From: (b)(6); (b)(7)(C)
Sent: Mon, 2 Dec 2019 18:54:58 +0000
To: # Boston OCC (All Employees)
Subject: Brito Decision Issued - Burden of Proof in 236(a) bond hearings on DHS effective December 13, 2019.
Attachments: Doc 88 112719 Memorandum and Order.pdf, Brito Memorandum and Order Class Certification.pdf

All – Judge Saris issued the below order and the attached memorandum and order last Wednesday in the Brito class action litigation in USDC-MA. As expected, Judge Saris granted the Plaintiffs' motion for summary judgement and allowed in part and denied in part the requested declaratory and injunctive relief. The Brito class action litigation deals with bond hearings conducted in the Boston immigration court pursuant to INA Section 236(a). As set forth below, Judge Saris found that beginning on December 13, 2019, DHS bears the burden of proof in 236(a) bond hearings and 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. Judge Saris further ordered that 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.

The above applies to aliens who have not yet received a bond hearing before the Boston immigration court.

(b)(5)

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If anyone has any questions, feel free to let me know.

(b)(6);

ORDER

Plaintiffs' motion for summary judgment and motion to modify the class definitions are **ALLOWED.** Plaintiffs' request for declaratory and injunctive relief is **ALLOWED IN PART** and **DENIED IN PART.**

DECLARATORY JUDGMENT (BOTH CLASSES)

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

PERMANENT INJUNCTION (BOTH CLASSES)

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

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

PERMANENT INJUNCTION (POST-HEARING CLASS ONLY)

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

(b)(6); (b)(7)(C)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

November 27, 2019

Saris, C.J.

INTRODUCTION

In this class action, Plaintiffs challenge the procedures at immigration court bond hearings on the grounds they violate the Fifth Amendment Due Process Clause, the Administrative Procedure Act ("APA"), and the Immigration and Nationality Act ("INA"). Specifically, Plaintiffs claim that the allocation of the burden of proof to the alien and failure to consider alternative conditions of release and the alien's ability to pay are unlawful with respect to aliens detained under 8 U.S.C.

§ 1226(a), the provision applicable to aliens with no serious criminal convictions who are not subject to an order of removal.

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

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

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

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

In summary, the Court holds and declares as follows: First, the Board of Immigration Appeals ("BIA") policy of placing the burden of proof on the alien at 8 U.S.C. § 1226(a) bond hearings violates due process and the APA. Second, due process requires the Government prove at § 1226(a) bond hearings an alien's

dangerousness by clear and convincing evidence or risk of flight by a preponderance of the evidence. Third, due process requires the immigration court to evaluate an alien's ability to pay in setting bond, and consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances. Fourth, the Government shall produce to class counsel certain information regarding each member of the Post-Hearing Class in order to facilitate individual habeas petitions challenging their continued detention.

FACTUAL BACKGROUND

I. Bond Hearings

A. The Class Representatives

Gilberto Pereira Brito is a citizen of Brazil. Immigration and Customs Enforcement ("ICE") arrested him at his home in Brockton, Massachusetts on March 3, 2019. On April 4, 2019, Pereira Brito received a bond hearing in Boston Immigration Court where he was required to prove that he is not a danger or a flight risk in order to be released from custody. At the hearing, Pereira Brito presented evidence that he lives in Brockton with his wife and three young children, all of whom are U.S. citizens. Further, his wife is disabled and cannot work, which means Pereira Brito is the sole provider for his family. Prior to his arrest, Pereira Brito voluntarily disclosed his

location to the Government as part of the process for applying for lawful permanent resident status through his wife. In immigration court, meanwhile, he applied for cancellation of removal on the basis that he has been in the United States for more than 10 years and has U.S. citizen family members who would suffer an exceptional and extremely unusual hardship were he removed. Other than his March 2019 arrest by ICE, Pereira Brito had not been arrested for, charged with, or convicted of any crimes since May 2009. The immigration judge denied him bond because he "did not meet his burden to demonstrate that he neither poses a danger to the community nor is a risk of flight."

