UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIOR ONOSAMBA-OHINDO and ANTONIO LOPEZ AGUSTIN, on behalf of themselves and all others similarly situated,

Petitioners-Plaintiffs,

v.

WILLIAM BARR, in his official capacity as Attorney General of the Department of Justice; et al.,

Respondents-Defendants.

Case No. 1:20-cv-290

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

MEGAN SALLOMI*
VICTORIA ROECK
JORDAN LARIS COHEN**
CHRISTOPHER DUNN
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

JIM DAVY***
PHIL TELFEYAN***
Equal Justice Under Law
400 7th St. NW, Suite 602
Washington, D.C. 20004
Tel: (202) 505-3599

Counsel for the Petitioners-Plaintiffs

Dated: April 10, 2020
New York, N.Y.

*Application for admission to the Western District of New York pending
** Application for admission to the Western District of New York forthcoming
***Application for admission *pro hac vice* forthcoming

Table of Contents

INTRODUCTION 1

LEGAL FRAMEWORK AND STATEMENT OF FACTS 1

ARGUMENT 8

I. DETENTION IN VIOLATION OF CONSTITUTIONAL RIGHTS AND UNDER SEVERE CONDITIONS IS IRREPARABLE HARM. 9

II. IJ MONTANTE'S AND BAUMGARTEN'S POLICY OF DENYING BOND TO EVERYONE BEFORE THEM VIOLATES THE APA. 10

A. The No Bond Policy Violates the INA's Requirement that IJs Perform Individualized Custody Determinations. 10

B. The No Bond Policy Violates *Accardi* Because Governing Regulations Require an Individualized Custody Determination. 13

C. The No Bond Policy Violates Due Process. 14

III. REFUSING TO CONSIDER ABILITY TO PAY AND OTHER ALTERNATIVE CONDITIONS OF RELEASE VIOLATES THE INA AND DUE PROCESS. 15

A. Refusing to Consider Alternative Conditions of Release Violates the INA. 15

B. Refusing to Consider Ability to Pay in Setting Bond Violates the INA. 16

C. Refusing to Consider Ability to Pay or Alternatives to Detention Violates Due Process. 18

IV. DUE PROCESS REQUIRES THE GOVERNMENT TO PROVE DETENTION IS JUSTIFIED BY CLEAR AND CONVINCING EVIDENCE. 20

A. Supreme Court Precedent and the Balancing of Interests Require the Government to Bear the Burden of Proof in § 1226(a) Custody Hearings. 21

B. The Appropriate Standard of Proof is Clear and Convincing Evidence. 24

V. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR A PRELIMINARY INJUNCTION. 25

CONCLUSION 25

Table of Authorities

Cases .... Page(s)

Abdi v. Duke, 280 F. Supp. 3d 373 (W.D.N.Y. 2017) 10, 13, 17, 25

Addington v. Texas, 441 U.S. 418 (1979) 22, 24, 25

Accardi v. Shaughnessy, 347 U.S. 260 (1954)... 13, 14

Alfaro v. Barr, No. 6:19-cv-06571, 2019 WL 8064614 (W.D.N.Y. Dec. 10, 2019)......... 18, 21

Arellano v. Sessions, No. 18-cv-06625, 2019 WL 3387210 (W.D.N.Y. July 26, 2019)... 20, 21

Bearden v. Georgia, 461 U.S. 660 (1983) 18

Bellarno Int'l Ltd. v. Food & Drug Admin., 678 F. Supp. 410 (E.D.N.Y. 1988).................... 12

Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005) 23

Blandon v. Barr, No. 18-cv-06941, 2020 WL 465728 (W.D.N.Y. Jan. 22, 2020).................. 12

Brevil v. Jones, No. 17 cv 1529, 2018 WL 5993731 (S.D.N.Y. Nov. 14, 2018)......... 19, 21, 22

Bridges v. Wixon, 326 U.S. 135 (1945) 19

Brito v. Barr, 415 F. Supp. 3d 258 (D. Mass. 2019).. 18

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009)... 14

Xiao Fei Zheng v. Holder, 644 F.3d 829 (9th Cir. 2011) 16

Clark v. Martinez, 543 U.S. 371, 381 (2005) 18

Clerveaux v. Searls, 397 F. Supp. 3d 299 (W.D.N.Y. 2019)... 14, 15

Coronel v. Decker, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) 18

Damus v. Nielsen, 313 F. Supp. 3d 317 (D.D.C. 2018)..................................... 12, 13, 15

Darko v. Sessions, 342 F. Supp. 3d 429 (S.D.N.Y. 2018)... 21, 22

Doe v. Kelly, 878 F.3d 710 (9th Cir. 2017).. 25

Enoh v. Sessions, 236 F.Supp.3d 787 (W.D.N.Y. 2017) 21, 24

Faiveley Transport Malmo AB v. Wabtec Corp., 559 F.3d 110 (2d Cir. 2009)......................... 9

Foucha v. Louisiana, 504 U.S. 71 (1992).. 22

Guerrero v. Decker, No. 19 CIV. 11644, 2020 WL 1244124 (S.D.N.Y. 2020)...................... 21

Griffin v. Illinois, 351 U.S. 12 (1956).. 18

Hechavarria v. Whitaker, 358 F. Supp. 3d 227 (W.D.N.Y. 2019) 12, 18, 24

Hemans v. Searls, No. 18-cv-1154, 2019 WL 955353 (W.D.N.Y. Feb. 27, 2019) 20, 24, 25

Hernandez v. Decker, No. 18-cv-5026, 2018 WL 3579108 (S.D.N.Y. July 25, 2018) 17

Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017) .... *passim*

INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 11

Jean v. Nelson, 472 U.S. 846 (1985) 11, 12

Jennings v. Rodriguez, 138 S.Ct. 830 (2018) 24

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) 9

Jones v. Wolf, No. 20-cv-361, 2020 WL 1643857 (W.D.N.Y. Apr. 2, 2020) 9, 10, 25

Kansas v. Hendricks, 521 U.S. 346 (1997) 22

Lett v. Decker, 346 F. Supp. 3d 379 (S.D.N.Y. 2018) 17

Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2016), *vacated* 138 S. Ct. 1260 (2018) 20, 21

Marczak v. Greene, 971 F.2d 510 (10th Cir. 1992) 11

Martinez v. Decker, No. 18-cv-6527, 2018 WL 5023946 (S.D.N.Y. Oct. 17, 2018) .. 21, 22, 23

Mathews v. Eldridge, 424 U.S. 319 (1976) .... *passim*

Medley v. Decker, No. 18-cv-7361, 2019 WL 7374408 (S.D.N.Y. Dec. 11, 2019), *appeal filed*, No. 20-632 (2d Cir. Feb. 19, 2020) 21

McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988) 12

Moncrieffe v. Holder, 569 U.S. 184 (2013) 23

Montilla v. I.N.S., 926 F.2d 162 (2d Cir. 1991) 13

Navarijo-Orantes v. Barr, No. 19-cv-790, 2019 WL 5784939 (W.D.N.Y. Nov. 6, 2019) 18

Nguti v. Sessions, 259 F.Supp.3d 6 (W.D.N.Y. 2017) 21, 24

Rasel v. Barr, No. 19-cv-458, 2019 WL 4257408 (W.D.N.Y. Sept. 9, 2019) 21

Reno v. Flores, 507 U.S. 292 (1993) 11

Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904 (2d Cir. 1990) 9

Rivera v. Holder, 307 F.R.D. 539 (W.D. Wash. 2015) 16

Sajous v. Decker, No. 18-cv-2447, 2018 WL 2357266 (S.D.N.Y. May 23, 2018) 9, 25

Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011) 25

Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) 13

Stroucher v. Shah, 891 F. Supp. 2d 504 (S.D.N.Y. 2012) 9

U.S. v. Salerno, 481 U.S. 739 (1987) 22

Velasco-Lopez v. Decker, No. 19-cv-2912, 2019 WL 2655806 (S.D.N.Y. May 15, 2019), *appeal filed*, No. 19-2284 (2d Cir. July 23, 2019) 21

