



PRACTICE ADVISORY
BOND HEARINGS AND ABILITY-TO-PAY DETERMINATIONS IN THE NINTH
CIRCUIT UNDER [HERNANDEZ V. SESSIONS](#)
October 2017

This practice advisory discusses the Ninth Circuit’s decision in [Hernandez v. Sessions](#), --- F.3d ---, 2017 WL 4341748 (9th Cir. 2017). *Hernandez* requires that, when determining the conditions of release for an individual detained pursuant to 8 U.S.C. § 1226(a), U.S. Immigration and Customs Enforcement (“ICE”) officers and immigration judges (“IJ”) must consider the person’s (1) financial ability to post bond and (2) suitability for release on non-monetary alternative conditions of supervision. As the Court explained, these basic procedures are necessary to ensure that “no person [is] imprisoned merely on account of his poverty,” in violation of his or her due process rights.¹

Hernandez is the first court of appeals decision to impose these due process requirements in the immigration context. It applies to all custody determinations and bond hearings held in the Ninth Circuit pursuant to Section 1226(a).² Moreover, although *Hernandez* is not binding outside the Ninth Circuit, it can serve as persuasive authority in other parts of the country.

This advisory discusses the holding in *Hernandez* and provides information on how to use *Hernandez* at an IJ bond hearing. This advisory will be updated as needed. Should you have questions or require technical assistance, please email Michael Tan, ACLU Immigrants’ Rights Project, mtan@aclu.org.

Background

Hernandez is a class action lawsuit filed in April 2016 in the Central District of California to challenge the government’s failure to consider an individual’s financial ability to post bond and suitability for alternative, non-monetary conditions of supervision when determining his or her conditions of release under Section 1226(a). Plaintiffs argue that the government’s failure to provide these basic procedural safeguards—which are routinely applied in the criminal pretrial justice context—results in the unconstitutional detention of individuals based solely on their lack of financial resources.³

¹ *Hernandez*, 2017 WL 4341748 at *1 (citing *Bearden v. Georgia*, 461 U.S. 660, 671 (1983)).

² *Hernandez* specifically affirmed a class-wide preliminary injunction imposing these requirements for custody determinations conducted in the Central District of California. However, because the panel decision is law of the circuit, *see Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 n.5 (9th Cir. 2015), *Hernandez* applies to *all* custody determinations pursuant to Section 1226(a) in the Ninth Circuit.

³ Plaintiffs also challenge the government’s (1) requirement that Section 1226(a) detainees post a full cash bond to obtain release, instead of providing them an alternative forms of bond, such as a deposit or property or collateral bond; and (2) its refusal to recognize a good faith, but unsuccessful, effort to post a money bond as a “changed

Section 1226(a) gives the Attorney General general, discretionary authority to detain a noncitizen “pending a decision on whether the alien is to be removed from the United States.”⁴ Section 1226(a) also authorizes the Attorney General, in his discretion, to release a noncitizen “on bond of at least \$1,500” or “conditional parole.”⁵ When a noncitizen is detained pursuant to Section 1226(a), ICE makes an initial custody determination.⁶ If the noncitizen objects to ICE’s custody determination, he or she may request a custody redetermination hearing before an IJ at any time before the issuance of a final order of removal.⁷

At both the initial custody determination and custody redetermination hearing, the burden is on the noncitizen to “establish to the satisfaction of” the ICE officer or the IJ “that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”⁸ If the DHS officer or IJ determines that the noncitizen does not pose a danger and is likely to appear at future proceedings, then he or she may release the noncitizen on bond or other conditions of release.⁹ Prior to the *Hernandez* preliminary injunction, there was no requirement that ICE or the IJ consider an individual’s financial circumstances or suitability for release on alternative, non-monetary conditions of supervision when determining the terms of his or her release.

In November 2016, the district court held that the government’s policy or practice of making custody decisions without considering ability to pay and non-monetary conditions of release likely violated the Fifth Amendment Due Process Clause and equal protection guarantee; the Eighth Amendment’s Excessive Bail Clause; and the Immigration and Nationality Act.¹⁰ The Court certified a plaintiff class of individuals who are or will be detained under Section 1226(a) in the Central District of California and granted a [classwide preliminary injunction](#). The government appealed the preliminary injunction to the Ninth Circuit.¹¹

What did the Ninth Circuit hold in *Hernandez v. Sessions*?

