No. 20-1828

In the United States Court of Appeals
for the Fourth Circuit

MARVIN DUBON MIRANDA, ET AL.

Petitioners-Appellees,

v.

MERRICK B. GARLAND, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
DISTRICT COURT NO. 20-CV-01110-CCB

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, counsel for Petitioners-Appellees hereby make the following disclosures: (1) Appellees are not publicly held corporations or other publicly held entities; (2) Appellees do not have any parent corporations; (3) no publicly held corporation owns 10 percent or more of stock in the respective Appellees; (4) there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation; (5) Appellees are not trade associations; (6) this case does not arise out of a bankruptcy proceeding; and (7) this is not a criminal case in which there was an organizational victim.

Dated: June 4, 2021

/s/

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INTRODUCTION

This case concerns the procedures required before the government may deprive a person of their liberty—a fundamental right enshrined in the Constitution. In our legal system, liberty is the norm, and detention a carefully limited exception. But before the decision below, *detention* was the default for individuals taken into immigration custody pending civil removal proceedings in the Baltimore Immigration Court. The government routinely imprisoned individuals like Petitioners based on immigration court bond hearings lacking the most basic due process protections.

In its preliminary injunction order, the district court sought to correct that, holding that due process requires that: (1) the government bear the burden to justify continued civil immigration detention by clear and convincing evidence; and (2) the immigration judge ("IJ") consider a noncitizen's ability to pay a set bond amount and suitability for release on alternative conditions of supervision. The government lodged a blanket appeal of that decision. Petitioners respectfully request that this Court affirm.

STATEMENT OF THE ISSUES

1. Does the Due Process Clause require the government to bear the burden of justifying a noncitizen's continued detention at a bond hearing by clear and convincing evidence under 8 U.S.C. § 1226(a);

2. Does the Due Process Clause require an IJ to consider a noncitizen's ability to pay a bond and suitability for release on alternative conditions of supervision in order to prevent wealth-based detention;

3. Does 8 U.S.C. § 1226 (a) require an IJ to consider a noncitizen's ability to pay a bond and suitability for release on alternative conditions of supervision;

4. Does 8 U.S.C. § 1252(f)(1) authorize the preliminary injunction, where the relief does not "enjoin or restrain the operation of" the statute, and the beneficiaries of the injunction are all "individual alien[s] against whom [removal proceedings] have been initiated";

5. Did the district court's equitable powers authorize its grant of preliminary classwide relief before class certification;

6. Did the government waive (1) its arguments under 8 U.S.C. § 1252 (f)(1) and (2) its arguments challenging the scope of preliminary relief by failing to raise them in opposition to Petitioners' motion for preliminary injunction?

STATEMENT OF THE CASE

I. Legal Background

Noncitizens may be subject to civil detention during proceedings to seek their removal from the United States. Generally, subsection (a) or (c) of 8 U.S.C. § 1226 governs such detention. Section 1226(a), the default provision, authorizes discretionary detention and release of noncitizens. Section 1226(c) carves out an

exception to this rule, mandating detention for noncitizens with certain criminal convictions. This appeal concerns only procedures for implementing § 1226(a).

Under § 1226(a) and its implementing regulations, when Immigration and Customs Enforcement ("ICE") arrests a noncitizen, it makes an initial custody determination to decide if the individual should be detained or released on bond or other conditions of supervision. 8 C.F.R. § 1236.1(c)(8). If the noncitizen remains detained after that initial custody determination, the noncitizen may then request a *de novo* custody redetermination from an IJ at a bond hearing. 8 C.F.R. § 1236.1(d). At that hearing, the IJ considers any number of the factors enumerated in *Matter of Guerra*, 24 I.&N. Dec. 37, 40 (B.I.A. 2006), to evaluate whether flight risk or dangerousness justify continued detention. If not, the IJ orders the noncitizen released on a monetary bond.[1] No regulation or agency guidance requires that the IJ consider the noncitizen's ability to pay a bond amount or suitability for alternative conditions of release, such as a reporting requirement or electronic monitoring.

Practically, because ICE frequently decides to keep noncitizens detained, the bond hearing before the IJ is the *one* shot many noncitizens have to seek release and win their liberty during their removal proceedings. While noncitizens may appeal

[1] Although 8 U.S.C. § 1226(a)(2)(B) authorizes release on "conditional parole"—i.e., release conditions apart from a monetary bond—prior to the PI, IJs in the Baltimore Immigration Court did not release noncitizens on alternative conditions of supervision. *See* JA074 (declaration of Adam Crandell); JA084 (declaration of Katherine Perino).

adverse IJ decisions to the Board of Immigration Appeals ("BIA"), 8 C.F.R. § 1003.19(f), backlogs delay BIA decisions for months, while the individual remains imprisoned.[2] Noncitizens rarely have a second shot before the IJ because requests for renewed IJ custody redeterminations are available only if noncitizens can establish that their "circumstances have changed materially." 8 C.F.R. § 1003.19(e).

A. Congress Enacted § 1226(a) Against the Backdrop of Long-Standing Agency Rules Establishing a Presumption of Release.

For nearly five decades, the Executive Branch implemented § 1226(a) and its predecessor statute through a presumption of release, which the government could only rebut by proving that detention was necessary to prevent the individual's flight or protect public safety. *See* JA096 (declaration of former IJ Denise Noonan Slavin);[3] *see also Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) ("Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond."); *Matter of Patel*, 15 I.&N. Dec. 666,

[2] *Adjudication Statistics: Case Appeals Filed, Completed, and Pending*, EOIR (Apr. 19, 2021), https://www.justice.gov/eoir/page/file/1248501/download.

[3] The government cites a remark in *Reno v. Flores*, 507 U.S. 292, 306 (1993), that Congress "eliminated any presumption of release pending deportation" and instead "committ[ed] that determination to the discretion of the Attorney General." Gov't Br. 8. However, there the Court referenced a "precursor to" § 1252(a), which some courts construed as *mandating release* whenever a detained person could post bond. *See id.*; *Carlson v. Landon*, 342 U.S. 524, 538-39, 538 n.31 (1952) (discussing 8 U.S.C. 156 (1946)). Congress revised that statute in 1950 to add the phrase "in the discretion of the Attorney General," simply clarifying that the decision to release (or not) was for the Attorney General to make. *Id*. at 538-40.

666 (B.I.A. 1976) (reaffirming that a noncitizen "generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk" (citations omitted)).

In the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Congress re-codified the predecessor statute as today's § 1226(a):

> (a) Arrest, detention and release
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . . .

8 U.S.C. § 1226(a).

The only substantive change to the statutory text was to raise the minimum bond amount to $1,500. *Compare id. with* 8 U.S.C. § 1252 (a)(1) (1995). Notably, Congress simultaneously created a new mandatory detention provision, § 1226(c), for noncitizens subject to removal based on certain criminal offenses, mandating their custody without *any* bond hearing. Importantly, Congress only allowed for release of noncitizens subject to § 1226(c) through the federal Witness Protection Program, and explicitly placed the burden on noncitizens to show they are not a

flight risk or a danger to the community. 8 U.S.C. § 1226 (c)(2). By contrast, Congress did *not* disturb the longstanding presumption of release for noncitizens eligible for bond hearings under § 1226(a).

B. The BIA Abruptly Changed the Burden of Proof in Bond Hearings.

After IIRIRA, the BIA continued reading § 1226(a) to impose a presumption of release until 1999, when it abruptly changed course. *See Matter of Adeniji*, 22 I.&N. Dec. 1102, 1112-13 (B.I.A. 1999).[4] Under *Adeniji* and its progeny, the BIA has since required that people seeking release prove "to the satisfaction of" an IJ that they do not pose a danger to property or persons and are likely to appear for any future proceeding. *See id.*; *Guerra*, 24 I.&N. Dec. at 40. The result is a rule of detention by default: the government imprisons individuals it suspects of being removable without having to provide any individualized justification. Instead, the *individual* shoulders the burden of proving two negatives—that they pose neither a danger nor flight risk—to be released. Those who cannot meet this burden suffer months-long detention (if not longer) pending their removal proceedings. *See infra* Statement III (describing Petitioners' months-long detentions); *see also Velasco*

[4] In doing so, the BIA relied on 8 C.F.R. § 236.1(c)(8) (1999), which stated that the noncitizen "must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." However, this regulation, now 8 C.F.R. § 1236.1(c)(8), governs burden in the initial custody determination made by an ICE officer—*not* bond hearings before the IJ. Regulations governing bond hearings are silent on burden of proof. *See* 8 C.F.R. §§ 1003.19, 1236.1(d)(1).

Lopez v. Decker, 978 F.3d 842, 846 (2d Cir. 2020) (individual detained for 15 months under § 1226(a), "with no end in sight").

