Nos. 20-1119 / 20-1037

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Petitioners-Appellants/Cross-Appellees,

v.

WILLIAM P. BARR, Attorney General, U.S. Department of Justice; TIMOTHY S. ROBBINS, acting Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement; CHAD WOLF, Secretary, U.S. Department of Homeland Security, JAMES MCHENRY, Director, Executive Office of Immigration Review, U.S. Department of Justice; ANTONE MONIZ, Superintendent of the Plymouth County 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

Respondent-Appellee/Cross-Appellant.

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

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS/CROSS-APPELLEES AND PARTIAL AFFIRMANCE AND REMAND

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, undersigned counsel for Amicus Curiae, the American Immigration Lawyers Association, certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock. Amicus knows of no publicly owned corporation which is not a party to the proceedings before this Court but which has a financial interest in the outcome of the proceeding

Dated: May 13, 2020

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INTRODUCTION AND STATEMENT OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), Amicus Curiae, the American Immigration Lawyers Association ("AILA"), respectfully offers this brief in support of the Appellants/Cross-Appellees.[1]

AILA is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors, who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and it seeks to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

AILA has strong and long-standing interests in legal issues related to immigration detention and the standards of deference that federal courts apply

[1] All parties have consented to the filing of this amicus brief. Under Federal Rule of Appellate Procedure 29(a)(E), counsel for Amicus Curiae state that no party's counsel authored this brief in whole or in part, and no party's counsel or any other person contributed money that was intended to fund preparing or submitting this brief.

when reviewing agency interpretations of immigration statutes and regulations. AILA has submitted amicus briefs on these topics in cases before numerous courts, including the U.S. Court of Appeals for the First Circuit and the U.S. Supreme Court.[2]

[2] AILA amicus briefs have been accepted for filing in the following representative cases on these topics: *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (AILA amicus brief in support of petitioner, addressing deference standards for judicial review of agency regulatory interpretations, filed, Jan. 31, 2019, 2019 WL 423417); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (AILA amicus brief in support of Respondents, addressing interpretation of immigration detention statutes, filed, Oct. 24, 2016, 2016 WL 6276889): *Reid, et al. v. Donelan, et al*, First Circuit Docket Nos. 19-1787, 19-1900 (AILA amicus brief in support of Petitioners–Appellants / Cross–Appellees, filed, Mar. 27, 2020).

ARGUMENT

The questions before this Court—whether the government must bear the burden of proof in immigration bond hearings under 8 U.S.C. § 1226(a), what standards of proof should apply, and whether the immigration judge must factor a noncitizen's ability to pay when setting bond—are all questions this Court should decide without deference to the Board of Immigration Appeals (BIA). To the extent the Government tries to invoke judicial deference for the BIA precedents *Matter of Adeniji* and *Matter of Guerra*[3]—as it did earlier in this litigation—the Court should reject that argument for two reasons. First, Judge Saris's decision below turned on constitutional questions that courts decide without any application of the *Chevron* doctrine.[4] Although it should be unnecessary to the Court's ruling here, even non-constitutional questions of statutory interpretation regarding 8 U.S.C. § 1226(a) would also lie wholly beyond the *Chevron* framework. Second, the BIA's *Adeniji* and *Guerra* precedents, which improperly allocate the burden of proof to noncitizens in immigration bond hearings, are based upon arbitrary interpretations

[3] *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1102 (B.I.A. 1999); *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

[4] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

of inapposite agency regulations,[5] and for this reason the BIA's current policy is twice removed from any conceivable claim of judicial deference.

Accordingly, this Court should resolve the important questions before it without paying interpretive deference of any kind to the BIA. The Court should affirm the judgment of the District Court in all respects, except insofar as it requires the government to only prove flight risk by a preponderance of the evidence. The Court should hold that due process requires immigration judges conducting 8 U.S.C. § 1226(a) bond hearings to allocate to the government a burden of proving both danger and flight risk, both by a standard of clear and convincing evidence, while also factoring the noncitizen's ability to pay bond.

