before an immigration judge in a successful manner.

To simply have the opportunity to get a fair hearing before ICE on the custody determination is a separate legal matter; it's something that is a statutory violation. And so

the fact that some other remedy down the road could potentially ameliorate some of these harms is irrelevant; and the person has a statutory right to a fair individualized assessment.

To the extent that this Court is going to rule that the no-release policy is unlawful, and that it should be set aside, and that people detained by ICE have a right to an individualized assessment in accordance with the law, all of those people who are still detained and sitting in jail because of a faulty process where they were not given the opportunity to have an individualized assessment have the right to that assessment. It doesn't mean they will all get out; it just means they have the right to the fair process. That's what this class is about, and that's what everyone is entitled to.

THE COURT: You would not make an exception for those subsequently given an individualized bail hearing by an immigration judge.

MR. HODGSON: No, your Honor, that's a separate matter and it's not part of this claim. I think those people can and should pursue those remedies. But the right to an individualized bond hearing is what's at issue here -- or an individualized custody determination is what's at issue here; and everyone in the class is entitled to it who didn't get it.

THE COURT: Mr. Waterman.

MR. WATERMAN: Yes, your Honor, this is Mr. Waterman.

I completely disagree with Mr. Hodgson. It really

doesn't make a lot of sense to say that once an individual appears before an immigration judge and presents a packet, which oftentimes will include letters from the community, letters from employers, family members, clergy, employment records, and the like, presenting a packet for release, an immigration judge on a record with argument from counsel and the presentation of evidence makes a determination on custody that for, I guess, lack of a better way to phrase it is because ICE was required to, by statute, evaluate a determination in a certain way, regardless what the immigration judge finds, it needs to go back to ICE again.

So an immigration judge, like Mr. Velesaca, in his case, could deny bond and find that his DWI record presents concerns where a bond won't be granted, but we should kick it back to ICE to consider again. I don't know what the following recourse would be if ICE were to again, in their discretion, say, We are denying bond, then would this individual then, in Mr. Hodgson's view, go before an IJ for a second time to have a review of that custody determination?

THE COURT: I think we have to make an exception for those people given a hearing by an immigration judge. Their recourse is appeal to the Board of Immigration Appeals, and from there to the Court of Appeals. It doesn't seem to me a useful remedy. It requires starting all over again, even after a hearing. It's not a bad hearing; no error has been charged.

And if there were error, it would be an error that had to be brought up on appeal.

So I think we would make an exception to those who would have been given an immigration hearing before an immigration judge.

Anything else that I need to consider?

MR. WATERMAN: I'm sorry, I didn't catch that, your Honor.

THE COURT: Are there other issues that I need to consider?

MR. WATERMAN: Well, again, this is Brandon Waterman, for the government.

I think that covers it with respect to the scope, that it would be limited to the New York field office for aliens subject to 1226(a) detention who have not yet had a bond hearing before an immigration judge. I think we've covered that.

THE COURT: And those who are detained in the future.

MR. WATERMAN: Right. Based on arrests and custody determinations by the New York field office, right, it would be a -- sort of a replenishing class where it's going forward.

THE COURT: Yes.

MR. WATERMAN: Yes, I think that would adequately cover the scope issue. And I'm sorry, your Honor, you did have a specific question before I took a step back to the scope.

THE COURT: No, I asked if I've covered all the issues that I need to cover.

MR. HODGSON: Your Honor, if this is also directed at me -- this is Robert Hodgson -- I think we would like the opportunity to speak on the Rehabilitation Act claim, partly because these are, again, requirements that are part and parcel of DHS's own internal regulations about how they do these custody determination processes.

THE COURT: I'll grant you that.

MR. HODGSON: Thank you.

I'd like to turn it over to my colleague Niji then.

THE COURT: I'll grant you that.

But have we now exhausted the issues under the immigration law?

MR. HODGSON: Yes, your Honor.

