Case Nos.: 19-1787, 19-1900

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARK ANTHONY REID; ROBERT WILLIAMS, on behalf of himself and others similarly situated; LEO FELIX CHARLES, on behalf of himself and others similarly situated

Petitioners - Appellants/Cross - Appellees

v.

CHRISTOPHER J. DONELAN, Sheriff, Franklin County, Massachusetts; LORI STREETER, Superintendent, Franklin County Jail & House of Correction; THOMAS M. HODGSON, Sheriff, Bristol County, Massachusetts; JOSEPH D. MCDONALD, JR., Sheriff, Plymouth County, Massachusetts; STEVEN W. TOMPKINS, Sheriff, Suffolk County, Massachusetts; CHAD WOLF, Acting Secretary of the Department of Homeland Security; DENIS C. RIORDAN, Director, Immigration and Customs Enforcement Boston Field Office; WILLIAM P. BARR, Attorney General; JAMES MCHENRY, Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; DAVID DUBOIS, Sheriff, Strafford County, New Hampshire; CHRISTOPHER BRACKETT, Superintendent, Strafford County House of Corrections; MATTHEW T. ALBENCE, Acting Director, Immigration and Customs Enforcement

Respondents - Appellees/ Cross – Appellants

On Appeal from the United States District Court for the District of Massachusetts
The Honorable Patti B. Saris
Case No. 3:13-cv-30125-PBS

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STATEMENT REGARDING ORAL ARGUMENT

This case raises complex issues regarding the constitutionality of prolonged detention of noncitizens under 8 U.S.C. § 1226(c) without an opportunity for a bond hearing. This is a question of first impression that the Supreme Court expressly left open in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), and that no Court of Appeals has addressed since then. Oral argument will assist the Court in understanding the important legal issues in this case. Furthermore, this Court heard oral argument in a previous appeal arising from the same underlying district court case. *See Reid v. Donelan*, No. 14-1270, 819 F.3d 486 (1st Cir. 2016).

PRELIMINARY STATEMENT

The government has imprisoned Plaintiffs-Appellants ("Plaintiffs") for at least six months, and in some cases significantly longer, with no opportunity to seek release on bond. The government thereby violates their Fifth and Eighth Amendment rights—depriving them of their liberty without a hearing, separating them from their families, and restraining their ability to defend themselves against deportation.

The government claims that it must deprive Plaintiffs of these rights because the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), categorically mandates incarceration during removal proceedings for certain immigrants. However, such a scheme of unchecked, prolonged incarceration is unprecedented outside of the national security context. Applying this Court's reasoning in *Reid v. Donelan* (*Reid IV*), 819 F.3d 486, 494 (1st Cir. 2016), *withdrawn*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018), the district court correctly held that mandatory incarceration under Section 1226(c) violates due process when it exceeds a reasonable period of time. This holding is consistent with every other decision that has squarely addressed the constitutionality of prolonged incarceration under Section 1226(c).

While the court correctly recognized a constitutional violation, it erred in multiple ways while fashioning relief. ***First***, the court incorrectly held that that

only a ***district court*** on *habeas* can determine whether detention has become unreasonable, and that the law therefore forecloses the Plaintiffs' requested relief of individualized process ***in immigration court*** after six months. ***Second***, given the Supreme Court's recognition that six months of incarceration constitutes severe deprivation of liberty, bond hearings—or at the very least, reasonableness hearings—must be held at six months to ensure that Plaintiffs are not being detained unconstitutionally, and the court erred in holding otherwise.

Third, the court erred in determining that mandatory detention becomes presumptively unreasonable after one year. The court wrongfully based this determination on the government's legally irrelevant assertions regarding aspirational completion times for immigration cases. ***Finally***, the court erred in concluding that the government must prove flight risk by only a preponderance of evidence at class members' bond hearings.

For these reasons, this Court should reverse the district court's partial denial of Plaintiffs' motion for summary judgment and partial grant of Defendants' motion for summary judgment, and remand for the district court to determine, using the correct legal framework, the proper relief for unconstitutionally prolonged no-bond incarceration.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as the action alleges violations of the Fifth and Eighth Amendments. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On August 6, 2019, Plaintiffs timely appealed the final decision of the district court entered on July 9, 2019, granting in part and denying in part the cross-motions for summary judgment of Plaintiffs and Defendants. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that immigration courts lack jurisdiction to determine if mandatory incarceration has exceeded a reasonable period of time;

2. Whether the Constitution requires either a bond hearing at six months, or a hearing in immigration court after six months to determine if mandatory incarceration has become unreasonable;

3. Whether the district court erred in basing its determination of when incarceration without a bond hearing is likely to be unreasonable on the government's legally irrelevant assertions; and

4. Whether due process requires the government to prove flight risk by clear and convincing evidence at the bond hearing of any individual detained for a prolonged period.

STATEMENT OF THE FACTS

I. THE PLAINTIFF CLASS

A. Characteristics and Representatives of the Class

On October 23, 2018, the district court certified a class of immigrants "who are or will be detained within the Commonwealth of Massachusetts or the State of New Hampshire pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond or reasonableness hearing." Appx.269.[1] The government detains many class members for well over six months, and some for more than a year, while they litigate their cases in the immigration courts. *See* Appx.437 (¶8) (the four longest incarceration lengths were 1,541, 1,291, 1,101, and 1,048 days); Add.8. Other class members face prolonged incarceration while they challenge their removal orders through the Petition for Review process in the federal Courts of Appeals. *See* Appx.429(¶¶34-39) (class member detained eleven months with challenge to removal order pending at Second Circuit). The median incarceration time for *Reid* class members is 363 days (or nearly one year), with 25% detained for fewer than 253 days (i.e., eight and a half months) and 25% detained for more than 561 days (i.e., over a year and a half). Appx.437(¶8); Appx.437(¶8); Add.8.

[1] Citations to the Appendix are denoted using "Appx.__." Citations to the Addendum are denoted using "Add.__."

As of the close of discovery in the district court case, 113 individuals had vested into the class, and 104 had received bond hearings. Appx.551(¶3); Appx.424(¶3).[2] Of the *Reid* class members who received bond hearings pursuant to the district court's earlier injunction in this case (*see infra* Section II), immigration judges ("IJs") set bond for 37 of those class members after determining that each individual would not pose a danger or flight risk if released on bond. Appx.424(¶¶4-5). Twelve additional class members were released under orders of supervision or orders of recognizance. Appx.425(¶6). Thus, nearly ***half*** of all class members who had bond hearings (51 out of 104) were found by an IJ to be neither a danger to the community nor a flight risk.

[2] Since the close of discovery, the number of class members has risen to 158. The *Reid* class has increased more rapidly following the Supreme Court's ruling that Section 1226(c) applies to immigrants with criminal convictions who were detained by the government after intervening periods of liberty following their release from criminal custody. *See Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019). Prior to the ruling in *Preap*, immigrants held in Massachusetts who had not been arrested within 48 hours were granted bond hearings pursuant to the district court's order in *Gordon v. Lynch*. *See Gordon v. Johnson*, 300 F.R.D. 31 (D. Mass. 2014), *rev'd sub. nom. Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016). *Gordon* class members did not vest into the *Reid* class because they received bond hearings prior to the six-month mark. *Gordon*, 842 F.3d at 68-69. In the wake of *Preap*, however, the district court vacated its prior order in *Gordon* and dismissed the case. *See* Order, *Gordon v. McAleenan*, No. 13-30146-PBS (D. Mass. June 26, 2019), ECF No. 241. Incarcerated individuals who would previously have received immediate bond hearings under *Gordon* now become *Reid* class members after six months of detention.

Individuals who are subject to prolonged mandatory incarceration under Section 1226(c), including class members, have colorable defenses against removal. For the one year prior to the date of the first injunction in this case (May 27, 2014), 27% of individuals detained under Section 1226(c) for at least six months with cases in either the Boston or Hartford immigration courts were ultimately successful on the merits of their cases, compared to an overall success rate of 15% for all individuals detained throughout their proceedings. Appx.425(¶9); Add.9. Similarly, the government's own data showed that in 2018, 22% of immigrants subject to Section 1226(c) with cases in the Boston immigration court were granted relief by an IJ or otherwise had their cases terminated. Appx.205; Add.10. At least two *Reid* class members have defeated deportation after over ***one thousand*** days in immigration incarceration. Appx.425(¶12).

A study covering over 400 comparably situated individuals subject to mandatory incarceration for six months or longer in the Central District of California, which was made part of the record in this case, revealed similar lengths of incarceration. *See* Appx.80(¶4). Individuals held under Section 1226(c) there spent an average of 427 days—over fourteen months—in Immigration and Customs Enforcement ("ICE") incarceration. *Id.* The California study likewise showed that a substantial number of individuals were prima facie eligible for relief

from removal, and many of them won their cases. Appx.80(¶5) (73% of individuals mandatorily incarcerated applied for some form of relief, and more than 40% were granted some form of relief).

B. Effects of Prolonged Incarceration on Class Members

Prolonged immigration incarceration imposes significant hardships on class members and impedes their ability to contest the merits of their removal proceedings. The experiences of Mr. Reid and the other named plaintiffs in this action, Robert Williams and Leo Felix Charles, are illustrative of these challenges. More than seven years since ICE first detained Mr. Reid, he continues to defend his right to remain in the United States and contest his removal in Immigration Court. Appx.428(¶¶25, 27, 29). Without the district court's intervention, he would remain incarcerated today. Although the IJ has denied Mr. Reid relief under the Convention Against Torture three times, the Board of Immigration Appeals ("Board" or "BIA") has reversed and remanded after each denial. Appx.428(¶27). The IJ recently found that Mr. Reid has not been convicted of an aggravated felony, a holding that renders him eligible for three previously unavailable forms of relief. *Id.* The government's attempt to deport Mr. Reid remains ongoing, with an evidentiary hearing scheduled before the IJ in April 2020, and the possibility of appeals to the BIA and Second Circuit after that.

In 2018, Robert Williams and Leo Felix Charles joined the case as named plaintiffs. Appx.255, Appx.269-270. At the time, Defendants were incarcerating Mr. Williams while he litigated his removal proceedings. Appx.429(¶¶33, 34 39). Ultimately, without the possibility of release from incarceration on the horizon, Mr. Williams consented to removal rather than continue enduring confinement, even though he continues to litigate his removal order from abroad. Appx.429(¶¶38-39). By that point, ICE had imprisoned Mr. Williams under Section 1226(c) for nearly eleven months without any process to determine whether his incarceration was justified. *Id.*

Mr. Charles filed an individual habeas petition before the district court in January 2019 after more than eleven months of un-reviewed incarceration, during which he suffered from diabetes, high blood pressure, acid reflux, nerve and kidney damage, and other conditions. Appx.45(#430); Appx.430(¶40, 49). Mr. Charles could not access surgery to restore his ability to walk while incarcerated, so he was required to use a wheelchair despite medical advice that this would further damage his back. Appx.431(¶¶50-51). The jail also refused to provide the diet that Mr. Charles' doctors had ordered to manage his diabetes. Appx.431(¶52).

On February 14, 2019, a day before the government's deadline to file an opposition to Mr. Charles' individual habeas petition, Defendants suddenly decided that Mr. Charles was actually not properly held under Section 1226(c) but

was instead subject to an entirely different statute, 8 U.S.C. § 1231(a). Defendants then exercised their discretion to release him under that statute—thus recognizing he posed no flight risk or threat to public safety that warranted his imprisonment.[3] Appx.431(¶53). Since obtaining his freedom, Mr. Charles has returned to his family and obtained medical treatment for his disabilities. *Id.* Like Mr. Williams, Mr. Charles continues to contest his removal on a petition for review before the U.S. Court of Appeals for the Second Circuit. Appx.429(¶39), Appx.431(¶54).

Imprisonment severely burdens class members' ability to defend their underlying removal cases by interfering with their ability to gather evidence, secure effective counsel, and communicate effectively with counsel. Appx.81(¶12), Appx.426(¶14). For example, class member Arnoldo Rodriguez, detained for a year and a half before being released on bond, had difficulty finding effective counsel and gathering evidence, as his legal calls could be completed only if lawyers chose to accept the calls. Appx.431-32(¶55, 57). Additionally, he could not access touch-tone phone menus or leave voicemails with counsel from jail phones. *Id.* Mr. Rodriguez ultimately retained a lawyer who made serious

[3] *See* 8 C.F.R. § 241.4(e) (stating that "[b]efore making any recommendation or decision to release a detainee," the relevant officials "***must*** conclude," *inter alia*, that the detainee "is presently a non-violent person," "is likely to remain nonviolent if released, "is not likely to pose a threat to the community following release," "is not likely to violate the conditions of release," and "does not pose a significant flight risk if released") (emphasis added).

mistakes that led to the issuance of an order of removal on erroneous grounds; after filing a petition for review in this Court, the government stipulated to a remand. *Id.* *See also* Appx.82(¶23, 41) (additional examples of class members experiencing difficulty working with counsel). Class member Guerlie Pierre attempted to contest her removal *pro* se, but could not call her family to gather evidence due to lack of funds, could not access her legal files because she was transferred to four detention centers in the twenty months she was incarcerated by ICE, and could not mail documents to immigration court due to lack of supplies. Appx.432(¶59).

Incarceration severely affects the physical, emotional, and economic wellbeing of class members and their families and communities. Mr. Rodriguez's children and grandchildren suffered while he was imprisoned, and his release has allowed him to support his family and raise his children while he continues to contest his removal case. Appx.431(¶56). *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting) ("the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails."); *see also Reid v. Donelan* (*Reid II*), 22 F. Supp. 3d 84, 90 (D. Mass. 2014) ("detention [beyond six months] is an emotional and physical ordeal for class members"), *vacated and remanded, Reid IV*, 819 F.3d at 501-02; Appx.426(¶¶13-14) (summarizing hardships to class members caused by incarceration).

Class members' incarceration is often unnecessary because the government can utilize alternatives to incarceration that ensure the appearance of noncitizens at removal proceedings. *See* U.S. Gov't Accountability Office, Rep. No. GAO-15-26, Alternatives to Detention 30 (2014), *available at* http://www.gao.gov/assets/670/666911.pdf (showing that "over 99 percent of aliens … appeared at their scheduled court hearings" while participating in the "Full-Service" Alternative to Detention ("ATD") program). There is also no evidence in the record that those who are released on bond are likely to abscond or become threats to public safety. Although the government noted that Mr. Reid had been arrested after his release on bond, this represents just ***one*** example out of 51 class members released (*i.e.*, less than 2%); moreover, Mr. Reid himself has not been deemed dangerous or a flight risk by state authorities, as his Massachusetts charges were dismissed and he was transferred to Connecticut and released on a promise to appear. Appx.541(¶5-6).

Finally, the government's prolonged incarceration of individuals who present no danger or flight risk comes at great fiscal cost. The average cost of ICE incarceration is $123.86 per person per day, not including payroll, while the cost of supervision as an alternative to incarceration is no greater than $14 per person per day. Appx.427(¶¶22-23). Moreover, the government presented no evidence that

providing an individualized bond or reasonableness hearing to class members in immigration court would impose any cost.

II. PROCEDURAL HISTORY

On July 1, 2013, after he had been detained by ICE for six months under Section 1226(c), Mr. Reid filed a petition for writ of *habeas corpus* and class action complaint in the district court, on behalf of himself and other similarly-situated noncitizens held by ICE in Massachusetts. *Reid v. Donelan* (*Reid I*), 297 F.R.D. 185, 187 (D. Mass. 2014). After granting Mr. Reid's individual *habeas* petition and ordering the government to provide him with a bond hearing (at which bond was granted), the district court certified a class of individuals incarcerated in Massachusetts whom Defendants have held or will hold for over six months under Section 1226(c) without a bond hearing. *Id.* at 188, 188 n.1, 194. The district court granted summary judgment to the class in May 2014, concluding that Section 1226(c) must be interpreted in light of the Due Process Clause to require a bond hearing after six months. *Reid II*, 22 F. Supp. 3d at 89, 93.