I. The Questions on Appeal Do Not Implicate the *Chevron* Doctrine

The questions on appeal regarding the burdens and standards of proof required by 8 U.S.C. § 1226(a), and the relevance of a noncitizen's ability to pay a bond, do not implicate any doctrines of judicial deference. It is beyond debate that the U.S. Supreme Court and lower courts, including the First Circuit, do not extend any form of deference to the BIA when addressing a noncitizen's head-on

[5] *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. L. REV. 75, 81–90 (2016) (providing historical overview and legal analysis of BIA decisions departing from prior agency precedent and shifting burden of proof in immigration bond hearings from government onto noncitizens).

constitutional arguments about the meaning of immigration statutes. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (analyzing constitutional due process challenge to detention statute 8 U.S.C. § 1226 with no form of judicial deference mentioned or paid to executive); *Vieira Garcia v. I.N.S.*, 239 F.3d 409, 414–16 (1st Cir. 2001) (resolving equal protection challenge to BIA interpretation of 8 U.S.C. § 1101(a)(48) definition of "conviction" without mentioning or applying *Chevron*); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 693 (D. Mass. 2018) (holding *Chevron* judicial deference doctrine had no bearing on the squarely constitutional argument that due process requires government—not an incarcerated person—to bear burden of proof in 8 U.S.C. § 1226(a) bond proceedings).

Then-Chief Judge Saris correctly disregarded the government's argument for *Chevron* deference and resolved the constitutional due process issues without mentioning *Chevron* or applying deference to the BIA's flawed interpretations of 8 U.S.C. § 1226(a). *Brito v. Barr*, 415 F. Supp. 3d 258, 267 (D. Mass. 2019).[6] This

[6] The government, at page 2–3 of its September 23, 2019 motion, argued that *Matter of Adeniji*, 22 I. & N. Dec. at 1112, which holds noncitizens must bear the burden of proof as to dangerousness and flight risk, "represents a reasonable interpretation of 8 U.S.C. § 1226(a)." Respondents Opposition to Petitioner's Motion for Summary Judgment and Motion to Modify the Class Definition at 2–3, ECF 80, No. 1:19-cv-11314-PBS. This Court should also be aware that the single district court decision the government cited as its *sole* source of support for invoking *Chevron* deference to the BIA precedents *Matter of Adeniji* and *Matter of Guerra* was vacated *in its entirety* by the First Circuit some two years earlier. *Id.* (citing *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 13 n.1 (D. Mass.

Court should do the same, and it need not give any further consideration to the topic of deference regarding the constitutional questions on appeal.[7]

Even if this Court were considering alternative, non-constitutional arguments about the proper textual interpretation of 8 U.S.C. § 1226(a), it would still be proper for this Court to perform that review de novo without any application of the *Chevron* doctrine. In each of its past two terms, the U.S. Supreme Court has issued an important ruling analyzing the text of 8 U.S.C. § 1226, and both times, even though the Justices were divided in their interpretations of the statutory questions before them, they all carried out that textual review without any mention, let alone application, of the *Chevron* framework. *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). *Jennings*, by a 5-3 vote, reversed and remanded the Ninth Circuit's holding that the canon of constitutional avoidance required an interpretation of the text of 8 U.S.C. §§ 1226(a), 1226(c), and 1225(b) that would mandate periodic

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2017), *vacated for mootness*, *Maldonado-Velasquez v. Moniz*, No. 17-1918, *2 n.2 (1st Cir. Mar. 22, 2018).

[7] The BIA itself recently reaffirmed that it cannot decide the constitutionality of the statutes and regulations it administers. *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 n.2 (B.I.A. 2020) (holding the BIA does "not have the authority" to entertain the argument "that placing the burden of proof on the alien [in an 8 U.S.C. § 1226(a) hearing] to establish that he merits release on bond is constitutionally deficient").

administrative bond hearings after a set period of detention. 138 S. Ct. at 846–47. No Justices on either side of these statutory questions ever cited *Chevron* or discussed its deference principles in any way. *Id.* Likewise, in *Preap*, while the Justices splintered in their analysis of whether the text of 8 U.S.C. § 1226(c)(2) limits mandatory immigration detention only to noncitizens arrested immediately "when released" from criminal custody, not one Justice on any side of that textual debate ever mentioned *Chevron* or remotely suggested it could be relevant to their judicial review. 139 S. Ct. at 971; *see also id.* at 985 (Breyer, J., dissenting).

