Nos. 20-1037
20-1119

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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 Correctional Facility; YOLANDA SMITH, Superintendent of the Suffolk County House of Corrections; STEVEN N. 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.

Appeal from the United States District Court for the District of Massachusetts
District Court No. 19-cv-11314-PBS

RESPONDENTS - APPELLEES/CROSS - APPELLANTS' REPLY BRIEF

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

ELIANIS N. PÉREZ
Assistant Director

LAUREN E. FASCETT
Senior Litigation Counsel

HUY M. LE
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-4028

Attorneys for Respondents-Appellees/Cross-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other

I. INTRODUCTION

This Court should vacate the decision of the district court and should hold that the existing procedures governing bond hearings under 8 U.S.C. § 1226(a) are fully consistent with the Due Process Clause of the Constitution. In their response and reply brief ("Pet. Resp."), Petitioners-Appellants ("Petitioners") advance various arguments asking this Court to disregard long-standing due process analysis in order to substitute Petitioners' preferences in place of well-established procedures for bond proceedings. Petitioners erroneously attempt to widen the scope of this case by largely relying on cases that do not relate to civil immigration detention to support their demand that the Government bear the burden of proof at a Section 1226(a) bond hearing to justify an individual's continued, temporary detention during his or her removal proceedings. Despite Petitioners' distractions, Section 1226(a) detention is constitutional (*see Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)) and the current bond hearing procedures requiring an alien who seeks release to prove he is not a danger or flight risk readily comports with due process.

As Respondents-Appellees ("Respondents" or "Government") outlined in their principal and response brief ("Gov't Br."), the Supreme Court has never ruled that due process requires placing the burden of proof on the Government to justify the detention of an alien during removal proceedings. Instead, placing the burden on the alien to show he or she is not a flight risk or danger is rationally related to

advancing this legitimate immigration purpose. Thus, bond procedures under Section 1226(a) fully satisfy the requirements of due process.

Moreover, the Supreme Court has upheld the constitutionality of *categorical* detention of aliens during removal proceedings without any individualized assessment and has re-affirmed, time and again, the Government's paramount interest in detaining aliens during removal proceedings. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Accordingly, this Court should vacate the district court's flawed holding in *Brito v. Barr*, 415 F. Supp. 3d 258, 269 (D. Mass. 2019).

IV. ARGUMENT

A. The Bond Hearing Procedures Afforded to Aliens Detained Under Section 1226(a) Fully Comport with the Due Process Clause.

1. Petitioners' continued reliance on non-immigration decisions does not overcome the Supreme Court precedent that due process is flexible and circumstance-specific.

As explained in the Gov't Br., for decades, the Supreme Court has always affirmed the constitutionality of detention pending removal proceedings and has *never* required the Government to bear the burden of proof. *See Demore*, 538 U.S. at 531; *Carlson*, 342 U.S. at 524, 538; *Reno v. Flores*, 507 U.S. 292, 306 (1993). Despite this precedent, Petitioners nevertheless continue to rely on non-immigration cases to support their request that this Court apply a bright line rule

that due process requires the Government bear the burden of proof to justify *all* civil detention. Petitioners' argument is unpersuasive for a number of reasons.

To support their burden-shifting claim at Section 1226(a) bond hearings,[1] Petitioners press for a misapplication of two non-immigration decisions involving state statutes permitting civil commitment. Pet. Resp. at 15-20[2] (citing *Foucha v. Louisiana*, 504 U.S. 71 (1992) and *Addington v. Texas*, 441 U.S. 418 (1979)). As the Government previously argued, *see* Gov't Br. at 27-31, Petitioners' reliance on these non-immigration cases is problematic because immigration detention is fundamentally different. For example, detainees under Section 1226(a), like Petitioners, are subject to detention for the *limited duration* of removal proceedings, which has a definite end point: the end of removal proceedings. *Demore*, 538 U.S. at 529 (detention pending removal proceedings has "definite termination point").

Conversely, *Addington* and *Foucha* involved *indefinite* and potentially *permanent* confinement. *See Foucha*, 504 U.S. at 82 (noting that under the state's rationale, which the Court rejected, it could "hold *indefinitely* any other insanity

[1] Under Section 1226(a) of Title 8 U.S.C., Congress provided that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."