II. Petitioners' Detention and Unconstitutional Bond Hearings

The government detained Petitioners Marvin Dubon Miranda, Ajibade Thompson Adegoke, and Jose de la Cruz Espinoza following § 1226(a) bond hearings that were fundamentally unfair, violated their due process rights, and guaranteed a result of continued detention.

ICE detained Mr. Dubon Miranda on December 12, 2019, denying him bond. JA135. On February 26, 2020, Mr. Dubon Miranda had a bond hearing in the Baltimore Immigration Court, in which he bore the burden of proving that he was not a flight risk or danger to the community. JA136. The Department of Homeland Security ("DHS") offered no documentation to oppose bond, but merely alleged, without *any* evidence and for the first time at that hearing, that he had a conviction involving domestic violence. JA136-37. Mr. Dubon Miranda, who had no notice of the allegations DHS would levy against him, submitted supportive letters from his son, ex-wife, friends, and his terminally ill partner. *Id.* Nonetheless, the IJ denied bond, holding that Mr. Dubon Miranda failed to show he was not a danger, in part due to DHS's unsubstantiated accusation of a domestic violence crime. *Id.*

ICE detained Mr. Thompson Adegoke on November 18, 2019. JA177. Although he had no criminal convictions and only minor traffic violations, ICE

denied him bond. *Id.* Mr. Thompson Adegoke, then *pro se*, had a bond hearing on December 2, 2019 in the Baltimore Immigration Court. JA178. He was not aware that he was having a bond hearing until the hearing began and did not know what was expected of him. *Id.* The IJ set bond at $15,000, much higher than any amount Mr. Thompson Adegoke could afford. *Id.* The IJ did not inquire into his financial circumstances, provided a perfunctory explanation as to why bond was being set at that amount, and did not consider alternative conditions of supervision. *Id.* Afterwards, Mr. Thompson Adegoke wrote a letter to the IJ, explaining that he would sell his only property (a car) to put toward bond, but that he had no family in the U.S. who could help him pay such a high amount. JA178-79, 185. He asked the IJ to reduce his bond to $5,000 because he was a "man without resources," but received no response. *Id*.

On February 9, 2020, local law enforcement took Mr. de la Cruz Espinoza into criminal custody after he had a dispute with his brother. JA188-89. The criminal court released him on his own recognizance. JA189. Upon release, ICE took him into immigration custody on February 12, 2020. *Id.* On February 19, 2020, Mr. de la Cruz Espinoza had a bond hearing in the Baltimore Immigration Court, where he presented evidence of his significant family ties, including his wife and four U.S. citizen children. JA187, 190. He had no criminal convictions and only traffic violations. JA189. He requested bond at $5,000, an amount within his ability to pay

given his financial responsibilities as the primary breadwinner for his family and the manager of a small landscaping business, which could not operate without him while he was in detention. JA190. While the government conceded that it had *no* documentation and only limited information about Mr. de la Cruz Espinoza's pending charges, it argued that he bore the burden to demonstrate that he was not a flight risk or danger. JA639-41. The IJ granted Mr. de la Cruz Espinoza bond at $20,000, which he could not afford. JA190-91. On March 4, 2020, he requested that bond be lowered but was denied. JA191.

III. Procedural Background

On April 30, 2020, Petitioners filed a Habeas Corpus Petition and Class Action Complaint for Declaratory and Injunctive Relief (the "Petition"). JA14-460. They sued on behalf of a proposed class consisting of "all people who are or will be detained under . . . § 1226(a), and had or will have a bond hearing before the Baltimore Immigration Court[.]" JA17.

On May 5, 2020, Petitioners filed a Motion for Temporary Restraining Order and/or Preliminary Injunction (the "Motion"). JA461-817. Two days later, Mr. Thompson Adegoke was granted asylum and released, JA818, after being detained for nearly six months. *Compare id. with* JA177. On May 18, 2020, Mr. Dubon Miranda was granted withholding of removal, JA918, and released after

languishing in detention for over five months. *Compare id. with* JA135. On May 22, 2020, Petitioners filed a Motion for Class Certification. JA919-46.

On May 29, 2020, the district court granted Petitioners' Motion for Preliminary Injunction ("PI"), ordering that

> all future bond hearings conducted in the District of Maryland for individuals held pursuant to 8 U.S.C. § 1226(a) adhere to the following requirements: (1) the government must bear the burden of proving, by clear and convincing evidence, that a noncitizen is a flight risk or a danger to the community in order to justify detention; and (2) the IJ must consider a noncitizen's ability to pay a set bond amount and his or her suitability for release on alternative conditions of supervision.

JA947-48. The Court also ordered new bond hearings for individuals detained under § 1226(a). JA948.

On June 15, 2020, Mr. de la Cruz Espinoza received a new bond hearing pursuant to the injunction. JA978. The IJ reconsidered the prior bond amount of $20,000 and ordered Mr. de la Cruz Espinoza released with an ankle monitor and no monetary bond. *Id.* In total, the government detained Mr. de la Cruz Espinoza for more than four months. *Compare id. with* JA189.

The government filed a notice of appeal of the PI on July 27, 2020, JA982-84, and filed its opening brief on December 3, 2020. Dkt. 21 ("Gov't Br."). On December 4, 2020, the district court denied Petitioners' motion for class certification without prejudice to renewal after the conclusion of this appeal. ECF 75.

SUMMARY OF THE ARGUMENT

The PI enforces two well-established due process safeguards against arbitrary detention: that (1) the government bear the burden of justifying an individual's civil immigration detention by clear and convincing evidence; and (2) the decisionmaker (here, the IJ) consider the individual's ability to pay a bond and alternative forms of supervision when determining their conditions of release. In so ordering, the district court joined the growing consensus among federal courts requiring these basic protections at immigration court bond hearings. *See infra*, Argument I(A); II.

In asking this Court to undo the PI, the government mischaracterizes Petitioners' arguments, the district court's reasoning, and governing case law. The Court should reject this attempt to avoid basic constitutional requirements. Petitioners do not challenge the government's authority to detain or any discretionary determinations IJs make in bond hearings, and the PI does not prohibit the government from detaining anyone, as the government contends. *See* Gov't Br. 12.[5] Instead, Petitioners challenge *only* the government's failure to follow basic procedures required by the Constitution to ensure that bond hearings are fair and detention serves a valid purpose.

[5] Citations herein to pages of Appellants' Opening Brief refer to the CM/ECF page numbers.

Nor has the Supreme Court blessed the government's rule of detention by default, as the government claims. *See* Gov't Br. 34. Rather, the Court has repeatedly held that the due process touchstone for civil detention is a hearing where the government bears the burden of justifying detention. *See infra*, Argument I(A). Likewise, the Court's precedents support the basic procedures that the district court ordered here necessary to prevent wealth-based detention—consideration of ability to pay and alternative forms of release. *See infra*, Argument II.

While the government invokes *Demore v. Kim*, 538 U.S. 510 (2003), that case is inapposite. In *Demore*, the Court reviewed Congress's determination, based on extensive studies and findings, that a subset of so-called "criminal aliens" posed a categorical flight risk and danger, and should be detained without any hearing at all under § 1226(c). *See id.* at 517–21. The Supreme Court held that, in these "narrow" circumstances, the Constitution permitted an exception from ordinary due process rules and upheld the "brief" mandatory detention of people found "deportable" based on a predicate crime. *Id.* at 513, 526, 531. Congress made no such findings justifying an exception for individuals detained under § 1226(a); indeed, Congress has long made the proposed class members eligible for release.

The government's arguments against class relief likewise lack merit. To start, the government waived its argument under 8 U.S.C. § 1252 (f)(1) by failing to raise it in opposing the PI. Regardless, (f)(1) only bars relief that "enjoin[s] or restrain[s]

the operation of" the statute itself. 8 U.S.C. § 1252(f)(1). The injunction here does no such thing. Rather, it merely requires the agency to follow hearing procedures that the Constitution requires. Furthermore, (f)(1)'s plain language contains an exception for actions like the one here, on behalf of "individual alien[s] against whom [removal proceedings] have been initiated." *Id.*; *see infra*, Argument V(B).

Finally, the district court did not abuse its discretion in granting the PI prior to class certification. Here, too, the government has waived its argument. And regardless, both the Supreme Court and this Court have affirmed the equitable power of district courts to grant injunctive relief to those similarly situated to plaintiffs, even absent class certification. *See infra*, Argument VI(B).

The PI should be affirmed.

