IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARVIN DUBON MIRANDA, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs-Petitioners*, v. WILLIAM P. BARR, *et al.*, *Defendants-Respondents*.	Civil No. 1:20-cv-01110-CCB

MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs-Petitioners ("Petitioners") Marvin Dubon Miranda, Ajibade Thompson Adegoke, and Jose de la Cruz Espinoza bring this action on behalf of themselves and all others similarly situated, alleging that Defendants-Respondents ("Respondents") violate the Constitution and the Immigration Nationality Act ("INA") by detaining noncitizens based on procedurally deficient bond hearings in the Baltimore Immigration Court.

At least two flaws in the bond hearings in the Baltimore Immigration Court have resulted in the unlawful detention of Petitioners and the class. First, as a matter of policy or practice, and in contrast to essentially every other civil detention hearing in the U.S., Respondents jail noncitizens pending their removal proceedings without being required to demonstrate that such detention is justified. Rather, it is the noncitizens who bear the burden of demonstrating, to the satisfaction of the immigration judge ("IJ"), that they pose no danger or flight risk and are therefore eligible for release. Second, as a matter of policy or practice, Respondents condition release on payment of a cash bond, without any requirement that IJs consider the noncitizen's financial circumstances in setting bond, or whether alternative conditions of supervision, alone or in combination with a lower bond amount, would suffice to mitigate flight risk. Noncitizens are, as a result, routinely held in custody *solely* due to their inability to pay a prohibitively high bond. By enforcing such procedures, the government has created an unconstitutional and unlawful system of arbitrary bond determinations in which detention is not adequately tailored to legitimate governmental interests.

Through this motion, Petitioners seek preliminary relief to enjoin these unlawful practices and policies. Specifically, Petitioners seek a temporary restraining order and/or a preliminary injunction requiring Respondents to comply with the Constitution and immigration

laws by: (1) shifting the burden of proof at bond hearings to the government to demonstrate a noncitizen's dangerousness or flight risk by clear and convincing evidence; and (2) requiring IJs to consider ability to pay and alternative conditions of release in setting bond.

As set forth below, Petitioners are likely to succeed on the merits of their claims and will suffer irreparable harm if relief is not granted. Petitioners are being deprived of their liberty through arbitrary and unlawful detention, resulting in the separation from their families and loved ones; they are prevented from providing necessary support to their partners and children; and they are denied the ability to obtain legal representation and otherwise assist in the defense of their immigration cases from outside of detention.

Moreover, the threat of irreparable harm is especially severe in light of the COVID-19 pandemic. As of May 4, 2020, more than one million people in the United States have been diagnosed with the virus, and more than 62,000 have died.[1] The Centers for Disease Control and Prevention ("CDC") have acknowledged that correctional and detention facilities present a unique challenge for control of COVID-19 transmission.[2] Indeed, at the time of this writing, at least 522 individuals in immigration detention and numerous detention center staff nationwide have tested positive, including a nurse at the Howard County Detention Center, the facility currently housing Mr. Dubon Miranda and Mr. de la Cruz Espinoza.[3] This is an increase from just 18 reported cases

[1] Ex. 1 (Coronavirus Disease (COVID-19) Situation Report - 104, World Health Org. (May 3, 2020)), *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200503-covid-19-sitrep-104.pdf?sfvrsn=53328f46_2.

[2] Ex. 2 (CENTERS FOR DISEASE CONTROL AND PREVENTION, INTERIM GUIDANCE ON MANAGEMENT OF CORONAVIRUS DISEASE 2019 (COVID-19) IN CORRECTIONAL AND DETENTION FACILITIES, at 2 (Mar. 23, 2020)), *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

[3] Dkt. 1-25 (Declaration of Dr. Jaimie Meyer ("Dr. Meyer Decl.")) ¶ 32; Ex. 3 (*ICE Guidance on COVID-19: Confirmed Cases* (May 4, 2020)), *available at* https://www.ice.gov/coronavirus.

among detainees on April 6, 2020.[4] Researchers also predict that 72% to 100% of individuals in U.S. Immigration and Customs Enforcement ("ICE") custody will be infected with the COVID-19 virus within 90 days and that the rapid spread of COVID-19 will have a substantial impact on local health care systems, particularly Intensive Care Unit beds at local hospitals, if the population in ICE detention is not substantially decreased.[5] For this and other reasons, the balance of hardships and public interest also weigh in favor of granting the requested relief. The Court should grant Petitioners' motion.

BACKGROUND

I. Respondents' Policies or Practices at Immigration Court Bond Hearings

Title 8 U.S.C. § 1226(a) of the INA and its implementing regulations authorize the discretionary detention of noncitizens whom the government is seeking to remove from the United States. The statute and regulations also authorize the Attorney General to release individuals from immigration detention while their civil removal cases are pending if the individual does not pose a flight risk or danger to the community. Pursuant to the statute, 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); *see also* 8 C.F.R. § 1236.1(c)(8) (requiring individualized review of flight risk and danger); *Matter of Guerra*, 24 I. & N. Dec. 37, 37–38 (B.I.A. 2006) (same). The Attorney General shares the authority to detain or release individuals under § 1226(a) with the Secretary of

[4]Ex. 4 (*ICE Guidance on COVID-19: Previous Statements)*, *available at* https://www.ice.gov/coronavirus (last visited May 4, 2020).
[5] Dkt. 1-3 (Michael Irvine, et al., *Modeling COVID-19 and impacts on U.S. Immigration and Enforcement (ICE) detention facilities, 2020*, Journal of Urban Health 2020), *available at* https://whistleblower.org/wpcontent/uploads/2020/04/Irvine_JUH_ICE_COVID19_model.pdf.

the Department of Homeland Security ("DHS"), who has the authority to "prescribe" bond in immigration proceedings. 8 U.S.C. § 1103 (a) & (g).

Under the regulations, an ICE officer makes the initial custody determination as to whether a person detained under § 1226(a) should be released, and if so, whether on bond, personal recognizance, or other conditions. 8 C.F.R. § 1236.1(c)(8). The individual may then seek review of ICE's custody determination at a custody redetermination hearing—or bond hearing—before an IJ. *Id.* § 1236.1(d)(1). The IJ is authorized "to detain the [individual] in custody, release the [individual], and determine the amount of bond, if any, under which the respondent may be released." *Id.*; *see also id.* § 1003.19.

To obtain an order of release from the IJ, "[t]he burden is on the [detained individual] to show to the satisfaction of the Immigration Judge that he or she merits release on bond" by establishing that he or she poses no danger or flight risk. *Guerra*, 24 I. & N. Dec. at 40. In other words, the noncitizen must prove a negative in order to win release. "An [IJ] has broad discretion in deciding the factors that he or she may consider in custody redeterminations." *Id.* The Board of Immigration Appeals ("BIA") has set out "a number of factors" that an IJ can consider in determining whether an individual "merits release from bond, as well as the amount of bond that is appropriate." *Id.*[6]

[6] In *Guerra*, the BIA provided the following list of non-exhaustive factors for IJs to consider in determining both whether to grant bond and the amount that bond should be set: "(1) whether the [individual] has a fixed address in the United States; (2) the [individual]'s length of residence in the United States; (3) the [individual]'s family ties in the United States, and whether they may entitle the [individual] to reside permanently in the United States in the future; (4) the [individual]'s employment history; (5) the [individual]'s record of appearance in court; (6) the [individual]'s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the [individual]'s history of immigration violations; (8) any attempts by the [individual] to flee prosecution or otherwise escape from authorities; and (9) the [individual]'s manner of entry to the United States." 24 I. & N. Dec. at 40.

There is no requirement, however, that the IJ consider an individual's ability to pay when setting a bond or their eligibility for alternative, non-monetary conditions of release. *Id*. The BIA has expressly stated that "an [individual]'s ability to pay the bond amount *is not* a relevant bond determination factor." *Matter of Castillo-Cajura*, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009) (emphasis added); *Matter of Sandoval-Gomez*, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008) (same). Once an IJ decides a request for bond, a request for a subsequent bond redetermination will "be considered only upon a showing that the [detained individual's] circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The IJ's bond decision may also be appealed to the BIA. *Id.* § 1236.1(d)(3); *id.* § 1003.19(f).

