UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Jorge Miguel PALACIOS; Jesus Eduardo CARDENAS LOZOYA,

Plaintiffs-Petitioners,

v.

Jefferson B. SESSIONS, Attorney General, Department of Justice; James McHENRY, Acting Director, Executive Office for Immigration Review, Department of Justice; MaryBeth KELLER, Chief Immigration Judge; Deepali NADKARNI, Assistant Chief Immigration Judge; V. Stuart COUCH, Immigration Judge, Charlotte, NC; Barry J. PETTINATO, Immigration Judge, Charlotte, NC; Theresa HOLMES-SIMMONS, Immigration Judge, Charlotte, NC; Sean W. GALLAGHER, Atlanta Field Office Director, U.S. Immigration and Customs Enforcement; Major T.E. WHITE, Facility Commander, Mecklenburg County Jail Central; Charlie PETERSON, Warden, Stewart Detention Center, in their official capacities,

Defendants-Respondents.

No. 3:18-cv-0026-RJC-DSC

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

I. INTRODUCTION

Plaintiffs challenge the policy and/or practice of three of the four immigration judges (IJs) at the Charlotte Immigration Court, Defendants Couch, Pettinato, and Holmes-Simmons (collectively, the IJ Defendants), of refusing to conduct bond hearings to determine whether individuals may be released from immigration custody (hereinafter, the No Bond Hearing Policy). This policy, which Defendants Sessions, McHenry, Keller, and Nadkarni (collectively, the DOJ Defendants) have allowed to continue by failing to take corrective action, violates the constitutional, statutory and regulatory rights of Plaintiffs and proposed class members to a prompt bond hearing. Plaintiffs challenge only the lawfulness of the No Bond Hearing Policy, not the discretion of any IJ—including the IJ Defendants—to determine during a bond hearing whether to grant or deny release after consideration of the appropriate factors.

On June 26, 2018, Magistrate Judge David S. Cayer issued a Memorandum and Recommendation and Order (M & R), addressing two pending motions to dismiss. *See* Dkt. 26 (recommending granting the Federal Defendants' Motion to Dismiss, Dkt. 21, and recommending denying as moot Defendant White's Motion to Dismiss, Dkt. 13). The Magistrate Judge correctly applied the relation back doctrine to find that Plaintiffs have standing to raise their claims notwithstanding their subsequent release from immigration detention. Dkt. 26 at 4-6. Nevertheless, the remainder of the Magistrate Judge's M & R is erroneous and should be rejected by the Court on de novo review.

First, the M & R mischaracterizes the No Bond Hearing Policy challenged in this case as discretionary and as a series of individual change of venue decisions. *See infra* Section IV.A. In fact, by regulation, venue over Plaintiffs' lay in the Charlotte Immigration Court, and, as Plaintiffs have shown, IJ Defendants have available legal tools and technology that could easily

facilitate the expeditious adjudication of bond requests by Plaintiffs and proposed class members. Second, in recommending dismissing this action based on the application of 8 U.S.C. § 1226(e), the M & R failed to consider and thus did not find that that the No Bond Hearing Policy does not fall under the plain language of that provision and that § 1226(e) does not bar review of the legal and constitutional claims presented here. *See infra* Section IV.B.1. Third, the M & R's recommendation of dismissal based on 8 U.S.C. § 1252(a)(2)(B)(ii) is similarly flawed because the clear weight of authority holds that this provision does not bar challenges to compliance with the law, which is exactly what Plaintiffs seek. *See infra* Section IV.B.2. Fourth, the M & R erroneously recommends denying Defendant White's Motion to Dismiss, Dkt. 13, as moot. *See infra* Section IV.C. But for the Magistrate Judge's mischaracterization of Plaintiffs' claims and erroneous construction and application of 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii), he would have recommended denying the Federal Defendants' motion to dismiss and would have adjudicated Defendant White's motion. As further explained below, this Court should reject the recommendations, find jurisdiction over this action, and adjudicate Defendant White's motion.

II. BACKGROUND

A. Defendants Have an Unlawful No Bond Hearing Policy

1. The No Bond Hearing Policy

Following the Charlotte Immigration Court's creation in 2008, IJs conducted bond hearings when individuals detained in North Carolina or South Carolina filed bond motions with that court. In represented cases, the IJs would conduct hearings and make individualized determinations whether to order release on bond or other conditions. They would do so without the individual seeking release present, if he or she agreed to waive presence, without inquiry into

where the individual was located at the time of the hearing. *See* Dkt. 1 ¶¶7, 49; *see also* Dkts. 2-9 ¶2; 2-11 ¶2; 2-12 ¶3; 2-16 ¶5; 2-17 ¶3; 2-19 ¶4; 2-20 ¶2; 2-21 ¶3; 2-26 ¶3.

Subsequently, IJ Defendants instituted a No Bond Hearing Policy. They now refuse to conduct bond hearings or adjudicate bond motions, often without any explanation, though the motions have been properly filed with the Charlotte Immigration Court. Dkt. 1 ¶¶4, 50, 53-59; Dkts. 2-5 – 2-7; *see generally* Dkts. 2-8 – 2-26. Specifically, Defendants Pettinato and Couch refuse to adjudicate *any* bond motions or conduct *any* bond hearings. Dkt. 1 ¶¶54-55.[1] Instead, they issue orders imprinted with a stamp that reads: "The Court declines to exercise its authority. 8 C.F.R. Sec. 1003.19(c)." *See* Dkt. 1 ¶54; Dkts. 2-5 – 2-6.[2] Since the filing of this lawsuit, Defendants allegedly have replaced the use of the stamp with pro forma "denial orders." *See* Dkt. 21-1 at 13 n.1; Dkt. 21-3. Even if evidence of this alleged change were admissible, this new iteration of Defendants' policy is simply a continuation of their unlawful practice of refusing to conduct bond hearings, using boilerplate orders rather than stamped decisions. *See generally* Dkt. 23 at 14-16; Dkts. 24-2, 24-3 (examples of boilerplate orders issued by Defendant Couch and Defendant Pettinato since the filing of this case). At most, the evidence shows a voluntary cessation of Defendant Couch's use of the stamp with no evidence that the cessation is permanent. Regardless, IJ Defendants continue to unlawfully refuse to exercise their authority over properly filed bond requests. *See* Dkt. 21-3 at 4 ("declin[ing] to hear [Plaintiff's] bond request"); *see also* Dkt. 24-2 at 3 (same); Dkt. 24-3 at 3 (same).