Velesaca v. Decker, No. 20-cv-1803 (S.D.N.Y. Mar. 30, 2020) 11, 13

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) 9

Woodby v. I.N.S., 385 U.S. 276 (1966) 19

Zadvydas v. Davis, 533 U.S. 678 (2001) 14, 18, 19, 22

Zuh v. Mukasey, 547 F.3d 504 (4th Cir. 2008) 23

Federal Statutes

5 U.S.C. § 706(2)(A) 13

5 U.S.C. § 706(2)(B) 14

8 U.S.C. § 1225 2

8 U.S.C. § 1225(b) 2, 21

8 U.S.C. § 1226 .... 2, 24

8 U.S.C. § 1226(a) .... *passim*

8 U.S.C. § 1226(a)(2) 17

8 U.S.C. § 1226(a)(2)(A) 16

8 U.S.C. § 1226(c) 2, 20

8 U.S.C. § 1226(c)(2) 3

8 U.S.C. § 1252(a) 11

Federal Regulations

8 C.F.R. § 1003.19 14

8 C.F.R. § 1003.19(a) 2

8 C.F.R. § 1003.19(d) 14

8 C.F.R. § 1003.19(f) 3

8 C.F.R. § 1236.1(d)(1) 14

Board of Immigration Appeals Decisions

Matter of Adeniji, 22 I. & N. Dec. 1102 (BIA 1999) 3, 4

Matter of Castillo-Cajura, 2009 WL 3063742 (BIA Sept. 10, 2009) 4

Matter of Garcia-Garcia, 25 I. & N. Dec. 93 (BIA 2009) 16

Matter of Guerra, 24 I. & N. Dec. 37 (BIA 2006) 3

Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019) 21

Matter of Patel, 15 I. & N Dec. 666 (BIA 1976) 3

Matter of R-A-V-P-, 27 I. & N. Dec. 803 (BIA 2020) 4

Matter of Sandoval-Gomez, 2008 WL 5477710 (BIA Dec. 15, 2008) 4

Matter of Urena, 25 I. & N. Dec. 140 (BIA 2009) 4, 17

INTRODUCTION

Each year thousands of people—many of whom have been productive, law-abiding members of American society for years—face unlawful, prolonged immigration detention because Buffalo-area immigration judges routinely violate federal law, agency regulations, and the Due Process Clause when conducting custody hearings. Specifically, these immigration judges impose on detained persons the burden of disproving their detention is justified, and, if setting a bond, do not consider the person's ability to pay, and do not consider alternatives to detention other than bond. In addition, this past year two immigration judges—Philip Montante and Mary Baumgarten—implemented policies of denying bond across the board, leading to hundreds of putative class members having no chance for release.

The detention resulting from these unlawful policies and practices inflicts enormous harm on class members, all of whom are eligible for release while their cases proceed. Mr. Agustin provides one example of hundreds: he was torn from his eight-year-old U.S. citizen daughter, friends, and community of the past twenty years and, despite never having been incarcerated before, he was jailed for eight months. The threat posed by the coronavirus, which particularly imperils those in detention facilities, compounds this harm.

Given this dire situation, the petitioners seek preliminary injunctive relief that will afford every putative class member a fair opportunity to be considered for release, consistent with the Immigration and Nationality Act, the Administrative Procedure Act, and the Due Process Clause. The petitioners respectfully submit they are likely to prevail on the merits of these claims in light of well-established caselaw, they plainly demonstrate irreparable harm, and they show the balance of equities and the public interest are strongly in their favor.

LEGAL FRAMEWORK AND STATEMENT OF FACTS

In support of their motion, the named Petitioner-Plaintiffs and the putative class (collectively "the petitioners") rely upon declarations from the proposed class representatives,

lawyers who practice in the Buffalo-area courts, a former Immigration Judge ("IJ"), a data analyst, a public health expert, and supporting exhibits[1] to establish the following.

Immigration Detention and Custody Proceedings in Immigration Court

The Immigration and Nationality Act ("INA") authorizes the Attorney General to detain alleged noncitizens pending the outcome of removal proceedings. *See* 8 U.S.C. §§ 1225, 1226. Under § 1226(a), which covers the majority of cases, the Attorney General "may" detain or release the person on a case-by-case basis. The proposed class includes only individuals detained under this provision, many of whom have strong ties to the United States and limited criminal records. *See, e.g.*, Agustin Decl. ¶¶ 2–5; Johnson Decl. ¶ 10. (The mandatory detention that § 1225(b) and § 1226(c) prescribe for those with serious criminal history or who arrive at the border seeking admission is not at issue in this case.)

All individuals ICE detains under § 1226(a) are entitled to independent review of their custody at a hearing before an IJ. *See* 8 C.F.R. § 1003.19(a). IJs are "non-supervisory career attorneys" employed by the Executive Office for Immigration Review ("EOIR") within the Department of Justice.[2] Their custody decisions can be appealed administratively to the Board

[1] *See* Declaration of Junior Onosamba-Ohindo (Mar. 10, 2020), ECF No. 2-4 ("Onosamba-Ohindo Decl."); Declaration of Antonio Lopez Agustin (Mar. 10, 2020), ECF No. 2-6 ("Agustin Decl."); Declaration of Nicholas Phillips (Mar. 10, 2020), ECF No. 2-8 ("Phillips Decl."); Declaration of Dalya Kefi (Mar. 10, 2020), ECF No. 2-3 ("Kefi Decl."); Declaration of Christine Lao-Scott (Mar. 10, 2020), ECF No. 2-5 ("Lao-Scott Decl."); Declaration of Kimberly Hunter (Mar. 10, 2020), ECF No. 2-7 ("Hunter Decl."); Declaration of Grace Zaiman (Apr. 9, 2020) ("Zaiman Decl."); Declaration of James Tinsley (Apr. 8, 2020) ("Tinsley Decl."); Declaration of Lara Nochomovitz (Apr. 8, 2020) ("Nochomovitz Decl."); Declaration of Cliff Johnson (Apr. 7, 2020) ("Johnson Decl."); Declaration of Nathalia Dickson (Apr. 9, 2020) ("Dickson Decl."); Supplemental Declaration of Dalya Kefi (Apr. 8, 2020) ("Kefi Supp. Decl."); Declaration of Denise Noonan Slavin (Apr. 4, 2020) ("Slavin Decl."); Declaration of Jesse Barber (Mar. 10, 2020), ECF No. 2-9 ("Barber Decl."); Supplemental Declaration of Jesse Barber (Apr. 3, 2020) ("Barber Supp. Decl."); Declaration of Dr. Jaimie Meyer (Apr. 7, 2020) ("Meyer Decl."); Declaration of Victoria Roeck (Mar. 10, 2020), ECF No. 2-2 ("Roeck Decl."); Supplemental Declaration of Victoria Roeck (Apr. 9, 2020) ("Supp. Roeck Decl.").

[2] Final Brief of Appellees (EOIR), ECF No. 156759 at 15, *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016) (No. 15-5201).

of Immigration Appeals, 8 C.F.R. § 1003.19(f), but even expedited appeals of custody decisions can take six months or more, *see* Zaiman Decl. ¶ 16; Tinsley Decl. ¶ 10.

