PRACTICE ADVISORY[1]
BOND HEARINGS IN BALTIMORE IMMIGRATION COURT
UNDER *DUBON MIRANDA v. BARR*

July 28, 2020

I. Introduction

This practice advisory addresses the United States District Court for the District of Maryland's decision in *Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB at 1, 2020 WL 2794488 (D. Md. May 29, 2020) (order granting preliminary injunction) (Order, attached). *Dubon Miranda* requires that "all future bond hearings conducted in the District of Maryland for individuals held pursuant to 8 U.S.C. § 1226(a)" follow two new requirements.[2]

- First, "the government must bear the burden of proving, by clear and convincing evidence, that [Respondent] is a flight risk or a danger to the community. . ." and

- Second, the Immigration Judge "must consider [Respondent's] ability to pay a set bond amount and his or her suitability for release on alternative conditions of supervision."[3]

In addition, any individual currently detained pursuant to 8 U.S.C. § 1226(a) who received a bond hearing in the District of Maryland that did not accord with the aforementioned requirements must receive a new hearing.[4]

The preliminary injunction order is a notable shift. Prior to the Order, respondents bore the burden of proving they were not a danger or flight risk, and therefore eligible for release. There was also no requirement that Immigration Judge's consider ability to pay or alternatives to bond when determining conditions of release.

This practice advisory will first offer background on the class action lawsuit that resulted in the *Dubon Miranda* order and § 1226(a) detention generally. After a brief overview of the new procedures laid out by *Dubon Miranda* and the process for scheduling hearings, the advisory offers section-by-section suggestions on how to draft the request on bond. The practice advisory concludes with tips for the hearing itself, including suggestions for how to handle the discussion of preliminary matters, questions from the court, and rebuttal. Attached are the *Dubon Miranda*

---

1 The instructions in this practice advisory are general and should not be considered absolute. This information should not be considered legal advice for any particular respondent. The circumstances or facts of a respondent's particular case may render some/all of this information inapplicable.
2 *Id.*
3 *Id.*
4 *See id.* at 2.

order, the *Dubon Miranda* memorandum, a sample redacted request on bond, and the latest notice and instructions created pursuant to the preliminary injunction order.

II. Background

Dubon Miranda is a class action lawsuit and petition for writ of habeas corpus filed on April 30, 2020 in the United States District Court for the District of Maryland. It challenges the adequacy of custody redetermination hearings (colloquially known as "bond hearings") held in Baltimore Immigration Court under 8 U.S.C. § 1226(a). Under § 1226(a), the Attorney General is given general, discretionary authority to detain a noncitizen "pending a decision on whether the alien is to be removed from the United States."[5] Section 1226(a) also authorizes the Attorney General, in his discretion, to release a noncitizen "on bond of at least $1,500" or "conditional parole."[6] When a noncitizen is detained pursuant to § 1226(a), ICE makes an initial custody determination.[7] If the noncitizen objects to ICE's custody determination, he or she may request a custody redetermination hearing before an IJ at any time before the issuance of a final order of removal.[8]

III. New Procedures under *Dubon Miranda*

On May 29, 2020, the Court granted a preliminary injunction order imposing two new requirements at bond hearings: (1) a requirement that the government bear the burden of proof of justifying detention by clear and convincing evidence; and (2) a requirement that Immigration Judges (IJs) consider respondents' ability to pay when setting bond amounts and their eligibility for alternative conditions of release. The Order applies to all future bond hearings in the Baltimore Immigration Court for individuals detained under 8 U.S.C. § 1226(a). It also requires that individuals who received bond hearings in the Baltimore Immigration Court prior to the Order and are still detained under 8 U.S.C. § 1226(a) receive new bond hearings that comply with the Order's requirements.[9]

Prior to *Dubon Miranda*, the respondent bore the burden of proof to "establish . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight."[10] *Dubon Miranda* has shifted the burden of proof to the government to show that a respondent is a flight risk or danger to his or her community by clear and convincing

