Nos. 20-1037
20-1119

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Petitioners - Appellants/Cross - Appellees,

v.

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

Respondents - Appellees/Cross - Appellants.

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

RESPONDENTS - APPELLEES/CROSS - APPELLANTS' PRINCIPAL AND RESPONSE BRIEF

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I. PRELIMINARY STATEMENT

Under Section 1226(a) of Title 8 U.S.C., Congress provided that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Section 1226(a) further provides that the Secretary of Homeland Security "may" continue to detain the alien or "may" release him on bond, except in circumstances involving criminal or terrorist aliens who are subject to mandatory detention. The procedures by which the Government decides whether to detain an individual alien in removal proceedings have been in existence for more than 20 years. Under these procedures, every person detained for removal proceedings under Section 1226(a) may be released on bond if they demonstrate to the satisfaction of an immigration officer that they are not a danger to the community or a flight risk. When an officer determines that an alien should remain detained, each such individual has a right to an individualized review of the initial custody determination by an immigration judge ("IJ"), and if necessary, the Board of Immigration Appeals ("BIA" or "Board"). Further, each such person has the right to testify and submit evidence and witnesses in support of release at an individualized hearing, and to request a subsequent custody redetermination hearing if circumstances materially change.

Petitioners-Appellants ("Petitioners") are individuals afforded bond hearings in accordance with the foregoing procedures, but filed a class action Petition for

Writ of Habeas Corpus arguing that these procedures violate the Due Process Clause and the Immigration and Nationality Act and the Administrative Procedures Act. Unlike other cases involving challenges to immigration detention, Petitioners' argument here is *not* based on the length of their detention. Rather, Petitioners assert what amounts to a facial challenge to Section 1226(a): that *all* aliens detained during their removal proceedings – *regardless of how long they have been detained* – are constitutionally entitled to release unless the Government bears the burden of justifying further detention at a bond hearing and that no condition or combination of conditions will reasonably assure the detainee's future appearance and safety of the community, and which requires consideration of the detainee's ability to pay a bond.

Insofar as it agreed with Petitioners' arguments, the district court erred by failing to assess the existing procedures for Section 1226(a) bond hearings in light of the Government's well-recognized and legitimate interest in maintaining custody of individuals in removal proceedings. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Indeed, the Supreme Court has never held that due process requires placing the burden of proof on the Government to justify detention of an alien during proceedings to determine whether he or she should be removed from the country. In fact, it has upheld the constitutionality of *categorical* detention of aliens during removal

proceedings without any individualized assessment. This Court should vacate the decision of the district court, and in accordance with decades of Supreme Court precedent, should hold that the existing procedures governing bond hearings under Section 1226(a) – including the requirement that the alien bears the burden of proof – are fully consistent with the Due Process Clause of the Constitution.

II. JURISDICTIONAL STATEMENT

On November 29, 2019, the district court partially allowed Petitioners' motion for summary judgment and entered a final judgment disposing of all parties' claims. *Brito v. Barr*, 415 F. Supp. 3d 258, 269 (D. Mass. 2019); Record Appendix ("RA") 402-424. This Court has jurisdiction to review the district court's November 29, 2019 order because it constitutes a final decision of a district court in the District of Massachusetts, which is located within this circuit. *See* 28 U.S.C. § 1291; *see also* 28 U.S.C. § 1294(1).

III. STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the Government must bear the burden of proof at a bond hearing.

2. If so, whether the district court erred by raising the standard of proof and requiring that the Government to prove by *clear and convincing evidence* as to an alien's dangerousness and *a preponderance of the evidence* as to an alien's risk of flight.

3. Whether the district court erred in holding that an IJ must consider an alien's ability to pay and alternative conditions of release in a bond hearing when this position finds no support in the statutes.

4. Whether the district court erred by granting class certification either because certification is precluded or because the class does not meet the requirements for certification.

IV. STATEMENT OF THE CASE

In accordance with decades of Supreme Court precedent, this Court should vacate the decision of the district court and uphold the existing procedures governing bond hearings under Section 1226(a) which are fully consistent with the Due Process Clause of the Constitution. The Supreme Court has consistently affirmed the constitutionality of *categorical* detention of aliens during removal proceedings without any individualized assessment and has re-affirmed, time and again, the Government's paramount interest in detaining aliens during removal proceedings. *See, e.g.*, *Demore*, 538 U.S. at 523; *Carlson*, 342 U.S. at 538.

A. Legal Background.

1. The Detention of Aliens and Bond Hearings Under Section 1226(a)

For more than a century, immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232-37 (1960). And as the Supreme Court has repeatedly recognized, "detention during deportation proceedings is a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523; *see id*. at 523, n.7 (observing that, "prior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings") (citation omitted); *see also Carlson*, 342 U.S. at 538 ("[d]etention is necessarily a part of [the] deportation

procedure"). Removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U. S. 228, 235 (1896)).

Within the current statutory and regulatory framework, the Immigration and Nationality Act ("INA") provides the Department of Homeland Security ("DHS")[1] with "broad discretion" to either detain or release most aliens during the pendency of their removal proceedings. *Nielsen v. Preap*, 139 S. Ct. 954, 956 (2019); 8 U.S.C. § 1226(a); *see* 8 U.S.C. § 1226(a)(1) (further clarifying that "the Attorney General . . . *may continue to detain* the arrested alien" during the pendency of removal proceedings) (emphasis added). When an alien is apprehended by either U.S. Immigration and Customs Enforcement ("ICE") or U.S. Customs and Border Protection ("CBP"), an immigration officer or agent makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). ICE or CBP may, in the exercise of its discretion, release the alien "provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." *Id*. If ICE

[1] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 291(a)), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security..

or CBP decides to release an alien, it may set bond and/or prescribe other conditions for release. 8 U.S.C. § 1226(a); *see* 8 C.F.R. § 236.1(c)(8).

In the event ICE or CBP determines that an alien should remain detained during the pendency of removal proceedings (or the alien believes bond is too high), the alien may seek a custody redetermination hearing, or "bond hearing," before an IJ. 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The IJ decides whether to release the alien based on a variety of factors that account for the alien's ties to the United States and predict whether the alien will pose a danger to the community or a flight risk. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).[2] The IJ may also "consider the amount of bond that is appropriate." *Id*. Section 1226(a) does not explicitly address the burden of proof that should apply in bond hearings, and instead simply states that the "an alien may be arrested and detained pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a). Section 1226(a) further provides that the Attorney General may

[2] The nonexclusive list of factors an immigration judge may consider during a bond hearing "include any or all of the following: (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." *Matter of Guerra*, 24 I. & N. Dec. at 40.

continue to detain the arrested alien or may release the alien on bond or conditional parole, unless the alien has committed a criminal offense that subjects him to mandatory detention. *Id*. Under Board precedent, an alien seeking release must demonstrate to the satisfaction of the IJ that his or her release "would not pose a danger to property or persons, and that [he or she] is likely to appear at any future proceeding." *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1114 (BIA 1999). If, after the hearing, the IJ concludes that the alien should not be released, the alien may appeal the IJ's decision to the Board. 8 C.F.R. §§ 236.1(d)(3), 1236.1(d)(3). Moreover, if circumstances materially change after an initial bond hearing, an alien may request an additional subsequent bond hearing. 8 C.F.R. § 1003.19(e). And if dissatisfied with the outcome of any subsequent hearing, aliens may appeal those decisions to the Board as well. *See Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989).

2. The Enactment of Section 1226(a), Implementing Regulations, and Board Precedent

With each iteration of the bond statute, Congress demonstrated its intent that an alien is not entitled to release pending removal proceedings; detention is often necessary to ensure removal and the Attorney General (and DHS) should have broad discretion in deciding whether to release an alien on bond. In 1950, Congress enacted the precursor statute to Section 1226(a). *See Carlson*, 342 U.S. at 538-540 (discussing prior statutes governing the detention of aliens pending removal

proceedings). Prior to 1950, some circuit courts had interpreted the then-existing immigration bail statute as meaning that an alien had a presumptive right to release. *Id*. In enacting the 1950 statute, Congress explicitly "eliminated any presumption of release pending deportation" and instead expressly "commit[ted] that determination to the discretion of the Attorney General." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

Congress enacted the current version of Section 1226(a) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. No. 104-208, 110 Stat. 3009-546 (enacted Sept. 30, 1996). Section 1226(a) continues to reflect Congress's judgment that an alien is not entitled to a presumption of release and that the Attorney General (and DHS) should have broad discretion in deciding whether to release an alien on bond. "A major objective of IIRIRA was to 'protec[t] the Executive's discretion' from undue interference by the courts; indeed, 'that can fairly be said to be the theme of the legislation.'" *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (*AAADC*)).