In § 1226(a) custody hearings, IJs are bound by the INA, its regulations, and Board precedent. These authorities require IJs to consider whether an individual poses a danger to society, threat to national security, or flight risk. *See, e.g.*, *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). Historically, the government bore the burden to justify detention to the IJ. *See Matter of Patel*, 15 I. & N. Dec. at 666-67. In 1996, Congress shifted the burden of proof for a limited class of individuals: those subject to mandatory detention where release was necessary for witness protection. *See* 8 U.S.C. § 1226(c)(2). For all other cases, Congress did not change the historical practice of placing the burden on the government. *See* § 1226(a). Despite Congress's implicit acceptance of the burden allocation in all but exceptional cases, the Board departed from its decades-old precedent in 1999 in *Matter of Adeniji* by shifting the burden to people detained under § 1226(a) to prove to the IJ's "satisfaction" that they did not pose a danger or flight risk. *See* 22 I. & N. Dec. 1102, 1112-13 (BIA 1999).

This policy change has created a presumption of detention for a broad class of persons which is inherently difficult for detained persons to overcome. To meet their burden of proof, detained persons must gather a significant amount of evidence. Zaiman Decl. ¶ 5; Phillips Decl. ¶ 10. Exorbitant phone rates and remote locations prevent communication with the outside world to obtain supporting documents. Philips Decl. ¶ 11; Zaiman Decl. ¶ 6; Tinsley Decl. ¶ 4. Those seeking release *pro se* often do not understand the evidentiary requirements and appear for custody hearings unprepared. Slavin Decl. ¶ 5. In these scenarios, some IJs deny bond outright rather than allowing detained persons more time to gather evidence. *Id*. Even those with lawyers may not fare better due to language barriers, limited resources, and logistical problems. Philips Decl. ¶ 11; Zaiman Decl. ¶ 6. In contrast, when the government bore the burden of proof before *Adeniji*, government attorneys typically were able to meet their burden

through records "already available in the person's immigration file" or having "resources readily accessible [] to collect relevant documents fairly quickly." Slavin Decl. ¶¶ 6–7 (former IJ and government attorney recalling her experience pre-*Adeniji*).

In determining whether the detained person has disproven the need for detention, the Board does not require IJs to consider alternatives to detention other than money bond, or in setting bond, the person's ability to pay, even though the Board has explained "the setting of bond is designed to ensure an alien's presence at proceedings." *Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009). To the contrary, in unpublished decisions the Board has stated "an alien's ability to pay the bond amount *is not* a relevant bond determination factor." *Matter of Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (emphasis added); *Matter of Sandoval-Gomez*, 2008 WL 5477710, at *1 (BIA Dec. 15, 2008) (same). The Board also instructs IJs only to set money bond or order detention, without considering whether an alternative to money bond could equally serve the government's interest. *See, e.g.*, *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 807 (BIA 2020); *Matter of Urena*, 25 I. & N. Dec. at 141.

The result is individuals are detained on bonds they cannot afford. Zaiman Decl. ¶ 8; Johnson Decl. ¶ 9; Kefi Decl. ¶ 14; Onosamba-Ohindo Decl. ¶ 11. Unnecessary immigration detention is expensive: according to the Congressional Research Service, it costs $137 per day to jail an adult in ICE custody, whereas it costs $4.16 to oversee someone's participation in community supervision. Audrey Singer, Cong. Research Serv., R45804, *Immigration: Alternatives to Detention (ATD) Programs* 15 (Jul. 8, 2019) ("ATD Report") (annexed as Ex. D to Supp. Roeck Decl.). Moreover, alternative conditions of release are proven as effective, if not more effective, than bond. *Compare id.* at 9 (reporting 95% compliance in ICE community supervision program) *with* Johnson Decl. ¶ 10 (bond fund administrator noting the return rate for immigrants on bond is 87%). Considering these factors in custody hearings is

not burdensome to the government; many IJs outside the Buffalo-area courts already do so. Slavin Decl. ¶¶ 10–11, 14–16.

Pressures on IJs to Complete Cases Without Individualized Determinations

During the Trump Administration, EOIR has pressured IJs to decide cases quickly, establishing case completion quotas that encourage speed over individualized consideration.[3] Failure to meet these metrics can lead to discipline, reassignment, or termination.[4] According to IJ Tabbador, the quotas "are nothing more than a tool to bully judges into rushing through cases, curtailing or barring testimony and evidence, and issuing decisions without adequate deliberation." Tabbador Testimony at 5. The completion quotas do not account for IJs who must also adjudicate custody hearings, which "disincentivizes judges to spend time completing bond hearings" and likely leads to increased bond denials. Slavin Decl. ¶ 22. Meanwhile, caseloads have increased throughout the country to unmanageable levels without a comparable increase in support staff. *See* Tabbador Testimony at 12; SPLC Report at 18–20; Slavin Decl. ¶ 18 (recalling her docket growing from 800 to 5,000).

These problems are particularly pressing in the Buffalo-area courts; from 2018 to 2019, the courts' docket more than tripled. *See* Supp. Barber Decl. ¶¶ 13–15. This was in part because EOIR added over 1,000 cases of people detained at the Richwood Correctional Center, a jail in rural Louisiana, to appear by video there. *See id.* ¶ 15; Tinsley Decl. ¶ 1.

IJ Montante's and Baumgarten's "No Bond Policy"

In March 2019, Philip Montante was promoted to Assistant Chief Immigration Judge, overseeing the Buffalo-area courts, and Mary Baumgarten was hired as an IJ at the Buffalo

---

[3] *See* Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* 18 (June 2019) ("SPLC Report") (annexed as Ex. F to Supp. Roeck Decl.).

[4] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Sec'y & Immigration Subcomm.*, 115th Cong. 4 (Apr. 18, 2018) (statement of Judge A. Ashley Tabaddor, President, Nat'l Assoc. Immigration Judges) at 4 (Apr. 18, 2018) ("Tabbador Testimony") (annexed as Ex. E to Supp. Roeck Decl.).

Immigration Court.[5] Since then, IJs Montante and Baumgarten have denied release in 95% of their custody hearings. Barber Decl. ¶ 15. During the same time, other IJs at the Buffalo-area courts hearing similar caseloads denied release in 67% of cases, and nationwide IJs denied release in 60% of cases. *Id.* ¶ 9, 15. IJs Montante and Baumgarten have the third and fourth highest denial rates, respectively, of IJs around the country with similar caseloads. *Id.* ¶ 11. Even when the detained person and ICE stipulate to an appropriate bond amount, IJs Montante and Baumgarten deny bond. Zaiman Decl. ¶ 11; Tinsley Decl. ¶ 8; Nochomovitz Decl. ¶ 9.

The Buffalo-area Courts' Refusal to Consider Ability to Pay or Alternatives to Detention

Those who appear before other IJs at the Buffalo-area courts still face steep obstacles to release. As discussed above, putative class members struggle to gather the necessary evidence to meet their burden of proof. *See supra* pp. 3-4. If IJs set a bond amount, they routinely fail to consider the person's ability to pay. *See* Kefi Decl. ¶ 3; Phillips Decl. ¶ 6; Zaiman Decl. ¶ 8; Johnson Decl. ¶ 7; Tinsley Decl. ¶ 5; Nochomovitz Decl. ¶ 7. This has led to high bond amounts: the median bond amount at the Buffalo-area courts from March 2019 to February 2020 was $14,000—$5,000 more than the national median and more than twice the median in immigration courts ordered by a Massachusetts district court to consider ability to pay in setting bond. Supp. Barber Decl. ¶¶ 5, 8–9. As a result, many putative class members remain detained on bonds they cannot pay or rely on predatory lenders or bond funds to pay for them. Zaiman Decl. ¶ 8; Johnson Decl. ¶¶ 7, 9, 11; Kefi Decl. ¶ 14; Onosamba-Ohindo Decl. ¶ 11.

