UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 20-1037
20-1119

GILBERTO PEREIRA BRITO, individually and on behalf of all those similarly situated; FLORENTIN AVILA LUCAS, individually and on behalf of all those similarly situated; JACKY CELICOURT, individually and on behalf of all those similarly situated,

Petitioners-Appellants/Cross-Appellees,

v.

WILLIAM P. BARR, Attorney General, U.S. Department of Justice; TIMOTHY S. ROBBINS, acting Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement; CHAD WOLF, Secretary, U.S. Department of Homeland Security, JAMES MCHENRY, Director, Executive Office of Immigration Review, U.S. Department of Justice; ANTONE MONIZ, Superintendent of the Plymouth County House of Correction Facility; YOLANDA SMITH, Superintendent of the Suffolk County House of Corrections; STEVEN SOUZA, Superintendent of the Bristol County House of Corrections; CHRISTOPHER BRACKETT, Superintendent of the Strafford County Department of Corrections; LORI STREETER, Superintendent of the Franklin County House of Corrections,

Respondents-Appellees/Cross-Appellants.

On Appeal from the
United States District Court, District of Massachusetts
No. 1:19-cv-11314-PBS
Honorable Patti B. Saris, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s) **Cases**

Statutes

Regulations

Other Authorities

RESPONSE TO THE GOVERNMENT'S STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that, under the Due Process Clause, the government bears the burden of proof in depriving a person of his or her liberty pursuant to 8 U.S.C. § 1226(a).

2. Whether the district court correctly concluded that the standard of proof for dangerousness in a Section 1226(a) bond hearing is clear and convincing evidence, but erred in concluding that the standard for flight risk is a preponderance of the evidence.

3. Whether the district court correctly concluded that the government cannot deprive a person of his or liberty under Section 1226(a) without at least considering whether the government's interest can be satisfied by release on non-monetary conditions.

4. Whether the district court correctly concluded that the government cannot set a bail amount under Section 1226(a) without considering the person's ability to pay, given that a bail amount beyond a person's ability to pay is a *de facto* detention order.

5. Whether the district court's class certification order was barred by 8 U.S.C. § 1252(f)(1).

RESPONSE TO THE GOVERNMENT'S STATEMENT OF THE CASE

In the district court, the government made no evidentiary record supporting its arguments. The district court properly decided this case at summary judgment based upon the undisputed facts drawn from affidavits submitted by Petitioners. [RA312]; *see also* Fed. R. Civ. P. 56(c)(1); *Zimmerman v. Puccio*, 613 F.3d 60, 62-63 (1st Cir. 2010). Those facts, considered in light of the governing legal standards, demonstrate that the government's practice of jailing people until they can prove a negative—*i.e.*, until the individual proves that she is *not* dangerous and *not* a flight risk—transgresses constitutional boundaries and deviates from congressional prescriptions.

1. Legal Background: the BIA's Mistake

The detention practices at issue here are a relatively recent invention. Since the passage of the Immigration and Nationality Act (INA) nearly 70 years ago, in 1952, Congress has consistently authorized the *release* of alleged noncitizens arrested in the United States during the pendency of their deportation proceedings. The INA provided in 8 U.S.C. § 1252(a)(1)—the precursor to Section 1226(a)—that such noncitizens "may, in the discretion of the Attorney General and pending such final determination of deportability … be continued in custody; or … be released under bond …; or … be released on conditional parole." *See Matter of Valdez-Valdez*, 21 I.&N. Dec. 703, 704 n.2 (BIA 1997) (quoting former statute); *see also*

Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case Western Res. L. Rev. 75, 81 n.17 (Fall 2016). In 1976, the Board of Immigration Appeals (BIA) ruled that an alleged noncitizen subject to Section 1252(a)(1) "should not be detained or required to post bond except on a finding that he is a threat to the national security…, or that he is a poor bail risk…." *Matter of Patel*, 15 I.&N. Dec. 666, 666 (BIA 1976). Thereafter, the immigration courts "presumed that an alien would not be detained or required to post bond unless there was [such] a finding…." *Valdez-Valdez*, 21 I.&N. Dec. at 706*; see also Matter of Andrade*, 19 I.&N. Dec. 488 (BIA 1987); *Matter of Shaw*, 17 I.&N. Dec. 177 (BIA 1979); *Matter of Spiliopoulos*, 16 I.&N. Dec. 561 (BIA 1978). Because it required a positive finding that the alleged noncitizen "*is* a poor bail risk" in order to detain him (as opposed to a negative finding that he is *not* a bail risk in order to release him), *Patel* put the burden of proof squarely on the government.

Beginning in the 1980s, Congress passed a series of statutes that carved out categories of "presumptively unbailable" immigration detainees who had specific types of criminal convictions Congress evidently considered an adequate proxy for an individualized showing of dangerousness or flight risk. *See* Holper, *supra*, at 83-85. Some of these statutes required that noncitizens with such convictions be detained. *See, e.g.*, Anti-Drug Abuse Act of 1988, §7343, Pub. L. No. 100-690, 102 Stat. 4470 (1988). Others explicitly required them to bear the burden of proving the

justification for release. *See, e.g.*, Misc. & Tech. Immigration & Naturalization Amendments of 1991, §306(a)(4), Pub. L. No. 102-232, 105 Stat. 1733. However, for all other noncitizens arrested in the United States—*i.e.*, those outside the narrow categories explicitly selected by Congress for mandatory or presumptive detention based on criminal record—Section 1252(a)(1) continued to apply, and the BIA did not alter the *Patel* rule with its presumption in favor of release for such detainees. *See Valdez-Valdez*, 21 I.&N. Dec. at 706.

In 1996, Congress moved the statutory authority to detain alleged noncitizens during their removal proceedings from former Section 1252 to what is now Section 1226. In Section 1226(c), Congress again mandated the detention of a defined subset of alleged noncitizens, specifically those who have committed certain crimes or have certain links to terrorism. In Section 1226(a), however, Congress also again declined to order that detainees *outside* of that category (such as the class members in this case) must be detained, or that they should be presumed detained, or that they should bear any burden of proof to secure release from custody. Instead, Section 1226(a) is functionally indistinguishable from former Section 1252(a) and is silent on bond procedures. *Compare* 8 U.S.C. § 1226(a), *with* former 8 U.S.C. §1252(a)(1). By its terms, Section 1226(a) does not require the noncitizen to prove anything or to bear any burden of proof to secure release. And because Congress enacted Section 1226(a) with the benefit of the BIA's consistent application of a presumption *against*

the detention of aliens held under Section 1252(a)'s essentially identical language, the BIA's *Patel* rule should have continued under Section 1226(a).

But roughly three years later, in 1999, the BIA departed from the *Patel* rule in *Matter of Adeniji*, and shifted the burden of proof from the government to the individual. 22 I.&N. Dec. 1102, 1104 (BIA 1999). *Adeniji* was an unusual, if not a unique, case as Mr. Adeniji had been convicted of an aggravated felony. *See id*. He could not be subjected to mandatory detention, because he had been released from criminal custody too *early* to be covered by the recently enacted Section 1226(c), and the BIA's decision came too *late* to be covered by the Transition Period Custody Rules, which had expired. *Id.* at 1107-1111. The BIA thus decided that, under the peculiar circumstances, Section 1226(a) was the only available statutory authority for detention. *Id.* at 1111. It approved an agreement, reached by Mr. Adeniji and the government, that "the respondent must show that he is not likely to abscond, is not a threat to the national security, and is not a threat to the community." *Id*. at 1112. In support of this outcome, the BIA failed to acknowledge that *Patel* had already resolved this question, and instead referenced *Matter of Drysdale*, 20 I.&N. Dec. 815 (BIA 1994) and a regulation, 8 C.F.R. § 236.1(c)(8). *See id.*

Drysdale, in turn, said nothing about *Patel*, and did not purport to overrule or otherwise abrogate it. *Drysdale* had nothing to do with the treatment of detainees authorized for release under former Section 1252(a)(1) or the later Section 1226(a).

Drysdale, rather, interpreted one of the pre-1996 presumptive detention provisions of Section 1252(a)(2) to "create a presumption against the release from Service custody of any alien *convicted of an aggravated felony* unless the alien demonstrates that he was lawfully admitted to the United States, is not a threat to the community, and is likely to appear for any scheduled hearings." 20 I.&N. Dec. at 816-17 (emphasis added).

Similarly, *by its own terms*, the cited regulation in *Adeniji*, §236.1(c)(8), could not be deemed applicable to the general run of bond hearings in the Immigration Court. *See* 22 I.&N. Dec. at 1112. On its face, the regulation applies only to initial bond determinations conducted by an "officer authorized to issue a warrant of arrest…." *Id*. As the BIA acknowledged, immigration judges are not authorized to issue such warrants. *See id*. Neither this regulation nor *Drysdale* justified reversing *Patel* or placing any burden of proof on alleged noncitizens held under Section 1226(a).