THE COURT: Is there any other issue that I need to discuss, apart from the disability act -- apart from the Rehabilitation Act?

MR. WATERMAN: Your Honor, this is Brandon Waterman, for the government.

I don't think so. But I did, if your Honor would indulge me, have some current information I can provide your Honor about ICE's current custody determinations whenever your Honor believes it's the appropriate time.

THE COURT: I think, Mr. Waterman, that I'm going to

rule extemporaneously as soon as this hearing concludes and follow up with a written decision. But my ruling extemporaneously will be the final order.

I think both sides will probably want to resort to the Court of Appeals; and the sooner I can let you do that, the better. And at this time of working remotely, there would be too much of a possibility of delay to wait for a written opinion. And so I do not wish the record to be supplemented. The record stands where it is. It's closed.

I'll now hear Ms. Jain on the Rehabilitation Act.

MS. JAIN: Thank you, your Honor.

Niji Jain, from The Bronx Defenders.

Your Honor, we understand why you may have understood our argument to be seeking special treatment; but instead what we are actually asking for is consideration of disability-related needs in the individualized assessments that we believe are required, as the regulations themselves require. And if it may please the Court, I'd like to explain our thinking on that in just a couple of brief sentences.

THE COURT: Go ahead.

MS. JAIN: Your Honor, it is well-established that the Rehabilitation Act requires individualized inquiries that consider someone's disability when determining appropriate modifications. So, for example, in *Wright v. New York State Department of Corrections* (2d Cir. 2016), the Court of Appeals

held that prisons must engage in an individualized inquiry before placing a disabled person in solitary confinement.

Similarly, in *Thompson v. Davis* (9th Cir. 2002), the Ninth Circuit held that the disability statute applied to the substantive decisions of a parole release; meaning that a parole decision must take disability into account.

And similarly here, what we're asking for is for ICE to take disability-related needs into account when making the individualized custody determinations. And phrased as a negative injunction, we are seeking to prohibit the no-release policy, as Mr. Hodgson described. And our contention is that would include the relief we're seeking here, because --

THE COURT: May I ask this question, Ms. Jain: Let's suppose we have a person with a disability, and he presents a danger to the community or he presents a flight risk. Are you suggesting that there should be favored treatment to the disabled person and give him bail where otherwise he would not be entitled to bail?

MS. JAIN: Your Honor, I think, in light of the numbers that the government has put forward that you all were discussing earlier, that the government suggests that any type of contact with the criminal system would necessarily suggest some sort of flight or danger; that there are people who would be on the cusp who -- where the disability and the fact that their disability would not be appropriately handled, they would

not be getting the necessary services, they would not have the necessary support in detention, where consideration of their disability-related needs may be an appropriate factor to consider when determining whether to give someone a bond or release or some alternative to detention.

THE COURT: The law provides two considerations: Risk of flight, risk of danger to the community. Let's suppose that a disabled person presents a risk of either one. Does that disabled person get entitled to favored treatment because of this disability?

MS. JAIN: Your Honor, respectfully, I think the way that the determinations are made, flight and safety are not binary; rather, there's a sliding scale, so some people are eligible for -- or are deemed appropriate for relief and recognizance, others on a low bond, others on a higher bond. And so there is space there for disability to also be considered as a factor.

THE COURT: That would give the disabled person a favored spot. The law provides that there should not be an exclusion for benefit or a denial of benefit or a discrimination against an otherwise qualified individual because of a disability. So we can't say that -- so we can't say that the person denied bail who -- sorry. We can't say that a disabled person is denied bail if he otherwise should not be given bail. He's not discriminated against.

MS. JAIN: Your Honor, the Rehabilitation Act and DHS's own implementing regulations require -- they say that DHS shall administer programs in the most integrated setting appropriate to the needs of a qualified individual with a disability. And so the regulations themselves anticipate that someone's disability-related needs would be part of the calculus.

THE COURT: Okay.

Mr. Waterman?

