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.

MERRICK B. GARLAND, Attorney General; **TIMOTHY S. ROBBINS**, Acting Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; **TAE D. JOHNSON**, Acting Director, U.S. Immigration and Customs Enforcement; **ALEJANDRO MAYORKAS**, Secretary, U.S. Department of Homeland Security; **JEAN KING**, Acting Director of the Executive Office for Immigration Review, U.S. Department of Justice; **ANTONE MONIZ**, Superintendent of the Plymouth County Correctional Facility; **YOLANDA SMITH**, Superintendent of the Suffolk County House of Corrections; **STEVEN SOUZA**, Superintendent of the Bristol County House of Corrections; **CHRISTOPHER BRACKETT**, Superintendent of the Strafford County House 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' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On August 18, 2021, the Court ordered the parties to file supplemental briefing addressing the following question:

> Whether for purposes of Article III standing, any of the named class representatives—before their individual claims became moot—suffered an injury-in-fact or faced imminent injury due to any failure of the Immigration Judge conducting his bond hearing to consider ability to pay and possible alternative conditions of release?

The named class representatives lack Article III standing regarding these claims because, although an immigration judge ("IJ") may consider any evidence presented in a bond hearing, the named class representatives did not ask the IJs to consider these factors. In any event, the IJ found that each representative presented a danger, meaning that the IJ could not set bond for that individual (*Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009))—regardless of his ability to pay or possible alternatives to detention. Therefore, the district court erred in reaching the merits of these claims, and the Court should reverse that portion of its decision.

II. STATEMENT OF THE CASE

The factual background and procedural history are located on pages 15 to 28 of the Government's Principal and Response Brief ("Gov't Br.").[1] Briefly, Petitioners filed a Petition for Writ of Habeas Corpus arguing, *inter alia*, that 8 U.S.C. § 1226(a) bond hearings violate due process because the detainee—rather

[1] Citations to the parties' briefing reference the ECF stamped page number.

than the Government—must carry the burden of proof and because IJs are not required to consider the detainees' abilities to pay bond and suitability for release on alternative conditions of supervision. RA46. Petitioners' case solely challenges bond hearings—they did not raise any claims related to U.S. Immigration and Customs Enforcement's ("ICE") discretionary decisions to release § 1226(a) detainees, which is a process separate and distinct from IJ bond hearings.

Additional factual information on the three named class representatives ("representatives") and their bond hearings is below. The IJs conducting the representatives' bond hearings declined to release them, finding each presented a danger. The IJs did not consider their abilities to pay bond or alternatives to detention. But none of the representatives asked the IJ conducting his bond hearing to consider these matters—a fact that Petitioners tacitly concede here (*see* Pet. Supp'l Br. at 13 (citing only to the habeas petition and class action complaint in claiming that they "challenged the Immigration Court's failure to provide him with procedural due process in the form of an 'adequate bond hearing'")). And Petitioners have never pointed to any evidence that the representatives presented to the IJs on those issues. Pet. Br. 17–18; Pet. Reply Br. 55–59; RA33–44; RA314–18.

A. Gilberto Pereira Brito

Petitioner Gilberto Pereira Brito is a native and citizen of Brazil who entered

the United States without inspection in April 2005, ICE apprehended him shortly thereafter. Record Appendix ("RA") 295; RA34. On May 7, 2005, ICE initiated removal proceedings against Mr. Brito by filing a Notice to Appear ("NTA") with the immigration court, charging him as being an alien present in the United States who has not been admitted or paroled. RA54; Supplemental Sealed Appendix ("SSA") 106.

Over the next several years, Mr. Brito was charged with a number of criminal offenses. SSA126–36. A criminal court placed him on probation and ordered him to complete an Alcohol and Substance Abuse Program for operating a motor vehicle under the influence of alcohol. SSA128; RA295. Police later arrested him for operating a vehicle with a suspended license. SSA134. Mr. Brito violated probation (SSA141; SSA136) and repeatedly failed to appear in court, resulting in the court issuing default warrants (SSA130–31; SSA134; SSA138). RA295. He did not return to court—and those criminal cases remained open—for nearly a decade. SSA131; ECF No. 24-1 at 2, 4; SSA138.

