Typeface Corp., 43 F.3d 443, 450 (9th Cir. 1994). Given the complex nature of this case, we are troubled by the strict imposition of time limits and the relative inflexibility of the district court once Skidmore ran out of time. On remand, if the district court again imposes time limits for the retrial it should ensure that each side has adequate time to present its witnesses and arguments.

VII.

We vacate the amended judgment in part and remand for a new trial against Defendants because of the deficiencies in the jury instructions on originality and the district court's failure to include a selection and arrangement jury instruction. Additionally, although harmless in this instance, we conclude that the district court abused its discretion by not allowing the sound recordings of "Taurus" to be played to prove access. Further, at any retrial, the district court should reconsider whether an inverse ratio jury instruction is warranted. The district court did not err, however, in limiting the copyright of "Taurus" to its deposit copy or in allowing Dr. Ferrara to testify. Finally, we vacate the order denying Defendants' motions for attorneys' fees and costs. Given our disposition, there is no need to address the remaining issues raised by Skidmore.

VACATED in part and REMANDED for a new trial.

Appellant shall recover his costs on appeal.

Ilsa SARAVIA, as next friend FOR A.H., a minor, and on her own behalf; Lorenza Gomez, as next friend for A.H., a minor, and on her own behalf; Wilfredo Velasquez, as next friend for F.E., a minor, and on his own behalf, Plaintiffs-Appellees,

v.

Jefferson B. SESSIONS III, Attorney General; James McHenry, Acting Director of the United States Executive Office for Immigration Review; Thomas E. Price, Secretary of the Department of Health and Human Services of the United States; Steven Wagner, Acting Assistant Secretary of the Administration for Children and Families; Scott Lloyd, Director of the Office of Refugee Resettlement of the United States; Elicia Smith, Federal Field Specialist of the Office of Refugee Resettlement of the United States; Elaine C. Duke, Acting Secretary of the Department of Homeland Security of the United States; Thomas Homan, Acting Director of U.S. Immigration and Customs Enforcement; James McCament, Acting Director of U.S. Citizenship and Immigration Services, Defendants-Appellants.

No. 18-15114

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 13, 2018
San Francisco, California

Filed October 1, 2018

Background: Noncitizen minors who had entered United States unaccompanied by parent or guardian and been placed in Office of Refugee Resettlement's (ORR) custody and later released to parent or sponsor after it concluded that they were not dangerous to themselves or community

nor flight risk filed putative class action alleging that their subsequent arrests and detention based on their alleged gang affiliation violated their procedural due process rights. The United States District Court for the Northern District of California, No. 3:17-cv-03615-VC, Vince Chhabria, J., 280 F.Supp.3d 1168, granted plaintiffs' motion for preliminary injunction, and government appealed.

Holdings: The Court of Appeals, Hurwitz, Circuit Judge, held that:

(1) preliminary injunction did not conflict with Trafficking Victims Protection Reauthorization Act (TVPRA);

(2) district court did not abuse its discretion in requiring Department of Homeland Security (DHS) to provide hearing within seven days of arrests in jurisdiction where minor was arrested or where minor lived; and

(3) district court did not abuse its discretion in concluding that ORR procedures were inadequate to protect noncitizen minors.

Affirmed.

1. Federal Courts ⚿3616(2)

Court of Appeals reviews district court's decision to grant or deny preliminary injunction for abuse of discretion.

2. Federal Courts ⚿3616(2)

In reviewing district court's decision to grant or deny preliminary injunction, Court of Appeals does not determine ultimate merits, but rather determines only whether district court correctly distilled applicable rules of law and exercised permissible discretion in applying those rules to facts at hand.

3. Injunction ⚿1092

Plaintiff seeking preliminary injunction must establish that he is likely to succeed on merits, that he is likely to suffer irreparable harm in absence of preliminary relief, that balance of equities tips in his favor, and that injunction is in public interest.