MR. WATERMAN: Yes, your Honor. And I don't think we need to belabor this much.

I think your Honor correctly stated the standard. And I don't think that the plaintiffs here have demonstrated any discrimination or entitlement to any certain benefit that they are being denied here.

And also, in the Joyce declaration at paragraph 12, Mr. Joyce had noted that an alien's disability may impact the custody determination; but ultimately the question comes down to the issue of flight risk and danger to the community.

And as plaintiffs' counsel has noted, it may be that ICE determined that somebody with a disability may pose a lesser danger to the community, but ultimately ICE's determination would turn on the determination of whether the alien poses the flight risk or a danger.

I don't think ICE has ever taken a position that

disability is a completely irrelevant factor for them to consider, but it's built into a discretionary decision. So I don't think that the Rehab Act claim here is on solid footing; but there is also, I don't think, any reason to impose any restrictions on what ICE considers and what they don't consider.

THE COURT: Anything else?

It's now 3:30 --

MR. HODGSON: Your Honor?

THE COURT: Yes.

MR. HODGSON: Sorry. This is Mr. Hodgson.

I just wanted to make the request explicit, because I know we were discussing the remedy earlier. And your Honor did allude to the fact that, of course, there would need to be some followup from the government regarding its compliance with any order that comes out of that.

I do want to articulate the petitioners' position that such followup should be prompt; it should include a description of the activities that the actions that have been taken to set aside the no-release policy, any sort of directive, for example, that ICE has given, any instructions it's given to the officers making determinations; and, of course, follow up with a class list identifying people to whom the injunction will have applied and the outcome of their determinations or redeterminations if they haven't yet had a bond hearing.

So I did want to make that ask explicit, that it be incorporated into the initial order, if such an order is, in fact, put in place. Thank you.

THE COURT: Well, supposing, Mr. Hodgson, I were to give a preliminary injunction. You would then be continuing the case. Let's say I give the injunction and Mr. Waterman appeals. The case would go forward, would it not? There would be discovery and so on.

MR. HODGSON: Yes, your Honor.

But certainly because of the expedited nature of this hearing, and the expedited nature of any relief, and the fact that, you know, a matter of days or weeks will count to our clients, the normal schedule of responses to discovery requests would not necessarily allow us to determine the actions they've taken in the coming days and weeks; whereas this Court certainly has jurisdiction to issue an order that ensures compliance and checks in with the government in a briefer time period to describe, again, the actions it has taken in response, to promptly provide a class list of putative class members so that we can identify them and reach out to them, if necessary, and an accounting of what redeterminations have been made and when.

This is certainly something we would seek in discovery. But the expedited nature of this proceeding and the relief that's contemplated would certainly indicate that it

should be turned over as quickly as possible because it will affect the putative class members who are sitting in prison, you know, for example, waiting for a bond hearing that's not going to come for a month.

Thank you, your Honor.

THE COURT: Mr. Hodgson, don't give up so quickly.

Anything I do has to be discrete. I do not want to set myself up as an administrator; I do not want to immerse myself in the administrative process; and nor do I want to send -- to appoint a special master to do that which you would want me to do.

So the problem with the remedy you're asking is that it would create the very dangers that I don't want to encounter. If there is an enforcement mechanism or a reporting mechanism, it must be simple and definite and not lead to additional proceedings, except if there is a clear violation.

So what would you suggest?

MR. HODGSON: Yes, your Honor.

I think a very simple and straightforward articulation would be that the government provides an update within a certain time period regarding the actions it has taken, just describing the actions it has taken to come into compliance with the order; and that the government provides a class list. This is something it can do with the snap of its fingers. It knows who these people are. It's simply providing that

information and making sure that that covers the relevant characteristics.

THE COURT: Mr. Waterman?

MR. WATERMAN: Yes, this is Mr. Waterman.

I would oppose what Mr. Hodgson suggests is something as easy as, quote, a snap of the fingers.