In enacting IIRIRA, Congress "had before it evidence that one of the major causes of [former Immigration and Naturalization Services' ("INS")] failure to remove deportable criminal aliens was the agency's failure to detain those aliens

during their removal proceedings." *Demore*, 538 U.S. at 519. While the Supreme Court in *Demore* discussed the failure to remove *criminal* aliens in particular, the authorities it cited as reflective of Congress's aims in enacting IIRIRA equally note that, as a general matter, "[d]etention is the key to effective deportation." *Id*. (Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996)). For example, the Supreme Court cited a House Report that accompanied the draft version of Section 1226(a), *see Demore*, 538 U.S. at 520, which includes a section titled "Detention Issues Pertaining to Removal of Criminal *and Illegal Aliens*." H.R. Rep. 104-469(I), at 123 (emphasis added). The report details how "[a] chief reason why many deportable aliens are not removed from the United States is *the inability of the INS to detain such aliens through the course of their deportation proceedings*." *Id*. (emphasis added).

Indeed, based on Congress's evident concern regarding the low rate at which *all* non-detained aliens were removed at the conclusion of proceedings, IIRIRA provided that "[s]ubject to the availability of appropriations, the Attorney General shall provide for an increase in the detention facilities of the [INS] to at least 9,000 beds before the end of year 1997." 8 U.S.C. § 1368 (1996); *see* H.R. Rep. 104-469(I), at 19. Congress also raised the minimum bond amount in Section 1226(a) from $500 to $1,500 after observing that "the INS is sometimes reluctant to set

bonds too high because if the alien is not able to pay, the alien cannot be released, and a needed bed space is lost. A bond requirement under such circumstances is an empty threat." H.R. Rep. 104-469(I), at 124, 129; *see* 8 U.S.C. § 1226(a)(2). Finally, Congress provided in Section 1226(e) that "the Attorney General's discretionary judgment regarding the application of [Section 1226(a)] shall not be subject to review." 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").

In March 1997, former INS promulgated a regulation implementing the new Section 1226(a), which provided that:

> Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; *provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding*.

8 C.F.R. § 236.1(c)(2) (1998) (emphasis added). In the comments accompanying this regulation, former INS acknowledged that "several commenters stated that § 236 of the proposed rule as written is a reversal of long established procedure that provides that a noncriminal alien is presumptively eligible for release."[3] 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997). In response, the former INS stated:

[3] While Board precedent interpreting the prior law did not specifically address which party carried the "burden" in bond hearings, in *Matter of Adeniji*,

> The Service has been strongly criticized for its failure to remove aliens who are not detained. A recent report by the Department of Justice Inspector General shows that when aliens are released from custody, nearly 90 percent abscond and are not removed from the United States. The mandate of Congress, as evidenced by budget enhancements and other legislation, is increased detention to ensure removal. Accordingly, because the Service believes that the regulation is consistent with the intent of Congress, the interim rule has not modified the proposed rule in this regard.

Id.

Two years later, in its 1999 decision, *Matter of Adeniji*, the Board addressed the burden of proof in custody redetermination hearings before an IJ under Section 1226(a). 22 I. & N. Dec. at 1102. Relying on the language of 8 C.F.R. § 236.1(c)(2) – which by that time had been re-codified as 8 C.F.R. § 236.1(c)(8) – the Board held that "the regulations under the IIRIRA have added as a requirement for ordinary bond determinations under section [1226(a)] that *the alien* must demonstrate that 'release would not pose a danger to properly or other persons,' even though section [1226(a)] does not explicitly contain such a requirement." *Matter of Adeniji*, 22 I. & N. Dec. at 1113 (emphasis added).

The Board later reaffirmed *Matter of Adeniji* in a 2006 decision, *Matter of Guerra*, 24 I. & N. Dec. at 38. Specifically, in *Matter of Guerra*, the Board

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the Board acknowledged that "[u]nder our case law addressing general bond conditions under our prior law, an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight." 22 I. & N. Dec. at 1103 (citing *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976)).

reaffirmed its view that an alien in removal proceedings has no right to release on bond and that Section 1226(a) merely gives the Attorney General (through immigration judges) the authority to grant bond if he or she concludes, in the exercise of discretion, that the alien's release on bond is warranted. *Id*. at 39. The Board further reiterated its interpretation that the burden is on the alien to show that release on bond is warranted, and it went on to provide a non-exclusive list of factors an IJ may consider when reviewing ICE's initial custody determinations. *Id*. at 39-40. The Board has continued to reaffirm its interpretation of the correct allocation of the burden of proof under Section 1226(a) in numerous subsequent published decisions. *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (BIA 2020) (stating that the alien's "assertion that the DHS should bear the burden to demonstrate that he is a flight risk by clear and convincing evidence lacks merit because we have clearly held that section [1226](a) places the burden of proof on the alien to show that he merits release on bond."); *Matter of Siniauskas*, 27 I. & N. Dec. 207 (BIA 2018); *Matter of Fatahi*, 26 I. & N. Dec. 791, 793−94 (BIA 2016); *Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009).

B. **Procedural History.**

1. **The district court's prior decisions regarding Section 1226(a)**

Prior to issuing the November 27, 2019 order that is the subject of this appeal, the district court addressed the constitutionality of Section 1226(a) in

several prior cases involving individual (rather than a class of) habeas petitioners. *See Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018); *Doe v. Tompkins*, No. CV 18-12266-PBS, 2019 WL 8437191, at *2 (D. Mass. Feb. 12, 2019) *appeal filed*, No. 19-1368 (1st Cir. Apr. 18, 2019).[4] In *Pensamiento*, the district court relied on the Ninth Circuit's decision in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), as well as several non-immigration Supreme Court decisions discussing involuntary civil commitment, to hold that "[r]equiring 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." *Pensamiento*, 315 F. Supp. 3d at 692 (original emphasis). In relying heavily on the Ninth Circuit's decision in *Singh*, the district court in *Pensamiento* characterized the *Singh* decision as holding that "in § 1226(a) custody hearings, the Constitution mandates that (1) the burden must be placed on the government and (2) the standard is clear and convincing evidence." *Id.* at 691. Following the lead of the Ninth Circuit in *Singh*, the district court also cited two Supreme Court decisions involving civil commitment: *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (striking down Louisiana statute for continued detention of defendants acquitted for reason of insanity under the Due Process Clause because

[4] The appeal of the district court's decisions in *Doe* and another decision, *Hernandez-Lara v. Lyons*, No. 19-2019 (1st Cir.), are also pending before this Court and are scheduled for oral argument on the same day as this appeal. *See Doe*, No. 19-1368.

the statute placed the burden on the detainee to prove that he was not dangerous); and *Addington v. Texas*, 441 U.S. 418, 427 (1979) (holding that an individual's interest in the outcome of a civil commitment process under Texas law "is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"). *Pensamiento*, 315 F. Supp. 3d at 691-92. Unlike in *Singh*, however, the *Pensamiento* court declined to impose the clear and convincing standard on the Government for both bond elements. *Id*. at 693. The district court then relied primarily on its own prior analysis in *Pensamiento* when granting the habeas petition in *Doe*. 2019 WL 8437191, at *1.

2. Petitioners' habeas petition and motion for class certification

Petitioners filed a class action Petition for Writ of Habeas Corpus on June 13, 2019, arguing that aliens detained under Section 1226(a) are deprived of due process during bond hearings in the Boston immigration court because the IJs require them (rather than the Government) to prove that the aliens are not a flight risk or danger to the community. Petitioners then moved for class certification, articulating a class that essentially included all aliens in pending removal proceedings who are detained under Section 1226(a). The district court certified the class over the Government's objection. The district court created two subclasses of aliens detained under Section 1226(a): 1) Pre-Hearing Detainees; and

2) Post-Hearing Detainees.[5] On August 29, 2019, Petitioners moved for summary judgment and moved to modify the class definition, requesting both declaratory and injunctive relief for all of the underlying issues.