ARGUMENT

I. Due Process Requires that the Government Justify § 1226(a) Detention by Clear and Convincing Evidence.

A. Due Process Places the Clear and Convincing Burden of Proof on the Government for Civil Detention.

The district court correctly held that due process requires that the government bear the burden of justifying detention under § 1226(a) by clear and convincing evidence.

The Due Process Clause protects all "person[s]"—citizens and noncitizens alike—from the deprivation of liberty without due process of law. U.S. Const.

amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Thus, like all civil detention, immigration detention is justified only in "special and 'narrow' nonpunitive 'circumstances,' where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (citations omitted) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Those special and narrow circumstances in immigration detention are protection against danger and flight risk. *Id*. at 690-91. Where there is no evidence that a noncitizen would flee or pose a danger to the community, detention is arbitrary and violates due process.

For a civil detention scheme to satisfy due process, the Supreme Court has required that the *government* bear the burden of justifying an individual's incarceration. The Court has consistently struck down schemes that presumptively impose detention and place the burden on the individual to prove that they should not be imprisoned. *See id.* at 692 (finding administrative custody review procedures deficient because, *inter alia*, they placed the burden on the detainee); *Foucha*, 504

U.S. 81-83 (invalidating civil commitment law because, *inter alia*, it did not require the state "to justify continued detention," but unlawfully "place[d] the burden on the detainee to prove that he [was] not dangerous"). Conversely, the Court has upheld civil detention schemes that place the burden on the government. *Salerno*, 481 U.S. at 741, 751-52, 755 (finding civil detention statute constitutional because, *inter alia*, it required government to justify detention based on danger "by clear and convincing evidence after an adversary hearing"); *Hendricks*, 521 U.S. at 353, 364, 371 (same, where "beyond a reasonable doubt" standard applied for involuntary civil commitment).

Furthermore, because a fundamental liberty is at stake in the detention context, the government must meet a heightened burden of proof. When the government seeks to deprive an individual of a "particularly important individual interest[]," *Addington v. Texas*, 441 U.S. 418, 424 (1979), it bears the burden of proof by clear and convincing evidence, *see id.* at 432-33 (civil commitment); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (parental termination); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt v. United States*, 364 U.S. 350, 353–55 (1960) (same, for denaturalization); *United States v. Comstock*, 627 F.3d 513, 524-25 (4th Cir. 2010) (upholding civil commitment statute because, *inter alia*, the government bore the burden of proving dangerousness "by clear and convincing

evidence"). This is "[b]ecause it is improper to ask the individual to 'share equally with society the risk of error when the possible injury to the individual'—deprivation of liberty—is so significant[.]" *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011) (quoting *Addington*, 441 U.S. at 427); *accord Velasco Lopez*, 978 F.3d at 856.[6]

The government invokes its plenary power over immigration and asks this Court to ignore *Addington* and related precedent because they arise outside the immigration context. *See* Gov't Br. 39. But the Supreme Court has already applied this line of civil detention cases to the immigration context to determine the due process limits on the detention of noncitizens, *Zadvydas*, 533 U.S. at 690-92 (applying, *inter alia*, *Foucha*, *Salerno*, and *Hendricks*), and has emphasized that the immigration "power is subject to important constitutional limitations," *id*. at 695; *see also Velasco Lopez*, 978 F.3d at 856 (rejecting government's argument).

Here, the government has been jailing people under § 1226(a) without being required to provide any reason whatsoever. It imposes detention by default on all individuals whom it suspects to be removable. The resulting deprivations of liberty

[6] The federal Bail Reform Act requires proof of flight risk by only a preponderance of the evidence. *United States v. Stewart*, 19 F. App'x 46, 48 (4th Cir. 2001). However, criminal defendants have a right to appointed counsel at bail hearings, 18 U.S.C. § 3142(f), and speedy trial rights, 18 U.S.C. §§ 3161-74; U.S. Const. amend. VI, which limit the risk and length of erroneous detention. Because civil immigration detainees enjoy neither right, the protection of the clear and convincing evidence standard is required to guard against undue detention.

are necessarily neither "carefully limited," *Salerno*, 481 U.S. at 755, nor "narrow," *Zadvydas*, 533 U.S. at 690, and fail to meet constitutional requirements.

In reaching this conclusion, the decision below joins a growing chorus of federal courts holding that the government must bear the burden of justifying detention under § 1226(a). *See, e.g.*, *Cruz-Zavala v. Barr*, 445 F. Supp. 3d 571, 576 (N.D. Cal. 2020); *Alfaro v. Barr*, 426 F. Supp. 3d 6, 11-12 (W.D.N.Y. 2019); *Singh v. Barr*, 400 F. Supp. 3d 1005, 1017-19 (S.D. Cal. 2019); *Darko v. Sessions*, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018); *J.G. v. Warden, Irwin Cnty. Det. Ctr.*, 2020 WL 6938013, at *8-9 (M.D. Ga. Nov. 16, 2020); *Hernandez-Lara v. Immigr. & Customs Enf't*, 2019 WL 3340697, at *7-8 (D.N.H. July 25, 2019). This Court should do the same here.

B. Neither Congress nor the Supreme Court Has Approved Detention by Default Under § 1226(a).

The government asks this Court to disregard the presumption of liberty imposed by the Due Process Clause, primarily arguing that because the Supreme Court in *Demore* upheld the categorical detention of a limited class of noncitizens without an individualized hearing, the Constitution must permit the government to detain *all* noncitizens without having to justify their imprisonment. *See* Gov't Br. 34-38. But *Demore* held only that *Congress* may adjust the normal due process presumptions when extensive legislative findings establish that certain noncitizens pose a heightened bail risk, and Congress has spoken clearly on the matter. *See* 538

U.S. at 513, 528, 531; *id.* at 522 ("Congress may make rules as to aliens that would be unacceptable if applied to citizens."). The Supreme Court has never suggested that the *Executive Branch* may abrogate the presumption of liberty whenever it chooses to detain someone for removal proceedings, as it has done here. *See supra*, Statement I(B).

Demore is clearly distinguishable. The statute there imposed mandatory detention on a narrow subset of noncitizens who were deportable for enumerated criminal convictions "obtained following the full procedural protections our criminal justice system offers." *Id*. at 513; *see also* 517-18. As the Court stressed in *Demore*, Congress determined that such noncitizens posed a categorical bail risk based on an extensive record showing that the "criminal aliens" targeted by the statute posed a heightened risk of flight and danger. *See* 538 U.S. at 518-21 (citing studies and congressional findings).

None of these criteria apply here. Section 1226(a) applies broadly to individuals with no or minimal criminal records and who are generally charged with removal because they either entered without inspection or overstayed a visa. *Cf. Zadvydas*, 533 U.S. at 690-91 (indefinite detention raised due process concerns because the statute did "not apply narrowly to 'a small segment of particularly dangerous individuals,' . . . but broadly to [noncitizens] ordered removed for many and various reasons" (quoting *Hendricks*, 521 U.S. at 368)). As to this § 1226(a)

group, Congress made no findings that they pose a categorical flight risk or a danger to the community. Instead, Congress has long authorized their release on bond and other conditions, against the backdrop of agency rules requiring that the government bear the burden of proof. *See supra*, Statement I(A).

Carlson v. Landon, 342 U.S. 524 (1952), is similarly distinguishable. Congress determined, based on an evidentiary record, that a class of "active alien communists" were especially dangerous to the United States and permitted the Attorney General to deny bail based on their active Communist affiliations. *Id.* at 526-27, 535-36, 543-44. The Attorney General was "not left with untrammeled discretion as to bail," but rather was required in bail hearings to "justify his refusal of bail by reference to the legislative scheme[.]" *Id*. at 543. Congress has made no comparable findings regarding noncitizens detained under § 1226(a).

Indeed, the government can point to nothing in § 1226(a)'s text or legislative history showing that Congress sought to depart from the due process presumption of liberty. The government cites a statement from a House Report regarding Congress's concern that a chief reason many removable noncitizens were not deported was attributable to the inability to detain them. Gov't Br. 37. However, the concern relates only to the former Immigration and Naturalization Service's ("INS") lack of detention capacity at that time and plans to increase it. *See* H.R. Rep. 104-469(I), at 123 (referring to INS's "limited resources"). The report says nothing about

presumptively detaining all people the government suspects are removable and does not justify a departure from fundamental due process.

The other cases the government cites either favor Petitioners or are distinguishable. In *Zadvydas*, the Supreme Court found the government's custody review procedures deficient partly *because* they imposed the burden of proof on noncitizens. 533 U.S. at 692. The Court in *Reno v. Flores* found that the claim there did not implicate adults' fundamental right to physical liberty, as it involved unaccompanied minors whom the Court deemed were "always in some form of custody." 507 U.S. 292, 302-03 (1993). Moreover, the minors were in fact entitled to bond hearings where the government bore the burden of proof. *See id*. at 308-09; *supra,* Statement I(A).