On appeal, this Court affirmed the district court's judgment on Mr. Reid's individual habeas petition. *Reid IV*, 819 F.3d at 501. With respect to the class claims, however, this Court reversed the district court. *Id.* This Court agreed that a construction of Section 1226(c) that permitted categorical, prolonged incarceration without a bond hearing presented grave constitutional concerns and

therefore construed the statute to permit such no-bond incarceration only for a reasonable time period in order to avoid those concerns. *Id.* at 494. The panel held that incarceration without a bond hearing could not automatically be deemed unreasonable after six months and that reasonableness must instead be decided on a case-by-case basis. *Id.* at 498. However, this Court also expressly noted that it had "no occasion to consider here whether another petitioner might be able to challenge the individualized reasonableness of his continued categorical detention before the immigration courts rather than the federal courts." *Id.* at 502 n.5.

Two months after this Court issued its opinion in *Reid IV*, the Supreme Court granted certiorari in *Jennings*; in response, this Court stayed this case, leaving the class relief order in place. Add.7. Eventually, the Supreme Court in *Jennings* held that the text of Section 1226(c) unambiguously requires no-bond incarceration for the entire duration of removal proceedings, and that therefore there was no room for application of the canon of constitutional avoidance. *Jennings*, 138 S. Ct. at 844. The *Jennings* majority did not reach the question of whether prolonged imprisonment without bond hearings under Section 1226(c) violates the Constitution. *Id.* at 851. In light of *Jennings*, this Court vacated its 2016 decision, affirmed its grant of individual relief to Mr. Reid, vacated the district court's 2014 grant of class-wide relief, and remanded to the district court. *Reid IV*, 819 F.3d 486, 2018 WL 4000993, at *1 (1st Cir. May 11, 2018).

Defendants then moved to decertify the class. Plaintiffs opposed the motion and cross-moved to amend the complaint and modify the class to name Mr. Williams and Mr. Charles and include individuals incarcerated in New Hampshire, where ICE had begun to incarcerate individuals. Appx.248, Appx.255. Plaintiffs also moved for summary judgment that Section 1226(c) was unconstitutional as applied to class members and that the Constitution required bond hearings—or, at a minimum, hearings to determine whether the continued denial of a bond hearing was reasonable—after six months. Add.1-2, Add.18. The district court granted Plaintiffs' motions to amend and to modify the class and denied the Defendants' motion to decertify. Appx.269. The district court also denied Plaintiffs' motion for summary judgment without prejudice to renewal after discovery, Appx.44(#418), rejected Plaintiffs' request for ordinary Rule 26 discovery, and instead ordered "limited discovery related to the average and median detention times for aliens subject to 8 U.S.C. [§] 1226(c)." Appx.44(#420); Appx.194:2-199:13.

The parties then engaged in limited discovery and cross-moved for summary judgment. Plaintiffs moved for summary judgment that a bond hearing was required at six months under both the Due Process Clause and the Eighth Amendment. Add.8, Add.18, Add.41. In the alternative, Plaintiffs moved for summary judgment that at six months, an incarcerated individual be given a

hearing before an IJ to determine whether the continued denial of a bond hearing was reasonable (a "reasonableness hearing"), followed by a bond hearing if an IJ determined that the denial of a hearing was not reasonable. Add.18-19. Plaintiffs also contended that due process required the government to bear the burden at bond hearings for class members of demonstrating dangerousness and flight risk by clear and convincing evidence. Add.19. The Defendants cross-moved for summary judgment that the only mechanism for an individual incarcerated pursuant to Section 1226(c) to challenge his or her incarceration was through an individual *habeas corpus* petition and that the individual bore the burden of proof at a bond hearing to demonstrate that he or she is not dangerous or a flight risk. Add.2, Add.19, Add.35.

On July 9, 2019, the district court allowed in part and denied in part the motions of both Plaintiffs and Defendants. Add.1-2. The district court held that mandatory incarceration under Section 1226(c) "violates due process when a[] noncitizen's individual circumstances render the detention unreasonably prolonged in relation to its purpose in ensuring the removal of deportable noncitizens with criminal records." Add.2. However, the district court disagreed that this automatically occurred at the six-month mark of no-bond detention. Add.19-20.

Instead, the court held that whether mandatory incarceration without a bond hearing has become unreasonably prolonged depends on a fact-specific analysis of

the individual's circumstances, including the length of incarceration, the likelihood that the individual will obtain relief, and whether the individual or the government had used dilatory tactics over the course of the removal case. Add.26. Of these factors, the district court held that the length of incarceration was most important, and that when mandatory incarceration lasts for more than ***twelve*** months—excluding any dilatory tactics by the noncitizen—the government's incarceration of the individual is ***presumptively*** unreasonable. Add.26-29. The district court determined that one year was the appropriate time at which detention becomes presumptively unreasonable based on the government's policies aiming to complete removal proceedings in no more than nine months, and data indicating that nearly all proceedings take less than one year. Add.3, Add.26-28.[4]

The district court also rejected Plaintiffs' alternative argument for a reasonableness hearing before the IJ at six months, based on the legal conclusion that IJs lack jurisdiction to determine whether the mandatory denial of a bond hearing has become unreasonable. Add.31-32. Instead, the court held that for a noncitizen to secure individualized review of the reasonableness of incarceration, the individual must first file a *habeas* petition in federal court. Add.32-33.

[4] The district court reserved the question whether detention during judicial review of a removal order was pursuant to Section 1226(c) for the purposes of this timing analysis, Add.27 n.4, notwithstanding the prior adjudication of that issue in this litigation. *Reid v. Donelan* (*Reid III*), 64 F. Supp. 3d 271, 277 (D. Mass. 2014).

Finally, the district court held that if the federal court finds the noncitizen's mandatory detention unreasonable and grants the habeas petition, the individual is entitled to a bond hearing before an IJ. Add.33. At such bond hearings, the court held that due process requires the government to bear the burden of proving that the individual is either dangerous (by clear and convincing evidence) or a risk of flight (by a preponderance of the evidence), and that the IJ must consider the individual's ability to pay bond and alternative conditions of release, such as GPS monitoring. Add.38-41. The court also held that the Eighth Amendment prohibits the IJ from setting bond in an amount greater than necessary to ensure the individual's appearance at court hearings. Add.42.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Rabbia*, 699 F.3d 85, 89 (1st Cir. 2012). This Court "review[s] a district court's grant or denial of summary judgment *de novo*." *Matusevich v. Middlesex Mut. Assur. Co.*, 782 F.3d 56, 59 (1st Cir. 2015). "Summary judgment is warranted where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). "Where … there are cross motions for summary judgment," this Court "evaluate[s] each motion independently and

determine[s] whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Id.* (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

An individualized, automatic process before an IJ to review immigration detention without bond should occur upon six months of such detention. Plaintiffs maintain their argument that the Constitution requires a ***bond hearing*** at six months. But at the very least, the Constitution requires a ***reasonableness hearing*** at that time to determine whether categorical mandatory detention without an individualized bond hearing is still reasonable in relation to Section 1226(c)'s purpose. The district court erroneously concluded that IJs lack jurisdiction to determine whether an individual's mandatory, no-bond incarceration is reasonable, and that class members must instead demonstrate unreasonableness to a district court via a *habeas corpus* petition. But IJs have jurisdiction to conduct the necessary inquiry, and they are far better positioned to do so than district judges. Thus, this Court should reverse the district court's holding requiring individual *habeas corpus* petitions. Further, requiring a reasonableness hearing at six months is compelled by both the Supreme Court's recognition that six months of incarceration is a severe deprivation of liberty and by procedural due process, and is well within this Court's equitable powers.

Even if the Court disagrees that six months of no-bond incarceration on its own requires review, whether in the form of a bond or a reasonableness hearing, the Court must reverse and remand this case due to the district court's errors in determining when mandatory incarceration becomes presumptively unreasonable. In establishing the one-year presumption that categorical incarceration has become unreasonably prolonged, the district court incorrectly focused on the government's case processing goals and practices. But Plaintiffs' due process rights cannot be made to turn on the vagaries of the immigration court dockets, and to hold otherwise was legal error.

Additionally, the Excessive Bail Clause of the Eighth Amendment forbids mandatory incarceration under Section 1226(c) without the possibility to seek bail. Without individualized bond hearings after six months of incarceration, continued incarceration necessarily constitutes unreasoned (and therefore unreasonable) denial of bail.

Finally, due process requires the government to establish flight risk by clear and convincing evidence. The district court erred in concluding that the government must prove flight risk by only a preponderance of evidence at class members' bond hearings.

ARGUMENT

I. IMMIGRATION JUDGES CAN AND SHOULD DETERMINE IF MANDATORY INCARCERATION HAS EXCEEDED A REASONABLE PERIOD OF TIME.

The district court erred in requiring class members to file individual *habeas* petitions to secure bond hearings. The court recognized that the government bears a "responsibility to ensure that criminal aliens are not subject to unreasonably prolonged mandatory detention." Add.32.[5] However, it rejected Plaintiffs' argument that, in the alternative to a bond hearing, immigration courts should determine whether detention has become unreasonable. The district court's decision was based on the legally flawed premise that IJs lack jurisdiction to conduct reasonableness hearings. There is no jurisdictional bar to IJs conducting reasonableness hearings, however, and IJs routinely conduct similar types of fact-specific inquiries according to constitutionally-mandated standards. Indeed, even in this litigation, the district court has made other constitutional rulings that are applied through determinations made by the IJ.

[5] This obligation to provide due process exists separate and apart from habeas review. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality) (setting forth due process hearing requirements even though "[a]ll agree suspension of [habeas corpus] has not occurred here"); *Doe v. Gallinot*, 657 F.2d 1017, 1023-24 (9th Cir. 1981) (explaining that the mere "existence of optional habeas corpus review does not, of itself, alleviate due process concerns" regarding involuntary civil commitment).

Furthermore, requiring district courts to determine reasonableness is impractical and unworkable. Because most immigration detainees are unable to file *habeas* petitions, and because petitions that are filed are subject to court delays, requiring class members to file *habeas* petitions will inevitably exacerbate already unconstitutionally prolonged detentions. By contrast, the immigration court can provide prompt review and is accessible to all class members. Moreover, as this Court and numerous other courts have recognized, IJs are in the best position to evaluate reasonableness, especially when it is based on such factors as likelihood of success ***in the removal proceeding before the IJ*** and whether the person or the government has improperly delayed ***the removal proceeding before the IJ***.

A. IJs Have Jurisdiction to Determine if Mandatory Incarceration has Become Unreasonable

The district court erred in determining that IJs lack jurisdiction to determine if an individual's continued mandatory detention is reasonable. The court reasoned that an IJ conducting a reasonableness hearing would be "the equivalent" of "holding that § 1226(c) is unconstitutional as-applied to that alien"—a matter over which the immigration court lacks jurisdiction. Add.32. The district court was incorrect because it conflated two separate categories of inquiries: (i) an inquiry into what rule is required by the Constitution in a given circumstance; and (ii) a factual inquiry conducted ***pursuant to*** a constitutional rule to ensure compliance with the Constitution. While an IJ lacks authority over the former, a

reasonableness inquiry by the IJ falls into the latter category, and therefore an immigration court can properly conduct such a hearing as part of its regulatory authority.

Here, the ***district court*** established the constitutional rule: "mandatory detention without a bond hearing under 8 U.S.C. § 1226(c) violates due process when a[] noncitizen's individual circumstances render the detention unreasonably prolonged[.]" Add.2. The role of an IJ at a reasonableness hearing is only to make the "inherently fact-specific" determination of whether incarceration has exceeded a reasonable period. Add.20. The IJ does not decide any constitutional issues, but simply finds the relevant facts and applies the factors set forth by the court.[6] IJs already have authority to find facts and apply those facts in inquiries that the Constitution requires IJs to conduct. *See* 8 C.F.R. § 1003.10(b) (powers of IJs include, *inter alia*, administering oaths, receiving evidence, examining witnesses,

[6] Specifically, the district court held that incarceration is presumptively unreasonable after one year, Add.26-27, Add.29, and adopted the other factors previously identified by this Court in *Reid IV*:

> the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.

Id. (quoting *Reid IV*, 819 F.3d at 499). These factors require findings of fact and weighing those facts in favor of or against the immigrant seeking a bond hearing.

and issuing subpoenas). Thus, IJs can properly make the necessary factual determinations and apply those facts to the standard set by the district court regarding when mandatory detention has become unreasonable. There is no legal basis to hold that an IJ can conduct a constitutionally-required ***bond*** hearing, but that the same IJ cannot conduct a constitutionally-required predicate ***reasonableness*** hearing.

Indeed, IJs are routinely expected to engage in such fact-finding to ensure that removal proceedings meet constitutional requirements. For example, immigration courts must make fact-based inquiries to apply the requirements of the Due Process Clause to evidentiary issues. *See, e.g., Matter of Toro,* 17 I. & N. Dec. 340, 343 (BIA 1980) ("To be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the [F]ifth [A]mendment."); *Matter of Garcia,* 17 I. & N. Dec. 319, 321 (BIA 1980) (holding that respondent's admissions were obtained in violation of the Fifth Amendment when immigration agents led him to believe he had no rights and prevented him contacting his counsel). IJs must also engage in factual inquiry when evaluating whether deficient assistance of counsel violated a person's due process rights. *See Matter of Lozada,* 19 I & N. Dec. 637, 638-39 (BIA 1988) (noting that ineffective

assistance of counsel violates due process in removal cases and setting forth standards for resolving such claims).

Additionally, immigration courts regularly make factual findings to apply Fourth Amendment requirements when hearing motions to suppress evidence. *See, e.g.*, *Corado-Arriaza v. Lynch*, 844 F.3d 74, 78-79 (1st Cir. 2016) (affirming IJ's determination that evidence should not be suppressed); *Garcia-Aguilar v. Lynch*, 806 F.3d 671, 675-76 (1st Cir. 2015) (same); *Cotzojay v. Holder*, 725 F.3d 172, 182-83 (2d Cir. 2013) (setting forth non-exhaustive list factors for immigration court to determine on remand whether an egregious Fourth Amendment violation occurred); *Yanez-Marquez v. Lynch*, 789 F.3d 434, 460–61 (4th Cir. 2015) (setting forth non-exhaustive list of factors that would merit suppression by immigration court); *Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 279 (3d Cir. 2012) (same); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778–79 (8th Cir. 2010) (same); *see also Rodriguez v. Barr*, 943 F.3d 134, 142-43 (2d Cir. 2019) (same, where suppression motion involves racially discriminatory immigration arrest). Given this long-standing practice, recognized by this Court and many others, of IJs conducting factual inquiries required by the Constitution, it is unsurprising that this Court in *Reid IV* acknowledged the possibility of IJs conducting reasonableness hearings without alluding to any jurisdictional barriers. *See* 819 F.3d at 502 n.5.

