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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JURISDICTIONAL STATEMENT

The named petitioners and the members of the two classes certified by the district court (collectively, the "petitioners") are immigration detainees held by the federal government under 8 U.S.C. § 1226(a). This lawsuit asserted claims that the petitioners were unlawfully detained in violation of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment, and that (absent judicial intervention) the government would continue to detain them unlawfully. The lawsuit sought both injunctive and declaratory relief.

The district court therefore had jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (cases arising under the Constitution or laws of the United States), and 28 U.S.C. § 2201 (declaratory relief for interested parties in cases of actual controversy). The district court's jurisdiction was not limited by 8 U.S.C. § 1252 for the reasons argued by petitioners below and stated in the district court's order granting class certification on August 16, 2019, [RA231-234], and its order granting summary judgment on November 27, 2019. [RA418-419], reported at *Brito v. Barr*, 415 F. Supp. 3d 258, 269 (D. Mass. 2019).

The district court entered a final judgment disposing of all parties' claims on November 27, 2019. [RA402-424]. On December 26, 2019, the petitioners filed a timely notice of appeal, raising the single issue discussed in this brief. [RA425-428].

The respondents noticed a cross-appeal on January 24, 2020. [RA429-431]. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE

An alleged noncitizen detained under 8 U.S.C. § 1226(a) is entitled to a bond hearing before an immigration judge. 8 C.F.R. § 1236.1(d)(1). The district court held that, under the Due Process Clause, the detainee is entitled to a bond hearing in which the government bears the burden of proving that detention is justified on the basis of either "dangerousness" or "flight risk." The district court also held that the government must prove dangerousness by clear and convincing evidence. The government has appealed those elements of the district court's decision.

The district court also ruled, however, that the standard of proof for justifying detention on the basis of flight risk is only a preponderance of the evidence. The issue presented by the petitioners' appeal is: Was this error, and does the Due Process Clause require the government to prove that detention is justified on the basis of flight risk by clear and convincing evidence?

STATEMENT OF THE CASE

This case concerns the deprivation of the Due Process rights of alleged noncitizens against whom the federal government has initiated deportation proceedings. Liberty is supposed to be the norm throughout the American legal system, and detention a carefully limited exception that, among other things, can be imposed only after the government proves that restraint is justified. In the immigration proceedings at issue, however, this principle has been reversed. The named petitioners and the class members they represent have been jailed because they have failed to prove, to the satisfaction of an immigration judge, that they should be free.

In the judgment at issue, the district court held that this practice was impermissible. It ruled, among other things, that Due Process requires the *government* to bear the burden of proving that detention is justified. The petitioners emphatically agree with that element of the district court's decision, and with several others that may also be the subject of the government's cross-appeal. The petitioners' appeal is limited to the single, narrow issue stated above. They ask this court to affirm the judgment below in all respects, except insofar as it held the government to an erroneously low standard of proof when the government purports to justify detention on grounds that the alleged noncitizen presents a flight risk.

1. Statutory Background.

Three provisions of immigration law—8 U.S.C. §§ 1226(a), 1226(c), and 1231—address the civil detention of alleged noncitizens during and after proceedings to deport (or "remove") them from the United States. Section 1231 governs detention after an order to remove the noncitizen has become final but before he or she is deported. Section 1226(c) mandates detention *before* an order of removal—that is, while removal proceedings are pending—but applies only to alleged noncitizens who have committed one or more enumerated criminal offenses. This appeal concerns Section 1226(a), which governs the detention of alleged noncitizens who do not have a criminal record that qualifies them for mandatory detention under Section 1226(c), and who are not subject to detention under Section 1231 because they do not have (and may never receive) a final order of removal.

Under Section 1226(a), an alleged noncitizen is subject to release on bond or other conditions during removal proceedings. 8 U.S.C. § 1226(a)(1) and (2). The relevant regulations allow U.S. Immigration and Customs Enforcement ("ICE") to make an "initial custody determination." 8 C.F.R. § 1236.1(d)(1). If ICE decides to detain the alleged noncitizen, however, then he or she is entitled to a detention hearing before an immigration judge. *Id.* These proceedings are colloquially known as "bond hearings." *See Brito*, 415 F. Supp. 3d at 263.

2. The Burden of Proof Imposed in Bond Hearings by The Board of Immigration Appeals.

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, for many years, the Board of Immigration Appeals ("BIA") properly put the burden of proof in bond hearings on the government, requiring it to justify continued detention by showing "that [the noncitizen] *is* a poor bail risk…." *Matter of Patel*, 15 I&N Dec. 666, 666 (BIA 1976) (emphasis added).

However, beginning with *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) —in which the noncitizen *agreed* to bear the burden of showing he was entitled to release on bond, *id.* at 1112—the BIA reversed course, inverted the burden of proof for bond hearings, and began to require persons detained under Section 1226(a) to justify their release on bond by showing that they were *not* flight risks and would *not* endanger the community if released from detention while removal proceedings were pending. *See, e.g.*, *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009); *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016); *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018). This abrupt reversal created a system of detention by default, in which alleged noncitizens are jailed unless they can prove a negative—that is, unless they can demonstrate the *absence* of adequate reasons to detain them.

3. Judicial Response to the BIA's Misallocation of the Burden of Proof.

The federal courts—including one court of appeals and many district courts—have almost uniformly rejected the BIA's position, holding that Due Process requires the government to bear the burden of proof in bond hearings for persons held under Section 1226(a). *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011); *Hernandez-Lara v. ICE*, 2019 U.S. Dist. LEXIS 124144, at *8 (D.N.H. July 25, 2019) (collecting cases and concluding that "decisions placing the burden of proof on the government rather than the noncriminal alien under § 1226(a) are in accord with every other district court that has addressed this precise question"); *Darko v. Sessions*, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018) (placing burden of proof on government "in accordance with every court to have decided this issue"); *but see Maldonado-Velazquez v. Moniz*, 274 F. Supp. 3d 11, 13-15 (D. Mass. 2017).

Several district court decisions from this Circuit have joined the burgeoning consensus. *See, e.g.*, *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *13. They include a series of decisions in the District of Massachusetts in 2018 and 2019, all in cases involving *individual* habeas petitions from immigration detainees. *See Doe v. Tompkins*, 2019 U.S. Dist. LEXIS 22616, at *2 (D. Mass. Feb. 12, 2019); *Diaz-Ortiz v. Tompkins*, 2019 U.S. Dist. LEXIS 14155, at *2 (D. Mass. Jan. 29, 2019); *Alvarez Figueroa v. McDonald*, 2018 U.S. Dist. LEXIS 80781, at *14 (D. Mass. May 14, 2018); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass.

2018). These cases all arose from bond hearings in the Boston Immigration Court, which generally hears matters involving alleged noncitizens detained in Massachusetts, New Hampshire, and other New England States.[1]

4. This Class Action Lawsuit.

In each of the cases cited in the preceding paragraph, the district court granted a writ of habeas corpus and ordered the government either to release the individual petitioner or to give him a new bond hearing at which the government bore the burden of proof. *See, e.g., Pensamiento*, 315 F. Supp. 3d at 694. However, except when a federal judge has specifically ordered it to do otherwise, the Boston Immigration Court has continued to follow the BIA and impose the burden of proof on detainees in Section 1226(a) bond hearings. More than a year after the federal district court in Massachusetts first held, without qualification, that "the Constitution requires placing the burden of proof on the government in § 1226(a) custody redetermination hearings," *Pensamiento*, 315 F. Supp. 3d at 692, an attorney who regularly attended bond hearings in the Boston Immigration Court attested that, in almost-daily observations by herself and her colleagues, "we have always seen the burden placed on the detainee." [RA51, ¶5].

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[1] The government appealed the judgment in *Pensamiento*, but later dismissed the appeal. *See* No. 18-1691 (1st Cir. Dec. 26, 2018). It also appealed the judgments in *Doe v. Tompkins* and *Hernandez-Lara*; those appeals are pending before this court and will be heard together with this one. *See* No. 19-1368; No. 19-2019.

The three named petitioners in this lawsuit—Gilberto Pereira Brito, Florentin Avila Lucas, and Jacky Celicourt—all had that experience. Each was taken into custody by ICE after the decisions in *Pensamiento* and *Alvarez Figueroa* had established that Due Process required the government to bear the burden of proof at an immigration court bond hearing.[2] Each was detained under Section 1226(a), since none had a criminal record that would have qualified them for mandatory detention under 1226(c): Mr. Avila Lucas had no criminal history at all, [RA72-79]; Mr. Celicourt's only arrest and conviction was a recent guilty plea to a charge of shoplifting less than $6 worth of merchandise from a discount store, for which he paid a fine, [RA105-107]; and Mr. Pereira Brito had last interacted with the criminal justice system in 2009 (and before then had been arrested only on charges of driving under the influence, which was continued without a finding, and possession of marijuana, which was dismissed). [RA53-56].

After ICE made the initial determination to detain them, each of the named petitioners was given a bond hearing in the Boston Immigration Court. At each bond hearing, the immigration judge put the burden of proof on the petitioner to show that he was *not* a flight risk and would *not* present a danger to the community if released

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[2] *Pensamiento* and *Alvarez Figueroa* were both decided in May 2018. Mr. Celicourt was taken into custody on January 16, 2019. [RA42]. Mr. Pereira Brito and Mr. Avila Lucas were detained in March 2019. [RA35, 37-38]. By then, the district court had also issued its decisions in *Doe* and *Diaz-Ortiz*.

pending a decision on removal. [RA53-56] (Pereira Brito); [RA80-81] (Avila Lucas); [RA117-131] (Celicourt).

With the deck stacked against them, each named petitioner lost his bond hearing and remained in detention, even though the government had not been required to show that any of them was actually dangerous or a flight risk, and even though in each case there was strong evidence to the contrary. For example, when Mr. Celicourt was arrested for shoplifting, the state court noted that he had no criminal history and released him on his own recognizance. [RA105-107]. Mr. Celicourt later appeared for a hearing on the shoplifting charge, pleaded guilty, and paid a fine. [RA117-131]. ICE arrested him as he left the courtroom. [RA42, ¶73]. Mr. Pereira Brito was arrested at home, where he lived with his disabled wife and three children, who at the time were ages 10, 4, and 8 months. [RA35, ¶38; RA53-56; RA57-60]. And Mr. Avila Lucas, who was arrested by Border Patrol agents while visiting a store near his home in New Hampshire, [RA72-79], has no criminal record and has lived in the same place and worked on the same dairy farm since 2006. [RA37-38, ¶51].

The named petitioners were held in county jails that concurrently housed convicted criminals and pretrial criminal detainees. [RA26, ¶¶3-5]. When this lawsuit began, Mr. Celicourt had been in detention for almost five months, Mr. Pereira Brito for more than three months, and Mr. Avila Lucas for nearly three

months. All faced prolonged periods of detention before their removal proceedings concluded: although the median case length was 129 days for noncitizens who received bond hearings in Boston or Hartford between November 1, 2018 and May 7, 2019, one out of every four cases lasted more than 732 days. [RA326] (Supplemental Declaration of Sophie Beiers, dated August 19, 2019).

On June 13, 2019, the named petitioners filed a Habeas Corpus Petition and Class Action Complaint for Declaratory and Injunctive Relief (the "Petition"). [RA24-49]. They sued on behalf of a class consisting of "people who, now or at any future time, are detained pursuant to 8 U.S.C. § 1226(a), and either are being held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court." [RA44, ¶84].

