The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, IBIS GUZMAN, BLANCA ORANTES, BALTAZAR VASQUEZ,

Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE"); U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); U.S. CUSTOMS AND BORDER PROTECTION ("CBP"); U.S. CITIZENSHIP AND IMMIGRATION SERVICES ("USCIS"); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ("EOIR"); THOMAS HOMAN, Acting Director of ICE; KIRSTJEN NIELSEN, Secretary of DHS; KEVIN K. McALEENAN, Acting Commissioner of CBP; L. FRANCIS CISSNA, Director of USCIS; MARC J. MOORE, Seattle Field Office Director, ICE, JEFFERSON BEAUREGARD SESSIONS III, United States Attorney General; LOWELL CLARK, warden of the Northwest Detention Center in Tacoma, Washington; CHARLES INGRAM, warden of the Federal Detention Center in SeaTac, Washington; DAVID SHINN, warden of the Federal Correctional Institute in Victorville, California; JAMES JANECKA, warden of the Adelanto Detention Facility,

Defendants-Respondents.

No. 2:18-cv-928 MJP

DEFENDANTS' MOTION TO VACATE THE COURT'S PRELIMINARY INJUNCTION ORDER (DKT. 110)

NOTE ON MOTION CALENDAR: MAY 15, 2019.

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TABLE OF CONTENTS

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 54(b), defendants move to vacate the Order entered by this Court on April 5, 2019 granting plaintiffs' motion for a preliminary injunction ("Order"). *See* Dkt. 110. The predicate for the Order was that "detained asylum seekers who are determined by Defendant U.S. Immigration and Customs Enforcement ('ICE') to have a credible fear of persecution" possess an entitlement "to request release from custody during the pendency of the asylum process" via a bond hearing under *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). Dkt. 110 at 2. Since the issuance of the Order, however, the legal landscape has dramatically changed. Specifically, as defendants previously noted, *see* Dkt. 83 at 1-2, the Attorney General undertook review of the validity of *Matter of X-K-* in light of the holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), that "§§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin." *Id.* at 845. On April 16 of this year the Attorney General concluded that given *Jennings*, "*Matter of X-K-* was wrongly decided" and "is therefore overruled." *Matter of M-S-*, 27 I&N Dec. 509, 510, 519 (A.G. 2019). That ruling compels vacatur of the Order, as *Matter of M-S-* abrogates the very entitlement that the Order rests upon. Indeed, this Court observed that once a decision in *Matter of M-S-* was rendered, it would "address that decision as needed," Dkt. 101 at 3, and plaintiffs themselves averred that "[p]roposed class members are eligible for bond hearings unless and until [*Matter of X-K-*] is vacated." Dkt. 45 at 4 n.2; *see also* Dkt. 84 at 2 ("If and when [the Attorney General] issues a decision in *Matter of M-S-*, this Court may address that decision as needed, including with respect to the pending motion[] for … preliminary injunctive relief."). Because the Order's statutory and constitutional analysis is premised on an incorrect understanding of the applicable baseline statutory entitlements, the injunction must be vacated.

BACKGROUND

A. Plaintiffs' Motion for a Preliminary Injunction.

The amended Complaint filed in this action brings claims on behalf of two now-certified classes, *see* Dkt. 102 at 1-2, only one of which is relevant to the instant motion: those plaintiffs who entered the United States between Ports of Entry, were initially subjected to expedited

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

removal proceedings, and were determined to have an initial credible fear of persecution ("Bond Hearing Class"). *See id.* at 2; Dkt. 26, ¶ 5.

The statutory framework underpinning the claims pled by the Bond Hearing Class is largely enshrined in section 235 of the Immigration and Nationality Act ("INA").[1] *See* 8 U.S.C. § 1225. Importantly, in no case governed by section 235 is a bond hearing permitted. Subsection (b) of INA section 235 is subdivided into two subsections, the first—which is relevant here—governing expedited removal, *see* 8 U.S.C. § 1225(b)(1), and a second subsection not at issue here that provides for full removal proceedings in certain circumstances, *see* 8 U.S.C. § 1225(b)(2). All members of the Bond Hearing Class are governed by Section 1225(b)(1); they were placed in expedited removal proceedings as aliens who crossed the border illegally between Ports of Entry and were encountered within 14 days of entry without inspection and within 100 air miles of a U.S. international land border. *See* Dkt. 102 at 2; Dkt. 83 at 2. Once found to have a "credible fear of persecution or torture," the Bond Hearing Class members were referred from expedited to full removal proceedings. 8 C.F.R. § 208.30(f). The statutory provision governing the detention of the Bond Hearing Class, 8 U.S.C. § 1225(b)(1)(B)(ii), provides that if an Immigration Officer "determines at the time of the interview that an alien has a credible fear of persecution … the alien shall be detained for further consideration of the application for asylum." Against this statutory backdrop, the amended Complaint[2] alleges "Federal law requires that if an asylum seeker enters the United States at a location other than a designated 'Port of Entry' and is determined to have a credible fear of persecution in his or her credible fear interview, that asylum seeker is entitled to an individualized bond hearing before an immigration judge …. This bond hearing must comport with constitutional requirements." Dkt. 26, ¶ 5. This claim was based not on a statutory provision, but upon the Board of Immigration Appeals ("BIA") decision in *Matter of X-K-*, which found that the INA "provide[s] no specific guidance regarding the custody jurisdiction over" aliens found to have a "credible fear"—like members of the Bond Hearing Class—and proceeded to conclude that

[1] A comprehensive assessment of the statutory scheme is set forth in defendants' motion to dismiss. *See* Dkt. 36 at 1-3.