[2] References to the parties' briefings refer to the numbers at the bottom of the pages.

acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct") (emphasis added); *Addington*, 441 U.S. at 419-20 ("The question in this case is what standard of proof is required . . . in a civil proceeding brought under state law to commit an individual involuntarily for an *indefinite* period to a state mental hospital.") (emphasis added).

Petitioners in essence propose that due process requires the Government bear the burden of proof to justify *all* civil detention, regardless of the statutorily-authorized purpose for and duration of the detention. Pet. Resp. at 15-16. Put differently, Petitioners suggest a blanket due process analysis that lumps all civil detention together without further analysis and irrespective of context to support their demand that the Government always bear the burden to justify continued detention. Petitioners' argument, however, is in direct conflict with the well-settled reality that due process is flexible and should be analyzed on case-by-case basis. Indeed, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971); *Feeley v. Sampson*, 570 F.2d 364, 376 (1st Cir. 1978) ("Due process is a flexible concept"). The Court has long held that the due process analysis "cannot be lifted intact from some handy manual" because it "must be tailored to fit each particular situation." *Neron v. Tierney*, 841 F.2d 1197, 1201 (1st Cir. 1988);

Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 13 (1st Cir. 2011) ("No rigid taxonomy exists for" a due process analysis).

Most importantly, the Supreme Court has held that the constitutionality of immigration detention should be assessed based on whether it continues to serve the statute's "purported immigration purpose." *Demore*, 538 U.S. at 527-28 (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Zadvydas*, 533 U.S. at 699-700 (assessing the reasonableness of immigration detention "primarily in terms of the statute's basic purpose").[3] The Supreme Court recognized the long-standing principle that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523; *see id*. at 524 ("detention is necessarily part of [the] deportation procedure.") (quoting *Carlson*, 342 U.S. at 538). Indeed, the Supreme Court acknowledged that the purposes of removal proceedings "would be vain if those accused could not be held in custody

[3] Generally, when analyzing due process, the Supreme Court has consistently highlighted the important and unique sovereign purpose of immigration statutes. *See, e.g.*, *Demore*, 538 U.S. at 522 (recognizing that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" by the government) (internal citation and quotation marks omitted); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("the power to admit or exclude aliens is a sovereign prerogative"); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (recognizing that the Constitution provides the Government with "plenary authority to decide which aliens to admit").

pending the inquiry into their true character[.]" *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Unsurprisingly, this Court has affirmed "the important practical governmental interests in the administration of the immigration enforcement program." *Saysana v. Gillen*, 590 F.3d 7, 17 n.6 (1st Cir. 2009); *see also Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 22 (1st Cir. 2007) (recognizing "the government's legitimate interest in effectuating detentions pending the removal of persons illegally in the country"). Consequently, considering the importance of immigration detention to effectuate immigration proceedings, constitutional due process is in no way violated by Section 1226(a)'s well-established bond hearing procedure of placing the burden on the alien to establish he is not a flight risk or a danger to the community. *Matter of Guerra*, 24 I. & N. Dec. 37, 40-41 (BIA 2006); *see also Matter of Adeniji*, 22 I. & N. Dec. 1102, 1114 (BIA 1999).

Petitioners expend a noticeable amount of effort noting that the Supreme Court's decisions in *Nielsen v. Preap*, 139 S. Ct. 954 (2019), and *Jennings*, do not squarely address the instant due process question. *See* Pet. Resp. at 20-22. But Petitioners ignore the language in both decisions showing the Supreme Court's view that the burden of proof rests with the alien at bond hearings—not with the Government. *See Preap*, 139 S. Ct. at 956–59 (aliens generally "may secure their

release by proving to the satisfaction of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody."); *Jennings*, 138 S. Ct. at 882 (unlike the disagreement relating to constitutional avoidance, even the dissenting Justices agreed that "bail proceedings should take place in accordance with the customary rules of procedure and burdens of proof *rather than the special rules that the Ninth Circuit imposed*.") (emphasis added). Although the Supreme Court did not directly address what due process requires regarding the burden of proof, the Supreme Court certainly expressed its understanding that the alien shoulders the burden of proof during Section 1226(a) bond hearings. *See Preap*, 139 S. Ct. at 959–60 (noting that an alien detained under Section 1226(a) "may secure his release if *he can convince* the officer or immigration judge that he poses no flight risk and no danger to the community.") (internal citations omitted).