The Petition asserted two claims. Count I alleged that, at bond hearings for noncitizens taken into custody under Section 1226(a), the Due Process Clause requires the government to bear "the burden to justify continued detention by proving by clear and convincing evidence that the detainee is a danger to others or a flight risk, and, even if he or she is, that no condition or combination of conditions will reasonably assure the detainee's future appearance and the safety of the community." [RA46, ¶91]. Count I also alleged that a constitutionally adequate bond hearing must include "consideration of the detainee's ability to pay in selecting the amount of any bond and suitability for release on alternative conditions of

supervision." *Id.* Count II alleged that detention without Due Process also violated the Immigration and Nationality Act and the Administrative Procedure Act. [RA47, ¶¶93-94].

5. Proceedings Below.

Soon after the named petitioners filed the Petition, the government voluntarily released all three of them on bond. [RA205-208; RA214-216]. The district court ruled, however, that the matter satisfied the "inherently transitory" exception to the mootness doctrine, [RA235-236], and the class action continued. On August 6, 2019, the district court certified two classes: a "Pre-Hearing Class" of noncitizens who had yet to receive bond hearings, and a "Post-Hearing Class" of noncitizens who had already received unconstitutional bond hearings and (in the district court's view) would have to demonstrate prejudice therefrom in order to obtain writs of habeas corpus ordering the government to give them new bond hearings. [RA240-242]. The district court initially certified these classes only for the Due Process claims. [RA242-243]. It later modified the class certification to include the statutory claim in Count II. [RA402-424].

The government answered the Petition, [RA286-306], and the petitioners then moved for summary judgment (or, in the alternative, for a preliminary injunction). [RA307-311]. After a hearing, [RA339-401], on November 27, 2019 the district

court gave summary judgment to the petitioners on both the Due Process and statutory claims. [RA402-424]. The court granted three forms of relief:

(1) A declaratory judgment to both classes "that aliens detained pursuant to 8 U.S.C. § 1226(a) are entitled to a bond hearing at which the government must prove the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence and that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community." [RA423]. At the bond hearing, the district court ruled, "the immigration judge must evaluate the alien's ability to pay in setting bond above $1,500" – the statutory minimum, 8 U.S.C. § 1226(a)(2)(A) – and "must consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances." *Id.*

(2) A permanent injunction for the benefit of both classes, ordering the immigration courts to follow the requirements set forth in its declaration. [RA424].

(3) An additional permanent injunction for the benefit of the "Post-Hearing Class" only. It ordered the government to provide class counsel with certain information about each member of the Post-Hearing Class, [RA424], so that class counsel could identify the members of the Post-Hearing Class who would need to file individual habeas petitions, and to demonstrate personal prejudice in order to

obtain new bond hearings that complied with the standards articulated by the district court.

6. The Appeals.

Although the judgment granted most of the relief sought in the Petition, the petitioners noticed this appeal to preserve the classes' rights as to a single issue: the district court's ruling that the government need prove risk of flight only by a preponderance of the evidence, as opposed to clear and convincing evidence. [RA425-428]. The petitioners' appeal was docketed in this Court as No. 20-1037.

The government filed a notice of appeal on January 24, 2020. [RA429-431]. Its appeal was docketed in this Court as No. 20-1119. On March 27, 2020, this Court entered an order noting the cross-appeals and designating the petitioners as appellants/cross-appellees.

SUMMARY OF THE ARGUMENT

Civil detention for any purpose constitutes a significant deprivation of liberty that requires Due Process protection. Standards of proof play an important role in the Due Process analysis because a heightened standard of proof both (1) reflects the value that society places on the individual interests at stake, and (2) reduces the chances that inappropriate deprivations of those interests will occur. (pp. 18-20)

In civil cases where the government seeks to infringe or interfere with important individual interests, courts have routinely held that a preponderance of the evidence standard falls short of meeting the demands of Due Process, and that a clear and convincing evidence standard is required. This is especially true where, as here, the interest at stake is the individual's interest in freedom from bodily restraint, which lies at the core of the liberty protected by the Due Process Clause. Consequently, the overwhelming majority of federal courts to consider the issue have held that, in bond hearings under Section 1226(a), the government must prove both dangerousness and flight risk by clear and convincing evidence. (pp. 21-24)

The district court erred when it imposed a "differentiated standard of proof" that required clear and convincing evidence of dangerousness, but only a preponderance of evidence for flight risk. From the detainee's perspective, the interest at stake is exactly the same no matter which justification the government offers for detention, and the government has no more compelling an interest in

detaining alleged noncitizens as flight risks than on grounds of dangerousness. (pp. 24-26)

The district court erred, moreover, when it relied on the Bail Reform Act as the basis for its differentiated standard of proof. People jailed under Section 1226(a) are not criminal detainees, and they do not receive the other procedural protections that the Bail Reform Act provides to pretrial criminal detainees, such as the right to appointed counsel and the right to demand a speedy trial. The length of immigration detention has grown dramatically in recent years, and the extent to which such detention affects individual liberty interests has increased along with it. Clear and convincing evidence is therefore the appropriate standard of proof for *both* justifications the government may offer to support detention under Section 1226(a). (pp. 26-29)

ARGUMENT

The district court correctly decided all but one of the issues in this case. It correctly held that the government must bear the burden of proof in Section 1226(a) bond hearings, that the standard of proof for dangerousness is clear and convincing evidence, and that immigration judges must take ability to pay and alternative conditions of release into account in determining whether and how to release a Section 1226(a) detainee. In so holding, the district court recognized that detention under Section 1226(a) is confinement that deprives alleged noncitizens of their fundamental liberty interests – often for months and sometimes even for years. The district court erred, however, when it imposed a "differentiated standard of proof" that requires the government to prove dangerousness by clear and convincing evidence but enables it to justify the detention of alleged noncitizens on grounds of flight risk by only a preponderance of the evidence.

I. Clear and Convincing Evidence Is Required in Civil Proceedings Where the Government Seeks to Curtail Important Individual Liberty Interests.

"A deportation proceeding is a purely civil action." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Persons held under Section 1226(a), therefore, "are subject to civil detention rather than criminal incarceration." *De Paz Sales v. Barr*,

2019 U.S. Dist. LEXIS 169552, at *16 (N.D. Cal. Sept. 30, 2019).[3] The Supreme Court "repeatedly has recognized that civil commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added). To determine the right level of Due Process protection, courts perform "what is essentially a balancing test" that weighs competing private and governmental interests. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 611 (1st Cir. 1992) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

A. Heightened Standards of Proof Protect Important Individual Interests From Government Intrusion by Shifting the Risk of an Erroneous Decision to the Government.

Standards of proof play a vital constitutional role in this analysis. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970)) (Harlan, J., concurring). "[I]n any

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[3] *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (detention proceedings under Section 1231 "are civil, not criminal"); *Muse v. Sessions*, 409 F. Supp. 3d 707, 717 (D. Minn. 2018) (persons held under Section 1226(c) are subject to civil detention); *Singh v. Murray*, 2017 U.S. Dist. LEXIS 202708, at *6-7 (E.D. Cal. Dec. 8, 2017) (Sections 1226 and 1231 provide for "the continued civil detention of aliens pending removal").

given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed among the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

In cases involving the government's invasion of a protected constitutional interest, the "standard of proof [at a minimum] reflects the value society places on [that interest]." *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)). This is because, as a practical matter, the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous deprivation." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 283 (1990). Raising the standard of proof, then, is both "one way to impress the factfinder with the importance of the decision," as well as a practical method "to reduce the chances that inappropriate [deprivations of liberty interests] will be ordered." *Santosky v. Kramer*, 455 U.S. at 764-65.

Standards of proof are therefore imposed in different kinds of proceedings according to the interests those proceedings implicate. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties." Because no governmental interest is at stake and the litigants are sparring over property, "society has a minimal concern with the outcome," and the "plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the

risk of error in roughly equal fashion." *Addington*, 441 U.S. at 423. At the other end of the spectrum are criminal prosecutions, in which the reasonable-doubt standard ensures that "our society imposes almost the entire risk of error upon itself." *Id.* at 424.

The Supreme Court has confined use of the reasonable-doubt standard to criminal proceedings, *id.* at 428, but it has also rejected a preponderance standard for civil cases that "concern the proper protection of fundamental rights in circumstances in which the state proposes to take drastic action against an individual." *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996). In such cases, the "individual should not be asked to share equally with society the risk of error," *Addington*, 441 U.S. at 427, and the Court has imposed a clear and convincing evidence standard "to protect particularly important individual interests…." *Id.* at 424. "'Clear and convincing evidence' means 'highly probable,' or 'reasonably certain.'" *Diaz-Alarcon v. Flandez-Marcel*, 944 F.3d 303, 306 n.5 (1st Cir. 2019) (citations omitted). When the preponderance standard "falls short of meeting the demands of due process," this "middle level burden of proof … strikes a fair balance between the rights of the individual and the legitimate concerns of the state." *Addington*, 441 U.S. at 431.

B. Clear and Convincing Evidence Is Required to Justify the Government's Interference with Individual Interests That Are More Important Than Mere Loss of Money.

Federal courts have held that the preponderance standard *does* fall short, and must give way to the clear and convincing standard, in civil cases where "the individual interests at stake are both particularly important and more substantial than mere loss of money." *Cooper v. Oklahoma*, 517 U.S. at 363. In *Addington*, the Supreme Court held that the state needed to meet a clear and convincing evidence standard because—by committing the petitioner to a state mental hospital—it had deprived the petitioner of his liberty interest in freedom from government detention. 441 U.S. at 419-20. Likewise, in *Santosky v. Kramer*, 455 U.S. at 753, the Supreme Court determined that "freedom of personal choice in matters of family life" is a "fundamental liberty interest protected by the Fourteenth Amendment," and held that the clear and convincing evidence standard must apply when a state seeks to terminate parental rights on grounds of abuse or neglect. And in *Chaunt v. United States*, 364 U.S. 350, 353 (1960), the Court prefigured the logic of *Addington* by holding that, "in view of the grave consequences to the citizen" of a denaturalization proceeding, the government could revoke the citizenship of a naturalized American only on the basis of "clear, unequivocal, and convincing" evidence that does not leave the issue "in doubt." *See also Woodby v. INS*, 385 U.S. 276, 285 (1966)

(imposing "clear, convincing, and unequivocal" standard of proof in deportation proceedings, given "the drastic consequences that may follow" a deportation order).[4]

C. The Clear and Convincing Evidence Standard Is Especially Appropriate Where the Government Seeks to Impose Bodily Restraint.

Freedom from bodily restraint, however, is first among equals when it comes to the application of the Due Process Clause: it lies "at the core of the liberty protected … from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Detention under Section 1226(a) disturbs that fundamental interest no less than involuntary commitment to psychiatric hospitals did in cases like *Addington* and *Foucha*. Indeed, immigration detention may well have a *greater* impact on the affected person's liberty than psychiatric confinement. From the immigration detainee's day-to-day perspective, civil detention may be little different from criminal incarceration: for example, members of the petitioner-classes in this

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[4] *Cf. Cooper v. Oklahoma*, 517 U.S. at 369. In *Cooper*, the Court held that, although a state can impose the burden of proving incompetence to stand trial on a criminal defendant, it cannot require the defendant to prove his incompetence by clear and convincing evidence. This, the Court said, was "in complete accord with the basis for our holding in *Addington*. Both cases concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual. The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent." *Id.*

case have been held in county jails concurrently used to house convicted criminals and pretrial criminal detainees. [RA27, ¶¶6-10] (naming as respondents the superintendents of the Plymouth County Correctional Facility, Strafford County Department of Corrections, Suffolk County House of Correction, Bristol County House of Correction, and Franklin County Jail and House of Correction).