[2] "The complaint in this case was initially filed on June 25, 2018. (Dkt. No. 1). Since then, it has been twice amended. (Dkt Nos. 8, 26)." Dkt. 102 at 2 n.1.

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

such aliens would be entitled to seek a bond hearing. 23 I&N Dec. at 734, 736.

On September 20 of last year, plaintiffs moved for a preliminary injunction on behalf of the Bond Hearing Class, contending that "[u]nder the … INA, detained asylum seekers who entered the country without inspection, who were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), and who USCIS determines to have a credible fear of persecution, are eligible to seek release from incarceration while they pursue their claims. *See Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005)." Dkt. 45 at 3-4. Plaintiffs noted that *Matter of X-K-* was likely to undergo "reconsider[ation]," but nonetheless argued that "[p]roposed class members are eligible for bond hearings unless and until the decision is vacated." *Id.* at 4 n.2. The crux of the motion was that defendants' alleged practice of "delaying Plaintiffs' bond hearings weeks, if not months, after a hearing request" ran afoul of the Due Process Clause of the Constitution. *Id.* at 4-5. The Bond Hearing Class accordingly requested an Order compelling defendants to: (1) conduct bond hearings within seven days of a hearing request; (2) place the burden of proof on the Department of Homeland Security ("DHS") in bond hearings; (3) produce a recording or verbatim transcript; and (4) produce a contemporaneous written decision with particularized determinations. *Id.* at 2.

While the preliminary injunction motion was pending, defendants moved to "hold this case in abeyance … pending the Attorney General's forthcoming decision in *Matter of M-S-*." Dkt. 83 at 1. Defendants noted that "the Attorney General's forthcoming decision likely impacts any determination by this Court concerning whether Plaintiffs are entitled to bond hearings within seven days as a constitutional or statutory matter." *Id.* at 6. In denying the motion, this Court observed that a significant period of time had already passed and "[i]f Attorney General Barr issues a decision in *Matter of M-S-*, the Court will address that decision as needed." Dkt. 101 at 3.

After briefing on the preliminary injunction motion concluded, this Court issued the Order on April 5 of this year, granting the motion in its entirety. *See* Dkt. 110 at 2. The Order began with the regulatory entitlement that the Bond Hearing Class possessed under *Matter of X-K-*. *See id.* ("[D]etained asylum seekers who are determined … to have a credible fear of persecution are entitled to request release from custody during the pendency of the asylum process."). In assessing

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

the Bond Hearing Class's likelihood of success on the merits of their claim and carrying out the "balancing test" mandated by application of the Due Process Clause, *id.* at 6, this Court rejected defendants' argument that *Jennings* strongly implied that the Bond Hearing Class no longer had any private interests to vindicate: "This is an oversimplified and inaccurate reading of [*Jennings*], which concerns 8 U.S.C. § 1225(b)(1), and quotes its language that '[a]ny alien … shall be detained pending a final determination of credible fear of persecution and, *if found not to have such a fear*, until removed.' The members of the Bond Hearing Class have been found 'to have such a fear' and that finding removes them from the detention requirements referenced in *Jennings*." *Id.* at 7 (emphasis in original). This Court went on to conclude that the remainder of the calculus under the Due Process Clause pointed to the conclusion that the Bond Hearing Class was likely to succeed on the merits, *see id.* at 7-15, and that the remaining preliminary injunction factors also favored granting plaintiffs' motion. *See id.* at 15-18. As a result, this Court issued the following directive: "within 30 days of this Order," defendants must:

> 1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit; 2. Place the burden of proof on Defendant [DHS] in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions; 3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and 4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

Id. at 19.

B. *Matter of M-S-.*[3]

Following the issuance of the Order, the Attorney General decided *Matter of M-S-*, finding that "*Matter of X-K-* was wrongly decided," *Matter of M-S-*, 27 I&N Dec. at 510, based largely on the recent Supreme Court decision in *Jennings*, which concluded last year that section 1225(b) was not susceptible to a statutory interpretation under which bond hearings could be permitted. *See Jennings*, 138 S. Ct. at 851.

The "question presented" in *Matter of M-S-* was "whether aliens who are originally placed

[3] A copy of the decision in *Matter of M-S-* is attached to this motion.