ICE is under a tremendous amount of -- has a lot of issues that they are currently dealing with. In the past 11 days alone I understand that ICE has redetermined custody for over 100 individuals, and has released roughly that number. And they continue to evaluate a number of individuals for release, in light of COVID-19, including three individuals that plaintiffs' counsel has asked me about.

So they are certainly extremely busy. And these things that Mr. Hodgson is suggesting takes a snap of the fingers, I respectfully disagree and don't think it's that simple and easy for ICE to accomplish.

I think a simple order stating that the government provide an update within however many days about the steps it has taken, I think, would suffice. At this point it's not even a certified class; the government hasn't had an opportunity to oppose the motion for class certification. So a request to ask the government to compile a list, I think, would be unduly burdensome at this stage.

THE COURT: I don't know about that.

I was thinking of these two actions: A list of persons detained, a list of those persons in the subclass who have been given -- who have appeared before immigration judges, and a report on the actions taken in response to the Court's order, those three things. A list of persons detained. We'd define who may be possibly subject to this injunction and who may be part of the class; a list of those from that class who already have been given a hearing by the IJ, would answer the exception that we spoke about earlier; and a report on the actions taken by the agency in response to the Court order I do not think would be onerous.

MR. WATERMAN: Your Honor, if I may, this is Brandon Waterman now, for the government.

What time frame would you be looking at for that information?

THE COURT: I don't know. 28, 30 days?

MR. WATERMAN: I would ask for at least 30, your Honor, given -- again, ICE is completely overwhelmed, I think, with release requests and redetermining custody as it is. It's been very difficult on such short notice in this case alone to prepare the government's briefing and a declaration. We didn't have an opportunity to provide a record or build a record with data or numbers because of the strain on the resources. I would certainly ask for at least 30 days to be able to provide that.

And also if we can clarify the list of detained individuals would be 1226(a) aliens only, not all detained aliens out of the New York field office.

THE COURT: Those -- what are 1226 aliens again, those who what?

MR. WATERMAN: Those that are subject to detention under 8, U.S.C., 1226(a). That would not include 1226(c) aliens who are subject to mandatory detention, those are not putative class members. It would not include aliens subject to detention under 1225(b). Those are not putative class members. It also would not include aliens subject to detention under 1231, which are also not putative class members. The only aliens that are at issue here are 1226(a) aliens.

THE COURT: Mr. Hodgson.

MR. HODGSON: Yes. We only want a list that would identify our class members, which are people detained under 1226(a).

THE COURT: Thirty days okay?

MR. HODGSON: Your Honor, we do think that this is something that requires prompt followup. I think 30 days is a long time. If, in fact, the government is going to take 30 days, perhaps the idea is that it provides follow-up monthly reports. Obviously there are future class members who will come into play in future months. So if the idea is it's going to give a regular report every month, that would be one thing.

But particularly with the threat of COVID-19 --

THE COURT: I don't envision receiving the reports at once.

MR. HODGSON: Well, then, your Honor, we would say that 30 days -- particularly in light of the threat of COVID-19 to so many of our class members who would get a redetermination under this order, 30 days is excessive, and that something shorter is more appropriate.

THE COURT: What do you suggest?

MR. HODGSON: I would suggest within a week. Again, these are determinations that they have -- they make the determination in any case; this is a matter of sorting out everyone who they have already identified as being held pursuant to 1226(a).

MR. WATERMAN: Your Honor, again, this is Brandon Waterman, for the government.

I don't think a week is feasible or reasonable. Again, I really do stress under these circumstances, ICE is really overwhelmed with the work it is doing to redetermine custody. And as I noted, in the past 11 days alone it has redetermined custody for roughly 100 individuals and has released them.

THE COURT: Mr. Waterman --

MR. WATERMAN: -- out of custody.

Yes, your Honor.

THE COURT: How about April 15?

MR. WATERMAN: About three and-a-half weeks from today, I believe, your Honor? We could certainly live with that. And if --

THE COURT: Two and-a-half weeks.