In any event, because detention under Section 1226(a) indisputably imposes bodily restraint, and because freedom from bodily restraint is a protected liberty interest, there is no reason *not* to calibrate the standard of proof so as to require the government to bear the significantly greater risk of an erroneous decision. The Ninth Circuit recognized this in *Singh v. Holder*, holding that when the government provides a bond hearing under Section 1226(a), it must justify detention on grounds of either dangerousness *or* flight risk by clear and convincing evidence. Following *Addington*, the Ninth Circuit reasoned that "it is improper to ask the individual to 'share equally with society the risk of error when the possible injury to the individual'—deprivation of liberty—is so significant…." 638 F.3d at 1203-04 (quoting *Addington*, 441 U.S. at 427).

The "overwhelming majority" of district courts have come to the same conclusion, *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018), holding almost uniformly that, "in a § 1226(a) bond hearing, Due Process requires that the government bear the burden of justifying detention by clear and convincing

evidence." *Hernandez-Lara v. ICE*, 2019 U.S. Dist. LEXIS 124144, at *18 (D.N.H. July 25, 2019). Like the Ninth Circuit, these courts have held that the clear and convincing evidence standard applies across the board—that is, whether the government attempts to justify detention on grounds of dangerousness or flight risk, or both.[5]

II. The District Court Erred When It Imposed a "Differentiated Standard of Proof" That Requires the Government to Prove Flight Risk by Only a Preponderance of the Evidence.

To the knowledge of petitioners' counsel, only two district courts have concluded that the standard of proof for risk of flight under Section 1226(a) is less than clear and convincing evidence: (1) the district court in this case, *Brito v. Barr*, 415 F. Supp. 3d at 266-67, and (2) one in the District of Colorado. *Diaz-Ceja v. McAleenan*, 2019 U.S. Dist. LEXIS 110545 (D. Colo. July 2, 2019).[6] Neither court

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[5] *See, e.g.*, *Linarez-Martinez v. Decker*, 2018 U.S. Dist. LEXIS 178577, at *13-14 (S.D.N.Y. Oct. 17, 2018); *Brevil v. Jones*, 2018 U.S. Dist. LEXIS 194933, at *9-10 (S.D.N.Y. Nov. 14, 2018); *Velasco Lopez v. Decker*, 2019 U.S. Dist. LEXIS 82881, at *10 (S.D.N.Y. May 15, 2019); *Yong Guo v. Nielsen*, 2019 U.S. Dist. LEXIS 104218, at *13-14 n.2 (W.D. Wash. June 18, 2019); *Nzemba v. Barr*, 2019 U.S.Dist.LEXIS 119126, at *18 (W.D.N.Y. July 17, 2019). In addition, "even in cases where the alien's detention is mandatory pursuant to § 1226(c), an overwhelming majority of district courts have held that prolonged detention warrants a bond hearing at which the government bears the burden of proving by clear and convincing evidence that the alien is either dangerous *or* a flight risk." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *8 (emphasis added); *see also Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015).

[6] The position of the Massachusetts district court on this issue has evolved. In an earlier Section 1226(a) case, the court required the government to prove both

disagreed with the *principles* underpinning the consensus view. For example, the district court in this case agreed that detention under Section 1226(a) is a deprivation of liberty that requires Due Process protection, and it recognized the consequent need to shift the risk of an erroneous determination from the individual to the state. *Brito*, 415 F. Supp. 3d at 266 (citing *Addington*); *see also Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *22 ("Supreme Court jurisprudence addressing civil detention emphasizes the importance of procedural due process protections given the important civil liberty interests at play").

The district court in this case nevertheless created a "differentiated standard of proof" for the two kinds of justifications that the government may offer for detention under Section 1226(a). *Brito*, 415 F. Supp. 3d at 267. It adopted the majority position that the government must prove dangerousness by clear and convincing evidence, but imposed only a preponderance of the evidence standard for risk of flight. *Id.; see also Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *33 (same).

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dangerousness and flight risk merely "to the satisfaction of the immigration judge." *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 693 (D. Mass. 2018). This was the mirror image of the burden that the immigration court had imposed on the petitioner in that case. *Id.; see also Alvarez Figueroa*, 2018 U.S. Dist. LEXIS 80781, at *11, n.2. In this case, however, the district court concluded that, given the nature of the liberty interest at stake, "to the satisfaction of the immigration judge" was a "vague standard of proof" that did *not* "provide an alien with 'the opportunity to be heard "at a meaningful time and in a meaningful manner."' *Brito*, 415 F. Supp. 3d at 267.

The district court's other conclusions in this case were correct, but this was error. A noncitizen facing a long spell of detention should not be compelled to bear the same risk of an erroneous judicial outcome as the defendant in a breach-of-contract lawsuit. The balance of constitutional interests does not change when the inquiry shifts from dangerousness to flight risk. The detainee's liberty interest certainly is no weaker: detention is detention, no matter how the State tries to justify it. Nor does the government have a more compelling interest in jailing alleged noncitizens who ostensibly present a risk of flight than it does in detaining those who pose a danger to the community.

The district court's rationale for imposing a "differentiated standard of proof," rather, was that the bifurcated standard "is the same that applies in the context of criminal pretrial detention under the Bail Reform Act." *Brito*, 415 F. Supp. 3d at 267. Specifically, the district court was "not persuaded that aliens who are civilly detained are entitled to protections that go beyond those given to criminally detained U.S. citizens." *Id.; see also Reid*, 390 F. Supp. 3d at 224-25 (reasoning that none of the contexts in which the Supreme Court had required clear and convincing proof to justify civil detention "involves considerations of risk of flight," and that "[t]he most comparable context is criminal pretrial detention").

The Bail Reform Act, however, applies only when a person faces *criminal* pretrial detention. People detained under Section 1226(a) are not criminal detainees.

The detention they face is purely civil, *Zadvydas*, 533 U.S. at 690, and while some of them *might* have minor criminal records, they are not being detained for any criminal justice purpose. Except for the accident of their places of birth, they would otherwise be free in society.

The burden and standards of proof imposed by the Bail Reform Act are not the only protections available to criminal pretrial detainees. Criminal defendants, for example, have a right to counsel at bail hearings regardless of their financial resources. 18 U.S.C. § 3142(f). Immigration detainees have no right to appointed counsel. *Imasuen v. Moyer*, 1995 U.S. Dist. LEXIS 12176, at *21 (N.D. Ill. Aug. 22, 1995). Criminal defendants who are denied bail also have speedy trial rights that give them some ability to influence the duration of their pretrial detention. 18 U.S.C. §§ 3161-3174; U.S. Const., Amt. VI. An immigration detainee has no such rights. *See Hemans v. Searls*, 2019 U.S. Dist. LEXIS 31353, at *19, n.7 (W.D.N.Y. Feb. 27, 2019) (contrasting the absence of speedy trial limitations for immigration detainees with the "stringent time limitations of the Speedy Trial Act"). The noncitizen can shorten his detention only by accepting deportation and surrendering his or her right to challenge removal – an especially unacceptable choice given that many Section 1226(a) detainees will ultimately be allowed to remain in the United

States.[7] *See Singh*, 638 F.3d at 1204 (rejecting argument that immigration detainees should be treated differently from other civil detainees because they can end their detention by voluntarily electing to leave the country: "We are not persuaded that a lower standard of proof is justified by putting people like Singh to the choice of remaining in detention, potentially for years, or leaving the country and abandoning their challenges to removability even though they may have been improperly deemed removable").

The length of immigration detention has become a critical variable in the Due Process calculation. "The country has seen a 'dramatic increase'" in the length of immigration detention over the last two decades. *Hernandez v. Decker*, 2018 U.S. Dist. LEXIS 124613, at *33 (S.D.N.Y. July 25, 2018). Between 2002 and 2012, for example, the average time spent in immigration detention during removal proceedings increased almost ten-fold, from 47 days to 455 days. *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *16-17. Nothing in the record suggests that the typical period of detention has gotten shorter since 2012, or that removal

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[7] Statistics compiled by the Transactional Records Access Clearinghouse at Syracuse University ("TRAC") show that, so far in fiscal year 2020, 36% of the deportation proceedings conducted in Massachusetts ended with the noncitizen being allowed to stay in the United States. In recent years, that percentage has been as high as 73%. TRAC, Outcomes of Deportation Proceedings in Immigration Court (Feb. 2020), available at https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

proceedings move faster in Massachusetts and Connecticut than nationally. *See* [RA325-327] (Supplemental Declaration of Sophie Beiers, dated August 19, 2019).

"As the length of average detention under § 1226 grows, so too do the aliens' liberty interests." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS, at *17. As its duration grows, moreover, immigration detention looks less like pretrial detention, which has a "definite" end date that cannot be extended without implicating the defendant's speedy trial rights; instead, it increasingly resembles the sort of "indefinite" civil commitment that the Supreme Court confronted in *Addington*, 441 U.S. at 420, and for which Due Process demands clear and convincing evidence. These developments give the courts all the more reason to apply, to *both* justifications the government may offer for detention during removal proceedings, the protection afforded by the clear and convincing standard against erroneous infringements of an alleged noncitizen's liberty interest.

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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By and through their counsel,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,514 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).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using 14-point Times New Roman font using Microsoft Word.

/s/ Susan M. Finegan

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I caused the Petitioners-Appellants/Cross-Appellees' Principal 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.

/s/ Susan M. Finegan

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GILBERTO PEREIRA BRITO, FLORENTIN, AVILA LUCAS, and JACKY CELICOURT, individually and on behalf of all those similarly situated,	)	
Plaintiffs-Petitioners,	)	
v.	)	Civil Action No. 19-11314-PBS
WILLIAM BARR, Attorney General, U.S. Department of Justice, et al.,	)	
Defendants-Respondents.	)	

MEMORANDUM AND ORDER

August 6, 2019

Saris, C.J.

INTRODUCTION

Plaintiffs Gilberto Pereira Brito, Florentin Avila Lucas, and Jacky Celicourt challenge the procedures at immigration court bond hearings for aliens detained pursuant to 8 U.S.C. § 1226(a). They allege that the allocation of the burden of proof to the alien and failure to consider alternative conditions of release and the alien's ability to pay violate the Fifth Amendment Due Process Clause, Immigration and Nationality Act ("INA"), and Administrative Procedure Act ("APA"). Plaintiffs move to certify a class of aliens who are or will be

detained under § 1226(a) either in Massachusetts or subject to the jurisdiction of the Boston Immigration Court.

After hearing, the Court **ALLOWS** Plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2) (Docket No. 17).

FACTUAL AND PROCEDURAL BACKGROUND

I. Named Plaintiffs

A. Gilberto Pereira Brito

Gilberto Pereira Brito is a citizen of Brazil. He entered the United States without inspection in April 2005 and was apprehended by U.S. Customs and Border Protection ("CBP"). CBP issued a Notice to Appear ("NTA") that told Pereira Brito to appear in immigration court on June 8 at 1:30am. The court was closed at this hour, but an immigration judge ordered him removed in absentia the next day for failing to appear. He was not removed from the country, however, and has since lived in Massachusetts with his U.S. citizen wife and three children.

In April 2007, Pereira Brito was charged with possession of marijuana and three traffic offenses. The prosecutor dismissed the drug possession charge, and Pereira Brito admitted sufficient facts as to the charges of unlicensed operation of a motor vehicle and operating under the influence. Two years later, Pereira Brito was charged with driving with a suspended license. He did not appear for his hearing because, he claims,

he misunderstood the court's instructions at his arraignment. The prosecutor did not pursue the charge and agreed to dismiss the case in June 2019 when Pereira Brito's attorney inquired about the pending matter. The 2009 charge also triggered a probation violation in the 2007 case, but the notice was mailed to the wrong address. Pereira Brito has no other arrests, charges, or convictions on his record.