Because the district court incorrectly concluded that the conducting of a reasonableness inquiry was the equivalent of a constitutional holding, the cases that the court cited in support of its ruling on jurisdiction are inapposite. *See* Add.31. The court relied on *Johnson v. Robison*, 415 U.S. 361 (1974), a case about veterans' benefits claims, for the proposition that "[a]dministrative agencies generally do not adjudicate questions concerning the constitutionality of congressional statutes." Add.31 (citing *Johnson*, 415 U.S. at 368). But as explained above, the Plaintiffs are not asking for an IJ to adjudicate any question concerning the constitutionality of Section 1226(c). If an IJ can set bond for a Section 1226(c) detainee without adjudicating the constitutionality of the statute, as contemplated by the district court's order and this Court's prior affirmance of Mr. Reid's individual *habeas* petition, then an IJ can certainly make the predicate reasonableness finding. In other words, Plaintiffs simply ask for an IJ to conduct an inquiry that an Article III court has determined is required by the Constitution. The immigration courts and other administrative agencies routinely conduct such inquiries. *See* discussion *supra* p. 25; *see also, e.g., WesternGeco, LLC v. ION Geophysical Corp.*, 889 F. 3d 1308, 1319 (Fed. Cir. 2018) (noting that "the standards for the privity inquiry" that the Patent Office is required to conduct in certain proceedings "must be grounded in due process" and that the applicable

standards were articulated by the Supreme Court in *Taylor v. Sturgell*, 533 U.S. 880, 894-895 (2008)).

Such a situation, where an administrative agency is directed to conduct a narrow inquiry in order to comply with a constitutional standard established by an Article III court, stands in contrast to the scenarios in *Hinds v. Lynch*, 790 F.3d 259 (1st Cir. 2015), and *Matter of C-*, 20 I. & N. Dec. 529 (BIA 1992), also cited by the district court. Add.31. There, the immigrants had expressly asked the IJ and the BIA in the first instance to hold that their removal would violate the Constitution. *Hinds*, 790 F.3d at 261 (petitioner's "sole ground for denying removability was that his removal would violate his Fifth Amendment right to due process"); *C-*, 20 I. & N. Dec. at 532 (rejecting argument that application of INA 243(h)(2) to bar asylum would "contravene[] the ex post facto clause of the Constitution").

Even in this litigation, the district court has made other constitutional rulings that are then to be applied through administrative individual determinations. In the same order in which it held that IJs cannot conduct reasonableness hearings, the district court held that "due process requires that an immigration court consider both an alien's ability to pay in setting the amount of bond and alternative conditions of release such as GPS monitoring that reasonably assure the safety of

the community and the criminal alien's future appearances." Add.40-41.[7] The court also previously held that Mr. Reid's "due process rights" to be free from arbitrary and unnecessary shackling of his limbs while in court "are satisfied when [an] individual assessment is made by ICE." *Reid v. Donelan*, 2 F. Supp. 3d 38, 47 (D. Mass. 2014).[8] Just as these constitutional rulings were then effectuated through administrative determinations, a constitutional ruling on when prolonged mandatory detention becomes unconstitutional can be remedied through hearings where an IJ applies the standard set forth by an Article III court and determines when detention has become unreasonable.

B. A *Habeas* Requirement is Unworkable and Exacerbates Already Unconstitutionally Prolonged Detention

A requirement that individuals file habeas petitions to obtain bond hearings is unworkable for reasons this Court already recognized in *Reid IV*. Requiring habeas petitions is contrary to judicial efficiency. *See* 814 F.3d at 498. The IJ is far better positioned than the district court to find the facts relevant to a reasonableness inquiry because the IJ is already "familiar with the intricacies of [an individual's] case and the particulars of the underlying removal proceedings."

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[7] Other courts have required the same. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 982 (9th Cir. 2017) (affirming district court's preliminary injunction requiring immigration officials to consider, *inter alia*, ability to obtain bond and alternative conditions of release making bond determinations).

[8] The question of when shackling is proper is not presented in this appeal.

Id. at 502 n.5. IJs can best consider "the foreseeability of proceedings concluding in the near future" and "the promptness (or delay) of the immigration authorities or the detainee," because they are familiar with their case dockets and can easily determine the cause of delays in proceedings. *Id.* at 500. IJs are also best positioned to consider "the likelihood that proceedings will culminate in a final removal order," *Id.*, because they receive evidence and arguments from the government and the noncitizen prior to deciding whether to order removal.

By contrast, federal district courts do not have ready access to information regarding the removal case and have little experience with immigration law, a particularly dynamic field at this time. A district court does not have information on immigration court dockets or the individual's immigration case file and would therefore need to be provided with that information in the course of a *habeas* proceeding. Moreover, because district courts are generally barred from reviewing the merits of removals orders, *see* 8 U.S.C. § 1252(a)(5) (eliminating *habeas corpus* review of removal orders in district court), district judges are far less experienced in evaluating the likelihood of a removal order or any delay in removal proceedings.

Even worse, requiring *habeas* petitions will inevitably exacerbate already unconstitutionally prolonged detentions, for two reasons. First, the practical reality is that most individuals subject to immigration incarceration cannot file *habeas*

petitions. As this Court has observed, federal litigation is "complicated and time-consuming" for noncitizens who are incarcerated, often do not speak English, have little to no formal legal training, and are frequently unrepresented by counsel. *Reid IV*, 819 F.3d at 498; *see also* Mary Holper, *The Great Writ's Elusive Promise*, Crimmigration Blog, http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise (January 21, 2020) (cataloging challenges posed by federal habeas requirement for incarcerated individuals and pro bono counsel).

Second, *habeas* filings remain pending before federal district courts for extended periods of time, as evidenced by the *habeas* petitions filed by *Reid* class members—many *pro se*—since the district court issued its ruling. *See, e.g.*, *De Jesus v. Charles*, 1:19-cv-11476-WGY, Dkt. No. 1 (D. Mass. July 22, 2019) (decision pending since petition filed in July 2019); *Lemonious v. Streeter*, 3:19-cv-30038-MGM, Dkt. No. 23 (D. Mass. October 3, 2019) (decision pending since district court's Order to Show Cause regarding relief under *Reid* in October 2019); *Evariste v. DHS*, 1:19-cv-11144-DJC, Dkt. No. 40 (D. Mass. November 11, 2019) (decision on *Reid* claim issued more than three months after petitioner filed motion *pro se* for *Reid* bond hearing). Thus, even in cases where individuals will successfully establish that their detention is unconstitutional, requiring *habeas* petitions has and will necessarily prolong their detentions for additional periods.

By contrast, the immigration court can provide prompt review of detention, and is far more accessible to individuals ICE incarcerates.

Finally, requiring reasonableness hearings in immigration court would be no more burdensome than requiring bond hearings, which IJs conduct regularly in the course of their duties. In ruling that a *habeas* petition was required, the district court noted the government's argument that requiring reasonableness hearings "would overwhelm the already overburdened immigration courts." Add.31. But this argument has no support in the record. *See* Appx. 325-335 (Defendants' Statement of Material Facts Pursuant to Local Rule 56.1, stating no facts regarding alleged burden, much less providing any evidence). It was legal error for the district court to credit the government's unsupported claims of burden. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 466, 479 (1992) (affirming reversal of grant of summary judgment where movant "[did] not present any actual data" related to material factual issue of market power).

Now that the district court has correctly concluded that unreasonably prolonged incarceration violates the Fifth Amendment, this Court should not require an unnecessary, unworkable process that further prolongs individuals' imprisonment. Thus, to the extent that reasonableness hearings are required at all, *see infra* Sections IV-V, the Court should order that those hearings take place in immigration court.

II. DUE PROCESS REQUIRES, AT A MINIMUM, A REASONABLENESS HEARING BEFORE AN IJ AT SIX MONTHS

Plaintiffs submit that, at a minimum, due process requires a ***reasonableness hearing*** before an IJ after six months of mandatory detention.[9] This reasonableness hearing is wholly consistent with the fact-specific inquiry required by both *Reid IV* and the district court.[10] Unlike a bond hearing, which directly assesses whether the person poses a flight risk or danger and should be released, the reasonableness hearing would apply the factors set forth by this Court in *Reid IV* to determine, as a threshold matter, whether mandatory incarceration has become unreasonable and a bond hearing is thus required.

Under the district court's own reasoning below, due process requires that the government provide ***some procedure*** to determine if mandatory detention has become unreasonable. The district court held that mandatory incarceration for more than one year is presumptively unreasonable but acknowledged that detention could become unreasonable before one year "if the Government unreasonably

[9] As explained *infra* Sections IV-V, Plaintiffs maintain that no "reasonableness" finding is necessary because incarceration without a bond hearing for six months is *per se* unconstitutional under the Due Process Clause and the Excessive Bail Clause. However, should this Court conclude that a "reasonableness" finding is necessary, that finding should be made by the IJ.

[10] This Court's prior opinion in *Reid IV* expressly left open the question of how individuals incarcerated by ICE should be able to challenge their continued mandatory no-bond incarceration. 819 F.3d at 502 n.5.

delays or the case languishes on a docket." Add.27-28. The court also recognized that the government bears a "responsibility" to prevent unconstitutional detentions. *See* Add.32.

At a minimum, that required procedure should take place after ***six months*** of incarceration without an individualized hearing. This rule is both consistent with the Supreme Court's recognition that six months of incarceration is a severe deprivation of liberty warranting constitutional protection, and compelled by procedural due process. This relief is also well within the courts' equitable discretion to remedy the extraordinary evidence of constitutional violations that pervades this record.

A. Supreme Court Precedent Requires a Reasonableness Hearing at Six Months

The Supreme Court has consistently held that due process requires individualized procedures to ensure that confinement serves a valid purpose and remains reasonable in relation to that purpose. Furthermore, the Supreme Court has repeatedly recognized six months of incarceration as a turning point at which individualized process is required under the Constitution to justify the deprivation of liberty.

Class members, like all "person[s]" protected by the Due Process Clause, have a fundamental liberty interest in freedom from incarceration: "Freedom from imprisonment—from government custody, detention, or other forms of physical

restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Thus, due process requires "adequate procedural protections" to ensure that prolonged detention serves valid government goals. *Id*. at 690.

Our legal tradition has long recognized six months as a substantial period of physical confinement, such that due process imposes significant process to continue incarceration beyond that time. "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual[.]" *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975). For example, the Supreme Court has set six months as the limit on confinement for criminal offenses that courts can impose without a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (limiting court-imposed sentences for contempt without jury trial to six months); *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970) (requiring jury trial for sentences in excess of six months); *Duncan v. State of La.*, 391 U.S. 145, 161 (1968) (recognizing the weight of common law precedent in support of the same).

Similarly, in the civil context, both before and after the enactment of Section 1226(c), Congress and the Executive Branch have recognized six months as a time period triggering individualized process to justify civil detention, even for national security risks and "especially dangerous" individuals. *See*, *e.g.*, 8 U.S.C. § 1537(b)(2)(C) (mandating incarceration review every six months for individuals

incarcerated for national security reasons who cannot be repatriated); 8 C.F.R. § 241.14(k)(1-3) (requiring IJ review every six months of especially dangerous individuals not substantially likely to be removed); *United States v. Comstock*, 560 U.S. 126, 131 (2010) (explaining that federal statutory regime enacted in 2006 for civil commitment of "sexually dangerous" individuals permits judicial review at six-month intervals). Indeed, the Supreme Court noted that "Congress previously doubted the constitutionality of [immigration] detention for more than six months" in holding that due process requires the government to justify immigration detention beyond six months for individuals who had already been ordered removed (unlike the Plaintiffs here). *Zadvydas*, 533 U.S. at 701.

The Supreme Court also reinforced the constitutional importance of six months for mandatory incarceration under Section 1226(c) in *Demore v. Kim*, 538 U.S. 510 (2003). There, the Court upheld the constitutionality of mandatory detention under Section 1226(c) only for "brief" periods of time, *id*. at 513, "[taking] pains to point out the specific durations that it envisioned were encompassed by its holding"—namely, a month and a half to five months. *Reid IV*, 819 F.3d at 494 (citing *Demore*, 538 U.S. at 530). In contrast, "[t]he constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [*Demore*'s] thresholds." *Diop v. ICE/Homeland Sec*., 656 F.3d 221, 234 (3d Cir. 2011).

The district court was wrong to disregard these precedents and therefore wrong to reject Plaintiffs' argument that relief is warranted at six months of no-bond incarceration. For example, the court held that the historical six-month threshold for requiring jury trials did not apply because the immigration context was "materially different" from the criminal context. Add.25. But the Supreme Court has made clear that Congress's legislative authority over immigration is still subject to due process. *See Zadvydas*, 533 U.S. at 693. And from the perspective of due process, there is no material difference between civil and criminal detention that is relevant to the analysis here. "[T]he Due Process Clause protects 'those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors,' and which were brought by them to this country." *Jennings*, 138 S. Ct. at 830 (Breyer, J., dissenting) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277, 15 L. Ed. 372 (1856)).[11] And as discussed above, the recognized historical understanding has been that six months is a threshold that triggers individualized process in a variety of incarceration contexts, both civil and criminal. Moreover, *Zadvydas* itself relied on the six-month jury cutoff and other examples from the

[11] As discussed *infra* p. 51, Justice Breyer's dissent in *Jennings* was the only opinion in that case to discuss the constitutionality of prolonged detention under Section 1226(c); thus, although not controlling, it still has persuasive weight.

criminal context in deciding that individualized process was required after six months of immigration detention. *See id*. at 701.

The district court also discounted the six-month rule from *Zadvydas* because *Zadvydas* concerned the potentially indefinite detention of individuals who had received final orders of removal, but whose removals could not be effectuated. Add.25; *Zadvydas*, 533 U.S. at 699-700. However, regardless of this difference, the logic of *Zadvydas* applies here. By definition, all class members have been imprisoned for ***at least*** six months, the same period that triggered the constitutional concern in *Zadvydas*, and in some cases significantly longer. *Zadvydas*, 533 U.S. at 701; Add.8 (two longest periods of incarceration for *Reid* class members were 1,541 and 1,291 days). Furthermore, while Section 1226(c) incarceration has a statutorily-defined termination point—the end of removal proceedings—one cannot predict in any case ***how much*** longer it will last beyond six months. Mr. Reid, for instance, has been in removal proceedings for over ***seven years***—since 2012—and he is still before the Immigration Court. Moreover, unlike in *Zadvydas*, *Reid* class members are not subject to final orders of removal, and many will prevail in their effort to be allowed to remain in this country. *See* discussion *supra* Sections I.A pp. 7-8, I.B p. 8. In this way, they have even stronger due process rights than the individuals afforded additional process in *Zadvydas*.

Finally, even if this Court disagrees that due process strictly requires a reasonableness hearing at six months, it is well within the Court's equitable power to require such a hearing as a remedy for unconstitutional detentions. Indeed, the Supreme Court has repeatedly protected constitutional rights through specific time limits. *See, e.g.*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (judicial evaluation of probable cause under the Fourth Amendment generally must occur not later than ***48 hours*** after arrest); *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (Fifth Amendment permits police interrogation of suspects without counsel after ***14 days*** out of custody). Because six months is already such a severe deprivation of liberty, the Court should require a reasonableness hearing at that time to ensure that class members do not suffer unconstitutional imprisonment.

B. Procedural Due Process Compels a Reasonableness Hearing at Six Months

A reasonableness hearing at six months is required not only by the broad remedial powers that any court may exercise to remedy the constitutionally unreasonable incarceration of class members without a bond hearing, but also by procedural due process. To determine what process is due under procedural due process, a court must balance: (1) the liberty interest affected; (2) the risk of an erroneous deprivation and probable value of additional safeguards; and (3) the government's interest against providing such procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). These factors compel the relief Plaintiffs seek.

1. Class members have a weighty interest in avoiding unreasonable incarceration and its attendant harms

As explained *supra* pp. 33-34, class members have a strong liberty interest in avoiding incarceration. *See Zadvydas*, 533 U.S. at 690. This liberty interest becomes even stronger as incarceration becomes prolonged. *See id.* at 701 (recognizing that the requirements of due process change as "the period of … confinement grows"); *Muniz*, 422 U.S. at 477 ("It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual[.]"); *Diouf v. Napolitano*, 634 F.3d 1081, 1091, 1092 (9th Cir. 2011) ("When the period of detention becomes prolonged," "the private interests at stake are profound."); *Diop*, 656 F.3d at 234 ("the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues" beyond the timeframes discussed in *Demore*).