MR. WATERMAN: Two and-a-half?

THE COURT: Two and-a-half.

MR. WATERMAN: It is very tight, your Honor. If I may just say we can certainly set that for a date. But if circumstances seem to be --

THE COURT: It could be April 17th. I don't want to have it (inaudible). April 17th.

MR. WATERMAN: Okay. Thank you, your Honor.

THE COURT: That will be the date.

And this is a process of people being removed, people coming, people detained, people getting hearings, and so on. So we need a record date, as of a certain -- reporting will come on the 17th as of the condition of a particular date. April 10, is that feasible, Mr. Waterman?

MR. WATERMAN: I believe, yes, your Honor.

My understanding, again, I think, as we noted earlier, I believe arrests are down. I think only in the past week there are a handful, less than five.

THE COURT: That will make it easier.

MR. WATERMAN: I think going forward, yes. But to

capture whoever might be in the class for the past weeks or months or so, that, I think, is the harder part.

But, yes, I think setting the 10th as the date would be fine.

THE COURT: The record date.

MR. WATERMAN: The record date, yes.

THE COURT: Reporting on the 17th.

Is a bond required?

MR. WATERMAN: I'm sorry --

THE COURT: Is a bond -- the plaintiffs have proposed a bond.

MR. WATERMAN: This is Brandon Waterman.

I guess I'm uncertain with the question now.

THE COURT: I don't have Rule 65 in front of me. In a civil case, if I grant an injunction, a bond is required to be posted. I'm not sure in this situation against the government if a bond is required. Does anybody know?

Mr. Dunn, you would probably know. Are you on?

MR. DUNN: I am, your Honor.

THE COURT: Would a bond be required?

MR. DUNN: Your Honor, I can't tell you in all circumstances. What I can tell you is we've got many preliminary injunctions against the government and never once posted a bond.

THE COURT: That's a good enough answer.

Okay. No bond.

What I'd like to have -- I don't know if this is feasible. It's now almost a quarter of four. I wonder if we could break this call now, and you could call back at 4 o'clock -- make it 4:15, call back at 4:15, and I'll give you my decision at that time. Is that feasible?

MR. HODGSON: This is Robert Hodgson.

Thank you, your Honor. Yes, it is.

THE COURT: Mr. Waterman.

MR. WATERMAN: This is Mr. Waterman.

Yes, your Honor, that is acceptable.

THE COURT: Okay.

And Martha, could that be okay with you?

THE COURT REPORTER: Yes, Judge, that's fine.

THE COURT: All right. So everyone will call in again.

Adam, do we use the same numbers?

THE LAW CLERK: Yes, the same numbers, Judge.

THE COURT: The number you called in before will be the one you'll be calling in now.

Okay. So a quarter past four please call in and I'll deliver my decision at that time.

THE DEPUTY CLERK: Judge, are you sure you don't want to make it 4:30?

THE COURT: Okay. You can make it 4:30.

You know me very well.

THE DEPUTY CLERK: Yes.

THE COURT: 4:30, folks. Okay.

(Recess)

THE COURT: Good afternoon, everyone. This is Judge Hellerstein.

Is Mr. Hodgson on the call?

MR. HODGSON: Yes. Good afternoon, your Honor.

THE COURT: Is Ms. Jain on the call?

MS. JAIN: Yes, your Honor.

THE COURT: Is Mr. Waterman on the call?

MR. WATERMAN: Yes, your Honor.

THE COURT: Is Ms. Martin on the call?

THE COURT REPORTER: Yes, your Honor.

THE COURT: All right. I'm going to proceed now.

I have before me a motion by the plaintiffs for a preliminary injunction, the details of which have been expressed in the conference that we just had.