4. Aliens, Immigration, and Citizenship ⚿485

Preliminary injunction requiring Department of Homeland Security (DHS) to provide hearing within seven days to noncitizen minors who had entered United States unaccompanied by parent or guardian and been placed in Office of Refugee Resettlement's (ORR) custody and later released to parent or sponsor after it concluded that they were not dangerous to themselves or community nor flight risk, and who were subsequently arrested and placed in immigration detention pending removal based on their alleged gang affiliation did not conflict with Trafficking Victims Protection Reauthorization Act (TVPRA) provision prohibiting government from placing minor with person or entity unless ORR made determination that proposed custodian was capable of providing for child's physical and mental well-being, where preliminary injunction called for minors to be released back to their previous sponsors, who government had already determined were suitable. 8 U.S.C.A. § 1232(c)(3)(A).

5. Aliens, Immigration, and Citizenship ⚿485

District court did not abuse its discretion in entering preliminary injunction requiring Department of Homeland Security (DHS) to provide hearing to minor immigration detainees within seven days of their arrests in jurisdiction where minor was arrested or where minor lived, even though government only maintained juvenile immigration detention facilities in limited locations, in light of district court's determination that cost of transporting minors to hearing location was not likely to outweigh benefits provided by its order, given that witnesses and evidence concerning gang allegations that led to minor's

current predicament were most likely to be found where they lived.

6. Aliens, Immigration, and Citizenship ⚿485

District court did not abuse its discretion in concluding that Office of Refugee Resettlement (ORR) procedures were inadequate to protect noncitizen minors who had entered United States unaccompanied by parent or guardian and been placed in ORR custody and later released to parent or sponsor after it concluded that they were not dangerous to themselves or community nor flight risk from being erroneously taken away from their sponsors after they were rearrested and placed in detention pending removal based on their alleged gang affiliation, thus warranting preliminary injunctive relief requiring government to provide hearing within seven days of their arrests, even though Trafficking Victims Protection Reauthorization Act (TVPRA) required ORR to review minor's placement in secure facility on monthly basis, and government was required by *Flores* settlement to provide bond hearing, where ORR's process did not provide juveniles with notice of reason for incarceration or opportunity to answer any charges, *Flores* hearings were designed to consider ORR's initial determination under TVPRA that minor should be detained in secure facility, and record was unclear as to how promptly minors received *Flores* hearings. 8 U.S.C.A. § 1232(c)(2)(A).

7. Constitutional Law ⚿3879

Due process requires opportunity to be heard at meaningful time. U.S. Const. Amend. 5.

Appeal from the United States District Court for the Northern District of California, Vince Chhabria, District Judge, Presiding, D.C. No. 3:17-cv-03615-VC

Scott G. Stewart (argued), Attorney; Sarah B. Fabian and Nicole N. Murley, Senior Litigation Counsel; William C. Silvis, Assistant Director; William C. Peachey, Director, District Court Section; Chad A. Readler, Acting Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.

Julia Harumi Mass (argued) and William S. Freeman, ACLU Foundation of Northern California, San Francisco, California; Martin S. Schenker, Nathaniel R. Cooper, Kathlyn A. Querubin, and Trevor M. Kempner, Cooley LLP, San Francisco, California; Judy Rabinovitz, ACLU Foundation Immigrants' Rights Project, New York, New York; Holly S. Cooper, Law Offices of Holly S. Cooper, Davis, California; Stephen B. Kang, ACLU Foundation Immigrants' Rights Project, San Francisco, California; for Plaintiffs-Appellees.

Before: Michael Daly Hawkins, Carlos T. Bea, and Andrew D. Hurwitz, Circuit Judges.

OPINION

HURWITZ, Circuit Judge:

This case involves noncitizen minors who entered the United States unaccompanied by a parent or guardian and were then placed in the custody of the United States Office of Refugee Resettlement ("ORR"). ORR subsequently released the plaintiffs to a parent or sponsor after concluding that each minor was not dangerous to himself or the community nor a flight risk.

In 2017, the government arrested plaintiffs because of alleged gang membership and transferred them to secure juvenile detention facilities. The district court granted a preliminary injunction, requiring a prompt hearing before a neutral decisionmaker at which the minors could con-

test the gang allegations. We find no abuse of discretion and affirm.