II. Respondents' Policies and Practices in the Baltimore Immigration Court Have Led to the Unlawful Detention of Petitioners and the Class

The Baltimore Immigration Court hears bond cases for noncitizens detained by DHS at three Maryland facilities: the Howard County Detention Center in Jessup; the Frederick County Adult Detention Center in Frederick; and the Worcester County Jail in Snow Hill. *See* Dkt. 1-5 (Declaration of Adam N. Crandell ("Crandell Decl.")) ¶ 3. The majority of individuals appear in their bond hearings *pro se*.[7] The noncitizen bears the burden of proving that they are not a flight risk or danger. *See id.* ¶ 4; Dkt. 1-6 (Declaration of Katherine J. Perino ("Perino Decl.")) ¶ 9; Dkt. 1-7 (Declaration of Michelle N. Mendez ("Mendez Decl.")) ¶ 6; Dkt. 1-8 (Declaration of Judge Denise Noonan Slavin ("Judge Slavin Decl.")) ¶ 5. From March 2019 to March 2020, immigrants were denied release at 43.4% of bond hearings, 334 bond hearings in total, under this rule. *See* Ex. 6 (Declaration of Sophie Beiers ("Beiers Decl.")) ¶ 8.

[7] Ex. 5, The Ctr. for Popular Democracy, *Access to Justice: Ensuring Counsel for Immigrants Facing Deportation in the D.C. Metropolitan Area* (March 2017) at 9, *available at* https://populardemocracy.org/sites/default/files/DC_Access_to_Counsel_rev4_033117%20%281%29.pdf (finding 81% of detained immigrants had no legal representation before the Baltimore Immigration Court).

The burden on the noncitizen is significant, especially for noncitizens representing themselves *pro se*. *See* Crandell Decl. ¶¶ 7–9; Perino Decl. ¶¶ 13, 16; Judge Slavin Decl. ¶ 6. Noncitizens are generally required to submit their evidence in advance of the hearing and serve copies of that evidence on DHS. *See* Crandell Decl. ¶ 6; Perino Decl. ¶ 10. In contrast, the government typically does not submit any materials in advance of a bond hearing, leaving the noncitizen or their counsel to defend their case against evidence they have only seen for the first time that day. *See* Crandell Decl. ¶ 6; Perino Decl. ¶ 15; Mendez Decl. ¶ 6. In some circumstances, the detained person does not even have the chance to see the document, especially in bond hearings held through a video hearing. Perino Decl. ¶ 16; *see* Ex. 7 (Transcript of December 2, 2019 Bond Hearing for Ajibade Thompson Adegoke ("Thompson Transcript")) at 6–7. Often, this means that the noncitizen or their counsel has only minutes, if any, to review evidence submitted by the government in the middle of a bond hearing. Perino Decl. ¶ 15; Mendez Decl. ¶ 6. And even when individuals overcome the stacked odds to meet their burden of proof to show that they may be released, the very fact that they bore the burden necessarily informs the IJs' decisions regarding the degree of the person's flight risk and thus the amount at which to set bond. After all, the factors identified by the BIA in *Guerra* are used by the IJs to determine "whether an [individual] merits release from bond, *as well as* the amount of bond that is appropriate." 24 I. & N. Dec. at 40 (emphasis added).

Furthermore, consideration of only those factors in *Guerra*, especially when coupled with unsubstantiated or surprise evidence presented by the government at bond hearings, results in bond amounts that are routinely beyond what individuals can afford to pay. As a matter of policy and practice, IJs in Baltimore are not required to inquire into an individual's ability to pay or financial circumstances when determining the amount of bond set pursuant to § 1226(a), and in practice, they almost never do. *See* Crandell Decl. ¶ 16; Perino Decl. ¶ 21; Mendez Decl. ¶ 13; Judge Slavin

Decl. ¶¶ 9–10. IJs also rarely, if ever, consider alternative conditions of release in making custody determinations. *See* Crandell Decl. ¶ 17; Perino Decl. ¶ 23; Judge Slavin Decl. ¶ 14. By failing to consider an individual's financial circumstances or eligibility for alternative conditions of release, the government's bond-setting practices often result in *de facto* detention orders because individuals cannot pay the high bonds that are set. *See* Crandell Decl. ¶ 14; Perino Decl. ¶ 24; Mendez Decl. ¶ 13; Judge Slavin Decl. ¶ 12. Indeed, government data on bond hearings held from March 2019 to March 2020 show that the Baltimore Immigration Court's median and mean bond amounts—$12,500 and $13,586, respectively—are far higher than the national average. *See* Beiers Decl. ¶¶ 9–10. Moreover, immigrants are routinely detained for significant periods of time on bonds set by the Baltimore Immigration Court that they have not posted. *See id*. ¶ 11 (reporting, among other things, that at least 11% of individuals who had bond set were detained for more than 20 days and cases where individuals remained detained for several months).

The named Petitioners' experiences are typical of noncitizens detained pursuant to Respondents' constitutionally and statutorily deficient bond hearings. Petitioner Marvin Dubon Miranda has been in immigrant detention since December 12, 2019 and is currently detained at the Howard County Detention Center. *See* Dkt. 1-10 (Transcript of February 26, 2020 Bond Hearing for Marvin Dubon Miranda ("Dubon Miranda Decl.")) ¶¶ 8–9. After having an initial hearing on January 13, 2020, during which he asked for more time to find an attorney, on February 26, 2020, Mr. Dubon Miranda had a bond hearing in the Baltimore Immigration Court before IJ Elizabeth Kessler. *Id.* ¶ 12; Ex. 8 (Dubon Miranda Hearing Transcript ("Dubon Miranda Transcript")). At the hearing, Mr. Dubon Miranda bore the burden of proving he was not a flight risk or danger to the community. Dubon Miranda Decl. ¶ 13. He was represented by counsel and filed substantial documents for his bond hearing in support of his request for bond, including letters from his son, his ex-wife, his friends, and his partner, Patty, who is currently suffering from end-stage renal

disease. *Id.* ¶¶ 13–14. Counsel argued that Mr. Dubon Miranda was not a danger to the community, and that despite two DUI convictions, Mr. Dubon Miranda had stopped drinking, was seeking alcohol treatment classes, and planned to take additional corrective measures to address his issues with alcohol. *Id.* ¶ 14. Mr. Dubon Miranda's only other criminal history consisted of one misdemeanor conviction for second degree assault from over eight years ago. *Id.* ¶ 17. Counsel also argued that Mr. Dubon Miranda was not a flight risk because he had been living in Maryland for 11 years and had strong ties to the community, including to his partner, Patty, whom he sought to care for in her final days, and his son, Jason, who lives in Maryland and is the "most important person in [Mr. Dubon Miranda's] life." *Id.* ¶¶ 3, 14–15. Counsel moreover argued that Mr. Dubon Miranda should be granted a low bond amount based on his inability to pay. *Id.* ¶ 16.