IJs at the Buffalo-area courts also routinely refuse to consider alternatives conditions of release, and some believe they lack the authority to do so. *See* Kefi Decl. ¶ 8; Phillips Decl. ¶

[5] *Biography of Philip J. Montante*, EXEC. OFF. OF IMMIG. REV., U.S. DEP'T OF JUSTICE (last visited Apr. 8, 2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios #PhilipJMontanteJr.; *Notice: Executive Office for Immigration Review Swears in 31 Immigration Judges*, EXEC. OFF. OF IMMIG. REV., U.S. DEP'T OF JUSTICE (Mar. 18, 2019), https://www.justice.gov/eoir/page/file/1145691/download.

6; Zaiman Decl. ¶ 9; Tinsley Decl. ¶¶ 5–6; Nochomovitz Decl. ¶ 7. Buffalo-area IJs ordered release without bond in just one-tenth of one percent (.1%) of cases. Supp. Barber Decl. ¶ 12.

The Respondents Impose Unnecessary and Prolonged Detention on the Petitioners

The respondents' custody review policies—placing the burden of proof on detained persons, refusing to consider ability to pay or alternative conditions of release, and the No Bond Policy exercised by some IJs—have had severe consequences for the individuals who come before them. Many, like Mr. Agustin, have resided in the United States for decades, are parents to young U.S. citizen children, and have never before been incarcerated. *See* Agustin Decl. ¶¶ 2–5; Brief of Amici Curiae Immigration Legal Service Providers at 9–11, 13–14, *Velasco Lopez v. Decker*, No. 19-cv-2284, ECF No. 67 (2d Cir. Feb. 11, 2020). They face prolonged detention in restrictive conditions essentially the same as in criminal facilities.[6] *See* Nochomovitz Decl. ¶ 13 (describing how individuals who do not give up their claims after a bond denial face prolonged detention); Agustin Decl. ¶ 6; Onosamba-Ohindo Decl. ¶ 8.

These conditions have profoundly negative physical and psychological effects on detained persons, particularly those who have suffered trauma or past persecution, and lead some to abandon meritorious cases for immigration relief. *See* Onosamba-Ohindo Decl. ¶¶ 12–13; Phillips Decl. ¶ 20; Zaiman Decl. ¶ 17; Nochomovitz Decl. ¶ 13; Tinsley Decl. ¶ 11. Detention exacerbates existing mental health challenges and causes new trauma to those

---

[6] *See generally* U.S. Dep't of Homeland Sec. Office of Inspector Gen., *Concerns about ICE Detainee Treatment and Care at Detention Facilities* at 3-9 (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, including indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detained non-citizen, a multi-day lock down for sharing a cup of coffee) (annexed as Ex. G to Supp. Roeck Decl.); U.S. Immigration and Customs Enforcement, *National Detainee Handbook: Custody Management* (2016) (annexed as Ex. H to Supp. Roeck Decl.); Swellenbach et al., *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, PROJECT ON GOVERNMENT OVERSIGHT (Aug. 14, 2019) (annexed as Ex. I to Supp. Roeck Decl.); U.S. Immigration and Customs Enforcement, *Buffalo Federal Detention Facility Handbook* (2016) (annexed as Ex. A to Roeck Decl.); Bryn Stole, *In North Louisiana, Sheriff and Private Prison Operator Trade Prisoners for ICE Detainees*, NOLA TIMES-PICAYUNE (Oct. 21, 2019) (annexed as Ex. J to Supp. Roeck Decl.).

without a preexisting diagnosis.[7] Despite these psychological harms, mental health services in ICE facilities are inadequate where they exist at all. Zaiman Decl. ¶ 22; *see also supra* n.6.

Moreover, in many cases, denial of bond results in the deportation of people legally entitled to remain in the United States. Detention prevents putative class members from accessing certain forms of immigration relief that otherwise could prevent removal. *See* Dickson Decl. ¶¶ 13-16. Prohibitively expensive phone calls, jails' remote locations, and expedited timelines hamper individuals' ability to communicate with and retain lawyers, collect necessary evidence for their cases, or retain and present expert testimony. Phillips Decl. ¶¶ 10–11, 14–20; Kefi Decl. ¶¶ 12, 16–19; Lao-Scott Decl. ¶¶ 17–18; Zaiman Decl. ¶¶ 6, 18–20; Tinsley ¶ 4. The COVID-19 pandemic has placed further restrictions on access to detention facilities that hinders detained persons' ability to retain and communicate with attorneys. Zaiman Decl. ¶ 24.

Detention also poses an especially urgent threat to individuals due to the current pandemic of COVID-19. Congregate settings such as Batavia and Richwood allow for rapid spread of infectious diseases like COVID-19. Meyer Decl. ¶¶ 9, 23. The result will be widespread infection, serious illness or death and increased burden on local community hospitals and scarce medical supplies. *Id.* ¶ 25–41.

ARGUMENT

To obtain a preliminary injunction, the petitioners must establish they are (1) likely to suffer irreparable harm in the absence of preliminary relief, (2) likely to succeed on the merits, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In ruling on the motion, the Court "may conditionally certify the class or otherwise award a broad preliminary

---

[7] *See, e.g.*, M. von Werthern et al., *The Impact of Immigration Detention On Mental Health: A Systematic Review*, 18 BMC Psychiatry 382 (2018) (annexed as Ex. K to Supp. Roeck Decl.).

injunction, without a formal class ruling, under its general equity powers." *Stroucher v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012). Each of these factors is met here,[8] and, for the reasons stated in the petitioners' motion for class certification, *see* ECF No. 3, conditional certification is warranted.

I. DETENTION IN VIOLATION OF CONSTITUTIONAL RIGHTS AND UNDER SEVERE CONDITIONS IS IRREPARABLE HARM.

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). The harm alleged must "be imminent, not remote or speculative" and be "incapable of being fully remedied by monetary damages." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). Here, the petitioners are suffering irreparable harm from their ongoing, unlawful detention. As the petitioners allege their detention violates constitutional rights, this alone "triggers a finding of irreparable harm." *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

Independently, unnecessary immigration detention is "in and of itself, irreparable harm." *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (collecting cases). The petitioners languish in prison-like conditions that cause physical and psychological injury, particularly for those who have suffered trauma or past persecution. *See supra* n. 6, 7; Onosamba-Ohindo Decl. ¶¶ 12–13; Phillips Decl. ¶ 20; Zaiman Decl. ¶ 17.

---

[8] The petitioners seek an injunction prohibiting the government from violating the INA and the Constitution which, the petitioners submit, is a prohibitory injunction requiring only a showing that they are likely to succeed on the merits. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 998-99 (9th Cir. 2017) (holding that requirement for future custody hearings to comply with due process was a prohibitory injunction and noting that requiring redetermination hearings for detained persons whose initial hearing did not comply with due process could also be seen as prohibitory). Nonetheless, the petitioners can also meet the higher mandatory injunction standard of either "a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." *Jones v. Wolf*, No. 20-cv-361, 2020 WL 1643857, at *2 (W.D.N.Y. Apr. 2, 2020) (regarding a motion for a temporary restraining order).

Detention during the COVID-19 pandemic further poses a high risk of severe illness or death. This Court already has held "remain[ing] confined under current conditions" at Batavia amounts to irreparable harm for individuals who are particularly vulnerable to complications from COVID-19. *Jones*, 2020 WL 1643857, at *13; *see also* Meyer Decl. ¶¶ 26–39.