Likewise, this Court has recognized the "real, human consequences of being held for prolonged periods of time in civil confinement away from family, friends, and loved ones." *Reid IV*, 819 F.3d at 498. Individuals subjected to long-term immigration incarceration face a great risk of physical and psychological injuries while detained as well as a lack of adequate medical care. Appx.431(¶50). These hardships implicate significant liberty interests. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("the right to rejoin [one's] immediate family [is] a right that ranks high among the interests of the individual"); *Youngberg v. Romeo*, 457

U.S. 307, 315 (1982) ("the right to personal security constitutes a historic liberty interest protected substantively by the Due Process Clause") (internal quotation marks omitted). Incarceration also harms class members' ability to litigate their removal cases by interfering with attorney-client relationships and restricting the ability of class members to gather evidence. *See, e.g.*, Appx.431-432(¶¶55, 57) (class member Arnoldo Rodriguez hindered in gathering evidence and securing effective assistance of counsel due to jail phone system restrictions); Appx.81(¶12), Appx.82(¶23, 41), Appx.426(¶14), Appx.429(¶37), Appx.432(¶57, 59); *supra* Section I.B. p. 10-11. *See also* Brief of *Amici Curiae* Retired Immigration Judges and Board Of Immigration Appeals Members in Support of Petitioner-Appellee ("*Reid IV* IJ/BIA Amicus Br.") at 7-9, *Reid IV*, 893 F.3d 486 (No. 14-1270) (noting restrictions imposed on incarcerated individuals' ability to retain and confer with counsel); Brief of *Amici Curiae* 44 Social Science Researchers and Professors ("*Reid IV* Social Science Br.") at 20, *Reid IV*, 893 F.3d 486 (No. 14-1270) (noting that in many facilities, lawyers are unable to speak by phone with clients or leave messages).

Although the language of Section 1226(c) ostensibly subjects class members to categorical mandatory detention, that does not negate the weight of the liberty interests described above. That categorical detention is itself subject to constitutional limits. As this Court recognized in *Reid*, the Supreme Court's

opinion in *Demore* acknowledged that the "categorical sanction" of Section 1226(c) has a "'limited' scope" and applies only to what the Supreme Court was led to believe was the "'brief period necessary'" for removal proceedings. *Reid IV*, 819 F.3d at 493-94 (quoting *Demore*, 538 U.S. at 513, 526). For this reason, this Court, like every other Circuit court post-*Demore* to consider the question, "recognized that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute." *Reid*, 819 F.3d at 494. Therefore, class members have a strong liberty interest in not being subjected to mandatory incarceration when such categorical incarceration becomes unreasonable. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("government action depriving a person of life, liberty, or property … must still be implemented in a fair manner" under "'procedural' due process") (citing *Mathews*, 424 U.S. at 335).

2. Requiring a reasonableness hearing at six months reduces the risk of erroneous deprivation

Without a reasonableness hearing at six months, individuals risk suffering constitutionally unreasonable detentions without an opportunity to be heard. As the Third Circuit has explained:

> given that Congress and the Supreme Court believed [Section 1226(c)'s] purposes would be fulfilled in the vast majority of cases within a month and a half, and five months at the maximum … [t]he constitutional case for continued detention without inquiry into its

> necessity becomes more and more suspect as detention continues past [*Demore*'s] thresholds.

Diop, 656 F.3d at 234 (citing *Demore*, 548 U.S. at 530). Requiring a reasonableness hearing at six months reduces the risk of erroneous deprivation by ensuring that an IJ will determine at six months if mandatory detention is still reasonable or if, instead, a bond hearing is warranted.

Moreover, there is "probable value" in the "additional … procedural safeguard[]," *Mathews*, 424 U.S. at 335, of automatically calendaring an Immigration Court reasonableness hearing at six months. This rule will enable the inquiry to be conducted at a predictable time when the IJ has the information necessary to evaluate the *Reid IV* factors. By regulation, the government must set forth its grounds for removability, including the underlying criminal conviction that would subject someone to § 1226(c), at the outset of the immigration case. 8 C.F.R. §§ 1003.14, 1003.15. Furthermore, in the majority of cases, by six months, the IJ will have conducted a master calendar hearing and received a pleading from the incarcerated individual outlining his or her requested relief. *See* Executive Office of Immigration Review, Immigration Court Practice Manual ("Practice Manual"), at § 4.15(e) (2018) ("[s]cope of the master calendar hearing" includes, *inter alia*, "take pleadings," "identify and narrow the factual and legal issues," "set deadlines for filing applications for relief, briefs, motions, prehearing statements, exhibits, witness lists, and other documents," and "schedule hearings to

adjudicate contested matters and applications for relief"), *available at* https://www.justice.gov/eoir/page/file/1084851/download. Thus, by six months, the IJ will have the information necessary to evaluate reasonableness. *See*, *e.g.*, *Reid IV*, 819 F.3d at 500 (relevant factors include "foreseeability of proceedings concluding in the near future (or the likely duration of future detention)" and "likelihood that the proceedings will culminate in a final removal order").[12]

3. There is no meaningful burden on the government

The only possible burden imposed on the government by requiring hearings at six months is the increase in number of hearings in immigration court. However, there is no evidence in the record that providing reasonableness hearings, and then conducting bond hearings for those who are deemed eligible, will burden the government in any meaningful way. *See*, *e.g.*, Appx. 325-335 (Defendants' Statement of Material Facts Pursuant to Local Rule 56.1, stating no facts regarding alleged burden of any type of hearing).

It is unsurprising that the government did not even attempt to demonstrate that providing individualized process in immigration court would burden the immigration court system. Immigration courts regularly and efficiently process

[12] Moreover, even in the event that the master calendar hearing has not occurred by six months, the IJ would be able to assess the degree to which the delay is attributable to the noncitizen or to the government, since all requests for continuances must be made by motion to the immigration court itself. *See* Practice Manual at § 5.10(a).

dispositive hearings related to incarceration. For example, the government's own publicly-available statistics show that between FY2015 and FY2019, Immigration Courts in Massachusetts conducted 5,496 bond hearings. *See Immigration Court Bond Hearings and Related Case Outcomes*, TRAC Immigration https://trac.syr.edu/phptools/immigration/bond/ (last visited Feb. 12, 2010).[13] Such bond hearings are typically brief and, at the option of the IJ, often involve evidentiary proffers by counsel rather than live testimony. By comparison, the *Reid* class has been certified for approximately that same length of time; in that period, ***158 members*** have vested into the class, *see supra* Section I.A p. 6 n.2. Furthermore, as noted *supra* pp. 42-43, the information that an IJ would consider in a reasonableness inquiry is information that would ordinarily be submitted to the IJ anyway. Thus, conducting reasonableness hearings for *Reid* class members poses a negligible adjudicative burden.

Indeed, the government will actually *benefit* from providing reasonableness hearings to class members at six months. If an IJ finds a noncitizen's mandatory incarceration unreasonable and conducts a bond hearing, and that noncitizen is then granted bond and then released, the government saves the average $123.86 per person per day cost of incarcerating that person (not including payroll costs).

[13] Figures for Massachusetts for each fiscal year are viewed by selecting "by Fiscal Year" on the "Graph Time Scale" and then selecting "Massachusetts" under the "Bond Hearing Immigration Court State" menu.

Appx.427(¶¶22, 23). Moreover, as former IJs explained to this Court in *Reid IV*, hearings that lead to the release of detainees improve the efficiency of immigration court proceedings. These hearings reduce the need for multiple continuances by *pro se* detainees laboring to secure documents and witnesses from prison while also facilitating access to counsel for detainees released on bond and able to retain a lawyer. IJ/BIA Amicus Br. 14.

In sum, procedural due process compels a reasonableness hearing at the six-month mark.

III. THE DISTRICT COURT ERRED IN DETERMINING WHEN DUE PROCESS RENDERS MANDATORY INCARCERATION PRESUMPTIVELY UNREASONABLE

The district court erred in basing its determination of when mandatory incarceration becomes presumptively unreasonable on the government's case completion statistics and goals. Add.26-28. This determination lacks support in the law and is, in fact, contrary to due process principles on the limits of mandatory detention. *Zadvydas* acknowledged that it was "practically necessary to recognize some presumptively reasonable period of detention" and set that period at six months. 533 U.S. at 700-701. Here, the district court sought to provide similar guidance, but its reliance on the government's information to determine what due process requires was legally flawed. It cannot be that the length of a constitutionally reasonable detention is equivalent to the amount of time the

government generally takes to resolve removal proceedings without any determination that detention is justified for the duration of those proceedings.

The district court held that incarceration was presumptively unreasonable only after one year, emphasizing the government's target of completing removal proceedings within that period. *See* Add.2-3 (referencing "the Government's own regulations and policies, which aim to complete removal proceedings in no more than nine months, and statistics showing that most removal proceedings take less than one year"), Add.26-28 (concluding that "[i]t is reasonable to expect EOIR to complete removal proceedings within one year for most aliens"). The district court also examined the data in the record regarding incarceration lengths and concluded that "[t]hese data do not show that six months is the outer limit of a reasonable period for the Government to complete removal proceedings." Add.19-20.

Neither the fact that the government takes more than six months to complete removal proceedings, nor its aspirational timeline for concluding proceedings, renders mandatory no-bond incarceration longer than six months reasonable. The district court's rationale—that a person may be detained without process for however long it typically takes the government to complete proceedings—would surrender constitutional interpretation to the agency's choices about how to allocate its resources. Under the district court's logic, if the data had shown that the government typically completes removal proceedings for Section 1226(c)

detainees in five years, or ten years, that might still be considered a period that is likely reasonable for incarcerating an individual without a bond hearing.

Due process precedent shows that the district court's deference here was legal error. *Zadvydas*, *Demore*, and historical practice in other contexts of confinement support a six-month presumption, at which point a bond hearing is required unless the government can demonstrate that mandatory detention remains reasonable under the *Reid IV* factors. The district court cited no legal authority for the proposition that a person's due process rights are governed by the government's stated case disposition target or its ability or willingness to meet those aspirations. The government's targets are far outside the month and a half to five months the Supreme Court contemplated as a reasonable detention length in *Demore.* 538 U.S. at 530. The Court should reject this approach.

Indeed, the two circuit courts to have addressed this issue have similarly held, in reliance on *Demore*, that mandatory detention without a bond hearing is likely to become unreasonable between six months and a year. *See Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 477-78 (3d Cir. 2015); *Sopo v. Atty. Gen.*, 825 F.3d 1199, 1217-18 (11th Cir. 2016), *vacated* 890 F.3d 952 (11th Cir. 2018). Neither circuit took the approach employed by the district court here, which erred in its application of due process law to mandatory ICE incarceration.

This Court should hold that mandatory incarceration is presumptively unreasonable at six months.

IV. DUE PROCESS REQUIRES A BOND HEARING AFTER SIX MONTHS OF INCARCERATION

To preserve their claim, Plaintiffs continue to maintain, as they did before the district court, that no reasonableness determination is necessary in the first place because due process requires more: a ***bond hearing*** after six months of incarceration. The precedent cited in Section II.A *supra*, and the weighing of the Plaintiffs' and governments' interests discussed in Section II.B, *supra*, support this bright-line rule. Moreover, as this Court recognized, the workability of the bright-line rule cannot be overstated: it allows the government to schedule bond hearings regularly and efficiently, without burdening the district courts or requiring a cumbersome, two-step process (a reasonableness determination followed by a bond hearing). It also allows Plaintiffs to vindicate their due process rights without the enormous burden of litigating individual *habeas* petitions in federal court. *See Reid*, 819 F.3d at 498. Thus, Plaintiffs respectfully request that this Court restore the remedy originally entered by the district court in this litigation on due process grounds and order the government to provide bond hearings to class members after six months of incarceration.

Due process often requires uniform procedures to ensure that adjudicators make consistent determinations rather than ad-hoc, case-by-case assessments of

what process is due. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (recognizing denial of due process "does not depend upon the merits of a claimant's substantive assertions," but instead on whether the government created a sufficient process). "[T]he determination of what process is due is performed on a 'wholesale' basis for general categories of disputes, rather than on a 'retail' basis taking into account the particular characteristics of each case." Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 698 (7th ed. 2011). In this vein, *Zadvydas* mandated a uniform threshold—six months—at which the government must show that incarceration under Section 1231(a) "bears a reasonable relation to [its] purpose," and the government subsequently adjusted its regulations accordingly. *Zadvydas*, 533 U.S. at 690; 8 C.F.R. § 241.13 (amended after *Zadvydas* to conduct post-order custody reviews after 180 days).[14]

[14] Moreover, the *Zadvydas* Court was right to examine historical precedent to determine when unchecked state control over individuals should be found unreasonable. *See* 533 U.S. at 701 (noting that "Congress previously doubted the constitutionality of detention for more than six months"). The district court declined to follow this aspect of *Zadvydas* because it concluded that *Zadvydas* relied on a case involving ***post-final order*** supervision. Add.25 (citing *United Sates v. Witkovich*, 353 U.S. 194 (1957)). But this argument misapprehends ***why*** *Witkovich* was relevant to the Supreme Court's decision in *Zadvydas*. Due process broadly protects "'settled usages.'" *Jennings*, 138 S. Ct. at 863 (Breyer, J., dissenting) (quoting *Murray's Lessee*, 18 How. at 277). Thus, when examining what process is due in a given circumstance, courts do not restrict their analysis to the historical practice ***in that exact circumstance***; rather, they look at historical practice more broadly. *Witkovich* was relevant in *Zadvydas* ***not*** because the two cases concerned the exact same circumstance – *Witkovich* was a case about

As this Court itself recognized, a uniform hearing requirement provides "significant benefits" that a case-by-case rule lacks. *Reid IV*, 819 F.3d at 497-98; *see also id.* (recognizing that its now-vacated ruling would "result[] in inconsistent determinations," could "have the perverse effect of increasing detention times for those least likely to actually be removed at the conclusion of their proceedings," and would be largely duplicative of hearings already held in immigration court). In light of these concerns, Plaintiffs respectfully submit that this Court should reconsider *Reid IV*'s suggestion that an impractical form of relief, so onerous as to be preclusive for many individuals, could satisfy due process. *See Sopo*, 825 F.3d at 1225 (Pryor, J. concurring in part) (noting that the reasonableness test creates "the risk that the case-by-case approach will result in unpredictable, inconsistent, or arbitrary outcomes itself rais[ing] serious due process concerns").

In ruling against a bond hearing at six months, the district court erroneously held that such a rule would be inconsistent with *Demore* and *Jennings*. Add.19-20. In fact, neither case precludes requiring a bond hearing at six months. The Supreme Court upheld the facial constitutionality of Section 1226(c) in *Demore*, but the Court did not consider whether the statute is constitutional ***as applied*** to

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supervision, not detention, *see* 353 U.S. at 195 — but because *Witkovich* was a further illustration (along with *Cheff v. Schnackenberg*, 384 U.S. 373, which *Zadvydas* also cited) of the historical recognition of six months as a critical threshold. *See Zadvydas*, 533 U.S. at 701.

persons who have already been detained for a prolonged period, as Plaintiffs have been. And although the respondent in *Demore* had been imprisoned for six months when the case was decided, his constitutional claim was not premised on the length of his confinement without a bond hearing, because he was challenging the government's right to ***initially*** detain him without a bond hearing. *Demore*, 538 U.S. at 514 n.2 (noting that Mr. Kim challenged the "absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk"). The respondent in *Demore* never argued, and thus the Supreme Court never considered, the possibility that categorical mandatory incarceration might initially be permissible for some period, but then become impermissible when it continues for a prolonged period. The *Demore* Court carefully limited its holding to individuals whose detentions were "brief," *id.* at 513, and the Court "took pains to point out the specific durations that it envisioned were encompassed by its holding"—i.e., a month and a half to five months. *Reid IV*, 819 F.3d at 494 (citing *Demore*, 538 U.S. at 530).