On March 3, 2019, ICE apprehended Mr. Brito, charged him with removability, detained him under § 1226(a), and declined to release him on bond. RA296. On April 4, 2019, Mr. Brito appeared with counsel for a § 1226(a) bond hearing before an IJ. RA54. Mr. Brito, through counsel, submitted evidence regarding, *inter alia*, his family, his wife's medical history, and his immigration

history, but he did not ask the IJ to consider his ability to pay or alternatives to detention. RA315–16; SSA100–01.

The IJ denied bond and later issued a written decision. RA54. The IJ explained that, to establish that he should be released, a noncitizen "must prove to the satisfaction of the Court that he neither poses a danger to the community nor is a flight risk." RA55–56. The IJ articulated the factors the Board of Immigration Appeals ("BIA") consistently has held are significant in bond hearings, and noted that "[t]he Court may base a custody or bond determination upon any information that is available or that is presented by the [parties]. 8 C.F.R. § 1003.19(d)." RA55. In conclusion, the IJ found that Mr. Brito posed a danger to the community based on his criminal activity, his inability to complete probation, and his propensity to commit further crimes. RA56.

Mr. Brito appealed the IJ's bond decision to the BIA. RA296. However, on June 25, 2019, based on a change in circumstances—his criminal charge was dismissed—ICE released Mr. Brito from custody (subject to GPS monitoring and other conditions) upon his payment of $1,500 bond. ECF No. 32-1; Supplemental Record Appendix ("SRA") 8; SSA8; RA205; RA296. Based on his release, the BIA dismissed the appeal as moot. SRA3.

B. Florentin Avila Lucas

Petitioner Florentin Avila Lucas is a Guatemalan citizen who entered the

United States without inspection in 2002. RA150; SRA14. In March 2019, ICE arrested him, charged him with removability for entering without inspection, detained him under § 1226(a), and declined to release him on bond. RA287; RA298; RA316; RA335.

On May 2, 2019, Mr. Avila Lucas appeared with counsel for a § 1226(a) bond hearing before an IJ. RA298. At the bond hearing, ICE submitted Border Patrol arrest reports. RA298–99. Mr. Avila Lucas, through counsel, filed a written motion seeking the minimum bond of $1,500 and arguing that he was not a flight risk or danger. SRA13–16; SRA20. He did not ask the IJ to consider his ability to pay or alternatives to detention. SRA13–16; Bond Hearing Recording.[2]

On June 18, 2019, the IJ issued a written decision denying Mr. Avila Lucas's request for bond because he had failed to show that he was not a danger or a flight risk. RA81. The IJ acknowledged the evidence Mr. Avila Lucas had submitted, but explained that it did not persuade the IJ that Mr. Avila Lucas did not pose a danger to the community or that he was not a flight risk. The IJ expressed "great concern" regarding Mr. Avila Lucas's alleged behavior during his apprehension, and found that it created a "potentially dangerous situation and [was] indicative of his danger

[2] No transcript of the bond hearing exists. *See* EOIR Policy Manual, Part III – BIA Practice Manual, Ch. 7.3(b)(2) ("Bond hearings are seldom recorded and are not routinely transcribed."). Accordingly, the Government sent a copy of the recording to Petitioners' counsel, who opposes reference to the recording. The Government will provide a copy to the Court upon request.

to the community and his risk of flight." SRA21.[3]

C. Jacky Celicourt

Petitioner Jacky Celicourt is a Haitian citizen who was admitted to the United States on a six-month tourist visa in March 2018. SSA48; RA300; RA336. In January 2019, ICE charged Mr. Celicourt with removability for overstaying his tourist visa, detained him under § 1226(a), and declined to release him on bond. SSA48; RA300–01; RA288.