By contrast, DHS filed *no* documentation to support their position; instead, DHS argued that Mr. Dubon Miranda had not met his burden to show he was not an "extreme danger to public safety" and wrongly asserted—without providing any supporting documentation—that his past conviction was a domestic violence crime. Dubon Miranda Transcrip at 14–16. Despite Mr. Dubon Miranda's arguments in the motion and at the hearing and the government's complete lack of documentary evidence in support of its position, IJ Kessler found that Mr. Dubon Miranda had failed to meet his burden of proof to demonstrate that he was not a danger to the community and denied bond. Dubon Miranda Decl. ¶ 17. The IJ relied in part on her concerns regarding the assault conviction that was mischaracterized by the government as domestic violence. Dubon Miranda Transcript at 17–18. As a result of this unsupported assertion, IJ Kessler also refused to consider

Mr. Dubon Miranda's equities involving his partner. *Id.* Mr. Dubon Miranda has remained detained for nearly five months. *Id.*[8]

Petitioner Ajibade Thompson Adegoke has been in immigrant detention since November 18, 2019 and is currently detained at the Worcester County Detention Center. *See* Dkt. 1-13 (Declaration of Ajibade Thompson Adegoke ("Thompson Decl.")) ¶ 12. He has no criminal convictions besides minor traffic violations. *Id.* ¶ 15. On December 2, 2019, Mr. Thompson had a bond hearing before IJ Kessler in the Baltimore Immigration Court. *Id.* ¶ 14. Because he was proceeding *pro se*, Mr. Thompson did not understand that the burden was on him to prove to the court why he was neither a danger nor a flight risk; indeed, Mr. Thompson was not even aware that he was having a bond hearing until after the hearing began, and did not know what was expected of him during the hearing. *Id.* Even though the court found that Mr. Thompson was eligible for release, IJ Kessler set Mr. Thompson's bond at $15,000. *Id.* ¶ 15. IJ Kessler did not inquire into Mr. Thompson's financial circumstances, provided very limited explanation as to why bond was being set at that amount, and did not consider alternative conditions of supervision. *Id.*; Thompson Transcript at 6–7. Following the bond hearing, Mr. Thompson wrote a letter to IJ Kessler asking her to reduce his bond to $5,000 because of his inability to pay. Thompson Decl. ¶ 16. He did not receive a response and has remained detained for nearly six months. *Id.*

Petitioner Jose de la Cruz Espinoza has been in immigration detention since February 12, 2020 and is currently detained at the Howard County Detention Center. *See* Dkt. 1-16 (Transcript

[8] The reliance on unsubstantiated allegations of criminal conduct at Mr. Dubon Miranda's bond hearing contrasts sharply with the bond hearing this Court ordered for Howard Duncan, where the Court required the government to bear the burden of proof by clear and convincing evidence. Mendez Decl. ¶ 10. At the bond hearing, IJ Kessler rejected the government's attempt to argue danger based on two alleged detention infractions "because DHS presented them without any supporting evidence." *Id.* The IJ's divergent treatment of the unsubstantiated allegations in Mr. Dubon Miranda's case underscores the significant and detrimental impact that placing the burden of proof on a noncitizen has on the IJ's ultimate bond determination.

of February 19, 2020 Bond Hearing for Jose de la Cruz Espinoza ("de la Cruz Espinoza Decl.")) ¶ 6. On February 19, 2020, Mr. de la Cruz Espinoza had a bond hearing in the Baltimore Immigration Court before IJ Kessler at which he bore the burden of proving that he was eligible for release. *Id.* ¶ 12.

Represented by counsel, Mr. de la Cruz Espinoza presented evidence of his significant family ties—including a wife and four U.S. citizen children—and his community connections, including having founded a landscaping company with his wife. *Id.* ¶¶ 2, 13. Mr. de la Cruz Espinoza argued that he was the primary breadwinner for his family and that his wife had been unable to work since he had been detained. *Id.* ¶ 13. Mr. de la Cruz Espinoza requested a bond of $5,000 based on his limited financial resources. *Id.* ¶¶ 6, 11, 13. He has no criminal convictions besides traffic violations and two pending misdemeanor charges for an incident relating to a verbal dispute with his brother, in which no one was harmed. *See id.* ¶¶ 7, 9; Ex. 9 (de la Cruz Espinoza Hearing Transcript) at 6–9. At the hearing, after reiterating that the burden was on Mr. de la Cruz Espinoza to prove he was neither a flight risk nor a danger to the community, the government presented no documentation and conceded that it had limited information regarding Mr. de la Cruz Espinoza's criminal history or the status or circumstances of his pending charges. *Id.* at 8–12 ("[A]t this point I just don't know enough to make a completed assessment . . . And it is [Mr. de la Cruz Espinoza's] burden to produce that information to demonstrate he's not a public safety threat"). Despite the criminal court's order to release Mr. de la Cruz Espinoza on his own recognizance in his criminal bail hearing, the government's complete lack of documentation, and his attorney raising Mr. de la Cruz Espinoza's limited financial resources and seeking a bond of $5,000 at his bond hearing in the Baltimore Immigration Court, IJ Kessler set the bond at $20,000. *Id.* at 12–13 (concluding that she did not have "enough information" to decrease Mr. de la Cruz Espinoza's bond amount); de la Cruz Espinoza Decl. ¶¶ 6, 11, 13. The IJ did not consider Mr. de la Cruz

Espinoza's financial circumstances or if alternative conditions of supervision would ensure his appearance for removal proceedings. de la Cruz Espinoza Decl. ¶ 13. Despite his request during a master calendar hearing on March 4, 2020 to lower his bond to an affordable amount, his bond remains at $20,000. *Id.* ¶ 15. Mr. de la Cruz Espinoza has remained detained for nearly three months because neither he nor his family can afford to pay this high bond and *Id.* ¶¶ 15, 16.

ARGUMENT

A temporary restraining order or preliminary injunction is warranted where the moving party demonstrates: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) that the balance of equities tips in the movant's favor; and (4) that an injunction is in the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). To show a likelihood of success on the merits, plaintiffs "need not show a certainty of success." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013). All four factors weigh in favor of granting relief.

I. Petitioners Are Substantially Likely to Succeed on the Merits

A. Respondents' Policies and Practices Violate the Fifth Amendment

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. These principles apply equally "to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *accord United States v. Lopez-Collazo*, 824 F.3d 453, 460–61 (4th Cir. 2016). Central to the Due Process Clause is its prohibition on arbitrary detention: "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the] Clause protects." *Zadvydas*, 533 U.S. at 690.

Because immigration detention is civil, rather than criminal, it must be "nonpunitive in purpose and effect." *Id*. Due process requires a "special justification" for detention—namely, the prevention of flight or danger to the community," *id.*; *accord Portillo v. Hott*, 322 F. Supp. 3d 698, 705 (E.D. Va. 2018), as well as "adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint," *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (citation omitted); *see also Zadvydas*, 533 U.S. at 690 (noting that detention must "bear [] [a] reasonable relation to [its] purpose").

As set forth below, Petitioners are likely to succeed in showing a violation of their due process rights because they have been detained following bond hearings in which: (1) the burden of proof was placed on the Petitioners and the class to demonstrate lack of dangerousness or flight risk; and (2) the IJ was not required to consider ability to pay in setting the bond amount or their suitability for release on alternative conditions of supervision.

i. *Petitioners Possess a Cognizable Liberty Interest that is Being Deprived by State Action*

It is indisputable that civil pretrial detention deprives an individual of his or her fundamental right to physical liberty. *See Zadvydas*, 533 U.S. at 690. "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Petitioners and members of the class are currently detained, either as a result of an outright bond denial, *see* Dubon Miranda Decl. ¶ 17, or through a *de facto* denial after receiving a prohibitively high bond, Thompson Decl. ¶¶ 14, 16–17; de la Cruz Espinoza Decl. ¶ 16; *see also Abdi v. Nielsen*, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018) (finding that a court functionally denies a noncitizen's bond without justification when it fails to consider ability to pay and alternative conditions of release and then sets a prohibitively high bond amount);

Leslie v. Holder, 865 F. Supp. 2d 627, 630 n.1 (M.D. Pa. 2012) (agreeing with the Court of Appeals for the Third Circuit that "the imposition of a bail which the agency knows cannot be met [i]s tantamount to detention"); *see also* Judge Slavin Decl. ¶ 12; Crandell Decl. ¶ 14; Mendez Decl. ¶ 13. And because Petitioners and class members are and will be detained pursuant to such orders issued by the Baltimore Immigration Court, the deprivation has plainly occurred by some form of state action. Dubon Miranda Decl. ¶ 17; Thompson Decl. ¶¶ 15–16; de la Cruz Espinoza Decl. ¶¶ 13, 16.

ii. *The Government's Bond Procedures are Constitutionally Inadequate*

a. The Government Must Bear the Burden of Proving Flight Risk and Dangerousness by Clear and Convincing Evidence