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

in expedited [removal] proceedings and then transferred to full [removal] proceedings after establishing a credible fear become eligible for bond upon transfer." 27 I&N Dec. at 515. The Attorney General answered the question resoundingly in the negative. *See id.* ("I conclude that such aliens remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States."). The starting point for the decision in *Matter of M-S-* was the statutory text: "Section 235(b)(1)(B)(ii) provides that, if an alien in expedited proceedings establishes a credible fear, he 'shall be detained for further consideration of the application for asylum.'" *Id.* (quoting 8 U.S.C. § 1225(b)(1)(B)(ii)). The Attorney General rejected the argument that the word "for" in this phrase simply applied to the lead up to full removal proceedings: "[T]hat latter definition makes little sense in light of the surrounding provisions of the [INA]. If section 235(b)(1)(B)(ii) governed detention only 'in preparation for' … full proceedings, then another provision, [8 U.S.C. § 1226], would govern detention during those proceedings. [8 U.S.C. § 1226], however, permits detention only on an arrest warrant issued by the Secretary. The result would be that if an alien were placed in expedited proceedings, DHS could detain him without a warrant, but, if the alien were then transferred to full proceedings, DHS would need to issue an arrest warrant to continue detention. That simply cannot be what the Act requires." *Id.* at 515-16 (internal citations omitted). This reasoning followed directly from the Supreme Court's analysis in *Jennings*: "If respondents' interpretation of § 1225(b) were correct, then the Government could detain an alien without a warrant at the border, but once removal proceedings began, the Attorney General would have to issue an arrest warrant in order to continue detaining the alien. To put it lightly, that makes little sense." 138 S. Ct. at 845. The Attorney General accordingly concluded that 8 U.S.C. § 1226, which confers discretion upon DHS to release aliens on bond once they are arrested pursuant to a warrant, applies to a "different class[] of aliens" than 8 U.S.C. § 1225, and because the latter provides for mandatory detention, the two provisions "can be reconciled only if they apply to different classes of aliens." *Matter of M-S-*, 27 I&N Dec. at 516.

"The conclusion that section 235 requires detention does not mean that every transferred alien must be detained from the moment of apprehension until the completion of removal proceedings," as the INA explicitly enumerates an exception to detention: parole for "urgent

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

humanitarian reasons or significant public benefit." *Matter of M-S-*, 27 I&N Dec. at 516 (citing 8 U.S.C. § 1182(d)(5)(A)). The presence of this "express exception" countenanced the conclusion that the INA "cannot be read to contain an implicit exception for bond" because "'[t]hat express exception to detention implies that there are no *other* circumstances under which aliens detained under [§ 1225(b)] may be released.'" *Matter of M-S-*, 27 I&N Dec. at 517 (quoting *Jennings*, 138 S. Ct. at 844) (emphasis in original). The Supreme Court in *Jennings* accordingly concluded that, "[i]n sum, §§ 1225(b)(1) and (b)(2) mandate detention throughout the completion of applicable proceedings and not just until the moment those proceedings begin," 138 S. Ct. at 845, the same holding the Attorney General reached: "For those reasons, the [*Jennings*] Court held, as I do here, that the [INA] renders aliens transferred from expedited to full proceedings after establishing a credible fear ineligible for bond." *Matter of M-S-*, 27 I&N Dec. at 517-18. The Attorney General further concluded that his interpretation of section 235 of the INA comported with the Act's "implementing regulations." *Id.* at 518.

"In conclusion, the statutory text, the implementing regulations, and the Supreme Court's decision in [*Jennings*] all le[d] to the same conclusion: that all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond." *Matter of M-S-*, 27 I&N Dec. at 518-19. "*Matter of X-K-* is therefore overruled." *Id.* at 519. The "effective date" of *Matter of M-S-* was set to be "90 days" from April 16 "so that DHS may conduct the necessary operational planning for additional detention and parole decisions." *Id.* n.8.

LEGAL STANDARD

It is well-settled that district courts possess discretionary authority to "modify or revoke an injunction as changed circumstances may indicate." *Lapin v. Shulton, Inc.*, 333 F.2d 169, 170 (9th Cir. 1964). "[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance, have changed." *Sys. Fed. No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 859 (9th Cir. 2004) (Beezer, J., concurring) ("The proposition that a court has the authority to alter the effect of an injunction in light of changes in the law or the circumstances is well established."); *Language Line Servs., Inc. v. Language Servs.*

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

Assocs., Inc., No. CV 10-02605 RS, 2013 WL 12173920, at *1 (N.D. Cal. June 25, 2013) ("Preliminary injunctions are ambulatory remedies and the issuing court has continuing jurisdiction to modify or revoke an injunction as changed circumstances may dictate." (internal quotations omitted)). This conclusion follows directly from the text of Federal Rule of Civil Procedure 54(b), which states that "any order or other decision … that … does not end the action … may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Thus, "the court cannot be required to disregard significant changes in law or facts if it is satisfied that what it [has done] has been turned through changing circumstances into an instrument of wrong," *Wright*, 364 U.S. at 647 (internal quotation omitted), a principle that plaintiffs also recognize. *See* Dkt. 84 at 9 ("[T]his Court has ample authority … to modify any class definition or order granting preliminary injunctive relief.").