Accordingly, Petitioners' proposed one-size-fits-all due process analysis for all civil detention is at odds with the long-standing jurisprudence that requires a flexible analysis depending on the context. And, as outlined below, Section 1226(a)'s current bond hearing procedures placing the burden on the alien to

establish he is not a flight risk or a danger to the community do not conflict with the alien's due process.[4]

2. The procedural protections available to aliens detained under Section 1226(a) more than adequately satisfy due process.

Applying the *Mathews* test, it is clear that the plentiful procedural protections afforded to aliens detained under Section 1226(a) fully satisfy due process requirements. *See* Gov't Br. at 32-43. In *Mathews v. Eldridge*, the Supreme Court held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. 319, 333 (1976) (quotation marks omitted). Petitioners argue that the *Mathews* test is not required here merely because they have successfully identified a shared liberty interest with the aforementioned non-immigration cases. Pet. Resp. at 13. Simply identifying the liberty interest involved, however, is merely a *threshold* question

[4] Petitioners also claim that Respondents have waived the district court's decision relating to the Administrative Procedure Act ("APA"). Pet. Resp. at 19. However, the district court's APA decision explicitly rests on its due process analysis. *See Brito*, 415 F. Supp. 3d at 268 (holding that because the court has already decided that the BIA's "policy" to place the burden of proof on the alien in Section 1226(a) bond hearings violated due process, "the Court also holds that the BIA policy is a violation of the APA"). It follows, therefore, that Respondents sufficiently addressed the district court's adopted APA decision by doing exactly that, adopting by reference their arguments on the *same* due process analysis. *See* Gov't Br. at 17 n.7, 21 n.8; *see also* Fed. R. App. P. 28(i) (allowing "any party may adopt by reference a part of another's brief" when the case involves "more than one appellant or appellee") (cited by *Evans v. Comm'r, Maine Dep't of Human Servs.*, 933 F.2d 1, 5 (1st Cir. 1991)).

under the due process analysis—not the end of the analysis. *See Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (explaining that examination of a due process claim *begins* with "a determination of the precise nature of the private interest that is threatened").

Consistently, this Court has long held that "[t]he *threshold* issue in a procedural due process action is whether" an individual has identified a valid protected interest at stake. *Mard v. Town of Amherst*, 350 F.3d 184, 188 (1st Cir. 2003) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 1985); *Aponte-Rosario v. Acevedo-Vila*, 617 F.3d 1, 9 (1st Cir. 2010). "Only after that interest has been identified," can the Court properly evaluate the adequacy of the challenged procedure. *Lehr*, 463 U.S. at 256. Thus, although Petitioners may have satisfied the threshold question for a due process analysis, the *Mathews* test is still necessary to analyze the second question—whether the challenged procedures are constitutionally adequate. *See Aponte-Rosario*, 617 F.3d at 9.

Nevertheless, Petitioners' subsequent application of the *Mathews* test is notably imbalanced. Pet. Resp. at 24-32 (applying the *Mathews* test "to the extent it applies"). Under the *Mathews* test, in assessing whether a given procedural framework affords due process, courts typically assess three distinct factors: (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. *Mathews*, 424 U.S. at 335.

First, Petitioners' weighing of the private interest at stake here is overbroad. Pet. Resp. at 28-30; *see Mathews*, 424 U.S. at 335 (courts should consider "the private interest that will be affected by the official action"). As Respondents previously acknowledged, Gov't Br. at 33, the physical restraint of freedom "lies at the heart of the liberty that [the Due Process] Clause protects" *as a general matter*. *Zadvydas*, 533 U.S. at 690 (citing *Foucha*, 504 U.S. at 80). That said, the demands of due process do not turn on generalities, but, rather "will, as always, ultimately depend on the circumstances." *See Fergiste v. I.N.S.*, 138 F.3d 14, 19 n.4 (1st Cir. 1998) (citation and quotations marks omitted). Consistent with their rigid catch-all due process analysis, Petitioners again attempt to equate their *temporary* detention under Section 1226(a) to the liberty at stake with potentially *indefinite* detention. In *Demore*, the Supreme Court went out of its way to distinguish "indefinite" and "potentially permanent" detention in *Zadvydas*, 533 U.S. at 690–691, as "materially different" from detention under Section 1226, which has an "obvious termination point." *Demore*, 538 U.S. at 529. Plainly, temporary detention is not the same as permanent detention.