Additionally, as the Ninth Circuit has recognized, immigration detention results in "economic burdens imposed on detainees and their families[, and] collateral harms to children of detainees whose parents are detained." *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). Those harms are equally present here. *See* Agustin Decl. ¶¶ 8–10; Onosamba-Ohindo Decl. ¶ 13; *see also* Johnson Decl. ¶ 11 (describing exploitative service charging families $1,500 to drive them to remote jail for social visits). Finally, detention impedes the petitioners' ability to defend themselves against removal as it limits their options for obtaining legal status and hinders them from retaining counsel, gathering evidence, and presenting expert testimony. *See* Dickson Decl. ¶¶ 13-16; Phillips Decl. ¶¶ 14–20; Kefi Decl. ¶¶ 17–19; Zaiman Decl. ¶¶ 18–21; Nochomovitz Decl. ¶ 11. This is an additional basis for finding irreparable harm. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 382 (W.D.N.Y. 2017), *order vacated in part on other grounds, Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

II. IJ MONTANTE'S AND BAUMGARTEN'S POLICY OF DENYING BOND TO EVERYONE BEFORE THEM VIOLATES THE APA.

The proposed subclass—individuals currently detained under § 1226(a) who had or will have a custody hearing before IJs Montante or Baumgarten—seeks preliminary relief enjoining these IJs' No Bond Policy under the APA and ordering individualized custody determinations, as the INA, governing regulations, and due process require.

A. The No Bond Policy Violates the INA's Requirement that IJs Perform Individualized Custody Determinations.

As the Supreme Court has held, INA language that the Attorney General "may" detain or release someone in immigration custody requires an individualized determination. *See INS*

v. Nat'l Ctr. for Immigrants' Rights, Inc. ("NCIR"), 502 U.S. 183, 191, 194-95 (1991); *Reno v. Flores*, 507 U.S. 292, 313–14 (1993). *NCIR* held the permissive "may" in an effectively identical INA provision required the Attorney General to perform an "individualized determination" about whether to impose a particular condition of release, since "in the absence of such judgments, the legitimate exercise of discretion is impossible." *Id.* at 194–95; *see also Flores*, 507 U.S. at 313–14 (reaffirming *NCIR*'s interpretation of former § 1252(a) in the context of children's detention). Relatedly, in *Jean v. Nelson*, the Supreme Court interpreted a statute permitting the Attorney General, "in his discretion," to parole certain people held in immigration detention if their release would be "in the public interest," to contain the same requirement. 472 U.S. 846, 848, 857 (1985). Adopting this reasoning, a district court in this Circuit recently recognized § 1226(a) requires an individualized custody determination. *See* Transcript of Oral Argument at 47, 50, *Velesaca v. Decker*, No. 20-cv-1803 (S.D.N.Y. Mar. 30, 2020) ("*Velesaca* Tr.") (annexed as Ex. P to Supp. Roeck Decl.).

A blanket policy of denying bond violates this INA requirement of an individualized determination whether to detain or release a person. In *Jean*, the Supreme Court held low-level officials' policy to deny release across the board violated the parole statute because the exercise of discretion required "individualized determinations." 472 U.S. at 857. Interpreting *Jean*, the Tenth Circuit held applying a broad-based presumption in adjudicating parole requests conflicts with the parole statute's individualized-determination mandate. *See Marczak v. Greene*, 971 F.2d 510, 512–15 (10th Cir. 1992); *see also id*. at 515 ("So long as the agency has not thought it wise to enact such sweeping rules, [] no single immigration official may take it upon him or herself to set personal policies for groups of parole applicants."). The court reasoned: "[A]s a logical matter, we do not see how an immigration official *could* base his decision on a general rule, given the Supreme Court's requirement that the district director 'make *individualized determinations* of parole.'" *Id.* (quoting *Jean,* 472 U.S. at 857). Similarly,

the court in *Velesaca* struck down a local ICE field office's policy of denying release to almost everyone in its initial custody determinations as lacking individualized determinations and thus violating § 1226(a). *Velesaca* Tr. at 49–50.

The data demonstrate that IJs Montante and Baumgarten have implemented a comparable policy of refusing to grant release to all who come before them. Since March 2019, they have denied release in 95% of cases. Barber Decl. ¶ 15. This is powerful evidence that they have not engaged in individualized determinations but instead have been denying release categorically. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (when ICE field officers denied parole in 92 to 100 percent of cases, the "numbers [] are irrefutable" evidence of a policy to categorically deny parole); *Velesaca* Tr. at 13, 49 (finding "a change of policy is dramatically shown" in data demonstrating ICE's release rate in initial custody determinations fell from 29 to 2 percent).[9] Their policy is so entrenched that even when ICE agrees the person should be released on bond, IJs Montante and Baumgarten reject the stipulation and deny bond. Zaiman Decl. ¶ 11; Tinsley Decl. ¶ 8; Nochomovitz Decl. ¶ 9.

Further, federal courts (including this Court) have observed IJ Montante's practice of denying release without an individualized determination. This Court has found a custody decision by IJ Montante appeared "preordained and not based on thoughtful evaluation of the evidence presented" and "[b]ased on [the IJ's] reasoning, no one would ever be released." *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 240–241 (W.D.N.Y. 2019); *see also Blandon v. Barr*, No. 18-cv-06941, 2020 WL 465728, at *5, 7, n.4 (W.D.N.Y. Jan. 22, 2020) (holding IJ Montante's actions "amount[] to an utter refusal by the IJ to consider any evidence submitted by Petitioner" and he failed to consider "individualized . . . facts" in a custody hearing).

[9] *See also Bellarno Int'l Ltd. v. Food & Drug Admin.*, 678 F. Supp. 410, 415 (E.D.N.Y. 1988) ("[T]wo . . . instances of deviation [out of 385 decisions] can hardly form the basis of a finding of agency discretion."); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (evidence that agency departed from general rule only four times out of 100 cases was sufficient to show general policy and absence of bona fide individualized review).

Immigration practitioners confirm the same. *See* Zaiman Decl. ¶¶ 10-17; Dickson Decl. ¶¶ 10-12; Tinsley Decl. ¶ 9; Hunter Decl. ¶ 13; Nochomovitz Decl. ¶¶ 8-10. The IJs' actions contravene § 1226(a)'s mandate to provide individualized consideration of danger and flight risk at custody hearings. The policy should be enjoined and set aside under the APA as contrary to law. *See* 5 U.S.C. § 706(2)(A); *Damus*, 313 F. Supp. 3d at 337.

B. The No Bond Policy Violates *Accardi* Because Governing Regulations Require an Individualized Custody Determination.

Separate from the statutory violation, the No Bond Policy also runs afoul of the due-process based *Accardi* doctrine, under which an agency is bound by its regulations and the rules it has announced for itself. In *U.S. ex rel. Accardi v. Shaughnessy*, the Supreme Court held agencies must comply with their own rules because "regulations with the force and effect of law supplement the bare bones" of federal statutes. 347 U.S. 260, 265 (1954). The Second Circuit has explained this doctrine "is premised on fundamental notions of fair play underlying the concept of due process." *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991). The Circuit later held the *Accardi* rationale applies even when a court is reviewing "the merits of decisions made within the area of discretion delegated to administrative agencies." *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969). "[W]here the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved." *Id.*

Consistent with *Accardi*, a court in this district found ICE's practice of denying almost all parole applications violated agency policy that required individualized determinations and ordered ICE to comply with its own criteria. *See Abdi,* 280 F. Supp. 3d at 410. Similarly, the court in *Velesaca* relied on *Accardi* to enjoin ICE's policy of denying release to almost everyone as contrary to the agency's own regulations requiring an individualized custody determination. *Velesaca* Tr. 49–50, 52.

Here, IJs are bound by 8 C.F.R. § 1236.1(d)(1), which states the IJ "is authorized to exercise the authority in [8 U.S.C. § 1226(a)] to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter." In doing so, IJs may base their decision "upon any information that is available to the [IJ] or that is presented to him or her by [the parties]." § 1003.19(d). Under the regulations, IJs are to make discretionary determinations based on the evidence in a particular case, which necessarily requires an individualized determination. *See supra* pp. 10-12. Because the No Bond Policy plainly forecloses individualized determinations, it violates these regulations and must be enjoined under *Accardi*.