Defendant Holmes-Simmons similarly will refuse to make an individualized custody redetermination if a Department of Homeland Security (DHS) attorney states that DHS has

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[1] *See also* Dkts. 2-5; 2-6; 2-8 ¶6; 2-9 ¶5; 2-10 ¶9; 2-11 ¶4; 2-12 ¶5; 2-13 ¶5; 2-14 ¶6; 2-15 ¶6; 2-16 ¶¶8-9; 2-18 ¶5; 2-19 ¶9; 2-20 ¶5; 2-22 ¶3; 2-23 ¶3; 2-25 ¶¶6-7.

[2] *See also* decisions attached to Dkt. 2-8 at 6; Dkt. 2-18 at 10; Dkt. 2-22 at 3.

transferred or is in the process of transferring the person out of North or South Carolina at the time of the scheduled hearing. Dkt. 1 ¶56.[3] After indicating that she will not adjudicate the merits, she has asked attorneys to withdraw bond motions filed on behalf of their clients.[4] In so doing, Defendant Holmes-Simmons is refusing to conduct bond hearings.

The No Bond Hearing Policy is known to the DOJ Defendants, under whose supervision the IJ Defendants operate, and they have failed to take corrective action. The Executive Office for Immigration Review (EOIR) has stated that it "does not intend to issue special guidance" to address the issue. Dkt. 1 ¶¶61-64; Dkt. 2-42 at 6-7, 12-13. Defendant Nadkarni, the Assistant Chief Immigration Judge (ACIJ) with oversight over the IJ Defendants, has stated that she is aware of the issue and expressly declined to provide any guidance addressing the problem. Dkt. 1 ¶¶66-71; Dkt. 2-18 ¶¶7-16.

2. Application of the No Bond Hearing Policy to Plaintiffs

On January 17, 2018, Plaintiff Palacios, through counsel, filed a motion for a bond hearing with the Charlotte Immigration Court while he was detained at the Mecklenburg County Jail in Charlotte, North Carolina. Dkt. 1 ¶46; Dkt. 2-50. His motion included a signed waiver of appearance authorizing his attorney to represent him at a bond hearing in his absence. Dkt. 1 ¶46; Dkt. 2-51. On January 18, 2018, Plaintiffs served Defendant Couch with a copy of the Complaint. Dkt. 3-4. On January 22, 2018, Defendant Couch issued an order which neither granted nor denied Plaintiff Palacios' request for bond. Dkt. 21-3. Instead, Defendant Couch "decline[d] to hear [his] bond request" and "decline[d] to exercise [his] authority to determine

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[3] *See also* Dkts. 2-7; 2-8 ¶¶7, 13; 2-9 ¶¶6, 9; 2-10 ¶¶6-8, 10; 2-11 ¶¶4, 6-7; 2-12 ¶4; 2-13 ¶¶4-5; 2-14 ¶6; 2-15 ¶6; 2-16 ¶¶7, 12; 2-18 ¶5; 2-19 ¶¶5-6; 2-20 ¶5; 2-21 ¶4; 2-23 ¶3c; 2-24 ¶2; 2-25 ¶¶9-10.

[4] *See* Dkts. 2-8 ¶6; 2-23 ¶3c; 2-25 ¶¶9-10; *cf.* Dkts. 2-20 ¶8; 2-25 ¶4.

the custody status of [Plaintiff Palacios]." *Id*. at 4-5. At the time Plaintiffs filed this lawsuit and Defendant Couch issued the order, Plaintiff Palacios was detained in the Carolinas. Dkt. 1 ¶46; Dkt. 2-53. Subsequently, DHS transferred him to Stewart Detention Center in Lumpkin, Georgia. Dkt. 23-2. He filed a new bond request with the Lumpkin Immigration Court.

On February 15, 2018, twenty-four days after his bond hearing should have taken place in Charlotte, Immigration Judge Lisa A. De Cardona ordered Plaintiff Palacios released on bond. Dkt. 23-2 ¶5. Plaintiff Palacios appeared from the Stewart Detention Center in Georgia, his immigration counsel appeared by telephone from her office in North Carolina, and IJ De Cardona appeared by video conference from a third location. Dkt. 23-2 ¶6.

On January 4, 2018, Plaintiff Cardenas Lozoya, through counsel, filed a motion for a bond hearing with the Charlotte Immigration Court while he was detained at the Wake County Detention Center in Raleigh, North Carolina. Dkt. 1 ¶47; Dkt. 2-55. On January 5, 2018, the Court scheduled a bond hearing for January 10, 2018 before Defendant Holmes-Simmons. Dkt. 1 ¶47; Dkt. 2-58. Plaintiff Cardenas Lozoya signed a waiver of appearance authorizing his attorney to represent him at a bond hearing in his absence. Dkt. 1 ¶47; Dkt. 2-56. On January 10, 2018, Plaintiff Cardenas Lozoya's counsel appeared by telephone at the hearing. Dkt. 1 ¶47. Several of his relatives were present in the courtroom. *Id*. At the hearing, the DHS trial attorney asserted that DHS already had transferred Plaintiff Cardenas Lozoya to the Stewart Detention Center. *Id*. Thereafter, Defendant Holmes-Simmons issued a decision stating that she "decline[d] to exercise jurisdiction" over the case because Plaintiff Cardenas Lozoya was not in the Carolinas. *Id*.; Dkt. 2-57. He subsequently filed a new bond request with the Lumpkin Immigration Court. Dkt. 23-3.