Basically, on behalf of a class, plaintiffs Velesaca and Uzategui, and a class of those arrested by immigration officials by the New York City field office, a subclass of detainees with disabilities, seek relief from this Court enjoining defendant Thomas R. Decker, in his official capacity as New York field office director of U.S. Immigration and Customs Enforcement, from changing his policies pursuant to

statute and regulations that have become more stringent after 2017, and denied applications by persons arrested for release to the community on bail or recognizance. We had argument on this issue, and I will now make my findings.

The motion is granted to the extent I indicate in my remarks. This extemporaneous decision is the decision of the Court. It will be followed by a very short summary order issued tomorrow -- today, if possible, but more likely tomorrow, and a longer decision explaining my reasoning as quickly as we can. But the extemporaneous order I issue now, followed by the summary order tomorrow, will be the order -- the final order of the Court with regards to the motion for preliminary injunction from which an appeal may be taken.

First, the class, which has not yet been certified, but which, in the end, I will ask for a schedule for a motion for certification, is on behalf of all individuals eligible to be considered for bond or release on recognizance under 8, U.S.C., Section 1226(a)(1) and (2), by the New York field office of immigration -- of U.S. Immigration and Customs Enforcement and, with respect to those individuals, all who have been or will be detained without bond. A subclass of those people who also have a disability as defined by the Rehabilitation Act, 8 U.S.C. -- I'm sorry, I'll give the citation later -- also applies for determination and evaluation of a disability.

The governing statute provides as follows: On a warrant issued by the attorney general, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. And it goes on to say: Except as provided in subsection C, if pending such decision, the attorney general, one, may continue to detain the arrested alien; and two, 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 parole.

The language "may release" has been interpreted by the United States Supreme Court to require the attorney general to make some level of individualized determination. The case is *INS v. The National Center for Immigrants Rights Incorporated,* 502 U.S. 183, 194 (1991).

The applicable regulation there as follows, 8 CFR, Section 1236.1, provides that any officer authorized to issue a warrant of arrest may, in the office's discretion, release an alien not described -- that's subsection C -- provided -- I leave out something else -- provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. That determination, under 8 CFR, Section 1236.1(c)(8), must be made within 48 hours of the arrest, except in the event of an

emergency or other extraordinary circumstance. In that case, the determination is to be made within an additional reasonable period of time whether the alien will be continued in custody or released on bond or recognizance, and whether a notice to appear and warrant of arrest will be issued.

The regulations go on to provide a right to appeal to the immigration judge and, beyond that, to the Board of Immigration Appeals.

Another principle that is important here is that called the *Accardi* doctrine. Under the *Accardi* doctrine, it's *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 90 (1954), that there is a requirement of due process and the basic principle of administrative law that rules promulgated by a federal agency regulating the rights and interests of others are controlling upon the agency. That doctrine is premised on fundamental notions of fair play underlying the concept of due process.

Under the Administrative Procedure Act, agencies may not depart from a prior policy, whether expressed or implied, nor they may disregard the rules on the books. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), held: Agencies are free to change their existing policies, as long as they provide a reasoned explanation for the change. And that requirement of an explanation is not limited to formal rules or official policies, and applies equally to practices implied

from agency conduct.

Now, we have discussed and it has been shown, particularly under the Hausman declaration and the various tabulations under that declaration, that there has been a marked change in practice in policy, so that the percentage of those released on bond or on recognizance prior to June 6, 2017, as compared to those released on bond or recognizance after June 6, 2017, is markedly different, so much so that a change of policy is dramatically shown.

The number of people who have been denied release, whether on bond or recognizance, has become so infinitesimally small as compared to what had been in existence, as to show such a fundamental alteration of the nature of the program. And whether it is done by this risk classification assessment, a various algorithm, or by actions of arresting officers, or by their supervisor, really does not make a difference. There has been a change, a marked change, and there has been no recent explanation to support that.

What the government has said is that most of the arrests now follow criminal arrests. But the fact of a criminal arrest did not indicate whether a person is a risk of flight or a danger to the community. And that condition existed before June 6, 2017 or after.