The government's current policy of placing the burden on the noncitizen to show he or she is neither a flight risk nor a danger to the community is constitutionally inadequate. As a growing number of federal courts have concluded, due process requires that the government bear the burden of justifying noncitizens' detention under § 1226(a). *See, e.g.*, *Brito v. Barr*, 415 F. Supp. 3d 258, 267 (D. Mass. 2019), *appeal docketed*, No. 20-1119 (1st Cir. 2020); *Darko v. Sessions*, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (noting "there has emerged a consensus view that where . . . the government seeks to detain a [noncitizen] pending removal proceedings, it bears the burden of proving that such detention is justified" under § 1226(a) and collecting cases); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692–93 (D. Mass.), *appeal dismissed by gov't*, No. 18-1691 (1st Cir. Dec. 26, 2018); *Guerrero v. Decker*, No. 19 CIV 11644 (KPF), 2020 WL 1244124, at *3–4 (S.D.N.Y. Mar. 16, 2020); *Aparicio-Villatoro v. Barr*, No. 6:19-cv-06294-MAT, 2019 WL 3859013, at *6 (W.D.N.Y. Aug. 16, 2019); *Arellano v. Sessions*, No. 6:18-cv-06625-MAT, 2019 WL 3387210, at *11 (W.D.N.Y. July 26, 2019); *Diaz-Ceja v. McAleenan*, No. 19-cv-00824-NYW, 2019 WL 2774211, at *10–12 (D. Colo. July 2, 2019); *Velasco Lopez v. Decker*, 19-cv-2912, 2019

WL 2655806 (ALC), at * 3 (S.D.N.Y. May 15, 2019), *appeal docketed*, No. 19-2284 (2d Cir. 2019).

Placing the burden on the government follows from longstanding Supreme Court precedent holding that, where the government subject individuals to civil detention, it must bear the burden of justifying their imprisonment. As the Supreme Court has explained, "[i]n 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, in *Salerno*, the Court upheld the constitutionality of the Bail Reform Act in part because the government was required to demonstrate by "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Id.* at 751. Likewise, in cases concerning civil commitment, the Supreme Court has affirmed that the government must prove that detention is necessary by clear and convincing evidence. *See Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (concluding that a civil commitment statute violated due process because it failed to provide "an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *see also Addington*, 441 U.S. at 431–33 (concluding that the government must show by "clear and convincing evidence" that indefinite civil commitment was necessary under the Due Process Clause). The Fourth Circuit has done the same. *See United States v. Comstock*, 627 F.3d 513, 524–25 (4th Cir. 2010) (upholding a civil commitment statute in part because the government bore the burden of proving "by clear and convincing evidence" that detention was necessary). By placing the burden of proof on noncitizens, the government's current bond procedure ignores this well-settled jurisprudence. *See Darko*, 342 F. Supp. 3d at 435 (concluding that the government should bear the burden of proof "particularly in light of long-established Supreme Court precedent affecting the deprivation of individual liberty").

In addition to requiring that the burden be placed on the government, courts have also made clear that due process mandates that the necessary standard of proof be clear and convincing evidence. *See Darko*, 342 F. Supp. 3d at 435–46; *Arellano*, 2019 WL 3387210, at *12; *Linares Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *4–5 (S.D.N.Y. Oct. 17, 2018); *see also Foucha*, 504 U.S. at 81–83; *Addington*, 441 U.S. at 431–33; *Comstock*, 211 F. Supp. 3d at 515. As these courts have recognized, "[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, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection." *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011) (citing, *inter alia*, *Addington*, 441 U.S. at 427; *Foucha*, 504 U.S. at 80; *Woodby v. INS*, 385 U.S. 276, 285 (1996); *Chaunt v. United States*, 364 U.S. 350, 353 (1960)).[9]

Although courts in this Circuit have yet to squarely address who properly bears the burden of proof at bond hearings for initial periods of immigration detention under § 1226(a), they have required the government to bear the burden to justify *prolonged* detention under another detention statute, 8 U.S.C. § 1226(c), by clear and convincing evidence. *See, e.g.*, *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 721 (D. Md. 2016); *Haughton v. Crawford*, 221 F. Supp. 3d 712, 714 (E.D. Va. 2016); *Duncan v. Kavanagh*, No. CCB-19-1465, 2020 WL 619173, at *10 (D. Md. Feb. 10, 2020);

[9] Respondents may argue that, at most, they should be required to prove flight risk only by a preponderance of the evidence, as required under the Bail Reform Act. *United States v. Jackson*, 823 F.2d 4, 5 (2d Cir. 1987). Petitioners submit that, as civil immigration detainees, they are entitled to a more protective standard. This is particularly true given that, unlike the criminal defendants to whom the Bail Reform Act applies, noncitizens who fail to appear forfeit their right to a removal proceeding and are ordered deported *in absentia*, and thus have a much stronger incentive to appear for their court hearings. *See* 8 U.S.C. § 1229a(b)(5) (providing for entry of removal order where removable noncitizen who was notified of hearing does not appear); *see also Linares Martinez*, 2018 WL 5023946, at *4–5; *but see Brito*, 415 F. Supp. 3d at 267 (requiring that the government show flight risk by only a preponderance of the evidence at immigration bond hearings).

Obando-Segura v. Whitaker, No. GLR-17-3190, 2019 WL 423412, at *4 (D. Md. Feb. 1, 2019). The reasoning of those decisions underscores the necessity of placing the burden on the government in civil detention hearings and should extend to initial bond hearings held under § 1226(a). *See Jarpa*, 211 F. Supp. 3d at 721–23 (relying upon the Supreme Court's "well-settled jurisprudence" that due process requires the burden be placed on the government in civil commitment proceedings, and noting the "unusual disadvantage" of placing the burden on the noncitizen when his detention necessarily limits his ability to gather evidence); *Haughton*, 221 F. Supp. 3d at 715 ("Pre-removal detention is a form of civil, not criminal detention. Therefore applying the traditional burden and quantum of proof to petitioner's bond hearing is appropriate.").[10]

Placing the burden of proof on the government at § 1226(a) hearings is also consistent with how other courts outside this Circuit have addressed the issue. *See Brito*, 415 F. Supp 3d. at 267 (concluding that the safeguards applicable to bond hearings following prolonged detentions under § 1226(c) must "appl[y] equally in [] § 1226(a) bond hearings"); *Linares Martinez*, 2018 WL 5023946, at *4 (explaining that "[i]t would be both illogical and legally unsound to afford greater procedural protections to [individuals] detained under Section 1226(c)"—who by definition have more serious criminal records—"than to [individuals] under Section 1226(a)," since individuals detained under Section 1226(c) by definition have more serious criminal records than individuals detained under Section 1226(a)) (citation omitted).

Petitioners' detention underscores the constitutional inadequacies of Respondents' bond procedures. The named Petitioners have remained in detention for nearly three months or longer

[10] Although the *Jarpa* line of cases distinguished the procedures for bond hearings under § 1226(a) and bond hearings for prolonged detention under § 1226(c), none of these cases directly considered the constitutionality of the procedures in place for an initial § 1226(a) bond hearing. As Petitioners' argue herein, these procedures are constitutionally deficient.

following bond hearings at which they bore the burden of proof to show that they were not a flight risk or a danger to the community. Dubon Miranda Decl. ¶¶ 8–9 (four and a half months); Thompson Decl. ¶ 12 (five and a half months); de la Cruz Espinoza Decl. ¶ 1 (nearly three months). Like many *pro se* noncitizens who are detained, Petitioner Thompson was unaware before his bond hearing that he bore the burden of proof or even what the purpose of the hearing was, significantly limiting his ability to prepare documents or arguments to support his claim for release on a decreased bond amount. Thompson Decl. ¶ 14; *see also* Judge Slavin Decl. ¶ 6; Perino Decl. ¶¶ 13. And despite providing a thorough motion regarding his eligibility for release, the IJ denied Mr. Dubon Miranda's request for bond, concluding that he had not met his burden to show that he was not a danger to the community, in part relying on unfounded and unsubstantiated allegations of "domestic violence." Dubon Miranda Decl. ¶ 17; Dubon Miranda Transcript at 14–18. Finally, despite presenting evidence of his eligibility for release and his financial circumstances, the IJ set bond for Mr. de la Cruz Espinoza at $20,000, in a hearing that lasted less than 10 minutes and during which the government conceded that it had incomplete information. de la Cruz Espinoza Decl. ¶¶ 13–14; de la Cruz Espinoza Transcript at 10–13 (conceding that it lacked information but reiterating it was Mr. de la Cruz Espinoza's burden to show that he was not dangerous).