In particular, "an intervening change of controlling law" is a "major ground[] justifying" the grant of a motion made under Rule 54(b). *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *see also Matthews v. NCAA*, 179 F. Supp. 2d 1209, 1222 (E.D. Wash. 2001) ("These intervening developments in the law warrant this Court's reconsideration of its prior holding.").[4]

ARGUMENT

I. Vacatur of the Order is Required.

A. The Claim Pled in the Amended Complaint on Behalf of the Bond Hearing Class is No Longer Viable.

Simply put, the claim pled in the amended Complaint that resulted in an award of preliminary injunctive relief to the Bond Hearing Class is no longer cognizable in the wake of the outcome reached in *Matter of M-S-*. As noted, the amended Complaint alleged an entitlement to a bond hearing that the Bond Hearing Class members were not allegedly receiving in accordance with the constitution. *See* Dkt. 26, ¶ 5 ("Federal law *requires* that if an asylum seeker enters the United States at a location other than a designated 'Port of Entry' and is determined to have a

[4] Because the instant motion is based exclusively upon "circumstances that occurred after the court granted the preliminary injunction" and refrains from "relitig[ating] the issues underlying the original preliminary injunction order," it should be treated as a "motion to vacate … an injunction." *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124-25 (9th Cir. 2005).

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

credible fear of persecution … that asylum seeker is *entitled* to an individualized bond hearing …. This bond hearing must comport with constitutional requirements." (emphases added)). The claim, in other words, consisted of two different components; first, that the pertinent regulations, *i.e.* "[f]ederal law," *id.*, mandated that the Bond Hearing Class receive a bond hearing; and second, that the bond hearing was not occurring expeditiously enough, which, in turn, violated the constitution. *See id.* The entire premise of this claim, however, has been eroded. The Attorney General's *Matter of M-S-* decision unambiguously held—based on *Jennings*—that federal law, far from requiring bond hearings for members of the Bond Hearing Class, compels the opposite conclusion, namely that individuals similarly situated to the Bond Hearing Class "shall be detained for further consideration of the application for asylum" and are "ineligible for bond." 27 I&N Dec. at 515. This follows directly from the holding in *Jennings* that "§§ 1225(b)(1) and (b)(2) mandate detention throughout the completion of applicable proceedings." 138 S. Ct. at 845.

This Court's Order bolsters the conclusion that the claim brought by the Bond Hearing Class that prompted the grant of injunctive relief depended upon *Matter of X-K-* remaining good law. The analysis in the Order begins with the baseline entitlement under *Matter of X-K-* and the consequences that flow from that entitlement. *See* Dkt. 110 at 2 ("[D]etained asylum seekers who are determined by … [ICE] to have a credible fear of persecution are entitled to request release from custody during the pendency of the asylum process …. the asylum seekers may request review of the DHS determination before an immigration judge ('IJ') by means of a bond hearing." (citing *Matter of X-K-*, 23 I&N Dec. at 731)).[5] Post *Matter of M-S-*, however, that baseline simply no longer exists.

This Court further utilized *Matter of X-K-* to distinguish the reasoning employed by the Supreme Court in *Jennings* as inapposite: "[t]he members of the Bond Hearing Class have been found 'to have such a fear' and that finding removes them from the detention requirements referenced in *Jennings*." Dkt. 110 at 7. In other words, this Court found it persuasive that the language in 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) setting forth mandatory detention for individuals for

[5] U.S. Citizenship and Immigration Services ("USCIS"), rather than ICE, is the component of DHS that is charged with making credible fear determinations.

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

whom a negative credible fear finding is made, *see Jennings*, 138 S. Ct. at 844-45, did not apply to members of the Bond Hearing Class, who had been found to have a credible fear of persecution or torture and were thus entitled to a bond hearing under *Matter of X-K-*. Importantly, this same reasoning—contrasting 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), on the one hand, with individuals for whom a credible fear finding is made, on the other hand—is what the BIA relied upon in *Matter of X-K-*. 23 I&N Dec. at 734; *see also Matter of M-S-*, 27 I&N Dec. at 513. Yet, *Matter of M-S-* makes clear that 8 U.S.C. § 1225(b)(1)(B)(ii)—which applies to individuals who have established a credible fear of persecution or torture, like members of the Bond Hearing Class—and 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), the provision that this Court deemed distinguishable, impose identical, mandatory detention requirements that do not encompass the right to a bond hearing. *See Matter of M-S-*, 27 I&N Dec. at 515 ("The text of the Act … provides that, if an alien in expedited proceedings establishes a credible fear, he shall be detained for further consideration of the application for asylum." (internal quotation omitted)); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii) (stating that aliens with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (stating that aliens found not to have a credible fear of persecution "shall be detained … until removed"). Indeed, this conclusion was the central holding in *Jennings*. 138 S. Ct. at 845 ("In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin."). Thus, from a detention perspective, members of the Bond Hearing Class now stand on equal footing with individuals found not to have a credible fear of persecution, which, at a minimum, necessitates reconsidering the effect of *Jennings* on the Bond Hearing Class's motion for a preliminary injunction, given the express holding in *Matter of M-S-* that members of the Bond Hearing Class are clearly subject to "the detention requirements referenced in *Jennings*." Dkt. 110 at 7.