I. Background

a. The Legal Framework

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044 (2008), requires the Department of Homeland Security ("DHS") to transfer an unaccompanied noncitizen minor to the custody of the Secretary of Health and Human Services ("HHS") within 72 hours of determining that the minor is unaccompanied, absent "exceptional circumstances." 8 U.S.C. § 1232(b)(3). ORR then must ensure that the minor is "promptly placed in the least restrictive setting that is in the best interest of the child." *Id.* § 1232(c)(2)(A). "In making such placements, [ORR] may consider danger to self, danger to the community, and risk of flight." *Id.* The TVPRA requires that minors be placed either with a "suitable family member" or in an ORR facility.[1] *Id.* "A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." *Id.*

In 1997, the United States entered into a settlement agreement with a plaintiff class in *Flores v. Sessions*, providing a minor in an ORR facility the right to a bond hearing before an immigration judge to challenge the agency's initial determination that the minor is a danger to the community. *See Flores v. Sessions*, 862 F.3d 863, 879 (9th Cir. 2017); *see also* ORR Guide § 2.9; *Flores* Settlement ¶ 24A.

b. Factual Background

In 2017, Immigration and Customs Enforcement ("ICE") agents and New York law enforcement officials executed "Operation Matador." The operation targeted undocumented immigrants with alleged connections to criminal gangs. After receiving allegations of gang affiliation from local law enforcement, ICE agents arrested the alleged gang members, relying on the agency's general authority to arrest noncitizens subject to removal.

Among the minors arrested was A.H., who was born in Honduras in 2000 and entered the United States without inspection in April 2015. After requesting the assistance of immigration officials at the border, A.H. was initially detained in an ORR facility. After determining that A.H. was not a flight risk and posed no danger to himself or the community, ORR released him to live with his mother in New York.

In 2016, A.H. was charged in state juvenile court with menacing and possession of a weapon. The action was adjourned in contemplation of dismissal after A.H. completed a community service program. In March 2017, A.H. was charged in state court with possession of marijuana; this action was also adjourned in contemplation of dismissal.[2]

In June 2017, ICE officers arrested A.H. pursuant to a warrant that alleged

1. "ORR may place a child in a shelter facility, foster care or group home (which may be therapeutic), staff-secure or secure care facility, residential treatment center, or other special needs care facility." U.S. Dep't of Health & Human Servs., *Children Entering the United States Unaccompanied* § 1.1 ("ORR Guide"), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (last updated Sept. 5, 2018). Secure facilities "have a secure perimeter, major restraining construction inside the facility, and procedures typically associated with correctional facilities." *Id.* § 1.2.4.

2. A.H. was arrested on the marijuana charge together with a friend who admitted to a previous gang affiliation. A.H., however, denied any gang involvement.

removability. A.H. was flown to California and detained at the Yolo County Juvenile Detention Facility.[3]

c. Procedural Background

A.H. filed this action in the United States District Court for the Northern District of California in June 2017, seeking a writ of habeas corpus, a declaratory judgment, and injunctive relief.[4] In August 2017, A.H. filed an amended habeas corpus petition and a putative class action complaint.[5] Relevant to this appeal, the complaint alleged violation of the Fifth Amendment procedural due process rights of the putative class. A.H. then moved for a preliminary injunction and provisional class certification.

For purposes of ruling on the preliminary injunction motion, the district court provisionally certified

> a class of noncitizen minors meeting the following criteria: (1) the noncitizen came to the country as an unaccompanied minor; (2) the noncitizen was previously detained in ORR custody and then released by ORR to a sponsor; (3) the noncitizen has been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017 on allegations of gang affiliation.[6]

Saravia, 280 F.Supp.3d at 1202. The court also granted a preliminary injunction, ordering a "prompt hearing" before a neutral decisionmaker, "in which the government must show that ... changed circumstances" justified the minors' detention. *Id.* at 1197, 1205–06. The injunction provided that the minor and sponsor "must receive notice of the basis for the rearrest," and the hearing must occur "within seven days of arrest, absent extraordinary circumstances," "in the jurisdiction where the minor has been arrested or where the minor lives." *Id.* The government timely appealed.[7]