Petitioners' experiences are typical of those of other noncitizens detained pursuant to Respondents' policies and practices, all of which underscore the necessity of placing the burden of proof on the government. *See* Crandell Decl. ¶ 4; Perino Decl. ¶ 9; Mendez Decl. ¶ 5. While detained, a noncitizens' ability to prepare supporting documents, or even access their immigration file, to "prove the negative" required by the government's policies is significantly restricted, particularly for *pro se* individuals. *See* Judge Slavin Decl. ¶¶ 5–6; Crandell Decl. ¶¶ 6–9, 12–13; Perino Decl. ¶¶ 10–13, 16. Often, *pro se* noncitizens are not even aware of what they are required to prove, if anything, prior to or during their hearing. *See* Judge Slavin Decl. ¶ 6; Thompson Decl.

¶ 14. And because of the improperly placed burden, DHS rarely—if ever—provides the noncitizen or his counsel with records supporting DHS's position before the hearing, severely limiting the person's opportunity to meaningfully review or rebut DHS's claims. *See* Crandell Decl. ¶ 10; Mendez Decl. ¶ 6; Perino Decl. ¶¶ 14–16. DHS's ability to present evidence for the first time during a hearing is particularly egregious considering that noncitizens, if even given the opportunity to do so, are forced to review documents—often via video teleconference—not in their native language and without a complete translation of those materials. *See* Perino Decl. ¶ 16. Indeed, because the government bears no burden to prove the noncitizen's detention is justified, ICE attorneys often merely state as a basis for continued detention: "[W]e don't believe this person has met their burden to show they are not a flight risk or danger.'" *See* Perino Decl. ¶ 18.

Petitioners are also likely to succeed under the balancing test set forth by the Supreme Court in *Mathews v. Eldridg*e, 424 U.S. 319, 335 (1976). Under that test, courts consider three factors in determining appropriate procedures under the Due Process Clause: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. In civil proceedings, the aim of the legal process is to weigh the competing interests of the individual and of the government to "minimize the risk of erroneous decisions." *Addington*, 441 U.S. at 425 (citing *Mathews*, 424 US. at 335). In *Addington*, the Supreme Court held that courts should allocate the risk of error based on the stakes for each party and that this calculation, in turn, informs the appropriate burden of proof. *See, e.g.*, *id.* at 423-24; *see also Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (holding that due process requires a heightened burden of proof on the government where the "individual interests at stake . . . are both particularly important

and more substantial than mere loss of money" (internal quotation marks and citation omitted)); *see also Hernandez-Lara v. Immigration and Customs Enforcement, Acting Director*, No. 19-cv-394-LM, 2019 WL 3340697, at *5–6 (D.N.H. July 25, 2019) (citing, *inter alia*, *Addington* and *Cooper* and holding that because the "individual interests at stake" in a bond hearing under § 1226(a) are "more substantial than mere loss of money[,] . . . the burden should not be shared equally by the alien and the government").

In § 1226(a) bond hearings, the Petitioners' and class members' individual interests at stake—the right to be free from arbitrary imprisonment—is fundamental. *Zadvydas*, 533 U.S. at 690. The nature of this interest and the risk of erroneously depriving Petitioners and class members of it far outweigh any governmental interest at stake. *See* Judge Slavin Decl. ¶¶ 7-8 (explaining from experience as an INS attorney that placing the burden of proof on the government "was not overly burdensome"); Mendez Decl. ¶ 14 (noting that "[t]here were no indications at the habeas-mandated March 3, 2020 bond hearing that placing the burden on the government . . . is administratively burdensome"). Thus, the government should bear the burden of proof at bond hearings by clear and convincing evidence. *See Hernandez-Lara*, 2019 WL 3340697, at *5 (relying on, *inter alia*, *Mathews* and *Addington* and imposing clear and convincing evidence standard on the government).

For these reasons, Petitioners are substantially likely to succeed on the merits of their burden of proof claim under the Due Process Clause.

b. <u>The Government Must Consider a Noncitizen's Inability to Pay and Alternative Conditions of Release</u>

In addition to the patently deficient procedure described above, the government's failure to consider a noncitizen's financial circumstances when setting bond and alternative conditions of release impermissibly results in the detention of people based solely on their inability to pay. As

various courts have found, such detention is clearly not reasonably related to the government's legitimate purposes under § 1226(a): ensuring future attendance and protecting the community. Accordingly, these courts have required IJs to consider an individual's ability to pay when setting the amount of the bond as well as alternative conditions of release. *See, e.g.*, *Hernandez*, 872 F.3d at 994 (concluding that the government's failure to consider ability to pay and alternative conditions of release has "created a system of immigration bond determinations that does not adequately provide a reasonable connection between detention and legitimate governmental interests," thereby violating the Due Process Clause); *Brito*, 415 F. Supp. 3d at 266–67 ("[D]ue process requires an immigration court [to] consider both a[noncitizen's] ability to pay in setting the bond amount and alternative conditions of release."); *cf. Lett v. Decker*, 346 F. Supp. 3d 379, 389 (S.D.N.Y. 2018) (ordering a bond hearing for a noncitizen detained pursuant to 8 U.S.C. § 1225(b) and concluding that "an immigration bond hearing that fails to consider ability to pay or alternative conditions of release is constitutionally inadequate"), *appeal filed*, No. 18-3714 (2d Cir. Dec. 11, 2018); *Abdi*, 287 F. Supp. 3d at 337–38 (applying principles of constitutional avoidance to interpret § 1225(b) to require IJ to consider during bond hearings a noncitizen's ability to pay and alternative conditions of release in setting bond).

These cases are consistent with, and build on, the long-established rule that "imprisoning a defendant solely because of his lack of financial resources" violates the Due Process Clause and the Equal Protection Clause.[11] *Bearden v. Georgia*, 461 U.S. 660, 661–62, 665 (1983) (prohibiting the government from revoking a criminal defendant's probation due to nonpayment of a fine without first determining that the individual "had not made sufficient bona fide efforts to pay or

[11] As the Supreme Court has explained, in this context, "[d]ue process and equal protection principles converge . . . ." *Bearden*, 461 U.S. at 665.

that adequate alternative forms of punishment did not exist").[12] *Bearden*, in turn, followed from prior cases prohibiting both criminal incarceration beyond the statutory maximum based solely on the defendant's inability to pay a fine, *Williams v. Illinois*, 399 U.S. 235, 240–42 (1970), and conversion of a fine under a fine-only statute into a jail term based on the defendant's indigence, *Tate v. Short*, 401 U.S. 395, 397–98 (1971) (a person may not be "subject to imprisonment solely because of . . . indigency"); *see also Alexander v. Johnson*, 742 F.2d 117, 124–24 (4th Cir. 1984) (explaining that due process and equal protection require that any repayment program for court-appointed counsel fees must be "narrowly drawn to avoid . . . creating discriminating terms of repayment based solely on the defendant's poverty").

The Supreme Court has applied analogous principles in the civil contempt context, 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. *Turner v. Rogers*, 564 U.S. 431, 447–48 (2011). And when considering pretrial criminal detention, courts have found that bail schemes violate due process where they do not consider ability to pay and alternative conditions of release. *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1055–57 (5th Cir. 1978) (en banc) (examining a Florida bail scheme that allowed for cash bail and concluding that "[t]he 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"). These courts have acknowledged that while a bail "requirement as is necessary to provide reasonable assurance of the accused's presence at trial is constitutionally permissible," "[a]ny requirement in

[12] The *Bearden* Court found the petitioner's detention particularly egregious because he had been placed on probation precisely because the state had previously determined that detention was not necessary. *Hernandez*, 872 F.3d at 992 n.20 (citing *Bearden*, 461 U.S. at 670). The same reasoning applies here, since by ordering release on bond, the IJ must have already determined that the noncitizen is "neither dangerous nor so great a flight risk as to require detention without bond." *Id.* at 990.

excess of that amount would be inherently punitive and run afoul of due process." *Id.* at 1057; *see also ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (concluding that "the County's mechanical application of the secured bail schedule without regard for the individual's personal circumstances," including ability to pay, violated the Due Process Clause); *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *8, *11–12 (M.D. Ala. Sept. 14, 2015) (same).