In their opposition to defendants' motion to stay proceedings pending a decision in *Matter of M-S-*, the Bond Hearing Class intimated that *Matter of M-S-* would have no impact on this case because "the Due Process Clause of the Fifth Amendment … [has] long provided the foundational basis for those [bond] hearings." Dkt. 84 at 1; *see also id.* at 12 (referencing "fundamental

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

constitutional principles concerning due process"). That position suffers from a plethora of substantive and procedural deficiencies. From a substantive perspective, the Bond Hearing Class is incorrect in arguing that simply because the bulk of their claim addressed constitutional considerations implicated by the timing of bond hearings that *Matter of M-S-* has no impact on the constitutional dimensions of that claim. To the contrary, the gravamen of that constitutional claim, were it allowed to continue in this case, has changed significantly. Prior to the issuance of *Matter of M-S-*, the constitutional claim brought by the Bond Hearing Class was that 8 U.S.C. § 1225 entitled them to a bond hearing pursuant to *Matter of X-K-*, and not receiving that bond hearing quickly enough constituted a transgression of the Due Process Clause. *See* Dkt. 26, ¶ 5; Dkt. 110 at 2-3.

Now, however, *Matter of M-S-* confirms that as a matter of statutory interpretation, members of the Bond Hearing Class are not entitled to a bond hearing under 8 U.S.C. § 1225. Therefore, any constitutional claim raised by the Bond Hearing Class must necessarily be that 8 U.S.C. § 1225 is unconstitutional because it does not provide what plaintiffs perceive as the constitutional minimum in accordance with the Due Process Clause. *See* Dkt. 84 at 9 ("[R]egardless, [defendants'] actions continue to violate proposed class members' constitutional rights with respect to bond hearings."); *see also id.* at 1, 12. That claim suffers from a threshold deficiency that for unadmitted aliens like members of the Bond Hearing Class, "[w]hatever the procedure authorized by Congress is, it is due process." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (internal quotation omitted). Moreover, such a claim imposes a far higher burden on plaintiffs, requires a substantially different analysis than the claim on which the Bond Hearing Class was awarded preliminary injunctive relief, would also require different plaintiffs who are subjected to prolonged detention as well as a different complaint and, indeed, would duplicate the claims currently being litigated in *Jennings* itself. *See* 138 S. Ct. at 839 ("Rodriguez and the other respondents argued that …. [a]bsent such a bond-hearing requirement … those three provisions [of the INA] would violate the Due Process Clause of the Fifth Amendment."). Each of these considerations requires reassessing whether the Bond Hearing Class can demonstrate a likelihood of success on the merits.

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

The salient reason any claim brought by the Bond Hearing Class would need to challenge the constitutionality of 8 U.S.C. § 1225 is that *Jennings* unequivocally held that the canon of constitutional avoidance is inapplicable to that very statute: "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction …. The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible …. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 138 S. Ct. at 842-43 (internal quotation omitted). As a result, the Bond Hearing Class would need to show that as interpreted by the Supreme Court in *Jennings*, 8 U.S.C. § 1225's mandatory detention requirements are unconstitutional, a showing that would be difficult, to say the least. To start, courts "do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994), and "[i]t is well-established that acts of Congress enjoy a strong presumption of constitutionality." *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000); *see also Perez v. Marshall*, 946 F. Supp. 1521, 1531 (S.D. Cal. 1996) ("A party challenging the constitutionality of a statute bears a heavy burden of proof. The Act comes to the courts with a presumption of constitutionality, and the burden is on the [plaintiff] to establish the Act violates the Constitution." (internal citation omitted)). Unsurprisingly, "a decision to declare an Act of Congress unconstitutional is the gravest and most delicate duty that [a] [c]ourt is called on to perform," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), which is precisely why courts adhere to the canon of constitutional avoidance, "out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Id.* (internal quotation omitted). Because any constitutional claim the Bond Hearing Class purports to bring after *Matter of M-S-* based on the Due Process Clause imposes an exacting burden to demonstrate that 8 U.S.C. § 1225 is unconstitutional, that, by itself, casts serious doubt on whether the Bond Hearing Class can show a "likelihood of success on the merits." Dkt. 110 at 6.