On February 7, 2019, Mr. Celicourt appeared with counsel for a § 1226(a) bond hearing before an IJ. SSA51–63. ICE submitted evidence of Mr. Celicourt's arrest and conviction for Theft By Unauthorized Taking. RA301; SSA36. Mr. Celicourt, through counsel, filed letters of support along with a motion for bond redetermination asserting that Mr. Celicourt was not a danger or flight risk. SSA80–84. Mr. Celicourt did not ask the IJ to consider his ability to pay or alternatives to detention. SSA80–84; SSA51–64.

After hearing argument, the IJ determined that Mr. Celicourt had failed to prove that he was not a danger to property or a flight risk. The IJ specifically

[3] On June 28, 2019, ICE reevaluated Mr. Avila Lucas's custody status and determined that he could be released upon payment of a $3,000 bond. RA210. He posted bond and ICE released him on July 1, 2019. RA287–88; RA206. Mr. Avila Lucas had appealed the IJ's decision but voluntarily withdrew the appeal before the BIA ruled on it due to his release. RA299.

highlighted Mr. Celicourt's theft conviction and his visa overstay. SSA62–63. Thus, the IJ denied his request for bond.[4] SSA86.

On June 13, 2019, the three representatives filed a habeas corpus petition and class action complaint for declaratory and injunctive relief. RA24–49. By July 2, 2019, ICE had released all three representatives, and before that time, none of them had asked an IJ to consider his ability to pay or alternatives to detention during his bond hearing.

III. ARGUMENT

A. Standing is a non-waivable jurisdictional requirement that Petitioners must establish.

The named class representatives have not established Article III standing on their claims regarding ability to pay and alternatives to detention. Standing limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong, "'serves to prevent the judicial process from being used to usurp the powers of the political branches,' and confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citations omitted); *see also Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 330 (1st Cir. 2020) (Article III confines the judicial power of federal courts to

[4] In June 2019, ICE reevaluated Mr. Celicourt's custody status and determined that he could be released upon payment of a $5,000 bond. RA205; 212. Mr. Celicourt posted bond and ICE released him on July 2, 2019. RA288; RA318.

"'concrete, living contest[s] between adversaries,' that a court can resolve with real-world relief'") (citations omitted).

To satisfy the "'irreducible constitutional minimum' of standing," the party invoking federal jurisdiction must demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the 'invasion of a legally protected interest' that is 'concrete and particularized,' *i.e.*, which 'affects the plaintiff in a personal and individual way.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff must also show that the injury is actual or imminent. *Lujan*, 504 U.S. at 560; *Spokeo*, 136 S. Ct. at 1548.

The parties cannot waive standing, and it may be raised (even by the court *sua sponte*) at any stage of the case. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Beyond this, the named plaintiffs in a class action may not rely on other class members' injuries—they must show an injury to themselves. *Amrhein*, 954 F.3d at 331 ("'[E]ven named plaintiffs who represent a class "must allege and show" a past or threatened injury to *them*, and not just to 'other, unidentified members of the class to which they belong" and which they purport to

represent.'") (quoting *Spokeo*, 136 S. Ct. at 1547 n.6).

B. The three named class representatives did not suffer an injury in fact or face imminent injury when the IJs did not consider their abilities to pay bond or possible alternative conditions of release. Thus, they lacked standing to raise these issues, and the district court lacked jurisdiction to reach them.

The three representatives failed to establish any injury in fact or imminent injury. Not only is there no statutory or regulatory right to have an IJ consider ability to pay or alternative conditions of release, but also the IJs found that each Petitioner presented a danger.[5] And if an IJ finds that a detainee's release would "pose a danger to property or persons,…that determination would require the respondent to remain in custody without bond." *Urena*, 25 I. & N. Dec. at 141. Therefore, the IJ's dangerousness determination meant that the IJ could not release him—regardless of his ability to pay or possible alternatives to detention. Further, not one of them ever asked the IJs to consider his ability to pay bond or possible alternative conditions of release. Unsurprisingly, Petitioners presented no arguments or evidence suggesting they made such a request. Pet. Supp'l Br. at 13[6];

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[5] Federal courts lack power to review bond determinations. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. 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.").