Nor does *Jennings* preclude requiring bond hearings at six months as a matter of due process. As a threshold matter, the *Jennings* majority opinion disposed of the case purely on statutory construction grounds and did not reach the requirements of due process at all; indeed, the majority criticized the dissent for even discussing the Constitution. 138 S. Ct. at 848. Nevertheless, the district court

held that providing a bond hearing after six months was inconsistent with *Jennings* because *Jennings* "emphasized that 'due process is flexible, … and it calls for such procedural protections as the particular situation demands.'" Add.20 (quoting *Jennings*, 138 S. Ct. at 852). The district court read this language out of context. In *Jennings*, the Court directed the Ninth Circuit to consider on remand whether a uniform bond hearing rule was appropriate in light of its prior observation that "some members of the certified class"—noncitizens arriving at the border, as opposed to admitted to the U.S.—"may not be entitled to bond hearings as a constitutional matter." *Jennings*, 138 S. Ct. 852 (citing *Rodriguez v. Robbins* (*Rodriguez II*), 804 F.3d 1060, 1082 (9th Cir. 2015), and *Rodriguez v. Robbins* (*Rodriguez I*), 715 F.3d 1127, 1139-41 (9th Cir. 2013)).[15] Here, unlike in *Jennings*, there is no dispute that all class members have the same due process rights.

V. MANDATORY INCARCERATION UNDER § 1226(c) BEYOND SIX MONTHS VIOLATES THE EXCESSIVE BAIL CLAUSE

Imprisonment under Section 1226(c) past six months without an individualized hearing likewise violates the Eighth Amendment. U.S. Const. amend. VIII ("[e]xcessive bail shall not be required").

[15] The class in *Jennings*, unlike the class here, encompassed four subclasses of individuals held under four separate statutes, including Section 1226(c). *See Jennings*, 138 S. Ct. at 838-839.

"[E]xcessive" conditions include "refusal to hold any bail hearing at all." *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting). *See also Carlson*, 342 U.S. at 569 (Burton, J., dissenting) (because the Eighth Amendment prohibits excessive bail, "[l]ikewise, it must prohibit unreasonable denial of bail … which comes to the same thing"); *Castañeda v. Souza*, 810 F.3d 15, 44 (1st Cir. 2015) (*en banc*) (Torruella, J., concurring) (Section 1226(c) incarceration is "ongoing, institutionalized infringement of the right to bail"). *See also* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 969 (1965) (contention that Congress may deny all access to bail "would constitute an anomaly in the American Bill of Rights[.]").

The Excessive Bail Clause's prohibition against "excessive" conditions applies whenever "there is a direct government restraint on personal liberty," including immigration incarceration. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 n.3 (1989) (Excessive Bail Clause is implicated "when there is a direct government restraint on personal liberty, be it in a criminal case *or in a civil deportation proceeding*") (emphasis added); *see also, e.g.*, *Carlisle v. Landon*, 73 S. Ct. 1179, 1182 (1953) (Douglas, J., in chambers) (Excessive Bail Clause requires that a person "not be capriciously held" and ordering individual released on bail pending appeal in deportation proceedings); *see also* Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in*

Removal Proceedings, 4 AM. U. CRIM. L. Brief 30, 46-47 (2009) (history of Excessive Bail Clause confirms it is applicable to immigration incarceration).

Numerous courts have applied the Excessive Bail Clause to immigration incarceration and concluded that it requires at least a possibility of release on reasonable bail. *See, e.g.*, *Danesh v. Jenifer*, No. 00-CV-74409-DT, 2001 WL 558233, at *7 (E.D. Mich. Mar. 27, 2001) ("a statute that mandatorily denies bond violates the Eighth Amendment"); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1380 (E.D. La. 1996) ("[T]he denial of the opportunity to seek bail constitutes the setting of excessive bail."); *Probert v. I.N.S.*, 954 F.2d 1253 (6th Cir. 1992) (affirming decision that found statute not providing for bail or bail hearing unconstitutional and the Eight Amendment); *Leader v. Blackman*, 744 F. Supp. 500, 509 n.15 (S.D.N.Y. 1990) ("[A] blanket rule prohibiting a court from even ascertaining whether bail in a particular situation is appropriate would violate [the Eighth A]mendment"). This requirement is particularly important in prolonged immigration incarceration. *See, e.g.*, *Kabba v. Barr*, 403 F. Supp. 3d 180, 190-91 (W.D.N.Y. 2019) ("Although the detention of criminal aliens during removal proceedings for only a brief period without individualized findings after a hearing is not 'excessive in relation to the valid interests the government seeks to achieve,' the same cannot necessarily be said 'after unusual delay in deportation hearings.'") (citations omitted).

The Excessive Bail Clause forbids mandatory incarceration without the possibility of seeking bail and requires that non-citizens detained under Section 1226(c) be afforded bond hearings after six months of incarceration.

VI. DUE PROCESS REQUIRES THAT THE GOVERNMENT PROVE FLIGHT RISK BY CLEAR AND CONVINCING EVIDENCE

The district court erred in holding that when bond hearings become necessary for people detained pursuant to Section 1226(c), "due process requires the Government to prove an alien's dangerousness by clear and convincing evidence … [and] an alien's risk of flight by a preponderance of the evidence." Add.39. The district court incorrectly adopted burden of proof standards from the criminal context, when it should have adopted the higher burden of proof on the government that due process mandates in civil detention proceedings. This Court should require the government to prove both dangerousness and flight risk by clear and convincing evidence.

Although the bifurcated standard adopted by the district court is consistent with the Bail Reform Act, a more protective standard is warranted for prolonged incarceration under Section 1226(c). Unlike the defendants to whom the Bail Reform Act applies, the flight risk determinations here apply to alleged class members who are appearing for civil removal proceedings and who forfeit rights in those proceedings by defaulting. *See* 8 U.S.C. §1229a(b)(5)(A) (providing for

entry of removal order where removable noncitizen who was notified of hearing does not appear).

In civil proceedings, due process requires the government to prove flight risk and dangerousness by clear and convincing evidence. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992); *Addington*, 441 U.S. at 431-33. Other courts have held that this is the appropriate standard for both factors in bond hearings for individuals incarcerated by ICE. *See, e.g.*, *Singh v. Holder*, 638 F.3d 1196, 1205-06 (9th Cir. 2011); *Hernandez Arellano v. Sessions*, No. 6:18-cv-06625, 2019 WL 3387210, at *12 (W.D.N.Y. Jul. 26, 2019) ("most courts that have decided the issue have concluded that Government must supply clear and convincing evidence that the alien is a flight risk or danger to society"); *Hernandez-Lara*, No. No. 19-cv-394-LM, 2019 WL 3340697, at *7 (D.N.H. Jul. 25, 2019) (similar). "Civil commitment for any purpose constitutes a significant deprivation of liberty." *Addington*, 441 U.S. at 425. "Because 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*, 638 F.3d at 1203-04 (citing *Addington*, 441 U.S. at 427).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's remedial order and hold that (1) bond hearings—and if not bond hearings, then reasonableness hearings—should be conducted by immigration judges for each class member detained six months or longer; and (2) detention pursuant to 1226(c) is presumptively unreasonable after six months. In the alternative, this Court should vacate and remand the district court's remedial order so as to permit consideration by the district court in the first instance of whether—and if so, when and how—immigration judges might make findings regarding the reasonableness of a class member's continued no-bond detention. Finally, this Court should require the government to prove flight risk by clear and convincing evidence at any bond hearing over prolonged incarceration.

Respectfully submitted,

Date: February 12, 2020

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a true and correct copy of the foregoing Brief of Appellants/Cross-Appellees has been filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the CM/ECF system this 12th day of February, 2020, to be served on the following counsel of record via ECF:

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ADDENDUM

Addendum

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID; ROBERT WILLIAMS; and LEO FELIX CHARLES, on behalf of themselves and others similarly situated, Plaintiffs/Petitioners, v. CHRISTOPHER DONELAN, Sheriff, Franklin County, et al., Defendants/Respondents.	Civil Action No. 13-30125-PBS

MEMORANDUM AND ORDER

July 9, 2019

Saris, C.J.

INTRODUCTION

In this class action, Plaintiffs challenge the constitutionality of mandatory detention of noncitizens with certain criminal convictions who have been detained for more than six months during removal proceedings without the opportunity for a bond hearing pursuant to 8 U.S.C. § 1226(c). Plaintiffs represent a class of "[a]ll individuals who are or will be detained within the Commonwealth of Massachusetts or the State of New Hampshire pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond or

reasonableness hearing." Reid v. Donelan, No. 13-30125-PBS, 2018 WL 5269992, at *8 (D. Mass. Oct. 23, 2018). Both Plaintiffs and the Government have moved for summary judgment on whether mandatory detention of the class members under 8 U.S.C. § 1226(c) for over six months violates the Fifth Amendment Due Process Clause or the Eighth Amendment Excessive Bail Clause. After hearing, the Court **ALLOWS IN PART** and **DENIES IN PART** Plaintiffs' motion for summary judgment (Docket No. 453) and **ALLOWS IN PART** and **DENIES IN PART** the Government's motion for summary judgment (Docket No. 455).

In summary, the Court holds and declares as follows: First, as the Government agrees, mandatory detention without a bond hearing under 8 U.S.C. § 1226(c) violates due process when an noncitizen's individual circumstances render the detention unreasonably prolonged in relation to its purpose in ensuring the removal of deportable noncitizens with criminal records. Second, the determination of whether mandatory detention without a bond hearing has become unreasonably prolonged is a fact-specific analysis. The most important factor in determining whether detention has become unreasonably prolonged is the length of the detention. The Court rejects Plaintiffs' request that the Court impose a bright-line six-month rule on the ground that it is unsupported by the record and the caselaw. Third, in the unusual instances when mandatory, categorical detention

lasts for more than one year during agency removal proceedings, excluding any dilatory tactics attributable to the noncitizen, the delay is likely to be unreasonable. This one-year period reflects the Government's own regulations and policies, which aim to complete removal proceedings in no more than nine months, and statistics showing that most removal proceedings take less than one year. However, detention of under a year may be unreasonably prolonged if the matter just lingers on the immigration court or Board of Immigration Appeals ("BIA") docket.

Fourth, a noncitizen subject to mandatory detention without a bond hearing under § 1226(c) must bring a habeas petition in federal court to challenge his detention as unreasonably prolonged. If the court agrees, the individual is entitled to a bond hearing before an immigration judge at which the Government bears the burden of proving that he is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence. If the Government demonstrates that the individual is dangerous or a risk of flight, for example if he has a serious criminal record, he is not entitled to release. Fifth, in making its release determination, the immigration court may not impose excessive bail, must evaluate the individual's ability to pay in setting bond, and must consider alternative conditions of release such as GPS monitoring that

reasonably assure the safety of the community and the individual's future appearances.

PROCEDURAL HISTORY

The Court assumes familiarity with the complex procedural posture of this case from its October 23, 2018 memorandum and order and only briefly summarizes the relevant background. See Reid, 2018 WL 5269992, at *1-3.

On July 1, 2013, Plaintiff Mark Anthony Reid filed a petition for writ of habeas corpus and complaint for injunctive relief that raised statutory and constitutional claims challenging mandatory detention under § 1226(c). On January 9, 2014, the court (Ponsor, J.) granted Reid's individual habeas petition. Reid v. Donelan, 991 F. Supp. 2d 275, 282 (D. Mass. 2014), aff'd, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018). Following its earlier decision in Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009), the court held that § 1226(c) "include[d] a 'reasonableness' limit on the length of time an individual can be detained without an individualized bond hearing" to avoid due process concerns with indefinite detention, Reid, 991 F. Supp. 2d at 279. The court evaluated two approaches to implementing this reasonableness requirement: an automatic bond hearing once mandatory detention exceeds six months ("six-month rule") or a bond hearing only when mandatory detention has become unreasonable as analyzed on

a case-by-case basis ("individualized reasonableness rule"). See id. at 279-82. The court determined that Reid was entitled to a bond hearing under either approach but suggested it would adopt the six-month rule. See id. at 279.

On February 10, 2014, the court (Ponsor, J.) certified the following class under Federal Rule of Civil Procedure 23(b)(2): "All individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing." Reid v. Donelan, 297 F.R.D. 185, 194 (D. Mass. 2014). Three months later, the court (Ponsor, J.) awarded summary judgment and a permanent injunction to the class on the basis of its holding that § 1226(c) includes a requirement for a bond hearing after six months of mandatory detention. See Reid v. Donelan, 22 F. Supp. 3d 84, 88-89, 93-94 (D. Mass. 2014), vacated, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018). The court also held that due process did not require that the Government bear the burden of proof at the class members' bond hearings, let alone by clear and convincing evidence. Id. at 92-93.

On appeal, the First Circuit agreed that "categorical, mandatory, and indeterminate detention raises severe constitutional concerns" and that the canon of constitutional avoidance necessitated reading a bond hearing requirement into

§ 1226(c). Reid v. Donelan, 819 F.3d 486, 494 (1st Cir. 2016), withdrawn, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018). Disagreeing with the district court, however, the First Circuit held that Supreme Court precedent required it to adopt the individualized reasonableness rule. See id. at 495-98. It instructed district courts evaluating the reasonableness of § 1226(c) detention without a bond hearing to "examine the presumptions upon which [mandatory detention] was based (such as brevity and removability)" and consider "the total length of the detention; the foreseeability of proceedings concluding in the near future . . .; the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order." Id. at 500. Based on this holding, the First Circuit vacated the grant of summary judgment to Plaintiffs on the class claims. Id. at 501. Since its decision raised questions as to the continued propriety of class certification, the court declined to address Plaintiffs' cross-appeal challenging the district court's holding that due process does not require the Government to bear the burden of proof at a bond hearing. See id. The court noted, however, that Plaintiffs raised "a bevy of weighty constitutional arguments" concerning the procedural protections required at a bond hearing. Id.

Two months later, the Supreme Court granted certiorari in Jennings v. Rodriguez, a class action in the Ninth Circuit also challenging mandatory detention under § 1226(c). See 136 S. Ct. 2489 (2016) (mem.). The First Circuit stayed this lawsuit pending resolution of Jennings. On February 27, 2018, the Supreme Court held that the explicit language in § 1226(c) requiring mandatory detention during removal proceedings barred courts from invoking the canon of constitutional avoidance to read an implicit requirement for bond hearings into the statute. Jennings v. Rodriguez, 138 S. Ct. 830, 846-47 (2018). Because the Ninth Circuit did not decide if such mandatory detention is constitutional, the Court declined to rule on that question. See id. at 851.

Shortly thereafter, the First Circuit withdrew its previous opinion in this case. See Reid, 2018 WL 4000993, at *1. In a summary decision, it affirmed the district court's judgment for Reid individually, vacated the judgment for the class, and remanded the case for reconsideration of the certification order. Id. After the case was reassigned on remand, this Court determined that continued certification of the class was proper. See Reid, 2018 WL 5269992, at *8. While adoption of the individualized reasonableness rule would require an analysis of the circumstances of each class member's detention, the class still raised the common question of "whether the Due Process

Clause or Excessive Bail Clause requires that they at least have the chance to plead their case after six months at an individualized bond or reasonableness hearing." Id. at *5. The Court declined to address whether 8 U.S.C. § 1252(f)(1) would bar a classwide permanent injunction because it could, at a minimum, issue a declaratory judgment establishing class members' right to a bond or reasonableness hearing. Id. at *6. After an opportunity for discovery, both Plaintiffs and the Government now move for summary judgment.