On February 8, 2018, twenty-nine days after his bond hearing should have taken place in Charlotte, Immigration Judge Lisa A. De Cardona ordered Plaintiff Cardenas Lozoya released on

bond. Dkt. 23-3; Dkt. 21-2 ¶21. Plaintiff Cardenas Lozoya appeared from the Stewart Detention Center in Georgia, his immigration counsel appeared by telephone from her office in North Carolina, and IJ De Cardona appeared by video conference from a third location. Dkt. 23-3 ¶3.

B. The No Bond Hearing Policy Deviates from Nationwide Practices and Precedential Agency Decisions

The IJ Defendants' No Bond Hearing Policy deviates from the practice of IJs across the country, which is to make individualized custody determinations, even without the individual who is seeking release present, by, inter alia, waiving the detained individual's presence, arranging for and conducting hearings via videoconference or telephone, or, in some situations, by making custody redeterminations without a hearing. *See* Dkt. 1 ¶39-44; Dkts. 2-27 – 2-39; *accord* 8 U.S.C. § 1229a(b)(2) (authorizing IJs to conduct removal proceeding after waiver of a noncitizen's presence, by video conferencing, and/or with telephonic appearances). IJ Defendants' No Bond Hearing Policy also stands in contrast to the actions of their colleague at the same immigration court, IJ Rodger C. Harris, who conducts bond hearings no matter the location of the detained individuals provided the bond motion was correctly filed while the person was detained in the Carolinas. Dkt. 1 ¶6.[5] In addition, Defendants' No Bond Hearing Policy conflicts with Defendant Holmes-Simmons' internally inconsistent policy of conducting bond hearings when the individual seeking release is in immigration custody inside the Carolinas on the date of the scheduled hearing, even if he or she is not present in the courtroom. Dkt. 1 ¶56.[6]

The IJ Defendants are not the only IJs in the country who confront the issue of

[5] He does so even if the individual waives presence and is not present in the courtroom. *See* Dkts. 2-8 ¶14; 2-9 ¶7; 2-11 ¶4; 2-16 ¶13; 2-18 ¶5; 2-20 ¶5; 2-23 ¶3d; 2-24 ¶¶6, 8.

[6] *See also* Dkts. 2-10 ¶10; 2-13 ¶5; 2-23 ¶3c; 2-25 ¶9.

adjudicating bond motions without the person requesting bond present in the courtroom. Yet, unlike their counterparts elsewhere who employ legal tools and technology that facilitate the expeditious adjudication of properly filed bond motions, the IJ Defendants simply refuse to conduct hearings, and the DOJ Defendants fail to correct this abdication of IJ Defendants' responsibility.

According to Defendants' own policies, IJs may employ any one or a combination of the following measures to ensure prompt adjudication of bond motions, including:

- Asking DHS to bring the individual to the hearing.[7]
- Arranging and/or conducting hearings by videoconference or telephone.[8]
- Permitting the individual to waive presence.[9]
- Deciding the motion without a hearing.[10]

The practices of IJs around the country, including IJ Harris and sometimes Defendant Holmes-Simmons, and the past practice of all three IJ Defendants demonstrate the viability of these readily available options. Yet, the IJ Defendants, with the occasional exception of Defendant Holmes-Simmons, *see supra* Sections II.A.1, II.A.2, refuse to utilize them, even where counsel and witness are present in the Charlotte courtroom and ready to proceed.[11]

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[7] Dkt. 1 ¶¶38-42, 44; *cf.* Imm. Court Practice Manual § 9.1(c); 8 U.S.C. § 1229a(b)(1) (subpoena authority).

[8] Dkt. 1 ¶¶38-40, 45; *see also* Dkts. 2-27 ¶2; 2-29 ¶¶3-4; 2-30 ¶¶3-5; 2-31 ¶4; 2-32 ¶3; 2-33 ¶3; 2-34 ¶2; 2-35 ¶¶2-3; 2-36 ¶¶5-6; 2-37 ¶2; 2-38 ¶2.

[9] Dkt. 1 ¶¶38-40; 44; *see also* Dkts. 2-27 ¶¶2-3; 2-30 ¶2 and 2-35 ¶5; 2-31 ¶5; 2-36 ¶4; 2-38 ¶¶3-4; 2-39 ¶2; *see also* Dkts. 2-9 ¶2; 2-11 ¶2; 2-12 ¶3; 2-16 ¶5; 2-17 ¶3; 2-18 ¶2; 2-19 ¶4; 2-20 ¶2; 2-21 ¶3; 2-25 ¶3; 2-26 ¶3; *accord* 8 U.S.C. § 1229a(b)(2)(A)(ii).

[10] Dkt. 1 ¶¶41, 44; *see also* Dkt. 2-30 ¶2; Dkt. 2-41; Imm. Court Practice Manual § 9.3(d).

[11] This is particularly unnecessary given that, in counseled cases, bond motions largely are adjudicated between the IJ and party's counsel with limited to no interaction with the individual. Dkt. 1 ¶43; Dkts. 2-28 ¶6; 2-29 ¶¶3-4; 2-30 ¶¶4-5; 2-31 ¶3; 2-33 ¶3; 2-34 ¶3; 2-35 ¶4; 2-36 ¶7; 2-37 ¶2; 2-38 ¶5; 2-39 ¶4; 2-23 ¶10. In Georgia, where DHS transfers most proposed class

Reflecting the impact of IJ Defendants' outlier No Bond Hearing Policy, a recent nationwide report reviewing immigration courts with at least 50 custody hearing cases from October 2017 to May 2018 found that the Charlotte Immigration Court had the lowest rate of granting bond motions in the country. *See* Transactional Records Access Clearinghouse, Three-fold Difference in Immigration Bond Amounts by Court Location (Jul. 2, 2018), http://trac.syr.edu/immigration/reports/519/.

In addition, by delaying access to bond hearings, Defendants' No Bond Hearing Policy conflicts with Board of Immigration Appeals precedent providing for the use of informal procedures in bond proceedings to ensure that "the parties be able to place the facts *as promptly as possible* before an impartial arbiter." *Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977) (emphasis in the original); *see also Matter of Valles-Perez*, 21 I&N Dec. 769, 772 (BIA 1997) (encouraging expeditious adjudication of bond motions).