Nevertheless, in 2006, in *Matter of Guerra*, the BIA stated that *Adeniji* placed the burden of proof on *all* detainees in *all* bond proceedings under Section 1226(a). 24 I.&N. Dec. 37, 38 (BIA 2006). Although this outcome wholly abrogates *Patel*, the BIA did not explain—in *Adeniji* or *Guerra*—why that should be so, or why the authorities cited in the unique circumstances of *Adeniji* can or should overcome decades of BIA precedent or the constitutional limits on civil detention. Nor has the

BIA offered such explanation in any subsequent decisions, which simply cite *Adeniji*, *Guerra*, and their progeny as authority for a blanket rule that a Section 1226(a) detainee bears the burden of proof in her bond proceeding. *See, e.g.*, *Matter of Urena*, 25 I.&N. Dec. 140, 141 (BIA 2009); *Matter of Fatahi*, 26 I.&N. Dec. 791, 793 (BIA 2016); *Matter of Siniauskas*, 27 I.&N. Dec. 207 (BIA 2018). As far as its published decisions indicate, the BIA has never once considered, much less explained, why the burden of proof should have suddenly flipped onto the individual in 1999 in apparent defiance of Congress's settled expectations, nor has it ever grappled with the constitutional ramifications of that reversal.

2. Factual Background: Detention by Default.

After the BIA's decision in *Adeniji* and *Guerra*, the immigration authorities implemented a detention regime that compromised the Constitution's promise of freedom for people covered by Section 1226(a), even people who had long resided in the United States, who had strong community ties, and who had little or no criminal history. After being arrested by ICE under that statute, an alleged noncitizen was entitled to a custody redetermination from an immigration judge, through what is referred to as a "bond hearing." [RA313 ¶2; RA334 ¶2]. At the bond hearing, the government was not required to justify continued detention by proving that the alleged noncitizen presents a danger or risk of flight. Rather, the immigration judge required that the alleged noncitizen bear the burden to prove that he should be

released because he is *not* a danger and *not* a flight risk—*i.e.*, to prove a negative. The immigration judge would not authorize the release of an alleged noncitizen who did not satisfy that burden. [RA313 ¶3; RA334 ¶3]. Additionally, immigration judges were not required to consider, and typically did not consider, the noncitizen's ability to pay when selecting a bond amount, nor the possibility of release on conditions. [RA313 ¶4; RA334 ¶4].

These policies resulted in people being needlessly detained, as the experiences of the class representatives in this case demonstrate. Mr. Avila Lucas has no criminal history. [RA316 ¶14(a); RA335 ¶14(a)]. He has lived and worked 70 hours per week at the same New Hampshire dairy farm since 2006. [RA317 ¶14(b)]. The immigration judge ordered him jailed because he "failed to meet his burden to show he is not a danger or flight risk." [RA316 ¶13; RA335 ¶13]. Mr. Celicourt fled political persecution in Haiti and lived for nearly a year in Nashua, New Hampshire. [RA317 ¶18(a)]. His only criminal record was a dispute over less than $6 worth of merchandise from a discount store, for which he received a fine. [RA318 ¶18(c); RA336 ¶18(c)]. The immigration judge ordered him jailed because he "failed to prove he's not a danger to property or a flight risk." [RA317 ¶17; RA336 ¶17]. And Mr. Pereira Brito resided in Brockton, Massachusetts, with his disabled U.S. citizen wife and their three young U.S. citizen children. [RA315 ¶10(a), (b); RA335 ¶10]. Before his arrest, he had disclosed his location to the government and started the

process to become a lawful permanent resident by virtue of his marriage; he had not been arrested for, charged with, or convicted of any crimes for roughly a decade. [RA315 ¶10(c); RA316 ¶10(e); RA335 ¶¶10(c), 10(e)].[1] The immigration judge ordered him jailed because he "did not meet his burden to demonstrate that he neither poses a danger to the community nor in a flight risk." [RA315 ¶9; RA335 ¶9].

Each of these men merely stood accused in a *civil* proceeding of being out of status and subject to deportation. Each had arguments and defenses that would potentially rebut those contentions and allow them to stay.[2] Yet each was needlessly jailed for between three and six months during the pendency of those proceedings. ICE finally decided to voluntarily release them, but only after this lawsuit was filed. [RA315-318 ¶¶11, 15, 19].

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[1] Mr. Pereira Brito was charged with motor vehicle offenses in 2007 and 2009. [SSA99-100 ¶¶7-9].

[2] In the Immigration Court, Mr. Pereira Brito applied for cancellation of removal based on his family ties to the United States. [RA315 ¶10(d)]. Mr. Celicourt applied for asylum, withholding of removal, and protection under the Conventional Against Torture based on, among other things, an attempt to murder him in Haiti. [RA318 ¶18(b)]. At the time of summary judgment, Mr. Avila Lucas had moved to suppress evidence of alienage based on government misconduct, and was prepared to seek asylum and withholding of removal if that motion was denied or the case was otherwise not terminated. [RA143-144 ¶¶14-16].

These men were not alone. The district court defined the classes in this case as people who are or will be detained under Section 1226(a) in Massachusetts[3] or otherwise subject to the jurisdiction of the Boston Immigration Court. Add. 25. During the six-month period from November to May 2019, those class members received 651 bond hearings that resulted in a substantive decision. [RA313-314 ¶5; RA335 ¶5]. Of those decisions, at least 268 (approximately 41%) were a "no bond" order. *Id*. Additionally, even when a bond was set, the amounts were extraordinarily high—the median bond for a class member was over $6,000 in Boston and over $28,000 in Hartford. [RA314 ¶6; RA335 ¶6]. Roughly half of those people remained detained more than 10 days after the bond was set, suggesting that they could not pay it. *Id.* And the deprivation of liberty resulting from a denial of bond, or setting a financially unattainable bond, was potentially severe: the median length of the immigration proceedings was more than four months, and many lasted almost two years. [RA314 ¶7; RA325-326]; *Brito v. Barr*, 415 F. Supp. 3d 258, 264-65 (D. Mass. 2019).

These facts were all undisputed below. The government submitted no contradictory evidence; indeed, it submitted *no* evidence. [RA334-337]. Consequently, there was no showing by the government that, for example, released

[3] At the time, people detained in Massachusetts might receive their bond hearing in either the Hartford Immigration Court or the Boston Immigration Court.

Section 1226(a) detainees fail to appear for removal proceedings or, if ordered, for removal. There was no showing that such detainees present any particular public safety risks, or indeed how many of them even have a criminal conviction. There was no showing that the government lacks relevant information about Section 1226(a) detainees (*e.g.*, address, criminal history) or is unable to present such information effectively at a bond hearing. The government simply did not attempt to show that placing the burden of proof on the detainee advances any governmental interest at all. Indeed, the government has never clearly articulated why it would *ever* wish to jail a person if it has no information indicating that the person actually presents a danger or flight risk.

Nevertheless, the government contends that it may presumptively detain alleged noncitizens under Section 1226(a). Gov't Br. at 5-13. However, *Adeniji* and *Guerra* are not rooted in any reasoned constitutional analysis or expression of Congressional intent, but rather in the BIA's abrupt and unexplained reversal of settled administrative practice after Section 1226(a) was enacted. The government does not contend that *Adeniji* and *Guerra* are entitled to any deference from this Court, and indeed they are not. Br. for AILA as *Amicus Curiae* Supporting Petitioners at 8-9, 12-13. Rather, the courts must declare what process the Constitution requires before stripping a person of her liberty. As described below, the Supreme Court has made abundantly clear that the Constitution requires the

government to show an adequate justification before depriving a person of that fundamental right.

SUMMARY OF THE ARGUMENT

Noncitizens and citizens alike hold certain fundamental constitutional protections, chief among them a liberty interest that protects them from bodily restraint without due process of law. Guiding Supreme Court precedent in *Foucha v. Louisana*, *Zadvydas v. Davis*, and other decisions requires that a detention regime be carefully limited and narrowly focused on identified governmental interests, and justified in each individual case by a showing by the government. The Due Process Clause thus requires that in Section 1226(a) bond hearings, the government bear the burden of proving that the individual is dangerous or a flight risk to justify detention. (pp. 15-20)

To avoid the troubling reality that the government has been systematically depriving alleged noncitizens of adequate process in bond hearings for over twenty years, the government cites to Supreme Court decisions that addressed statutory, rather than constitutional, concerns, and detention under different statutes, and that do not endorse the presumption of detention the government advances. (pp. 20-24) The government also invokes the *Mathews v. Eldridge* test—an unnecessary invocation where the Supreme Court's civil detention jurisprudence controls—which, if applied, still requires that the government bear the burden of proof in bond hearings. (pp. 24-32) In so doing, the government neglects a powerful consensus nationwide that due process mandates that the government prove that detention is

necessary, and not that the detainee prove that it is not. (pp. 32-36) From every angle, the district court's decision on the burden allocation was just and proper.