STATISTICAL BACKGROUND ON § 1226(c) DETENTION

The Court allowed for limited discovery concerning the average and median detention times for individuals subject to mandatory detention under 8 U.S.C. § 1226(c). The parties did not submit any deposition testimony but present dueling statistics about § 1226(c) detention. Plaintiffs state that the median length of detention for released or removed class members (whose detention has ended and who, per the class definition, were detained for at least 180 days) was 363.5 days, with 25% detained for fewer than 253 days and 25% detained for more than 561.5 days. Dkt. No. 460-1 ¶ 8. The two longest periods of detention were 1,541 and 1,291 days. Id. Non-class members detained under § 1226(c) (i.e., for less than 180 days) were held for a median of 98 days, with 25% detained for 60 days or fewer. Id. ¶ 11. Plaintiffs do not provide information on the

average period of § 1226(c) detention overall. They do add, however, that 27% of class members detained under § 1226(c) before implementation of Judge Ponsor's 2014 injunction obtained relief from removal or termination of their removal proceedings. Dkt. No. 387-5 ¶ 9.

The Government provided the Court with data on the duration of removal proceedings in the Boston and Hartford Immigration Courts for individuals detained under § 1226(c) over the past twenty years. Dkt. No. 415-1 at 9-14. The Government emphasizes that immigration court proceedings for only 3.8% of aliens lasted more than a year, but this figure does not account for the duration of an appeal to the BIA. From the Government's charts, the Court has calculated that removal proceedings, including any appeal to the BIA, but not including any petition for review to the circuit court, lasted longer than one year for 5.8% of aliens detained under § 1226(c) over the past five years.[1] See id. The median completion time for removal

[1] I added together the "total cases not appealed" (second column of Charts 1 and 2) and the "total appeals" (second column of Charts 5 and 6). This figure (1302) is the total number of § 1226(c) removal cases over the past five years in the Boston and Hartford Immigration Courts. I then added together the number of cases that took more than twelve months at the immigration court level where there was no appeal (fourth column of Charts 1 and 2) and the number of cases that took more than twelve months in total where there was an appeal (fourth column of Charts 5 and 6). This figure (75) represents the number of § 1226(c) removal cases over the past five years that lasted longer than a year within the agency. 75 is 5.8% of 1302.

proceedings at the immigration court level over the past five years was around 40 days in non-appealed cases and three months in cases that were ultimately appealed to the BIA. Id. ¶ 18. In 2018, the median pendency of an appeal to the BIA was around four months. Id. ¶ 24. Nearly 90% of non-appealed cases were completed within six months. Id. ¶ 18. Only 22% of § 1226(c) detainees were granted relief or had their removal proceedings terminated in 2018 in the Boston Immigration Court. Id. ¶ 20.

The parties agree that close to half of the class members that received a bond hearing pursuant to Judge Ponsor's 2014 injunction were given an opportunity for release. Immigration judges set bond for 37 of the 104 class members (36%) and released 13 others under orders of supervision or recognizance (13%). See Dkt. No. 460-1 ¶¶ 14-15; Dkt. No. 467 ¶¶ 5-6.

The Government has also submitted the criminal histories of all of the members of the class. This information reveals that the class is comprised of immigrants with a wide range of criminal backgrounds. Some class members have only one conviction for a nonviolent offense. See, e.g., Dkt. No. 459-1 at 33 (gambling); id. (identity theft). A number have been convicted of drug offenses. See, e.g., id. at 21 (two convictions for drug possession); id. at 22 (one conviction for selling marijuana). Others have lengthy criminal histories with a number of convictions for violent crimes. See, e.g., id. at 10

(multiple convictions for burglary and aggravated assault); id. at 23-24 (two convictions for assault and one for kidnapping).

Mark Reid, the original class representative, was convicted in 2002 and 2010 of drug trafficking and possession and conspiracy to commit burglary. U.S. Immigration and Customs Enforcement ("ICE") detained him on November 13, 2012 and initiated removal proceedings. At the bond hearing Judge Ponsor ordered for him in January 2014, an immigration judge released him on bond. Reid's removal proceedings are still ongoing, as the BIA has remanded his case back to the immigration judge three times. The immigration judge determined that Reid has not committed an aggravated felony, and Reid is currently challenging whether his convictions are crimes involving moral turpitude and is claiming eligibility for asylum, withholding of removal, and relief under the Convention Against Torture. In March and April 2019, Reid was charged in two separate incidents with, inter alia, threatening, breach of the peace, and possession of cocaine.

Robert Williams, another class representative, pled guilty to drug possession and weapons charges. ICE served Williams with a Notice to Appear and took him into custody on December 6, 2017. An immigration judge ordered him removed and denied his application for cancellation of removal, and the BIA dismissed his appeal. He was removed on October 25, 2018 while his

petition for review of the BIA order was pending at the Second Circuit.

Leo Felix Charles, the final class representative, was convicted of drug trafficking and first-degree assault. After completing his term of imprisonment, he was detained by ICE on February 2, 2018. An immigration judge terminated his deferral of removal under the Convention Against Torture, which he had received in 2003, and the BIA dismissed his appeal. Charles filed a petition for review of the BIA dismissal, and the Second Circuit stayed his removal on December 11, 2018 pending resolution of his petition. ICE released Charles from custody on February 14, 2019.

DISCUSSION

I. Statutory Background

8 U.S.C. § 1226 governs the detention of aliens[2] during removal proceedings. Jennings, 138 S. Ct. at 837. The Government may generally release an alien on bond or conditional parole pending a decision on his removability. 8 U.S.C. § 1226(a). However, 8 U.S.C. § 1226(c) "carves out a statutory category of aliens who may not be released." Jennings, 138 S. Ct. at 837.

[2] In light of the Supreme Court and First Circuit's use of the terms "aliens" for noncitizens and "criminal aliens" for noncitizens with criminal convictions that serve as predicates for mandatory detention under § 1226(c), the Court uses these terms.

Under § 1226(c), the Government "shall take into custody any alien" who is inadmissible or deportable based on a conviction for "certain crimes of moral turpitude, controlled substance offenses, aggravated felonies, firearm offenses, or acts associated with terrorism." 8 U.S.C. § 1226(c)(1) (emphasis added); Gordon v. Lynch, 842 F.3d 66, 67 n.1 (1st Cir. 2016). The crimes that serve as predicates for mandatory detention under § 1226(c) vary widely from simple drug possession, 8 U.S.C. § 1227(a)(2)(B)(i), to violent crimes such as rape and murder, 8 U.S.C. § 1101(a)(43)(A).

A criminal alien is subject to mandatory detention whether or not he is taken into immigration custody as soon as he is released from criminal custody for his underlying offense. See Nielsen v. Preap, 139 S. Ct. 954, 965 (2019).[3] The Government may release such an alien only for witness protection purposes and only if the alien shows he is not a danger to the community or a risk of flight. 8 U.S.C. § 1226(c)(2). The statute does not provide a right to a bond hearing, but an alien who believes he does not have the requisite criminal conviction to qualify for mandatory detention may challenge his classification in Joseph

[3] In Preap, the Supreme Court held that the language of § 1226(c) does not require that the Government take the alien into immigration custody immediately upon release from criminal custody to trigger mandatory detention. 139 S. Ct. at 965. The Court did not address whether this interpretation of § 1226(c) renders the statute unconstitutional. See id. at 972.

hearings. Preap, 139 S. Ct. at 971 n.8 (citing Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999)).

Congress enacted § 1226(c) in the 1990s in response to the difficulty the Government faced in removing deportable criminal aliens. See Demore v. Kim, 538 U.S. 510, 521 (2003). Congress had evidence that the Government was unable to remove deportable criminal aliens in large part because of its "broad discretion" to release aliens on bond during removal proceedings and the "severe limitations on funding and detention space, which . . . affected its release determinations." Id. at 519. Between one-in-five and one-in-four aliens with criminal records released on bond failed to appear at their removal hearings. See id. at 519-20. In enacting § 1226(c), Congress determined that "detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal." Id. at 521.

The Supreme Court has decided two cases concerning § 1226(c) that are relevant to Plaintiffs' constitutional claims. First, in Demore v. Kim, the Court rejected an alien's facial due process challenge to mandatory detention under § 1226(c). 538 U.S. at 522-23, 530. The Court emphasized that "[d]etention during removal proceedings is a constitutionally permissible part of that process" and Congress may detain aliens based on statutory presumptions rather than relying on individualized dangerousness and flight risk determinations for

each alien. Id. at 526, 531. As the Court explained, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." Id. at 528. Accordingly, mandatory detention under § 1226(c) was a permissible exercise of Congress's immigration authority to ensure that aliens removable for serious criminal offenses would neither commit new crimes nor abscond before execution of their removal orders. See id. at 517-20, 528.

The Court relied on statistics showing that the vast majority of aliens subject to mandatory detention were detained for no more than five months and noted that the petitioner had been detained himself for only six months. Id. at 529-31. Unfortunately, these statistics turned out to be erroneous. See Jennings, 138 S. Ct at 869 (Breyer, J., dissenting) (explaining that the statistics the Court relied on in Demore were incorrect and that "[d]etention normally lasts twice as long as the Government then said it did"). The Court therefore emphasized that § 1226(c) detention was permissible for "the brief period necessary for . . . removal proceedings." Demore, 538 U.S. at 513; see also id. at 531 (upholding the petitioner's detention "for the limited period of his removal proceedings"). In a concurrence, Justice Kennedy, who provided the fifth vote for the majority, noted that due process might require "an

individualized determination as to [an alien's] risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J., concurring).

Second, as discussed above, the Court held in Jennings v. Rodriguez that § 1226(c) unambiguously "mandates detention of any alien falling within its scope" and permits detention to end "prior to the conclusion of removal proceedings only if the alien is released for witness-protection purposes." 138 S. Ct. at 847 (internal quotation omitted). Because of the statute's clarity, the Court reversed the Ninth Circuit's use of the canon of constitutional avoidance to read an implicit requirement for an individualized bond hearing once an alien is detained pursuant to § 1226(c) for six months. See id. at 836, 839. The Court declined to address whether this interpretation of § 1226(c) violated due process. Id. at 851.

II. Due Process Clause

In its brief and at the hearing, the Government concedes that mandatory detention under § 1226(c) without a bond hearing violates the Due Process Clause when it becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens. This concession accords with the pre-Jennings decisions of the six circuit courts, including the First Circuit, that read a reasonableness limitation into § 1226(c) via the canon of constitutional avoidance. See Sopo v.

U.S. Att'y Gen., 825 F.3d 1199, 1212-13 (11th Cir. 2016) (collecting cases), vacated, 890 F.3d 952 (11th Cir. 2018). While Demore upheld the constitutionality of mandatory detention under § 1226(c) for the brief period of time reasonably necessary to effectuate the removal of a deportable criminal alien, it did not address the lengthy period of detention at issue in this case, which Plaintiffs point out lasted over four years for one class member. Indeed, Justice Kennedy recognized in Demore that due process would require "an individualized determination as to [an alien's] risk of flight and dangerousness if the continued detention became unreasonable or unjustified." 538 U.S. at 532 (Kennedy, J., concurring). And Jennings rejected the use of the canon of constitutional avoidance to read a reasonableness limitation into § 1226(c) because of the statute's unambiguous language, not because prolonged, categorical detention under § 1226(c) does not raise due process concerns. 138 S. Ct. at 836; see also id. at 851 (declining to address the underlying due process question).

This Court therefore holds that mandatory detention under § 1226(c) without a bond hearing violates due process when it becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens. See Reid, 819 F.3d at 498-99.

The more difficult question is how to determine when a criminal alien's mandatory detention becomes unreasonably prolonged. Before Jennings, circuit courts developed two approaches. The Second and Ninth Circuits adopted a six-month rule requiring an automatic bond hearing for any alien detained under § 1226(c) for more than six months. See Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015), vacated, 138 S. Ct. 1260 (2018); Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013), abrogated by Jennings, 138 S. Ct. 830 (2018). The First, Third, Sixth and Eleventh Circuits utilized an individualized reasonableness rule requiring a fact-specific analysis of whether an alien's detention had become unreasonable. See Sopo, 825 F.3d at 1215; Reid, 819 F.3d at 498; Diop v. ICE/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2011), abrogated by Jennings, 138 S. Ct. 830 (2018); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003), abrogated by Jennings, 138 S. Ct. 830 (2018).

Plaintiffs urge the Court to adopt the six-month rule and grant each class member a bond hearing, while the Government advocates for the individualized reasonableness rule. In the event the Court adopts the individualized reasonableness rule, Plaintiffs ask the Court to order the Government to provide each class member a "reasonableness hearing" in immigration court at which the Government bears the burden of demonstrating that the alien's continued mandatory detention without a bond hearing is

reasonable. The Government contends that each class member must raise his fact-specific challenge to the reasonableness of his mandatory detention via an individual habeas petition in federal court. Finally, Plaintiffs argue that due process requires a number of procedural protections for criminal aliens who are granted bond hearings, namely that the Government bear the burden of proving dangerousness and/or risk of flight by clear and convincing evidence.

A. Six-Month Rule or Individualized Reasonableness Rule?

As an initial matter, Demore implicitly forecloses adoption of the six-month rule. See Reid, 819 F.3d at 497. The alien in Demore spent six months in immigration detention before the district court granted his habeas petition. 538 U.S. at 530-31. Neither the majority opinion nor Justice Kennedy's concurrence expressed any concern that his detention had become unreasonable by virtue of hitting the six-month mark, although the Court was not directly presented with this question. Plaintiffs point out that the statistics concerning the average length of § 1226(c) detention on which the Court relied were erroneous and that "[d]etention normally lasts twice as long as the Government then said it did," Jennings, 138 S. Ct at 869 (Breyer, J., dissenting), but they do not explain why this fact renders the six-month rule required as a matter of due process. Plaintiffs assert that the median length of detention for released or

removed class members (who, per the class definition, were detained for at least 180 days) was 363.5 days, while non-class members detained under § 1226(c) (i.e., for less than 180 days) were detained for a median of 98 days. Dkt. No. 460-1 ¶¶ 8, 11. These data do not show that six months is the outer limit of a reasonable period for the Government to complete removal proceedings.

The six-month rule is also inconsistent with the Supreme Court's opinion in Jennings. The Supreme Court expressly rejected the six-month rule as a matter of statutory interpretation, noting that "nothing in [§ 1226(c)] imposes a 6-month time limit on detention without the possibility of bail." Jennings, 138 S. Ct. at 851. The Court also emphasized that "due process is flexible, . . . and it calls for such procedural protections as the particular situation demands." Id. at 852 (quotation omitted). An alien's mandatory detention without a bond hearing becomes unreasonably prolonged when it no longer reasonably serves to ensure the swift removal of a deportable criminal alien. This determination is inherently fact-specific. Cf. Barker v. Wingo, 407 U.S. 514, 521 (1972) (recognizing in the speedy trial context that courts "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate"). Section 1226(c) detention does not necessarily stop reasonably serving its statutory purpose at six

months. The six-month rule has practical advantages in avoiding inconsistent and burdensome individual determinations, but it does not account for the fact-specific nature of the due process inquiry. See Reid, 819 F.3d at 497-98.