On October 2, 2017, the Ninth Circuit affirmed the preliminary injunction on due process grounds. Applying well-established case law, the Court reaffirmed that although “[t]he government has legitimate interests in protecting the public and in ensuring that noncitizens in

circumstance” warranting a new bond hearing. *See* 8 C.F.R. § 1003.19(e). Plaintiffs did not seek a preliminary injunction on these claims; thus, neither the district court nor the Ninth Circuit ruled on them.

⁴ 8 U.S.C. § 1226(a). The Attorney General shares his authority to detain or release noncitizens under Section 1226(a) with the Secretary of Homeland Security. *See* 8 U.S.C. § 1103(a) & (g); Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192.

⁵ 8 U.S.C. § 1226(a)(2).

⁶ 8 C.F.R. § 1236.1(d).

⁷ 8 C.F.R. §§ 1236.1(d), 1003.19(c).

⁸ *In re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006); 8 C.F.R. § 1236.1(c)(8). However, the government bears the burden of proving the individual is a flight risk or danger by clear and convincing evidence at a *prolonged* detention hearing. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1087 (9th Cir. 2015); *Franco-Gonzalez v. Holder*, CV-10-02211, 2013 WL 3674492 at *13 (C.D. Cal. Apr. 23, 2013); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008).

⁹ 8 C.F.R. §§ 1236.1(d), 1003.19.

¹⁰ *See Hernandez v. Lynch*, EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *21-28 (C.D. Cal. Nov. 10, 2016).

¹¹ *Hernandez*, 2017 WL 4341748 at *7.

removal proceedings appear for hearings, . . . any detention incidental to removal must ‘bear[] [a] reasonable relation to [its] purpose.’”¹² “Detention of an indigent ‘for inability to post money bail’ is impermissible if the individual’s ‘appearance at trial could reasonably be assured by one of the alternate forms of release.’”¹³ As the Ninth Circuit explained:

Given that the detainees have been determined to be neither dangerous nor so great a flight risk as to require detention without bond, the question before us is: Is consideration of the detainees’ financial circumstances, as well as of possible alternative release conditions, necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings? We conclude that the answer is yes.

A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government’s legitimate interests. Since the government’s purpose in conditioning release on the posting of a bond in a certain amount is to “provide enough incentive” for released detainees to appear in the future, we cannot understand why it would ever refuse to consider financial circumstances: the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person’s appearance. Nor can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen’s presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government’s current policies fail to provide “adequate procedural protections” to ensure that detention of the class members is reasonably related to a legitimate governmental interest.¹⁴

The Court concluded that by “maintaining a process for establishing the amount of a bond that . . . fails to consider the individual’s financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release, the government risks detention that accomplishes ‘little more than punishing a person for his poverty.’”¹⁵

What does the *Hernandez* preliminary injunction require?

The Ninth Circuit’s ruling affirms a [preliminary injunction](#) order that imposes three requirements on ICE and the IJ when they determine the conditions of release under Section 1226(a). ICE and the IJ must:

¹² *Id.* at *10 (quoting *Zadvydas*, 533 U.S. at 690).

¹³ *Id.* (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)).

¹⁴ *Id.* at *10-11.

¹⁵ *Id.* at *11 (quoting *Bearden*, 461 U.S. at 669).

- (1) consider the person’s financial ability to pay a bond;
- (2) not set bond at a greater amount than that needed to ensure the person’s appearance; and
- (3) consider whether the person may be released on alternative conditions of supervision, along or in combination with a lower bond amount, that are sufficient to mitigate flight risk.¹⁶

What types of cases does *Hernandez* apply to?

Hernandez applies to all ICE custody determinations and IJ bond hearings conducted pursuant to Section 1226(a). Thus, *Hernandez* applies both at initial IJ bond hearings as well as all other bond hearings held in the Ninth Circuit pursuant to Section 1226(a). These include:

- Bond hearings held after six months of detention pursuant to *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) and *Franco-Gonzalez v. Holder*, CV-10-02211 (C.D. Cal. Apr. 23, 2013), and
- Bond hearings held pursuant to *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), for detainees whose removal is stayed pending a petition for review (“PFR”) of a removal order or on remand from a PFR.