As to the standard of proof and other considerations in bond hearings, the district court properly held that due process requires the government to prove dangerousness by clear and convincing evidence, and that immigration judges must consider ability to pay and alternatives to detention. But the court erred in bifurcating the standard of proof and imposing a lower one, preponderance of the evidence, for flight risk. The government offers no credible basis for utilizing a preponderance standard for both dangerousness and flight risk, or for reverting to the Immigration Court's apparently meaningless standard of proof "to the satisfaction of the immigration judge." A clear and convincing standard of proof is essential where anything less would deprive noncitizens of their liberty without adequate process. (pp. 36-42) Consideration of ability to pay and alternatives to detention are also essential to adequate process. (pp. 42-46)

Finally, 8 U.S.C. § 1252(f) does not bar the district court's class certification order. That statute does not preclude declaratory relief, and the order does not "enjoin or restrain the operation of" any provisions of the INA. Moreover, the class members are necessarily people against whom removal proceedings have been initiated, and thus fall within the exception to Section 1252(f)'s bar on injunctive relief. (pp. 46-53)

ARGUMENT

The district court correctly enforced certain minimum constitutional standards necessary to ensure that an alleged noncitizen's fundamental liberty interest is sufficiently protected. Where agency practice deprives noncitizens of adequate due process, that precedent, however long-standing, must be set aside.

I. The Constitution Requires That the Government Bear the Burden of Proof in Immigration Bond Hearings Pursuant to 8 U.S.C. § 1226(a).

A. The *Addington* and *Foucha* Line of Cases Apply with Equal Weight to Immigrants and Require the Government to Bear the Burden of Proof.

Certain foundational constitutional principles apply to noncitizens and citizens alike. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (applying *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *United States v. Salerno*, 481 U.S. 739, 746 (1987)). Among them is "freedom from bodily restraint," which is "at the core of the liberty protected by" the Fifth Amendment's Due Process Clause. *Foucha*, 504 U.S. at 80. The Due Process Clause "forbids the Government to deprive any person of liberty without due process of law." *Zadvydas*, 533 U.S. at 690 (quotations and ellipses omitted). "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). "[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

The Supreme Court has identified two such carefully limited exceptions. *See Zadvydas*, 533 U.S. at 690. The first is pretrial detention in a criminal proceeding with strong procedural protections, including that the government prove the necessity of detention. *See id.*; *Salerno*, 481 U.S. at 746. The second is certain special and "narrow" non-punitive "circumstances," such as involuntary civil commitment, *Foucha*, 504 U.S. at 80, in which "a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*¸ 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356).

When deciding if a detention regime, like the one set forth in 8 U.S.C. § 1226(a), satisfies the requirements of the Due Process Clause, the Supreme Court assesses whether it is "carefully limited" and "narrowly focused on a particularly acute problem in which the government interests are overwhelming." *Foucha*, 504 U.S. at 81. A regime meets this standard only if, among other things, it requires the government to submit information justifying detention. *See Hendricks*, 521 U.S. at 359 (government bears burden of proving dangerousness for involuntary civil commitment); *Foucha*, 504 U.S. at 80 (government must show by clear and convincing evidence mental illness and dangerousness for involuntary civil confinement); *Salerno*, 481 U.S. at 751 (government must show by clear and convincing evidence that arrestee presents threat to individual or community). And,

because a person's fundamental liberty interest is at stake, that information must be substantial. *See Addington*, 441 U.S. at 427 (for civil commitment, preponderance of evidence standard would improperly ask individual "to share equally with society the risk of error when the possible injury to the individual"—wrongful deprivation of liberty—"is significantly greater than any possible harm to the state").

As explained *supra*, the government has been jailing people under Section 1226(a) without being required to show any reason at all.[4] The resulting deprivations of liberty are necessarily neither "carefully limited" nor "narrowly focused," and therefore the process fails to meet the constitutional requirements articulated by the Supreme Court. *See Foucha*, 504 U.S. at 81. In *Foucha*, for example, the Court struck down Louisiana's involuntary civil commitment law because it did not require the state "to justify continued detention." *Id.* at 81. Instead, it unlawfully "place[d] the burden on the detainee to prove that he [was] not dangerous." *Id.* at 82. The immigration detention regime under *Adeniji* and *Guerra* was functionally the same.

In *Salerno*, the Supreme Court held that pre-trial detention in criminal cases based on dangerousness satisfied Due Process requirements, but *only* because the Bail Reform Act included strong procedural protections that ensure that the Act

[4] Detaining anyone who is alleged to be unlawfully present in the United States, but not yet finally determined to be, is not a "carefully limited" or "narrowly focused" regime.

"narrowly focuses on a particularly acute problem in which the Government interests are overwhelming." 481 U.S. at 746-47, 750. Among other protections, the Act required the government, "[i]n a full-blown adversary hearing," to convince "a neutral decisionmaker by clear and convincing evidence that no conditions of release [could] reasonably assure the safety of the community or any person." *Id.* at 750. In this case, the district court correctly ruled that, if the Constitution requires the government to meet that burden to detain those accused of serious federal crimes before trial, it must require the government to meet *at least* the same burden to jail people during the pendency of civil immigration proceedings. *See Brito*, 415 F. Supp. 3d at 266-67. The district court's conclusion is buttressed by this Court's recent decision in *Ryan v. ICE*, which concluded that there are analytic similarities between criminal arrests and civil arrests for immigration matters. *See Ryan v. United States Immigration & Customs Enf't*, No. 19-1838, 2020 U.S. App. LEXIS 27804, at *33 (1st Cir. Sep. 1, 2020).

In *Zadvydas*, the Supreme Court explained that these principles apply to noncitizens arrested in the United States. *See* 533 U.S. at 690. There, the Court addressed the rights of noncitizens who (unlike Section 1226(a) detainees) were detained because their immigration proceedings were completed and resulted in a final order of removal. *See id.* The Court explained that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their

presence here is lawful, unlawful, temporary, or permanent."[5] *Id.* at 693. The Court consequently relied on the principles of cases like *Foucha* and *Salerno* to hold that even noncitizens ordered removed must be released, if the government cannot demonstrate with sufficient evidence that detention satisfies a lawful objective. *See id.* at 701.

In light of this precedent, the district court properly held that "the BIA's policy of placing the burden of proof on the alien in §1226(a) bond hearings is unconstitutional," and also "a violation of the APA" because of these constitutional violations. *Brito*, 415 F. Supp. 3d at 268. The government has effectively waived any argument regarding the APA claim on appeal by addressing it only in two short footnotes. *See* Gov't Br. at 17 n.7, 21 n.8; *see also Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999).

Petitioners alternatively argued below that the BIA's burden allocation in *Adeniji* unlawfully reversed long-standing agency precedent placing the burden of proof on the government (*Patel*) without sufficient reason. *See* 5 U.S.C. § 706(2)(A); *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 115 (1st Cir. 2009). Though the

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[5] In 2020, in *DHS v. Thuraissigian*, the Supreme Court ruled that someone detained 25 yards inside the border was "on the threshold" and had no due process right to a particular procedure for determining whether to admit him, beyond whatever procedure is established by Congress. 140 S.Ct. 1959, 1982-83 (2020). That case did not involve any Section 1226(a) detainees. *See id.* at 1966 (citing 8 U.S.C. § 1225(b)(1)(B)(ii) & (B)(iii)(IV)).

district court did not reach this alternative ground under the APA, this Court may affirm on any basis in the record. *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 51 n.6 (1st Cir. 2013). And in any event, the decision the government cited to defend *Adeniji* as representing a reasonable interpretation of Section 1226(a) was previously vacated *in its entirety* by the First Circuit. *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 13 n.1 (D. Mass. 2017), *vacated for mootness*, No. 17-1918, Judgment, at *2 n.2 (1st Cir. Mar. 22, 2018).

B. The Supreme Court Has Not Already Decided This Case.

The government principally contends that the Supreme Court has already decided this case against Petitioners. That is not true.

The government first relies on *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). *See* Gov't Br. at 21. In *Jennings*, the Supreme Court engaged solely in statutory interpretation. *See id.* at 851. The Court concluded that Section 1226(a) itself does not command any particular procedures for the detention hearing, *see id.* at 847-48, but it declined to consider or decide whether the constitution does. *See id.* at 851 ("[The Court of Appeals] had no occasion to consider respondents' constitutional arguments on their merits… . [W]e do not reach those arguments."); *see also Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 690 (D. Mass. 2018) (explaining that *Jennings* "left open the question of whether the Due Process Clause" requires

"a clear and convincing evidence burden be placed on the government in [Section 1226(a)] bond hearings").

The government also cites *Nielsen v. Preap*, 139 S.Ct. 954 (2019), see Gov't Br. at 6, 21 n.9, but that case similarly addressed solely a question of statutory interpretation (the meaning the phrase "when…released" in Section 1226(c)) and declined to reach any constitutional questions. *See Preap*, 139 S.Ct. at 968, 972 ("Our decision today on the meaning of that statutory provision does not foreclose…constitutional challenges to the applications of the statute…."). The Court in *Preap* did not address any of the questions presented here—it simply described the existing Section 1226(a) detention procedures under *Guerra* as background on the immigration detention system. *See Preap*, 139 S.Ct. at 959-60.