Since the Supreme Court decided Jennings in 2018, the vast majority of district courts have adopted the individualized reasonableness rule as a matter of due process. See, e.g., Cabral v. Decker, 331 F. Supp. 3d 255, 260 (S.D.N.Y. 2018); Dryden v. Green, 321 F. Supp. 3d 496, 502 (D.N.J. 2018). The Court has identified only one decision that has utilized the six-month rule post-Jennings. See Rodriguez v. Nielsen, No. 18-cv-04187-TSH, 2019 U.S. Dist. LEXIS 4228, at *18 (N.D. Cal. Jan. 7, 2019).

The six-month rule fails to account for actions taken by an alien that may extend his pre-removal detention. The Government reports that the median completion time of removal proceedings in cases appealed to the BIA in 2018 was just under nine months. See Dkt. No. 415-1 ¶ 24. As the Court explained in Demore, § 1226(c) detention does not violate due process simply by virtue of the length of time it takes for an alien to effectuate an appeal. See 538 U.S. at 530 n.14. A bright-line six-month rule would effectively grant a bond hearing to aliens who appealed to the BIA even where those proceedings were moving forward in a timely manner. See Reid, 819 F.3d at 500 n.4

(recognizing that mandatory detention does not become unreasonable during the pendency of a promptly adjudicated appeal by the alien but explaining that "there may come a time when promptness lapses"). The six-month rule also does not account for dilatory tactics by the alien that extend removal proceedings. Plaintiffs argue that an immigration court could consider such tactics at a bond hearing, but the only relevant considerations in determining the suitability of bond are dangerousness and risk of flight. See In re Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006), abrogated on other grounds by Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018).

Zadvydas v. Davis, 533 U.S. 678 (2001), does not compel, or even support, the conclusion that due process requires an automatic bond hearing after six months of mandatory detention under § 1226(c). In Zadvydas, the Supreme Court addressed whether 8 U.S.C. § 1231(a)(6) authorized the Government to detain an alien subject to a final order of removal for more than the ninety-day statutory period to secure his removal. 533 U.S. at 682. Because "indefinite detention of [such] aliens . . . would raise serious constitutional concerns" if they were never removed, the Court read § 1231(a)(6) to "contain an implicit 'reasonable time' limitation." Id. "[T]o guide lower court determinations," the Court adopted six months after entry of the final order of removal as the "presumptively reasonable

period of detention." Id. at 701. After six months, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." Id.

The Zadvydas Court did not simply order release (or a bond hearing) for any alien detained under § 1231(a)(6) for six months after entry of a removal order. Instead, the Court required the Government to present evidence after six months of post-removal-order detention that removal was still reasonably foreseeable for the alien being detained, i.e., that detention still reasonably served the purpose of the statute. See id. Zadvydas therefore undermines the notion that the reasonableness of immigration detention can be determined by a bright-line rule without some individualized analysis of each alien's circumstances.

Furthermore, the question at issue here, namely whether unreasonably prolonged, categorical detention during removal proceedings violates due process, presents different considerations than the issue in Zadvydas. See Demore, 538 U.S. at 527 (recognizing that the circumstances in Zadvydas were "materially different" from § 1226(c) detention). "[P]ost-removal-period detention, unlike detention pending a determination of removability . . . , has no obvious termination

point." Zadvydas, 533 U.S. at 697; see also Demore, 538 U.S. at 529 (explaining that § 1226(c) detention has "a definite termination point"). In Zadvydas, the Supreme Court adopted a bright-line presumption to give some metric to determine "how much longer towards eternity could be considered 'reasonable.'" Reid, 819 F.3d at 496. Removal proceedings have a reasonably foreseeable endpoint.

Plaintiffs contend that mandatory detention becomes unreasonable after six months because an immigration court can continue to detain any alien found to be dangerous or a risk of flight at a bond hearing, which protects the Government's interests in flight and danger prevention. Under this reasoning, mandatory detention under § 1226(c) would violate due process from the start, a conclusion the Supreme Court rejected in Demore. The Government need not "employ the least burdensome means to accomplish its goal" of ensuring the removal of deportable criminal aliens and may rely on "reasonable presumptions and generic rules" to determine whom to detain. Demore, 538 U.S. at 526, 528 (quotation omitted).

Plaintiffs challenge the congressional presumption that criminal aliens are likely to be dangerous or risks of flight, but they have presented no evidence on point. And Congress implemented § 1226(c) based on statistics showing that released

criminal aliens were committing new offenses and absconding. See id. at 518-20.

Plaintiffs also point to the Sixth Amendment's requirement of a jury trial for any crime punishable by a term of imprisonment of more than six months. See Baldwin v. New York, 399 U.S. 66, 69 (1970). The Supreme Court adopted this six-month rule based on "the existing laws and practices in the Nation" with regard to jury trials. Id. at 70 (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)). Plaintiffs provide no reason why this historically based six-month cutoff should apply to the materially different context of immigration detention, especially given Congress's unique authority to legislate with regard to aliens. See Demore, 538 U.S. at 521. And while Zadvydas imposed a version of the six-month rule based on its historical understanding "that Congress previously doubted the constitutionality of detention for more than six months," 533 U.S. at 701 (citing United States v. Witkovich, 353 U.S. 194 (1957)), the case it cited for this proposition also involved post-removal-order detention, see Witkovich, 353 U.S. at 194. Plaintiffs present no historical justification for the six-month rule in the context of detention pending removal proceedings.

For these reasons, the Court holds that mandatory detention under § 1226(c) without a bond hearing violates due process when an alien's individual circumstances render the detention

unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens. Because mandatory detention under § 1226(c) "is premised upon the alien's presumed deportability and the government's presumed ability to reach the removal decision within a brief period of time," Reid, 819 F.3d at 499 (citing Demore, 538 U.S. at 531 (Kennedy, J., concurring)), the reasonableness of a criminal alien's mandatory detention depends on the strength of these presumptions, id. at 500. "As the actualization of these presumptions grows weaker or more attenuated, the categorical nature of the detention will become increasingly unreasonable." Id. The First Circuit held that the following nonexclusive factors are relevant in determining the reasonableness of continued mandatory detention:

> the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.

Id.

The total length of the detention is the most important factor. See Sopo, 825 F.3d at 1217 (describing this factor as "critical"). To provide guidance in determining the reasonableness of prolonged mandatory detention under § 1226(c), the Court concludes, based on the record and the Government's own policies, that such detention is likely to be unreasonable

if it lasts for more than one year during removal proceedings before the agency, excluding any delays due to the alien's dilatory tactics.[4] See id. ("[A] criminal alien's detention without a bond hearing may often become unreasonable by the one-year mark . . . ."); Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 476-78 (3d Cir. 2015) (recognizing that mandatory detention under § 1226(c) becomes unjustified around the one-year mark unless the alien engages in delay tactics), abrogated by Jennings, 138 S. Ct. 830 (2018). The Executive Office for Immigration Review ("EOIR") has set a goal that immigration courts complete 85% of removal cases involving detained aliens within sixty days of the filing of a Notice to Appear, James R. McHenry III, Director of EOIR, Memorandum on Case Priorities and Immigration Court Performance Measures 3 (2018), https://www.justice.gov/eoir/page/file/1026721/download, and an agency regulation requires the Board of Immigration Appeals ("BIA") to adjudicate appeals from the immigration court within six months absent "exigent circumstances," 8 C.F.R. § 1003.1(e)(8)(i). It is reasonable to expect EOIR to complete removal proceedings within one year for most aliens. In fact, the Government's data show that, over the past five years, the

[4] The parties do not specifically address how the period of time while a petition for review with a circuit court is pending should factor into the reasonableness analysis. The Court therefore does not take a position on this issue.

agency completed removal proceedings for all but 5.8% of aliens detained under § 1226(c) within a year.[5]

This one-year period is not a bright line. Periods of detention directly attributable to an alien's dilatory tactics should not count in determining whether detention has exceeded the one-year mark. The Court also does not exclude the possibility that an alien's individual circumstances would render mandatory detention of less than one year unreasonable if the Government unreasonably delays or the case languishes on a docket. The one-year period simply recognizes that, based on EOIR's own goals and statistics, the agency should reasonably be able to complete removal proceedings for most aliens within one year.

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[5] Despite a six-month opportunity for discovery about the length of § 1226(c) detention, the data the parties provide is far from helpful. Plaintiffs present separate statistics for class members and non-class members but do not aggregate data for all § 1226(c) detainees. The Government provides statistics on the length of immigration court proceedings and BIA appeals separately and fails to explain how to aggregate the two periods to determine the median and average length of the entire agency proceeding. The data both Plaintiffs and the Government present, however, do make clear that removal proceedings that last longer than one year at the agency level are outliers. See Dkt. No. 460-1 ¶ 8 (explaining Plaintiffs' calculation that the median length of detention for released or removed class members (whose detention has ended and who, per the class definition, were detained for at least 180 days) was 363.5 days); Dkt. No. 467 ¶ 8 (noting the Government's calculation that removal proceedings for only 3.8% of § 1226(c) detainees took more than one year in 2013 and 2014 at the immigration court level in Boston and Hartford Immigration Courts).

The Court's refusal to import the six-month rule from Zadvydas into the context of mandatory detention under § 1226(c) does not prevent the adoption of a presumption that mandatory detention exceeding one year is unreasonable. As noted above, the six-month rule in Zadvydas provided a metric to determine how long toward an unforeseeable endpoint (the possible execution of a final removal order) could be considered reasonable. See Reid, 819 F.3d at 496. Under Zadvydas, an alien subject to a final order of removal cannot challenge his detention until the six-month period has elapsed. See 533 U.S. at 701. By contrast, an alien subject to mandatory detention under § 1226(c) may bring an individual habeas petition at any point. The one-year presumption simply acknowledges that, given EOIR's own goals and statistics, detention for longer than a year is likely to be unreasonably prolonged.

Once an alien's mandatory detention has become unreasonably prolonged in violation of due process, he is entitled to a bond hearing before an immigration judge, not immediate release. At the bond hearing, an immigration judge will assess the alien's dangerousness and risk of flight. The Court recognizes the Government's concern about the extensive criminal records of many members of the class and emphasizes that an immigration judge is under no obligation to release a criminal alien deemed to be dangerous or a risk of flight under the burden and

standard of proof described below. Indeed, when Judge Ponsor's 2014 injunction was in effect, more than half of the class members were denied bond. Aliens convicted of certain relatively minor, nonviolent offenses (like simple drug possession or gambling), however, are subject to mandatory detention under § 1226(c), and just under half of the class members granted bond hearings were released on supervision or offered bond. Already tasked with holding bond hearings for aliens detained under § 1226(a), immigration judges are capable of determining which criminal aliens are dangerous or risks of flight.

B. Reasonableness Hearings or Individual Habeas Petitions?

As an alternative to the six-month rule, Plaintiffs argue that due process requires a "reasonableness hearing" before the immigration court for any criminal alien detained under § 1226(c) for more than six months at which the Government must bear the burden of showing that the alien's continued categorical detention remains reasonable. If the immigration court determines that mandatory detention has become unreasonable, Plaintiffs submit, it must hold a bond hearing. Plaintiffs' suggestion for reasonableness hearings before the immigration court is derived from a footnote in the First Circuit's withdrawn opinion in this case. See Reid, 819 F.3d at 502 n.5 ("[W]e have no occasion to consider here whether another

petitioner might be able to challenge the individualized reasonableness of his continued categorical detention before the immigration courts rather than the federal courts."). The Government responds that the proper mechanism for a criminal alien to challenge his mandatory detention as unreasonable is via an individual habeas petition in federal court. I agree.

The Government argues that providing every alien detained under § 1226(c) for six months with a reasonableness hearing would overwhelm the already overburdened immigration courts. Moreover, the Government raises a more fundamental concern: the immigration court's lack of jurisdiction to adjudicate the constitutional question of when mandatory detention under § 1226(c) becomes unreasonable. Administrative agencies generally do not adjudicate questions concerning the constitutionality of congressional statutes. See Johnson v. Robison, 415 U.S. 361, 368 (1974). Accordingly, "it is settled that the immigration judge and [the BIA] lack jurisdiction to rule upon the constitutionality of the" Immigration and Nationality Act ("INA"). Matter of C-, 20 I. & N. Dec. 529, 532 (BIA 1992); see also Hinds v. Lynch, 790 F.3d 259, 263 n.4 (1st Cir. 2015) ("The BIA is without jurisdiction to adjudicate purely constitutional issues . . . ." (quotation omitted)). Determining that a criminal alien's mandatory detention has become unreasonable under the Due Process Clause is the

equivalent of holding that § 1226(c) is unconstitutional as applied to that alien, a constitutional judgment about a federal statute that immigration courts and the BIA cannot adjudicate. While requiring federal courts to adjudicate individual habeas petitions does impose a burden on the judiciary, "federal courts have the institutional competence to make fact-specific determinations, and they have great experience applying reasonableness standards." Sopo, 825 F.3d at 1217.

The Court's holding that the proper mechanism for a criminal alien to challenge his mandatory detention without a bond hearing is via an individual habeas petition does not mean that the Government has no responsibility to ensure that criminal aliens are not subject to unreasonably prolonged mandatory detention. Indeed, the Department of Justice issued regulations establishing a review process for aliens detained under 8 U.S.C. § 1231(a)(6) after Zadvydas. See 8 C.F.R. §§ 241.4, 241.13-14; see also Bonitto v. Bureau of Immigration & Customs Enf't, 547 F. Supp. 2d 747, 752-53 (S.D. Tex. 2008) (explaining the "Post Order Custody Review" procedures and process for an alien detained under § 1231(a)(6) to request release).

While the Court urges ICE to establish similar procedures for ensuring criminal aliens are not subject to unreasonably prolonged mandatory detention without a bond hearing, the

Government has explained that no such administrative procedures currently exist. An individual criminal alien must therefore bring an individual habeas petition if he believes his detention has become unreasonably prolonged.

C. Procedural Protections at Bond Hearings

For a criminal alien whose mandatory detention has become unreasonable, thus entitling him to a bond hearing before the immigration court, Plaintiffs argue that due process requires that the Government prove the alien's dangerousness or risk of flight by clear and convincing evidence. The Government claims Plaintiffs are barred from raising this argument by the doctrines of collateral estoppel and the law of the case because the court (Ponsor, J.) held in its 2014 judgment for the class in this case that the alien should bear the burden of proof. See Reid, 22 F. Supp. 3d at 92-93. However, "it is hornbook law that '[a] vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case.'" Jackson v. Coalter, 337 F.3d 74, 85 (1st Cir. 2003) (alteration in original) (quoting No E.-W. Highway Comm., Inc. v. Chandler, 767 F.2d 21, 24 (1st Cir. 1985)). The First Circuit vacated the 2014 judgment for the class, Reid, 2018 WL 4000993, at *1, so Plaintiffs may relitigate the burden of proof issue.

1. Burden of Proof

In Pensamiento v. McDonald, this Court held that due process requires that the Government bear the burden of proof at bond hearings for non-criminal aliens detained under § 1226(a). 315 F. Supp. 3d 684, 692 (D. Mass. 2018), appeal dismissed, No. 18-1691 (1st Cir. Dec. 26, 2018). Plaintiffs ask the Court to extend this holding to bond hearings provided to criminal aliens detained under § 1226(c) when mandatory detention becomes unreasonable. Many courts have done so, both before Jennings as a matter of statutory interpretation, see, e.g., Lora, 804 F.3d at 616; Diop, 656 F.3d at 235, and after Jennings as a matter of due process, see, e.g., De Oliveira Viegas v. Green, 370 F. Supp. 3d 443, 449 (D.N.J. 2019); Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 239-40 (W.D.N.Y. 2019); Portillo v. Hott, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018). The Court agrees that the status of § 1226(c) detainees as criminal aliens does not alter the conclusion that due process requires that the burden of proof fall on the Government at their bond hearings.