In June 2017, Pereira Brito's wife filed a petition on his behalf for an immigrant visa based on his marriage to a U.S. citizen. The petition was approved in February 2018. However, on March 3, 2019, U.S. Immigration and Customs Enforcement ("ICE") detained Pereira Brito at his home because of his outstanding removal order. The immigration court reopened his removal proceedings due to his lack of adequate notice of the 2005 removal hearing. Pereira Brito intends to apply for cancellation of removal and continue to pursue lawful permanent residency through his wife's petition.

On April 4, Pereira Brito received a bond hearing in the Boston Immigration Court. The immigration judge put the burden on Pereira Brito to prove that he is not dangerous or a flight risk and denied his release on bond. The immigration judge determined that Pereira Brito did not meet his burden because he failed to provide his criminal records and, despite his existing family ties and long residence in the United States, did not

show that his application for cancellation of removal was meritorious. Pereira Brito appealed this decision to the Board of Immigration Appeals ("BIA").

B. Florentin Avila Lucas

Florentin Avila Lucas came to the United States from Guatemala without authorization in 2002. He has worked at a dairy farm in New Hampshire since the mid-2000s. He has never been charged or convicted of any crime.

Avila Lucas was detained by CBP agents on March 20, 2019 in West Lebanon, New Hampshire. The agents began to follow Avila Lucas after they ran his license plate and discovered there was no valid social security number associated with the owner of the vehicle. The agents followed him into a thrift store, questioned him, and then detained him in the parking lot. ICE subsequently charged him with being present in the United States without admission and placed him in removal proceedings. Avila Lucas has filed a motion to suppress the evidence obtained by the CBP agents during this encounter. The immigration court held a hearing on the motion to suppress on June 18, 2019 and took the motion under advisement.

Avila Lucas received a bond hearing in the Boston Immigration Court on May 2. The immigration judge put the burden on Avila Lucas to prove that he is not dangerous or a flight

risk and denied his release on bond. Avila Lucas appealed the denial of bond to the BIA.

C. Jacky Celicourt

Jacky Celicourt was born in Haiti. He was politically active and worked for an opposition leader in the mid-2010s. He fled Haiti after armed men attacked him in November 2017. He entered the United States on a tourist visa on March 12, 2018. He moved to Nashua, New Hampshire and has worked in construction and roofing. He has a wife and four children who live in Haiti.

On December 13, 2018, Celicourt was arrested for theft of a a $5.99 pair of headphones. He claims he accidentally put the headphones in his pocket and offered to pay for them when the store clerk confronted him. He was released after his arrest on personal recognizance. He was found guilty and fined $310 on January 16, 2019. He has no other convictions or charges on his record.

ICE detained Celicourt as he was exiting the courtroom on January 16. A week later, ICE issued an NTA charging him with overstaying his tourist visa. He has applied for asylum, withholding of removal, and relief under the Convention Against Torture based on the persecution or torture he claims he will face in Haiti due to his political activities. An immigration judge denied his applications at a hearing on April 10 and

ordered him removed to Haiti. Celicourt appealed this decision, which remains pending at the BIA.

Celicourt received a bond hearing in the Boston Immigration Court on February 7. The immigration judge placed the burden of proof on him to show he is not dangerous or a flight risk and refused to release him on bond.

II. Statistical Background on § 1226(a) Bond Hearings

According to Plaintiffs' uncontroverted data, the Boston and Hartford Immigration Courts, the latter of which has jurisdiction over removal proceedings for aliens detained in western Massachusetts, held bond hearings for 700 and 77 aliens, respectively, during the six-month period between November 1, 2018 and May 7, 2019. An immigration judge issued a decision after 651 of those hearings, denying release on bond in approximately 41% of cases. The average bond amount set during this period was $6,302 and $28,700 in the Boston and Hartford Immigration Courts, respectively. About half of individuals were still in custody ten days after bond was set.

III. Procedural History

On June 13, 2019, Plaintiffs filed a habeas corpus petition and class action complaint on behalf of all aliens who are or will be detained under 8 U.S.C. § 1226(a) either within Massachusetts or otherwise within the jurisdiction of the Boston Immigration Court. The complaint alleges that allocating the

burden of proof to the alien at a § 1226(a) bond hearing is a violation of the Due Process Clause (Count I) and the INA and APA (Count II). The complaint also alleges that due process requires that the Government show the alien's dangerousness or flight risk by clear and convincing evidence and that the immigration court consider alternative conditions of release and ability to pay in determining release and the amount of bond. Plaintiffs seek an injunction ordering constitutionally compliant bond hearings for all class members and a declaratory judgment explaining the class members' due process rights.

After the filing of this lawsuit, ICE authorized the release of all three named plaintiffs on bond. They all posted bond and were released.

Five days after filing suit, Plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b)(2). The Government moved to stay the civil action because many of the legal arguments raised by the class are currently before the First Circuit in Doe v. Smith, No. 19-1368 (1st Cir. Apr. 18, 2019), an appeal from this Court's grant of habeas relief to an individual alien detained pursuant to § 1226(a). The Court denied the motion to stay, and the Government now opposes certification of the class.

DISCUSSION

I. Statutory Background

Pursuant to 8 U.S.C. § 1226(a), "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Unless the alien is removable on certain criminal or terrorist grounds, see id. § 1226(c), the Attorney General may continue to detain him or may release him on "conditional parole" or "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General," id. § 1226(a)(1)–(2). After ICE makes the initial decision to detain an alien, the alien may request a bond hearing in immigration court at any time before a removal order becomes final. 8 C.F.R. § 236.1(d)(1). The immigration court's bond decision is appealable to the BIA. 8 C.F.R. § 1003.19(f). Notably, § 1226(a) is silent as to whether the Government or the alien bears the burden of proof at a bond hearing and what standard of proof that party must meet. See 8 U.S.C. § 1226(a).

The BIA has held that at a bond hearing under § 1226(a) "[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond."[1] In re

[1] This language is drawn from a regulation governing the authority of immigration officers who may issue arrest warrants. See 8 C.F.R. § 236.1(c)(8) (requiring the alien to "demonstrate to the satisfaction of the officer" that he is neither dangerous

Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006). The alien must show that he is not "a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." Id. The BIA has repeatedly reaffirmed that the burden of proof falls on the alien. See, e.g., Matter of Fatahi, 26 I. & N. Dec. 791, 793 (BIA 2016).

The Supreme Court recently addressed the procedures required at a bond hearing under § 1226(a) in Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018). The Ninth Circuit had employed the canon of constitutional avoidance to read a requirement into § 1226(a) for "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." Id. at 847. The Supreme Court held that "[n]othing in § 1226(a)'s text . . . even remotely supports the imposition of either of those requirements." Id. The Supreme Court expressly declined to address whether the Constitution required these procedural protections. See id. at 851.

Post-Jennings, this Court has repeatedly ordered new bond hearings for aliens detained under § 1226(a) on the basis that the agency's allocation of the burden of proof to the alien

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nor a flight risk to be released). The BIA has applied the burden allocation and standard of proof in 8 C.F.R. § 236.1(c)(8) to bond determinations by immigration judges. See In re Adeniji, 22 I. & N. Dec. 1102, 1112-13 (BIA 1999).

violates due process. See, e.g., Doe v. Tompkins, No. 18-cv-12266-PBS, 2019 U.S. Dist. LEXIS 22616, at *2 (D. Mass. Feb. 12, 2019), appeal filed, No. 19-1368 (1st Cir. Apr. 18, 2019); Diaz Ortiz v. Tompkins, No. 18-cv-12600-PBS, 2019 U.S. Dist. LEXIS 14155, at *2 (D. Mass. Jan. 29, 2019), appeal filed, No. 19-1324 (1st Cir. Mar. 29, 2019); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018), appeal dismissed, No. 18-1691 (1st Cir. Dec. 26, 2018); Figueroa v. McDonald, No. 18-cv-10097-PBS, 2018 WL 2209217, at *5 (D. Mass. May 14, 2018).

Most courts have held that where "the government seeks to detain an alien pending removal proceedings, it bears the burden of proving that such detention is justified." Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (collecting cases); see also Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) (holding that due process requires the Government to bear the burden of proof at a § 1226(a) bond hearing); cf. Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 224 (3d Cir. 2018) (placing the burden of proof on the Government at a bond hearing for an alien detained after a final order of removal under 8 U.S.C. § 1231(a)(6)).

Additionally, this Court has held that a criminal alien subject to unreasonably prolonged mandatory detention under 8 U.S.C. § 1226(c) is entitled to a bond hearing at which the Government bears the burden of proving either his dangerousness

by clear and convincing evidence or his risk of flight by a preponderance of the evidence. Reid v. Donelan, -- F. Supp. 3d --, 2019 WL 2959085, at *16 (D. Mass. 2019). In deciding whether to set bond and in what amount, the immigration court must also consider the alien's ability to pay and alternative conditions of release that reasonably assure the safety of the community and the alien's future appearances. Id.

II. Class Certification Standard

A class may be certified pursuant to Federal Rules of Civil Procedure 23 only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to these four prerequisites, the class must satisfy at least one requirement of Rule 23(b). Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003). Here, Plaintiffs invoke Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[2]

[2] At least for Rule 23(b)(3) classes, the First Circuit adds an extratextual ascertainability requirement to the test for

"A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23] -- that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). A district court must "probe behind the pleadings" and conduct "a rigorous analysis" to ensure Rule 23 is satisfied. Id. at 350-51 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160-61 (1982)).

III. Analysis

Plaintiffs seek certification of the following class: all people who, now or in the future, are detained pursuant to 8 U.S.C. § 1226(a) and are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court. Although they do not waive their claim based on the APA and INA, Plaintiffs currently seek to certify this class only for their due process claim.

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class certification. In re Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015). Although the First Circuit long ago stated that the lack of required "notice to the members of a (b)(2) class" means that "the actual membership of the class need not therefore be precisely delimited," Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972), abrogated on other grounds by Gardner v. Westinghouse Broad. Co., 437 U.S. 478 (1978), some courts in this district treat ascertainability as a threshold requirement for any type of class, see, e.g., Manson v. GMAC Mortg., LLC, 283 F.R.D. 30, 38 n.26 (D. Mass. 2012); Shanley v. Cadle, 277 F.R.D. 63, 67-68 (D. Mass. 2011). Even if a (b)(2) class must satisfy this requirement, the members of Plaintiffs' proposed class are easily ascertainable through ICE's detention records.

While apparently conceding that the numerosity and adequacy of class counsel requirements are met,[3] the Government argues that this class does not satisfy the requirements of commonality, typicality, adequacy of the named plaintiffs, or Rule 23(b)(2). The Government raises three arguments against certification: 1) the jurisdictional bar in 8 U.S.C. § 1252(f)(1), 2) the mootness of the named plaintiffs' claims, and 3) the prejudice requirement for a due process claim in the immigration context. The Court addresses each argument in turn.