Moreover, although the opinion does not address the issue, *Hernandez* should likewise apply to:

- Bond hearings held pursuant to *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), for individuals detained for six months or longer under 8 U.S.C. § 1231.

The same procedures should apply at *prolonged* detention hearings, which the Ninth Circuit has recognized require even more rigorous procedural protections than initial bond hearings to justify the more severe deprivation of individual liberty.¹⁷

What are the next steps for implementing *Hernandez*?

The parties are negotiating implementation of the preliminary injunction order affirmed in *Hernandez* for class members detained in the Central District of California—that is, detainees held under Section 1226(a) at the Adelanto Detention Center, Santa Ana City Jail, James A. Musick Facility, or Theo Lacy Facility. The preliminary injunction order specifically directs the parties to meet and confer to develop guidelines and instructions to ICE officers and IJs in the Central District. It also requires that the government provide new bond hearings for individuals

¹⁶ [*Hernandez v. Lynch*](#), No. 5:16-cv-00620-JGB-KK (C.D. Cal. Nov. 10, 2016) (order granting class-wide preliminary injunction) (ECF 85).

¹⁷ See *Hernandez*, 2017 WL 4341748 at *3 n.8 (describing hearing procedures as “lesser constitutional procedural protections” than the procedures required at prolonged detention hearings).

who are currently detained in the Central District under Section 1226(a) that adhere to the preliminary injunction's requirements.

It is presently unclear whether the government will agree to extend same procedures to implement the preliminary injunction in the Central District to the rest of the Ninth Circuit. However, given that the Ninth Circuit affirmed a preliminary injunction that granted new bond hearings consistent with its opinion to individuals detained on a bond they were unable to post, similarly situated individuals outside the Central District likewise should be entitled to a new bond hearing where the IJ must consider their financial ability to pay and release on alternative conditions of supervision.

What should I do to obtain a bond hearing consistent with *Hernandez*?

Until the government has clarified how it plans to implement *Hernandez*, Section 1226(a) detainees held in Ninth Circuit should ask the IJ to consider their financial ability to pay and suitability for alternative conditions of supervision at their bond hearings, consistent with the Ninth Circuit's decision. Moreover, detainees who had a bond set by the IJ that they could not afford prior to the Ninth Circuit's ruling should request a new bond hearing that adheres to *Hernandez*'s requirements. Sample motions for pro se detainees are attached to this advisory.

How do I establish my or my client's financial inability to pay a bond or suitability for alternative conditions of release at a bond hearing?

Hernandez requires that the IJ *affirmatively* inquire into an individual's financial ability to post bond and suitability for release on alternative conditions. The Ninth Circuit's decision does not specify what factors are relevant to the ability to pay determination. Those factors may include, among other things, an individual's income; the income of his or her spouse or partner; assets, including personal or real property; and expenses, debts, or other circumstances that would impair ability to pay.

Moreover, the IJ may consider a range of evidence on financial ability to pay.¹⁸ Sworn testimony alone should be sufficient to establish financial ability to pay. However, the individual may also wish to corroborate sworn testimony with documentary evidence, such as evidence of wages, salary, or other earnings, including pay stubs, bank records, tax returns or similar documents; evidence of mortgage/rental payments; or evidence of debts such as medical expenses and child-support/care expenses.¹⁹

The detainee can also request release on suitable non-monetary alternatives. The Ninth Circuit recognized "the empirically demonstrated effectiveness of such conditions at meeting the government's interest in ensuring future appearances."²⁰ For detainees whom ICE or an IJ have concluded do not pose a danger and can be released, such alternatives may be sufficient to

¹⁸ See *In re Guerra*, 24 I&N Dec. at 40 ("Any evidence in the record that is probative and specific can be considered.").

¹⁹ By regulation, the bond proceeding "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d). However, practitioners should be sensitive to the potential impacts of evidence submitted in the bond proceeding on the individual's removal case.

²⁰ *Hernandez*, 2017 WL 4341748 at *11.

address any risk of flight. Detainees may wish to present evidence concerning their ties in the community or other evidence that may bear on the appropriate non-monetary conditions of release in their case.