Second, Petitioners appear to misunderstand the "erroneous deprivation" element of the *Mathews* test in the context of Section 1226(a) detention. *See Mathews*, 424 U.S. at 335 (courts should consider "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"). In essence, Petitioners argue that any bond hearing that places the burden of proof on the alien, in a vacuum, constitutes an erroneous deprivation of his or her liberty interest. Pet. Resp. at 29-30. As the Government previously listed (Gov't Br. at 34-36), the existing framework governing the detention of aliens under Section 1226(a) affords aliens ample opportunity to challenge their detention. Indeed, by the time a final decision has been made that an alien should remain detained for the duration of removal proceedings, the alien will have received at least three levels of independent review: a U.S. Department of Homeland Security ("DHS") officer, an immigration judge ("IJ"), and, if the alien appeals, the Board of Immigration Appeals ("BIA" or "Board").[5] Thus, the ample procedures available to those

[5] First, upon initial apprehension, DHS makes an individualized custody determination. 8 C.F.R. §§ 236.1(c)(8), 236.1(g). Second, the alien may at any time ask an IJ for a redetermination of the custody decision in the form of an individualized bond hearing where he or she may testify, call witnesses, and present evidence. 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Third, if the IJ concludes after the hearing that the alien should not be released, the alien may appeal the IJ's decision to the Board. 8 C.F.R. § 236.1(d)(3), § 1236.1(d)(3). Finally, if the IJ denies release on bond but the alien's circumstances materially change, the alien may request another bond hearing based on those materially changed

detained under Section 1226(a) weigh significantly against Petitioners' due process argument. *Neron*, 841 F.2d at 1201 ("within a given situation, a broad range of alternatives, each different from the others, may suffice to alleviate due process concerns").

Third, Petitioners continue to discount the Government's legitimate interest in maintaining custody of individuals in removal proceedings. *See Mathews*, 424 U.S. at 335 (courts should consider the Government's interest, including "the fiscal and administrative burdens" posed by alternative procedural requirements). As previously discussed, Gov't Br. at 36-37, the Government has an undisputed and legitimate interest in maintaining custody of individuals in removal proceedings. *See, e.g.*, *Demore*, 538 U.S. at 523; *Carlson*, 342 U.S. at 538; *Aguilar*, 510 F.3d at 22. When applying *Mathews* in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Plasencia*, 459 U.S. at 34.

Petitioners claim that the Government's interest would not be negatively impacted by carrying the burden of proof at Section 1226(a) bond hearings because the Government "can easily obtain" evidence. Pet. Resp. at 30-31. As a matter of

---

circumstances. 8 C.F.R. § 1003.19(e); *Matter of Uluocha*, 20 I. & N. Dec. 133 (BIA 1989).

common sense, however, Petitioners have the most immediate and instant access to evidence relevant to bond considerations—his or her own testimony. *See Matter of Y-S-L-C-*, 26 I. &. N Dec. 688, 690 (BIA 2015) (holding that aliens may "testify based on personal experience and perception" as lay witnesses); *Matter of D-R-*, 25 I. & N. Dec. 445, 454 (BIA 2011) (noting that immigration judges as fact finders can draw on their "common sense and ordinary experience") (internal citations omitted).

This is especially true given that "bond hearings are less formal than hearings in removal proceedings." Immigration Court Practice Manual, Chapter 8.5(a)(iii) (July 2, 2020).[6] To that end, aliens are already provided an opportunity to "make an oral statement (an 'offer of proof' or 'proffer') addressing whether the alien's release would pose a danger to property or persons, whether the alien is likely to appear for future immigration proceedings" during bond hearings. Practice Manual, Chap. 9(e)(v). Regardless, Petitioners offer no evidence that such detainees are somehow unable to articulate basic facts about their *own* family and community ties or their likelihood of committing future crimes to show that they are not a flight risk or danger—the only criteria considered at bond hearings. *See* Gov't Br. at 38-39. Thus, shifting the burden to the Government would reward the

[6] Also available at: https://www.justice.gov/eoir/page/file/1258536/download.

party with the best access to information regarding flight risk and danger—the alien—for not sharing it.