A. 8 U.S.C. § 1252(f)(1)

First, the Government contends that 8 U.S.C. § 1252(f)(1) bars both the injunctive and corresponding declaratory relief Plaintiffs seek, meaning that the Court cannot issue any unitary classwide remedy if the class is certified under Rule 23(b)(2). Section 1252(f)(1) strips all courts, except the Supreme Court,

[3] Based on Plaintiffs' data showing that the Boston and Hartford Immigration Courts held bond hearings for 777 aliens over a recent six-month period, the Court finds it is likely that more than forty aliens are detained pursuant to § 1226(a) in Massachusetts or subject to the jurisdiction of the Boston Immigration Court at any time. See Henderson v. Bank of N.Y. Mellon, N.A., 332 F. Supp. 3d 419, 426 n.3 (D. Mass. 2018) ("[A] proposed class of 40 or more generally meets numerosity in the First Circuit."). The transient nature of the class and the inability of many aliens to speak English and secure counsel render joinder impracticable. See Reid v. Donelan, 297 F.R.D. 185, 189 (D. Mass. 2014). With significant experience litigating immigration class actions, class counsel "is qualified, experienced and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985).

of jurisdiction "to enjoin or restrain the operation of [the removal provisions of the INA], other than with respect to the application of such provisions to an individual alien against whom [removal] proceedings . . . have been initiated." 8 U.S.C. § 1252(f)(1). This Court has already held that § 1252(f)(1) does not bar declaratory relief. See Reid, 2019 WL 2959085, at *15; Reid v. Donelan, No. 13-cv-30125-PBS, 2018 WL 5269992, at *7 (D. Mass. Oct. 23, 2018). The Sixth Circuit in Hamama v. Adducci expressed skepticism that § 1252(f)(1) permitted declaratory relief under its specific facts but declined to address the issue, which was not before it. 912 F.3d 869, 880 n.8 (6th Cir. 2018). However, Hamama preceded a majority of the Supreme Court indicating that a district court can entertain a request for declaratory relief despite § 1252(f)(1). See Reid, 2019 WL 2959085, at *15 (explaining that three justices in Jennings, 138 S. Ct. at 875 (Breyer, J., dissenting), and three additional justices in Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) (opinion of Alito, J.), expressed this opinion).

This Court has also issued an injunction ordering certain procedural protections required by due process at bond hearings for aliens detained under 8 U.S.C. § 1226(c). See Reid, 2019 WL 2959085, at *15. Section 1226 is silent on the procedural rules for bond hearings, including which party bears the burden of proof, what standard of proof is to be applied, and what the

immigration court must consider. See 8 U.S.C. § 1226; Reid, 2019 WL 2959085, at *12 n.7, *15. Instead, the BIA in precedential decisions has set the procedural rules immigration courts apply. See Reid, 2019 WL 2959085, at *12 & n.7; see also Guerra, 24 I. & N. Dec. at 40 (placing the burden of proof on the alien to justify his release at a bond hearing). In fact, the BIA used to place the burden of proof on the Government but changed course in the late 1990s. See Reid, 2019 WL 2959085, at *12 n.7. While the injunction Plaintiffs request would "abrogate[] agency precedent imposing the burden of proof on the alien" and require the Government to follow certain other procedures at bond hearings, id. at *15, it would not mandate release or allow an opportunity for release not provided in the statute, see Hamama, 912 F.3d at 879-80 (holding that § 1252(f)(1) stripped the district court of jurisdiction to enter such an injunction). Because an injunction would "in no way enjoin[] or restrain[] the operation of the detention statute," Reid, 2019 WL 2959085, at *15, it is not barred by § 1252(f)(1).

The Government emphasizes that such an injunction would abrogate twenty years of precedent that places the burden on the alien based on the agency's interpretation of congressional intent. The Government's claim that congressional intent supports the agency's placement of the burden of proof on the alien is questionable, as the BIA's decision allocating this

burden relied on a regulation that does not address immigration court bond hearings. See In re Adeniji, 22 I. & N. Dec. 1102, 1113 (BIA 1999) (citing 8 C.F.R. § 236.1(c)(8)); see also Mary Holper, The Beast of Burden in Immigration Bond Hearings, 67 Case Western Res. L. Rev. 75, 90-93 (2016) (explaining that the BIA in Adeniji adopted the burden of proof from 8 C.F.R. § 236.1(c)(8) despite its inapplicability to immigration court bond hearings). In any event, § 1252(f)(1) strips courts of jurisdiction to enjoin the operation of the statute, not any agency regulation or precedent that purportedly reflects congressional intent.[4] Cf. Kucana v. Holder, 558 U.S. 233, 236-37 (2010) (holding that 8 U.S.C. § 1252(a)(2), which bars judicial review of agency action "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," applies only to "determinations made discretionary by statute," not those "declared discretionary by the Attorney General himself through regulation" (emphasis omitted)).

[4] The Government also contends that an order releasing each class member unless he is provided with a constitutionally adequate bond hearing enjoins § 1226(a) in violation of § 1252(f)(1) because it would authorize the release of aliens for reasons other than a discretionary determination by an immigration court as specified in the statute. See 8 U.S.C. § 1226(a) ("[T]he Attorney General . . . may release the alien . . . ."). The Court will decide the remedy when it addresses the merits.

B. Mootness of the Named Plaintiffs' Claims

Second, the Government argues that the named plaintiffs are not adequate class representatives because they have already been released from custody. A class action "ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved." Cruz v. Farquharson, 252 F.3d 530, 533 (1st Cir. 2001). However, a court may certify a class with a moot named plaintiff where "it is certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76 (2013) (quotation omitted).

Plaintiffs' proposed class satisfies the inherently transitory exception. Plaintiffs explain, and the Government does not controvert, that the Boston Immigration Court determines bond for three to six aliens at each master calendar hearing, which happens at least three or four times a week. Because the immigration court always places the burden of proof on the alien and rarely considers ability to pay, the Government consistently holds bond hearings according to the procedures the

class is challenging. And given the Government's ability to end the allegedly unconstitutional detention of an alien through removal or release and each alien's interest in filing an individual habeas petition to seek immediate relief, it is uncertain whether any alien will be subject to § 1226(a) detention long enough to serve as a class representative. As Pereira Brito, Avila Lucas, and Celicourt are still in contact with Plaintiffs' counsel and willing to pursue this action, the fact that the Government has released them on bond therefore does not render them inadequate named plaintiffs. See Reid v. Donelan, 297 F.R.D. 185, 192 (D. Mass. 2014) (finding a named plaintiff who had already been granted a bond hearing and release adequate to represent a class challenging mandatory detention without a bond hearing under 8 U.S.C. § 1226(c) for similar reasons).

C. Prejudice Requirement

Finally, the Government emphasizes that, in deciding whether the misallocation of the burden of proof or other procedural flaw in an immigration proceeding violates due process, a court must conduct a prejudice inquiry asking if the error could have made a difference in the outcome. This prejudice analysis involves an individualized assessment of each class member's criminal history and personal characteristics, the Government explains, so the Court cannot determine whether

each class member has suffered a due process violation on a classwide basis. Accordingly, the Government argues that the class fails to meet Rule 23(a)'s requirements of commonality, typicality and adequacy of the named plaintiffs and cannot be certified under Rule 23(b)(2).

1. Commonality, Typicality, and Adequacy

The Government's argument misses the mark as it relates to commonality, typicality, and adequacy. To satisfy commonality, "the class members [must] 'have suffered the same injury.'" Dukes, 564 U.S. at 349-50 (quoting Falcon, 457 U.S. at 157). In particular, the class's "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution -- which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. A named plaintiff satisfies typicality if his "injuries arise from the same events or course of conduct as do the injuries of the class" and his "claims and those of the class are based on the same legal theory." Henderson v. Bank of N.Y. Mellon, N.A., 332 F. Supp. 3d 419, 427 (D. Mass. 2018) (quoting In re Credit Suisse–AOL Sec. Litig., 253 F.R.D. 17, 23 (D. Mass. 2008)). Typicality asks "whether the putative class representative can fairly and adequately pursue the interests of the absent class members without being sidetracked by [his] own particular

concerns." Id. (quoting In re Credit Suisse, 253 F.R.D. at 23). In the same vein, a named plaintiff is adequate if his "interests . . . will not conflict with the interests of any of the class members." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). Commonality, typicality, and adequacy all aim to ensure that maintenance of a class action is economical and the interests of absent class members are protected. See Dukes, 564 U.S. at 349 n.5.

The class satisfies commonality, typicality, and adequacy. The class presents multiple common legal questions that are central to each member's claims and do not require any individualized analysis: Does due process require that the Government bear the burden of proof at a bond hearing? If so, what standard of proof must the Government satisfy? Must the immigration judge consider alternative conditions of release and an alien's ability to pay in deciding on release and the amount of bond? Since all class members challenge detention pursuant to the same statutory authority and set of procedural rules and seek the same relief, the claims of the named plaintiffs are typical of those of the rest of the class, and the interests of the named plaintiffs and class members will not conflict. The common legal questions that apply to the claims of all § 1226(a) detainees mean that the named plaintiffs can adequately represent the interests of individuals who have already had a

bond hearing with unconstitutional procedures as well as those who will have such a hearing in the future. And the need to answer a question of prejudice on an individual basis would not by itself defeat commonality, typicality, and adequacy. See, e.g., id. at 359 (noting that a class need only present a single common question to satisfy commonality); In re Credit Suisse, 253 F.R.D. at 23 (explaining that typicality does not require that the named plaintiffs' claim be "identical to those of absent class members").

2. Rule 23(b)(2)

The Government's argument about the prejudice requirement raises more serious questions under Rule 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted —- the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Dukes, 564 U.S. at 360 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 85 N.Y.U. L. Rev. 97, 132 (2009)). Accordingly, the class must show that "a single injunction or declaratory judgment would provide relief to each member of the class." Id. In this case, all aliens detained under § 1226(a) receive bond hearings conducted in accordance with the same procedural rules set by BIA precedent. Plaintiffs seek a

classwide injunction and declaratory judgment regarding the procedures required by due process for a § 1226(a) bond hearing.

However, the Government is correct that this Court has required a showing of prejudice before ordering a new bond hearing for an individual alien who files a habeas petition after an immigration court unconstitutionally places the burden of proof on him at an initial bond hearing. See, e.g., Pensamiento, 315 F. Supp. 3d at 693 (explaining that the "[p]etitioner must show he was prejudiced by the constitutional error" and ordering a new bond hearing because the immigration judge "could well have found that [the petitioner] was not dangerous based on a single misdemeanor conviction"). Plaintiffs' proposed class includes aliens who are seeking a second bond hearing after receiving a constitutionally deficient one. The Court cannot issue a unitary injunction ordering new bond hearings for them without delving into their individual criminal histories and personal characteristics to determine whether they suffered prejudice from the errors at their first hearings. See In re Asacol Antitrust Litig., 907 F.3d 42, 56 (1st Cir. 2018) (explaining that the class action is a procedural device that does not alter a class member's individual substantive rights).

That said, the Court can issue a declaratory judgment explaining the procedures due process requires at a § 1226(a)

bond hearing and each individual's entitlement to a new bond hearing in accordance with those procedures if he can show prejudice via an individual habeas petition. See Reid, 2019 WL 2959085, at *1 (issuing declaratory relief to a Rule 23(b)(2) class of aliens detained under § 1226(c) explaining their right to an individualized analysis to determine whether their mandatory detention without a bond hearing has become unreasonably prolonged in violation of due process). This single declaration would address the rights of all aliens who have already had a bond hearing subject to unconstitutional procedures.