C. Plaintiffs' Claims and the Relief Sought

Plaintiffs seek an order certifying the proposed class and declaratory and injunctive relief to ensure that the IJ Defendants conduct the bond hearings they are required to hold under the Immigration and Nationality Act (INA), implementing regulations, and the Constitution. They ask the Court to declare that Defendants' No Bond Hearing Policy violates the INA, APA, and due process, and to order Defendants to cease refusing to conduct bond hearings, to vacate the IJ Defendants' prior decisions refusing to conduct bond hearings, and to order the Charlotte Immigration Court to conduct a bond hearing for any class members who have not yet been afforded one.

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members, IJs rarely seek to obtain information directly from the individuals seeking release. *See* Dkt. 1 ¶43; Dkts. 2-28 ¶7; 2-14 ¶9; 2-20 ¶6; 2-21 ¶2; 2-23 ¶10.

Significantly, Plaintiffs do not ask this Court to make an individualized determination regarding whether they merit discretionary release on bond. Dkt. 1 at ¶9. Plaintiffs do not challenge the discretion of IJs to determine whether to grant or deny release after consideration of dangerousness and flight risk. Instead, Plaintiffs challenge the outright refusal of the IJ Defendants to conduct bond hearings; i.e., make individualized custody determinations based on an assessment of dangerousness and flight risk, for individuals who properly file motions with the Charlotte Immigration Court pursuant to 8 C.F.R. § 1003.19(c) (i.e., individuals who file while detained within the Carolinas), and the DOJ Defendants' knowledge of and acquiescence to the IJ Defendants' dereliction of duty. *See generally* Dkt. 1.

III. STANDARD OF REVIEW

This Court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. Proc. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to" and "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. Proc. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C).

IV. ARGUMENT

A. The Memorandum and Recommendation Mischaracterized the Challenged Policy and Erred in Finding Plaintiffs' Claims Are Based on Discretionary Determinations.

The Magistrate Judge's M & R mischaracterizes the nature of IJ Defendants' No Bond Hearing Policy challenged in this case as discretionary in nature. Specifically, this Court should reject the M & R's findings that: (1) Plaintiffs are challenging IJ Defendants' "discretionary determinations" in their individual cases, (2) the IJ Defendants have "sen[t]" the bond motions of Plaintiffs and proposed class members "to another venue for hearing," and (3) that the policy

and/or practice at issue in this case is "'properly in the province of the [immigration courts].'" Dkt. 26 at 6 (quoting *Matter of Cerda Reyes*, 26 I&N Dec. 528, 530-31 (BIA 2015), alteration in M & R). Furthermore, to the extent the M & R found that Plaintiffs challenge individual bond decisions and not Defendants' uniform refusal to conduct bond hearings, the Court also should reject that finding. *See id.* at 2 (describing Plaintiffs' individual bond requests, but not IJ Defendants' No Bond Hearing Policy); *id.* at 4 (describing "relevant question" in terms of factors for establishing eligibility for bond pursuant to 8 C.F.R. § 1236.1(c)(8)).

Plaintiffs challenge Defendants' No Bond Hearing Policy. *See supra* Section II.A.1. Thus, the appropriate inquiry is whether IJ Defendants must expeditiously *conduct bond hearings* for individuals who properly filed requests with the Charlotte Immigration Court while detained in the Carolinas where the person makes a voluntary, knowing and intelligent election to waive presence at the hearing or where via telephone or video conferencing is available. This inquiry is entirely distinct from whether IJs have discretion to grant or deny release when they conduct such hearings.

Plaintiffs and proposed class members properly filed their bond requests with the Charlotte Immigration Court, as is required by regulation. *See* 8 C.F.R. § 1003.19(c)(1). Thus, they were entitled to prompt bond hearings under 8 U.S.C. § 1226(a), the immigration regulations, and the Constitution. *See, e.g.*, *Guerra v. Shanahan*, 831 F.3d 59, 61 (2d Cir. 2016) (affirming district court decision that, because noncitizen was detained under § 1226(a), "he was, therefore, entitled to a bond hearing"); *Reid v. Donelan*, 819 F.3d 486, 491 (1st Cir. 2016) (stating that a noncitizen detained under § 1226(a) "may seek a bond hearing before an immigration judge . . . to show that he or she is not a flight risk or a danger"); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205-06 (N.D. Cal. 2017) (requiring bond hearings for class

members within 9 days of order based on noncitizens' entitlement to prompt hearing before an IJ); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 720 (D. Md. 2016) (stating that § 1226(a) "provid[es] for a detention hearing upon entry into ICE custody"); *R.I.L-R*, 80 F. Supp. 3d 164, 172 (D.D.C. 2015) (describing noncitizens' "option[] of requesting a custody redetermination from an immigration judge"); *Preap v. Johnson*, 303 F.R.D. 566, 583 (N.D. Cal. 2014), *aff'd* 831 F.3d 1193 (9th Cir. 2016), *cert. granted sub. nom. Nielsen v. Preap*, 138 S. Ct. 1279 (2018) (stating that noncitizens detained under § 1226(a) are "entitle[d] . . . to a bond hearing"); *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910, 917 (E.D. Mich. 2013) (upon finding that a noncitizen was detained pursuant to § 1226(a), ordering an individualized bond hearing within 10 days or release from custody); *Castañeda v. Souza*, 952 F. Supp. 2d 307, 314-15 (D. Mass. 2013), *aff'd by equally divided court* 810 F.3d 15 (1st Cir. 2015) (describing § 1226(a) detention as "subject to an individualized bond hearing and potential release" and noting that "Congress intended that [noncitizens] taken into custody typically receive a bond hearing"); *Pujalt-Leon v. Holder*, 934 F. Supp. 2d 759, 766 n.3 (M.D. Pa. 2013), *abrogated on other grounds by Sylvain v. Att'y Gen.*, 714 F.3d 150 (3d Cir. 2013) ("Detention under § 1226(a) . . . *requires* an individualized bond hearing.") (quotation omitted) (emphasis in original); *see also Demore v. Kim*, 538 U.S. 510, 531-32 (2003) (Kennedy, J., concurring) (noting that if a noncitizen had not been subject to mandatory detention, an IJ "then *would have had to* determine if respondent could be considered . . . for release under the general bond provisions of § 1226(a)") (quotations omitted) (emphasis added). Furthermore, under binding BIA precedent, such hearings must be conducted promptly. *See supra* Section II.B; *cf.* Executive Office for Immigration Review, *Case Priorities and Immigration Court Performance Measures* at App. A ¶ 4 (Jan. 17, 2018),

https://www.justice.gov/eoir/page/file/1026721/download (noting that IJs should make 90% of all custody redeterminations within 14 days of the request).