PRO SE IMMIGRATION COURT MOTIONS

Attached are two sample immigration court motions for detainees who do not have a lawyer and who wish to seek a custody redetermination hearing consistent with the requirements of *Hernandez v. Sessions*. --- F.3d ----, 2017 WL 4341748 (9th Cir. 2017). Each motion requests a bond hearing where the Immigration Judge must consider your financial ability to post bond and your suitability for alternative, non-monetary conditions of release.

- **Use Motion #1 if you have not yet had a bond hearing.**
- **Use Motion #2 if you had a bond set at a bond hearing held prior to October 2, 2017, but have not been able to post it. This motion requests a new bond hearing consistent with the requirements of *Hernandez*.**

For general advice on how to prepare for your custody redetermination hearing, please see the following guides from the Florence Project:

- **Getting a Bond: Your Keys to Release from Detention, <http://firrp.org/media/Bond-Guide-2013.pdf>**
- **Conseguir una fianza: las claves para que lo pongan en libertad, <http://firrp.org/media/Bond-Guide-2013-SPA.pdf>**

SAMPLE MOTION #1

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT**

(write court address here)

In the Matter of _____) A _____
(print your name here)) *(write your A number here)*
Respondent.) IN REMOVAL PROCEEDINGS
_____) DETAINED
_____).

MOTION REQUESTING HEARING FOR CUSTODY REDETERMINATION

I am the Respondent and I am pro se. I respectfully request that the Court grant me release on recognizance under INA § 236(a)(2)(B).

- *(If you cannot afford to post bond):* Because I have no ability to pay even the minimum \$1,500 monetary bond, I am requesting a bond on release on recognizance under Section 236(a)(2)(B).
- *(If you can afford to post a minimum \$1,500 bond):* I respectfully request that the Court release me under conditional parole as provided by INA § 236(a)(2)(B) or, in the alternative, grant me a minimum bond of \$1,500 as provided under INA § 236(a)(2)(A).

Section 236(a) of the Act provides for release upon the posting of a monetary bond or release on “conditional parole” as an alternative to monetary bond. The statute provides:

Except as provided in subsection (c) of this section and pending [a decision on whether the alien is to be removed from the United States], the Attorney General—

- (1) may continue to detain the arrested alien; and
- (2) 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

INA § 236(a); *see also* 8 C.F.R. § 1236.1(d)(1). “[INA § 236(a)(2)(B)] unambiguously states that an [Immigration Judge] may consider conditions for release beyond a monetary bond.” *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015); *see also Rodriguez v. Robbins*, 804 F.3d 1060, 1088 (9th Cir. 2015) (recognizing that Immigration Judges are “empowered to . . . impos[e] a less restrictive means of supervision than detention” that are distinct from release on bond).

The Ninth Circuit has held that consideration of a detainee’s financial ability to post bond and suitability for release on non-monetary conditions is *required* under the Fifth Amendment’s Due Process Clause. *See Hernandez v. Sessions*, --- F.3d ----, 2017 WL 4341748 (9th Cir. 2017). As the Court explained, “[d]etention of an indigent ‘for inability to post money bail’ is impermissible if the individual’s ‘appearance at trial could reasonably be assured by one of the alternate forms of release.’” *Id.* at *10 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). As a result, due process requires the “consideration of the detainees’ financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings.” *Id.* By contrast, the failure “to consider the individual’s financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release . . . risks detention that accomplishes ‘little more than punishing a person for his poverty.’” *Id.* at *11 (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 (1983)).

I am not a flight risk or danger. *See In re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). I have a stable location to live and support to ensure I will attend all future court hearings. My record also shows that I would not pose a danger to property or persons.

- *(If you cannot afford to post bond):* I am eligible for release on recognizance. Moreover, because I do not have sufficient resources or assets, I am unable to pay the minimum bond. Therefore, I am requesting release on conditional parole under INA § 236(a)(2)(B).
- *(If you can afford to post a minimum \$1,500 bond):* I may be safely released on my own recognizance, without a monetary bond. However, given my limited financial resources, should this Court deem a bond necessary, a minimum \$1,500 bond is sufficient to ensure my appearance in court.