The government also relies on *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993), but neither of those cases endorsed presumptive detention. *See* Gov't Br. at 22, 25-26. To the contrary, in *Carlson*, the government had presented individualized evidence of active participation in the Communist Party (then designated a proxy for dangerousness) for each detainee, and "[t]here [was] no evidence or contention" that Party members were categorically denied bail. *See* 342 U.S. at 541-42. Further, *Carlson* noted that dangerousness could not be imputed to *all* aliens subject to deportation and that the relevant statute made detention of these aliens without bail discretionary based on a finding of

dangerousness. *Id* at 543-44. And *Flores* addressed the rights of unaccompanied children who could not be released except to an adequate caretaker. *See* 507 U.S. at 314-15. Contrary to the government's characterization, *Flores* (which issued while the government bore the burden in bond hearings under *Patel*) did not suggest that default detention for *all* alleged noncitizens would comply with due process so long as the noncitizens are afforded a mere "*right* to a hearing"—rather, that language signifies the Court's ruling that, in the context of children who could not be released, the practice of giving them bond hearings upon request, rather than automatically, was not itself a due process violation. *See id.* at 308-09. Similarly, although the government places great emphasis on *Flores*'s statement that "Congress eliminated any presumption of release pending deportation," that statement refers to *Carlson*'s explanation that Congress had eliminated what some courts had interpreted as a *statutory* presumption, leaving former Section 1252(a) silent on the subject of bond hearing procedures. *See Flores*, 507 U.S. at 306 (citing *Carlson*, 342 U.S. at 538-40).

Lastly, the government relies heavily on *Demore v. Kim*, 538 U.S. 510 (2003), but that slender holding will not bear the weight. *See* Gov't Br. at 23. In *Demore*, the Supreme Court addressed certain constitutional questions relating to 8 U.S.C. §1226(c). *See Demore*, 538 U.S. at 513. In that statute, Congress ordered the categorical detention of noncitizens with certain criminal convictions (subject to

exceptions), apparently based on the conclusion that such convictions are a reliable proxy for dangerousness or risk of flight. *See* 8 U.S.C. § 1226(c)(1)-(2); *Demore*, 538 U.S. at 518-19, 528. The Court, relying on Congress's findings regarding the flight risk and danger Section 1226(c) detainees allegedly pose, ruled that Congress, "pursuant to its broad power over naturalization and immigration," could permissibly order such detention for "the brief period necessary for their removal proceedings." *See* 538 U.S. at 513, 521; *see also id.* at 532 (Kennedy, J., concurring) (noting that categorical detention under Section 1226(c) is still subject to Due Process limitations, and could be unconstitutional if "unreasonable or unjustified" or if there is "unreasonable delay" in the removal proceedings).

Demore is inapposite here because it addressed the scope of what Congress is empowered to command. *See id.* at 513. However, unlike Section 1226(c), Congress chose not to include any such command in Section 1226(a)—it does not order that any noncitizen be detained, or be presumed detained, or bear any burden of proof to secure release. *See* 8 U.S.C. § 1226(a). The statute's use of the word "may" does not, by itself, command the adoption of any particular procedures, and certainly not unconstitutional bond hearing procedures. *See Zadvydas*, 533 U.S. at 697 (word "may" did not confer "unlimited discretion" to detain); *see also Pensamiento*, 315 F. Supp. 3d at 689 (violation of Constitution "not a matter of the IJ's discretionary judgment"). And surely Congress's decision to adopt language from former Section

1252(a)(1)—language that, in 1996, had long been construed to place the burden on the government under *Patel*—cannot reasonably be construed as a command to reverse the established bond hearing procedures. *See, e.g.*, *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). To the contrary, in *Jennings*, the Supreme Court concluded that Section 1226(a) is *silent* on procedure. *Jennings*, 138 S.Ct. at 847-48. Consequently, *Demore* does not control.[6]

C. The *Mathews* Test, to the Extent It Applies, Requires That the Government Bear the Burden of Proof.

The government argues that, under the test described in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the status quo affords class members sufficient process. *See* Gov't Br. at 32-33. This is wrong for several reasons. First, the liberty interest at stake here, as in *Addington*, *Foucha*, and other cases, is so fundamental as to render a *Mathews* analysis unnecessary. Second, even if the *Mathews* test did apply, the government has not made any evidentiary record of its interests for this test. And, last, even if the government had presented evidentiary support for its stated interests, the *Mathews* test would still weigh in favor of placing the burden on the government.

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[6] The various statistics in *Demore* the government references do not relate the Section 1226(a) detainees. *See* 538 U.S. at 519-20, 565.

First, in cases like *Foucha*, *Salerno*, and *Addington*, the Supreme Court has resolved the issue by focusing almost exclusively on the liberty interest at stake. *See also Diaz-Ceja v. McAleenan*, 2019 U.S. Dist. LEXIS 110545, at *25-27 (D. Colo. July 2, 2019). *Addington* held that the government must bear the burden of proof—and prove it with clear and convincing evidence—when seeking to involuntarily commit a person to a mental hospital. 441 U.S. at 419-20. Further, *Addington* held that the petitioner's liberty interest in freedom from government detention was of such weight and gravity that the government necessarily bore this burden, and at a higher standard than in normal civil cases. *Id*. Likewise, *Foucha* held that freedom from bodily restraint is paramount when applying the Due Process Clause because it "lies at the core of the liberty protected…from arbitrary governmental action." 504 U.S. at 80. Those cases point uniformly towards requiring the government to bear the burden of proof in *all* pretrial and civil detention contexts because such a vital liberty interest is at stake. *See Pensamiento*, 315 F. Supp. 3d at 692-93.

The liberty interest described by *Addington* and *Foucha* is so weighty that it is dispositive in a *Mathews* analysis in the pretrial and civil detention contexts. Physical detention requires "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (citation omitted); *see also Addington*, 441 U.S. at 425 ("[C]ivil commitment for *any* purpose constitutes a *significant* deprivation of liberty that

requires due process protection." (emphasis added)). Unlike for Section 1226(c), Congress has not found—and the government has not presented any evidence—that noncitizens detained under Section 1226(a) pose any particular danger or flight risk. *Cf. Demore*, 538 U.S. at 518-20. The statutory framework for civil detention of noncitizens is necessarily subject to constitutional constraints. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens…." *Zadvydas*, 533 U.S. at 693. Therefore, *Foucha*, *Addington*, and their progeny instruct that the government must bear the burden of proof as a matter of due process protection because the liberty interest is such an overriding factor. *See Addington*, 441 U.S. at 427.

Second, even insofar as the other factors do come into play, if the Court did apply the *Mathews* test, the government could not prevail as a threshold matter because it has failed to rebut Petitioners' facts or make any record of the government's supposed interest. Fed. R. Civ. P. 56(c)(2); *Harrington v. City of Nashua*, 610 F.3d 24, 27-28 (1st Cir. 2010). Petitioners have shown the prejudice noncitizens face in bearing the burden of proof in bond hearings. [RA50-52; RA141-145; RA193-198; RA312-327; SSA23-26; SSA98-102]. Petitioners have demonstrated that this burden implicates a significant liberty interest and that the risk of erroneous deprivation of this interest is high without additional safeguards. *Id.*; *see also Addington*, 441 U.S. at 427. The government did nothing to rebut these

facts. If the immigration bond system faces an existential crisis from this burden shift, the court might expect the government to have submitted ample testimony and data backing up this claim; it has offered nothing but argument. There is simply no record support for the government's claims of overriding administrative necessity to require placing the burden of proof on noncitizens during their bond hearings.

Nonetheless, the government argues that Section 1226(a)'s framework of placing the burden on the noncitizen ensures that noncitizens "do not abscond or commit crimes while removal proceedings are ongoing." Gov't Br. at 34, 36. But it did not offer any statistics or data suggesting that Section 1226(a) detainees abscond or commit crimes at any rate that would justify this burden allocation. Further, the government presses the administrative convenience of detention, but cites nothing in the record that supports such claims. Gov't Br. at 36-37. Indeed, the government has not offered any declaration, affidavit, or piece of evidence substantiating the pitfalls it now posits the immigration system would face because of this burden shift.

Even if the *Mathews* test applies *and* the Court takes the assertions of government counsel as evidence that the government will face significant issues administering the immigration system as a result of a burden shift, Petitioners still necessarily prevail because the *Mathews* test for procedural due process cannot be satisfied without assigning the burden of proof to the government in bond hearings. *See* 424 U.S. at 333. In assessing whether a given procedural framework affords due

process, courts typically consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id*. at 335. All three factors counsel in favor of placing the burden of proof on the government.

First, the interest of noncitizen detainees is tremendous because their liberty is at stake, potentially for a very long time. [RA314 ¶7; RA325-326]; *Brito*, 415 F. Supp. 3d at 264-65 (median case length 129 days, and one in four cases lasted 732 days or longer); *see Mathews*, 424 U.S. at 335; *Roberts v. State of Maine*, 48 F.3d 1287, 1292-93 (1st Cir. 1995) (applying step one of the *Mathews* test and concluding that "[the petitioner's] interest in freedom from incarceration is certainly worthy of substantial due process protections" (citing *Salerno*, 481 U.S. at 750)); *supra*, Part I.A. Contrary to the government's arguments, *see* Gov't Br. at 33, Petitioners do not assert a blanket constitutional right to be released from custody during the pendency of every removal proceeding. Instead, when class members are physically restrained, due process requires a bond hearing at which the government bears the burden of proving dangerousness or flight risk. *See Zadvydas*, 533 U.S. at 690 (citing *Foucha*,

504 U.S. at 80). This is especially true when individuals may be detained for extended periods of time. *See Jennings*, 138 S.Ct. at 860 (Breyer, J., dissenting).