Just as noncitizens have a right to request a custody redetermination hearing before an immigration court, the IJ Defendants have a corresponding duty to adjudicate those requests by holding a bond hearing. If the individuals seeking release are unable to be physically present in the courtroom, Defendants may conduct the hearing without the person present (if he or she has waived presence), by telephone (because jails in the Carolinas have telephones), or by video conference (because the Charlotte Immigration Court and many immigration detention facilities have video conferencing capacity). *See supra* Section II.B; Dkt. 1 ¶¶ 39-40, 45. As one court held, where Congress has vested EOIR with jurisdiction over a particular type of motion, "the agency is not required—by statute or by this decision—to grant [such a motion]. But it is required—by both—to consider it." *Pruidze v. Holder*, 632 F.3d 234, 239 (6th Cir. 2011); *see also Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 71 (2009) ("The general rule applicable to courts" that "when jurisdiction is conferred, a court may not decline to exercise it . . . also holds for administrative agencies directed by Congress to adjudicate particular controversies."). IJs do not have the discretion to refuse to conduct bond hearings, and so the Magistrate Judge erred by finding that the case dealt solely with discretionary determinations.

Defendants' duty to conduct bond hearings is not made discretionary through attempts by the IJ Defendants (or by the Magistrate Judge) to reframe the No Bond Hearing Policy as a series of change of venue decisions. *See* Dkt. 26 at 6 ("In fact, the Judges are sending these matters to another venue for hearing."). That finding is incorrect both as a factual and a legal matter. First, the IJ Defendants who issued decisions to Plaintiffs—and proposed class members—did not

"send[]" the bond motions anywhere. Instead, IJ Defendants refused to grant or deny the properly-filed motions; unless Plaintiffs and proposed class members file a second bond motion in a new location, they would never receive a bond hearing in *any* location. *See supra* Section II.A. But even if the IJ Defendants had attempted to change venue for Plaintiffs' cases, as a legal matter, IJs do not have the discretion to sua sponte change venue of bond proceedings. The regulation governing change of venue reads:

> (a) Venue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14.
>
> (b) The Immigration Judge, for good cause, may change venue *only upon motion by one of the parties*, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue *only after* the other party has been given notice and an opportunity to respond to the motion to change venue.

8 C.F.R. § 1003.20(a), (b) (emphasis added).[12] Notably, a prior version of the predecessor venue regulation *did* provide IJs with the authority "to change venue on his or her own motion," *see* 59 Fed. Reg. 1896, 1897-98 (Jan. 13, 1994), but the agency affirmatively choose to eliminate this authority from the regulations. Accordingly, before any IJ may change venue, the regulations and due process require that (1) one of the parties, i.e., either DHS or the individual, formally move for a change of venue; and (2) the non-moving party is "given notice and an opportunity to respond" to the motion. 8 C.F.R. §

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[12] In relevant part, the referenced regulation at 8 C.F.R. § 1003.14 reads:

> Jurisdiction and commencement of proceedings.
>
> (a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. . . . However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

1003.20(b). Thus, the M & R's finding conflicts with the plain language of the regulation. *Md. Gen. Hosp., Inc. v. Thompson*, 308 F.3d 340, 347 (4th Cir. 2002) ("[A]n interpretation that is inconsistent with the plain language of an unambiguous regulation cannot be upheld simply because the interpretation, standing alone, seems reasonable enough.").

Nor does the language cited from *Matter of Cerda Reyes* provide support to the position recommended by the Magistrate Judge – instead, it is taken out of context and mischaracterized. Dkt. 26 at 4, 6 (quoting *Matter of Cerda Reyes*, 26 I&N Dec. at 530-31 for the proposition that "policies related to the scheduling of bond hearings, including determining the location of the hearing, are properly within the province of the [immigration courts]"). In fact, the actual words from *Cerda Reyes* that Defendants in their briefing and, consequently, the Magistrate Judge have replaced with brackets describe the Office of the Chief Immigration Judge (OCIJ), which, unlike any individual immigration judge, actually possesses authority to establish policies and oversee policy implementation. *See* Dkt. 1 ¶¶ 18-22. Second, the policies referenced in the quoted language (which OCIJ establishes and oversees) do not relate to the venue provision at issue in this case, 8 C.F.R.§ 1003.19(c)(1), which governs venue for bond hearings in detained cases in the first instance.[13] Under 8 C.F.R. § 1003.19(c)(1), venue for bond

[13] Instead, this language refers to policies implementing 8 C.F.R. § 1003.19(c)(2) and (3). Through these policies, the OCIJ designates the geographical scope of administrative control courts referenced in § 1003.19(c)(2), *see* 8 C.F.R. § 1003.11, and "an appropriate Immigration Court" for bond redeterminations when the individual is not detained but seeks review of the conditions of release. *See* 8 C.F.R. § 1003.19(c)(2), (3). *See also* 52 Fed. Reg. 2931, 2932 (Jan. 29, 1987) (providing that the predecessor regulation to 8 C.F.R. § 1003.19(c)(3) "allows [OCIJ] to direct which Immigration Judge's Office will be selected for handling a bond redetermination *after the first two steps* [subsections (c)(1) and (c)(2)] *have been exhausted*") (emphasis added).

proceedings lies with Charlotte Immigration Court for proposed class members whose "place of detention" is in North or South Carolina at the time of filing a bond motion, and no authority exists for the IJ Defendants to unilaterally change venue to a different location. Here, IJ Defendants' failure to conduct hearings after Plaintiffs filed bond motions in the only venue available to them is an unlawful abrogation of their jurisdiction in violation of Plaintiffs' right to an expeditious bond hearing—not evidence that Plaintiffs are challenging discretionary custody determinations.