Finally, *Jennings v. Rodriguez* did not address Petitioners' constitutional claim, holding only that *the statute* does not place the burden of proof on the government by clear and convincing evidence. *See* 138 S. Ct. 830, 847, 851 (2018). The government acknowledges as much. Gov't Br. 40 n.6. Indeed, since *Jennings*, numerous courts have held that due process requires the government to bear the burden of justifying a noncitizen's detention under § 1226(a). *See supra*, Argument I(A).

C. The Government's Remaining Arguments Lack Merit.

The government's remaining arguments fail. First, the government faults the district court for relying on cases limiting prolonged mandatory detention under § 1226(c). Gov't Br. 38-39. But the district court also relied on cases regarding detention under § 1226(a), which the government ignores. *See* JA963-64. That aside, the fact that courts have required the government to justify detention under § 1226(c) by clear and convincing evidence *supports*, rather than undermines, requiring those procedures here. "It would be both illogical and legally unsound to afford greater procedural protections to [individuals] detained under Section 1226(c) than to [individuals] under Section 1226(a)," since individuals detained under § 1226(c) by definition have more serious criminal records. *Linares Martinez v. Decker*, 2018 WL 5023946, at *4 (S.D.N.Y. Oct. 17, 2018) (cleaned up)). Furthermore, the government's deficient bond procedures routinely lead to prolonged and unnecessary detentions. *See, e.g.*, *Velasco-Lopez*, 978 F.3d at 846 (15-month detention); *supra*, Statement III (describing Petitioners' months-long detentions).

Second, the government suggests that the presumption of liberty is limited to cases of indefinite detention. *See* Gov't Br. 39. Not so. For example, the Supreme Court in *Salerno* applied the presumption of liberty to pretrial detention, even though such detention is temporally limited by speedy trial requirements and has a definite termination point. *See* 481 U.S. at 741, 747, 755.

Third, the government suggests that Petitioners have less at stake because they "can unilaterally decide to end [their] detention by conceding to removal." Gov't Br. 39. But that ignores "the grave nature of deportation," which is a "drastic measure, often amounting to lifelong banishment or exile[.]" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (cleaned up); *see also Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of all that makes life worth living." (cleaned up)). Significantly, Mr. Dubon Miranda and Mr. Thompson Adegoke were granted withholding of removal and asylum, respectively. JA918, 818. Having to choose between sitting in detention and being deported to face persecution or death is no choice at all, and does not diminish a noncitizen's fundamental interest in freedom from imprisonment.

Finally, the government erroneously argues that the PI conflicts with precedent from sister circuits. Gov't Br. 40-42. In *Borbot v. Warden Hudson County Correctional Facility*, the Third Circuit made clear that the noncitizen did "not challenge the adequacy of his initial bond hearing," but argued, based solely on the length of his detention, that due process required a *second* hearing with the burden on the government. 906 F.3d 274, 276-77 (3d Cir. 2018). *Borbot* therefore did not

raise the constitutional claim presented here concerning the procedures applicable at the initial bond hearing.[7]

In *Velasco Lopez*, the Second Circuit required a new § 1226(a) bond hearing, with the government bearing the burden by clear and convincing evidence, for an individual detained 15 months. 978 F.3d at 855-57. Because that case involved prolonged detention arising from two constitutionally inadequate bond hearings, the court did not address whether due process requires the same protections for initial hearings. However, the court acknowledged that detention under § 1226(a) implicates a fundamental liberty interest and that placing the burden of proof on the individual created an impermissible risk of error. *See id*. at 851-53. The court also applied *Addington* and related cases to require clear and convincing evidence, and approvingly cited cases requiring these same procedures at initial § 1226(a) bond hearings. *See id*. at 855-57, 855 n.14. If anything, *Velasco Lopez* therefore *supports* the PI.

[7] Moreover, the Third Circuit *has* required that the government bear the burden of proof by clear and convincing evidence in cases involving prolonged detention under other immigration statutes. *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020) (§ 1226(c) detention); *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 224 & n.12 (3d Cir. 2018) (§ 1231(a)(6) detention).

D. The *Mathews* Test Requires that the Government Bear the Burden of Proof.

In addition to well-established due process precedent concerning civil detention, the *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), test also demands that the government bear the burden of proof in bond hearings.

Under the first *Mathews* factor, freedom from imprisonment is the most paramount of liberty interests. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Velasco Lopez*, 978 F.3d at 851. The deprivation that Petitioners suffered was severe: they were locked up in ICE detention, restricted from visits with their families, and held in the same conditions as criminal prisoners. JA137, 179-80, 191-92. Additionally, noncitizens have a significant interest in effectively preparing their own defense from removal, which is nearly impossible while sitting in detention. JA082-83 (declaration of Katherine Perino explaining that "[b]eing unable to leave detention and find a lawyer is almost a guarantee you will be deported").

As for the second *Mathews* factor, the government's prior procedures posed a substantial risk of erroneous deprivation. *See Velasco Lopez*, 978 F.3d at 852. Before the PI, noncitizens bore the burden of proving two negatives: that they were neither a danger to the community nor a flight risk. The risk of error was high, as detained noncitizens—the majority of whom are unrepresented—were expected to make this showing while behind bars. JA095-96 (declaration of former IJ Slavin); JA080-81 (declaration of Katherine Perino). And the improperly placed burden allowed ICE

to detain noncitizens while rarely—if ever—providing them with the records (if any) supporting its position, severely limiting any opportunity to meaningfully review or rebut its claims. JA071-72 (declaration of Adam Crandell); JA079-81 (declaration of Katherine Perino); JA089-90 (declaration of Michelle Mendez). Moreover, any documents produced were rarely or incompletely translated. JA080-81 (declaration of Katherine Perino). The result was a practice of "trial by surprise," in which the noncitizen had to defend against allegations and evidence with no advance notice before the bond hearing. Indeed, because the government bore no burden to justify detention, ICE attorneys often cursorily asserted, without any evidentiary support: "[W]e don't believe this person has met their burden to show they are not a flight risk or danger." JA082 (declaration of Katherine Perino).

Indeed, Petitioners' detention underscores the risk of arbitrary and wrongful deprivation of liberty absent these constitutional protections. The government incarcerated Petitioners for months following bond hearings at which they were required to prove two negatives to defeat a presumption of detention. Had the government instead been required to justify their detention by clear and convincing evidence, as due process requires, Petitioners' months-long detention based on unsubstantiated allegations and incomplete records could have been avoided.

Put otherwise, "the probable value . . . of [the] additional or substitute procedural safeguards" required by the PI is significant. *Mathews*, 424 U.S. at 335.

The district court rightly recognized that "erroneous deprivations of liberty are less likely when the government . . . bears the burden of proof." JA965. Placing the burden of proof on the government appropriately requires the party with access to records, financial resources, and legal expertise to show the necessity of continued detention. Contrary to the government's assertions, *see* Gov't Br. 54, a detained noncitizen (most likely unrepresented) is *not* in the best position to present evidence regarding dangerousness or flight risk. "[T]he government, by and large, has access to greater resources and legal expertise," and in most cases, the government "(but not the individual) ha[s] access to [immigration and criminal] records." JA096 (declaration of former IJ Slavin). Because the government enjoys a distinct advantage in accessing records and information, the burden of proof should reflect this asymmetry.

Furthermore, civil immigration detainees have limited procedural rights. Unlike criminal defendants, noncitizens seeking bond lack rights to counsel, a speedy trial, or cross-examination. JA080-81 (declaration of Katherine Perino); JA090 (declaration of Michelle Mendez); JA095-96 (declaration of former IJ Slavin). Thus, placing the burden on the government in § 1226(a) bond proceedings is the *least* that can be done to diminish the risk of violating noncitizens' due process.

As to the last *Mathews* factor, the PI's procedural protections are not costly or burdensome, so the governmental interest in not providing those protections is

insubstantial.[8] For decades, the government bore the burden of proof in these proceedings. *See supra*, Statement I(A). Restoring this scheme would in fact cut costs associated with unnecessary detention, ultimately *serving* the government. *See* JA092 (declaration of Michelle Mendez), JA096 (declaration of former IJ Slavin). Moreover, the government has no legitimate interest in "separat[ing] families and remov[ing] from the community breadwinners, caregivers, parents, siblings and employees," all of which result from the unconstitutional hearing procedures. *See Velasco Lopez*, 978 F.3d at 855. The district court was correct that any additional costs of affording basic due process protections at these hearings does not overcome a "noncitizen's significant interest in freedom from restraint." JA965.