C. The No Bond Policy Violates Due Process.

The No Bond Policy also violates the Due Process Clause's guarantee against unjustified imprisonment, and thus is "contrary to constitutional right" under the APA. *See* 5 U.S.C. § 706(2)(B). As this Court has held, "[d]ue process is not satisfied . . . by rubberstamp denials" but requires an individualized determination of danger to the community and flight risk. *See Clerveaux v. Searls*, 397 F. Supp. 3d 299, 319 (W.D.N.Y. 2019). Indeed, due process requires "adequate procedural protections" to ensure that the government's interest in mitigating flight and preventing danger to the community "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see infra* pp. 21-22. There is no more basic procedural protection than an opportunity to be heard "in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But an opportunity to be heard means nothing without a neutral adjudicator who is listening. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 878 (2009) (scheme that offered a "possible temptation to average judge to lead him not to hold the balance nice, clear and true" between the parties violates due process) (internal quotations omitted).

Those who appear before IJ Montante or Baumgarten receive "rubberstamp denials" in disregard of their profound liberty interests. *See Clerveaux*, 397 F. Supp. 3d at 319; Barber Decl. ¶ 15; *see infra* p.19 (discussing the liberty interests of individuals detained under § 1226(a)). The "numbers [] are irrefutable" evidence of the No Bond policy, *see Damus*, 313 F. Supp. 3d at 342, but the anecdotal evidence provides further corroboration, *see, e.g.*, Zaiman Decl. ¶ 13; *see also* Tinsley Decl. ¶ 9; Hunter Decl. ¶ 13; Nochomovitz Decl. ¶ 10. For these reasons, the Court should set aside the No Bond Policy.

III. REFUSING TO CONSIDER ABILITY TO PAY AND OTHER ALTERNATIVE CONDITIONS OF RELEASE VIOLATES THE INA AND DUE PROCESS.

The entire proposed class seeks preliminary injunctive relief directing the government to comply with its statutory and constitutional obligations to consider alternative conditions of release and, when setting bond, the person's ability to pay. Many courts, including this Court, have recognized failure to do so violates due process, *see infra* n.11, but the Court need not reach the constitutional issue here because the respondents' policy also violates the INA.

A. Refusing to Consider Alternative Conditions of Release Violates the INA.

Just as the No Bond Policy runs afoul of the INA's obligation of individualized determinations, so does the Buffalo-area IJ's policy of failing to consider one important alternative to detention specified by Congress: conditional parole. Specifically, § 1226(a) identifies three different options for the Attorney General to consider: (1) continue to detain, (2) release on "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General," or (3) release on "conditional parole." 8 U.S.C. § 1226(a). This third option "unambiguously" authorizes IJs to "consider conditions for release beyond a monetary bond." *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015).[10]

---

[10] Even the Board has held that the INA's plain language "clearly gives" IJs authority to place conditions on release, at least when they are setting a monetary bond under § 1226(a)(2)(A). *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 98 (BIA 2009).

Indeed, IJs in other jurisdictions can and do order release on such conditions to satisfy concerns about flight risk or dangerousness. *See* Slavin Decl. ¶ 14.

The Buffalo-area IJs, however, routinely refuse to exercise the authority delegated to them under the statute. Though the INA directs IJs to make a discretionary choice among three options (detain, release on bond, or release on conditional parole), the Buffalo-area IJs ignore this directive and consider only detention or monetary bond. In only 0.1% of all cases did a Buffalo-area IJ order an alternative to detention or bond. Supp. Barber Decl. ¶ 12. Immigration attorneys confirm IJs routinely reject requests for alternatives conditions of release, and some IJs believe they lack authority to order such conditions. *See* Kefi Decl. ¶ 8; Slavin Decl ¶12; Phillips Decl. ¶ 6; Zaiman Decl. ¶ 9; Tinsley Decl. ¶ 6; Nochomovitz Decl. ¶ 7. In the same way the denial of bond in 95% of cases is dispositive evidence of a failure to make individualized determinations required by § 1226(a), so is the denial of alternative conditions of release in 99.9% of cases.

By taking the position they cannot consider alternative conditions of release beside monetary bond, the Buffalo-area IJs are violating the INA's directive to exercise discretion in determining whether to detain, release on bond, *or release on conditional parole*. *See Rivera*, 307 F.R.D. at 553 (immigration courts' policy that IJs lacked jurisdiction to release on conditional parole violated the INA); *cf. Xiao Fei Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) (holding that the Board abuses its discretion when it denied an application for discretionary relief without considering all relevant factors).

B. <u>Refusing to Consider Ability to Pay in Setting Bond Violates the INA.</u>

Similarly, the Buffalo-area IJs' routine refusal to consider a person's ability to pay violates § 1226(a)'s requirement that the government make individualized determinations to *either* detain *or* release a person. Setting bond in an unattainable amount renders the release option illusory; the bond operates only as a *de facto* detention order. *See* Slavin Decl. ¶¶ 10–

11; *Lett v. Decker*, 346 F. Supp. 3d 379, 389 (S.D.N.Y. 2018) ("[Setting] a bond amount plainly outside the reach of an individual's financial resources . . . amounts, for all practical purposes, to a denial of bond."). The INA plainly directs IJs to make a discretionary choice to detain or release a person, but by only considering to (1) order detention, or (2) order *de facto* detention the Buffalo-area IJs are not complying with the statute, at least with respect to low-income persons. The respondents' application of the statute effectively eliminates the release option. *See* Phillips Decl. ¶ 7; Kefi Decl.¶ 13–14.

Significantly, the Board also has construed § 1226(a)(2) to mean that setting a bond is for the purpose of release, and should be set in the amount "necessary" to ensure future appearances. *See Matter of Urena*, 25 I. & N. Dec. 140, 141–42 (B.I.A. 2009). Considering ability to pay in setting the amount of bond ensures a decision to release someone on bond *in fact* results in their release, as Congress provided for in delegating to the Attorney General through § 1226(a) the decision to "detain" or "release" particular individuals. *See* Slavin Decl. ¶¶ 10–11. Indeed, several district courts have recognized the Board's construction of § 1226(a)(2) compels consideration of ability to pay. *See Abdi*, 287 F.Supp.3d at 337–38; *Hernandez v. Decker*, No. 18-cv-5026, 2018 WL 3579108, at *12 (S.D.N.Y. July 25, 2018).

If any ambiguity remains, the Court should adopt the petitioners' construction because, as discussed in the next Section, due process requires IJs to consider ability to pay and alternative conditions of release. The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). At the very least, the petitioners' construction is "plausible," especially in light of the Board's similar construction, and should be adopted over an interpretation that raises serious constitutional doubts.