3. The District Court's November 27, 2019 Order

On November 29, 2019, the district court granted Petitioners' motion to modify the class definition, and partially allowed their motion for summary judgment. In doing so, the district court declared that aliens detained pursuant to 8 U.S.C. § 1226(a) are entitled to receive a bond hearing at which the Government must carry the burden of proof. *Brito*, 415 F. Supp. 3d at 266. Further, contrary to its prior ruling in *Pensamiento*, *see* 315 F. Supp. 3d at 693, the district court held that due process requires the Government to prove either an alien's dangerousness by "clear and convincing" evidence, or a risk of flight by a "preponderance of the evidence." *Brito*, 415 F. Supp. 3d at 266-67. In doing so, the district court stated that the "the only standard [presently] applicable to detention hearings . . . is 'to the satisfaction' of the immigration judge, which is effectively no standard at all and may vary from judge to judge." *Id.* at 266. The district court also ruled that IJs must consider an alien's ability to pay in setting the bond amount and alternative

[5] The district court delineated subclasses dependent on whether or not the class member had already received a bond hearing at the time of the district court's order. *See Brito v. Barr*, 395 F. Supp. 3d 135, 149 (D. Mass.), *modified*, 415 F. Supp. 3d 258 (D. Mass. 2019).

conditions of release (such as GPS monitoring) that reasonably assure the safety of the community and the alien's future appearances. *Id.* In reaching this conclusion, the district court relied on its own holding in *Reid v. Donelan*, 390 F. Supp. 3d 201, 225 (D. Mass. 2019), which applied the same requirements for criminal aliens detained under Section 1226(c).[6] Finally, pursuant to Rule 23(c)(1)(C) of the Federal Rule of Civil Procedures, the district court held that its due process decision warranted expanding the class definition to include the Petitioners' statutory INA and APA claims.[7]

Finally, the district court rejected the Government's argument that 8 U.S.C. § 1252(f)(1) precludes the injunctive relief sought by Petitioners. *Brito*, 395 F. Supp. 3d at 145-46. While acknowledging that Section 1252(f)(1) precludes a court from "enjoin[ing] or restrain[ing] the operation of" the INA's detention statutes on a classwide basis, the district court reasoned that the rules governing the burden of

[6] Both the petitioners and the Government appealed the district court's *Reid* decision. *See Reid v. Donelan*, No. 19-1900 (1st. Cir. Sep. 23, 2019); No. 19-1787 (1st. Cir. Aug. 13, 2019). That appeal remains pending before this Court.

[7] In doing so, the district court reasoned that the due process and administrative law claims were essentially "co-extensive." Additionally, the district court concluded that the Board's holding in *Matter of Adeniji* was in violation of the APA insofar as it conflicted with the court's burden of proof analysis under the Due Process Clause. *Brito*, 415 F. Supp. 3d at 268-69. Similarly, Petitioners also raised alternative statutory claims under the INA and the APA challenging the BIA's decision in *Matter of Adeniji*. As discussed below, the Court ultimately declined to address these claims because it had already ruled on the due process issue. *Id.* at 268 n.4.

proof in Section 1226(a) "come from BIA precedential decisions" rather than the language of the statute itself, and therefore, Section 1252(f)(1)'s proscription against "enjoin[ing] or restrain[ing]" the *statute* was inapplicable. *See Brito*, 415 F. Supp. 3d at 269.

V. STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error and affords a *de novo* review to its conclusions of law. *United States v. Rabbia*, 699 F.3d 85, 89 (1st Cir. 2012); *Hilton v. Kerry*, 754 F.3d 79, 86 (1st Cir. 2007).

VI. SUMMARY OF THE ARGUMENT

In 8 U.S.C. § 1226(a), Congress provided that "an alien *may* be arrested *and detained* pending a decision on whether the alien is to be removed from the United States." (emphasis added). Section 1226(a) further provides that, in the exercise of administrative discretion, such an alien *may* be released on bond unless he or she has committed a criminal offense or act of terrorism that qualifies him for mandatory detention. Section 1226(a) thus reflects Congress's intent to grant the Attorney General broad discretion in determining the circumstances under which an alien should remain detained for removal proceedings. Since 1997, federal regulations and Board precedent implementing Section 1226(a) have provided that, for those detained under Section 1226(a), the burden of proof is on the alien to

establish that his or her release would not pose a danger to property or persons, and that he or she is likely to appear for any future proceeding.

Petitioners do not contend that they were deprived of any of the extensive procedural protections generally afforded to aliens detained under Section 1226(a). They nevertheless brought a habeas petition challenging the lawfulness of detention under Section 1226(a) based on a claim that the Constitution requires the Government to bear the burden of justifying their detention by clear and convincing evidence, and the Constitution requires IJs to consider certain factors before declining to order that an alien be released on bond. In so doing, Petitioners effectively argued that all of the numerous bond hearings conducted under Section 1226(a) over the last 20-plus years were in violation of the Due Process Clause.

The district court's order requiring the Government to justify detention by clear and convincing evidence was erroneous for several reasons. At the outset, the district court misread Supreme Court precedent, which has repeatedly reaffirmed the constitutionality of detention of aliens pending removal proceedings. Not only has the Supreme Court upheld mechanisms for release on bond in which the alien bears the burden of justifying release, but it has even authorized detention where an alien's flight risk and dangerousness is categorically presumed and not subject to individualized review. Moreover, in ordering that the Constitution requires IJ's

consider certain factors, the district court entirely ignored the full range of protections that already *do* apply to aliens detained under Section 1226(a).

Finally, the district court erred by certifying the present class because 8 U.S.C. § 1252(f)(1) precludes a court (other than the Supreme Court) from exercising jurisdiction to grant classwide injunctive relief and corresponding declaratory relief to enjoin or restrain the operation of the provisions of 8 U.S.C. §§ 1221-1254a on a classwide basis. The district court's grant of injunctive relief here undoubtedly enjoins and restrains the operation of Section 1226(a). Accordingly, the district court's injunction must be vacated.

For all of these reasons, the district court's judgment should be reversed.

VII. ARGUMENT

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

For decades, the Supreme Court has always affirmed the constitutionality of detention pending removal proceedings and has *never* required the Government to bear the burden of proof. *See Demore*, 538 U.S. at 531; *Reno*, 507 U.S. at 306; *Carlson*, 342 U.S. at 524, 538. Even assuming this long line of Supreme Court precedent has not foreclosed Petitioners' claims, the ample procedural protections available to aliens detained under Section 1226(a) more than adequately satisfy due

process. As further articulated below, this Court should therefore reverse the district court's decision.[8]

1. Supreme Court precedent forecloses the claim that the Due Process Clause requires the Government to bear the burden of proof to justify continued detention of an alien in removal proceedings

Throughout the entire history of federal immigration law, the Supreme Court has always affirmed the constitutionality of detention pending removal proceedings and effectuation of removal and has never recognized a right entitling an alien to a presumption of release. *See, e.g., Demore*, 538 U.S. at 531; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 524, 538; *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Indeed, in *Jennings v. Rodriguez*, the Supreme Court recently concluded that "[n]othing in § 1226(a)'s text . . . even remotely supports the imposition" of the burden on the Government to prove that an alien is a danger or flight risk, much less by clear and convincing evidence. 138 S. Ct. 830, 847-48 (2018).[9]

[8] For the same reasons, the district court's decision relating to the APA should also be reversed. The district court found that Board decision in *Matter of Adeniji* was an unconstitutional "policy" and therefore violates the APA. 22 I. & N. Dec. at 1112 (in response to and consistent with Congress's enactment of IIRIRA in 1997, the Board placed the burden of proof on the alien at bond hearings). The district court, however, declined to address the merits of Petitioners' alternative arguments under this theory. *Brito*, 415 F. Supp. 3d at 268 n.4. Since the district court's APA holding turns on its erroneous constitutional decision, this holding is equally flawed.

[9] Indeed, the Supreme Court again acknowledged as much in *Preap*. 139 S. Ct. at 956–59 (noting that aliens generally "may secure their release by proving to

Broader precedent concerning immigration detention also contradicts the burden the district court placed on the Government here. "[D]etention during removal proceedings is a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523; *accord Reno*, 507 U.S. at 306 ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); *Carlson*, 342 U.S. at 538 ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S. at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.").