The government's flawed bond policies in the Baltimore Immigration Court run afoul of these well-established principles. While the Petitioners' and class members' liberty interests are unquestionably at significant risk, the government's current bond procedures are not reasonably connected to its interests, rendering them constitutionally inadequate. *Zadvydas*, 533 U.S. at 690 (noting that detention must "bear [] [a] reasonable relation to [its] purpose"). As explained above, the purposes of immigration detention are twofold: "ensuring the appearance of [noncitizens] at future immigration proceedings and [p]reventing danger to the community." *Id.* (internal quotation marks omitted). Under the INA, where plaintiffs have already been found eligible for release on monetary bond under § 1226(a), they have "been determined to be neither dangerous nor so great a flight risk as to require detention without bond." *Hernandez*, 872 F.3d at 990, 991 n.18. In such situations, continued detention without consideration of the detainee's ability to pay or alternative conditions is not reasonably related to the government's interests. Indeed, "because the Government's purpose in making release contingent upon posting bond is to 'provide enough incentive' for [noncitizens] to appear at a future proceeding, refusing to consider financial circumstances [or alternative conditions of release] would be inexplicable, as the amount likely to secure the appearance of an indigent person 'obviously differs from the amount' necessary to secure the appearance of wealthy person." *Hernandez v. Decker*, 18-CV-502 (ALC), 2018 WL 3579108 at *12 (S.D.N.Y. 2018) (quoting *Hernandez*, 872 F.3d at 991); *see also Brito*, 415 F.

Supp. 3d at 267 (explaining that requiring the IJ to consider ability to pay and alternative conditions "ensures that the decision to continue detention of a [noncitizen] is reasonably related to the Government's interest in protecting the public and assuring appearances at future proceedings"); *see also* Judge Slavin Decl. ¶¶ 11–12 (explaining that consideration of ability to pay is important in setting a "meaningful" bond amount, thereby ensuring that the government's interests are actually furthered); Crandell Decl. ¶ 14 (noting that in his experience "many people whom the [IJ] finds to pose no danger or enough of a flight risk to deny bond outright . . . nonetheless remain in detention . . . because they cannot pay"); Mendez Decl. ¶ 13 (same). Indeed, the government itself shares this view.[13]

The named Petitioners' experiences are illustrative of this disconnect. Despite the IJ finding that both Petitioners Thompson and de la Cruz Espinoza posed no danger to the community and no level of flight risk that required detention, Petitioners nonetheless received prohibitively high bonds because the IJ failed to take their financial circumstances into account. Thompson Decl. ¶¶ 14–16; de la Cruz Espinoza Decl. ¶¶ 14–15. Petitioner Thompson, who represented himself *pro se*, was never even *asked* whether he could pay the $15,000 bond he was set. Thompson Decl. ¶ 15. The IJ gave almost no explanation for her bond redetermination decision, much less an explanation of why a $15,000 bond was necessary to further the government's interests. *Id.* The IJ later failed to respond to Mr. Thompson's request to lower his bond amount to $5,000 following his bond hearing. *Id.* at ¶ 16. Similarly, despite presenting evidence of his meager financial resources, the IJ refused to consider Mr. de la Cruz Espinoza's ability to pay when setting his bond at $20,000. de la Cruz Espinoza Decl. ¶¶ 11–14. The IJ also failed to consider whether Mr. de la

[13] *See* Ex. 10 (Statement of Interest of the United States, *Jones v. City of Clanton*, No. 2:15cv34-MHT (M.D. Ala. Feb. 13, 2015), Dkt. 26, (hereinafter "DOJ Statement")) at 8, 10–11 (recognizing that detaining a criminal defendant solely because he cannot afford a money bond is not reasonably related to the government's legitimate goals).

Cruz Espinoza or Mr. Thompson could be released on alternative conditions of supervision that would ensure their appearance for future removal proceedings. de la Cruz Espinoza Decl. ¶ 13; Thompson Transcript at 6–7.

Such experiences are typical of detainees in the Baltimore Immigration Court. *See* Judge Slavin Decl. ¶¶ 9–10, 14; Perino Decl. ¶¶ 21, 23; Crandell Decl. ¶¶ 16–17; Mendez Decl. ¶¶ 12–13. The government's own data shows that the Baltimore Immigration Court's median and mean bond amounts—$12,500 and $13,586, respectively—are far higher than the national average. *See* Beiers Decl. ¶¶ 9–10. Moreover, immigrants are routinely detained for significant periods of time on bonds that they have not posted. *See id*. ¶ 11.

The disconnect between the government's interests and the procedures it utilizes is further bolstered by the fact that alternative conditions of supervision are equally if not more effective than monetary bond at ensuring future appearance. Indeed, as a government-contracted evaluation illustrates, when released noncitizens are subjected to conditions such as electronic monitoring, in-person supervisions, unannounced home visits, and employer verification, 99% of the noncitizens appear at a scheduled court hearing, with a 95% attendance rate for final removal hearings. [14] *See also* Judge Slavin Decl. ¶¶ 16–17 (explaining from experience the effectiveness of setting non-monetary conditions on bond).[15] In light of this evidence, the government's failure to

[14] *See* Ex. 11, AUDREY SINGER, CONG. RESEARCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 8 (July 8, 2019) (discussing a 2014 GAO evaluation which examined the effectiveness of the ICE-created Alternatives to Detention program).

[15] *See also* Ex. 12, Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 522–23 (2018) (noting that "[e]xtensive social science research from the pretrial criminal context demonstrates . . . that there is no proven correlation between money bond an n individual's likelihood of fleeing or reoffending"); Ex. 13, Lauryn P. Gouldin, *Disentangling Flight Risk From Dangerousness*, 2016 B.Y.U. L. REV. 837, 856–57 (2016); Ex. 14, MICHAEL R. JONES, PRETRIAL JUSTICE INSTITUTE, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 16 (2013) (finding that the type of monetary bond posted does not affect public safety of defendants' court appearance).

consider readily available, and effective, non-monetary alternative conditions when setting bond under § 1226(a) lacks any reasonable relationship to the government's proffered interests. *See Hernandez*, 872 F.3d at 991 (explaining that the government has no reason to refuse to consider alternatives to monetary bonds "in light of the empirically demonstrated effectiveness of such conditions at meeting the government's interest in ensuring future appearances"); *ODonnell*, 892 F.3d at 162 (approving the district court's "thorough review of empirical data and studies [that] found that the County had failed to establish any link between financial conditions of release and appearance at trial or law-abiding behavior before trial" (internal quotation marks omitted)); *Schultz v. State*, 330 F. Supp. 3d 1344, 1362–63 (N.D. Ala. 2018) (citing empirical studies demonstrating that "secured money bail is not more effective than unsecured bail or non-monetary conditions of release in reducing the risks of flight from prosecution"), *appeal filed Hester v. Black*, No. 18-13898 (11th Cir. Sept. 13, 2018).

Finally, and for the same reasons detailed above, Petitioners are likely to succeed on the merits under the familiar *Mathews v. Eldridge* balancing test. 424 U.S. at 335. First, the right to be free from imprisonment is at the "core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80. As for the second *Mathews* factor, as the Ninth Circuit noted, "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, because the Petitioners and class members have been, or will be, determined to pose no flight risk or danger to the community to be eligible for bonds, "the government has no legitimate interest in detaining [those] individuals." *Id.* at 994.

In sum, Petitioners are substantially likely to demonstrate that the bond-setting policies implemented by the IJs in this District violate the Fifth Amendment's guarantees of due process. Preliminary injunctive relief is warranted.