C. Refusing to Consider Ability to Pay or Alternatives to Detention Violates Due Process.

In addition to violating the INA, failure to consider ability to pay or other alternatives to detention violates due process. Due process requires immigration detention to "bear a reasonable relation to its purpose," specifically, mitigating flight risk and preventing danger to the community. *See Zadvydas*, 533 U.S. at 690. Applying this principle, the Ninth Circuit concluded a "bond determination that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests [of ensuring future court appearances]" and violates due process. *Hernandez*, 872 F.3d at 991; *cf. Hechavarria*, 358 F. Supp. 3d at 244 n.14 (Vilardo, J.) (explaining as to possible drug testing and other conditions of release that "ability to pay should not be used as an excuse to deprive Hechavarria of his fundamental right to liberty") (citing *Bearden v. Georgia*, 461 U.S. 660, 674 (1983) and *Griffin v. Illinois*, 351 U.S. 12, 17–19 (1956)). Numerous courts have adopted this reasoning and held due process requires IJs to consider ability to pay and alternatives to detention in custody hearings under § 1226(a).[11]

The balancing of interests under *Mathews* also shows the respondents' practices violate due process. *See* 424 U.S. 319. *Mathews* requires review of (1) the private interest affected by government action; (2) the risk of "erroneous deprivation" of the private interest "through the procedures used, and the probable value, if any, of additional or substitute procedural

[11] *See Alfaro v. Barr*, No. 6:19-cv-06571, 2019 WL 8064614, at *1 (W.D.N.Y. Dec. 10, 2019) (Wolford, J.); *Hernandez*, 872 F.3d at 987; *Brito v. Barr*, 415 F. Supp. 3d 258, 267 (D. Mass. 2019); *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274, at *6 (S.D.N.Y. Mar. 27, 2020) (Nathan, J.) ("Myriad courts in this Circuit . . . have found that these procedures violate the Fifth Amendment's due process guarantee, ordered the Government to bear the burden by clear and convincing evidence, and directed immigration judges to consider alternatives to detention"). This Court also has ruled that ability to pay and alternatives to detention must be considered in the context of prolonged detention claims. *See, e.g.*, *Navarijo-Orantes v. Barr*, No. 19-cv-790, 2019 WL 5784939, at *7 (W.D.N.Y. Nov. 6, 2019); *Hechavarria*, 358 F.Supp.3d 227 (alternatives to detention).

safeguards;" and (3) the government's interest and its "fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Id.* at 335.

As to the first *Mathews* factor, the petitioners have a substantial liberty interest in being free from government detention. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of the liberty [the Due Process Clause] protects."). That petitioners "face[] the prospect of prolonged detention" heightens that interest. *Brevil v. Jones*, No. 17-cv-1529, 2018 WL 5993731, at *4 (S.D.N.Y. Nov. 14, 2018). The petitioners often spend weeks or months before an initial custody hearing, and a bond denial means they must choose either to accept deportation or spend six months or more litigating their cases on the merits. *See supra* p.7. Further, people are held in prison-like conditions, separated from their families, with inadequate access to medical or mental health care, creating an unacceptable risk of contracting COVID-19. *See supra* p.8; Meyer Decl. ¶¶ 26–38. The fact of detention also implicates the petitioners' substantial liberty interest in avoiding removal as it prevents them from obtaining certain forms of legal status and otherwise limits their ability to defend against removal. *See supra* p.8. The Supreme Court repeatedly has found this individual liberty interest to be very high, warranting significant procedural protections. *See Bridges v. Wixon*, 326 U.S. 135, 147 (1945); *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966).

As for the second *Mathews* factor, failure to consider ability to pay a bond or alternatives to bond poses a particularly pronounced risk of erroneous deprivation of liberty. Without considering these factors, the government simply cannot know if the bond will be effective in furthering its interests of preventing flight or danger or if bond even is needed. *See* Slavin Decl. ¶¶ 10, 14; *see also Hernandez*, 872 F.3d at 999.

Turning to the third *Mathews* factor, as the Ninth Circuit and other courts have found, the government interest in not considering ability to pay or alternative conditions of release is minimal. Alternatives to detention are proven effective at mitigating flight at a fraction of the

cost. *See supra* p.4. Nor does failing to consider ability to pay further the government's interest in preventing flight, as "the amount that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance." *Hernandez*, 872 F.3d at 991; *see also* Slavin Decl. ¶¶ 10–11, 14–16. There is no "legitimate Government interest, beyond administrative convenience," in detaining noncitizens during removal proceedings if they are not dangerous or significant flight risks. *Arellano v. Sessions*, No. 18-cv-06625, 2019 WL 3387210, at *11 (W.D.N.Y. July 26, 2019). Additionally, as former IJ Slavin noted, considering these additional factors "is not burdensome on the government," has minimal impact on custody hearings, and results in more fair and accurate results. Slavin Decl. ¶16. The Court therefore should find, as many others have, the balance of interests requires Buffalo-area IJs to consider a person's ability to pay and alternatives to detention in § 1226(a) custody hearings. *See supra* n. 11.

IV. DUE PROCESS REQUIRES THE GOVERNMENT TO PROVE DETENTION IS JUSTIFIED BY CLEAR AND CONVINCING EVIDENCE.

This Court already has held, in the context of prolonged detention, that due process requires a custody hearing at which the government bears the burden of justifying detention and it must do so by clear and convincing evidence. *See Hemans v. Searls*, No. 18-cv-1154, 2019 WL 955353, at *9 (W.D.N.Y. Feb. 27, 2019). This Court also extended the rule for custody hearings for criminal aliens detained under § 1226(c) after six months of detention, per *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2016), *vacated* 138 S. Ct. 1260 (2018), to those detained under § 1226(a) because "[i]f anything, an alien who is subject only to discretionary detention under § 1226(a) would seem to have a greater liberty interest than a criminal alien subject to mandatory detention under § 1226(c)." *Enoh v. Sessions*, 236 F.Supp.3d 787, 791 (W.D.N.Y. 2017). Indeed, "the same constitutional concerns at issue in *Lora* are present—and are even more persuasive—in the case of a § 1226(a) detainee." *Nguti v. Sessions*, 259 F. Supp. 3d 6, 12 (W.D.N.Y. 2017).

Though this Court has not yet had occasion to decide the issue outside the context of prolonged detention,[12] the same principles and concerns stated in those cases apply here. Accordingly, the Court should join the "consensus view" of all eight courts in this Circuit to have decided the issue and hold due process requires the government to bear the burden of proof by clear and convincing evidence, a conclusion compelled by long-standing Supreme Court case law on civil confinement and the *Mathews* balancing test.[13]

A. Supreme Court Precedent and the Balancing of Interests Require the Government to Bear the Burden of Proof in § 1226(a) Custody Hearings.

The Supreme Court has made clear that when the government seeks to deprive someone of a "particularly important individual interest[]," due process requires it bear the burden of proof. *See Addington v. Texas*, 441 U.S. 418, 424, 431–33 (1979); *U.S. v. Salerno*, 481 U.S. 739, 752, 755 (1987) (civil pretrial detention scheme satisfied due process in part because the government had to prove danger or flight risk by clear and convincing evidence); *see also Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (placing the burden of proof on a civil detainee

---

[12] In *Rasel v. Barr*, this Court concluded a detained person's initial bond hearing under § 1226(a) satisfied the requirements of procedural due process. No. 19-cv-458, 2019 WL 4257408, at *6 (W.D.N.Y. Sept. 9, 2019). It did so because Rasel was apprehended within one day of crossing the U.S.-Mexico border and thus was "merely on the threshold of initial entry" when he was first detained, which diminished his liberty interest in remaining in the United States and implicated the government's interest in controlling admission to the United States. *Id*. at *4-5. Neither concern is present here. The Board has clarified that individuals like Rasel are not detained under § 1226(a) but subject to mandatory detention under § 1225(b). *See Matter of M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). This case relates only to those detained under § 1226(a), which covers individuals who are present in the United States—not those seeking admission or arrested at the border and placed in regular removal proceedings after being found to have a credible fear.