II. Jurisdiction and Standard of Review

[1, 2] We have jurisdiction of this appeal from the grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1). *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Id.* "Abuse-of-discretion review is highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). We do not "determine the ultimate merits," but rather "determine only whether the district court correctly distilled the applicable rules of

3. After filing this lawsuit, A.H. was transferred to a lower-security ORR facility in New York.

4. A.H.'s mother, Ilsa Saravia, filed this suit on his behalf. For ease of reference, we refer to A.H. as the plaintiff.

5. The amended complaint added two plaintiffs, F.E. and J.G. Like A.H., the two new plaintiffs had originally been released by ORR to the custody of their mothers in New York. Federal immigration authorities later detained F.E. and J.G. in secure juvenile detention, alleging gang affiliation. The district court dismissed F.E. and J.G.'s claims without prejudice for improper venue, but noted that "as members of the proposed class, they could still benefit from relief granted on a class-wide basis." *Saravia v. Sessions*, 280 F.Supp.3d 1168, 1191 n.11 (N.D. Cal. 2017). F.E. and J.G. do not challenge the venue ruling in this appeal.

6. The government does not challenge the provisional class certification on appeal.

7. Plaintiffs have moved to supplement the record on appeal with records of hearings subsequently held for conditional class members, which show that the great majority of hearings resulted in release from detention. Because these records are unnecessary for the disposition of this appeal, we **DENY** the motion.

law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015).

III. Discussion

[3] The familiar *Winter* standard provides that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). In this case, however, we need consider only the plaintiffs' likelihood of success on their Fifth Amendment claims; the government does not quarrel with the district court's application of the other *Winter* factors.

Applying *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the district court found the minors could likely show they were entitled to a hearing to challenge the allegations of gang involvement. *Saravia*, 280 F.Supp.3d at 1194–1201. The government has correctly conceded that *Mathews* supplies the governing legal standard, and that plaintiffs are entitled a hearing in which they can contest the allegations that led to their arrests, *see* Oral Argument at 1:55–2:09, 13:07–:30, *Saravia v. Sessions* (No. 18-15114), https://youtu.be/7wuOaflXrLk; *see generally Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017) ("[T]he government's discretion to incarcerate noncitizens is always constrained by the requirements of due process.").[8] ORR has previously determined that each of the class members was neither dangerous nor posed a flight risk, and that the TVPRA therefore mandated placement with a suitable sponsor. *See* 8 U.S.C. § 1232(c)(2)(A). Thus, we focus not on the minors' arrests, but the revocation of their previous placements under the TVPRA. *See Goldberg v. Kelly*, 397 U.S. 254, 261–62, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (recognizing that the denial or removal of statutory benefits is constrained by procedural due process); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430–31, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (collecting cases); *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (similar).

The issues before us are therefore narrow. While agreeing that the minors are entitled to a hearing to contest the gang allegations, the government contends that the district court abused its discretion in entering the preliminary injunction because (1) the relief ordered conflicts with the TVPRA and the *Flores* settlement and (2) existing procedures provide the minors an adequate opportunity to challenge the revocation of their placements. We address these arguments in turn.

8. Whether existing procedures gave Plaintiffs sufficient opportunity to contest allegations of gang affiliation matters only if the legality of their rearrests and detention stand or fall on those allegations. DHS's enforcement authority under the INA includes the authority to arrest and detain *any* alien on a warrant "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a); *see also Preap v. Johnson*, 831 F.3d 1193, 1198 (9th Cir. 2016) ("8 U.S.C. § 1226(a) grants the AG discretion to arrest and detain *any alien* upon the initiation of removal proceedings.") (emphasis added). But the Government conceded at oral argument that Plaintiffs were entitled to a hearing to contest the finding of dangerousness that led to their rearrest. We therefore assume only for purposes of this appeal that the Government's plenary power to enforce immigration laws is an insufficient basis to justify Plaintiffs' rearrests, and that Plaintiffs have a due process right to contest the allegations of gang affiliation that led to their rearrests and detention at a higher level of custody.

a. The TVPRA and *Flores* Settlement

The TVPRA mandates that ORR place unaccompanied children in the "least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). The preliminary injunction is entirely consistent with that statutory mandate. For each member of the plaintiff class, ORR has already determined that the "least restrictive setting that is in the best interest of the child" is placement with a sponsor. As the district court recognized, "[i]f DHS could, the day after a minor was released to a parent or other sponsor, arrest the minor ... and restart the process, the TVPRA's instruction to place the minor in the least restrictive appropriate setting would mean little." *Saravia*, 280 F.Supp.3d at 1196.

