UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 20-1037
20-1119

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

Petitioners – Appellants/Cross-Appellees,

v.

MERRICK B. GARLAND, Attorney General, U.S. Department of Justice; 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, Director, Executive Office of Immigration Review, U.S. Department of Justice; ANTONE MONIZ, Superintendent of the Plymouth County House of Correction Facility; YOLANDA SMITH, Superintendent of the Suffolk County House of Corrections; STEVEN SOUZA, Superintendent of the Bristol County House of Corrections; CHRISTOPHER BRACKETT, Superintendent of the Strafford County Department of Corrections; LORI STREETER, Superintendent of the Franklin County House of Corrections,

Respondents – Appellees/Cross-Appellants.

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INTRODUCTION

The Court ordered supplemental briefing addressing: "[w]hether, 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 answer is emphatically "yes."

The standing inquiry is relaxed in cases alleging violations of procedural rights. *See Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007); *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1281 n.10 (1st Cir. 1996). To establish injury-in-fact, a party asserting a procedural right need only show that it has challenged an agency's failure to follow a procedural requirement designed to protect its "concrete interest." This case more than meets the standard. When this case began, each petitioner was incarcerated under Section 1226(a) without having received a bond hearing that included the full suite of procedural protections required under the Due Process Clause—namely, a hearing at which the government bore the burden of proof, and at which an immigration judge considered their ability to pay bond as well as alternative conditions of release. The petitioners filed this case to secure those procedures for themselves and similarly situated class members. Nothing more was required to establish standing for those procedural claims.

In fact, even non-procedural standing principles are satisfied here. The petitioners faced actual and imminent injury from the Immigration Court's failure to consider conditions of release and ability to pay a bond. As explained below, the requested procedures were integrated features of an adequate bond hearing that, at the time of filing, the petitioners had been denied, resulting in the loss of their freedom. And, even if the Court were to disaggregate the issues for standing purposes and treat them as arising separately and sequentially in the bond hearing (which, to be clear, the Court should not do), the petitioners faced imminent injury. If the District Court had decided only the burden of proof for flight risk and dangerousness, the petitioners would simply have returned to Immigration Court for new bond hearings where conditions and ability to pay—issues which the government effectively acknowledged were very much live in their cases—were not addressed, and where petitioners once again faced the substantial prospect of an unconstitutional deprivation of their liberty.

The petitioners respectfully assert that the requirements of Article III standing are more than satisfied here. And while the petitioners recognize that this Court has an independent responsibility to assess its jurisdiction, petitioners' view of the record is amply supported by the government's decision not to contest standing at any time.

ARGUMENT

I. Each Petitioner Was Arrested in the United States and Incarcerated for Months Without Constitutionally Adequate Bond Hearing Procedures.

When this case began in June 2019, Mr. Pereira Brito and Mr. Avila Lucas had each been detained more than three months, and Mr. Celicourt had been detained for almost six months. RA37, 40, 44 (Pet. ¶¶49, 64, 81). The petition alleged that each was being unlawfully detained because none had received a "bond hearing at which the government bears the burden to justify continued detention by clear and convincing evidence that the detainee is a danger to others or a flight risk, and even if he or she is, that no condition or combination of conditions will reasonably assure the detainee's future appearance and the safety of the community, and which includes consideration of the detainee's ability to pay in selecting the amount of any bond or suitability of release on alternative conditions of supervision." *See* RA46 (Pet. ¶91). In other words, the petition claimed that the petitioners were entitled to, but had not received, a unitary release analysis in which disproving the availability of conditions was a component of the government's burden, and the consideration of ability to pay was an integral component of the bond and conditions inquiry.

Record evidence confirms that, when the petition was filed, the Immigration Court consistently engaged in these unlawful practices. Attorney Elena Noureddine explained that the burden of proof is "always" placed on the detainee in immigration bond hearings. RA51. She explained that the immigration judges "do not typically

consider an individual's ability to pay," had repeatedly informed her that "an individual's ability to pay is not part of the consideration in setting a bond amount," and had recently imposed "significantly higher" bonds in the range of $10,000 to $20,000, resulting in "many clients . . . be[ing] forced to stay in detention due to their inability to pay the bond amount imposed." RA51-52. She further stated that "immigration judges typically do not consider releasing a detainee on conditions or whether such conditions might mitigate the extent to which an individual is a danger to the community a flight risk for purposes of setting bond." RA323. These observations are confirmed by the bond decisions for the three petitioners: in each decision, immigration judges placed the burden of proof on the petitioner, did not consider the availability of conditions and ability to pay a bond, and denied release. RA54-56 (Pereira Brito); RA81 (Avila Lucas); RA129-30 & RA133 (Celicourt). Petitioners Pereira Brito and Avila Lucas appealed their bond denials to the Board of Immigration Appeals and raised these specific defects.[1] SSA174-76; RA 187-92.