The government fails to escape this straightforward application of *Mathews*. It contends that bond hearings in which the noncitizen bears the burden of proof "already provide ample due process." Gov't Br. 48. But "the Fifth Amendment guarantees due process of law, not just some process of law." *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016) (cleaned up). "The mere availability and utilization of some procedures does not mean they were constitutionally sufficient." *Id.* The government touts that there are three opportunities for a noncitizen to demonstrate

[8] Tellingly, the government did not seek to stay implementation of the PI during the pendency of this appeal. And although the PI was in effect for nearly six months by the time the government filed its opening brief, the government provided no support to substantiate its contention that the PI impedes legitimate government interests. *See* Gov't Br. 52-53.

their suitability for release. Gov't Br. 52. However, because *each* opportunity is constitutionally inadequate, and none requires the government to justify continued detention, the sum of the three does not cure the due process deficiency.[9]

In sum, *Mathews* requires placing the burden of proof on the government by clear and convincing evidence.

II. Due Process Requires Consideration of Ability to Pay and Alternatives to Bond to Prevent Wealth-Based Detention.

The district court also correctly concluded that due process requires IJs to consider a noncitizen's ability to pay a bond and suitability for alternative conditions of release. As every court to have reached the issue has held, these procedures are constitutionally required to prevent impermissible, wealth-based detention.

By failing to consider these factors, the government's hearing procedures resulted in detention not reasonably related to valid government purposes—i.e., ensuring future appearance and protecting the community. Under the INA, where a noncitizen has already been found fit for release on monetary bond, the noncitizen has "been determined to be neither dangerous nor so great a flight risk as to require detention without bond[.]" *Hernandez v. Sessions*, 872 F.3d 976, 990-91, 991 n.18 (9th Cir. 2017). In such situations, the imposition of a bond amount that results in

[9] This assertion also ignores that the BIA can "easily take six months or more" to decide an appeal, meaning the third opportunity under the government's framework requires severely prolonged detention. *See* JA079 (declaration of Katherine Perino).

continued detention, without consideration of the detainee's ability to pay or suitability for alternative conditions of supervision, is not reasonably related to valid government goals, and violates due process.

Indeed, "refusing to consider financial circumstances is inexplicable, as the amount likely to secure the appearance of an indigent person 'obviously differs from the amount' necessary to secure the appearance of a wealthy person." *Hernandez v. Decker*, 2018 WL 3579108, at *12 (S.D.N.Y. July 25, 2018) (quoting *Hernandez*, 872 F.3d at 991). And the government has no reason to ignore alternatives to bond given that such release conditions are highly effective at ensuring court appearance. *See Hernandez*, 872 F.3d at 991; JA681 (discussing a 2014 GAO evaluation finding a 95% attendance rate for final removal hearings when noncitizens were subjected to conditions including electronic monitoring and in-person check-ins). For these reasons, courts have almost universally required that IJs consider an individual's ability to pay when setting a bond amount, as well as alternative conditions of release. *See Hernandez*, 872 F.3d at 994; *Brito v. Barr*, 415 F. Supp. 3d 258, 267–68 (D. Mass. 2019); *Roman v. Decker*, 2020 WL 5743522, at *4 (S.D.N.Y. Sept. 25, 2020); *see also Hernandez v. Kolitwenzew*, 2020 U.S. Dist. LEXIS 97874, at *37 (C.D. Ill. Apr. 23, 2020) (concluding that failure to consider ability to pay violated due process).

Indeed, both the Supreme Court and lower courts have long recognized that incarceration without considering an individual's ability to pay or alternatives to imprisonment impermissibly risks "imprisoning a defendant solely because of his lack of financial resources," in violation of his due process rights. *Bearden v. Georgia*, 461 U.S. 660, 661–62 (1983); *infra*, n.11. The Supreme Court in *Bearden* held that in probation "revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay," so if a defendant genuinely could not pay "the court must consider alternate measures of punishment other than imprisonment." *Id*. at 661-62, 672-73. The logic of *Bearden* has been applied both in the civil contempt context[10] and in determining whether pretrial criminal bail procedures satisfy due process.[11] In particular, courts have acknowledged that while monetary pretrial bail requirements may be "constitutionally permissible," "[a]ny requirement in excess of th[e] amount [necessary to ensure a future appearance] would be inherently punitive and run afoul of due process"; thus basic procedures must be provided to ensure that any detention under a bond still serves valid government goals. *Pugh v. Rainwater*, 572 F.2d 1053,

[10] *See Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (holding that due process requires adequate procedures and specific findings as to an individual's ability to pay child support before incarcerating him for civil contempt).

[11] *See, e.g*, *Pugh v. Rainwater*, 572 F.2d 1053, 1055-57 (5th Cir. 1978) (en banc) (concluding that "incarceration of those who cannot [pay a money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements").

1057 (5th Cir. 1978) (en banc); *see also ODonnell v. Harris Cnty.*, 892 F.3d 147, 163-64 (5th Cir. 2018) (concluding that the "application of the secured bail schedule without regard for the individual['s] . . . personal circumstances," including ability to pay, violated due process). The same principles apply to the bond hearings at issue here.

Here again, *Mathews* further supports the PI. First, the right to be free from imprisonment lies "at the core of the liberty protected by the Due Process Clause[.]" *Foucha*, 504 U.S. at 80. Second, "when the government determines what bond to set without considering a detainee's financial circumstances, or the availability of alternative conditions of release, there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty." *Hernandez*, 872 F.3d at 993-94. And finally, to be eligible for § 1226(a) bond, noncitizens have been, or will be, determined to pose no flight risk or danger to the community sufficient to mandate detention; thus, "the government has no legitimate interest in detaining [those] individuals[.]" *Id.* at 994.

None of the government's arguments to the contrary are persuasive. The government first asserts that 8 U.S.C. § 1226(e) stripped the district court of jurisdiction to require that IJs consider specific factors when setting conditions of release. Gov't Br. 43-44. But as the government recognizes, § 1226(e) only bars judicial review of *discretionary* decisions about the application of § 1226 to a

particular case, not review of legal or constitutional claims. *See Velasco Lopez*, 978 F.3d at 850 (finding § 1226(e) inapplicable because "[w]hether [the noncitizen] received the due process to which he was entitled 'is not a matter of discretion' and is subject to judicial review"); *Hernandez*, 872 F.3d at 987-88 (concluding that § 1226(e) "does not . . . preclude habeas jurisdiction over constitutional claims or questions of law" (cleaned up)); *see also Jennings*, 138 S. Ct. at 841 (§ 1226(e) does not preclude challenges to "the extent of the Government's detention authority under the 'statutory framework' as a whole").

Here, by challenging § 1226(a) bond hearing procedures on constitutional and statutory grounds, Petitioners' claims fall outside of § 1226(e). *See Hernandez*, 872 F.3d at 988 (concluding that § 1226(e) did not bar the same claims Petitioners raise here: "[the plaintiffs] do not challenge the *amount* of their initial bonds as excessive; instead, . . . [they] claim that the discretionary process itself was constitutionally flawed at their initial bond determinations" (cleaned up)); *Abdi v. Nielsen*, 287 F. Supp. 3d at 339, 327 (W.D.N.Y. 2018) (finding § 1226(e) inapplicable because "the question is not whether the IJ could or should have considered those factors in setting the amount of bond, but whether the IJ *must* have done so to properly carry out the . . . hearings"). Petitioners do not challenge IJs' discretionary decision to set bond at a certain amount; rather, Petitioners contend that the policy and practice of not requiring IJs to consider an individual's ability to pay or alternative conditions of

release violates the Constitution and § 1226(a). Accordingly, § 1226(e) is inapplicable.

The scant authority the government cites does not hold otherwise. *Nielsen v. Preap*, 139 S. Ct. 954, 961-62 (2019), simply reiterates the limitations on judicial review under § 1226(e), but as explained above, such limitations are inapplicable here. The government's reliance on *Torres-Aguilar v. INS*, 246 F.3d 1267 (9th Cir. 2001), is also unavailing. Although the Ninth Circuit noted that noncitizens cannot simply recharacterize an alleged abuse of discretion as a due process violation, it clarified that judicial review is nonetheless available if there is "at least a colorable claim of a due process violation." *Id.* at 1271. The government does not—and cannot—dispute that Petitioners allege a colorable due process claim.