This is especially true because the claim brought by the Bond Hearing Class does not simply request a bond hearing at some point in time, but rather demands a bond hearing "within

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

seven days of a hearing request." Dkt. 45 at 2, 17; Dkt. 110 at 19. As a matter of pure constitutional law, divorced entirely from the statutory language of 8 U.S.C. § 1225, such a request is unlikely to succeed, if not completely unfounded. Indeed, the Ninth Circuit, in the decision that was subsequently reversed by *Jennings*, found that the right to a bond hearing only attached after six *months* of detention. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1067 (9th Cir. 2015), *rev'd by Jennings*, 138 S. Ct. at 836 ("[T]he [Supreme] Court … recognized six months as a presumptively reasonable period of detention." (internal quotation omitted)); *id.* at 1078 ("[W]e have defined detention as 'prolonged' when it has lasted six months and is expected to continue more than minimally beyond six months. *At that point*, we have explained, the private interests at stake are profound, and the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." (emphasis added) (internal citation and quotation omitted)); *see also* Dkt. 83 at 6. It follows, *a fortiori*, that if a six-month period of detention is presumptively reasonable, and the Bond Hearing Class's claim after *Matter of M-S-* is grounded entirely in the Constitution, that the demand for a bond hearing within seven days of a hearing request—which is currently one of the components of the Order, *see* Dkt. 110 at 19—must be reevaluated.

From a procedural perspective, meanwhile, the Bond Hearing Class cannot change its claim on the fly in response to *Matter of M-S-*. It is undisputed that as currently pled, the claim depends upon a regulatory entitlement to a bond hearing. *See* Dkt. 26, ¶ 5. If the Bond Hearing Class now takes the position that the failure of 8 U.S.C. § 1225 to permit bond hearings renders the statute unconstitutional, the Class members must amend their Complaint accordingly, which is currently devoid of any mention of such a claim. Pursuant to Federal Rule of Civil Procedure 15(a)(2), the Bond Hearing Class would need to seek and obtain leave to amend the Complaint, and revise the claim that they believe merits injunctive relief after *Matter of M-S-*. *See, e.g.*, *Williams v. Prudential Ins. Co.*, No. C 08-04170, 2010 WL 431968, at *3 (N.D. Cal. Feb. 2, 2010) (noting that a "sufficient change in circumstances … justif[ied] amendment [of the Complaint] at this time"). Such an amendment would also require a new class certification process. The class certified here is defined directly with regard to an entitlement to a bond hearing that does not exist after *Jennings* and *Matter of M-S-*. Only after amending the Complaint and identifying new class

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

representatives as needed could the Bond Hearing Class even move for an injunction. The Bond Hearing Class cannot, however, simply end-run that procedure based on a desire to preserve the status quo.

In addition, the Complaint not only needs to be amended based on the nature of the claim the Bond Hearing Class seeks to obtain relief on, but also to include proper plaintiffs to bring that claim. It is unclear, at best, which of the current plaintiffs could bring a claim that 8 U.S.C. § 1225 is unconstitutional because it *does not provide for a bond hearing* at all. Prior to the issuance of *Matter of M-S-*, the named plaintiffs were subjected to an entirely different system of obtaining release that no longer has any vitality. Going forward, any constitutional claim should not be focused on the speed of obtaining a bond hearing, but rather on the only "circumstance[] under which aliens detained under § 1225(b) may be released": parole. *Jennings*, 138 S. Ct. at 844. And this Court would also need to address overlap between this case and *Jennings*; in particular, a nationwide class could not properly continue to be certified because it would likely include, at a minimum, *Jennings* class members. *See id.* at 860 (Breyer, J., dissenting) ("[A]ll members of the first group, the asylum seekers, have been found (by an immigration official) to have a 'credible fear of persecution' in their home country should the United States deny them admittance." (emphasis omitted)).

In sum, because *Matter of M-S-* drastically alters the legal basis upon which this Court granted injunctive relief since *Matter of X-K-* has been "vacated," Dkt. 45 at 4 n.2, this Court should revisit and vacate the Order.

B. Vacatur Is Also Necessary to Account for Jurisdictional Limitations Delineated in 8 U.S.C. § 1252.

A second and independent reason to vacate the Order is that in view of *Matter of M-S-*, this Court must account for two potential bars on injunctive relief outlined in 8 U.S.C. § 1252: 8 U.S.C. § 1252(f)(1) and 8 U.S.C. § 1252(e)(3).

In pertinent part, 8 U.S.C. § 1252(f)(1) provides that "no court … shall have jurisdiction or authority to enjoin or restrain the operation of the provisions" of the INA "other than with respect to the application of such provisions to an individual alien against whom proceedings under