To the extent the Petitioners characterize the Government's interest as "administrative convenience of detention" (Pet. Resp. at 27), they again overlook the purpose of temporary detention under Section 1226(a). In *Flores*, the Supreme Court soundly rejected the same mischaracterization. *See Flores*, 507 U.S. at 311. Like Petitioners in this case, the aliens in *Flores* depreciated the Government's interest in maintaining the detention procedures as merely "administrative convenience." *Id.* The Supreme Court explicitly held that this argument "fails to grasp the distinction between administrative convenience (or, to speak less pejoratively, administrative efficiency) as the *purpose* of a policy…" *Id.*

Here, as discussed above, the Supreme Court has long recognized the valid and legitimate *purpose* of detaining aliens while their removal proceedings are pending. *Demore*, 538 U.S. at 523-24; *Carlson*, 342 U.S. at 538; *Wong Wing*, 163 U. S. at 235. Time and again, courts have recognized that the important purpose of such detention is to ensure that aliens do not abscond or commit crimes while removal proceedings are ongoing. *See Demore*, 538 U.S. at 530; *Carlson*, 342 U.S. at 538; *see also Jennings*, 138 S. Ct. at 830 ("Detention during those proceedings gives immigration officials time to determine an alien's status without running the

risk of the alien's either absconding or engaging in criminal activity before a final decision can be made").

Despite this, Petitioners appear to ignore the Government's legitimate interest in maintaining custody of individuals in removal proceedings. Instead, Petitioners stray from the legal issues at hand by heavily relying on non-controversial factual references in the record. *See* Pet. Resp. at 26-27. Specifically, Petitioners question why the record lacks "data" to support the Government's claim. Pet. Resp. at 27. The answer is clear—the district court specifically noted that a statistical record would not be helpful in this case. RA283. During a motion hearing on August 5, 2019, the district court opined this case was "not fact-dependent" and turned on the due process issues. *See* RA282-84. Indeed, the district court noted that discovery was unnecessary in this case and, consequently, the parties never engaged in discovery. *See* RA283-84. Aside from the "background" section, the district court did not reference any factual considerations in its underlying due process analysis. *Brito*, 415 F. Supp. 3d at 265-69.

In sum, in balancing the temporary nature of detention under Section 1226(a), the Government's legitimate interest in maintaining custody of individuals in removal proceedings, and the current multi-layered review process, the existing procedures are more than constitutionally adequate.

3. Petitioners' requests for an elevated standard of proof and for immigration judges to consider aliens' ability to pay bond and alternatives to detention extend beyond the requirements of due process.

a. The Standards of Proof.

The district court erred by holding that Due Process requires the Government bear the burden of proof, specifically, clear-and-convincing evidence for dangerousness, and preponderance-of-the-evidence for flight risk at Section 1226(a) bond hearings. *Brito*, 415 F. Supp. 3d at 266-67; Gov't Br at 43-48. Relying on the Court's own holding in *Reid v. Donelan*, 390 F. Supp. 3d 201, 227-28 (D. Mass. 2019)[7], the district court adopted wholesale the standards employed for *criminal* pre-trial detention under the Bail Reform Act ("BRA"). *Brito*, 415 F. Supp. 3d at 266-67 (citing *United States v. Salerno*, 481 U.S. 739, 751). However, as the Government previously discussed, Gov't Br. at 44-45, the district court failed to appreciate the fundamental differences between criminal proceedings and *civil* immigration removal proceedings. *See United States v. Encarnacion*, 239 F.3d 395, 399 (1st Cir. 2001); *see also INS v. Mendoza-Lopez*, 468 U.S. 1032, 1038 (1984).

[7] The Government filed a cross-appeal of the *Reid* decision with this Court. *See* First Circuit Case Nos. 19-1787, 19-1900. All of the briefing has been filed and the case remains pending.