The government has also argued that there have been a large number of people who have failed to show up when they've

been asked -- summoned to come to court or noticed to come to court. But that also does not apply to the individual case. As the Supreme Court held under the section of 1262(a) and the governing regulations, there must be an individualized determination, and that has not been given.

So the likelihood of success on the part of the plaintiffs has been shown.

Furthermore, it's clear that there has been irreparable damage to the plaintiffs. It is patent that the condition of living in a community, holding a job, being able to come to a home for dinner, being able to rest after a day's work, being able to seek medical attention, is so far better when free than in jail, as to require no argument.

This irreparable damage applicable to all persons who have been denied their right to an individualized bond determination within 48 hours after arrest is so much greater than the possible risk to any kind of disruption to their obligation of ICE to do their work for the government and for all of us.

The injunction that's requested is an injunction to comply with law. It is not an injunction to change any action pursuant to law. And so Section 242 of the INA, Immigration and Nationality Act, 8, U.S.C., Section 1252(f) is not applicable. That section provides that regardless of the nature of the action or claim or of the identity of the party

or parties bringing the action, no court, other than the Supreme Court, shall have jurisdiction or authority to enjoin or restrain the operation of 8, U.S.C., Sections 1221 to 1231, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

This is not an application to enjoin or restrain the operation of law. This is an application to enforce compliance with law and to strain departures for law. And I believe that the government has conceded in argument that insofar as we are dealing with an injunction against noncompliance with law, the limitation of Section 242 of the Immigration and Nationality Act does not apply.

Plaintiffs have further argued that under the Rehabilitation Act, there is an obligation to consider disability as part of the (inaudible) the individualized determination after arrest.

The law requires consideration of the risk of flight and the risk to public safety. It is not part of the policy of the Rehabilitation Act to give favored treatment to those disabled. If a disabled person presents a risk of flight or a risk of harm committed to the community, that person, just as any other person, is subject to detention.

There has been no citation of any argument that there has been discrimination against any disabled person and, hence,

I find that the Rehabilitation Act is not applicable.

One moment.

(Pause)

THE COURT: And as to balancing the equities, the equity in favor of individual freedom, where freedom should be had, pending further activities in immigration court and the equities of the government, favors the individual because the relief that will be given, as will be seen, will not interfere with any government activity.

Now, I'm ready to announce what the injunction will be, and it's as follows:

Enjoining defendant Thomas R. Decker, in his official capacity as New York field office director for U.S. Immigration and Customs Enforcement -- let me repeat that.

Enjoining defendant Thomas R. Decker, in his official capacity as New York field office director for U.S. Immigration and Customs Enforcement, and all successors appointed or acting, from using or applying practices or policies relating to the discretion by arresting officers to release to the community on recognizance or pursuant to bond, pursuant to Section 236 of the Immigration and Nationality Act, 8, U.S.C., Section 1226(a), and applicable regulations, to any person now or hereafter arrested by said defendant or officers or agents directly or indirectly supervised by said defendant in any manner, more stringent or onerous than those used or applied

prior to June 6, 2017.

This order shall not apply to any person so arrested who has had his bond or recognizance application heard by an immigration judge.

Defendants shall file a report on April 17, 2020, identifying as of April 10, 2020, all persons thus arrested by or under the authority of the New York field office and of such persons, all persons who have had their bond or recognizance applications heard by an immigration judge.

These are the findings and conclusions of the Court and the injunction that I order issued effective upon the filing of the summary order that I expect will be done tomorrow.

Mr. Hodgson, have I touched on everything that needs to be said?

MR. HODGSON: Yes, your Honor.

THE COURT: Mr. Waterman?

MR. WATERMAN: I believe so, your Honor.

THE COURT: This proceeding is therefore closed.

I thank you all for expert arguments.

And I understand, Ms. Jain, you are a student?

MS. JAIN: No, your Honor.

THE COURT: Well, you are a remarkable student. And I wish you great success and fulfillment in the practice of law.

This is closed. Thank you all very much. (Adjourned)