Moreover, the government plainly mischaracterizes the PI, asserting that requiring IJs to consider ability to pay and alternative conditions independently compels a "presumption of release" in favor of the noncitizen. Gov't Br. 44. But the government forgets that to even consider ability to pay or alternative conditions, the IJ must have already determined that the noncitizen does not present a flight risk or danger warranting detention. *See* JA969 (confirming that the PI does not change the IJ's authority to deny release upon making a finding of dangerousness or substantial flight risk). The PI simply requires guardrails against wealth-based detention for noncitizens who are otherwise eligible for release. Nor does the PI require the

government to use the "least burdensome means to accomplish its goal." Gov't Br. 43. The PI in fact leaves the government free to impose restrictive conditions of supervision, such as electronic monitoring. Finally, the government's contention that requiring consideration of ability to pay "is in tension with the Supreme Court's *Jennings* decision," *id.* at 46, is meritless. *Jennings* did not concern what procedures are necessary to prevent wealth-based detention.

III. 8 U.S.C. § 1226(a) Requires Consideration of Ability to Pay and Alternatives to Bond to Prevent Wealth-Based Detention.

Although the district court did not reach Petitioners' INA claim, *see* JA 971-72, that claim provides a further basis for this Court to affirm the PI. *See, e.g.*, *R.R. ex rel. v. Fairfield Cty. Sch. Bd.*, 338 F.3d 325, 332 (4th Cir. 2003) ("[W]e may affirm the district court's judgment on any ground properly raised below[.]"). The plain language of § 1226(a) provides that the Attorney General may continue to detain the noncitizen or "may *release*" the noncitizen on a "bond of at least $1,500 . . . *or* conditional parole"—that is, conditions of release apart from a monetary bond. 8 U.S.C. 1226(a)(1)-(2) (emphasis added). The government thus may choose to either detain or release an individual. But the government effectively eliminated the release option for indigent people because bonds set at an amount that individuals cannot afford operate as *de facto* orders of detention. Moreover, the plain language of the statute also authorizes the Attorney General to release an individual on "bond . . . *or conditional parole*." *Id.* (emphasis added). Thus, the

statute requires IJs to consider individuals for release on bond as well as on alternatives to bond. But by failing to consider individuals for release on such alternatives, the government effectively rendered the "conditional parole" prong of the statute a nullity. *See Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015).

Given that Congress provided options for detention *and* release, the proper interpretation of § 1226(a) is that once the government has found an individual eligible for release, it must reasonably calculate the bond amount, if any, that would ensure the individual's appearance at future proceedings. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("All statutes must be construed in the light of their purpose."); *United States v. Bryant*, 949 F.3d 168, 175 (4th Cir. 2020) ("[W]e must interpret the statute with reference to its history and purpose[.]"). This necessarily requires consideration of ability to pay and alternative conditions of release if the statute's release option is to have any meaning.

IV. The Remaining Factors Strongly Support the Preliminary Injunction.

A. Petitioners and the Proposed Class Would Have Suffered Irreparable Harm Absent Preliminary Relief.

The district court properly found that Petitioners would suffer irreparable injury absent a PI, acknowledging that "[t]he deprivation of a constitutional right, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" JA972 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This alone sufficed. *See*

Hernandez, 872 F.3d at 994-95 (finding plaintiffs had "carried their burden as to irreparable harm" because they would "likely be deprived of their physical liberty unconstitutionally in the absence of the injunction"); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[D]enial of a constitutional right . . . constitutes irreparable harm[.]"). Petitioners also identified an array of irreparable harms, including extreme poverty and emotional injury, that they and their families were suffering or would suffer absent the injunction. *See* JA500-02.

The district court also appropriately considered the potential irreparable injury to proposed class members. Courts regularly consider potential harm to similarly situated individuals when balancing whether to grant an injunction. *E.g.*, *Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 49 (D.S.C. 2018), *aff'd*, 941 F.3d 687 (4th Cir. 2019) (considering irreparable harm to plaintiff and other similarly situated patients); *infra* Argument VI(B) (listing cases). The government relies on a concurrence and dissent in *Trump v. International Refugee Assistance Project* ("*IRAP II*") but ignores that the majority opinion *refused to stay* the PI as applied to individuals similarly situated to plaintiffs. *See* 137 S. Ct. 2080, 2087, 2089 (2017).[12]

[12] The government further cites to *Di Biase v. SPX Corp.*, claiming that Petitioners have not "demonstrate[d] more than just a 'possibility' of irreparable harm." Gov't Br. 56. But the district court in *Di Biase* determined that the petitioners there did not demonstrate the likelihood of success on the merits and that "mere injuries" from the expenditure of "money, time, and energy" absent a stay were not enough. 872 F.3d 224, 229-30 (4th Cir. 2017). In contrast, the district court here found that

The government then attempts to undermine the district court's analysis of how the COVID-19 pandemic "escalated precipitously" the potential for irreparable harm, JA972, by focusing narrowly on the finding that the Petitioners did not have underlying health conditions that heightened their risks of harm from COVID-19, *see* Gov't Br. 56-57, JA973. First, the district court did *not* consider the heightened risk of contracting COVID-19 in detention as an independent basis for irreparable harm, but rather found it strengthened the showing of irreparable harm of unconstitutional detention. JA974. Second, the government ignores that the district court found COVID-19 to pose a threat to *all* proposed class members, regardless of underlying health conditions, due to the inability to socially distance and lack of access to personal hygiene products. *See* JA972-93.

Finally, the district court correctly concluded that Petitioners satisfied the standard for granting a mandatory injunction given the "exigencies of the situation." JA974-76. Considering Petitioners' likelihood of success on the merits, together with the unconstitutional deprivation of liberty and the heightened risk of contracting COVID-19, the district court properly found that Petitioners and the proposed class faced "significantly more serious" irreparable harm than the potential monetary

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Petitioners showed a likelihood of success on the merits of their due process claim and irreparable harm that money damages could not remedy. JA963-74.

losses that warranted a mandatory PI in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004). JA975-76.

B. The Balance of Equities and Public Interest Strongly Favor the PI.

The district court did not err in finding that the balance of equities and public interest favored granting the PI. The government's brief grossly overstates the harm it faces and ignores the interests of Petitioners, similarly situated individuals, and the public.

First, the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Indeed, "upholding constitutional rights . . . serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F3d 507, 521 (4th Cir. 2002). "The public interest benefits from an injunction that ensures [both] that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process." *Hernandez*, 872 F.3d at 996. The pre-PI procedures violated well-established constitutional protections against deprivations of liberty without due process and wealth-based detention. *See* JA481-96; *supra* Argument I-II. The mere fact that the "named Petitioners received bond hearings and the immigration judges considered their arguments in support of their release," Gov't Br. 58, does not cure the violation of their due process rights. Similarly, the

government's argument that the equities and public interest favor the government because Petitioners did not exhaust appeals to the BIA, *id.*, is unavailing.[13] *See Hernandez*, 872 F.3d at 988 (noting "[t]he exhaustion requirement is prudential, rather than jurisdictional, for habeas claims" challenging § 1226(a) bond determinations). The district court properly held that exhaustion was futile and otherwise not required. *See* JA958-60.

Second, as the district court explained, the PI still leaves "the ultimate decision of whether to detain or release the members of the proposed class . . . within the executive branch." JA960. Such relief is hardly "a broad change in policy affecting the sovereignty of the United States and the operations of its immigration laws," as the government claims. Gov't Br. 58. Indeed, as explained above, for decades the government bore the burden of proof at immigration bond hearings under the prior agency rule; by requiring the government to return to that practice, the PI imposes no significant burden. *See* JA503; JA096-97 (declaration of former IJ Slavin). And while the government has a strong interest in enforcing immigration laws, courts

[13] In a footnote, the government contends that Petitioners failed to exhaust administrative remedies before filing suit. Gov't Br. 55 n.8. The government's cursory treatment of its exhaustion defense, however, is insufficient to preserve this issue for appeal and is therefore waived. *See Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015) ("Foster's opening brief limits its discussion of direct evidence to an isolated footnote and we therefore conclude that she has waived this argument on appeal." (cleaned up)).

have long recognized that the Executive's prerogative in immigration-related matters remains subject to constitutional limits. *See Zadvydas*, 533 U.S. at 695.

Finally, the government's argument that it is harmed by the injunction is particularly meritless in light of its failure to note any resulting administrative burden or costs since the PI went into effect. *See supra* n.8. On the contrary, alternative conditions of supervision are equally if not more effective at ensuring an individual's appearance at future proceedings. *See* JA681; *see also* JA101 (declaration of former IJ Slavin noting cost-effectiveness of alternatives to detention).