To the extent the Government contends that a prejudice analysis is necessary to determine what procedures due process requires for the rest of Plaintiffs' proposed class, namely aliens who are or will be detained under § 1226(a) and have not yet had a bond hearing before an immigration judge, the Government is mistaken. The Government "fails to distinguish between a challenge to the outcome of an immigration hearing and a preemptive objection to a procedure before the hearing takes place." Reid v. Donelan, 2 F. Supp. 3d 38, 44 (D. Mass. 2014). When a plaintiff challenges the outcome of a hearing based on a procedural defect, the prejudice requirement "prevents the needless remanding of a case that will be resolved identically even when the procedural infirmity is remedied." Id.; see also

Gomez-Velazco v. Sessions, 879 F.3d 989, 993 (9th Cir. 2018) (justifying the prejudice requirement because "the results of a proceeding should not be overturned if the outcome would have been the same even without the violation"). But the "premise that a due process violation is not grounds for reversal absent a showing of . . . prejudice has no bearing on a plaintiff's right to seek to enjoin due process violations from occurring in the first instance." Reid, 2 F. Supp. 3d at 44. For aliens yet to have a bond hearing, their individual circumstances are irrelevant to determining what procedures due process mandates, and the Court can issue an injunction requiring the Government to implement these procedures for their bond hearings.

Because the prejudice requirement affects the legal rights of aliens who have already had hearings subject to unconstitutional procedures but not those of aliens who have yet to have bond hearings, the Court certifies separate classes for these two categories of individuals. Both classes satisfy Rule 23(b)(2) because the Court can issue a single remedy that addresses the legal rights of all members of each class.

ORDER

For the foregoing reasons, Plaintiffs' motion for class certification (Docket No. 17) is **ALLOWED**. The Court certifies the following two classes for the due process claim:

> Pre-Hearing Class: All individuals who 1) are or will be detained pursuant to 8 U.S.C. § 1226(a), 2) are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and 3) have not received a bond hearing before an immigration judge.
>
> Post-Hearing Class: All individuals who 1) are or will be detained pursuant to 8 U.S.C. § 1226(a), 2) are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and 3) have received a bond hearing before an immigration judge.

The Court appoints Mintz Levin, the American Civil Liberties Union Foundation of Massachusetts, the American Civil Liberties Union Foundation of New Hampshire, and the ACLU Foundation Immigrants' Rights Project as class counsel under Federal Rule of Civil Procedure 23(g).

SO ORDERED.

/s/ PATTI B. SARIS
Hon. Patti B. Saris
Chief United States District Judge

Brito v. Barr

United States District Court for the District of Massachusetts

November 27, 2019, Decided; November 27, 2019, Filed

Civil Action No. 19-11314-PBS

Reporter
415 F. Supp. 3d 258 *; 2019 U.S. Dist. LEXIS 206578 **; 105 Fed. R. Serv. 3d (Callaghan) 540; 2019 WL 6333093

GILBERTO PEREIRA BRITO, FLORENTIN, AVILA LUCAS, and JACKY CELICOURT, individually and on behalf of all those similarly situated, Plaintiffs-Petitioners, v. WILLIAM BARR, Attorney General, U.S. Department of Justice, et al., Defendants-Respondents.

Subsequent History: Appeal filed, 02/10/2020

Prior History: *Brito v. Barr, 395 F. Supp. 3d 135, 2019 U.S. Dist. LEXIS 131092 (D. Mass., Aug. 6, 2019)*

Core Terms

alien, hearings, immigration, detention, burden of proof, detained, immigration judge, due process, injunction, class member, flight risk, declaratory, clear and convincing evidence, arrested, violates, flight, injunctive relief, standard of proof, ability to pay, orders, alternative condition, appearances, custody, removal, Courts, preponderance of evidence, safety of the community, permanent injunction, district court, new bond

Counsel: **[**1]** For 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: Adriana Lafaille, Daniel L. McFadden, LEAD ATTORNEYS, Matthew Segal, American Civil Liberties Union, Boston, MA; Andrew Nathanson, Susan J. Cohen, Susan M. Finegan, LEAD ATTORNEYS, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC, Boston, MA; Jennifer J. Mather, Ryan T. Dougherty, LEAD ATTORNEYS, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, Boston, MA; Michael Tan, LEAD ATTORNEY, PRO HAC VICE, American Civil Liberties Union Federation, San Francisco, CA; SangYeob Kim, LEAD ATTORNEY, PRO HAC VICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEW HAMPSHIRE, Concord, NH; Gilles R. Bissonnette, American Civil Liberties Union of New Hampshire, Concord, NH; Henry R. Klementowicz, American Civil Liberties Union of NH, Concord, NH.

For William Barr, Attorney General, U.S. Department of Justice, Marcos Charles, Acting Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Mark Morgan, Acting **[**2]** Director, U.S. Immigration and Customs Enforcement, Kevin McAleenan, 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 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: Carlton F. Sheffield, LEAD ATTORNEY, U.S. Department of Justice, Civil Division, Washington, DC; Huy Le, United States Department of Justice, Washignton, DC; J. Max Weintraub, U.S. Department of Justice, Office of Immigration Litigation, Washington, DC; Rayford A. Farquhar, United States Attorney's Office, Boston, MA.

Pro Se Party John A. Hawkinson, Intervenor, Pro se, Cambridge, MA.

Judges: Hon. Patti B. Saris, Chief United States District Judge.

Opinion by: Patti B. Saris

Opinion

[*263] MEMORANDUM AND ORDER

Saris, C.J.

INTRODUCTION

In this class action, Plaintiffs challenge the procedures at immigration court bond hearings **[**3]** on the grounds they violate the *Fifth Amendment Due Process Clause*, the Administrative Procedure Act ("APA"), and the Immigration and Nationality Act ("INA"). Specifically, Plaintiffs claim that the allocation of the burden of proof to the alien and failure to consider alternative conditions of release and the alien's ability to pay are unlawful with respect to aliens detained under *8 U.S.C. § 1226(a)*, the provision applicable to aliens with no serious criminal convictions who are not subject to an order of removal.

In August 2019, the Court certified two classes asserting the due process claim.

> Pre-Hearing Class: All individuals who (1) are or will be detained pursuant to *8 U.S.C. § 1226(a)*, (2) are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and (3) have not received a bond hearing before an immigration judge.
>
> Post-Hearing Class: All individuals who (1) are or will be detained pursuant to *8 U.S.C. § 1226(a)*, (2) are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and (3) have received a bond hearing before an immigration judge.

Plaintiffs now move to modify the certified classes to include the administrative law claim. They **[**4]** also move for summary judgment on both claims.

After hearing, the Court **ALLOWS** Plaintiffs' motion to modify the class definitions (Dkt. No. 72) and **ALLOWS** their motion for summary judgment. (Dkt. No. 67). The Court **ALLOWS IN PART** and **DENIES IN PART** the requested declaratory and injunctive relief.

In summary, the Court holds and declares as follows: First, the Board of Immigration Appeals ("BIA") policy of placing the burden of proof on the alien at *8 U.S.C. § 1226(a)* bond hearings violates due process and the APA. Second, due process requires the Government prove at *§ 1226(a)* bond hearings an alien's dangerousness by clear and convincing evidence or risk of flight by a preponderance of the evidence. Third, due process requires the immigration court to evaluate an alien's ability to pay in setting bond, and consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances. Fourth, the Government shall produce to class counsel certain information regarding each member of the Post-Hearing Class in order to facilitate individual habeas petitions challenging their continued detention.

FACTUAL BACKGROUND

I. Bond Hearings

A. The Class [**5] Representatives

Gilberto Pereira Brito is a citizen of Brazil. Immigration and Customs Enforcement ("ICE") arrested him at his home in Brockton, Massachusetts on March 3, 2019. On April 4, 2019, Pereira Brito received a bond hearing in Boston Immigration Court where he was required to prove **[*264]** that he is not a danger or a flight risk in order to be released from custody. At the hearing, Pereira Brito presented evidence that he lives in Brockton with his wife and three young children, all of whom are U.S. citizens. Further, his wife is disabled and cannot work, which means Pereira Brito is the sole provider for his family. Prior to his arrest, Pereira Brito voluntarily disclosed his location to the Government as part of the process for applying for lawful permanent resident status through his wife. In immigration court, meanwhile, he applied for cancellation of removal on the basis that he has been in the United States for more than 10 years and has U.S. citizen family members who would suffer an exceptional and extremely unusual hardship were he removed. Other than his March 2019 arrest by ICE, Pereira Brito had not been arrested for, charged with, or convicted of any crimes since May **[**6]** 2009. The immigration judge denied him bond because he "did not meet his burden to demonstrate that he neither poses a danger to the community nor is a risk of flight."

Florentin Avila Lucas is a citizen of Guatemala. Customs and Border Patrol agents arrested him outside a thrift store in Lebanon, New Hampshire on March 20, 2019. On May 2, 2019, Avila Lucas received a bond hearing in Boston Immigration Court where he was required to prove that he is not a danger or a flight risk in order to be released from custody. At the hearing, he presented evidence that he had no criminal history and he had worked at the same dairy farm located in Claremont, New Hampshire since 2006. Avila Lucas worked approximately 70 hours per week at the dairy farm. The immigration judge denied him bond because he "failed to meet his burden of proof to show that he is not a danger or flight risk."

Jacky Celicourt is a citizen of Haiti. ICE arrested him on January 16, 2019. On February 7, 2019, Celicourt received a bond hearing in Boston Immigration Court where he was required to prove that he is not a danger or a flight risk in order to be released from custody. At the hearing, he presented evidence that he arrived **[**7]** in the United States in 2018 on a tourist visa and that he moved to Nashua, New Hampshire where he worked in construction and roofing. Previously, Celicourt had been politically active in Haiti but was forced to flee after being attacked by armed men. Based on this experience, he was applying for asylum, withholding of removal, and protection under the Convention Against Torture. Celicourt did not have a criminal record other than a single charge for theft of a pair of headphones that cost $5.99. On January 16, 2019, he pleaded guilty to the theft charge and was fined $310, which was suspended for one year. The immigration judge denied Celicourt bond because he "failed to prove he's not a danger to property or a flight risk."

Following the commencement of this lawsuit, ICE released all three Class Representatives from custody on bond.

B. Bond Hearings

Between November 1, 2018 and May 7, 2019, Boston Immigration Courts held bond hearings for 700 aliens, and Hartford Immigration Courts held bond hearings for 77 aliens. Immigration judges issued decisions after 651 of those hearings, denying release on bond in approximately 41% of cases. The average bond amount set during this period was **[**8]** $6,302 and $28,700 in the Boston and Hartford Immigration Courts, respectively. About half of the aliens were still in custody ten days after bond was set. During that same period, the median case length was 129 days, the 25th **[*265]** percentile was 49.5 days, and the 75th percentile was 732 days.[1]

DISCUSSION

I. Statutory and Regulatory Framework

Pursuant to *8 U.S.C. § 1226(a)*, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Unless the alien is removable on certain criminal or terrorist grounds, see id. *§ 1226(c)*, the Attorney General may continue to detain him or may release him on "conditional parole" or "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General," id. *§ 1226(a)(1)-(2)*. After ICE makes the initial decision to detain an alien, the alien may request a bond hearing in immigration court at any time before a removal order becomes final. *8 C.F.R. § 236.1(d)(1)*. The immigration court's bond decision is appealable to the BIA. Id. *§ 1003.19(f)*. Notably, *§ 1226(a)* is silent as to whether the Government or the alien bears the burden of proof at a bond hearing and what standard of proof that party must meet. See *8 U.S.C. § 1226(a)*.