Indeed, the Supreme Court has repeatedly upheld detention pending removal proceedings on the basis of a *categorical*, rather than individualized, assessment that a valid immigration purpose warranted interim custody. *See Demore*, 538 U.S. at 530; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. It is against this backdrop that the Court must assess Petitioners' due process challenge to the procedures that govern bond proceedings under Section 1226(a).

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the satisfaction of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody."). Although that case did not directly address the present burden of proof issue, Justice Alito nonetheless stated that an alien detained under Section 1226(a) "may secure his release if *he can convince* the officer or immigration judge that he poses no flight risk and no danger to the community." *See id.* at 959–60 (internal citations omitted). Thus, *Preap* shows the Supreme Court's understanding that the burden rests with the alien at bond hearings and not with the Government.

Most prominently, in *Demore*, the Supreme Court upheld the constitutionality of 8 U.S.C. § 1226(c), which mandates detention during the pendency of removal proceedings without *any* individualized bond hearing in cases where an alien was convicted of certain criminal offenses. 538 U.S. at 513-14. The habeas petitioner in *Demore* argued that "his detention under section 1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk." *Id*. at 515. In rejecting this view, the Supreme Court emphasized that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Id*. at 523 ("deportation proceedings 'would be in vain if those accused could not be held in custody pending the inquiry into their true character.'") (citation omitted). The Supreme Court also cited the fact that Congress "had before it evidence that permitting discretionary release of aliens pending their removal proceedings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States." *Id*. at 528.

Like Section 1226(c), Section 1226(a) was enacted as part of the IIRIRA amendments to the INA, which reflect Congress's concern that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings." H.R. Rep. 104-469(I), at 123. Unlike Section 1226(c), however, the

Section 1226(a) procedures not only allow for individualized bond hearings, but also permit administrative review of bond decisions, as well as an opportunity to request subsequent bond hearings if there is a material change in circumstances. 8 C.F.R. §§ 236.1(d)(3), 1003.19(e), 1236.1(d)(3). Insofar as the Supreme Court in *Demore* upheld detention pending removal proceedings without any of the foregoing procedural protections, if follows *a fortiori* that the individualized and more extensive procedures governing detention under Section 1226(a) are well within constitutional limits.

In *Pensamiento*, which the district court relied on for purposes of its due process analysis in this case, *see Brito*, 415 F. Supp. 3d at 266, the district court quickly dismissed the relevance of *Demore* by stating that it was "not applicable here because it involved criminal aliens subject to mandatory detention." *Pensamiento*, 315 F. Supp. 3d at 692. But the Court in *Demore* relied on that fact to uphold a *categorical* determination by Congress that certain criminal aliens should always be treated as posing a flight risk or danger to the community. The Court's decision to uphold that *categorical* determination as consistent with due process powerfully supports the conclusion that the more generous procedures and individualized consideration under Section 1226(a) comports with due process as well.

Furthermore, in *Carlson*, which the district court did not address in either this case, *Doe*, or in *Pensamiento*, the Supreme Court rejected a due process challenge brought by resident aliens who were detained pending removal proceedings under the predecessor to Section 1226(a) and pursuant to a government policy of categorically denying bail to aliens who were members of the Communist Party. 342 U.S. at 535, 538; *see also Quattrone v. Nicolls*, 210 F.2d 513, 518 (1st Cir. 1954) (citing *Carlson*, the court rejected a due process challenge in a habeas petition filed by an alien detained without bail). The Supreme Court reasoned that this statute was a constitutional exercise of the Attorney General's broad discretion under the statute because it was designed to rationally advance a legitimate government purpose. *Id*. at 540. In the same manner, Section 1226(a) must be assessed in terms of a legislative scheme that plainly aimed to increase the rate of removal through increased use of detention. H.R. Rep. 104-469(I), at 123. Placing the burden on the alien to show he or she is not a flight risk or danger is rationally related to advancing this legitimate immigration purpose.

In *Flores*, another case that the district court did not address, the Supreme Court rejected a due process challenge to a regulation that denied bail under Section 1226(a) to alien minors in removal proceedings who could not be released into the custody of a parent, close relative, or guardian. 507 U.S. at 306. The Supreme Court resolved the procedural due process question by holding that "due

process is satisfied by giving the detained alien juveniles a *right* to a hearing before an immigration judge." *Id*. at 309 (original emphasis). Insofar as it is uncontested that every alien detained under Section 1226(a) has a *right* to an individualized custody redetermination hearing before an IJ (in addition to numerous other procedural safeguards), the existing procedures governing Section 1226(a) bond proceedings more than adequately satisfy due process under the Court's analysis in *Flores*. *Id*.

To the extent that the district court decision in this case (as well as in *Doe* and *Pensamiento*) did rely on case law, it did so in error. *Pensamiento* resolved the due process question primarily by relying on the Ninth Circuit's decision in *Singh*, which in turn relied on earlier Ninth Circuit precedent as well as two non-immigration Supreme Court decisions involving state statues that permitted civil commitment. 638 F.3d at 1196 (citing *Foucha*, 504 U.S. at 71, and *Addington*, 441 U.S. at 418); *see Pensamiento*, 315 F. Supp. at 691-63. First, *Singh* is inconsistent with the Supreme Court's subsequent *Jennings* decision. *Jennings* held that it was contrary to Section 1226(a)'s text to require the Government to bear the burden of proof at bond hearings, much less by clear-and-convincing evidence, and declined

to find any constitutional concerns capable of justifying any added procedural protections. *Jennings*, 138 S. Ct. at 847-48.[10]

Moreover, even *Singh* did not hold that an individual in Petitioners' circumstances is entitled to an *initial* bond hearing under Section 1226(a) where the Government bears the burden of justifying detention. By its own terms, *Singh* addressed the specific question of "the appropriate standard of proof at a *Casas* bond hearing," 638 F.3d at 1203, i.e., a bond hearing held pursuant to the Ninth Circuit's decision in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2004).[11] As the *Singh* decision noted, *Casas-Castrillon* "held that aliens facing *prolonged* detention while their petitions for review of their removal orders are pending are entitled to a bond hearing before a neutral

[10] Insofar as the holding in *Jennings* turned on a question of statutory interpretation, that decision does not squarely resolve the constitutional issue presented here. 138 S. Ct. 830. That said, even the dissenting Justices in *Jennings* agreed that "bail proceedings should take place in accordance with the customary rules of procedure and burdens of proof *rather than the special rules that the Ninth Circuit imposed*." *Id*. at 882 (Breyer, J., dissenting) (emphasis added). Notably, Justice Sotomayor demonstrated that the majority's holding denying relief to the Section 1226(a) subclass is fully consistent with the dissent by joining both decisions. *Jennings*, 138 S. Ct. at 836, 847-48.

[11] Insofar as the holding in *Casas-Castrillon* was based on a method of employing the canon of constitutional avoidance that was explicitly rejected in *Jennings*, 138 S. Ct. at 851, the continuing viability of both *Singh* and *Casas-Castrillon* is doubtful. *But see Aleman Gonzalez v. Barr*, 955 F.3d 762, 781 (9th Cir. 2020) (holding that *Jennings* did not invalidate Singh's constitutional due process burden of proof holding because *Jennings* was decided on statutory construction grounds).

immigration judge." *Singh*, 638 F.3d at 1200 (emphasis added). *Singh* thus holds that aliens who are facing *prolonged* detention – the alien in *Singh* had been detained nearly four years – are entitled to a bond hearing where the government bears the burden of proof. 638 F.3d at 1024. Unlike *Singh*, however, the Petitioners' arguments did not rest on any claim of prolonged detention. *Singh*'*s* holding as to the burden of proof in bond hearings for aliens who have been detained for *prolonged* periods is thus inapplicable in the present case.[12]

Pensamiento was also erroneously decided because, like *Singh*, its holding relies on *Foucha* and *Addington*. The district court's reliance on *Foucha* and *Addington* was problematic for at least three reasons. First, by directly applying these non-immigration civil confinement cases in the immigration context without further analysis, the district court failed to acknowledge that the Supreme Court in *Demore* previously rejected the applicability of these precedents in the context of aliens detained during the pendency of removal proceedings. 538 U.S. at 521-22. Indeed, the dissent in *Demore* took the view that "the only reasonable starting point [for analyzing detention under Section 1226] is the traditional doctrine concerning the Government's physical confinement of individuals," and