V. Section 1252(f)(1) Does Not Bar the Preliminary Injunction.

A. Respondents Waived Any Argument Under § 1252(f)(1).

Unable to defeat the due process analysis, the government for the first time on appeal argues that 8 U.S.C. § 1252(f)(1) independently bars the PI here. But the government waived this argument by failing to raise it in opposition to Petitioners' Motion. "As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered." *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). Exceptions to this general rule may be warranted in "circumstances of plain error or a fundamental miscarriage of justice," *Wash. Metro. Area Transit Auth. v. Precision Small Engines*, 227 F.3d 224, 227-28 (4th Cir. 2000), but the government fails to argue, much less prove, that such circumstances exist here, *see In re Under Seal*, 749 F.3d 276, 292 (4th Cir. 2014) ("[F]ailure to argue for plain error and its

application on appeal . . . surely marks the end of the road for [the appellant's] argument for reversal not first presented to the district court." (citation omitted)).[14]

The government concedes that it failed to invoke § 1252(f)(1) in opposition to Petitioners' Motion. Gov't Br. 49 n.9.[15] It attempts to excuse that failure on the grounds that the district court "had agreed to consider issues relating to class certification after the motion for preliminary injunction had been resolved," citing a May 5, 2020 memorandum from the district court setting the briefing schedule for the Motion. *Id.* (citing ECF 16). To start, that memorandum makes no mention of class certification or classwide relief. *See* ECF 16.[16] And most importantly, Petitioners' Motion *expressly* requested classwide relief, *see* JA017; JA461, and consideration of class certification is not identical to consideration of the

[14] The inapplicability of § 1252(f)(1) to the Petitioners' requested relief, *see infra*, Argument V(B), fatally undermines any claim that failure to consider the government's argument would constitute "plain error." *See In re Am. Honda Motor Co., Inc., Dealership Relations Litig.*, 315 F.3d 417, 440-41 (4th Cir. 2003) (finding no plain error where "the law is not clear or equivalently obvious"). Moreover, as the government admits, Gov't Br. 59 n.9, any argument as to the applicability of § 1252(f)(1) was readily available when it opposed Petitioners' Motion; accordingly, the government cannot now assert that failure to consider its argument on appeal would "affect[] the fairness, integrity or public reputation of judicial proceedings." *In re Am. Honda*, 315 F.3d at 441.

[15] The government later raised § 1252(f)(1) in opposition to Petitioners' motion for class certification. ECF 35.

[16] No transcript is available for the May 5, 2020 conference call. However, counsel for Petitioners recalls that the district court expressly asked the government whether it needed to consider class certification prior to ruling on the Motion; the government stated that its preference was for the district court to rule on the Motion prior to resolving class certification.

applicability of classwide preliminary injunctive relief. The district court at no point indicated that it would limit its consideration of the requested PI to the individual Petitioners only.[17]

The government further states in conclusory fashion that the Court should hear its argument because § 1252(f)(1) "imposes a jurisdictional requirement." Gov't Br. 59 n.9. But (f)(1) imposes no limit on courts' subject-matter jurisdiction; instead, it limits only courts' power to grant relief:

> (f) Limit on injunctive relief
>
> (1) In general
>
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1232] . . . , other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252 (f)(1). By its plain terms, (f)(1) is a limit on *relief*, not on courts' subject-matter jurisdiction. This is clear from the title—"Limit on injunctive relief"—as well as its operative language, which strips lower courts of their power

[17] If the government had expected the district court to limit its consideration of the PI to the named Petitioners only, the government did not memorialize that understanding by filing a motion for reconsideration after the district court granted the classwide PI.

to "enjoin or restrain the operation of" the detention and removal provisions of the INA in certain circumstances. *Id.*

Although the statute speaks in terms of the lower courts' "jurisdiction or authority" to enter relief, that language refers to the courts' remedial powers, not their "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The Supreme Court has construed statutory language similarly granting "jurisdiction" to "impose a civil penalty" or "grant . . . injunctive relief" as "merely specifying the remedial powers of the court," rather than delimiting its subject-matter jurisdiction. *Id*. at 90 (citing statutes; explaining: "[j]urisdiction . . . is a word of many, too many, meanings," and "it is commonplace for the term to be used" to refer to the court's remedial powers (cleaned up)); *see also United States v. Beasley*, 495 F.3d 142, 148 (4th Cir. 2007) (applying *Steel* to "differentiat[e] between a court's power to hear a case—its subject matter jurisdiction—and its power to issue a remedy").

The government does not argue that § 1252(f)(1) limits this Court's authority to hear the case pursuant to its federal-question jurisdiction or jurisdiction under the habeas statute. Because (f)(1) concerns the Court's remedial powers, and not its subject-matter jurisdiction, it is therefore subject to waiver. *See Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1160 (D.C. Cir. 2007) (holding defendant waived the argument that the district court lacked "equitable power" to enter the challenged PI

by not raising it below); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (same); *In re Am. Honda*, 315 F.3d at 437-38, 440-41 (noting district court had subject-matter jurisdiction and reviewing injunction for plain error where party "failed to argue" Anti-Injunction Act's applicability below); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224-25 (8th Cir. 1987) (noting because Anti-Injunction Act imposed remedial, rather than jurisdictional, limitations on district court's authority to issue injunction, defendant's "failure to assert the Act in the District Court bars her from obtaining review of this issue on appeal"). Accordingly, the government has waived its (f)(1) argument.

B. Section 1252(f)(1) Does Not Apply to the Preliminary Injunction.

Waiver aside, § 1252(f)(1) does not apply to the PI for two reasons. First, (f)(1) only limits courts' power to "enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1232]"—that is, the statutory provisions themselves. But the injunction in this case does not require that the operation of any provision of the INA be enjoined or restrained. Section 1226(a) provides that Petitioners are eligible for release on bond or conditional parole and is silent as to the procedures for custody determinations. At most, the PI addresses that silence, mandating that the agency comply with due process by affording certain procedures when making § 1226(a) custody determinations. Importantly, § 1252(f)(1) "places no restriction on the district court's authority to enjoin agency action found to be unlawful." *Grace v.*

Barr, 965 F.3d 883, 907 (D.C. Cir. 2020); *accord Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010); *Brito*, 415 F. Supp. 3d at 269. The PI here does just that—prevent the agency from implementing § 1226(a) in a way that would violate due process.

Second, by its terms, § 1252(f)(1) limits relief "*other than*" to "an individual alien against whom [removal] proceedings . . . have been initiated." *Id.* It therefore necessarily does not bar relief where all members of the class fall within this exception. *See Padilla v. ICE*, 953 F.3d 1134, 1149-51 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021). That is precisely the case here: all Petitioners in this case, like all people detained under § 1226(a), were subject to removal proceedings.

Simply put, "Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied." *Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000) ("*AILA*"). Accordingly, § 1252(f)(1) prohibits relief for litigants who are *not* "individual alien[s]" in removal proceedings, thus restricting preemptive challenges to the enforcement of certain immigration statutes by organizations and individuals not in such proceedings. *E.g.*, *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 47-51 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487-88 (1991); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1026 (5th Cir. Unit B 1982). The (f)(1) limitation has

no application here, where Petitioners were all in removal proceedings at the time of the PI.

This plain reading of § 1252(f)(1) is reinforced by the rule that the federal courts' equitable powers are available unless Congress indicates otherwise. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Congress has not done so here. If anything, the statute confirms the propriety of the relief granted.

The government also argues that reference in (f)(1) to an "individual alien" precludes relief to more than one individual. Gov't Br. 61. But the Supreme Court has warned courts not to construe references to "any individual" or "any plaintiff" in a statute as eliminating authority under Rule 23 to address claims by a class of individuals. *See Brown v. Plata*, 563 U.S. 493, 531 (2011) (reference in statute to "particular plaintiff or plaintiffs" does not bar classwide relief); *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("[T]hat the statute speaks in terms of an action brought by 'any individual' . . . does not indicate that the usual Rule providing for class actions is not controlling[.]"). Rather, the exceptions clause clarifies that only "individual alien[s]" who are in proceedings may seek injunctive relief, as opposed to organizations suing on behalf of clients or organizational members. *Padilla*, 953 F.3d at 1150; *but see Hamama v. Adducci*, 912 F.3d 869, 877-79 (6th Cir. 2018).[18]

[18] The court in *Hamama* relied on dicta in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) ("*AADC*"), to conclude that § 1252(f)(1) bars class injunctions. *Hamama*, 912 F.3d at 877. But *AADC* did not address

Congress speaks unequivocally when it wants to prohibit class relief, as a neighboring subsection within § 1252, adopted by the same Congress, illustrates. That subsection bars courts from "certify[ing] a class under Rule 23 . . . in any action for which judicial review is authorized under a subsequent paragraph of this subsection." 8 U.S.C. § 1252 (e)(1)(B). Section 1252(f)(1) cannot be read to create a *sub silentio* ban on class actions for injunctive relief when the same Congress explicitly imposed such a ban in another subsection of the very same statute. *See Nken v. Holder*, 556 U.S. 418, 430-31 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)); *see also Padilla*, 953 F.3d at 1149-51 (construing § 1252(f)(1) narrowly in light of § 1252(e)); *AILA*, 199 F.3d at 1359 (noting that § 1252(e) contains a "ban on class actions" while § 1252(f)(1) contains a different limitation).