The 2019 ruling in *Preap* stands in stark contrast with the First Circuit's earlier and evenly divided en banc ruling on this same question of statutory interpretation. *Castañeda v. Souza,* 810 F.3d 15 (1st Cir. 2015). All First Circuit Judges on both sides of the full Court's *Castañeda* decision, while applying the *Chevron* framework in divergent ways, assumed it was necessary to employ *Chevron* when reviewing the BIA's precedential interpretation of 8 U.S.C. § 1226. 810 F.3d at 23–24; *see also id.* at 53–55 (Kayatta, J., concurring). *Preap* demonstrates just the opposite is true. The Supreme Court's unanimous disregard of *Chevron* in both *Jennings* and *Preap* should rule out the possibility of extending

any interpretive deference to the BIA's flawed rationales for allocating the burden of proof to incarcerated persons under 8 U.S.C. § 1226(a).[8]

II. The BIA's Allocation of the Burden of Proof to Noncitizens in 8 U.S.C. § 1226(a) Bond Hearings Is Based on an Arbitrary Regulatory Interpretation Twice Removed from Any Claim to Judicial Deference

To any extent the government may again attempt to invoke judicial deference to *Matter of Adeniji* and *Matter of Guerra*, this Court can reject the attempt out of hand. These BIA precedents do not even purport to interpret 8

[8] While the Supreme Court did not explain precisely why *Chevron* has no role in its decisions interpreting 8 U.S.C. § 1226, it is reasonable to believe the Justices doubted that Congress either would or even *could* silently delegate to an agency the power to determine (and redetermine) such major questions as the burden and standards of proof to be applied in 8 U.S.C. § 1226(a) bond hearings, especially where the political significance of these questions is inextricable from the fundamental constitutional liberty interests of the countless individuals who could be subjected to prolonged and unnecessary civil incarceration as a result of the agency's policy determinations. *See, e.g.*, Michael Kagan, *Chevron's Liberty Exception*, 104 IOWA L. REV. 491, 532–535 (2019) (examining U.S. Supreme Court's practice of reviewing immigration detention and removal statutes that implicate individual liberty rights without any application of the *Chevron* doctrine); *see also Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing, in divided 5-3 decision, that Congress's non-specific authorization for U.S. Attorney General to create and alter rules implementing federal sex offender registration statute violates non-delegation doctrine by abdicating to agency major (legislative) policy choices that impact individual liberty rights, including policies extending criminal incarceration), *reh'g denied*, 140 S. Ct. 579 (2019); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) (praising Justice Gorsuch's dissent in *Gundy*, noting Justice Alito concurred only in the *Gundy* result, and signaling interest in revisiting the non-delegation doctrine in an appropriate future case that presents non-delegation concerns overlapping with concerns animating the Supreme Court's "major question" exception to *Chevron* deference).

U.S.C. § 1226(a). They rest instead upon misinterpretations of inapposite agency *regulations*, and thereby depart without rational explanation from the BIA's long line of prior precedents that had consistently and correctly applied a strong presumption *against* civil incarceration—leaving the government with the burden to prove the noncitizen's dangerousness or flight risk. *See* Petitioners-Appellants'/Cross-Appellees' Principle Br. at 6 (citing BIA precedent).[9] In these ways, *Matter of Adeniji* and *Matter of Guerra* are deeply arbitrary decisions whose flawed interpretation of inapplicable agency regulations both violate the Administrative Procedure Act ("APA") and preclude any possible claim of judicial deference regarding the standards of 8 U.S.C. § 1226(a) bond hearings. In the wake of *Kisor v. Wilkie*, which clarifies and substantially curtails the deference that courts should give agency interpretations of regulations, 139 S. Ct. 2400, 2416 (2019), it is even more obvious that this Court owes no deference to the BIA's arbitrary precedents that shifted the burden of proof from the government to noncitizens in immigration bond hearings.