[12] For the same reason, the Ninth Circuit's recent decision in *Aleman Gonzalez v. Barr*, which cites *Singh*, is inapposite here. 955 F.3d at 781. Like in *Singh*, the petitioners in *Aleman Gonzalez* involved aliens who were detained for periods of six months or longer, and the same is true of the class members. *Id.* at 764.

accordingly, relied on *Addington* and *Foucha*. 538 U.S. at 547, 550 (J. Souter, dissenting). But the majority soundly rejected this approach, noting instead that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id*. at 521-22; *see id*. (refuting the dissent's attempt to "avoid this fundamental premise of immigration law by repeatedly referring to it as 'dictum'"). *Demore* further noted that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Id*. at 523. The district court's extension of the holdings in *Addington* and *Foucha* to the immigration bond context in this case is thus at odds with the majority holding in *Demore*.[13] *Id*. at 521-22; *see Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 15 (D. Mass. 2017) (rejecting petitioner's reliance on *Foucha*, and holding that "*Zadvydas* and *Demore* illustrate that the cases [petitioner] cites requiring the government to bear the burden for

[13] While Justice Breyer briefly cited *Foucha* on several occasions in writing for the majority in *Zadvydas*, *see* 533 U.S. at 690, the Court's decision in that case primarily reflects a concern about *indefinite* detention. *Id*. at 696. And as discussed below, indefinite detention was equally at issue in *Foucha* such that the case was uniquely relevant to the specific issue in *Zadvydas*. *See infra*, at 30-31. Beyond that, *Demore*, which was issued two years *after Zadvydas*, directly and clearly addressed the applicability of *Foucha* and *Addington* in cases involving detention *pending removal* in a way that *Zadvydas* did not. *See Zadvydas*, 533 U.S. at 696 (responding to Justice Scalia's characterization of the right at stake as a "right to release into this country" by citing the "serious question as to whether . . . the Constitution permits detention that is *indefinite* and *potentially permanent*.") (emphasis added).

dangerousness detention by clear and convincing evidence are not readily applicable in a civil immigration context").

Second, *Addington* and *Foucha* are fundamentally different in the present case because detainees under Section 1226(a), like Petitioners, involve detention for the limited duration of removal proceedings, which has a definite end point: the end of removal proceedings. *Demore*, 538 U.S. at 529 (detention pending removal proceedings has "definite termination point"). *Addington* and *Foucha*, by contrast, involved *indefinite* and potentially permanent confinement. *See Foucha*, 504 U.S. at 82 (noting that under the state's rationale, which the Court rejected, it could "hold *indefinitely* any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct") (emphasis added); *Addington*, 441 U.S. at 419-20 ("The question in this case is what standard of proof is required . . . in a civil proceeding brought under state law to commit an individual involuntarily for an *indefinite* period to a state mental hospital.") (emphasis added).

Third, unlike involuntary civil commitment, any alien detained under Section 1226(a) can unilaterally decide to end his detention during removal proceedings simply by conceding to removal and thus being released into his home country. The aliens detained under Section 1226(a) are thus unlike the individuals

subject to civil confinement in *Addington* and *Foucha* for whom meeting a disputed burden of proof represented the *only* way to end confinement.

Finally, *Pensamiento* misread the Supreme Court's decision in *Zadvydas* to mean that "the government . . . holds the final burden of persuading a court that detention is justified." 315 F. Supp. 3d at 692 (citing *Zadvydas*, 533 U.S. at 701). At no point did the Court in *Zadvydas* express the view that the "final" burden of proof must be on the Government in cases involving aliens detained in the post-removal period. *Zadvydas*, 533 U.S. at 701. Rather, the Court stated that "once the *alien provides* good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must *respond* with evidence to *rebut* that showing." *Id*. (emphasis added). Thus, under *Zadvydas*, even in cases involving potentially *indefinite* detention, it is the alien and not the Government who bears the initial burden.

In sum, the Supreme Court's precedent forecloses Petitioners' challenge to the procedures that govern Section 1226(a) bond proceedings. Under that precedent, the Due Process Clause does not require that an IJ place the burden of proof on the Government during bond hearing.

2. Even assuming Supreme Court precedent does not directly foreclose Petitioners' claims, the ample procedural protections available to aliens detained under Section 1226(a) more than adequately satisfy due process

Under the Supreme Court's decision in *Mathews v. Eldridge*, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. 319, 333 (1976) (quotation marks omitted). Due process "is flexible and calls for such procedural protection as the particular situation demands." *Id*. at 334 (citation omitted); *see id*. at 334-35 ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances"). In assessing whether a given procedural framework affords due process, courts typically assess three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id*. at 335.

In applying *Mathews* in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Courts must also consider that Congress

"emphatic[ally]" intended the Government's discretionary decisions regarding detention to be "presumptively correct and unassailable except for abuse." *Carlson*, 342 U.S. at 540.

With respect to the first factor – the private interest at stake – it is of course true *as a general matter* that freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citing *Foucha*, 504 U.S. at 80). The Supreme Court has clarified, however, that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522. Accordingly, in the immigration context, while the "Fifth Amendment entitles aliens to due process of law in deportation proceedings, detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Id.* at 523 (citations omitted). Any assessment of the private interests at stake in this case must therefore account for the fact that the Supreme Court has never held that aliens have a constitutional right to be released from custody during the pendency of removal proceedings, and has in fact held precisely the opposite. *Id.* at 530; *Carlson*, 342 U.S. at 538.

Further, consideration of the "private interest at stake" must also account for the fact that Petitioners are not simply asserting a right to be at liberty, but rather, a right to be *at liberty in the United States*, where many detainees have never held

lawful status or they have violated the immigration laws and are subject to removal. *Demore*, 538 U.S. at 522 ("Congress may make rules as to aliens that would be unacceptable if applied to citizens") (cited by *Brito*, 415 F. Supp. 3d at 267)); *Flores*, 507 U.S. at 306 ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.").[14]

As for the second *Mathews* factor, the existing framework governing the detention of aliens under Section 1226(a) provides procedural protections that far exceed the constitutional minimum. *Nelson v. I.N.S.*, 232 F.3d 258, 263 (1st Cir. 2000) (the court dismissed the alien's due process challenge in part because the agency adhered to its own rules and regulations). Viewed together with its implementing regulations and Board precedent, Section 1226(a) provides extensive safeguards to protect against arbitrary deprivation of liberty while also protecting the Government's interests in ensuring that aliens do not abscond or commit crimes while removal proceedings are ongoing. As described above, upon initial apprehension, DHS makes an individualized custody determination. 8 C.F.R.

[14] The fact that the vast majority of cases heard in immigration courts do in fact result in an order of removal further underscores the fact that individuals who receive bond hearings under Section 1226(a) generally lack any right or entitlement to be in the United States. *See e.g.*, EOIR, *ADJUDICATION STATISTICS, FY 2020 Decision Outcomes* (April 15, 2020), available at: https://www.justice.gov/eoir/page/file/1105111/download (EOIR's chart indicating that a vast majority of cases result in a removal order).

§§ 236.1(c)(8), 236.1(g). DHS may release the alien if it determines that release would not pose a danger to property or persons, and that the alien is likely to appear for removal proceedings. *Id*. If the officer denies bond (or sets a bond the alien believes is too high), the alien may at any time ask an IJ for a redetermination of the custody decision in the form of an individualized bond hearing where he or she may testify, call witnesses, and present evidence. 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

Based on the evidence presented, the IJ decides whether to release the alien based on numerous factors that account for the alien's ties to the United States, and that predict whether the alien will pose a danger to the community or a flight risk. *Matter of Guerra*, 24 I. & N. Dec. at 40-41. The IJ may also consider the "amount of bond that is appropriate." *Id*. at 40. If the IJ concludes after the hearing that the alien should not be released, the alien may appeal the IJ's decision to the Board. 8 C.F.R. § 236.1(d)(3), § 1236.1(d)(3). Further, if the IJ denies release on bond but the alien's circumstances materially change, the alien may request another bond hearing based on those materially changed circumstances. 8 C.F.R. § 1003.19(e); *Matter of Uluocha*, 20 I. & N. Dec. at 133.