[4] The preliminary injunction therefore orders the minor's release to the previous custodian if a neutral adjudicator determines, after a hearing, that the minor poses no danger to the community or himself and is not a flight risk. *Id.* at 1176–77, 1197. The government first complains the injunction somehow conflicts with the TVPRA provision prohibiting the government from placing a minor "with a person or entity unless [ORR] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). But, the preliminary injunction calls for the minors to be released back to their *previous* sponsors; the government has already determined each of these sponsors is suitable. Nothing in the TVPRA requires the government to conduct this review a second time.[9]

Although the preliminary injunction requires a hearing within seven days of a minor's arrest, it provides the government significant flexibility in deciding whether and where to detain the minor in the interim. Contrary to the government's assertions on appeal, nothing in the order prohibits the government from transferring the minors to ORR custody within 72 hours, as required by the TVPRA. *See id.* § 1232(b)(3). Moreover, the government concedes that it can avoid the 72 hour rule when appropriate "under the 'exceptional circumstances' exception to the TVPRA." *See id.*

[5] The government argues in passing that the preliminary injunction's requirement to hold the hearing "in the jurisdiction where the minor has been arrested or where the minor lives," *Saravia*, 280 F.Supp.3d at 1197, is burdensome, because the government only maintains juvenile immigration detention facilities in limited locations. But, at the preliminary injunction stage, the district court was well within its discretion to conclude that the cost of transporting minors to the hearing location was not likely to outweigh the benefits provided by its order, given that witnesses and evidence concerning the gang allegations that led to the minor's current predicament are most likely to be found where they lived. *See Hernandez*, 872 F.3d at 993 (noting "minimal costs to the government ... are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals' physical liberty"); *see also Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 (9th Cir. 2013) ("Determining whether an individual is an active gang member presents a considerable

9. The district court recognized that if "ORR has legitimate concerns about the sponsor's suitability, its existing procedures, including coordination with state welfare agencies, would presumably be sufficient to address those concerns." *Saravia,* 280 F.Supp.3d at 1198 n.15. At the preliminary injunction hearing, a government witness testified that ORR typically refers such cases to Child Protective Services.

risk of error. The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful factfinding.").

b. Adequacy of Existing Procedures

The government next contends that the district court failed to consider two existing procedural protections allegedly available to the minors: (1) an internal review process mandated by the TVPRA and (2) the bond hearings required by the *Flores* settlement. To the contrary, the district court expressly considered "current ORR procedures," including "the right to challenge a finding of dangerousness in a *Flores* bond hearing ... and regular review by ORR to determine the appropriate security level" and concluded that "on the current record" these procedures "appear inadequate to protect against the risk of minors being erroneously taken away from their sponsors." *Saravia*, 280 F.Supp.3d at 1198–99.

[6] The district court did not abuse its discretion in so concluding. The TVPRA requires ORR to review a minor's placement in a secure facility on a monthly basis. 8 U.S.C. § 1232(c)(2)(A). But, the process is entirely unilateral; the juvenile is not provided with notice of the reason for incarceration or an opportunity to answer any charges. *See id.*; ORR Guide § 1.4.2. "Due process always requires, at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014); *see also Zimmerman Brush Co.*, 455 U.S. at 434, 102 S.Ct. 1148 (reciting rule). "The mere availability and utilization of some procedures does not mean they were constitutionally sufficient." *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016); *see Vitek*, 445 U.S. at 491, 100 S.Ct. 1254.