Within a month after the filing of this case, the government confirmed that conditions of release and bond amounts were live issues in the petitioners' underlying immigration cases when it demanded that one or both accompany their

[1] The petitioners were not required to exhaust administrative remedies. *See, e.g.*, *Flores Powell v. Chadbourne*, 677 F. Supp. 2d 455, 462-64 (D. Mass. 2010). Further, any objections to exhaustion have been waived on appeal, and, in all events, exhaustion has no bearing on the standing question posed by the Court.

actual releases from immigration custody. It is undisputed, for example, that the government offered to voluntarily release Mr. Pereira Brito, but only if he both paid a bond and complied with conditions of release. *See* RA316 & 335 (Pet.'s SJ SOF ¶11 & Gov't Response).[2] Similarly, the government agreed to release both Mr. Celicourt and Mr. Avila Lucas, but only if they paid bonds substantially higher than the statutory minimum. *Compare* 8 U.S.C. § 1226(a)(2) ($1,500 minimum bond), *with* RA210 ($3,000 bond for Avila Lucas), *and* RA212 ($5,000 bond for Celicourt). It is clear that the government was not interested in releasing Mr. Pereira Brito without conditions (which, absent judicial relief, an immigration judge would not consider or order), and was not interested in releasing Mr. Avila Lucas and Mr. Celicourt without high bond payments (which, absent judicial relief, the Immigration Court would not tether to their ability to pay). Accordingly, these aspects of the requested relief were necessarily crucial to ensuring that any new bond hearing would adequately protect the petitioners' rights.

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[2] When the government submitted Mr. Pereira Brito's release paperwork to the District Court, it submitted only the bond determination. D.E. 32-1. Given that there was no dispute concerning Article III standing, neither party submitted the complete release package, which ordered Mr. Pereira Brito to obey strict conditions under the Intensive Supervision Appearance Program (ISAP). Those conditions included compliance with electronic monitoring, home visits, abstaining from illegal drugs and excessive drinking, and appearing for all appointments and court dates. The parties have moved to expand the record with a Supplemental Record Appendix that includes this ISAP documentation so that the record does not present an inaccurate picture of Mr. Pereira Brito's release.

Following the release of the named petitioners, the District Court certified a class, including making findings—which are uncontested on appeal—that (a) whether "the immigration judge [must] consider alternative conditions of release and an alien's ability to pay in decide on release and the amount of bond" are "common legal questions *that are central to each [class] member's claims and do not require any individualized analysis*;" and (b) the proposed class representatives presented claims typical of the class and could adequately represent it. Add. 20-21 (emphasis added). In November 2019, the District Court entered class-wide summary judgment that (except as to the standard of proof for flight risk) essentially granted the unitary release inquiry requested by the petition.[3] Add. 34.

II. Petitioners Had Suffered Injury-In-Fact When They Filed the Petition, and Faced Imminent Injury If Their Bond Hearings Were Remanded Without Complete Relief.

Standing is ordinarily "assessed under the facts existing when the complaint is filed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); *see also Massachusetts v. U.S. Dep't of Health & Human Svcs.*, 923 F.3d 209, 221 (1st Cir.

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[3] The District Court declared that "the Government must prove the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence and that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community," and that, "[a]t the bond hearing, the immigration judge must evaluate the alien's ability to pay in setting a 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 appearance." Add. 34.

2019).[4] "Procedural rights" claims, like those asserted here, "receive 'special' treatment when it comes to standing," which means someone asserting a procedural right "can assert that right without meeting all of the normal standards for redressability and immediacy" of injury. *Dubois*, 102 F.3d at 1281 n.10 (quoting *Lujan*, 504 U.S. at 572 n.7); *see Nkihtaqmikon*, 503 F.3d at 27; *Citizens of the Karst, Inc. v. Army Corps of Eng'rs*, 160 F. Supp. 3d 451, 456 (D. Mass. 2016).