In *Kisor,* the U.S. Supreme Court made it clear that a federal court should never defer to an agency's interpretation of a regulation, unless the court first

[9] For a thorough historical overview and analysis of BIA caselaw regarding immigration bond hearings, including the agency's unacknowledged break from prior policy and reallocation of the burden of proof from the government onto detained noncitizens, see Holper, *supra* note 5, at 81–90 (2016).

determines that the regulation at issue is "genuinely ambiguous" with respect to the specific question of interpretation at hand—a determination the court must undertake with rigorous application of "all the traditional tools of construction." *Id.* at 2405 (citing *Chevron*, 467 U.S. at 839 n.9). But even with respect to genuinely ambiguous regulations, a court can only defer to the agency's interpretation when the court is satisfied both that the interpretation is reasonable, and that "the character and context" of the agency interpretation "entitle[] it to controlling weight." *Id.* at 2406 (identifying various markers courts should consider in this regard). In particular, *Kisor* emphasizes that courts should not defer to the regulatory interpretation of an agency that does not "implicate its substantive expertise[,]" *Id.* at 2416, or that departs without reasoned explanation from that agency's prior authoritative pronouncements. *Id.* at 2417–18.

The BIA's precedents asserting that regulations require noncitizens to bear the burden of proof in immigration bond hearings fail every stage of the *Kisor* analysis. Neither the statute, nor the regulations, have ever explicitly stated which party bears the burden of proof in bond proceedings. *See, e.g.*, 8 U.S.C. § 1226(a); 8 U.S.C. § 1252 (1952); 8 U.S.C. § 1252 (1990); 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 242.2(b) (1958). Yet, for years BIA decisions recognized a presumption *against* detention, which put a burden on the government to justify its decisions to detain noncitizens, with evidence, in immigration bond hearings. *See Matter of Patel*, 15

I. & N. Dec. 666, 666 (B.I.A. 1976) ("Generally, an alien is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk."). That the BIA did not provide extensive reasoning for its decision in *Patel* is consistent with the a proper *assumption*, grounded in fundamental constitutional principles, that civil incarceration of noncitizens could not be the *status quo*.[10] 8 C.F.R. § 236.1(d)(1) is in no way "genuinely ambiguous," and the BIA's misinterpretation and misapplication of that regulation is beyond any claim of deference. A heavy burden on the *government* remains the long-established norm in every other civil detention context. *See* Holper*, supra* note 5, at 85–95.

The lack of ambiguity is even more apparent considering that Congress did not alter the statute governing discretionary detention in its overhaul of the detention statutes through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility

[10] The BIA affirmed *Patel* in numerous subsequent decisions. *See, e.g.*, *Matter of Ellis*, 20 I. & N. Dec. 641, 642 (B.I.A. 1997) (citing *Patel*, 15 I. & N. Dec. at 666); *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (B.I.A. 1987) (same); *Matter of Vea*, 18 I. & N. Dec. 171, 174 (B.I.A. 1981) ("As a general rule, an alien should not be detained or required to post bond in connection with deportation proceedings unless there is a finding that he is a threat to national security or a poor bail risk."); *Matter of Shaw*, 17 I. & N. Dec. 177, 178 (B.I.A. 1979) (applying *Patel*); *Matter of Spiliopoulos*, 16 I. & N. Dec. 561, 563 (B.I.A. 1978) (same).

Act of 1996 (IIRIRA), except to raise the minimum bond amount from $500 to $1500. *Compare* 8 U.S.C. § 1252 (1952) *with* 8 U.S.C. § 1226(a). Congress must be presumed to have been aware of *Patel* and its progeny when it re-enacted 8 U.S.C. § 1226(a) without changes regarding a burden allocation. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978); *see also Bernardo ex rel. M & K E Eng'g, Inc. v. Johnson*, 814 F.3d 481, 488–89 (1st Cir. 2016) (applying legislative ratification cannon to interpret provision of the INA).