[13] *Darko v. Sessions*, 342 F. Supp. 3d 429, 434–36 (S.D.N.Y. 2018) (Ramos, J.); *see also Arellano*, 2019 WL 3387210, at *11 (Telesca, J.); *Alfaro*, 2019 WL 8064614, at *1 (Wolford, J.); *Guerrero v. Decker*, No. 19 CIV. 11644, 2020 WL 1244124, at *3-4 (S.D.N.Y. 2020) (Failla, J.); *Velasco-Lopez v. Decker*, No. 19-cv-2912, 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019) (Carter, J.), *appeal filed*, No. 19-2284 (2d Cir. July 23, 2019); *Medley v. Decker*, No. 18-cv-7361, 2019 WL 7374408, at *3-4 (S.D.N.Y. Dec. 11, 2019) (Nathan, J.), *appeal filed*, No. 20-632 (2d Cir. Feb. 19, 2020); *Martinez v. Decker*, No. 18-cv-6527, 2018 WL 5023946, at *3-5 (S.D.N.Y. Oct. 17, 2018) (Furman, J.); *Brevil*, 2018 WL 5993731, at *4 (Swain, J.).

to prove lack of danger violated procedural due process); *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (due process requires government bear burden of proof for civil commitment based on dangerousness).

The many district courts to have decided the issue presented here found the Supreme Court's due process requirements for all other forms of civil detention apply to initial custody hearings for those detained under § 1226(a). *See, e.g.*, *Darko*, 342 F. Supp. 3d at 434 (applying *Addington*, *Foucha*, and *Hendricks* to those detained under § 1226(a)). The Due Process Clause applies to all "persons within the United States, including aliens, whether their presence here is unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693. Thus, like all other forms of civil detention, due process requires "adequate procedural protections" to ensure the government's asserted justification for immigration detention—specifically, mitigating flight and preventing danger to the community—"outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690.

Applying the *Mathews* balancing test reaches the same result. *See Martinez v. Decker*, No. 18-cv-6527, 2018 WL 5023946, at *3 (S.D.N.Y. Oct. 17, 2018) ("The balance of [the government and private] interests, by itself, supports imposing the greater risk of error on the Government—specifically, by allocating to it the burden of proof.").

As for the first factor, the petitioners have a substantial liberty interest at stake. *See supra* p.19; *Brevil*, 2018 WL 5993731, at *4 (prospect of prolonged detention "mak[es] the effect of an initial bail determination so significant that [heightened protections are warranted to] safeguard the individual's liberty interests"); *see also* Agustin Decl. ¶¶ 6–7; Onosamba-Ohindo Decl. ¶¶ 8, 11.

As for the second *Mathews* factor, placing the burden of proof on a detained person poses an unacceptable risk they will be erroneously deprived of their liberty. Detained persons are not guaranteed legal counsel, struggle to understand the evidentiary burdens, and, even if

they do, face often insurmountable difficulties gathering the necessary evidence to meet their burden of proof. *See supra* p.3; Zaiman Decl. ¶¶ 5–7; Phillips Decl. ¶¶ 10–11; *see also Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (observing that detained immigrants have difficulty collecting evidence for their cases). High caseloads and completion quotas also create an unreasonably high risk of error in custody decisions. *See supra* p.5; Tabbador testimony at 5; *see also* Slavin Decl. ¶ 24; SPLC Report at 18; Tinsley Decl. ¶ 9 (noting IJ Baumgarten's decisions were rushed and contained little analysis). They exacerbate a problem the federal courts have recognized for years: immigration court adjudication "has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (citing cases); *see also Zuh v. Mukasey*, 547 F.3d 504, 513–14 (4th Cir. 2008) ("[C]ourts have grown increasingly skeptical of the high error rate within the immigration system."); *see also* Slavin Decl. ¶ 24 (stating increased pressure to adjudicate quickly likely has resulted in bond denials for those who were not dangerous or a flight risk).

As for the third *Mathews* factor, the petitioners' proposed procedures—that ICE bear the burden of establishing that a noncitizen is a danger or flight risk—do not meaningfully prejudice the government's interest in mitigating danger and risk of flight. When it bears the burden of proof, the government typically is able to meet it by presenting records already contained within its own files, or can obtain them "fairly quickly" through "resources readily available" to it. Slavin Decl. ¶¶ 6–7; *see also Martinez*, 2018 WL 5023946, at *3 ("[F]or a number of reasons, the Government is generally in a better position than a detained alien to gather and present evidence relevant to the bond determination."). Since the burden of proof allocation exists in part to reduce the risk of erroneous decisions, "it is [] unclear to what extent, if any, the state's interests are furthered by" the existing allocation. *Addington*, 441 U.S. at 426. Since the heightened standard and burden allocation will minimize the risk of inappropriate and costly detention, the government's interest is minimal.

This Court previously has analyzed the due process protections for persons detained under § 1226(a) by first determining whether the petitioner suffered unreasonably prolonged detention "'[i]n light of the substantial uncertainty surrounding the detention provisions in § 1226,'" after the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). *See, e.g.*, *Hemans*, 2019 WL 955353, at *5 (quoting *Hechavarria v. Sessions*, 891 F.3d 49, 58 (2d Cir. 2018)). The petitioners respectfully submit, in light of the consensus view that has emerged since *Jennings*, and the above analysis, there is no uncertainty here. *See supra* n. 13 (citing cases). While prolonged detention may be required to obtain a right to a bond hearing for those subject to mandatory detention under § 1226(c), those detained under § 1226(a) are distinguishable and entitled to greater procedural protections, as this Court has suggested. *See Enoh*, 236 F. Supp. 3d at 791; *Nguti*, 259 F. Supp. 3d at 12.

B. The Appropriate Standard of Proof is Clear and Convincing Evidence.

As this Court has held, "[w]hen the government seeks to detain a person to achieve a regulatory purpose, due process requires the government to demonstrate by clear and convincing evidence that detention necessarily serves a compelling interest." *Hemans*, 2019 WL 955353, at *8. And as the Supreme Court has explained, "[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." *Addington*, 441 U.S. at 427. Thus, the clear and convincing evidence standard applies when the individual interests at stake are "more substantial than mere loss of money," *id.* at 424, which is certainly true here, *see Hemans*, 2019 WL 955353, at *8 (relying on *Addington* to find the appropriate standard of proof is clear and convincing evidence). Further, "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).

V. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR A PRELIMINARY INJUNCTION.

The putative class seek an order that provides them with access to the procedural protections they are entitled to under the INA and the Constitution. "Where the government is the opposing party . . . the balance of the equities and the public interest [. . .] merge." *Jones*, 2020 WL 1643857, at *13. The public interest is served by "ensuring the constitutional rights of persons within the United States are upheld." *Sajous*, 2018 WL 2357266, at *13. And, the "government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017); *see also Abdi*, 280 F. Supp. 3d at 410. Procedural protections also reduce the risk of unnecessary detention at taxpayer expense, furthering the government's interests in detaining only those who pose a risk of flight or danger. *See supra* pp. 4, 19, 22-24.

The petitioners' interests in avoiding unnecessary detention and irreparable harm are undeniably weighty, especially during the current pandemic. *See supra* 8, 9-10. Meyer Decl. ¶¶ 26–39; *Jones,* 2020 WL 1643857, at *13 ("petitioners and the public *both* benefit from ensuring public health and safety" by reducing the spread of COVID-19 in ICE facilities). Adequate procedures to ensure individuals are not unnecessarily detained would make "the tinderbox scenario of a large cohort of people getting sick all at once [] less likely to occur, and the peak volume of patients hitting the community hospital would level out." *Id.*

CONCLUSION

For these reasons, the petitioners respectfully request that the Court grant the relief requested in the proposed order.

Dated: April 10, 2020
New York, N.Y.

Respectfully Submitted,

/s/ Victoria Roeck
MEGAN SALLOMI*
VICTORIA ROECK
JORDAN LARIS COHEN**
CHRISTOPHER DUNN

New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

JIM DAVY***
PHIL TELFEYAN***
Equal Justice Under Law
400 7th St. NW, Suite 602
Washington, D.C. 20004
Tel: (202) 505-3599

Counsel for the Petitioners-Plaintiffs

*Application for admission to the Western District of New York pending
** Application for admission to the Western District of New York forthcoming
***Application for admission *pro hac vice* forthcoming