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UC Irvine, ABA Back Immigrant Bond Ruling At 9th Circ.

Share us on: By [Kelly Knaub](#)

Law360, New York (March 9, 2017, 10:28 PM EST) -- The University of California, Irvine School of Law, the [American Bar Association](#) and others urged the Ninth Circuit on Wednesday to uphold a district court decision forcing immigration judges and officials to look at a detainee's ability to pay bond, flight risk and other factors, saying vulnerable immigrants will be punished if the ruling is struck.

The law school's Immigrant Rights Clinic, the ABA, a group of retired immigration judges, the National Association of Criminal Defense Lawyers, and the Center for Legal and Evidence-Based Practices argued in a number of amicus briefs that U.S. District Judge Jesus G. Bernal's November preliminary injunction should remain in force.

UCI Law argued that without the injunction — which forces immigration judges and officials to look at factors including a detainee's ability to pay bond, history of appearing in court, history of immigration violations and any attempt to elude the legal system — vulnerable immigrants who are neither a danger to the community nor a flight risk will be punished.

Immigration judges and [U.S. Immigration and Customs Enforcement](#) routinely set bond amounts that are inappropriately high, UCI Law said, noting that the risk of receiving bond amounts that are grossly out of reach for detainees is especially great when an individual is unrepresented.

UCI Law detailed a number of individuals who it says have been harmed by the government's policies. One 22-year-old woman was forced to miss her mother's funeral because she couldn't pay the \$30,000 bond set by an immigration judge, the brief said. And a 37-year-old transgender woman who fled Mexico because of

homophobia and transphobia has been forced to endure verbal and physical harassment by detention guards and fellow detainees because she can't pay a \$25,000 bond, it said.

"The government's refusal to require immigration officials to consider a detainee's ability to pay when setting bond amounts has led to the extended imprisonment of individuals when confinement is neither necessary nor desirable," UCI Law said.

The ABA argued in its amicus brief that the current process that detains noncitizen immigrants who are eligible for bond but unable to pay violates the due process clause and equal protection guarantee of the Fifth Amendment.

The retired group of immigration judges, for their part, said the preliminary injunction helps immigration judges ensure the integrity of their adjudications and achieve just outcomes, while helping the government conserve precious resources.

The NACDL and CLEP, in a jointly filed amicus brief, said the government's failure to consider a noncitizen's ability to pay bail and meet alternative conditions of release during bond determinations violates both the Constitution and the Immigration and Nationality Act.

The government appealed to the Ninth Circuit after Judge Bernal put the preliminary injunction in place in November. In the same ruling, the judge certified a class of immigrants challenging the government, saying that although the district's case law limits challenges to the results of immigration judges' decisions, the class members could proceed with their claims because they "challenge the legality of the process by which their bond amount was set."

The Department of Justice had previously argued that the case should have been nixed because the immigrants had proceeded in court before administrative proceedings had run their course.

However, the judge decided that "a record of administrative appeal is not necessary to resolve the purely legal questions presented by plaintiffs' statutory and constitutional claims."

The judge said he decided to grant the injunction because he found the immigrants likely to succeed under the due process clause of the Fifth Amendment, noting that the Ninth Circuit has already "established various procedural safeguards governing bond determination hearings." He also approved the injunction because it said the class could likely succeed under the equal protection, excessive bail and constitutional avoidance theories as well.

The [American Civil Liberties Union](#) launched the suit in April on behalf of Xochitl Hernandez, a Mexican woman facing deportation, and Cesar Matias, a Honduran man seeking asylum in the U.S. They were held in jail for months and years, respectively, because they couldn't come up with the money they needed to pay their bonds.

In certifying the class, Judge Bernal said he was satisfied that there were enough people — about 100 on any given day — affected by the detention practices to merit class treatment for the claims.

Hernandez, one of the lead plaintiffs, lived in a Los Angeles house she rented with her children and grandchildren before LAPD officers took her in a raid, in which they said they were looking for a gang member. The immigration judge set bond at \$60,000 and decided she was a flight risk because she lived in a gang activity zone, although Hernandez herself hadn't been connected to gang activity.

Several months after the class action was filed, Hernandez was let out on \$5,000 bond with an ankle monitor. The judge didn't mention Hernandez' ability to pay as a factor in the decision.

The other lead plaintiff, Matias, said he left Honduras to escape persecution because he is gay. Because he spent

all his money earned as a hair stylist and a clothing factory employee on rent and basic necessities, Matias said he did not have enough to pay his \$3,000 bond. In June, four years and three months later, he posted bond with the help of a community organization.

“[One LLP](#) enjoyed working to support the ACLU’s position in this case, which may have significant consequences on how immigration bond hearings are conducted,” Oscar Orozco-Botello, an attorney for UCI Law, told Law360 on Thursday.

A spokeswoman for the [U.S. Department of Justice](#) declined to comment.

The plaintiffs are represented by Michael Kaufman, Ahilan T. Arulanantham, Michael Tan, Judy Rabinovitz and Stephen B. Kang of the ACLU and Matthew E. Sloan, Douglas A. Smith, Devon L. Hein, Matthew E. Delgado, Michael D. Hidalgo and John C. Korevec of [Skadden Arps Slate Meagher & Flom LLP](#).

UCI Law is represented by its own Anne Lai and by Peter R. Afrasiabi and Oscar M. Orozco-Botello of One LLP. The retired immigration judges are represented by Leon T. Kenworthy, Webb Lyons and Alan E. Schoenfeld of [WilmerHale](#). The ABA is represented by its own Linda Klein and by John L. Ewald, Kelly M. Daley, Jasmine M. Owens and Ned Hirschfeld of [Orrick Herrington & Sutcliffe LLP](#). The NACDL and CLEP are represented by Peter H. Kang, Sue Wang, Kelly A. Rosencrans and Alex Baxter of [Sidley Austin LLP](#) and Jayashri Srikantiah of Stanford Law School’s Immigrants’ Rights Clinic.

The case is Xochitl Hernandez et al v. Jefferson Sessions et al., case number [16-56829](#), in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Kelcee Griffis. Editing by Kat Laskowski.

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Court

Appellate - 9th Circuit

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2440 Other Civil Rights

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December 13, 2016

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