---

[5] 8 U.S.C. § 1226(a). The Attorney General shares his authority to detain or release noncitizens under Section 1226(a) with the Secretary of Homeland Security. *See* 8 U.S.C. § 1103(a) & (g); Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192.
[6] 8 U.S.C. § 1226(a)(2).
[7] 8 C.F.R. § 1236.1(d).
[8] 8 C.F.R. §§ 1236.1(d), 1003.19(c).
[9] *Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB at 1-2, 2020 WL 2794488 (D. Md. May 29, 2020) (order granting preliminary injunction).
[10] *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006).

evidence.[11] In other words, the government's evidence must produce a "firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[12] This means, for example, that respondent's counsel could argue that unsubstantiated allegations regarding criminal history (such as those in a Form I-213, "Summary of Cases") are not sufficient to provide clear and convincing evidence that a person is dangerous.[13] Nor do criminal charges, which by definition are supported by only probable cause, that did not result in a conviction provide clear and convincing evidence that the person is dangerous.

In addition, the Department of Homeland Security (DHS), unless it can show good cause, now must "submit all of its supporting evidence to the Immigration Court and the noncitizen sufficiently in advance of the hearing" in order to grant the respondent a meaningful chance to review and respond.[14] If DHS submits evidence during the hearing itself, the respondent should oppose the admission of the evidence absent a showing of good cause by DHS. Should the evidence be admitted upon a finding of good cause, the respondent may also request a continuance for additional time to review the evidence. However, requesting a continuance would prolong a respondent's stay in detention.

IV. Scheduling Hearings

For individuals in detention who previously had bond hearings that did not comply with *Dubon Miranda*, counsel should submit a motion requesting a new bond hearing pursuant to the order. The government will soon issue notices to all remaining individuals in detention who have the right to a new hearing under *Dubon Miranda*, but counsel need not wait for notices to be issued to file a motion for a new bond hearing. For newly-detained respondents, their initial bond hearing will be pursuant to procedures set out by *Dubon Miranda*, requested under the normal request procedures to the Court (i.e., either asking during a Master Calendar Hearing or via a written request for bond).

V. Drafting Tips

Please see attached for a redacted sample of a request on bond under *Dubon Miranda* for an individual who received a prior, defective bond hearing.

---

[11] *See id.*

[12] *Shaw v. Sessions*, 898 F.3d 448, 458 (4th Cir. 2018).

[13] For example, unsubstantiated criminal allegations could include details of criminal incidents where charges were adjudicated *nolle prosequi*.

[14] *Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB at 1 (D. Md. July 10, 2020) (Instructions and Guidelines to Immigration Judges).

a. Framing

Because the burden of proof is now on the government, in theory, a respondent can submit a request on bond without any additional evidence or exhibits and wait for DHS to present its case before responding. In making the request, the respondent may emphasize that the government, not respondent's counsel, bears the burden of proof on danger to the community and flight risk by clear and convincing evidence.

One way to underscore this burden shift is by keeping the legal argument short and concise, usually totaling no more than a few pages. The legal argument may contain the following sections: danger to the community; flight risk; ability to pay; and alternatives to detention. For the former two sections, it is helpful to continue framing the argument in terms of the government not being able to meet its weighty burden. Consider avoiding the inclusion of any additional information that is not relevant to the custody redetermination. Brief references to the ongoing COVID-19 pandemic may prove helpful if they are woven into the danger, flight risk, or ability to pay analyses (e.g., "COVID-19 renders [respondent]'s financial situation even more dire").

b. Danger to the Community

A potential overarching framework for this section is to show that the respondent is a beneficial, productive member of his or her community, not a danger. If a respondent has family members in the United States, consider beginning this section by describing the respondent's relationship with them. This is particularly important if any of said family members are U.S. citizens or lawful permanent residents (LPRs). You may also include any volunteering, community involvement, or religious membership to emphasize that the respondent works to improve their community, not to make it dangerous.