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

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

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

B. Bond Hearings

Between November 1, 2018 and May 7, 2019, Boston Immigration Courts held bond hearings for 700 aliens, and Hartford Immigration Courts held bond hearings for 77 aliens. Immigration

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

DISCUSSION

I. Statutory and Regulatory Framework

Pursuant to 8 U.S.C. § 1226(a), "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Unless the alien is removable on certain criminal or terrorist grounds, see id. § 1226(c), the Attorney General may continue to detain him or may release him on "conditional parole" or "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General," id. § 1226(a)(1)-(2). After ICE makes the initial decision to detain an alien, the alien may request a bond hearing in immigration court at any time before a removal

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

order becomes final. 8 C.F.R. § 236.1(d)(1). The immigration court's bond decision is appealable to the BIA. Id. § 1003.19(f). Notably, § 1226(a) is silent as to whether the Government or the alien bears the burden of proof at a bond hearing and what standard of proof that party must meet. See 8 U.S.C. § 1226(a).

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

on the alien. See, e.g., Matter of Fatahi, 26 I. & N. Dec. 791, 793 (BIA 2016).

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

II. Constitutional Claim

Plaintiffs have moved for summary judgment on their constitutional claim that that the procedures currently followed in § 1226(a) bond hearings violate the Due Process Clause of the Fifth Amendment. They contend that a constitutionally adequate bond hearing requires that (1) the burden of proof be placed on the Government, (2) the Government prove by clear and convincing evidence that the alien is dangerous and a flight risk, (3) the immigration judge consider the alien's ability to pay in setting bond amounts, and (4) the immigration judge consider alternative

conditions of release that will assure the safety of the community and the alien's future appearances. There are no disputed issues of material fact.

a. Burden of Proof

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

Most other district courts have reached the same conclusion. See Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (collecting cases). No circuit court has addressed the allocation of the burden of proof in § 1226(a)

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

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

b. Standard of Proof

Plaintiffs argue that due process requires that the Government prove flight risk and dangerousness by clear and

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

In Reid v. Donelan, 390 F. Supp. 3d 201, 227-28 (D. Mass. 2019), however, the Court held that a criminal alien subject to unreasonably prolonged mandatory detention under 8 U.S.C. § 1226(c) is entitled to a bond hearing at which the Government bears the burden of proving either his dangerousness by clear and convincing evidence or his risk of flight by a preponderance of the evidence. This differentiated standard of proof is the same that applies in the context of criminal pretrial detention under the Bail Reform Act. See United States v. Salerno, 481 U.S. 739, 751 (1987) (holding that pretrial detention is "consistent with the Due Process Clause" "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991) (holding that standard for pretrial detention based on risk of flight is preponderance of the evidence).

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

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

c. Conditions of Release and Ability to Pay

Plaintiffs argue that due process requires an immigration court consider both an alien's ability to pay in setting the bond amount and alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances. This is what the Court held in Reid with respect to bond hearings for aliens detained under § 1226(c). 309 F. Supp. 3d at 225. The Court now holds that this requirement applies equally in 1226(a) bond hearings. This requirement ensures that the decision to continue detention of an alien is reasonably related to the Government's interest in protecting the public and assuring appearances at future proceedings.[2] See Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017) (requiring ICE and immigration judges consider alternative conditions of release and ability to pay in setting bond amounts for aliens detained under § 1226(a)); Abdi v. Nielsen, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018) (requiring same for arriving aliens detained under 8 U.S.C. § 1225(b)).

III. The APA Claim

Plaintiffs contend that the allocation of the burden of proof to the alien in § 1226(a) bond hearings also violates the

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

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

As an initial matter, the APA provides Plaintiffs with a cause of action to challenge the BIA's policy decisions regarding detention. See Judulang v. Holder, 565 U.S. 42, 52-53 (2011). APA challenges to immigration detention policies in District Court are not precluded by the zipper clause in § 1252(b)(9).[3] See Aguilar v. ICE, 510 F.3d 1, 11 (1st Cir.