Petitioners again request this Court raise the standard of proof to clear-and-convincing for both dangerousness *and* flight risk. But raising the standard of proof for flight risk to clear-and-convincing for Section 1226(a) bond hearings would indeed go beyond the burden in criminal pre-trial detention under the BRA, which only requires a "preponderance of the evidence" showing for flight risk. Consequently, under Petitioners' proposed rule, civil detainees under Section 1226(a) would enjoy *more* protection than that of criminal pre-trial detainees. This proposed rule contravenes the well-settled jurisprudence that the Constitution guarantees *more* procedural protections in criminal cases than the protections afforded in immigration proceedings. *Mendoza-Lopez*, 468 U.S. at 1038 (noting that the Constitution generally guarantees significantly *less* extensive procedural protections in immigration proceedings than in criminal cases).

Separately, Petitioners again cite inapposite cases in an attempt to persuade this Court to raise the standard of proof for flight risk: *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966) and *Chaunt v. United States*, 364 U.S. 350, 353 (1960). Pet. Resp. at 39-40. Petitioners' analysis for both cases misses the mark.

First, Petitioners argue that the Government put forth a flawed distinction between the required standard of proof in Section 1226(a) bond hearings and the proceedings in *Chaunt*, which Petitioners previously cited (Pet. Br. at 21). The

Chaunt case involved a naturalized individual challenging the cancellation of his certificate of naturalization, commonly referred to as "denaturalization." *Chaunt*, 364 U.S. at 353. In denaturalization cases, courts have imposed a noticeably high standard of proof—"clear, unequivocal, and convincing." *Schneiderman v. United States*, 320 U.S. 118, 158-59 (1943) (explaining that the Government cannot leave "the issue in doubt" in order to satisfy this standard). As a basis for this high standard, courts have "long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty." *Klapprott v. United States*, 335 U.S. 601, 612 (1949); *see id.* at 611 (further noting that these "consequences may be more grave than consequences that flow from conviction for crimes."); *see also Baumgartner v. United States*, 322 U.S. 665, 677 (1944) (explaining the "grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship"); *United States v. Mensah*, 737 F.3d 789, 809 (1st Cir. 2013). Simply put, the "grave consequences" in denaturalization cases do not exists in temporary detention while the merits of an individual's removal proceedings are still ongoing.

To reinforce their argument, Petitioners cite the Supreme Court's decision in *Woodby*. Pet. Resp. at 40. But like the *Chaunt* decision, the procedure, circumstances, and consequences in *Woodby* are completely different from the present case. In *Woodby*, the Supreme Court held that the former INS must

establish *deportability* by "clear, unequivocal, and convincing evidence." *Woodby*, 385 U.S. at 285.[8] The Court justified the high burden by noting the severe hardship and consequences that may result from deportation. *Id.* at 285-86, *see id.* at 285 ("the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years").[9] Of course, courts have acknowledged the serious and potentially permanent consequences that may follow deportations. *Knauer v. United States*, 328 U.S. 654, 659 (1946) (recognizing that deportation and denaturalization "may result in the loss of all that makes life worth living"); *Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting "removal is a serious burden for many aliens"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh

[8] In 1996, Congress combined "deportation" and "exclusion" proceedings into a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104–208, § 304(a), 110 Stat. 3009–587, adding 8 U.S.C. § 1229a; *see also Santos-Quiroa v. Lynch*, 816 F.3d 160, 162 (1st Cir. 2016).

[9] The *Woodby* decision was a pre-IIRIRA case that placed the burden of proof on the Government to demonstrate that the facts support the allegation of deportability. *See Woodby*, 385 U.S. at 286. Not only does that case have nothing to do with detention, but also its holding is more akin to the initial burden *currently* placed on the Government to prove the allegations contained in a charging document. 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8(a); *see also Lima v. Holder*, 758 F.3d 72, 80 (1st Cir. 2014) (The Government bears the burden of establishing the facts showing that a noncitizen is removable by "clear, unequivocal, and convincing evidence") (internal citations and question marks omitted). Thus, from a fundamental level, Petitioners' citation to the *Woodby* decision is inconsequential.

measure"). Conversely, these severe considerations do not attach to bond proceedings because bond decisions do not result in removal orders.