In sum, the existing procedures governing bond hearings under Section 1226(a) are flexible insofar as they permit an IJ to consider a wide range of factors, and the alien to present any evidence that may bear on these factors. *Matter of*

Guerra, 24 I. & N. Dec. at 40-41. Moreover, by the time a final decision has been made that an alien should remain detained for the duration of removal proceedings, the alien will have received at least three levels of independent review: a DHS officer, an IJ, and the Board (if the alien appeals). Thus, the existing framework governing the detention of aliens under Section 1226(a) provides extensive safeguards to protect against the risk of "erroneous deprivation of liberty"[15] while also protecting the Government's interests in ensuring that aliens do not abscond or commit crimes while removal proceedings are ongoing. *See, e.g.*, *Borbot v. Warden, Hudson County Correctional Facility*, 906 F.3d 274, 278-29 (3d Cir. 2018) (petitioner who bore the burden of proof at his bond hearing "was afforded a prompt bond hearing, as required by § 1226(a) and its implementing regulations," and was therefore "granted meaningful process").

With respect to the third *Mathews* factor – the Government's interest – the Supreme Court has observed that "[t]here is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established,

[15] Insofar as Section 1226(a) allows for the detention of *any* alien pending removal proceedings, the only true sense in which an individual may be "erroneously deprived" of liberty under Section 1226(a) is if that individual should not be in removal proceedings at all. Here, Petitioners have not alleged, much less shown, that "erroneous deprivation" of liberty is a common occurrence in detention under Section 1226(a).

and 'permit[s] and prolong[s] a continuing violation of the United States law.'" *Nken v. Holder*, 556 U.S. 418, 436 (2009) (quoting *AAADC*, 525 U.S. at 490). Like the *Nken* decision, this Court has recognized that "there is a strong public interest in bringing finality to the deportation process." *Pena-Muriel v. Gonzales*, 489 F.3d 438, 443 (1st Cir. 2007) (citing *Baez v. INS*, 41 F.3d 19, 24 (1st Cir. 1994)); *see also Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 22 (1st Cir. 2007) (recognizing "the government's legitimate interest in effectuating detentions pending the removal of persons illegally in the country"). Indeed, Section 1226(a) reflects Congress's intent to afford "broad discretion" to the Attorney General (and to DHS) in determining which individuals should remain detained for removal proceedings. *Preap*, 139 S. Ct. at 966 ("subsection (a) creates authority for *anyone's* arrest or release under § 1226(a) – *and gives the Secretary broad discretion as to both actions*") (emphasis added). Additionally, Congress clearly enacted Section 1226(a) to increase the probability that aliens who are ordered removed are in fact removed. H.R. Rep. 104-469(I), at 123 ("[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings"); *Zadvydas*, 533 U.S. at 699-700 (assessing the reasonableness of immigration detention "primarily in terms of the statute's basic purpose"). The Government's interest in maintaining the existing

procedures for bond hearings under Section 1226(a) are thus legitimate and significant.

Petitioners' challenge to the existing Section 1226(a) procedures, while cloaked as due process challenges, in fact seeks to substitute Petitioners' own procedural preferences for the Attorney General's and the Secretary's congressionally-authorized discretion. Any imposition of procedures not mandated by the Attorney General and the Secretary, however, is necessarily contrary to Congress's intent that such matters be left to the Attorney General's and Secretary's unreviewable discretion. 8 U.S.C. § 1226(a), (e). The additional procedures proposed by Petitioners also infringe on the Government's interest in ensuring that lawfully issued removal orders are promptly executed. *Demore*, 538 U.S. at 519 (noting evidence before Congress that "[d]etention is the key to effective deportation"). While Petitioners may disagree with Congress's judgment regarding the importance of detention as a means of ensuring removal, and with the Attorney General's and Secretary's judgment in implementing Section 1226(a), "the government need not use the 'least burdensome means to accomplish its goal' to comport with the Due Process Clause." *Id.* at 528.

The Government also has an interest in maintaining the existing procedures because the alien, and not the Government, is in the best position to provide evidence relevant to his or her lack of dangerousness, or other factors, including

family ties to the United States, a record of employment, and an established place of residence, which may demonstrate that the he or she is not a flight risk. *See*, *e.g.*, *Matter of Guerra*, 24 I. & N. Dec. at 40-41. Thus, shifting the burden to the Government would reward the party with the best access to information regarding flight risk and danger -- the alien -- for not sharing it. Further, in the removal proceeding itself, the INA places the "[b]urden on [the] alien" to establish "by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission." 8 U.S.C. § 1229a(c)(2).

Likewise, an alien who undisputedly was not lawfully present in the United States, also has the burden of establishing any eligibility for relief from removal. *See* 8 U.S.C. § 1229a(c)(4)(B). It would be fundamentally backwards to put the burden on the Government to justify the alien's detention during the interim period when the Government is pursuing removal when the burden is on the alien in the underlying removal proceedings themselves. *See Conteh v. Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006) (acknowledging "practical considerations" in holding that "Congress clearly intended to facilitate an efficient removal process").

Based on the foregoing, it is unsurprising that numerous courts, including the Supreme Court,[16] have looked favorably on the procedures governing Section

[16] As stated above, *supra*, n.10, although the *Jennings* decision did not resolve the specific constitutional question presented here, even among the Justices who identified constitutional concerns with several other detention provisions,

1226(a) bond proceedings. For example, the Third Circuit recently rejected a due process challenge to detention under Section 1226(a) that is nearly identical to the one at issue here. *See, e.g.*, *Borbot*, 906 F.3d at 278-29. The alien in *Borbot* predicated his own particular challenge to Section 1226(a) on the length of his detention and did not take issue with his initial bond hearing at which he bore the burden of proof. But the Third Circuit's central holding in that case, which this Court should follow, was that no additional procedures were required because the existing procedures for bond hearings under Section 1226(a) are in fact constitutionally adequate. *Id.* The Court specifically noted that "*Borbot* was afforded a prompt bond hearing, *as required by § 1226(a) and its implementing regulations*," and it was on this basis that the court concluded he was "granted meaningful process." *Id*. (emphasis added). *Borbot* thus stands for the simple proposition that Section 1226(a) and its implementing regulations fully satisfy the requirements of due process.

Indeed, in the wake of *Borbot*, several district courts in that jurisdiction have relied on *Borbot* for the proposition that Section 1226(a) bond hearings conducted

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those Justices did *not* raise similar concerns about the constitutionality of the procedures governing Section 1226(a) bond hearings. Notably, although the dissenting Justices disagreed with the majority with respects to the canon of constitutional avoidance issue, *see id*. at 869-75 (Breyer, J., dissenting), the dissenting Justices nevertheless agreed that "bail proceedings should take place in accordance with the customary rules of procedure and burdens of proof *rather than the special rules that the Ninth Circuit imposed*." *Id*. at 882 (emphasis added).

in accordance with federal regulations and Board precedent satisfy due process. *See, e.g.*, *Gomez v. Barr*, No. 1:19-CV-01818, 2020 WL 1504735, at *3 (M.D. Pa. Mar. 30, 2020); *Campoverde v. Doll*, No. 4:20-CV-00332, 2020 WL 1233577, at *9, 11 (M.D. Pa. Mar. 13, 2020); *Fredi v. Edwards*, No. 19-16921, 2019 WL 6799604, at *2 (D. N.J. Dec. 12, 2019). Similarly, decisions within this Circuit prior to *Jennings* reflect approval of the procedures governing Section 1226(a) bond proceedings *as a remedy* for those detained under other immigration detention statutes. In *Reid v. Donelan*, for example, a district court rejected the petitioners' argument that the Due Process Clause requires placing the burden of proof on the government for aliens facing prolonged detention under Section 1226(c), and instead held that "Section 1226(a) provides a reasonably effective way for class members to obtain the individualized assessment they are entitled to, without giving them heightened or special treatment that due process does not require." 22 F. Supp. 3d, 84, 93 (D. Mass. 2014), *vacated and remanded on other grounds*, 819 F.3d 486 (1st Cir. 2016), *opinion withdrawn*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018).[17]