The BIA has held that at a bond hearing under **[**9]** *§ 1226(a)* "[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra, 24 I. & N. Dec. 37, 40* (BIA 2006); *In re Adeniji, 22 I. & N. Dec. 1102, 1112-13* (BIA 1999). This language is drawn from a regulation governing the authority of immigration officers who may issue arrest warrants. See *8 C.F.R. § 236.1(c)(8)* (requiring the alien to "demonstrate to the satisfaction of the officer" that he is neither dangerous nor a flight risk to be released). The BIA has applied the burden allocation and standard of proof in *8 C.F.R. § 236.1(c)(8)* to bond determinations by immigration judges. See *Adeniji, 22 I. & N. Dec. at 1112-13*. The BIA has held that the alien must show to the satisfaction of the immigration judge that he or she is not "a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." *Guerra, 24 I. & N. Dec. at 40*. The BIA has repeatedly reaffirmed that the burden of proof falls on the alien. See, e.g., *Matter of Fatahi, 26 I. & N. Dec. 791, 793* (BIA 2016).

The Supreme Court recently addressed the procedures required at a bond hearing under *§ 1226(a)* in *Jennings v. Rodriguez, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018)*. The Ninth Circuit had employed the canon of constitutional avoidance to read a requirement into *§ 1226(a)* for "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention **[**10]** is necessary." *Id. at 847*. The Supreme Court held that "[n]othing in *§ 1226(a)*'s text . . . even remotely supports the imposition of either of those requirements." Id. The Supreme Court expressly declined to address whether the Constitution required these procedural protections. See *id. at 851*.

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[1] Plaintiffs' statement of material facts presents slightly different case-length figures than the Supplemental Declaration of Sophie Beiers, which is the source for the statement of material facts. The figures cited above are drawn directly from Beiers' Supplemental Declaration, but the differences between the figures are immaterial to the Court's decision.

II. Constitutional Claim

Plaintiffs have moved for summary judgment on their constitutional claim that that the procedures currently followed in § 1226(a) bond hearings violate the Due Process Clause of the Fifth Amendment. **[*266]** They contend that a constitutionally adequate bond hearing requires that (1) the burden of proof be placed on the Government, (2) the Government prove by clear and convincing evidence that the alien is dangerous and a flight risk, (3) the immigration judge consider the alien's ability to pay in setting bond amounts, and (4) the immigration judge consider alternative conditions of release that will assure the safety of the community and the alien's future appearances. There are no disputed issues of material fact.

a. Burden of Proof

Plaintiffs argue that the immigration court's allocation of the burden of proof to the alien violates due process. In Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018), the Court held that due process "requires placing the burden of proof on the government in § 1226(a) custody redetermination **[**11]** hearings. Requiring a non-criminal alien to prove that he is not dangerous and not a flight risk at a bond hearing violates the Due Process Clause." In cases where a noncriminal alien will be deprived of liberty, due process requires the Government prove detention is necessary. See Foucha v. Louisiana, 504 U.S. 71, 81-82, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); Addington v. Texas, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). This is especially true when many aliens are detained for extended periods of time. See Jennings, 138 S. Ct. at 860 (Breyer, J., dissenting) (stating that class members had been detained for periods ranging from six months to 831 days while pursuing asylum petitions).

Most other district courts have reached the same conclusion. See Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (collecting cases). No circuit court has addressed the allocation of the burden of proof in § 1226(a) bond hearings post-Jennings, but the pre-Jennings caselaw (which was not disturbed by Jennings) is consistent with placing the burden of proof on the Government. See Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) (holding that due process requires the Government to bear the burden of proof at a § 1226(a) bond hearing); cf. Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 224 (3d Cir. 2018) (placing burden of proof on the Government at a bond hearing for alien detained after final order of removal under 8 U.S.C. § 1231(a)(6)). The Government directs the Court to the Eighth Circuit's recent unpublished decision in Ali v. Brott, 770 F. App'x 298 (8th Cir. 2019). But Ali is no more helpful to the Government than Jennings **[**12]**. The Eighth Circuit held only that § 1226(a) does not contain a reasonableness requirement as to the amount of time an alien can be detained. Id. at 301-02. It then remanded the case for the district court to address petitioner's constitutional challenges under the Fourth and Fifth Amendments to his detention under § 1226(a). Id. at 302.

Therefore, the Court holds that the Due Process Clause requires the Government bear the burden of proof in § 1226(a) bond hearings.

b. Standard of Proof

Plaintiffs argue that due process requires that the Government prove flight risk and dangerousness by clear and convincing evidence in § 1226(a) bond hearings. The only standard applicable to detention hearings now is "to the satisfaction" of the immigration judge, which is effectively no standard at all and may vary from judge to judge. Although the Court has held the Government must bear the burden of proof, it has left open the question of the applicable standard of proof in § 1226(a) bond hearings.

In Reid v. Donelan, 390 F. Supp. 3d 201, 227-28 (D. Mass. 2019), however, the **[*267]** Court held that a criminal alien subject to unreasonably prolonged mandatory detention under 8 U.S.C. § 1226(c) is entitled to a bond hearing at which the Government bears the burden of proving either his dangerousness by clear and convincing evidence or his risk of flight by a preponderance of the evidence. This **[**13]** differentiated standard of proof is the same that applies in the context of criminal pretrial detention under the Bail Reform Act. See United States v. Salerno, 481 U.S. 739, 751, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (holding that pretrial detention is "consistent with the Due

Process Clause" "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); *United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991)* (holding that standard for pretrial detention based on risk of flight is preponderance of the evidence).

Plaintiffs argue that a higher standard of proof for risk of flight is appropriate because aliens with no criminal convictions do not pose the same risk of flight as defendants in criminal proceedings. They point out that an alien who fails to appear for an immigration court proceeding may forfeit the right to contest removal. See *8 U.S.C. § 1229a(b)(5)*. However, many aliens do not have viable defenses to removal and may well prefer to flee, rather than be removed from the country. While due process requires procedural protections for aliens unlawfully in this country, the Court is not persuaded that aliens who are civilly detained are entitled to protection that go beyond those given to criminally detained U.S. citizens. Cf. *Demore v. Kim, 538 U.S. 510, 522, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003)* ("Congress may make rules **[**14]** as to aliens that would be unacceptable if applied to citizens.").

The Court concludes that the vague standard of proof currently employed at *§ 1226(a)* bond hearing does not provide an alien with "the opportunity to be heard 'at a meaningful time and in a meaningful manner'" given the extent of the liberty interest at stake. *Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965))*. Accordingly, the Court holds the Government must prove either an alien's dangerousness by clear and convincing evidence or risk of flight by a preponderance of the evidence.

c. Conditions of Release and Ability to Pay

Plaintiffs argue 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. This is what the Court held in Reid with respect to bond hearings for aliens detained under *§ 1226(c)*. *390 F. Supp. 3d at 225*. The Court now holds that this requirement applies equally in 1226(a) bond hearings. This requirement ensures that the decision to continue detention of an alien is reasonably related to the Government's interest in protecting the public and assuring appearances at future proceedings. **[**15]** [2] See *Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017)* (requiring ICE and immigration judges consider alternative conditions of release and ability to pay in setting bond amounts for aliens detained under *§ 1226(a)*); *Abdi v. Nielsen, 287 F. Supp. 3d 327, 338 **[*268]** (W.D.N.Y. 2018)* (requiring same for arriving aliens detained under *8 U.S.C. § 1225(b)*).

III. The APA Claim

Plaintiffs contend that the allocation of the burden of proof to the alien in *§ 1226(a)* bond hearings also violates the INA and APA. They advance two separate theories of why the allocation of the burden of proof to the alien in *§ 1226(a)* bond hearings violates the APA and INA. First, they claim that because the allocation of the burden of proof is unconstitutional it also violates the INA and APA. See *5 U.S.C. § 706(2)(B)* ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right . . ."). Second, they claim it is arbitrary and capricious because Adeniji reversed long-standing agency precedent placing the burden on the Government, without providing sufficient reasons for the change. See *5 U.S.C. § 706(2)(A)* ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . **[**16]** .").

As an initial matter, the APA provides Plaintiffs with a cause of action to challenge the BIA's policy decisions regarding detention. See *Judulang v. Holder, 565 U.S. 42, 52-53, 132 S. Ct. 476, 181 L. Ed. 2d 449 (2011)*. APA challenges to immigration detention policies in District Court are not precluded by the zipper clause in *§*

[2] *Section 1226(a)* authorizes an immigration court to release an alien on "bond of at least $1,500" or "conditional parole." Plaintiffs do not challenge the statutory minimum bond amount.

1252(b)(9).[3] See Aguilar v. ICE, 510 F.3d 1, 11 (1st Cir. 2007); see also R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 186 (D.D.C. 2015) ("[A]lthough Congress has expressly limited APA review over individual deportation and exclusion orders, see 8 U.S.C. 1252(a)(5), it has never manifested an intent to require those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA." (citation omitted)).

Because the Court has already concluded that the BIA's policy of placing the burden of proof on the alien in § 1226(a) bond hearings is unconstitutional, the Court also holds that the BIA policy is a violation of the APA. See Atterbury v. U.S. Marshals Serv., 941 F.3d 56, 62 (2d Cir. 2019) (recognizing APA claim under § 706(2)(B) for violation of due process right as distinct from "free-standing constitutional claim"); Sierra Club v. Trump, 929 F.3d 670, 698 (9th Cir. 2019) (recognizing APA claim under § 706(2)(B) for violation of Appropriations Clause); Cancino Castellar v. McAleenan, 388 F. Supp. 3d 1218, 1248 (S.D. Cal. 2019) (declining to dismiss APA claim based on alleged constitutional violations in immigration detention context). Accordingly, the Court finds that the BIA policy of placing the burden of proof on the alien in § 1226(a) bond hearings violates the APA because the policy **[**17]** is unconstitutional.[4]

IV. Class Modification

Plaintiffs have moved to modify the class definitions to cover both their APA claims. "An order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). "In determining whether to do so, courts consider 'the criteria of Rule 23(a) and (b) in light of factual and legal developments' and if 'the parties or the class would be unfairly prejudiced by a **[*269]** change in proceedings.'" Reid v. Donelan, No. CV 13-30125-PBS, 2018 U.S. Dist. LEXIS 181700, 2018 WL 5269992, at *3 (D. Mass. Oct. 23, 2018) (quoting In re Harcourt Brace Jovanovich, Inc. Sec. Litig., 838 F. Supp. 109, 115 (S.D.N.Y. 1993)). Because Plaintiffs' due process and administrative law claims are essentially co-extensive, the reasoning of the Court's original class certification ruling applies equally to both claims. Likewise, there is no prejudice to the Government in amending the class definitions at this stage of the litigation. Accordingly, the Court modifies the definitions of the Pre-Hearing and Post-Hearing Classes to cover both of Plaintiffs' claims.

V. Remedy

Plaintiffs seek a declaratory judgment setting forth the minimum procedural requirements for § 1226(a) bond hearings to satisfy the Due Process Clause. They also seek an injunction ordering the Government to comply with these procedures in all future bond hearings. For the Post-Hearing Class only, **[**18]** Plaintiffs request an injunction ordering the Government provide new bond hearings to class members who were prejudiced by the constitutional deficiencies of their original bond hearings. They also request the Court to order the Government to take additional steps to facilitate the process of providing class members with new bond hearings.

a. Jurisdiction

The Government renews its argument from class certification that 8 U.S.C. § 1252(f)(1) deprives the Court of jurisdiction to issue the classwide declaratory and injunctive relief sought by Plaintiffs. Section 1252(f)(1) strips the lower courts of jurisdiction "to enjoin or restrain the operation of" certain provisions of the INA on a classwide basis. See Hamama v. Homan, 912 F.3d 869, 879-80 (6th Cir, 2018) (noting that the "practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions"). Yet a majority of the Supreme Court recently indicated that Section 1252(f)(1) does not extend to declaratory relief. Three justices in Nielsen v. Preap, 139 S. Ct. 954, 962, 203 L. Ed. 2d 333 (2019) (opinion of Alito, J.), stated that a district court has jurisdiction to entertain a request for declaratory relief consistent with § 1252(f)(1), adding their voices to the three other justices who said the same in Jennings, 138 S. Ct. at 875 (Breyer, J., dissenting).