These errors in the M & R were material to the Magistrate Judge's recommendation to dismiss this action. Unlike individual determinations to release or continue to detain noncitizens in immigration proceedings, federal courts regularly find that they have jurisdiction over challenges to detention policies and practices. *See, e.g.*, *Damus v. Nielsen*, No. 18-578 (JEB), 2018 U.S. Dist. LEXIS 109843 (D.D.C. Jul. 2, 2018) (unpublished); *L- v. ICE*, No 18-cv-0428-DMS-MDD, 2018 U.S. Dist. LEXIS 97993 (S.D. Cal. Jun. 6, 2018) (unpublished); *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018); *R.I.L-R*, 80 F. Supp. 3d 164. Thus, this Court should reject the Magistrate Judge's findings that fail to recognize that Plaintiffs challenge Defendants' No Bond Hearings Policy, not a discretionary determination.

B. But for the Mischaracterization of the Challenged Policy as Discretionary in Nature, the Magistrate Judge Would Have Found Jurisdiction Over this Case.

The Magistrate Judge erroneously recommended that the Court grant Federal Defendants' Motion to Dismiss, Dkt. 21, based on lack of jurisdiction under 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii). *See* Dkt. 26 at 6-7. But this Court should reject that finding because it is entirely predicated on the Magistrate Judge's mischaracterization of Plaintiffs' claims as discretionary in nature, discussed *supra*, as well as errors of law.

But for that mischaracterization, the Magistrate Judge would have found jurisdiction over this action. The Court's jurisdictional inquiry must "begin with the strong presumption that Congress intends judicial review of administrative action" and that a determination that such review is not available requires "clear and convincing evidence" that Congress intended to "restrict access to judicial review." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986) (quotation omitted). No such evidence is present here, and so this Court has jurisdiction over Plaintiffs' claims.

1. Section 1226(e) Does Not Bar Jurisdiction.

The Magistrate Judge first found that 8 U.S.C. § 1226(e) barred review of Plaintiffs' claims. That provision exempts from review only "discretionary judgment[s] regarding the application of [Section 1226]." Plaintiffs do not dispute that "discretionary decisions granting or denying bond are not subject to judicial review." *Prieto Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008). Again, however, Plaintiffs do not challenge a "discretionary decision" to grant or deny bond to any one person based on an individualized determination. Rather, they challenge the IJ Defendants' overarching No Bond Hearing Policy (i.e., their refusal to make individualized determinations), which violates 8 U.S.C. § 1226(a), its implementing regulations, and the Constitution. *See supra* Section IV.A; *see also* Dkt. 23 at 2-3, 5-8. "[I]t is not within [the IJ Defendants'] 'discretion' to decide whether [they] will be bound by the law." *R.I.L-R*, 80 F. Supp. 3d at 176 (quotation omitted).

As an initial matter, while the Magistrate Judge concluded that the challenged conduct "amounts to an 'action . . . regarding the detention . . . of any alien . . .' that falls under 8 U.S.C. § 1226(e)," Dkt. 26 at 6 (alterations in M & R), he failed to consider whether the No Bond Hearing Policy that has been applied to Plaintiffs cases actually falls within the bounds of that

provision. Rather than an "action or decision," the No Bond Hearing Policy is IJ Defendants' unlawful justification for *failing* to take action, and thus results in orders which do not address whether Plaintiffs and proposed class members should be detained or released and which do not provide for "the grant, revocation, or denial of bond or parole" as required by § 1226(e). *See, e.g.*, Dkt. 21-3 ("declin[ing] to hear [Plaintiff's] bond request"); Dkt. 24-2 (same); Dkt. 24-3 (same); *see also supra* Section II.A.1 (describing overarching policy dictating these results).

Moreover, even if failing to act could construed as an action taken for purposes of § 1226(e), multiple federal courts, including four courts of appeals, have held that § 1226(e) does not demonstrate clear and convincing evidence that Congress intended to allow IJs to evade federal court review for violations of the Constitution, the INA, or EOIR's regulations. *See, e.g.*, *Castañeda v. Souza*, 769 F.3d 32, 41 (1st Cir. 2014) ("[S]ubsection (e) does not bar our review of this case because [petitioners] . . . challenge the statutory basis for their detention."); *Sylvain v. Att'y Gen.*, 714 F.3d 150, 155 (3d Cir. 2013) ("Nothing in 8 U.S.C.§ 1226(e) prevents us from deciding whether the immigration officials had statutory authority to impose mandatory detention."); *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) ("Although § 1226(e) restricts jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law" which includes "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact.") (quotation omitted); *Al-Siddiqi v. Achim*, 531 F.3d 490, 494 (7th Cir 2008) ("[S]ection [1226(e)] strips us of our jurisdiction to review judgments designated as discretionary but does not deprive us of our authority to review statutory and constitutional challenges.").

Although the Fourth Circuit has yet to decide the issue, the M & R ignores the overwhelming weight of the circuit interpretations. Instead, the M & R relies on the Fifth

Circuit's broad view of § 1226(e) in *Loa-Herrera v. Trominski*, 231 F.3d 984 (5th Cir. 2000). Dkt. 26 at 7. That case, which arose in the context of a challenge to the former Immigration and Naturalization Service's (INS) denial of parole hearings, "provided little explanation of its reasoning" and the decision is an outlier among the circuits. *R.I.L-R*, 80 Supp. 3d at 177 (declining to follow *Loa-Herrera*).

In *R.I.L-R*, the District Court for the District of Columbia confronted and rejected the precise § 1226(e) argument that Defendants present here. In that case, the plaintiffs challenged a DHS "no release" policy, which provided for blanket detention of migrant mothers and children for the purpose of deterrence, without an individualized custody determination regarding flight risk or danger to the community. 80 F. Supp. 3d at 170-71. As here, the government argued that § 1226(e) barred plaintiffs' claims that the policy violated the INA, immigration regulations, and the Constitution. *Id*. at 176-77. The district court, however, recognized that the plaintiffs, like Plaintiffs here, were not seeking review of DHS' exercise of discretion but, rather, "challenge[d] DHS policy as *outside* the bounds of its delegated discretion." *Id*. at 176 (emphasis in original). As such, the court would "not construe § 1226(e) to immunize an allegedly unlawful DHS policy from judicial review." *Id*. at 177.