[6] Petitioners state that Mr. Brito and Mr. Avila Lucas "raised these specific defects" in their BIA appeals. Pet. Supp'l Br. at 9. But the BIA dismissed Mr. Brito's appeal as moot based on his release and Mr. Avila Lucas voluntarily

RA33–44; RA314–18; ECF No. 68 at 3, 7. Thus, Petitioners did not meet their burden of showing they were in-fact injured. Moreover, none can meet the imminence requirement since none remains detained.

1. The named class representatives did not establish a "concrete and particularized" injury.

To establish injury in fact, a plaintiff must show that he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted); *Spokeo*, 136 S. Ct. at 1548. First, the injury must be "concrete." *Spokeo*, 136 S. Ct. at 1548. "No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). A "concrete" injury must be "de facto," meaning it actually exists; further, it must be real and not abstract. *Spokeo*, 136 S. Ct. at 1548.

Second, an injury in fact must be "particularized," meaning it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, n.1); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (standing requires that the plaintiff "'personally has suffered some actual or threatened injury'"). "The particularization element of the injury-in-fact inquiry

withdrew his appeal. SRA3; RA299. Therefore, the BIA did not have occasion to reach these issues.

reflects the commonsense notion that the party asserting standing must not only allege injurious conduct attributable to the defendant but also must allege that he, himself, is among the persons injured by that conduct." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731–32 (1st Cir. 2016).

Here, the representatives cannot demonstrate that they suffered a concrete and particular injury. Notably, despite having counsel during their bond hearings, none of them asked the IJ to take into account his ability to pay bond or consider alternatives to detention. Furthermore, Petitioners have never pointed to any evidence they presented but claim the IJs did not consider at the representatives' bond hearings. Consistent with their broad discretion, IJs may indeed consider any evidence presented. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (identifying a non-exhaustive list of factors). But here, the representatives cannot show that the failure to consider these factors—which Petitioners neither asked the IJs to consider, nor presented any evidence on—injured them.

Moreover, noncitizens may be detained pending the completion of removal proceedings based on a finding of dangerousness and apart from an asserted inability to pay a bond amount. *See Carlson v. Landon*, 342 U.S. 524, 537–42 (1952). Therefore, *only if* a noncitizen demonstrates that he does not pose a danger to the community should an IJ continue the analysis and make a determination regarding the extent of flight risk posed by the noncitizen. *See Matter of Drysdale*,

20 I. & N. Dec. 815, 817–18 (BIA 1994). In this regard, bond is designed to ensure a noncitizen's presence at his proceedings—and, if ordered removed, his removal—but is not properly utilized where a noncitizen presents a danger. *Id.*; *see Urena*, 25 I. & N. Dec. at 141 ("An [IJ] should only set a bond if he first determines that the alien does not present a danger to the community.").

Here, the IJs found that each representative failed to show he was not a danger. *See* RA54 ("At the hearing, the Court was unable to find that the Respondent met his burden of proof to show that he does not pose a danger to persons or property.")); RA56; SRA21; SSA62–63. Because the IJs determined that they were dangerous, the IJs would have had no reason to consider their abilities to pay bond or alternatives to detention. *See Urena*, 25 I. & N. Dec. at 140-41; *see also Guerra*, 24 I. & N. Dec. at 41 ("An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings."). Given that the IJs determined that the three representatives presented a danger to property or persons and therefore were ineligible for release by the IJ, they could not—and did not—suffer any "de facto" injury where the IJs did not reach, and thus did not consider, their ability to pay bond or alternative conditions to detention. *Urena*, 25 I. & N. Dec. at 140–41.[7]

[7] Relatedly, Petitioners cannot establish that any alleged injury is "fairly traceable" to the "allegedly unlawful conduct" (*California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))). In *California v.*