B. Respondents' Policies and Practices Violate the INA, 8 U.S.C. § 1226(a)

Petitioners are also likely to succeed on their claim that the Respondents' policies and practices for setting bond violate the INA, 8 U.S.C. § 1226(a). Petitioners contend that, properly construed, § 1226(a) does not permit the government to detain Petitioners and the putative class on a full cash bond absent consideration of the individual's ability to pay the bond amount and consideration of whether an alternative form of bond or other conditions of supervision would sufficiently mitigate flight risk. The INA provides that the Attorney General:

> (1) may continue to detain the arrested alien," *or* "(2) may release the alien on . . . [a] bond of at least $1,500 . . . or conditional parole." 8 U.S.C. § 1226(a)(1)–(2).

Under this statute, the government has the choice to either detain or release an individual. Yet in many cases Respondents' policies and practices render the latter option illusory, because monetary bonds set at an amount that individuals are unable to afford operate as *de facto* orders of detention, not meaningfully calibrated to ensure future appearance. In other words, Respondents have effectively eliminated the release option set out in § 1226(a)(2) with respect to indigent people who are detained.

This approach is out of step with the provision's clear structure and purpose. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("All statutes must be construed in light of their purpose."). The best interpretation of § 1226(a), given that Congress provided the options for detention *and* release, is that once the government has decided that an individual is entitled to release, it should set the bond at an amount that is reasonably calculated to secure the individual's appearance at future proceedings. This necessarily means that an individuals' bond should not be

set without consideration of his or her ability to pay, because such a bond does nothing to reasonably assure future appearance—it simply detains the individual without justification. Moreover, as the statute clearly states by authorizing release on "conditional parole" as an alternative to bond, *see* 8 U.S.C. § 1226(a)(2)(B), the government should make a finding as to whether non-financial alternative release conditions are sufficient to ensure future appearance and, if they are, the individual should be released accordingly. *See Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015) (noting that § 1226(a) "unambiguously states that an IJ may consider conditions for release beyond a monetary bond" and holding that immigration judges in § 1226(a) bond hearings "must henceforth consider whether to grant conditional parole in lieu of imposing a monetary bond"). This interpretation ensures that a decision to release someone *in fact* results in their release, as Congress clearly intended. *See Haggar*, 308 U.S. at 394; *United States v. Bryant*, 949 F.3d 168, 174–75 (4th Cir. 2020) (noting that statutory interpretation is not conducted "in a vacuum" but that "we must interpret the statute with reference to its history and purpose as well") (citations omitted).

Petitioners submit that Respondents' widespread practice of failing to consider ability to pay or alternative conditions of release unambiguously violates § 1226(a). However, even if the Court were to find that the statute is ambiguous, the Court should nonetheless adopt Petitioners' construction of the statute to avoid the serious constitutional infirmities discussed above. The Supreme Court has made clear that courts should construe a statute "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). 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); *see also Mary Helen Coal*

Corp. v. Hudson, 235 F.3d 207, 214 (4th Cir. 2000) ("As is our duty, we decline to interpret the statute in a manner that gratuitously raises grave constitutional questions.").

Under the canon of constitutional avoidance, § 1226(a) can and should be construed to require that immigration officials consider noncitizens' financial circumstances and release on alternative conditions of supervision when making custody determinations. Petitioners' construction of the statute is at the very least "plausible." *Clark*, 543 U.S. at 381. Petitioners are therefore likely to succeed on the merits of their claim that Respondents violate the INA by setting bond without considering individuals' ability to pay and without considering alternative conditions of release.

II. Petitioners and the Putative Class Are Suffering and Will Continue to Suffer Irreparable Harm in the Absence of the Requested Relief

The unconstitutional deprivation of Petitioners' liberty is undeniably an irreparable harm. *Hernandez*, 872 F.3d at 995 (finding irreparable harm when "the government's current policies are likely unconstitutional," and thus "members of the plaintiff class will likely be deprived of their physical liberty unconstitutionally in the absence of the injunction"); *cf. United States v. Lapi*, 458 F.3d 555, 561 (7th Cir. 2006) (considering mandamus relief and concluding that "the deprivation of liberty occasioned by [defendant's] detention . . . inflict[ed] irreparable harm . . . ."); *United States v. Bogle*, 855 F.2d 707, 710–11 (11th Cir. 1988) ("[U]nnecessary deprivation of liberty clearly constitutes irreparable harm."); *see also Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (The "denial of a constitutional right. . . constitutes irreparable harm for purposes of equitable jurisdiction"). Indeed, courts have found that even *one* additional night incarcerated is a harm to a person that cannot be later undone. *See Jarpa*, 211 F. Supp. 3d at 711 (excusing petitioner's failure to administratively exhaust based on his irreparable harm and noting that if "continued detention is indeed unconstitutional, every subsequent day of detention without remedy visits harm anew").

And, "because the harm is loss of liberty, it is quintessentially the kind of harm that cannot be undone or totally remedied through monetary relief." *Id.* Here, absent a temporary restraining order or preliminary injunction, Petitioners and putative class members stand to remain detained in immigration prisons, for weeks or even months, in violation of their constitutional rights. For that reason alone, Petitioners have demonstrated irreparable harm.

Now, with the spreading and deadly threat from COVID-19, the irreparable harm to Petitioners has escalated precipitously, endangering their health and very lives. *See* Dr. Meyer Decl. ¶ 39 (describing the "imminent harm related to COVID-19 for people residing and working" in detention facilities in Maryland). This is particularly the case here in Maryland, where this Court recently ordered the release of an immigration detainee due to a confirmed case of COVID-19 inside the Howard County Detention Center. *See* Ex. 15 (*Coreas v. Bounds*, No. CV TDC-20-0780 at *3 (D. Md. Apr. 30, 2020) (order granting preliminary injunction)) (noting the "health risk to *all* individuals at HCDC") (emphasis added). Other courts have recognized the threat of irreparable harm that COVID-19 poses to detained immigrants. *See, e.g.*, *Fraihat v. U.S. Immigration & Customs Enf't*, No. EDCV 19-1546 JGB (SHKX), 2020 WL 1932570, at *27 (C.D. Cal. Apr. 20, 2020) (concluding that class of medically at-risk "Plaintiffs have established they will suffer the irreparable harm of increased likelihood of severe illness and death . . . .").

As this Court has recognized, "[p]risons, jails, and detention centers are especially vulnerable to outbreaks of COVID-19." *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *2 (D. Md. Apr. 3, 2020). This is for two reasons. "First, even if these facilities suspend in-person visitation, the staff, contractors, and vendors working at the facilities can still introduce the Coronavirus into the facility, a risk that is all the more difficult to contain because asymptomatic individuals can transmit the virus and because these facilities lack the capacity to screen for the virus in asymptomatic individuals." *Id.*; *accord* Dr. Meyer Decl. ¶¶ 10, 16, 25, 30–

32. "Second, once the Coronavirus is introduced into a detention facility, the nature of these facilities makes the mitigation measures introduced elsewhere in the country difficult or impossible to implement." *Coreas*, 2020 WL 1663133, at *2; *accord* Dr. Meyer Decl. ¶¶ 11–16, 25, 29–31. Indeed, a recent study by researchers at Brown University projects that, in three months, *72% to 100%* of people in ICE custody will be infected with the COVID-19 virus. Dkt. 1-3 (Michael Irvine, et al., *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) Detention Facilities*). Moreover, many proposed class members will have underlying medical conditions that increase their likelihood of severe illness or death if they contract COVID-19. Dr. Meyer Decl. ¶¶ 23, 33 (citing a study that indicates that "serious illness occurs in up to 16% of cases, including death" for individuals with "underlying chronic health conditions"); *id.* ¶ 15 (noting that individuals in detention are more likely to have chronic conditions). Thus, Petitioners' ongoing detention exposes them to severe and potentially fatal harm from COVID-19.

Petitioners suffer an array of other irreparable harms. Courts have recognized the significant impact detention has on individuals, both in the criminal pretrial detention context, *see Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) (noting that pretrial detention "disrupts family life" and hinders a person's "ability to gather evidence, contact witnesses, or otherwise prepare his defense"); *ODonnell*, 892 F.3d at 155 (affirming finding that "pretrial detention can lead to loss of job, family stress, and even an increase in likeliness to commit crime."), and the immigration context, *see Hernandez*, 872 F.3d at 995 (identifying subpar medical and psychiatric care in detention facilities, economic burdens, abuse by guards, missed family life events, and collateral harm to detainees' children as irreparable harms).