I submit the following documents in support of my custody redetermination:

No.	Document
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	

I have the following family members with lawful immigration status in the United States:

Name	Relationship	Status

I have lived in the United States for _____ years. If I am released, I will reside at the following address:

Respectfully submitted on: _____
Date

Signature
Respondent, *pro se*

I _____, certify that I mailed a copy of this document to:
(*print your name here*)

Office of the Chief Counsel
Immigration and Customs Enforcement

Signature

Date

SAMPLE MOTION #2

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT**

(write court address here)

In the Matter of _____) A _____
(print your name here)) (write your A number here)
Respondent.) IN REMOVAL PROCEEDINGS
) DETAINED
_____).

**MOTION REQUESTING HEARING FOR NEW CUSTODY REDETERMINATION
UNDER *HERNANDEZ V. SESSIONS***

I am the Respondent and I am pro se. I respectfully request that the Court provide me a new custody redetermination hearing because—in light of the Ninth Circuit’s decision in *Hernandez v. Sessions*, --- F.3d ----, 2017 WL 4341748 (9th Cir. 2017)—circumstances have changed materially since my prior bond hearing. *See* 8 C.F.R. § 1003.19(e).

- *(If you cannot afford to post bond)*: I also ask that the Court grant me release on recognizance under INA § 236(a)(2)(B) because I have no ability to pay a monetary bond.
- *(If you can afford to post a minimum \$1,500 bond)*: I also ask that the Court release me under conditional parole as provided by INA § 236(a)(2)(B) or, in the alternative, grant me a minimum bond of \$1,500 as provided under INA § 236(a)(2)(A).

On _____ (*date*), this Court held a custody redetermination hearing and granted me release on _____ (*amount*) bond. However, because I lack the adequate financial means, I

have been unable to post the bond and remain in detention. Moreover, at that hearing, the Court did not consider either my financial ability to post bond or my suitability for release on alternative, non-monetary conditions of supervision.

On October 2, 2017, the Ninth Circuit held that consideration of a detainee's financial ability to post bond and suitability for release on non-monetary conditions is *required* under the Fifth Amendment's Due Process Clause. As the Court explained, "[d]etention of an indigent 'for inability to post money bail' is impermissible if the individual's 'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Hernandez*, 2017 WL 4341748 at *10. (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). As a result, due process requires "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings." *Id.* By contrast, the failure "to consider the individual's financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release . . . risks detention that accomplishes 'little more than punishing a person for his poverty.'" *Id.* at *11 (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 (1983)). Moreover, the Ninth Circuit specifically upheld an injunction requiring new bond hearings for individuals who were currently detained on a bond that they were not able to post. *See id.* at *7, 17.

The Ninth Circuit's ruling is a material change in circumstances that warrants a new custody redetermination hearing where this Court must consider my financial ability to post bond and my eligibility for release on alternative conditions of supervision, including release on my own recognizance. *See* 8 C.F.R. § 1003.19(e); *see also, e.g., In re Garcia-Guzman*, 2009 WL

2218139, at *1 (BIA July 15, 2009) (remanding for bond hearing in light of Ninth Circuit's intervening ruling in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008)).

I am not a flight risk or danger. *See In re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). I have a stable location to live and support to ensure I will attend all future court hearings. My record also shows that I would not pose a danger to property or persons.

- (*If you cannot afford to post bond*): I am eligible for release on my own recognizance.

Moreover, because I have no resources or assets in the United States, I am unable to pay the minimum bond. Therefore, I am requesting release on my own recognizance under INA § 236(a)(2)(B).

- (*If you can afford to post a minimum \$1,500 bond*): I may be safely released on my own recognizance, without a monetary bond. However, given my limited financial resources, should this Court deem a bond necessary, a minimum \$1,500 bond is sufficient to ensure my appearance in court.

I submit the following documents in support of custody redetermination:

No.	Document
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	

9.	
10.	

I have these family members with lawful immigration status in the United States:

Name	Relationship	Status

I have lived in the United States for _____ years. If I am released, I will reside at the following address:

Respectfully submitted on: _____

Date

Signature
Respondent, *pro se*

I _____, certify that I mailed a copy of this document to:
(*print your name here*)

Office of the Chief Counsel
Immigration and Customs Enforcement

Signature

Date