Section § 1226(c) embodies a reasonable presumption within Congress's authority that removable criminal aliens are more likely than other removable aliens to be risks of flight or dangerous. See Demore, 538 U.S. at 526. As the Government concedes, though, once a criminal alien's detention becomes unreasonably prolonged in violation of due process, this

presumption no longer mandates categorical detention. The alien is then held pursuant to the Government's discretionary authority to detain during removal proceedings under § 1226(a).[6] And when "the sole procedural protections available to the alien are found in administrative proceedings" in which the alien bears the burden of proof without significant judicial review, prolonged detention violates due process. Zadvydas, 533 U.S. at 692; see also Foucha v. Louisiana, 504 U.S. 71, 81-82 (1992) (finding unconstitutional a state statute placing the burden of proof to justify release on an individual civilly committed after being found not guilty by reason of insanity).

The Government points to language in both Jennings and Preap that it claims requires that the alien bear the burden of proof. See Preap, 139 S. Ct. at 959-60 (explaining that agency precedent places the burden of proof on the alien at a § 1226(a)

[6] Congress has enacted a rebuttable presumption that criminal defendants facing certain serious charges or with certain prior convictions are subject to pretrial detention. See United States v. O'Brien, 895 F.2d 810, 814-15 (1st Cir. 1990) (citing 18 U.S.C. § 3142(e)). A defendant bears the initial burden of production to introduce some evidence that there are conditions that will reasonably assure his appearance. Id. at 815. If he satisfies this burden, the court may still consider the congressional presumption in favor of detention in deciding whether the Government has met its ultimate burden to justify detention. Id. The parties do not address the analogous question of what weight an immigration court should give to the congressional presumption codified in § 1226(c) at a bond hearing for a criminal alien whose mandatory detention becomes unreasonably prolonged in violation of due process.

bond hearing); Jennings, 138 S. Ct. at 847-48 (rejecting the Ninth Circuit's allocation of the burden of proof to the Government as a matter of statutory interpretation because "[n]othing in § 1226(a)'s text . . . even remotely supports the imposition of" this requirement). Both decisions addressed questions of statutory interpretation involving § 1226(c), and neither addressed whether due process requires the Government to bear the burden of proof. These decisions simply reflect how agency precedent currently allocates the burden of proof.[7] Neither Jennings nor Preap throws this Court's due process holding in Pensamiento into doubt. See Portillo, 322 F. Supp. 3d at 709 n.9 (rejecting the argument that Jennings "ma[de] clear that the burden must remain with the alien" because the Court "focused on the protections required by the statute and did not reach the constitutional question"); Cortez v. Sessions, 318 F. Supp. 3d 1134, 1146-47 (N.D. Cal. 2018) (declining to find that

[7] Section 1226 does not place the burden of proof on the immigrant and is silent on the subject of the allocation of the burden and the standard of proof to be applied. Before 1999, the BIA placed the burden of proof at a bond hearing on the Government to show that the alien was dangerous or a risk of flight. See Matter of Patel, 15 I. & N. Dec. 666, 666 (BIA 1999). In 1999, after the enactment of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigration Responsibility Act, the BIA flipped the burden and held that an alien detained under § 1226(a) bore the burden of proof at a bond hearing. See In re Adeniji, 22 I. & N. Dec. 1102, 1113 (BIA 1999); see also Mary Holper, The Beast of Burden in Immigration Bond Hearings, 67 Case Western Res. L. Rev. 75, 90-95 (2016) (explaining this shift).

Jennings reversed the Ninth Circuit's earlier determination in Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011), as to the burden and standard of proof at a bond hearing); see also Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 224 n.12 (3d Cir. 2018) (placing the burden of proof on the Government at a bond hearing for an alien detained under 8 U.S.C. § 1231(a)(6) post-Jennings).

Nor does Zadvydas suggest that a criminal alien should bear the burden of proof at a bond hearing. The Supreme Court did place the initial burden on a detained alien subject to a final removal order to show that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" to justify release from detention. Zadvydas, 533 U.S. at 701. But the ultimate burden falls on the Government to provide "evidence sufficient to rebut that showing." Id. While Zadvydas did not address the burden of proof at a bond hearing, it is consistent with placing the burden of proof on the Government at a criminal alien's bond hearing after the alien demonstrates that his detention has become unreasonably prolonged. See Pensamiento, 315 F. Supp. 3d at 692.

Finally, the Government points out that § 1226(c)(2), which permits the release of a criminal alien for witness protection purposes, places the burden on the alien to prove that he is not dangerous or a risk of flight. See 8 U.S.C. § 1226(c)(2). But

§ 1226(c)(2) codifies an exception to a reasonable and constitutional period of mandatory detention.[8] The provision is not relevant in determining the constitutionally required burden of proof in the far different context of mandatory detention that has become unreasonably prolonged under the Due Process Clause.

2. Standard of Proof

Plaintiffs argue that due process requires that the Government justify continued detention of a criminal alien at a bond hearing with clear and convincing evidence of his dangerousness and/or risk of flight. They point to a slew of circuit and district court cases imposing a clear and convincing standard of proof on the Government both before and after Jennings and for bond hearings for aliens held under a range of immigration detention statutes. See, e.g., Guerrero-Sanchez, 905 F.3d at 224 n.12; Lora, 804 F.3d at 616; Rodriguez, 715 F.3d at 1135; Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024, 1032 n.8 (W.D. Wash. 2019); Darko v. Sessions, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018). In Pensamiento, this Court declined to adopt the clear and convincing standard but did not rule out the possibility that it is required by due process. See 315 F. Supp. 3d at 693.

[8] The Court expresses no opinion on whether the allocation of the burden of proof in § 1226(c)(2) is constitutional.

The Court holds that due process requires the Government to prove an alien's dangerousness by clear and convincing evidence at a bond hearing. The Supreme Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." Zadvydas, 533 U.S. at 691-92. As such, civil commitment of a mentally ill individual requires proof by clear and convincing evidence of his dangerousness to himself or others. See Foucha, 504 U.S. at 80; Addington v. Texas, 441 U.S. 418, 431-32 (1979). The fact that immigration detention aims to ensure the removal of deportable aliens does not justify a lower standard of proof for dangerousness because "civil commitment for any purpose constitutes a significant deprivation of liberty" that requires due process protection. Singh, 638 F.3d at 1204 (emphasis in original) (quoting Addington, 441 U.S. at 425). While due process does not necessarily entitle aliens to the same rights as citizens, see Demore, 538 U.S. at 522, the Supreme Court in Zadvydas indicated that the requirement for strong procedural protections before an individual is detained for dangerousness applies to citizens and aliens alike, see 533 U.S. at 690-92.

But the Court is not persuaded that due process requires that the Government prove an alien's risk of flight by more than a preponderance of the evidence. Although the Supreme Court has

imposed a clear and convincing standard in a number of civil contexts, see, e.g., Addington, 441 U.S. at 431-32 (civil commitment for the mentally ill); Woodby v. INS, 385 U.S. 276, 286 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization), none of these contexts involves considerations of risk of flight. The most comparable context is criminal pretrial detention, and under the Bail Reform Act of 1984, which the Supreme Court upheld in United States v. Salerno, 481 U.S. 739, 755 (1987), the Government must only prove a defendant's risk of flight by a preponderance of the evidence to justify his detention, see United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991). An alien in removal proceedings is not entitled to more procedural protections under the Due Process Clause than a pretrial criminal detainee. Cf. Demore, 538 U.S. at 522 ("Congress may make rules as to aliens that would be unacceptable if applied to citizens."). Given the reasonable concern about risk of flight that prompted Congress to enact § 1226(c), see id. at 517-21, due process requires only that the Government prove an alien's risk of flight by a preponderance of the evidence to justify his detention at a bond hearing.

3. Alternatives to Detention and Ability to Pay

Finally, due process requires that an immigration court consider both an alien's ability to pay in setting the amount of

bond and alternative conditions of release such as GPS monitoring that reasonably assure the safety of the community and the criminal alien's future appearances.[9] See Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017) (requiring consideration of these factors for non-criminal aliens detained under 8 U.S.C. § 1226(a)); Abdi v. Nielsen, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018) (same for arriving aliens detained under 8 U.S.C. § 1225(b)). This requirement guarantees that the decision to continue to detain a criminal alien is reasonably related to the Government's interest in protecting the public and assuring appearances at future proceedings. See Hernandez, 872 F.3d at 990. The Government contends that immigration judges do not have the authority to consider alternative conditions of release, but the BIA has concluded otherwise. See Matter of Garcia-Garcia, 25 I. & N. Dec. 93, 98 (BIA 2009) (citing 8 U.S.C. § 1226(a)(2)(A) and 8 C.F.R. § 1236.1(d)(1)).

III. Excessive Bail Clause

Plaintiffs also argue that mandatory detention under § 1226(c) violates the Excessive Bail Clause of the Eighth Amendment. See U.S. Const. amend. VIII ("Excessive bail shall not be required . . . ."). The Excessive Bail Clause applies to

[9] 8 U.S.C. § 1226(a) authorizes an immigration court to release an alien on "bond of at least $1,500" or "conditional parole." 8 U.S.C. § 1226(a)(2). Plaintiffs do not challenge the statutory minimum bond amount.

civil immigration proceedings. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989) (stating that the Excessive Bail Clause is implicated by any "direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding"); Carlson v. Landon, 342 U.S. 524, 544-46 (1952) (assuming that the Excessive Bail Clause applied to deportation detention and ruling on the merits of detained aliens' excessive bail claims). It prohibits excessive bail in those cases where bail is granted. See Salerno, 481 U.S. at 752; Carlson, 342 U.S. at 545. Thus, if a criminal alien's mandatory detention becomes unreasonably prolonged and an immigration court holds a bond hearing, the Eighth Amendment prohibits setting bond in an amount greater than necessary to secure the alien's future appearances. See Salerno, 481 U.S. at 754.

Nonetheless, the Excessive Bail Clause does not guarantee bail in all cases. See id. at 752; Carlson, 342 U.S. at 545; see also Bolante v. Keisler, 506 F.3d 618, 619 (7th Cir. 2007) ("[T]he Court has never held that persons detained in civil proceedings, such as deportation . . . proceedings, are entitled to release on bail."). Congress may "defin[e] the classes of cases in which bail shall be allowed." Carlson, 342 U.S. at 545. Accordingly, mandatory detention for certain criminal aliens under § 1226(c) does not violate the Excessive Bail Clause.

See Marogi v. Jenifer, 126 F. Supp. 2d 1056, 1061-62 (E.D. Mich. 2000); Avramenkov v. INS, 99 F. Supp. 2d 210, 218 (D. Conn. 2000). The Due Process Clause, not the Excessive Bail Clause, imposes limits on Congress's ability to detain aliens without an individualized hearing as part of the removal process. See Zadvydas, 533 U.S. at 690-96 (explaining the due process concerns raised by potentially indefinite detention of an alien subject to a final order of removal); cf. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 792 n.16 (9th Cir. 2014) (explaining that "bail-denial schemes" in the criminal context are properly evaluated under the Due Process Clause, not the Excessive Bail Clause).

IV. Remedy

Plaintiffs ask the Court to issue a classwide injunction ordering the Government to provide all class members, who by definition have been detained at least six months, with either a bond hearing or a reasonableness hearing. Having concluded that due process requires a federal court to determine via an individual habeas petition that a criminal alien's mandatory detention under § 1226(c) has become unreasonable based on his particular circumstances before he is entitled to a bond hearing, the Court declines to issue either injunction Plaintiffs request. While certain class members whose mandatory detention has become unreasonable would be entitled to

injunctions ordering the Government to provide them with a bond hearing, Federal Rule of Civil Procedure 23(b)(2), under which the class is certified, does not allow for individualized injunctions. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."). The Court therefore need not address whether 8 U.S.C. § 1252(f)(1) prohibits a classwide permanent injunction ordering the Government to provide bond hearings for each class member.

The Government argues that § 1252(f)(1) deprives the Court of jurisdiction to issue even a classwide declaratory judgment concerning the rights of class members to a bond hearing. The Court already rejected this argument in the October 23, 2018 memorandum and order. See Reid, 2018 WL 5269992, at *6-7. Three justices in Preap subsequently stated that a district court has jurisdiction to entertain a request for declaratory relief despite § 1252(f)(1), 139 S. Ct. at 962 (opinion of Alito, J.), adding their voices to the three other justices who said the same in dissent in Jennings, 138 S. Ct. at 875 (Breyer, J., dissenting). Section 1252(f)(1) does not bar declaratory relief.

Finally, the Court may issue a classwide permanent injunction ordering the Government to follow the procedural rules mandated by due process at a bond hearing. These rules

apply to any class member who is granted a bond hearing without regard to his individual circumstances. Section 1252(f)(1), which strips courts of jurisdiction "to enjoin or restrain the operation of" certain provisions of the INA on a classwide basis, 8 U.S.C. § 1252(f)(1), does not bar this injunction because the INA is silent on the procedural rules for bond hearings, see Pensamiento, 315 F. Supp. 3d at 689. This injunction abrogates agency precedent imposing the burden of proof on the alien at a bond hearing, but it in no way enjoins or restrains the operation of the detention statute.

A court may issue a permanent injunction if "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." Healey v. Spencer, 765 F.3d 65, 74 (1st Cir. 2014) (quotation omitted). As discussed above, due process requires certain procedural protections at bond hearings. In the absence of an injunction, class members risk irreparable harm from the loss of their liberty. See Ferrara v. United States, 370 F. Supp. 2d 351, 360 (D. Mass. 2005) ("Obviously, the loss of liberty is a . . . severe form of irreparable injury."). Since this injunction does not require bond hearings for each class member,

it imposes minimal burden on the Government. Finally, the public interest supports requiring the Government to obey the Constitution in its administration of immigration detention. See Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005) ("[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). In opposing an injunction, the Government again emphasizes its concerns about criminal aliens' dangerousness and flight risk, but the procedural protections mandated by due process simply ensure that the Government detains only aliens who are in fact dangerous or flight risks. Plaintiffs have therefore met the four prerequisites for a permanent injunction ordering certain procedural protections at their bond hearings.

ORDER

For the foregoing reasons, Plaintiffs' motion for summary judgment is **ALLOWED IN PART** and **DENIED IN PART** (Docket No. 453), and the Government's motion for summary judgment is **ALLOWED IN PART** and **DENIED IN PART** (Docket No. 455).

The Court denies Plaintiffs' request for a permanent injunction ordering the Government to provide class members with bond or reasonableness hearings. The Court also denies Plaintiffs' request for a declaratory judgment insofar as they seek a declaration that due process requires an automatic bond hearing or reasonableness hearing for all criminal aliens detained under § 1226(c) for more than six months.

DECLARATORY JUDGMENT

The Court declares that mandatory detention without a bond hearing under 8 U.S.C. § 1226(c) violates due process when the detention becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens. The most important factor in determining the reasonableness of a criminal alien's mandatory detention is the length of the detention. Mandatory detention without a bond hearing is likely to be unreasonable if it lasts for more than one year, excluding any delays due to the alien's dilatory tactics. A criminal alien subject to mandatory detention without a bond hearing under § 1226(c) must bring a habeas petition in federal court to

challenge his detention as unreasonably prolonged. If the court agrees, the alien is entitled to a bond hearing before an immigration judge.

PERMANENT INJUNCTION

For any bond hearing held for a class member, the Court orders that the immigration court require the Government to prove that the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence. The immigration court may not impose excessive bail, must evaluate the alien's ability to pay in setting bond, and must consider alternative conditions of release such as GPS monitoring that reasonably assure the safety of the community and the alien's future appearances.

The Court orders that this declaratory judgment and permanent injunction be provided to all members of the class within thirty days and shall be provided to any new members of the class when their § 1226(c) detention exceeds six months.

SO ORDERED.

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

8 U.S.C. § 1226

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not

be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.