With respect to the second *Mathews* factor, there is a serious risk of an erroneous deprivation of liberty through requiring noncitizens to bear the burden of proof. *See Mathews*, 424 U.S. at 335. The government claims that the "existing framework governing detention under Section 1226(a) "provides procedural protections that far exceed the constitutional minimum." Gov't Br. at 34. That assertion is incorrect.

The government's procedural protections argument hinges on alleged layers of review: the initial custody determination by a DHS officer, a hearing before an immigration judge, a potential BIA appeal. Gov't Br. at 34-36. However, those layers are all predicated on a presumption of detention, requiring the detainee to prove at each administrative level why he is not dangerous or a flight risk. But weighted dice do not become fair by rolling them again and again. *See Mathews*, 424 U.S. at 334. Due process demands that the procedure be fair and relate to the particular circumstances of the case. *See id.* The "process" for Petitioners and other class members was tainted by the framework's inherent unfairness in allocating the

burden to detainees and in many instances resulted in the deprivation of their liberty. *Id.*[7]

The second *Mathews* factor often involves a determination of how the risk of error should be allocated, and a corresponding allocation of the burden of proof to serve as a procedural safeguard. *See Addington*, 441 U.S. at 427. On the *Addington* spectrum of interests, civil detention falls in the middle, warranting a standard with "some combination of the words 'clear,' 'cogent,' and 'convincing,'" because the "interests at stake...are deemed to be more substantial than mere loss of money." *Id.*; *see also Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996). Immigration detention involves interests that are at least as substantial.[8] *See* Br. for Massachusetts, *et al.* as Amici Curiae at 5-15. Because the government has the lesser of the interests—detaining the noncitizen as part of removal proceedings, versus the detainee's physical liberty interest—the government must bear the risk of error and *prove* that the individual should be denied his or her liberty.

On the third *Mathews* factor, the government's interests are not negatively impacted by requiring it to bear the burden of proof because if evidence exists that

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[7] This burden allocation has caused courts to question the constitutionality of similar regulations. *See Zadvydas*, 533 U.S. at 692; *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 227 (3d Cir. 2018).

[8] *See, e.g., Hendricks*, 521 U.S. at 359; *Foucha*, 504 U.S. at 76; *Salerno*, 481 U.S. at 746; *Addington*, 441 U.S. at 425.

will enable it to meet its burden, the government can easily obtain it.[9] *See Mathews*, 424 U.S. at 335; *see also Santosky v. Kramer*, 455 U.S. 745, 767 (1982) ("a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State"). The government is in the best position to establish the primary factor of a bond hearing: dangerousness. *See Urena*, 25 I.&N. Dec. at 141. Immigration judges determine dangerousness by reviewing records from federal, state, and local law enforcement—documents that are at the government's fingertips but extremely difficult for detained immigrants to obtain. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting that immigrant detainees "have little ability to collect evidence").

A presumption of danger and flight risk does not serve any government interest expressed in Section 1226(a), which authorizes discretionary detention for a wide swath of immigrants who are not otherwise subject to mandatory detention. *See Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *10. On the contrary, the burden allocation severely impacted Mr. Pereira Brito, Mr. Avila Lucas, and Mr. Celicourt at their bond hearings. [RA37 ¶¶49-50, RA40 ¶¶64-65, RA44 ¶¶81-82]. These

[9] Again the lack of record support speaks volumes. The government made no record that finding and presenting evidence of dangerousness or flight risk at bond hearings would prove administratively difficult. And relatedly, the government presented no evidence that noncitizens detained pursuant to Section 1226(a) tend to have criminal records or tend to flee. The government has presented no evidence as to why the noncitizen detainee, by default, should bear the burden of proof.

Petitioners, and similarly situated class members, could have—and likely would have—been released had they received constitutionally adequate bond hearings. *Id*. Instead, Petitioners needlessly spent months in detention throughout the pendency of their immigration proceedings because they bore the burden of disproving dangerousness or flight risk.

Where the detainee's interest in liberty is so great and the risk of error correspondingly so significant, and where the impact on the government's interest in executing removal proceedings has not been shown to be in any way affected by the government bearing the burden, the *Mathews* test compels the burden to lie with the government, not the detainee. Only then can the bond hearing be "meaningful" and constitutionally adequate. *See* 424 U.S. at 333.

D. The Substantial Weight of the Authority on This Precise Question Supports Placing the Burden on the Government.

In distinguishing *Foucha* and invoking *Mathews*, the government repeats arguments it has lost over and over again across the country, and refuses to acknowledge the tsunami of decisions placing the burden of proof on the government when detaining immigrants under Section 1226(a).

The government blithely asserts that "numerous courts…have looked favorably on the procedures governing Section 1226(a) bond proceedings." Gov't Br. at 39-40. But none of these cases are instructive here. In *Borbot v. Warden Hudson Cty. Corr. Facility*, the detainee never challenged the adequacy of his initial

bond hearing, as Petitioners are, and the issue was not squarely before the court. 906 F.3d 274, 276-77 (3d Cir. 2018). The sole basis of the petitioner's due process challenge was the *duration* of his detention. *Id*. The narrow focus of the Third Circuit's analysis in *Borbot* was whether the burden must shift to the government after a certain prolonged duration. Cases relying on *Borbot* are similarly uninstructive because they do not address the constitutionality of the Section 1226(a) bond hearing.[10]

Grasping at straws, the government cites decisions within the First Circuit—*Reid*, *Gordon*, and *Castañeda*—that (i) do not deal with Section 1226(a) or take any position on the constitutionality of its framework, and (ii) have since been

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[10] The district court decisions in the Third Circuit that the government cites misread *Borbot* as being about the burden of proof in initial bond hearings, when it is not. *See* Gov't Br. at 40-41 (citing *Gomez v. Barr*, 2020 U.S. Dist. LEXIS 54618 (M.D. Pa. Mar. 30, 2020); *Campoverde v. Doll*, 2020 U.S. Dist. LEXIS 43678 (M.D. Pa. Mar. 13, 2020); *Fredi v. Edwards*, 2019 U.S. Dist. LEXIS 214534 (D. N.J. Dec. 12, 2019)). *Compare Campoverde*, 2020 U.S. Dist. LEXIS 43678, at *33 ("In rejecting the petitioner's claim, the Third Circuit acknowledged that §1226(a) places the burden of proof on a detainee in a bond hearing, but held that such an allocation of the burden of proof does not violate the Constitution."), *with Borbot*, 906 F.3d at 279 ("*Borbot* complains that he has borne the burden of proof throughout his detention. The burden must eventually shift to the government, he argues, regardless of the process he was initially afforded under §1226(a)."). Indeed, in *Gomez*, the Magistrate Judge's initial report and recommendation concluded *Borbot* was inapplicable for this very reason. *Gomez*, 2020 U.S. Dist. LEXIS 54618 at *5 ("[T]he Third Circuit has not directly addressed the issue of which party bears the burden of proof during a §1226(a) bond hearing." (internal citations omitted)). These *Borbot*-reliant decisions have no bearing on the constitutional due process issue here.

overturned or called into question. *See* Gov't Br. at 41-43. *Reid*, *Gordon*, and *Castañeda* all involved Section 1226(c), which provides for mandatory detention of certain immigrants. *Castañeda v. Souza*, 810 F.3d 15, 20 (1st Cir. 2015); *Reid v. Donelan*, 22 F. Supp. 3d 84, 86 (D. Mass. 2014); *Gordon v. Johnson*, 300 F.R.D. 31, 34 (D. Mass. 2014), *vacated sub nom. Gordon v. Lynch*, 842 F.3d 66 (1st Cir. 2016). Section 1226(a) detainees—whose detention is discretionary rather than mandatory—deserve at least as much process, if not more, than Section 1226(c) detainees, and require a separate due process analysis on this distinction alone.

Moreover, the government uses stale case law to prop up its weight of authority assertion. *See Reid*, 22 F. Supp. 3d, at 93, *vacated and remanded on other grounds*, 819 F.3d 486 (1st Cir. 2016), *opinion withdrawn*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018); *Gordon*, 300 F.R.D. at 41, *vacated*, 842 F.3d 66 (1st Cir.); *Castañeda*, 810 F.3d at 43. The government cannot hide that the decisions it cites have all since been reversed or revisited in favor of Petitioners. The government acknowledges that the district court, in *Reid v. Donelan*, 390 F. Supp. 3d 201, 224-25 (D. Mass. 2019), "revisit[ed] the burden of proof issue in the context of aliens detained for prolonged period under Section 1226(c), holding that due process requires the Government to prove dangerousness by clear and convincing evidence, and flight risk by a preponderance of the evidence." Gov't Br. at 40-41, n.17. This Court vacated the 2014 *Gordon* decision the government cites and

remanded the case to the district court to "consider the parallel due process issues in *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)." *Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016). And with respect to *Castañeda*, the Supreme Court's subsequent decision in *Nielsen*, 139 S.Ct. at 956 called into question the central holding in *Castañeda*, which the government also acknowledges. Gov't Br. at 42, n.18.