2. The named class representatives did not establish an "actual or imminent" injury.

An injury also must be actual or imminent; the rationale for this requirement "is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is "'*certainly* impending.'" *Lujan*, 504 U.S. at 564, n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

As explained *supra*, the three representatives did not suffer an injury in fact or face imminent injury before their individual claims became moot. Notably, all three already have secured release from detention (SSA8; RA205; RA296; RA287–88; RA206; RA288; RA318).[8] Further, any speculation that they

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Texas, the plaintiffs challenged an aspect of the Patient Protection and Affordable Care Act that imposed a monetary penalty on individuals who failed to obtain minimum essential health insurance coverage. 141 S. Ct. at 2112. But in 2017, Congress effectively nullified the penalty by setting its amount at $0. *Id*. The Supreme Court held that the plaintiffs failed to establish traceability because the provision no longer had any means of enforcement. *Id*. at 2114. It reasoned that because the Internal Revenue Service no longer could seek a penalty from those who failed to comply, there was "no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." *Id*. The named class representatives face the same traceability setback here. Because the IJs conducting their bond hearings determined that each posed a danger, the IJ could not set any bond (*see*, *supra*). Therefore, the IJs could not order their release—whether or not the detainees could afford bond or under an alternative to detention. In other words, the representatives have "not shown that any kind of Government action or conduct has caused or will cause the injury they attribute to" the IJs' failure to consider their abilities to pay bond or alternatives to detention (*California v. Texas*, 141 S. Ct. at 2114).

[8] Moreover, even if other class members could establish an injury in fact, that possibility would not confer standing on the named class representatives. *See Amrhein*, 954 F.3d at 331.

theoretically could be re-detained and request bond hearings—at which (1) they ask the IJs to consider these factors, (2) they present supporting evidence, (3) the IJs conclude they are not dangerous, and (3) the IJs refuse to consider their abilities to pay or alternatives to detention—is far too remote to satisfy the imminence requirement, in addition to being beyond the scope of the initial standing question at issue. Indeed, Petitioners' imminent injury argument is a string of "what ifs." Petitioners posit that *if* the district court were to have remanded the case to the IJ and *if* in doing so, it departed from its actual holding and only ordered the IJ to re-allocate the burden of proof, "then the petitioners would have immediately faced deficient bond hearings" (Pet. Supp'l Br. at 19). This already conjectural argument omits two inferential steps: *if* Petitioners asked the IJs to consider their ability to pay bond or alternatives to detention and *if* the IJs still refused to consider the issues. This argument is precisely what the *Lujan* Court warned against: "[imminence] has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all."). *Lujan*, 504 U.S. at 564, n.2

CONCLUSION

Because the named class representatives plainly lacked standing on their claim that IJs must consider ability to pay and alternatives to detention during bond hearings, the district court erred in reaching this issue's merits. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiff cannot allege "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which [he] purport[s] to represent"). Thus, the Court should vacate the district court's holding that: "At the bond hearing, the immigration judge must evaluate the alien's ability to pay in setting bond above $1,500 and must consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances." RA423. *See Bender*, 475 U.S. at 541 (*United States v. Corrick*, 298 U.S. 435, 440 (1936)) ("And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.").

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, I certify that this Supplemental Brief:

(1) complies with the August 18, 2021 Corrected Order of Court (Doc. 00117776395) because the brief contains 15 pages, 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.

Dated: September 8, 2021

Respectfully submitted,

/s/ Catherine M. Reno
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Trial Attorney

CERTIFICATE OF SERVICE AND FILING

I hereby certify that a true and correct copy of the foregoing Supplemental Brief for Respondents-Appellees/Cross-Appellants has been electronically filed via the Court's CM/ECF system on this 8th day of September 2021. I also certify that all participants in the case are registered CM/ECF users and that service on Petitioners-Appellants/Cross-Appellees' counsel of record will be accomplished by the CM/ECF system.

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