Flores hearings provide minors in ORR custody the right to a bond hearing before an immigration judge to challenge the agency's determination that the minor is a danger to himself or the community. *See Flores*, 862 F.3d at 879; *see also* ORR Guide § 2.9; *Flores* Settlement ¶ 24A. But, these hearings were designed to consider ORR's *initial* determination under the TVPRA that a minor should be detained in a secure facility. Thus, "a favorable finding in a [*Flores* hearing] does not entitle minors to release" because "the government must still identify a safe and secure placement into which the child can be released." *Flores*, 862 F.3d at 867; ORR Guide § 2.9. This requires a "verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." *See* 8 U.S.C. § 1232(c)(3)(A). That process can take months. *See, e.g.*, *Santos v. Smith*, 260 F.Supp.3d 598, 613–14 (W.D. Va. 2017); *Beltran v. Cardall*, 222 F.Supp.3d 476, 483–84 (E.D. Va. 2016). The district court did not abuse its discretion in concluding that *Flores* hearings were not sufficient to protect the TVPRA rights of the members of the plaintiff class, each of whom had initially been found to qualify for placement with a parent or sponsor previously approved by ORR.

[7] Moreover, due process requires "the opportunity to be heard 'at a meaningful time.' " *Mathews*, 424 U.S. at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). But, as the government candidly conceded at oral argument, *see* Oral Argument at 1:01–:09, 4:19–6:47, 8:33–:42, the record is unclear as to how promptly minors receive *Flores* hearings. One class member, for example, was arrested on June 16, 2017, and requested a *Flores* hearing on August 22, 2017. As of September 22, 2017, no such hearing had been scheduled. *See Flores* Settlement

¶ 12.A (providing only that the government "shall expeditiously process the minor and shall provide the minor with a notice of . . . the right to a bond redetermination hearing"); ORR Guide § 2.9. In the district court, the government did not provide a clear timeline for hearings for members of the conditional class under the *Flores* settlement, instead describing the hearings as a "new requirement" and "a work in progress." Thus, the district court reasonably found "the evidence suggests [class members] will remain in ORR custody . . . indefinitely in the absence of a preliminary injunction." *Saravia*, 280 F.Supp.3d at 1200. It was plainly not an abuse of discretion for the court to conclude "on the current record" that current procedures "appear inadequate." [10] *Id.* at 1198.

IV. Conclusion

We affirm. We, of course, express no view whether a permanent injunction should issue or, if so, what it should provide. Nor do we suggest that the government cannot seek modification of the preliminary injunction based on new arguments or evidence. We hold only that, on this record, the district court did not abuse its discretion in concluding that the minors were entitled to some sort of due process hearing and ordering the government, pendente lite, to provide members of the minor class with the procedural protections set forth in its order.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ashley Lynn GRAY, Defendant-Appellant.

No. 18-30022

United States Court of Appeals, Ninth Circuit.

Submitted September 12, 2018 *

Filed October 3, 2018

Background: Probation officer filed a petition for revocation of defendant's supervised release and sought an arrest warrant. The United States District Court for the District of Montana, Charles C. Lovell, Senior District Judge, revoked supervised released but imposed an above-guidelines 20-month sentence without a hearing, despite magistrate judge's recommendation for a within-guidelines five-month sentence. Defendant appealed.

10. The government also argues the district court abused its discretion by modeling its preliminary injunction order on the procedures applicable to adults re-arrested by ICE after having been released on bond pursuant to 8 U.S.C. § 1226(b). In *Matter of Sugay*, 17 I. & N. Dec. 637, 640 (BIA 1981), the BIA recognized that "where a previous bond determination has been made by an immigration judge, no change should be made . . . absent a change of circumstance." At the preliminary injunction hearing, the government explained that DHS complies with *Sugay* by conducting a "changed circumstances" bond hearing before an immigration judge within seven to fourteen days of an arrest. Contrary to the government's characterization on appeal, the district court never held that *Sugay* requires these hearings; the court simply noted that "[a]ccording to government counsel, DHS has incorporated this holding into its practice" by holding such hearings. *Saravia*, 280 F.Supp.3d at 1197. The district court then reasonably looked to these procedures for guidance in structuring preliminary relief.

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).