What the government's citation to these inapposite cases tries to hide is a visible groundswell: post-*Jennings*, nearly *every* district court to address the burden allocation for Section 1226(a) bond hearings has decided that due process requires the government, not the detainee, to bear the burden of proof.[11] The district courts,

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[11] *See, e.g., Singh v. Holder*, 636 F.3d 1196, 1203 (9th Cir. 2011); *Doe v. Tompkins*, 2019 U.S. Dist. LEXIS 22616, at *5 (D. Mass. Feb. 12, 2019); *Gakou v. Barr*, 2019 U.S. Dist. LEXIS 177471, at *11-12 (W.D.N.Y. Oct. 10, 2019); *Adejola v. Barr*, 2019 U.S. Dist. LEXIS 172902, at *7-8 (W.D.N.Y. Oct. 4, 2019); *Singh v. Barr*, 400 F. Supp. 3d 1005, 1018 (S.D. Cal. 2019); *Aguirre v. Barr*, 2019 U.S. Dist. LEXIS 140065, at *12 (S.D.N.Y. Aug. 19, 2019); *Aparicio-Villatoro v. Barr*, 2019 U.S. Dist. LEXIS 138904, at *19-20 (W.D.N.Y. Aug. 16, 2019); *Arellano v. Sessions*, 2019 U.S. Dist. LEXIS 125057, at *38-39 (W.D.N.Y. July 26, 2019); *Hernandez-Lara v. ICE*, 2019 U.S. Dist. LEXIS 124144, at *9 (D.N.H. July 25, 2019); *Aparicio-Larin v. Barr*, 2019 U.S. Dist. LEXIS 121126, at *19-20 (W.D.N.Y. July 20, 2019); *Nzemba v. Barr*, 2019 U.S. Dist. LEXIS 119126, at *18-19 (W.D.N.Y. July 17, 2019); *Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *10-11; *Velasco Lopez v. Decker*, 2019 U.S. Dist. LEXIS 82881, at *10 (S.D.N.Y. May 15, 2019); *Diaz Ortiz v. Tompkins*, 2019 U.S. Dist. LEXIS 14155, at *2 (D. Mass. Jan. 29, 2019); *Melie I. v. DHS*, 2019 U.S. Dist. LEXIS 95338, at *6-7 (D. Minn. Jan. 7, 2019); *Darko v. Sessions*, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018); *Martinez v. Decker*, 2018 U.S. Dist. LEXIS 178577, at *13 (S.D.N.Y. Oct 17, 2018); *Pensamiento*, 315 F. Supp. 3d at 692; *Alvarez Figueroa v. McDonald*, 2018 U.S. Dist. LEXIS 80781, at *14-15 (D. Mass. May 14, 2018); *Garcia v. Decker*, 2020 U.S. Dist. LEXIS 50879 (S.D.N.Y. Mar. 24, 2020); *Medley v. Decker*, 2019 U.S. Dist. LEXIS 213666

post-*Jennings*, have one by one course-corrected the BIA's unconstitutional practice of requiring the noncitizen detainee to bear the burden of proof.[12] This Court should stay that course.

II. In Immigration Bond Hearings, Due Process Requires a Clear and Convincing Standard of Proof, Consideration of Ability to Pay, and Consideration of Alternatives to Detention.

In placing the burden of proof on the government, the district court imposed a "bifurcated" standard of proof for bond hearings, requiring the government to prove dangerousness by clear and convincing evidence and flight risk by a preponderance of the evidence. It held that due process also requires immigration judges to consider ability to pay and alternatives to detention when making bond

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(S.D.N.Y. Dec. 11, 2019); *De La Cruz v. Decker*, 2019 U.S. Dist. LEXIS 229673 (S.D.N.Y. Sep. 13, 2019); *Miranda v. Barr*, 2020 U.S. Dist. LEXIS 94283 (D. Md. May 29, 2020); *Vargas v. Wolf*, 2020 U.S. Dist. LEXIS 69511 (D. Nev. April 21, 2020); *Perez v. McAleenan*, 2020 U.S. Dist. LEXIS 45567 (N.D. Cal. January 23, 2020); *Mitka v. ICE Field Office Dir*., 2019 U.S. Dist. LEXIS 196045 (W.D. Wash. Nov. 12, 2019); *Haughton v. Crawford*, 221 F. Supp. 3d 712, 713-17 (E.D. Va. 2016); *Portillo v. Hott*, 322 F. Supp 3d 698, 709 n.9 (E.D. Va. 2018). Petitioners are aware of only two district court decisions post-*Jennings* which place the burden of proof on the detainee. *Basri v. Barr*, 2020 U.S. Dist. LEXIS 91836, *21-22 (D. Colo. May 11, 2020); *Lopez v. Barr*, 2020 U.S. Dist. LEXIS 75037, at *16 (W.D.N.Y. Apr. 29, 2020); *Onosamba-Ohindo v. Barr*, 2020 U.S. Dist. LEXIS 160270, at *67 (W.D.N.Y. Sep. 2, 2020).

[12] Despite the many judicial decisions holding that placing the burden of proof on the detainee is unconstitutional, the BIA has continued to do so. *See, e.g.*, *Matter of R-A-V-P-*, 27 I.&N. Dec. 803, 804 (BIA 2020); *id.* at n.2 (noting that the BIA does "not have the authority to entertain constitutional challenges to the statutes and regulations [it] administer[s]").

determinations. Petitioners challenge only the standard for flight risk, arguing that the clear and convincing standard should apply across the board.

The government disagrees with both Petitioners and the district court. It argues that (1) the district court erred by replacing the standard currently used in the Immigration Court, which requires proof "to the satisfaction of the immigration judge," Gov't Br. at 43-48, and (2) it is constitutionally unnecessary and practically unfeasible to require immigration judges to consider ability to pay and alternatives to detention. *Id.* at 48-51. The government is wrong on both counts.

A. The Government Offers No Valid Justification for a Lower Standard for Dangerousness and Flight Risk.

The government's attack on Petitioners' proposed standard of proof is unavailing in every respect. First, the government misrepresents Petitioners' position by claiming that Petitioners seek "*more* procedural protections" for immigration detainees "than those afforded criminal defendants." Gov't Br. at 46. This is backwards. Petitioners argued that because civil detainees receive *fewer* procedural protections than pretrial criminal detainees as their cases proceed, there is a heightened need to guard against undue detention. For example, pretrial criminal detainees have the right to counsel, so the *risk* of an erroneous bail determination is lower; they have speedy trial rights, so the *consequences* of an erroneous bail determination are minimized. Because civil immigration detainees enjoy none of these rights, they—like civil detainees in most other contexts—require the protection

of the clear and convincing evidence standard, in order to lower the odds that they will wrongly be deprived of liberty. *Santosky*, 455 U.S. at 764-65.

The government next claims Petitioners have maintained that "'no governmental interest is at stake' in this case." Gov't Br. at 46 (citing Pet. Br. at 19). This is not so. The phrase "no governmental interest is at stake" appears in Petitioners' brief only once to describe *other* cases, not "this case"—*i.e.*, to explain that courts apply a preponderance of the evidence standard in ordinary civil cases, such as negligence actions, "[b]ecause no governmental interest is at stake and the litigants are sparring over property…." Pet. Br. at 19 (citing *Addington*, 441 U.S. at 423). This was in contrast to detention proceedings, where courts have used the clear and convincing evidence standard to protect the particularly important individual interests at risk. Pet. Br. at 20 (citing *Addington*, 441 U.S. at 424). But Petitioners never said, or suggested, that the government has no interest in the outcome of this case (or in the outcomes of Section 1226(a) detention proceedings in general).

The government's description of the interests implicated by detention proceedings is, however, incomplete. The government may have an interest in "promptly adjudicating removal proceedings," Gov't Br. at 46, but that is not the only matter of concern. Indeed, there are other substantial government interests at stake that the government ignores. The government has an overriding concern "that justice shall be done," *id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)),

and thus a particular interest in avoiding unfair and unnecessarily prolonged detention based on "erroneous information or because of an erroneous evaluation of need." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). These interests must weigh in the balance too, along with the detainee's obvious and compelling liberty interest. Yet the government would have this Court believe that the only interest at stake is its generalized interest in "promptly adjudicating removal proceedings," Gov't Br. at 46—an interest the government contends, without any evidence, can be accomplished only by detaining people without justification.

Finally, the government deals both ineffectually and incompletely with the decisions Petitioners cite. It purports to distinguish *Chaunt v. United States*, 364 U.S. 353 (1960)—where the Court required clear and convincing evidence to justify revoking the citizenship of a naturalized American—on the grounds that, "[u]nlike Section 1226(a) detainees…, naturalized citizens enjoy the full protection of the constitution in civil proceedings." Gov't Br. at 47. According to the government, immigrants facing detention under Section 1226(a) do "not garner the same constitutional protections as naturalized citizens like in *Chaunt*." *Id.* at 48.