For example, Petitioner Dubon Miranda's detention has caused him and his family "the emotional harm of being separated and the economic harm of losing the families' primary income-earner[]." *Sanchez v. McAleenan*, No. GJH-19-1728, 2020 WL 607032, at *7 (D. Md. Feb. 7,

2020); *see* also *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 270 (4th Cir. 2018), *vacated on other grounds*, 138 S. Ct. 2710 (2018) (stating that "[p]rolonged and indefinite separation of parents, children, siblings, and partners create not only temporary feelings of anxiety but also lasting strains on the most basic human relationships" and therefore constitutes irreparable harm); *Wanrong Lin v. Nielsen*, 377 F. Supp. 3d 556, 565 (D. Md. 2019) (holding that a petitioner would suffer irreparable harm due to "both the emotional harm of being separated from her husband and raising their children alone, as well as the economic harm from losing her partner in their family-owned restaurant"). Because he is detained, Mr. Dubon Miranda cannot provide emotional and financial support to his 13-year old son—who depended on Mr. Dubon Miranda's consistent presence—and his partner, who suffers from end-stage renal disease and needs him now more than ever. Dubon Miranda Decl. ¶¶ 18–20. Likewise, since Mr. de la Cruz Espinoza's detention in February 2020, he has been unable to assist his wife in their shared gardening business or to financially support his four children, and his absence is taking a serious psychological toll on his family. de la Cruz Espinoza Decl. ¶¶ 4, 19. His wife must rely on tax returns and food banks to support their family, while his children have suffered in school and visibly suffer from the trauma of being separated from their father. *Id.* ¶¶ 19–21. Detention also has been devastating for Mr. Thompson, who is unable to contact his wife and children in Nigeria or confirm their safety, and now suffers from depression and insomnia, staying in his cell for four to five days on end and lying awake throughout the night worrying about his family. Thompson Decl. ¶¶ 8, 17–19.

Sadly, the severe emotional and financial distress that Petitioners and their families suffer is illustrative of the class as a whole. *See* Perino Decl. ¶¶ 26–27 (explaining that in "multiple cases" her clients' families have become homeless "as a direct result of their detention"); *id.* at ¶ 28 (describing a case in which an individual's family was "reduced to selling food on the side of the road to raise $10 or $20 at a time" to pay his bond, despite the fact that he had no criminal history

and a strong asylum claim); *id.* at ¶¶ 24–25 (explaining that because immigration bonds must be paid in full "up front," many detained people and their families are forced to agree to predatory loans from unregulated bond companies); Crandell Decl. ¶ 18 (noting the economic devastation caused when a family's primary earner is detained).

Petitioners and the proposed class members also suffer irreparable harm in their immigration cases, including obstacles to preparing documents to support their bond requests or merits hearings and a diminished likelihood of success on their claims for relief. *See, e.g.*, *Obando-Segura*, 2019 WL 423412, at *4 ("[P]rolonged detention compromises [the] ability to gather [ ] evidence."); Crandell Decl. ¶ 18 (describing how in many cases, a noncitizen's "prolonged detention by DHS . . . impacts the ability of the non-citizen to afford to hire a lawyer, which in many cases, negatively impacts the chances that the non-citizen will succeed on an application for relief from removal"); Judge Slavin Decl. ¶ 24 (noting that in some instances, she's seen individuals "with potentially meritorious cases take a voluntary order of removal rather than remain in indefinite detention because they are unable to pay the set bond amount").

In sum, without injunctive relief, Petitioners and putative class members will continue to suffer irreparable harm as a result of Respondents' unlawful bond hearing policies and practices.

III. The Balance of Hardships and Public Interest Favor a Grant of the Requested Relief

Finally, both the balance of equities and public interest strongly weigh in favor of granting the requested relief. 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) (*Rodriguez II*). By shifting the burden of proof or considering ability to pay, the relief sought would satisfy due process while in no way impeding an immigration judge's ability to individually assess flight risk or dangerousness based on

evidence presented. *See, e.g.*, Judge Slavin Decl. ¶¶ 7–8, 12. Moreover, "the government has no legitimate interest in detaining individuals who have been determined not to be a danger to the community and whose appearance at future immigration proceedings can be reasonably ensured by a lesser bond or alternative conditions." *Hernandez*, 872 F.3d at 994; *see also Sanchez*, 2020 WL 607032, at *7 (recognizing that the government is "unlikely to be harmed by an injunction against a likely unlawful practice").

Moreover, the relief sought is not administratively burdensome, particularly in light of the fact that, under prior agency precedent, the government bore the burden of proof at immigration court bond hearings. *See* Judge Slavin Decl. ¶¶ 7–8, 13, 18 (explaining that, prior to 1999, "the government bore the burden of proof in custody hearings" and that "[t]his was not overly burdensome . . ."); *see also* Mendez Decl. ¶ 14 (describing a bond hearing where the government bore the burden of proof by clear and convincing evidence by order of this Court); *Schultz*, 330 F. Supp. 3d at 1376 ("Satisfying an evidentiary standard before setting bail should add no extra cost, and making actual findings when requiring a bond may require very little extra time, if any."). And in any event, "any additional administrative costs to the government"—to the extent they even exist—"are far outweighed by the considerable harm to Plaintiffs' constitutional rights in the absence of the injunction." *Hernandez*, 872 F.3d at 995–96; *see also id.* at 996 ("[F]aced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardship tips decidedly in plaintiffs' favor.") (internal quotation marks and citation omitted). Indeed, if anything, the requested relief is more likely to *save* the government resources by preventing costly and unnecessary detention. *See infra* at 35.

Finally, granting the requested injunction will serve the public interest for at least three reasons. First, "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). "The public interest benefits from an

injunction that ensures 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, and "ensures federal statutes are construed and implemented in a manner that avoids serious constitutional questions." *Rodriguez II*, 715 F.3d at 1146.

Second, the sought-after relief advances the public interest by ensuring that the government does not needlessly expend resources to detain noncitizens who are not a danger or a flight risk. *See* Judge Slavin Decl. ¶ 23; *Tate*, 401 U.S. at 399 ("[R]ather than aiding the collection of revenue, [imprisoning the defendant for lack of ability to pay] saddles the State with the cost of feeding and housing him for the period of his imprisonment."). The Department of Justice has acknowledged that pretrial detention imposes "a burden on local jails" and "significant costs to taxpayers."[16] Civil immigration detention is similarly burdensome and costly. According to a July 2019 report by the Congressional Research Service, ICE spends, on average, $137 per adult per day in detention, compared to $4.16 average daily cost per adult enrolled in ICE's alternatives to detention program.[17]

Finally, the COVID-19 pandemic only heightens the public's interest in the injunction. As explained above, prisons and jails are amplifiers of COVID-19 and threaten the health of detained individuals and the individuals who work in correctional and detention facilities. *See* Section II. The injunction will serve the public interest by helping to ensure immigrants are not arbitrarily detained in detention facilities and exposed to infection. When many hospital settings are already overwhelmed and beyond capacity, Dr. Meyer Decl. ¶ 24, it is also in the public's interest to avoid further burdening the local health infrastructure with patients who contract the coronavirus in ICE.

[16] Ex. 10 (DOJ Statement) at 11–12, 14 n. 35.
[17] *See* Ex. 11, AUDREY SINGER, CONG. RESEARCH SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 15 (July 8, 2019).

IV. This Court Should Waive Any Security Bond Under Fed. R. Civ. P. 65(c)

Finally, Petitioners request that this Court waive any security bond levied pursuant to Fed. R. Civ. P. 65(c). *Pashby*, 709 F.3d at 332 (explaining that "the district court retains the discretion to . . . waive the security requirement") (citation omitted). As the Fourth Circuit has explained, "the purpose underlying Rule 65(c) . . . is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). "Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly." *Id.* District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g.*, *Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D. N.C. 2019) (federal prisoner); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983) (indigent state prisoners); *Orantes–Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). Petitioners respectfully request that the Court do the same here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their motion for a class-wide temporary restraining order and/or preliminary injunction.

Respectfully Submitted,

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