The test for injury-in-fact in a procedural rights case is whether the plaintiff has challenged an agency's failure to follow a procedural requirement that is designed to protect some threatened "concrete interest" of the party. *See Nkihtaqmikon*, 503 F.3d at 27; *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 567 (D.C. Cir. 2007); *Mills v. Turner*, 2017 U.S. Dist. LEXIS 136887, at *34 (D. Mass. Aug. 25, 2017). As long as that requirement is satisfied, and the plaintiff is not claiming the deprivation of a "procedural right *in vacuo*," *Citizens of the Karst*, 160 F. Supp. 3d at 456 (citation omitted), the procedural rights doctrine "relieves the plaintiff of the need to demonstrate that (1) the agency action would have been different but for the procedural violation, and (2) that court-ordered compliance with the procedure would alter the final result." *Nat'l Parks Conserv. Ass'n v. Manson*,

[4] The petitioners may rely on any materials submitted at all prior stages of the proceeding to show that standing existed when the petition was filed. *See, e.g.*, *Maine People's Alliance v. Mallinckrodt*, 471 F.3d 277, 283 (1st Cir. 2006).

414 F.3d 1, 5 (D.C. Cir. 2005). Indeed, a plaintiff asserting a procedural right to protect against future injury to a "concrete" interest has standing even if the injury is not on the near horizon. *See Lujan*, 504 U.S. at 572 n.7 (homeowner next to proposed dam would have standing to challenge licensing authority's failure to produce mandatory environmental impact statement "even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years").

A. Each Petitioner Suffered an Injury to His Liberty Interest From the Deprivation of a Constitutionally-Required Procedure.

The petitioners all satisfied the injury-in-fact requirement. First, each petitioner challenged the Immigration Court's failure to provide him with procedural due process in the form of an "adequate bond hearing" at which the government had to justify detention under Section 1226(a) by proving a risk of flight or danger to the community that (taking into account the petitioner's ability to pay a money bond) could not be ameliorated by conditions of release. RA25-26 (Pet. ¶2). Second, each petitioner alleged that the procedural requirements existed to protect his concrete liberty interest—a core constitutional interest embedded in "our most fundamental notions of justice." *Fernandez v. Trias Monge*, 586 F.2d 848, 855 (1st Cir. 1978). Finally, the petitioners did not allege violation of a procedural right "*in vacuo*," *cf. Summers v. Earth Island Institute*, 555 U.S. 488, 496-97 (2009), but rather alleged that each was presently being incarcerated under Section 1226(a) without the

necessary bond procedures demanded by the suit. RA26 (Pet. ¶¶3-5). Article III requires no more. *See Nkihtaqmikon*, 503 F.3d at 27-29.

B. Each Petitioner Suffered an Indivisible Injury From the Deprivation of a Unitary Procedure.

In its Order of August 18, 2021, this Court asked only whether the named petitioners had suffered an injury-in-fact or faced imminent injury due to the Immigration Court's failure "to consider ability to pay and possible alternative conditions of release." To the extent this question implies that the Court might disaggregate the petitioners' Due Process claim for standing purposes—with one "burden of proof" component and separate "ability-to-pay" and "conditions" components—the petitioners respectfully urge the Court not to do so.

Each petitioner received a single bond hearing at which the Immigration Court provided *none* of the procedural protections that the District Court later determined were constitutionally required, resulting in their loss of liberty. The constitutionally inadequate process each petitioner *received* was not bifurcated, and the constitutionally adequate process each petitioner *asked for* was not bifurcated, either. To the contrary, the petition sought an injunction that prohibited further detention without a unitary release analysis in which disproving the availability of conditions was an integrated component of the government's overall burden, and the consideration of ability to pay was, in turn, an integral component of the bond and conditions inquiry. *See* RA25-26 (Pet. ¶2); *see also* RA46-47 (Pet. ¶91 & Fourth

Prayer for Relief). The District Court made findings, not contested on appeal, that conditions and ability to pay issues were "central" to the claims of all class members, and that the petitioners presented typical claims. Add. 20. Thus, what the Immigration Court failed to provide, what cost the petitioners their freedom, and what they ultimately sought as a remedy—was "a single, unitary process." *Buffkin v. Hooks*, 2019 U.S. Dist. LEXIS 45790, at *8 (M.D.N.C. Mar. 20, 2019).