That is a false distinction. Immigrants may not enjoy *all* the "advantages of citizenship," *Mathews v. Diaz*, 426 U.S. 67, 78 (1976), but they enjoy paramount due process protections. "There are literally millions of aliens within the jurisdiction of the United States," and "[t]he Fifth Amendment, as well as the Fourteenth

Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law." *Id.* "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.*

The government might have spotted the flaw in its own argument if it had attempted to address all of the cases cited by Petitioners, instead of picking out *Chaunt* for selective treatment. For example, Petitioners also cited *Woodby v. INS*, 385 U.S. 276 (1966). *See* Pet. Br. at 21-22. In *Woodby*, as in *Chaunt*, the Supreme Court imposed a "clear, convincing and unequivocal" standard of proof because of the important individual interests at stake. Petitioners in *Woodby*, however, were not citizens. Like Petitioners here, they were aliens in removal proceedings. Nevertheless, the Supreme Court gave them the protection of an elevated standard of proof (in that case, for the removal proceedings themselves) because of the "drastic deprivations that may follow" deportation, and because the Court rejected the notion "that a person may be banished from this country upon no higher degree of proof than applies in a negligence case." *Id.* at 285. The government's brief never mentions *Woodby*, which ends the government's claim that citizenship status should affect the due process analysis when personal liberty is at stake.

B. "To the Satisfaction of the Immigration Judge" Is Not a Constitutionally Appropriate Standard of Proof.

The government argues that the standard of proof employed by the immigration court—"to the satisfaction of the immigration judge"—should govern. The district court rejected this standard because it is "effectively no standard at all, and may vary from judge to judge." *Brito*, 415 F. Supp. 3d at 266. According to the government, this characterization "effectively ignores the guidance provided by Board precedent, which … delineates numerous factors that an IJ should consider during … a bond hearing." Gov't Br. at 44.

The "Board precedent" cited by the government, however, merely advises immigration judges to take into account such obvious considerations as whether the detainee has a fixed address and family ties, or a "history of efforts to flee prosecution." *See Guerra*, 24 I.&N. Dec. at 40. This fails to provide what the district court found missing: a benchmark against which the presence or absence of relevant factors can be measured in particular cases, or against which the outcomes of different cases can be compared—in other words, a standard that is less vulnerable to capricious application than "to the satisfaction of the immigration judge." If anything, the decision in *Guerra* heightens the risk of arbitrary decision-making by emphasizing that the immigration judge "has broad discretion in deciding the factors that he or she may consider in custody redeterminations," and likewise "may choose to give greater weight to one factor over others, as long as the decision is

reasonable." *Id.* The "guidance" provided by BIA precedent, then, does nothing to alleviate the district court's well-founded concerns about the risks of the current standard of proof, as derived from *Addington*.

C. Ability to Pay and Alternative Conditions of Release Are Elements of the Process Due to Section 1226(a) Detainees.

The district court also held that "due process requires an immigration court consider both an alien's ability to pay in setting the bond amount and alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances." *Brito*, 415 F. Supp. 3d at 267. Petitioners agree with this aspect of the judgment.

The government does not agree. It states that "[t]here is no constitutional … requirement that an IJ consider alternatives to detention or an alien's ability to pay bond while conducting a bond hearing in immigration court." Gov't Br. at 48. This ignores the well-developed body of relevant constitutional law, founded on the proposition that "the government cannot keep a person in prison solely because of indigency." *United States v. Ellis*, 907 F.2d 12, 13 (1st Cir. 1990).

"Due process and equal protection principles converge" in this analysis. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). In *Bearden*, the Supreme Court reasoned that it would be contrary to the "fundamental fairness" required by the Due Process and Equal Protection Clauses to deprive a person "of his conditional freedom simply because, through no fault of his own, he cannot pay…." *Id.* at 673.

The Court thus held that in probation "revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay," and if the defendant cannot pay "despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." *Id.* at 672.

Because freedom in any context "should not depend on an individual's economic status," the constitutional principles stated in *Bearden* have also been applied to pre-trial bail hearings for criminal defendants. *People ex rel. Desgranges v. Anderson*, 59 Misc. 3d 238, 241 (N.Y. Sup. Ct. 2018) ("It is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the Equal Protection and Due Process Clauses"); *see also In re Humphrey*, 228 Cal. Rptr. 3d 513, 525 (Cal.App. 2018) (due process and equal protection require court to "determine whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are sufficient to serve the government's interests").

An immigrant's liberty interest is no weaker than a criminal defendant's, and while he is in the United States his due process rights are just as strong. Consequently, several courts—including two whose decisions were cited by the district court, but ignored by the government—have concluded that in bond hearings for Section 1226(a) detainees, "consideration of the detainees' financial

circumstances, as well as of possible alternative release conditions, [is] necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings[.]" *Brito*, 415 F. Supp. 3d at 267-68 (citing *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) (requiring consideration of these factors at immigration bond hearings under Section 1226(a)); *Abdi v. Nelson*, 287 F. Supp. 3d 327, 338-39 (W.D.N.Y 2018)); *see also* 18 U.S.C. § 3142(c)(2) ("[J]udicial officer may not impose a financial condition that results in the pretrial detention of the person"); *Miranda v. Barr*, 2020 U.S. Dist. LEXIS 94283, at *34 (D. Md. May 29, 2020) ("due process requires a §1226(a) bond hearing where the IJ considers a noncitizen's ability to pay a set bond amount and the noncitizen's suitability for alternative conditions of release"); *Hernandez v. Kolitwenzew*, 2020 U.S. Dist. LEXIS 97874, at *37 (C.D. Ill. Apr. 23, 2020) ("Petitioner's due process rights were violated when his financial circumstances and ability to pay were not considered when his bond amount was set"); *Sophia v. Decker*, 2020 U.S. Dist. LEXIS 26110, at *13 (S.D.N.Y. Feb. 14, 2020) (clear and convincing evidence, consideration of ability to pay and conditions of release "are the two conditions most often ordered as constitutionally necessary" in immigration bond hearings). This aspect of the district court's order, therefore, *was* constitutionally required.

The government also contends that "the district court's mandate … is also problematic in light of Congress's clear intent to entrust bond decisions to the discretion of the Attorney General." Gov't Br. at 49. Any statutory grant of discretion to the executive, however, is structurally subordinate to the Constitution, and the Due Process Clause in particular "stands as a significant constraint on the manner in which the political branches may exercise [even] their plenary authority." *Hernandez*, 872 F.3d at 990, n.17. For this reason, 8 U.S.C. § 1226(e) does not bar a categorical constitutional challenge to detention, which does not attempt to reweigh the discretionary factors entrusted to administrative discretion. *See, e.g.*, *Jennings*, 138 S.Ct. at 841.

Finally, there is nothing in the record to validate the government's claim that the district court's order "created practical and procedural concerns." Gov't Br. at 50. The government says that immigration judges "have no mechanism for enforcing an alien's failure to appear after being release on bond outside of issuing a removal order," *id.*, but if this is meant to suggest that releasing aliens under alternative conditions of release will reduce appearance rates at removal hearings, there is nothing in the record to support the government's prediction. *Cf. Hernandez*, 872 F.3d at 991 (noting "the empirically demonstrated effectiveness of [alternative] conditions in ensuring future appearances," and finding that ICE's "Intensive Supervision Appearance Program—which relies on various alternative release

conditions—resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings").

Likewise, although the government argues that "numerous detainees" have now asked for "a variety of unprecedented measures that IJs would be unable to enforce," Gov't Br. at 50-51, it backs up this empirical claim with a citation to a single case in which (1) the detainee (who had several alcohol-related arrests on his record) asked the immigration judge to consider an "ignition interlock device" as a condition of release, (2) the immigration judge considered the proposed alternative and rejected it as unenforceable, and (3) the district court agreed with the immigration judge and declined to disturb its decision. *Massingue v. Streeter*, 2020 U.S. Dist. LEXIS 64600, at *17-19 (D. Mass. Apr. 14, 2020). If the government cites *Massingue* to imply that the district court's order will send a flood of dangerous immigrants back onto the street, it has again failed to create a record to support its prognostication. *See Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 n. 2 (1st Cir. 1988) ("'[A]s the greenest of counsel should know,' representations in a brief are an impuissant surrogate for a record showing.").

III. Section 1252(f)(1) Does Not Preclude the Classwide Injunction.

The district court's entry of classwide injunctive relief was proper as a matter of substance and of form. Contrary to the government's contention, 8 U.S.C.

§1252(f)(1) does not preclude the classwide injunction entered by the district court for two reasons.

A. Section 1252(f)(1) Does Not Apply Because the Injunction Enjoins Agency Practice, Not the Operation of Section 1226(a).