Petitioners' attempt to equate their temporary detention with the potentially permanent consequences of deportation and denaturalization is substantially imbalanced. The grave consequences that Petitioners cite, Pet. Br. at 21, do not exist in this case. *See Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 636–37 (1967) ("When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by clear, unequivocal, and convincing evidence.") (quotation marks omitted). And without those serious considerations, Petitioners' attempt to parlay the standard of proof in deportation and denaturalization cases to bond hearings is misguided and unpersuasive.

b. Due process does not require IJs to consider ability to pay bond and alternatives to detention.

Although IJs already consider a wide array of factors during Section 1226(a) bond hearings,[10] Petitioners request this Court impose a requirement for IJs to consider an alien's ability to pay bond and whether alternative conditions of release would reasonably assure the safety of the community and the alien's appearance at future hearings. Pet. Resp. at 36, 42-46. Petitioners primarily rely on

[10] The Board provided a nonexclusive list in *Matter of Guerra*, 24 I. & N. Dec. at 40.

criminal cases to request this Court "constitutionalize" the factors IJs should consider. Pet. Resp. at 42-43. But as previously discussed, mirroring civil immigration detention with criminal procedure wholesale would fail to appreciate the fundamental differences between the two proceedings. *See Mendoza-Lopez*, 468 U.S. at 1038; *Encarnacion*, 239 F.3d at 399.

Further, despite the Supreme Court's clear holding that "the [G]overnment need not use the 'least burdensome means to accomplish its goal' to comport with the Due Process Clause[,]" *Demore*, 538 U.S. at 528, Petitioners request this Court reform bond procedures by imposing additional requirements. Indeed, for over two decades, the Supreme Court has never questioned the constitutionality of Section 1226(a) based on the notion that it does not require IJs to consider an alien's ability to pay bond or hinted that an IJ must consider alternatives to detention in order for a bond hearing to pass muster. *See id.* at 530; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538.

As further discussed above, although the Justices disagreed on the issue of constitutional avoidance in *Jennings*, even the *dissenting* Justices agreed that "bail proceedings should take place in accordance with the customary rules of procedure and burdens of proof *rather than the special rules that the Ninth Circuit imposed*." *Jennings*, 138 S. Ct. at 882 (Breyer, J., dissenting). Similarly, the Supreme Court in *Flores* addressed the relationship between requirements considered by INS by

balancing the detainee's interest and the governmental purpose. *Flores*, 507 U.S. at 301-07. In that case, the Court considered a challenge to a policy of releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives. *Id.* at 297, 303-04. In rejecting the alien's challenge to former INS policy and procedures, the Court affirmed the constitutionality of the detention by considering the variety of factors considered by INS[11] and the legitimate governmental purpose. *See id.* at 313–14; *see also id.* at 305 (holding there must be a "reasonable fit" between governmental purpose and "the means chosen to advance that purpose").

To be sure, the Supreme Court reiterated as much in the *Demore* decision by citing the *Flores* opinion on this point. *See Demore*, 538 U.S. at 526 (citing *Flores*, 507 U.S. at 313–14 (recognizing that the Government makes detention "determinations that are specific to the individual and necessary to accurate application of the regulation .... The particularization and individuation need go no further than this"). Thus, considering the variety of factors considered by IJs during Section 1226(a) bond hearings and the legitimate governmental purpose to detain aliens during removal proceedings, the current proceedings fully comport

[11] Specifically, INS considered: "Is there reason to believe the alien deportable? Is the alien under 18 years of age? Does the alien have an available adult relative or legal guardian? Is the alien's case so exceptional as to require consideration of release to someone else?" *See id.* at 313–14.

with the requirements of due process. In sum, there is no constitutional, statutory, or regulatory requirement that an IJ must consider alternatives to detention or an alien's ability to pay a bond while conducting a bond hearing in immigration court.

B. Petitioners Cannot Evade Section 1252(f)(1) by Commandeering an Exception that is Exclusively Reserved for a Single Individual.