The *Buffkin* analysis demonstrates why it is a unitary procedure at issue here. In *Buffkin*, the plaintiffs were inmates in state custody who sued on behalf of a class of all inmates who (1) had hepatitis C (HCV) and (2) were not being treated with antiviral drugs. The petitioners challenged the state's screening process, which tested only prisoners with certain risk factors, then followed up on prisoners who tested positive with an assessment protocol called "FibroSure," and provided antivirals only to prisoners with certain FibroSure test scores. The plaintiffs argued for universal testing at the first stage. The defendants challenged standing because all of the named plaintiffs had been screened for HCV under the existing screening process. The District Court agreed with the plaintiffs "that the two stages of screening should be viewed as a single unitary process and that, because certain named plaintiffs had not received [FibroSure] screening at the time of filing, there is standing to challenge the screening process" as a whole. *Id.*

If anything, this case presents a stronger argument for "unitary process" standing than *Buffkin*. Here, because the Immigration Court gave the petitioners *none* of the process due to them, the government cannot say that the petitioners were not injured by the agency's failure at one "stage" rather than the other. The District Court properly treated the claim as one alleging the infliction of an indivisible injury, for which the petitioners had standing to seek comprehensive relief.

C. Even If the Elements of the Procedural Deprivation Are Viewed Separately, the Petitioners Suffered Injury-in-Fact.

Even if the Court were to view the petitioners' Due Process claim as having separate components for standing purposes, they would have standing as to each component because, as shown above, the immigration judges at their proceedings *neither* properly assigned the burden of proof *nor* considered ability to pay *nor* considered alternatives to detention. The petitioners were not required to ascertain precisely how much each defect contributed to an immigration judge's decision to order their detention, because the case law is clear that plaintiffs asserting procedural rights can establish standing without showing that the outcome of a proceeding would have been different but for a particular lapse of procedure. *Lujan*, 504 U.S. at 572, n.7; *Nkihtaqmikon*, 503 F.3d at 27-29; *Nat'l Parks Conserv.*, 414 F.3d at 5.

Consequently, the petitioners would have standing even if the Court were to bifurcate the elements of an "adequate bond hearing." The petition alleged that the Immigration Court violated the Due Process requirement to consider conditions of

release and ability to pay at a detainee's bond hearing, and that these procedural requirements were designed to protect their threatened "concrete interest" in physical liberty. *See Nkihtaqmikon*, 503 F.3d at 27. Nothing more is required to create standing to challenge the alleged violation of their procedural rights; a plaintiff does not have to win on the merits in order to establish justiciability. *See Bond v. United States*, 564 U.S. 211, 219 (2011) ("the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute"); *see also ODonnell v. Harris County*, 227 F. Supp. 3d 706, 727 (S.D. Tex. 2016) (plaintiff had standing to challenge county's failure to consider ability to pay when making bail determinations, even though she allegedly could pay bail).

D. Even If the Elements of the Procedural Deprivation Are Viewed Separately and Sequentially, and If an Ordinary Standing Analysis Is Applied, Each Petitioner Faced Imminent Injury.

Procedural rights cases involve a "relaxed" requirement to show imminent injury. *Nkihtaqmikon*, 503 F.3d at 27. This requirement can be satisfied even if the injury may not arise for "many years," *Lujan*, 407 U.S. at 572 n.7, so long as the procedural violation "presents a 'risk of real harm.'" *Mills*, 2017 U.S. Dist. LEXIS 136887, at *34 (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). But, to be clear, even under a traditional standing analysis, and even if all aspects of a bond proceeding are viewed (incorrectly) as separate and sequential—such that

consideration of ability to pay and conditions of release comes after application of the burden of proof—the petitioners could still satisfy not only the relaxed imminence inquiry for procedural claims but also the standard imminence inquiry for non-procedural claims.