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

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

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

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

IV. Class Modification

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

V. Remedy

Plaintiffs seek a declaratory judgment setting forth the minimum procedural requirements for § 1226(a) bond hearings to satisfy the Due Process Clause. They also seek an injunction ordering the Government to comply with these procedures in all

future bond hearings. For the Post-Hearing Class only, Plaintiffs request an injunction ordering the Government provide new bond hearings to class members who were prejudiced by the constitutional deficiencies of their original bond hearings. They also request the Court to order the Government to take additional steps to facilitate the process of providing class members with new bond hearings.

a. Jurisdiction

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

voices to the three other justices who said the same in Jennings, 138 S. Ct. at 875 (Breyer, J., dissenting).

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

b. Injunctive Relief

A court may issue a permanent injunction if "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer

from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." Healey v. Spencer, 765 F.3d 65, 74 (1st Cir. 2014).

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

The Government contends that the third and fourth factors cannot be satisfied. First, the Government argues that the proposed injunction would adversely affect the public interest because it is contrary to congressional intent. This is wholly unpersuasive. Although the statute does state that "an alien may be . . . detained," 8 U.S.C. § 1226(a), § 1226 is silent on the procedures applicable in immigration bond hearings. Cf. Zadvydas v. Davis, 533 U.S. 678, 697 (2001) ("[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion."). In any case, requiring the Government to obey the

Constitution in its administration of immigration detention supports the public interest. See Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005) ("[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

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

c. Post-Hearing Relief

The parties' primary dispute concerning the scope of the injunctive relief concerns the Post-Hearing Class. Plaintiffs request that the Court order the Government to provide for each

class member: (i) the name and A-number; (ii) the current location; (iii) the date the current period of detention began, (iv) the name of the person's counsel in immigration court, if any, (v) a statement of whether the Government intends to dispute prejudice as to that person, and if so, a brief explanation of the good faith basis for such dispute, and (vi) a statement of whether a new bond hearing has taken place after the date of the Court's judgment and, if so, the outcome.

Some of the Plaintiffs' requests are reasonable and appropriate. The Government must provide class counsel with basic information regarding the Post-Hearing Class members whom it is currently detaining (i.e., name, location, detention date, counsel information, bond hearing dates). This information should be readily accessible to the Government and, in some cases, the information will be within its exclusive control. The sticking point is Plaintiffs' request that the Government also provide for each Post-Hearing Class member a statement of whether it intends to contest prejudice in a subsequent habeas action and its good faith basis for contesting prejudice. This proposed relief would be unduly burdensome for the Government because Plaintiffs allege, and the Government does not dispute, that since November 2018 hundreds of aliens have been denied bond. As the Court already explained in its class certification opinion, members of the Post-Hearing Class will have to litigate

prejudice through individual habeas petitions. The Government does not have to take a position on prejudice with respect to individual class members before any habeas petitions are filed.

ORDER

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

DECLARATORY JUDGMENT (BOTH CLASSES)

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

PERMANENT INJUNCTION (BOTH CLASSES)

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

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

PERMANENT INJUNCTION (POST-HEARING CLASS ONLY)

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

SO ORDERED.

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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

August 6, 2019

Saris, C.J.

INTRODUCTION

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

I. Named Plaintiffs

A. Gilberto Pereira Brito

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

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

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

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

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

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

B. Florentin Avila Lucas

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

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

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

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

C. Jacky Celicourt

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

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

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

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

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

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

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

III. Procedural History

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

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

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

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

DISCUSSION

I. Statutory Background

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

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

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

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

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

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

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

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

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

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

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

II. Class Certification Standard

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

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

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

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

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

III. Analysis

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

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

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

A. 8 U.S.C. § 1252(f)(1)

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

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

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

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

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

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

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

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

B. Mootness of the Named Plaintiffs' Claims

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

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

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

C. Prejudice Requirement

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

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

1. Commonality, Typicality, and Adequacy

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

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

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

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

2. Rule 23(b)(2)

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

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

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

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

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

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

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

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

ORDER

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

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

Post-Hearing Class: All individuals who 1) are or will be detained pursuant to 8 U.S.C. § 1226(a), 2) are held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and 3) have received a bond hearing before an immigration judge.

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

SO ORDERED.

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