That is why the BIA's abrupt and unexplained departure from long-standing precedent on the burden issue in *Matter of Adeniji* and *Matter of Guerra* is so jarring. In *Matter of Adeniji*, the BIA noted the presumption against detention in *Patel*, but found the burden in 8 C.F.R. § 1236(d)(1) was controlled by the language in 8 C.F.R. § 236(c)(8), which only controls ICE's initial arrest. The BIA did not explicitly overrule *Matter of Patel* in *Matter of Adeniji*, nor did it fully explain why this regulation should govern the allocation of burdens in bond hearings presided over by immigration judges. Given the *sui generis* nature of *Matter of Adeniji*, the BIA should have left *Adeniji*'s thin discussion of the regulation at issue there to the unique facts of that case. *See* Holper, *supra* note 5, at 93 & n.69. Instead, in *Matter of Guerra*, the BIA uncritically applied *Adeniji's* inapposite logic to 8 C.F.R. § 236(d)(1) bond determinations, and then unequivocally leaped to a holding that noncitizens bear the burden of proving

eligibility for release in all § 1226(a) bond hearings, 24 I. & N. Dec. at 38. *Guerra* cited *Patel* in passing, but without acknowledging or explaining why it was abandoning *Patel's* core rule. *Guerra,* 24 I. & N. Dec. at 40. The BIA's misinterpretation and misapplication of 8 C.F.R. § 236.1(c)(8)—a regulation written only for immigration *enforcement* officers making initial custody determinations at the time of *arrest*—is what now requires noncitizens to bear the burden to prove their eligibility for release in wholly separate proceedings before a separate and neutral agency arbiter—the immigration judge. This is "beyond the bounds of reasonable interpretation." *Kisor*, 139 S. Ct. at 2416. It is also an arbitrary departure, without reasoned explanation, from the BIA's prior authoritative pronouncement in *Patel*. *Kisor* 139 S. Ct. at 2417–18.

Finally, the BIA's precedents in *Matter of Adeniji* and *Matter of Guerra* also fail *Kisor* review because the BIA lacks the requisite "substantive expertise" on the constitutional issues at stake in this case. *Kisor*, 139 S. Ct. at 2417. *Kisor* states that a court need only defer when the regulation implicates the agency's "substantive expertise," such as when the regulation is technical or policy based. *Id.* The issues at stake in this case are constitutional in nature and therefore do not implicate the agency's expertise at all. *See supra* Part I at 4–5, n.7. This Court should therefore determine that the precedents *Matter of Adeniji* or *Matter of Guerra* warrant no deference.

CONCLUSION

There should be no doubt that deference does not apply to the questions before this Court. This Court should not acquiesce to the government's invocations of judicial deference for the BIA's precedent in *Matter of Adeniji* and *Matter of Guerra* for two main reasons. First, the lower court's decision turns on what the Due Process Clause of the U.S. Constitution requires, which is a constitutional question that courts must decide without any application of the *Chevron* doctrine. Second, the BIA's sudden shift to a presumption *against* the personal liberty interests of noncitizens in 8 U.S.C. § 1226(a) bond hearings is based upon an arbitrary interpretation of an inapposite agency regulation, and can claim no deference.

Accordingly, this Court should resolve the important constitutional questions before it without deferring to the BIA in any way. The Court should affirm the judgment of the District Court in all respects except insofar as it requires the government to only prove flight risk by a preponderance of the evidence, and on that point this Court should remand the judgment to the District Court to make clear and convincing the standard of proof for both dangerousness and flight risk. In doing so, this Court should hold that due process requires immigration judges conducting 8 U.S.C. § 1226(a) bond hearings to allocate to the government a

burden of proving both danger and flight risk, both by a standard of clear and convincing evidence, while also factoring the noncitizen's ability to pay bond.

Dated: May 13, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3510 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared with a proportionally spaced typeface of 14 points.

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CERTIFICATE OF SERVICE

I hereby certify that today, May 15, 2020, I electronically filed the foregoing corrected amicus brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the all parties and their counsel of record are registered as ECF Filers with the First Circuit Court and that they will be served by the CM/ECF system.

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