Similarly, the District Court for the Southern District of California held that § 1226(e) did not bar jurisdiction over Plaintiffs' claim that the government sets unreasonable bound amounts for detained noncitizens by failing to consider individuals' financial resources or ability to pay. *Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 U.S. Dist. LEXIS 191881 (C.D. Cal., Nov. 10, 2016) (unpublished). In affirming the lower court's decision, the Ninth Circuit held that § 1226(e) does not preclude claims that the discretionary bond process is legally or constitutionally flawed, finding that such claims "fit comfortably" within the scope of habeas

jurisdiction. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) (quotation omitted). As here, the government in that case attempted to "mischaracterize[] Plaintiffs' challenge," but the Ninth Circuit rejected that effort, finding that Plaintiffs "do not challenge the *amount* of their initial bonds as 'excessive[]', . . . instead, . . . Plaintiffs in the present case claim that the 'discretionary process itself was constitutionally flawed' at their initial bond determinations." *Id.* (internal citations omitted).

Finally, in *Abdi v. Nielsen*, the District Court for the Western District of New York recognized that § 1226(e) "does not deprive the Court of jurisdiction over [a detainee's] constitutional and statutory challenges to his detention." 287 F. Supp. 3d at 339 (quotation omitted). Thus, that court had jurisdiction over the question of whether immigration judges were *required* to consider certain factors in bond hearings—because the plaintiffs were "either entitled to [those] considerations pursuant to th[e] Court's interpretation of the bond hearing requirement . . . or they [we]re not," the relevant considerations were, although related to detention, not discretionary. *Id.* Similarly, Plaintiffs here do not ask whether IJ Defendants *may* consider the properly filed bond requests, but rather whether they *must* consider the motions and rule on them one way or the other. Analysis of such non-discretionary claims is not barred by § 1226(e), and thus this Court should reject the Magistrate Judge's recommendation to the contrary.

2. Section 1252(a)(2)(B)(ii) Does Not Apply.

a. The Clear Weight of Authority Holds That Section 1252(a)(2)(B) Does Not Apply to Challenges Seeking Compliance with the Law

The M & R also erroneously relied on 8 U.S.C. § 1252(a)(2)(B)(ii). Located in the section of the INA relating to judicial review of final orders of removal, § 1252(a)(2)(B)(ii) bars review of "decision[s] or action[s] of the Attorney General . . . the authority for which is specified under this title to be in the discretion of the Attorney General . . . ." Significantly,

however, the statute at issue here, § 1226(a), does not afford the Attorney General, who exercises this authority via IJs, discretion *not* to conduct bond hearings. *See supra* Section IV.A.

As the Supreme Court has recognized, § 1252(a)(2)(B)(ii) will not bar review of challenges to "the extent of the Attorney General's authority" where "the extent of that authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Federal courts regularly have held that this provision does not bar claims like the one at issue here – which do not challenge individual determinations to detain or release individuals, but rather challenge underlying policies, like Defendants' No Bond Hearing Policy, that prevent adjudicators from making lawful bond determinations on the merits. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) (permitting review over whether "the discretionary process itself was constitutionally flawed at . . . initial bond determinations") (quotation omitted); *Damus*, 2018 U.S. Dist. LEXIS 109843, *15 (recognizing jurisdiction where plaintiffs do "not challeng[e] the *outcome* of [detention decisions], but the *method* by which parole is currently being granted (or denied)") (emphasis in original); *Abdi v. Duke*, 280 F. Supp. 3d 373, 384 (W.D.N.Y. 2017) (permitting review where petitioners do not "ask[] this Court to interfere with the ultimate decision regarding parole," but rather ask the court to require immigration officials to "comply with certain policies and procedures in making that parole decision"). Likewise, in *L- v. ICE*, in its decision enjoining the government's practice of separating minor children from their parents, the district court reasoned that § 1252(a)(2)(B)(ii) only applies where there is an explicit and specific statutory *grant* of discretion. 2018 U.S. Dist. LEXIS 97993 at *19-21. Moreover, the court found that even if § 1252(a)(2)(B)(ii) did apply, it does not bar review of due process claims. *Id*. at *21 n.5.

Applying that rationale to the instant case, it is clear that no statutory provision grants the IJ Defendants authority not to conduct bond hearings. IJ Defendants' discretion to grant or deny bond on a case-by-case basis under § 1226(a) does not extend to the discretion to choose not to make any substantive decision on a bond motion. Any policy which would require IJ Defendants' to abdicate their responsibility to adjudicate properly filed bond motions is unlawful and violates due process; such a policy forms the basis of Plaintiffs' claims. *See supra* Section IV.A.1. Thus, 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar review.

b. Reliance on *Kucana, Brito-Ramirez,* and *Loa-Herrera* Is Misplaced

Despite the weight of authority discussed above, the entirety of the M & R's analysis rests on three cases: a Supreme Court decision that supports Plaintiffs' argument, a nonbinding Fifth Circuit decision that splits with four circuits, and an unpublished district court decision. The Court should find that the M & R's reliance on these decisions, despite a consensus of Courts of Appeals ruling otherwise, was misplaced.

The M & R cites to *Kucana v. Holder*, 558 U.S. 233 (2010), as an example of application of § 1252(a)(2)(B)(ii)'s bar to review. Dkt. 26 at 7. But, in that case, the Supreme Court expressly held that § 1252(a)(2)(B)(ii) did *not* bar review of a decision to deny a motion to reopen. Significantly, the Court did not find, nor did any party argue, that the permissive language of the reopening statute, 8 U.S.C. § 1229a(c)(7)(A), which provides that a noncitizen "*may* file" a motion to reopen (emphasis added), triggered § 1252(a)(2)(B)(ii).[14] Rather, the Court held that, for § 1252(a)(2)(B)(ii) to apply, Congress had to *expressly* confer the Attorney General with "discretion" over the relevant decision or action. 558 U.S. at 247-49. Here,

[14] In fact, the Court recognized that this language constituted a statutory guarantee of the "right to file" one such motion. *Kucana*, 558 U.S. at 249. Noncitizens similarly have a right to file bond motions. *See supra* Section IV.A.