[17] In its April 13, 2016 opinion in *Reid*, the First Circuit reversed the district court's holding that individuals detained under Section 1226(c) were entitled to what amounted to Section 1226(a) bond proceedings. *See* 819 F.3d at 486. The First Circuit withdrew its April 13, 2016 opinion and vacated its judgment in *Reid*, following the Supreme Court's opinion in *Jennings*, 138 S. Ct. at 830. *See* 2018 WL 4000993; *but see Reid*, 390 F. Supp. 3d at 224-25 (revisiting the burden of proof issue in the context of aliens detained for prolonged periods under Section

Similarly, in *Gordon v. Johnson*, a district court held that criminal aliens who were not detained by immigration authorities immediately upon being released from criminal custody were not subject to mandatory detention under Section 1226(c), but *also* held that "the procedures of § 1226(a) provide the reasonably effective remedy" to which the class members were entitled. 300 F.R.D. 31, 41 (D. Mass. 2014), *vacated sub nom. Gordon v. Lynch*, 842 F.3d 66 (1st Cir. 2016). On review of this same issue in a companion case with which *Gordon* was later consolidated, an equally divided *en banc* panel of the First Circuit affirmed the district court and held that "petitioners have a right to individualized bond hearings at which *they can make the case* that they do not pose sufficient bond risks, just as the Attorney General specified in the regulations that she issued pursuant to § 1226(a)." *Castaneda v. Souza*, 810 F.3d 15, 43 (1st Cir. 2015) (emphasis added).[18] In sum, district courts in this Circuit, and this Court itself, have a history of treating the ample procedural protections that apply in Section 1226(a) bond proceedings as constitutionally adequate. *See also Ali v. Brott*, 770 F. App'x 298, 301 (8th Cir. 2019) (rejecting a challenge to Section

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1226(c), and holding that due process requires the Government to prove dangerousness by clear and convincing evidence, and risk of flight by a preponderance of the evidence).

[18]Although the Supreme Court's recent decision in *Preap* calls into question the central holding of *Castaneda*, the decision nevertheless reflects this Court's broad acceptance of Section 1226(a) and its implementing regulations.

1226(a) bond hearing based on constitutional avoidance, but also noting that "[t]he Supreme Court has never indicated that the bond hearing process set forth in [Section 1226(a)] and accompanying regulations was constitutionally deficient," and that plaintiffs in *Jennings* and *Demore* sought "as a *remedy*," bond hearings similar to those available under Section 1226(a)) (original emphasis).

3. The District Court further compounded its error by imposing an elevated standard of proof and requiring consideration of ability to pay bond and alternatives to detention

a. The Standards of proof

The district court also erred by holding that particular standards of proof – clear and convincing evidence for dangerousness, and preponderance of the evidence for flight risk – are required by the Due Process Clause. *Brito*, 415 F. Supp. 3d at 266-67. The district court's rationale for doing so appears based primarily on the notion that "[t]he 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." *Id*. at 266; *see id*. at 267 ("The Court concludes that the vague standard of proof currently employed at [a] § 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 liberty interest at stake.").

The district court's characterization of the standard of proof as so "vague" as to raise due process concerns effectively ignores the guidance provided by Board precedent, which again, delineates numerous factors that an IJ should consider during such a bond hearing. *Matter of Guerra*, 24 I. & N. Dec. at 40. Given this longstanding precedent, it cannot be said that detained aliens are in any sense unaware of the standards that govern their bond hearings under Section 1226(a). Further, apart from citing its own prior decision in *Reid*, 390 F. Supp. 3d at 227-28, the district court does not explain why the Constitution requires the Government to prove dangerousness by "clear and convincing evidence" when, as explained above, the Supreme Court has repeatedly affirmed the constitutionality of detention pending removal proceedings on even categorical grounds.

The district court also erred to the extent it relied on the standards employed for *criminal* pre-trial detention under the Bail Reform Act ("BRA"). In so doing, the district court failed to appreciate the fundamental differences between criminal proceedings and *civil* immigration removal proceedings. *See United States v. Encarnacion*, 239 F.3d 395, 399 (1st Cir. 2001) (holding that a defendant's initial detention was civil, not criminal, and thus did not trigger the Federal Rules of Criminal Procedure at that time); *see also INS v. Mendoza-Lopez*, 468 U.S. 1032, 1038 (1984) (noting that the Constitution generally guarantees significantly *less*

extensive procedural protections in immigration proceedings than in criminal cases).

The inapplicability of the BRA's standard of proof for bail hearings is further highlighted in light of the BRA's "strong presumption in favor" of releasing of criminal detainees awaiting trial. *See, e.g.*, *United States v. Abrahams*, 575 F.2d 3, 6 (1st Cir. 1978) (holding that the BRA "clearly carries a strong presumption in favor of releasing a defendant on his personal recognizance or an unsecured appearance bond"); *United States v. Angiulo*, 755 F.2d 969, 976 (1st Cir. 1985) (listing the circumstances that create a rebuttable presumption against the defendant that no condition or combination of conditions will reasonably assure the safety of any other person and the community) (citing 18 U.S.C. §§ 3142(e),(f)). As discussed above, however, the Supreme Court has soundly acknowledged that Congress explicitly "eliminated any presumption of release pending deportation," and instead expressly "committ[ed] that determination to the discretion of the Attorney General." *Reno*, 507 U.S. at 306.

In their opening brief, Petitioners contend that the district court erred by not requiring a clear-and-convincing standard as to both dangerousness *and* flight risk. In so doing, they rely on a number of either unpersuasive or plainly flawed arguments. At the outset, Petitioners agree that criminal procedures do not readily apply to immigration proceedings. Pet. Br. at 24-29. Petitioners further concede

that Congress, through the BRA, has afforded criminal detainees with *more* procedural protections than the protections that are afforded immigration detainees. Pet. Br. at 27; *see Lopez–Mendoza*, 468 U.S. at 1038. Yet, in the face of these concessions, Petitioners put forth a puzzling assertion that civil detainees should garner *more* procedural protections than those afforded criminal defendants. As discussed above, however, Petitioners' argument contravenes the well-settled jurisprudence that has soundly held the exact opposite— the Constitution generally guarantees *more* procedural protections in criminal cases than the protections afforded in immigration proceedings. *Mendoza-Lopez*, 468 U.S. at 1038; *Encarnacion*, 239 F.3d at 399.

Petitioners attempt to harmonize their contradictory analysis by arguing that immigration detainees should be afforded even *greater* procedural protections than the protections enjoyed by criminal detainees because there is "no governmental interest is at stake" in this case. Pet. Br. at 19. Courts have plainly foreclosed Petitioners' proposition. First, the Supreme Court has explicitly acknowledged the well-settled interest of the Government and the general public in promptly adjudicating removal proceedings. *Nken*, 556 U.S. at 436; *Demore*, 538 U.S. at 519; *Carlson*, 342 U.S. at 538. Second, this very Court has long recognized the importance of administering and enforcing immigration laws and ensuring the finality thereof consistent with congressional intent. *See, e.g.*, *Saysana v. Gillen*,

590 F.3d 7, 17 n.6 (1st Cir. 2009) (in analyzing statutory text relating to mandatory detention, the court noted its "acknowledgment of the important practical governmental interests in the administration of the immigration enforcement program"); *Pena-Muriel*, 489 F.3d at 443 ("there is a strong public interest in bringing finality to the deportation process"); *Baez*, 41 F.3d at 24 (same).

Next, Petitioners' reasoning for raising the standard of proof beyond the restraint under the BRA is equally as faulty. Petitioners argue that due process requires the Government to prove an alien's flight risk by clear-and-convincing-evidence at bond hearings "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.'" Pet. Br. at 19. However, as discussed above, the extensive safeguards governing detention under Section 1226(a) are significant and more than adequately protect against the risk of "erroneous deprivation" of liberty.

Likewise, Petitioners' reliance on the Supreme Court's decision in *Chaunt v. United States*, 364 U.S. 350, 353 (1960) is even less fruitful. In *Chaunt*, the court considered legal challenges after the individual naturalized. *Id.* at 353 (noting that the "issue in these cases is so important to the liberty of the citizen"). Unlike Section 1226(a) detainees, however, naturalized citizens enjoy the full protection of the constitution in civil proceedings. *See United States v. Klimavicius*, 847 F.2d 28, 32 (1st Cir. 1988) ("Once naturalized, a person enjoys the same rights and

opportunities as a native born citizen"). Quite simply, the due process protection required at the preliminary bond hearing juncture that relates to *temporary* detention of aliens does not garner the same constitutional protections as naturalized citizens like in *Chaunt*. *See Mathews*, 424 U.S. at 334-35; *Neron v. Tierney*, 841 F.2d 1197, 1201 (1st Cir. 1988) (holding that the due process analysis "cannot be lifted intact from some handy manual because it "must be tailored to fit each particular situation") (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971)).

b. The requirement that IJs consider ability to pay bond and alternatives to detention.