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

such part have been initiated." Though unaddressed in the Order, this Court, in adjudicating defendants' motion to dismiss, found that 8 U.S.C. § 1252(f)(1) did not pose an obstacle to the Bond Hearing Class obtaining injunctive relief because "Plaintiffs are not asking the Court to enjoin or restrain the operation of the provisions of any statute, but instead seek an injunction against actions and policies that violate those statutes." Dkt. 91 at 19 (emphasis and internal quotation omitted). Since *Matter of M-S-* has obviated the alleged statutory violation, though, any claim the Bond Hearing Class seeks to nonetheless bring based on the Due Process Clause fits squarely within the ambit of 8 U.S.C. § 1252(f)(1) under this Court's application of it. The Supreme Court recognized this very point in *Jennings* when it overruled the ruling below that a statutory violation occurred: "[T]he Court of Appeals should first decide whether it continues to have jurisdiction despite 8 U.S.C. § 1252(f)(1) …. The Court of Appeals held that this provision did not affect its jurisdiction over respondents' *statutory* claims because those claims did not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct … not authorized by the statutes. This reasoning does not seem to apply to an order granting relief on constitutional grounds." *Jennings*, 138 S. Ct. at 851 (emphasis in original) (internal quotation omitted). This Court must likewise examine whether § 1252(f)(1) imposes a jurisdictional barrier to granting injunctive relief given the holding in *Matter of M-S-* and its impact on any claims the Bond Hearing Class could bring.

The same is true of § 1252(e)(3), entitled "Challenges on Validity of the System." That proviso provides that "[j]udicial review of determinations under section 1225(b) … and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—whether such section, or any regulation issued to implement such section, is constitutional." 8 U.S.C. § 1252(e)(3)(A)(i). To the extent the Bond Hearing Class attempts to assert it can challenge the validity of the changes in detention rules that result from *Matter of M-S-*, such a challenge must be brought only in the District Court for the District of Columbia. *See Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 427 (3d Cir. 2016) ("Section 1252(e) … provides jurisdiction to the District Court for the District of Columbia to review …. challenges to the constitutionality of any provision of the

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

expedited removal statute."); *Shunaula v. Holder*, 732 F.3d 143, 146-47 (2d Cir. 2013) ("§ 1252(e)(3) provides for review of constitutional challenges to the validity of the expedited removal system …. such a [systemic] challenge can be brought only in the United States District Court for the District of Columbia."). And not only would venue for any systemic challenge to the constitutionality of 8 U.S.C. § 1225 be proper only in the District Court for the District of Columbia, but such a claim could also not be brought as a class action. Section 1252(e)(1)(B) proscribes "certify[ing] a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection."

Because neither § 1252(f)(1) nor § 1252(e)(3) is currently addressed in the Order, and because *Matter of M-S-* renders both provisions germane in assessing any constitutional claim brought by the Bond Hearing Class, this is yet another reason to vacate the Order.

II. *Matter of M-S-* is a Correct Application of Unambiguous Law and, In Any Event, is Entitled to Deference.

Any effort by plaintiffs to turn this motion into litigation over the validity of *Matter of M-S-* should be rejected. Plaintiffs pled their claim based on the background rule set by *Matter of X-K-* and this Court's injunction likewise rested on the existing administrative ruling that permitted bond hearings but did not address timing for them. A new complaint, claim, and plaintiffs would be needed to assert that statutory or constitutional law required a bond hearing in these circumstances.

In any event, *Matter of M-S-* is a correct interpretation of a clear statutory provision making detention mandatory in these circumstances, and follows necessarily from the Supreme Court's *Jennings* decision. And that interpretation was made by the official—the Attorney General—who Congress expressly charged with making such legal interpretations. *See* 8 U.S.C. § 1103(a)(1). Accordingly, *Matter of M-S-* is correct and, moreover, is entitled to deference.

Matter of M-S- reflects a straightforward interpretation of a clear statutory provision that precludes bond hearings and which is not susceptible to any other reading given the holding in *Jennings*. In particular, 8 U.S.C. § 1225(b)(1)(B)(ii) provides that aliens who establish a credible fear "shall be detained for further consideration of the application for asylum," and the only way to construe that language is as the Supreme Court did in *Jennings*: mandating detention "for the

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 598-8060

purpose of ensuring additional review of an asylum claim" for "so long as that review is ongoing." *Matter of M-S-*, 27 I&N Dec. at 516. In other words, "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded …. Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings." *Jennings*, 138 S. Ct. at 842. Instead, the exclusive exception to mandatory detention is parole for urgent humanitarian reasons or significant public benefit. *See Matter of M-S-*, 27 I&N Dec. at 517; *see also Jennings*, 138 S. Ct. at 844 ("That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released." (emphasis in original)). It is little wonder, then, that the Attorney General correctly concluded that in *Jennings*, the "Supreme Court recently interpreted the Act in the exact same way." *Matter of M-S-*, 27 I&N Dec. at 517.