Congress also employed permissive language in § 1226(a) with respect to the Attorney General's authority to release or detain ("may continue to detain" and "may release") but did not expressly confer discretion on the Attorney General to refuse to conduct bond hearings. *See also L-*, 2018 U.S. Dist. LEXIS 97993, *18-21 (following *Kucana* and *Aguilar v. ICE,* 510 F.3d 1 (1st Cir. 2007) to find § 1252(a)(2)(B)(ii) did not bar jurisdiction over claims regarding decisions to separate children in immigration detention from their parents). Thus, Defendants' No Bond Hearing Policy does not trigger § 1252(a)(2)(B)(ii).

Additionally, the M & R cited to an unpublished recommendation of a Magistrate Judge that was summarily affirmed by a District Judge, *Brito-Ramirez v. Kelly*, No. 0:17-463-TMC-PJG, 2017 U.S. Dist. LEXIS 55217 (D.S.C. Mar. 17, 2017) (unpublished), *adopted by* 2017 U.S. Dist. LEXIS 55727 (D.S.C. Apr. 11, 2017), for the proposition that § 1252(a)(2)(B)(ii) "withholds subject-matter jurisdiction." Dkt. 26 at 7. But § 1252(a)(2)(B)(ii) is not substantively discussed in the *Brito-Ramirez* recommendation, to which no objections were filed, and was not mentioned in the District Judge's summary affirmance of that recommendation. The *Brito-Ramirez* Magistrate Judge relied on only one decision that itself referenced § 1252(a)(2)(B)(ii), *Hatami v. Chertoff*, 467 F. Supp. 2d 637 (E.D. Va. 2006). *Hatami* found that a district court lacked jurisdiction over a challenge to an IJ's decision to deny bond, after the IJ in question had actually conducted (and denied release in) three separate bond hearings. *Id*. at 639-41. Thus, *Hatami*, which involved a challenge to the result of bond hearings, not the failure to conduct a bond hearing, is not relevant to the claims at issue here.

Brito-Ramirez involved the refusal of one of the IJ Defendants in this case to conduct a bond hearing, specifically Defendant Couch's decision to "decline[] to exercise [his] authority to hear [a bond] case" based only on "Petitioner's absence from the hearing," though "counsel for

Petitioner appeared at the Charlotte Immigration Court with thirty witnesses and a fully executed waiver of appearance signed by Petitioner." 2017 U.S. Dist. LEXIS 55727 at *2. However, any similarity between *Brito-Ramirez* and the instant case ends there. That petitioner asked the district court both to enjoin his transfer out of South Carolina and to order him released from immigration custody under conditions of supervision. *Id*. at *2-3. After an IJ in Atlanta denied his release at a subsequent bond hearing, the court dismissed the case for lack of jurisdiction citing 8 U.S.C. § 1226(e). *Id.* at *4 n.3, *7-8. The claims, nature of the suit, and minimal briefing presented in *Brito-Ramirez* stand in stark contrast to the pattern and practice evidence and legal claims presented in the instant class action challenge to Defendants' No Bond Hearing Policy. This one Magistrate Judge's recommendation cannot overcome the weight of authority indicating that § 1252(a)(2)(B)(ii) does not bar the claims that Plaintiffs assert here.

Lastly, the M & R also cited to *Loa-Herrera*, 231 F.3d 984 for the proposition that § 1252(a)(2)(B)(ii) bars review, but the Fifth Circuit's decision does not reference, let alone analyze, that statute. As mentioned, that case arose in the context of a challenge the former Immigration and Naturalization Service's denial of parole hearings. Thus, even if the panel had addressed § 1252(a)(2)(B)(ii), the case is inapposite. Unlike individualized bond hearings required under § 1226(a), Congress made the Attorney General's parole authority explicitly and specifically discretionary. *See* 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General may . . . in his discretion parole into the United States . . .").

Because bond hearings are statutorily, regulatorily, and constitutionally required, IJs have *no* discretion to refuse to conduct them. As such, § 1252(a)(2)(B)(ii) does not apply. *Accord Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007) (agreeing with majority of circuits

holding that § 1252(a)(2)(B)(ii) does not bar review of an IJ decision to deny a continuance in the exercise of discretion where such discretion is not conferred by statute).

* * * * *

In sum, Plaintiffs are challenging the IJ Defendants' overall unlawful No Bond Hearing Policy – not any particular "discretionary" judgment or decision. When the nature of Plaintiffs' challenge is correctly characterized, it is evident that 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii) do not apply.

C. The Memorandum and Recommendation Incorrectly Neglected to Adjudicate Defendant White's Motion to Dismiss.

Although the Magistrate Judge acknowledged that Defendant White's motion to dismiss presented an issue not yet resolved by the Fourth Circuit with respect to the proper respondent to a habeas petition, the Judge did not adjudicate the merits of that motion because the M & R recommended dismissal. Dkt. 26 at 7-8. As Plaintiffs have argued herein, dismissal is not appropriate in this case because Plaintiffs have raised non-discretionary legal and constitutional claims over which this Court has jurisdiction. Thus, the Magistrate Judge should have adjudicated the merits of Defendant White's motion to dismiss based on the parties' briefing on that matter.

V. CONCLUSION

For the foregoing reasons, the Court should reject the Magistrate Judge's Memorandum and Recommendation, find jurisdiction over this case, and adjudicate Defendant White's motion to dismiss and Plaintiffs' motion for class certification.

Respectfully submitted,

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Dated: July 10, 2018

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that on July 10, 2018, I electronically filed the foregoing PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

Executed in Boston, Massachusetts, on July 10, 2018.

s/ Trina Realmuto

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