Even in an ordinary standing analysis, this Court has long recognized that "it could hardly be thought that administrative action likely to cause harm cannot be challenged until it is too late." *See Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993) (quoting *Rental Housing Ass'n of Greater Lynn v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977)). Standing exists if "there is a substantial probability that the harm will occur." *See Maine People's Alliance*, 471 F.3d at 284. Threatened or conditional harm can suffice, even if the plaintiff controls whether the condition triggering the harm will ever actually manifest. *See MedImmune v. Genentech*, 549 U.S. 118, 130 (2007). Indeed, where a plaintiff is challenging an enforcement action by the government, a plaintiff has standing if the enforcement action has not yet been initiated—and may never be initiated—so long as there is a "credible threat of enforcement." *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-61 (2014); *see also New Hampshire Lottery Comm'n v. Rosen*, 986 F.3d 38, 50 (1st Cir. 2021); *Hernandez-Gotay v. United States*, 985 F.3d 71, 77-78 (1st Cir. 2021).

Here, when the petition was filed, the petitioners faced a "substantial" and "credible" threat of harm from the Immigration Court's failure to consider

conditions of release and ability to pay. Enforcement proceedings against them had *already* been initiated, they were *already* detained, and the government had *already* refused their release without considering these factors. RA55-56; RA81; RA129-30 & RA133. The Immigration Court already had a consistent practice or policy of failing to consider these factors. RA51; RA322. If the District Court had remanded their cases to the Immigration Court only with instructions to re-allocate the burden of proof, then the petitioners would have immediately faced deficient bond hearings in which conditions of release and ability to pay would be ignored.

The government cannot credibly argue that conditions and high bonds were not live issues when the case was filed; it *demanded* those things as terms of release within a month after the case began. *See* RA210; RA212; RA316 & 335 (Pet.'s SJ SOF ¶11 & Gov't Response); SRA6-12 (ISAP conditions). If the petitioners had not challenged those harms, and if the District Court had not addressed them, then the petitioners would have certainly confronted them upon their return to Immigration Court. That is more than sufficient to confer Article III standing under any standard. *See Susan B. Anthony List*, 573 U.S. at 159-61; *MedImmune*, 549 U.S. at 130; *Maine People's Alliance*, 471 F.3d at 284; *Nkihtaqmikon*, 503 F.3d at 27.

III. The Named Petitioners' Also Have Standing Because Their Claims Are Not All Moot.

Lastly, although the Court's briefing order seems to posit that the petitioners' "individual claims became moot" when the government voluntarily released them,

these claims did not become moot. *See Clark v. Martinez*, 543 U.S. 371, 376 n.3 (2005). Because the government simply exercised its discretion to release petitioners after litigation was initiated, multiple exceptions to the mootness doctrine apply, including that the harms are capable of repetition but evading review, and that the government's voluntary cessation does not generally moot a claim. *See, e.g.*, *Knox v. Svc. Employees Int'l Union*, 567 U.S. 298, 307 (2012); *United States v. Chin*, 913 F.3d 251, 256 (1st Cir. 2019). And while Mr. Celicourt's removal proceeding concluded with *Celicourt v. Barr*, 980 F.3d 218 (1st Cir. 2020), proceedings for Mr. Pereira Brito and Mr. Avila Lucas remain open and ongoing. The government surely believes that it could return those two petitioners to Section 1226(a) detention. *See* 8 U.S.C. § 1226(b) (authorizing revocation of release and re-arrest "at any time"). Given that these petitioners are subject to ongoing enforcement proceedings in which the government asserts the right to arrest them, they maintain a personal stake in ensuring that any such arrest would be accompanied by constitutionally adequate procedures to protect their liberty.

CONCLUSION

For all the reasons stated above, the petitioners have Article III standing to raise claims concerning to the failure to consider ability to pay and possible alternative conditions of release in Immigration Court bond hearings.

Respectfully submitted,

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By and through their counsel,

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Dated: September 8, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the 15-page limit imposed by the Court's August 18, 2021 corrected order directing the parties to file supplemental briefs, because it is 15 pages long, determined by the page processing function of Microsoft Word, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f).

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

/s/ Susan M. Finegan

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, I caused the Petitioners-Appellants/Cross-Appellees' Supplemental Brief to be filed with the Clerk of the Court and served upon Respondents-Appellees/Cross-Appellants electronically via the Court's CM/ECF System.

/s/ Susan M. Finegan