If the government were correct that § 1252(f)(1) limits injunctive relief to only one individual at a time, it would bar such relief in any case involving two or more

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§ 1252(f)(1)'s exception clause, it was not a class action, and its reference to § 1252(f)(1) stated only that the statute was not an affirmative grant of subject-matter jurisdiction. *AADC*, 525 U.S. at 481-82. The Supreme Court has previously rejected the government's reliance on dicta in *AADC*. *Compare AADC*, 525 U.S. at 487 (asserting habeas review unavailable post-1996 immigration laws) *with INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001) (holding habeas remains available under those laws); *see also Padilla*, 953 F.3d at 1149 (distinguishing *AADC*).

plaintiffs. But the statute surely does not mean that if two noncitizens filed suit together raising the same claim, as Petitioners did here, the court could not issue a single injunction affording both the same relief. Conversely, if the proposed class members filed dozens of separate but materially indistinguishable lawsuits, the government's interpretation of § 1252(f)(1) would prohibit a court that consolidated these cases from issuing one order, instead requiring dozens of identical "individual" injunctive relief orders. The Court should avoid interpretations that would lead to absurd results. *See United States v. Wilson*, 503 U.S. 329, 334 (1992).

VI. The District Court Appropriately Granted Preliminary Relief Before Class Certification.

A. The Government Waived Any Argument Concerning the PI Scope.

The government argues that the district court erred in granting preliminary classwide relief before certifying a class. Gov't Br. 62-63. But once again, the government waived this argument by failing to raise any challenge to the scope of relief when it opposed Petitioners' Motion below, *see Muth*, 1 F.3d at 250, and the government does not even attempt to argue that its waiver should be excused, *see In re Under Seal*, 749 F.3d at 292. Should the government contend that the vague language in footnote 2 of its Opposition be interpreted as challenging the classwide scope of the PI, *see* JA823 ("Defendants reserve the right . . . to respond to Plaintiff-Petitioner's representations on behalf of a purported class of individuals, in accordance with the scheduling conference[.]"), such a contention should not be

credited. "The onus is on counsel to adequately convey his or her arguments and requests to the court, making an adequate record for meaningful appellate review." *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 157-58 (4th Cir. 2012). Moreover, a substantive argument only in a footnote—even when made clearly—is deemed waived. *See supra* at n.13. Indeed, in granting the PI, the district court specifically noted that "[t]he defendants do not mount any specific challenges to the scope of injunctive relief requested." JA976. If the government believed the district court had misunderstood or overlooked arguments to the contrary, it did not file a motion for reconsideration or otherwise attempt to preserve its position in any subsequent filings made in the district court regarding implementation of the PI.

B. In Any Event, this Court May Authorize Preliminary Classwide Relief Before Class Certification.

The government's waiver notwithstanding, the district court hewed well within its "wide discretion" by issuing the PI classwide. *Roe v. Dep't of Def.*, 947 F.3d 207, 231 (4th Cir. 2020) (citation omitted).[19] "[B]inding precedent requires this Court to reject the Government's [categorical] argument" to the contrary. *Id.* at 232. The Supreme Court and this Court have recently confirmed "the equitable power of district courts" to issue "injunctions extending relief to those who are similarly situated to the litigants," even absent class certification. *Id.* (upholding PI for

[19] *See also Brown*, 563 U.S. at 538 ("[A] district court's equitable powers . . . [are] broad, for breadth and flexibility are inherent in equitable remedies." (cleaned up)).

plaintiffs and those similarly situated without class certification); *see also IRAP II*, 137 S. Ct. at 2087; *HIAS, Inc. v. Trump*, 985 F.3d 309, 326-27 (4th Cir. 2021). As such, courts routinely grant preliminary classwide injunctive relief before a formal ruling on class certification. *See, e.g.*, *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp.3d 367, 376 (D. Md. 2019) ("[C]ourts may enter class-wide injunctive relief before certification of a class." (citations omitted)); *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1148 (D. Kan. 2016), ("[C]ase law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion."), *aff'd* 840 F.3d 710, 752-53 (10th Cir. 2016); *Rodriguez v. Providence Comm. Corrs., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) (same); *see also* Newberg on Class Actions § 4:30 (5th ed.) ("[A] court may issue a preliminary injunction in class suits prior to a ruling on the merits.").

Moreover, such relief fully comports with Article III.[20] *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (plaintiffs that satisfy Article III standing may "seek relief

[20] The authority on which the government relies is unavailing. Even *Lewis v. Casey*, which Justice Thomas quoted while partially dissenting in *IRAP II*, 137 S. Ct. at 2090, recognized that "a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual *or class of individuals*, [may] order[] the alteration of an institutional . . . procedure that causes the harm." 518 U.S. 343, 350 (1996) (emphasis added). And the *IRAP II* majority refused to stay the injunctions as applied to individuals who were similarly situated to the plaintiffs even where a class had not been certified. 137 S. Ct. at 2087, 2089. Finally, unlike in *Gill v. Whitford*, which neither addressed a proposed class action nor interim relief, the Petitioners' remedy has been "limited to the [constitutional] inadequacy that produced [their] injury in fact." 138 S. Ct. 1916, 1930 (2018)

on the basis of the legal rights and interests of others"); *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1305-06, 1308-09 (4th Cir. 1992) (holding that plaintiffs had Article III standing to seek injunctive relief and affirming nationwide PI without class certification).

"[W]ith any equity case, the nature of the violation determines the scope of the remedy." *Mayor of Baltimore v. Azar*, 973 F.3d 258, 293 (4th Cir. 2020) (citation omitted). After finding a likelihood of success on the merits, the district court tailored its interim relief to shield Petitioners and the proposed class members from irreparable harm until litigation of the final merits. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) ("[I]f there has been a systemwide impact . . . there [may] be a systemwide remedy.").[21] The district court also needed to issue interim classwide relief "to preserve . . . [its] ability to enter ultimate relief on the merits of the same kind" for the proposed class members, *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003), who would otherwise languish in

(citation omitted). This remedy remains well rooted in their individual legal rights, not "generalized partisan preferences." *Id.* at 1933.

[21] *Cf. Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (en banc) ("*IRAP I*") (because the challenged government policy "likely violate[d] the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all [the policy's] applications"), *vacated and remanded on other grounds sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).

detention, and potentially have their removal cases finally adjudicated while behind bars, without ever having received constitutionally sound bond hearings.

The cases the government invokes are inapposite. Gov't Br. 63; *cf. supra* n.20 (discussing *IRAP II*). To start, *Washington v. Finlay* and *Davis v. Hutchins* are immaterial because in both cases, the district court erred by entering a *final judgment* before certifying the class. 664 F.2d 913, 928 (4th Cir. 1981); 321 F.3d 641, 648-49 (7th Cir. 2003). No final relief or judgment was issued here, so class certification was not required. *See* Newberg on Class Actions § 4:30 (5th ed.) ("Rule 23(b)(2) authorizes certification of a class solely for the purpose of *final* injunctive or declaratory relief."); *cf. City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020) ("[*IRAP II*] . . . should put to rest any argument that the courts lack the *authority* to provide injunctive relief that extends to non-parties.").

And *CASA de Maryland, Inc. v. Trump* was vacated by the grant of rehearing en banc. 971 F.3d 220 (4th Cir.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020); *see also* 4TH CIR. R. 35(c). In any event, the district court here targeted relief to the District of Maryland after finding likely constitutional violations, amply supported by the record. Such relief is a far cry from the universal relief at issue in *CASA* or the plainly "overbroad injunction" in *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140-41 (9th Cir. 2009).

Ultimately, the district court appropriately tailored a classwide PI to ensure other similarly situated individuals would be treated equitably and consistently, and categorically address due process violations occurring in § 1226(a) bond hearings at the Baltimore Immigration Court. *See Roe*, 947 F.3d at 233-34 ("[G]ranting relief to all [those] similarly situated . . . is thus the only way to ensure uniform, fair, rational treatment of individuals who belong to a vulnerable, and often invisible, class.") (citation omitted); *HIAS*, 985 F.3d at 326-27 (affirming nationwide scope of injunction to avoid inequitable treatment and promote consistency).

CONCLUSION

For the foregoing reasons, this Court should affirm the preliminary injunction.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners respectfully request oral argument pursuant to Local Rule 34(a). Oral argument would materially advance the Court's resolution of this appeal, which involves important, complex, and novel issues of law.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,970 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Date: June 4, 2021

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