Nor is the conclusion in *Matter of M-S-* disturbed by 8 U.S.C. § 1226(a), which states that the Attorney General "may release the alien on—bond." 8 U.S.C. § 1226(a)(2)(A). The optional language in 8 U.S.C. § 1226(a) does not override the mandatory detention that 8 U.S.C. § 1225 provides; instead 8 U.S.C. § 1225 "under which detention is mandatory" and 8 U.S.C. § 1226(a) "under which detention is permissive" "can be reconciled only if they apply to different classes of aliens." *Matter of M-S-*, 27 I&N Dec. at 516. That is why Section 1225 speaks in terms of those populations that "shall be detained." 8 U.S.C. § 1225(b)(1)(B)(ii). Further, 8 U.S.C. § 1226 "authorizes detention only [o]n a warrant issued by the Attorney General leading to the alien's arrest." *Jennings*, 138 S. Ct. at 845 (internal quotation omitted). But in the case of arriving aliens, no arrest warrant is issued. *See id.* Accordingly, if the permissive language in 8 U.S.C. § 1226(a) was interpreted as governing the detention requirements of 8 U.S.C. § 1225, the anomalous result that would ensue is that "the Government could detain an alien without a warrant at the border, but once removal proceedings began, the Attorney General would have to issue an arrest warrant in order to continue detaining the alien. To put it lightly, that makes little sense." *Jennings*, 138 S. Ct. at 845; *Matter of M-S-*, 27 I&N Dec. at 515-16 ("The result would be that, if an alien were

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
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placed in expedited proceedings, DHS could detain him without a warrant, but, if the alien were then transferred to full proceedings, DHS would need to issue an arrest warrant to continue detention. That simply cannot be what the Act requires.").

Finally, the Attorney General rightly concluded that his interpretation was consistent with all applicable implementing regulations. 8 C.F.R. § 208.30(f) provides that for those aliens who are found to have a credible fear of persecution or torture, they are transferred to full removal proceedings and parole may be considered "only in accordance with" 8 U.S.C. § 1182(d)(5). The regulation, in other words, is fully consistent with both *Jennings* and *Matter of M-S-* in that it: (1) identifies parole as the only set of circumstances under which detained aliens may be released; and (2) "makes no mention of bond." *Matter of M-S-*, 27 I&N Dec. at 518. Likewise, the fact that 8 C.F.R. § 1003.19 makes certain categories of aliens ineligible for bond does not mean that those categories that are omitted are automatically entitled to a bond hearing; the regulation "does not provide an exhaustive catalogue of the classes of aliens who are ineligible for bond." *Matter of M-S-*, 27 I&N Dec. at 518.

The plain statutory text of 8 U.S.C. § 1225 and *Jennings* both forcefully support the decision in *Matter of M-S-*. And an additional reason this Court must adhere to *Matter of M-S-* is that the decision commands substantial deference. The Attorney General possesses statutory authority to review "administrative determinations in immigration proceedings," 8 U.S.C. § 1103(g)(2). Any resulting decisions "with respect to all questions of law shall be controlling," 8 U.S.C. § 1103(a)(1). Accordingly, courts must "afford the Attorney General's interpretation deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007); *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that … the determination and ruling by the Attorney General with respect to all questions of law shall be controlling." (internal quotation omitted)). *Chevron* countenances a two-step inquiry: first, assessing "whether the statute is silent or ambiguous," and, if it is, whether the "Attorney General's interpretation is based on a permissible construction of the statute." *Miguel-Miguel*, 500 F.3d at 947-48 (internal quotation omitted).

Department of Justice, Civil Division
P.O. Box 868 Ben Franklin Station
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As an initial matter, the statute is not "silent or ambiguous" here, *id*. Instead, it states clearly that detention "of aliens throughout the completion of applicable proceedings" is required and no bond hearing is available. *Jennings*, 138 S. Ct. at 845. No aspect of the statutory text in 8 U.S.C. § 1225 even mentions bond, and the principles of interpretation in *Matter of M-S-* therefore dovetail with both the analysis and result reached in *Jennings*. *See Matter of M-S-*, 27 I&N Dec. at 517. But even assuming, *arguendo*, that the statute was ambiguous—which it is not—applying the requisite level of deference, *Matter of M-S-* and its interpretation of 8 U.S.C. § 1225 is decisive. *See Miguel-Miguel*, 500 F.3d at 948-49 ("[T]he statute's text does not plainly foreclose the Attorney General's [interpretation] …. Under *Chevron*, we therefore defer to that construction."); *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1065 (9th Cir. 2005) ("If we owe *Chevron* deference to the … interpretation of [the statute], then our own prior, contrary interpretation of the statute can trump the agency's construction *only* if our decision held that its 'construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'" (emphasis in original) (quoting *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)); *see also Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019).[6]

Thus, if this Court were to reach the validity of *Matter of M-S*, the reasoning espoused in *Matter of M-S-*, relying heavily on *Jennings*, mandate abiding by the decision reached by the Attorney General.

CONCLUSION

For the foregoing reasons, this Court should vacate its previous Order granting plaintiffs' motion for a preliminary injunction.

[6] In the preliminary injunction motion, the Bond Hearing Class makes the unsubstantiated assertion that "this Court need not defer to any such vacatur" of *Matter of X-K-*. Dkt. 45 at 4 n.2. That assertion simply cannot be squared with the *Chevron* deference that is clearly applicable and must be accorded to *Matter of M-S-*.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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