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[3] This provision consolidates and channels judicial review of orders of removal in the courts of appeal.

[4] Given this ruling the Court need not address the Plaintiffs' alternative theory under the APA.

Whether the **[**19]** Court has jurisdiction to issue injunctive relief is a closer question. *Section 1226* does not provide the procedural requirements for bond hearings. See *8 U.S.C. § 1226*. Instead, the procedural rules followed by immigration courts come from BIA precedential decisions, which are not construing language in the statute. See *Reid, 390 F. Supp. 3d at 223* & n.7. To be sure, the requested injunction requires the Government to follow certain constitutionally mandated due process procedures at bond hearings, but it does not mandate the release of any class members nor does it allow an opportunity for release not already provided by the statute. Cf. *Hamama, 912 F.3d at 879-80* (finding district court lacked jurisdiction to enter injunction ordering release of detainees unless they were provided bond hearings not required by statute). Therefore, the Court concludes *Section 1252(f)(1)* is inapplicable because the proposed injunction does not "enjoin or restrict" the operation of the INA.

b. Injunctive Relief

A court may issue a permanent injunction if "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; **[*270]** (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) **[**20]** the public interest would not be adversely affected by an injunction." *Healey v. Spencer, 765 F.3d 65, 74 (1st Cir. 2014)*.

As discussed above, the Court finds that Plaintiffs prevail on both their constitutional and administrative law claims. Since these claims challenge the Government's immigration detention procedures, in the absence of an injunction, there is a risk irreparable of harm because the class members who have no or little criminal history face a loss of their liberty by incarceration in jail for months and sometimes years. See *Ferrara v. United States, 370 F. Supp. 2d 351, 360 (D. Mass. 2005)* ("Obviously, the loss of liberty is a . . . severe form of irreparable injury."). The first two permanent injunction factors therefore are satisfied.

The Government contends that the third and fourth factors cannot be satisfied. First, the Government argues that the proposed injunction would adversely affect the public interest because it is contrary to congressional intent. This is wholly unpersuasive. Although the statute does state that "an alien may be . . . detained," *8 U.S.C. § 1226(a)*, *§ 1226* is silent on the procedures applicable in immigration bond hearings. Cf. *Zadvydas v. Davis, 533 U.S. 678, 697, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)* ("[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion."). In any case, requiring the Government to obey the Constitution **[**21]** in its administration of immigration detention supports the public interest. See *Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005)* ("[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

Second, the Government argues that the proposed injunction would impose a severe administrative burden, which tips the balance of interests in its favor. It asserts that the immigration court system is already backlogged and overburdened. Yet the Government does not explain how the proposed procedures for the Pre-Hearing Class will worsen this supposed backlog. There is no evidence in the record that shifting the burden to the Government and clarifying the standard of proof will make hearings more time consuming or cases more difficult to adjudicate. As discussed below, while members of the Post-Hearing Class will be entitled to new bond hearings if they can show they were prejudiced by the constitutional defects in their original hearing, whether or not new hearings are in fact appropriate will be decided through separate habeas actions.

c. Post-Hearing Relief

The parties' primary dispute concerning the scope of the injunctive relief concerns the **[**22]** Post-Hearing Class. Plaintiffs request that the Court order the Government to provide for each class member: (i) the name and A-number; (ii) the current location; (iii) the date the current period of detention began, (iv) the name of the person's counsel in immigration court, if any, (v) a statement of whether the Government intends to dispute prejudice as to that person, and if so, a brief explanation of the good faith basis for such dispute, and (vi) a statement of whether a new bond hearing has taken place after the date of the Court's judgment and, if so, the outcome.

Some of the Plaintiffs' requests are reasonable and appropriate. The Government must provide class counsel with basic information regarding the Post-Hearing Class members whom it is currently detaining **[*271]** (i.e., name, location, detention date, counsel information, bond hearing dates). This information should be readily accessible to

the Government and, in some cases, the information will be within its exclusive control. The sticking point is Plaintiffs' request that the Government also provide for each Post-Hearing Class member a statement of whether it intends to contest prejudice in a subsequent habeas action and its **[**23]** good faith basis for contesting prejudice. This proposed relief would be unduly burdensome for the Government because Plaintiffs allege, and the Government does not dispute, that since November 2018 hundreds of aliens have been denied bond. As the Court already explained in its class certification opinion, members of the Post-Hearing Class will have to litigate prejudice through individual habeas petitions. The Government does not have to take a position on prejudice with respect to individual class members before any habeas petitions are filed.

ORDER

For the foregoing reasons, Plaintiffs' motion for summary judgment (Dkt. No. 67) and motion to modify the class definitions (Dkt. No. 72) are **ALLOWED**. Plaintiffs' request for declaratory and injunctive relief is **ALLOWED IN PART** and **DENIED IN PART**.

DECLARATORY JUDGMENT (BOTH CLASSES)

The Court declares that aliens detained pursuant to *8 U.S.C. § 1226(a)* are entitled to receive a bond hearing at which the Government must prove the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence and that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety **[**24]** of the community. At the bond hearing, the immigration judge must evaluate the alien's ability to pay in setting bond above $1,500 and must consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances.

PERMANENT INJUNCTION (BOTH CLASSES)

The Court orders that immigration courts shall follow the requirements set forth in the above declaration, effective December 13, 2019.

The Court orders that the Government shall provide this declaratory judgment and permanent injunction to all members of both classes by December 13, 2019 and to all new members of the Pre-Hearing Class once ICE makes the initial determination to detain them pursuant to *8 U.S.C. § 1226(a)*. The Government shall file a certification that this has occurred by December 16, 2019.

PERMANENT INJUNCTION (POST-HEARING CLASS ONLY)

The Court orders that the Government shall provide class counsel with the following information for each member of the Post-Hearing Class by January 3, 2020: (1) the name; (2) the current location; (3) the date the current period of detention began, (4) the name of the class member's counsel in immigration court, if any, and; (5) **[**25]** a statement of whether a new bond hearing has taken place after the date of this order and, if so, the outcome. The Government also shall file with the Court a copy of this information. SO ORDERED.

/s/ PATTI B. SARIS

Hon. Patti B. Saris

Chief United States District Judge

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		ELECTRONIC NOTICE Setting Hearing on Motion 67 MOTION for Summary Judgment *or, in the Alternative, Preliminary Injunction,* 72 MOTION to Modify *Class Definition* : Motion Hearing set for 11/5/2019 09:30 AM in Courtroom 19 before Chief Judge Patti B. Saris. (Molloy, Maryellen) (Entered: 10/04/2019)
11/05/2019	83	Electronic Clerk's Notes for proceedings held before Chief Judge Patti B. Saris: Motion Hearing held on 11/5/2019 re 72 MOTION to Modify *Class Definition* filed by Jacky Celicourt, Florentin Avila Lucas, Gilberto Pereira Brito, 67 MOTION for Summary Judgment *or, in the Alternative, Preliminary Injunction* filed by Jacky Celicourt, Florentin Avila Lucas, Gilberto Pereira Brito....All matters taken under advisement, supplemental materials to be filed on or before 11/12/19. (Court Reporter: Debra Joyce at joycedebra@gmail.com.) (Molloy, Maryellen) (Entered: 11/05/2019)
11/08/2019	84	Transcript of Motion Hearing held on November 5, 2019, before Chief Judge Patti B. Saris. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 11/29/2019. Redacted Transcript Deadline set for 12/9/2019. Release of Transcript Restriction set for 2/6/2020. (Scalfani, Deborah) (Entered: 11/08/2019)
11/08/2019	85	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 11/08/2019)
11/12/2019	86	RESPONSE TO COURT ORDER by Gilberto Pereira Brito, Jacky Celicourt, Florentin Avila Lucas re 83 Motion Hearing,, - *Petitioners' Post-Hearing Memorandum* -. (Attachments: # 1 Appendix A, # 2 Appendix B)(Finegan, Susan) (Entered: 11/12/2019)
11/12/2019	87	RESPONSE TO COURT ORDER by William Barr, Christopher Brackett, Marcos Charles, Kevin McAleenan, James McHenry, Antone Moniz, Mark Morgan, Yolanda Smith, Steven Souza, Lori Streeter re 83 Motion Hearing,, . (Le, Huy) (Entered: 11/12/2019)
11/27/2019	88	Chief Judge Patti B. Saris: MEMORANDUM AND ORDER entered: **ORDER** Plaintiffs' motion for summary judgment (Dkt. No. 67) and motion to modify the class definitions (Dkt. No. 72) are **ALLOWED.** Plaintiffs' request for declaratory and injunctive relief is **ALLOWED IN PART** and **DENIED IN PART.** **DECLARATORY JUDGMENT (BOTH CLASSES)** The Court declares that aliens detained pursuant to 8 U.S.C. § 1226(a) are entitled to receive a bond hearing at which the Government must prove the

		alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence and that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community. At the bond hearing, the immigration judge must evaluate the alien's ability to pay in setting bond above $1,500 and must consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances. **PERMANENT INJUNCTION (BOTH CLASSES)** The Court orders that immigration courts shall follow the requirements set forth in the above declaration, effective December 13, 2019. The Court orders that the Government shall provide this declaratory judgment and permanent injunction to all members of both classes by December 13, 2019 and to all new members of the Pre-Hearing Class once ICE makes the initial determination to detain them pursuant to 8 U.S.C. § 1226(a). The Government shall file a certification that this has occurred by December 16, 2019. **PERMANENT INJUNCTION (POST-HEARING CLASS ONLY)** The Court orders that the Government shall provide class counsel with the following information for each member of the Post-Hearing Class by January 3, 2020: (1) the name; (2) the current location; (3) the date the current period of detention began, (4) the name of the class member's counsel in immigration court, if any, and; (5) a statement of whether a new bond hearing has taken place after the date of this order and, if so, the outcome. The Government also shall file with the Court a copy of this information. SO ORDERED. (Lara, Miguel) (Entered: 11/27/2019)
12/13/2019	89	MOTION for Extension of Time to January 31, 2019 to Comply with Court Order by William Barr, Christopher Brackett, Marcos Charles, Kevin McAleenan, James McHenry, Antone Moniz, Mark Morgan, Yolanda Smith, Steven Souza, Lori Streeter.(Le, Huy) (Entered: 12/13/2019)
12/16/2019	90	NOTICE by William Barr, Christopher Brackett, Marcos Charles, James McHenry, Antone Moniz, Mark Morgan, Yolanda Smith, Steven Souza, Lori Streeter *Compliance with Judgment* (Attachments: # 1 Exhibit Ex. A, # 2 Exhibit Ex. B)(Le, Huy) (Entered: 12/16/2019)
12/17/2019	91	MEMORANDUM in Opposition re 89 MOTION for Extension of Time to January 31, 2019 to Comply with Court Order filed by Gilberto Pereira Brito, Jacky Celicourt, Florentin Avila Lucas. (Finegan, Susan) (Entered: 12/17/2019)
12/17/2019	92	DECLARATION re 91 Memorandum in Opposition to Motion *(Declaration of Daniel L. McFadden)* by Gilberto Pereira Brito, Jacky Celicourt, Florentin