There is no constitutional, statutory, or regulatory requirement that an IJ consider alternatives to detention or an alien's ability to pay a bond while conducting a bond hearing in immigration court. In the more than two decades since the enactment of IIRIRA, the Supreme Court has never questioned the constitutionality of Section 1226(a) based on the notion that it does not require IJ's to consider an alien's ability to pay bond. Nor has the Supreme Court hinted that an IJ must consider alternatives to detention in order for a bond hearing to pass muster. *See Demore*, 538 U.S. at 530; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. To the contrary, and as explained above, the Supreme Court has held that "the government need not use the 'least burdensome means to accomplish its goal' to comport with the Due Process Clause." *Demore*, 538 U.S. at 528.

In addition to being inconsistent with Supreme Court precedent concerning the requirements of due process, the district court's mandate that IJ's consider certain specific factors is also problematic in light of Congress's clear intent to entrust bond decisions to the discretion of the Attorney General, and to shield such decisions from judicial review. Indeed, 8 U.S.C. § 1226(e), "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." *Preap*, 139 S. Ct. at 962 (observing that the 8 U.S.C. § 1226(e) applies to the "'discretionary' decisions about the 'application' of § 1226 to particular cases"). By mandating that IJs consider certain factors during bond hearings, the district court effectively aimed to re-write Board precedent which already addresses the factors for consideration in such hearings and gives IJs broad discretion in determining whether an alien should be released during the pendency of removal proceedings, and if so on what conditions. *See Matter of Guerra*, 24 I. & N. Dec. at 40. The district court erred by requiring IJs to consider ability to pay and alternatives to detention as a factor in every single case—even if the alien does not put his ability to pay into issue (or introduce evidence about it) or propose alternatives to detention—and in doing so created a presumption of release in favor of the alien under the least burdensome conditions. The Constitution does not require such a result.

By constitutionalizing these factors, the district court created additional substantive and procedural problems. First, as a substantive matter, it threatens to give those factors outsized importance, elevating them above other factors, such as an alien's prior history of flight, lack of community ties, or criminal history.

Second, by placing a heightened importance on these factors, the district court created practical and procedural concerns. Specifically, unlike the federal judiciary, the immigration courts have no authority over ICE's alternatives to detention program, *see* S. Rep. No.112-169 at 52-53 (2012) (congressional appropriations provide DHS, not the Attorney General, with funding for alternatives-to-detention program), and they have no mechanism for enforcing an alien's failure to appear after being released on bond outside of issuing a removal order. That is, the consequence to a removable alien is the same before and after absconding in that the alien is subject to removal. *Compare* 18 U.S.C. § 3146 (imposing a criminal penalty for failure to appear in connection with release pending criminal proceedings) *with* 8 U.S.C. § 1229a(b)(5) (failure to appear for removal proceedings).

Indeed, practical concerns have been raised in the wake of the district court's decision. For example, numerous detainees have now argued that the IJ should consider ordering a variety of unprecedented measures that the IJs would be unable to enforce, such as installation of breathalyzers and requiring detainees to abstain

from alcohol. *See Massingue v. Streeter*, No. 3:19-CV-30159-KAR, 2020 WL 1866255, at *2 (D. Mass. Apr. 14, 2020) (noting that a petitioner with a history of alcohol abuse requested the IJ to consider "mandatory alcohol counseling" as well as the installation of "a breathalyzer car lock" as conditions of his release).

Accordingly, these substantive and procedural problems that were generated by the district court's decision to constitutionalize certain factors further highlight the faultiness of the decision.

B. Section 1252(f)(1) precludes the classwide injunction ordered by the district court.

The district court erred by certifying the *Brito* class because Section 1252(f)(1) precludes classwide injunctions that enjoin or restrain the operation of the detention statute. Indeed, 8 U.S.C. §1252(f)(1) plainly eliminates the classwide relief granted by the district court's order. Under that section, no court (other than the Supreme Court) has jurisdiction to enjoin or restrain the operation of the provisions of 8 U.S.C. §§ 1221-1254a on a classwide basis. Section 1252(f)(1) specifically states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this sub-chapter [8 U.S.C. §§ 1221-1254a], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). The "restrain the operation of" language found in Section 1252(f)(1) is clear: By limiting class action claims that "enjoin" or "restrain," Congress intended the statutory language to encompass any action that restrains the operation of a detention statute, as well as any class action claim that seeks to enjoin a detention statute. Notably, Congress recognized that a classwide injunction, such as the relief Petitioners obtained here, would override the laws governing detention. *See* H.R. Rep. No. 104-469, pt. 1, at 161 (1996).

The district court's grant of injunctive relief here undoubtedly enjoins and restrains the operation of Section 1226(a). An order enjoins the operation of a statute when it prevents "a doing or performing of a practical work or of something involving practical application of principles or processes" the statute requires. *Webster's Third New International Dictionary* 1581 (2002). Section 1226 provides the Attorney General with "broad discretion" to determine when an alien's release on bond is warranted. *Matter of Guerra*, 24 I. & N. Dec. at 40; *see* 8 U.S.C. § 1226(e) ("the Attorney General's discretionary judgment regarding the application of [1226] shall not be subject to review.).[19] Insofar as the district court's classwide

[19] The district court reasoned that because "Section 1226(a) does not provide the procedural requirements for bond hearings," Section 1252(f)(1) proscription against enjoining the operation of the statute did not apply. *Brito*, 415 F. Supp. 3d at 269. But as explained above, Section 1226(a) is not entirely silent as to how bond decisions should made, and rather provides the Attorney General with "broad discretion" to make such determinations.

permanent injunction – which requires the Government to depart from 20 years of Board precedent, creates a presumption of release, and requires IJs to explicitly consider certain factors not mandated by statute – the injunction plainly enjoins the operation of Section 1226(a).

Indeed, in *Jennings*, the Supreme Court refused to apply the constitutional-avoidance canon to Section 1226(a) to require the Government to provide the same procedural protections that the district court ordered here. The Court refused to require procedures that "go well beyond the initial bond hearing established by existing regulations"—because "[n]othing in § 1226(a)'s text…even remotely supports the imposition of [those] requirements." *Jennings*, 138 S. Ct. at 847. Thus, *Jennings* demonstrates the district court's injunction enjoins Section 1226(a)'s ordinary operation in a manner that is inconsistent with the discretion Congress afforded the Attorney General to make bond determinations. *See Hamama v. Adducci*, 912 F.3d 869, 879 (6th Cir. 2018) (holding bond hearing requirements "created out of thin air…that do[] not exist in the statute" "qualify as a restraint" on the operation of the statute). The district court's injunction therefore improperly enjoins Section 1226(a)'s ordinary operation on a classwide basis (and not with respect to "an individual alien"). *See Preap*, 139 S. Ct. at 975 (Thomas, J., concurring, in part) (1252(f)(1) bars injunction requiring action that is "not authorized by the statutes"); *Jennings*, 138 S. Ct. at 851; *cf. Bostock v. Clayton*

County, Ga., 140 S. Ct. 1731, 1740 (2020) (explaining in the context of Title VII that "the meaning of 'individual' was as uncontroversial in 1964 as it is today: 'A particular being as distinguished from a class, species, or collection.' Webster's New International Dictionary, at 1267."). Accordingly, the district court's injunction must be vacated.

VIII. CONCLUSION

For the foregoing reasons, and in accordance with decades of Supreme Court precedent, this Court should vacate the decision of the district court and should hold that the existing procedures governing bond hearings under Section 1226(a) are fully consistent with the Due Process Clause of the Constitution.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Principal and Response Brief for Respondents-Appellees has been electronically filed via the Court's CM/ECF system on this 20th day of July, 2020. I also certify that all participants in the case are registered CM/ECF users and that service on Petitioners-Appellants' counsel of record will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B) because the brief contains 14,751 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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

Respectfully submitted,

DATED: August 12, 2020

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