As a threshold matter, the government's Section 1252(f)(1) argument is necessarily limited to the injunctive relief granted, because "Section 1252(f) does not bar declaratory relief." *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) (citing *Nielsen*, 139 S.Ct. at 962); *see also Brito*, 415 F. Supp. 3d at 269.[13] The government argues that the injunctive relief granted in this case "enjoins and restrains the operation of Section 1226(a)" and thus is barred by Section 1252(f)(1) because the order "prevents 'a doing or performing of a practical work or of something involving practical application of principles or processes' the statute requires." Gov't Br. at 52 (citation omitted). But nothing about the district court's injunction prevents the government from doing what the statute requires, which is making a determination as to whether to detain an individual. Where the injunction bears upon *agency practice* in implementing a discretionary statutory provision, and

[13] To the extent the government contends that the district court erred in granting class certification because the class does not meet the requirements for certification, see Gov't Br. at 4, ¶4, the government has waived that argument by providing no discussion of it in its brief.

not upon *statutory requirements*, Section 1252(f)(1) is inapplicable, and presents no bar to injunctive relief.

Section 1252(f)(1) bars permanent injunctive relief only if the injunction "enjoin[s] … the operation of" Section 1226(a). *See Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("The most sensible way to give operative effect to both words in this statutory scheme is to treat the word 'enjoin' as referring to permanent injunctions and the word 'restrain' as referring to temporary injunctive relief…."). Where, as here, the statute is silent on the procedural components of the discretionary action the statute authorizes, an injunction prohibiting or directing certain agency practices is well within the scope of relief a district court can impose. *See, e.g.*, *Savino v. Souza*, 2020 U.S. Dist. LEXIS 83371, at *8-9 (D. Mass. May 12, 2020); *Reid*, 390 F. Supp. 3d at 226-27.

The U.S. Court of Appeals for the D.C. Circuit recently rejected precisely the same argument the government advances. In *Grace v. Barr*, the district court declared unlawful four policies (embodied in a USCIS policy memorandum) that were designed to guide asylum officers' determinations of whether an immigrant has demonstrated a "credible fear" of persecution for purposes of seeking asylum in the United States and avoiding immediate deportation. 965 F.3d 883, 887 (D.C. Cir. 2020). The district court found that these policies were inconsistent with the INA, the APA, and the Illegal Immigration Reform and Immigrant Responsibility Act

(IIRIRA), whose expedited-removal provisions the policies were adopted to implement, and permanently enjoined the application of these policies in credible-fear proceedings. *Id.* at 887, 907. The D.C. Circuit rejected the government's argument that Section 1252(f)(1) barred the injunctive relief, reasoning that this statute "refers only to 'the operation of the provisions'—i.e., the statutory provisions themselves, and thus places no restriction on the district court's authority to enjoin *agency action* found to be unlawful." *Id.* at 907. The D.C. Circuit further observed that "the Supreme Court has twice noted that section 1252(f) 'prohibits federal courts from granting classwide injunctive relief against the operation of §§1221-1231'; in neither case did it even hint that the 'operation of the provisions' refers to anything other than the statute itself." *Id.* at 907 (citations omitted); *see also Rodriguez v. Hayes*, 591 F.3d 115, 1120 (9th Cir. 2010) ("Where … a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of [the statute], and §1252(f)(1) therefore is not implicated." (internal quotation marks and citations omitted)).[14]

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[14] The district court in *Grace v. Barr* similarly rejected the government's Section 1252(f) argument. Quoting the same House Report the government quotes in its brief (see Gov't Br. at 52), the court drew a distinction between "'procedures established by Congress' or a challenge to the INA itself," and "'written policy directive[s] [and] written policy guideline[s]' established by the Attorney General." *Grace v. Whitaker*, 2019 U.S. Dist. LEXIS 11853, at *10 (D.D.C. Jan. 25, 2019) (quoting H.R. Rep. No. 104-469(I) at 161), *aff'd in part and rev'd in part, sub nom. Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020). Where the plaintiffs challenge "the action

It is undisputed that a Section 1226(a) detainee must receive a bond hearing. [RA313 ¶¶1-2; RA333 ¶¶1-2]. Section 1226(a) is silent on the procedural requirements for a bond hearing. The district court's injunction requiring the immigration court to provide adequate process in such hearings bears only on the processes that have developed through agency practice—namely, BIA decisions—and not on the statute itself.[15] *See supra*, Section 1. Accordingly, the procedural requirements for bond hearings imposed by the district court's order do not "enjoin" the discretionary detention of immigrants pursuant to Section 1226(a), but rather place necessary constitutional limits on the exercise of that discretion. *See* 8 U.S.C. § 1252(f)(1). This is precisely the reasoning employed by the district court when it determined that Section 1252(f)(1) did not bar the injunction. *See Brito*, 415 F. Supp. 3d at 269 (citing *Reid*, 390 F. Supp. 3d at 223 & n.7)); *see* Add. 13-16 (class certification decision). Because the district court's order enjoins agency practice and

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of the Attorney General, *not legislation passed by Congress*," Section 1252(f)(1) is no bar to injunctive relief. *Id.* at *11 (emphasis in original).

[15] The government's own reason for protesting the permanent injunction reveals that it bears only upon agency practice, not statutory requirements. *See* Gov't Br. at 53 ("the district court's classwide permanent injunction … requires the Government to depart from 20 years of Board precedent, creates a presumption of release, and requires IJs to explicitly consider certain factors not mandated by statute").

not the operation of Section 1226(a), Section 1252(f)(1) does not bar the injunctive relief entered here.[16]

B. Section 1252(f)(1) Does Not Bar Classwide Injunctive Relief Where All Members of the Class Fall Within the Statutory Exception.

The government's argument that Section 1252(f)(1) bars injunctive relief fails for another reason: all members of the class fall within the exception to Section 1252(f)(1). Section 1252(f)(1) permits a court to "enjoin or restrain the operations of [sections 1221-1232] … with respect to the application of such provisions to the individual alien against whom proceedings under such part have been initiated." Because all of the individuals in the certified classes are necessarily individuals against whom removal proceedings are pending, all of the class members fall within the exception to Section 1252(f)(1).

This reasoning was recently adopted by the Ninth Circuit in *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134 (9th Cir. 2020). The *Padilla* plaintiffs represented a class of noncitizens detained pursuant to 8 U.S.C. § 1225(b),

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[16] The government's reliance on *Hamama v. Adduci*, 912 F.3d 869, 879 (6th Cir. 2018), is misplaced. The district court rejected *Hamama*'s flawed reasoning, and most other district courts have reached similar conclusions. *See* Add. 14; *Brito*, 415 F. Supp. 3d at 269; *Reid*, 390 F. Supp. 3d at 227; *Padilla v. ICE*, 387 F. Supp. 3d 1219, 1227 (W.D. Wash. 2019); *O.A. v. Trump*, 2019 U.S. Dist. LEXIS 129426, at *117-19 (D.D.C. Aug. 2, 2019); *Torres v. United States Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal. 2019); *but see Vazquez Perez v. Decker*, 2019 U.S. Dist. LEXIS 170185, at *14-16 (S.D.N.Y. Sept. 30, 2019).

which provides for expedited removal of arriving noncitizens unless the noncitizen indicates an intent to apply for asylum or a fear of persecution, at which point DHS must, by statute, refer the noncitizen for an interview with an asylum officer. *Id.* at 1139. If the asylum officer determines that the noncitizen does not have a credible fear of persecution, the statute requires that the noncitizen be detained during the review process "pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). In *Padilla*, these individuals subject to detention sought "timely bond hearings that comport with due process." *Id.* at 1140. On interlocutory appeal of the preliminary injunction, the Ninth Circuit rejected the government's argument that the district court lacked authority to grant injunctive relief, and held that Section 1252(f)(1) does not bar classwide injunctive relief where "[a]ll of the individuals in the plaintiff class … are 'individual[s] against whom proceedings under such part have been initiated.'" *Id.* at 1149 (quoting 8 U.S.C. § 1252(f)(1)).

The Ninth Circuit reasoned that "Congress intended §1252(f)(1) to restrict courts' power to impede the new congressional removal scheme on the basis of suits brought by organizational plaintiffs and noncitizens not yet facing proceedings under 8 U.S.C. §§ 1221-1232." *Id.* at 1151. Classwide injunctive relief for a class "composed of individual noncitizens"—"each of whom is in removal proceedings and facing an immediate violation of their rights," and each of whom individually is

subject to the district court's jurisdiction—"is consistent with that congressional intent." *Id.* Thus, "§1252(f)(1) did not bar the district court from granting preliminary injunctive relief for this class of noncitizens, each of whom is an individual noncitizen against whom removal proceedings have been initiated." *Id.*

This reasoning is equally applicable here. An individual detained pursuant to 8 U.S.C. § 1226(a) is an individual "against whom proceedings" under sections 1221-1232 "have been initiated," because Section 1226(a) provides: "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Because all of the class members are individuals detained pursuant to Section 1226(a), the district court could grant injunctive relief as to any one of them, and thus the carve-out articulated in Section 1252(f)(1) applies to permit such relief.

CONCLUSION

Petitioners ask the court to **affirm** the judgment of the district court in all respects except insofar as it requires the government to prove flight risk only by a preponderance of the evidence, and to **remand** the judgment to the district court with instructions to make clear and convincing evidence the standard of proof for any justification the government may offer for continued detention in such bond hearings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(A)(i) because it contains 12,988 words, determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I caused the Petitioners-Appellants/Cross-Appellees' Response and Reply Brief to be filed with the Clerk of the Court and served upon Respondents-Appellees/Cross-Appellants electronically via the Court's CM/ECF System.

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