Petitioners attempt to conjure an exception to maneuver around Section 1252(f)(1), *see* Gov't Br. at 51-54, which precludes classwide injunctions that enjoin or restrain the operation of the detention statute. Pet. Resp. at 51-53. Petitioners rely on the Ninth Circuit's decision in *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1151 (9th Cir. 2020), *petition for cert. filed*, No. 20-234 (Aug. 24, 2020).[12] In that case, the court held that Congress intended to exclude "organizational plaintiffs and noncitizens not yet facing proceedings" from the preclusive effects of Section 1252(f)(1). *Padilla*, 953 F.3d at 1151. Petitioners and the Ninth Circuit's grammatical gymnastics, however, are incorrect.

At the outset, Section 1252(f)(1) begins by stating a broad restriction on courts' jurisdiction to award injunctions: "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain

[12] The Government maintains that the *Padilla* majority wrongly decided the issue and, on August 24, 2020, the Government filed a petition for certiorari to the Supreme Court (No. 20-234).

the operation of the provisions of [8 U.S.C. 1221-1232].” 8 U.S.C. 1252(f)(1). Section 1252(f)(1) then carves out a narrow exception to that restriction: a court may award an injunction “with respect to the application of such provisions to an individual alien against whom proceedings under [8 U.S.C. 1221-1232] have been initiated.” *Ibid.*

Petitioners focus on the latter portion of the statute’s narrowly crafted exception—“against whom proceedings under [8 U.S.C. 1221-1232] have been initiated.” Pet. Resp. at 51. The Court, however, does not need to address this unorthodox interpretation because the former part of this clause squarely limits the exceptions to *individuals*. For the purposes of this case, the most crucial words are “an individual alien.” The word “individual,” used as an adjective, means “[o]f, relating to, or involving a single person or thing, as opposed to a group.” *Black’s Law Dictionary* 924 (11th ed. 2019) (emphasis omitted). A class of aliens is not “an individual alien”; by definition, a class is a group, not a single person. The Supreme Court has described “[t]he *class* action” as “‘an exception to the usual rule that litigation is conducted by and on behalf of the *individual* named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (emphasis added; citation omitted). A class action, like the present case, is the antithesis of an action by an individual party. *See Brito v. Barr*, 395 F. Supp. 3d 135, 149 (D. Mass. 2019) (the district court’s certification of Petitioners’ class).

To be sure, the grammar of Section 1252(f)(1) reinforces the plain meaning of the adjective "individual." In stating the general rule against injunctions, Congress used both the singular and the plural: "Regardless of * * * the identity of the *party or parties.*" 8 U.S.C. § 1252(f)(1) (emphasis added). But in stating the exception to that rule, Congress used only the singular: "*an* individual alien." *Ibid.* (emphasis added). That contrast indicates that Congress meant the general jurisdictional restriction to apply only where a court enjoins the application of the specified provisions to a single alien. Thus, Petitioners cannot evade the preclusive effects of Section 1252(f)(1) because this case does not involve an *individual* petitioner, but a class of aliens seeking classwide injunctions to overturn over two decades of detention operations.

V. CONCLUSION

For the foregoing reasons and those in the Government's principal and response brief, this Court should vacate the decision of the district court and should hold that the existing procedures governing bond hearings under Section 1226(a) —including placing the burden of proof on the alien—are fully consistent with the Due Process Clause of the Constitution.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
United States Department of Justice
Civil Division

WILLIAM C. PEACHEY
Director
United States Department of Justice
Office of Immigration Litigation
District Court Section

COLIN A. KISOR
Deputy Director

ELIANIS N. PEREZ
Assistant Director

LAUREN E. FASCETT
Senior Litigation Counsel

Date: October 2, 2020

/s/ Huy M. Le
HUY M. LE
M.A. Bar Identification No. 697256
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-4028
Facsimile: (202) 305-7000
E-mail: Huy.M.Le2@usdoj.gov

Attorneys for Respondents–Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief for Respondents-Appellees has been electronically filed via the Court's CM/ECF system on this 2nd day of October, 2020. I also certify that all participants in the case are registered CM/ECF users and that service on Petitioners-Appellants' counsel of record will be accomplished by the CM/ECF system.

/s/ Huy M. Le
By: HUY M. LE
Trial Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28.1, I certify that this Brief:

(1) complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(C) because the brief contains 5,932, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

Respectfully submitted,

DATED: October 2, 2020

/s/ Huy M. Le
By: HUY M. LE
Trial Attorney