A respondent's criminal history may be referenced in this section, though the way in which this is done may vary depending on whether or not the respondent has had a prior bond hearing. If a respondent has had a prior bond hearing that did not comply with the new *Dubon Miranda* requirements, it is vital to determine what information regarding her or his criminal history was previously submitted. Due to the shift of the burden of proof to the government, an IJ should approach all *Dubon Miranda* bond hearings *de novo*, regardless of whether or not a respondent had a previous, defective bond hearing. Nevertheless, understanding what information about a respondent's criminal history was submitted in the prior bond hearing can prove helpful to respondent's counsel in their efforts to block the admission of damaging evidence in the new hearing. (Please see **Section VI.b.** for additional information on how and when to reference a respondent's prior bond hearing.)

Although the government bears the burden, it may be a good idea to raise criminal convictions affirmatively in the written bond request if respondent's counsel already has the respondent's I-213, "Summary of Cases." In such an instance, DHS will likely try to submit the I-

213, so one effective strategy may be to address its contents proactively. It may also prove beneficial to get out in front of a respondent's criminal history that is lengthy, severe, and/or well-documented. Where possible, any prior criminal incidents may be simultaneously reframed as less severe (e.g., assault could be reframed as an act of self-defense or a result of a misunderstanding; driving under the influence could be reframed as the result of a since-rehabilitated addiction; the past offenses at issue may be several years old, and the person has not since reoffended) and acknowledged as mistakes for which a respondent accepts full responsibility and expresses remorse. Presenting a series of excuses for prior criminal acts or framing a respondent as a victim may prove more harmful than helpful in developing a legal argument.

This reframing may be done in a variety of ways. Respondent's counsel could mention the lack of any additional (serious) criminal history and/or note that a respondent was never convicted after the arrest or had the charges dropped (*nolle prosequi*). Citing to witness testimony in the form of letters of support regarding a witness's perception of the incident or the respondent's efforts at rehabilitation afterwards may also prove helpful. If the criminal charge is still pending, underscore the lack of convictions and any bond or release on recognizance the respondent was granted by the criminal court.

Keep in mind that the government bears the burden of proving danger by *clear and convincing evidence*. Thus, for example, criminal charges that do not result in a conviction cannot suffice to prove danger because by definition they are only supported by probable cause. Similarly, respondent's counsel may argue that pending charges, arrests without charges, and traffic violations (decided under a "preponderance of the evidence" standard) also cannot suffice.

c. Flight Risk

If a respondent has family members in the U.S., one potential focus for this section could be on the respondent's responsibilities to support them financially, emotionally, and otherwise. Other information that may make sense to include are a respondent's involvement in her or his community; employment history; and any applications or legal claims for potential future relief and their viability. Most importantly, respondent's counsel should make sure to cite to all favorable discretionary factors listed in *Matter of Guerra*:

(1) Existence of a fixed address in the U.S.;
(2) Length of residence in the U.S.;
(3) Family ties in the U.S. "and whether they may entitle [respondent] to reside permanently in the U.S. in the future;"
(4) Employment history;
(5) Record of appearance in court;

(6) Criminal record, "including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;"[15]
(7) Past immigration violations;
(8) "Attempts...to flee prosecution or otherwise escape from authorities;" and
(9) "Manner of entry" into the U.S.[16]

d. Ability to Pay

The individual should submit evidence of her or his ability to pay (ATP) in the bond motion. The type of evidence will vary widely. Respondent's counsel may consider submitting no more information than is necessary to avoid giving DHS the opportunity to use the respondent's finances against her or him.

It frequently makes sense to delineate a clear chronology of declining income after a respondent's initial detention via a declaration or documentary evidence. For example, respondent's counsel may argue that a respondent's family had a specific income prior to the respondent's detention, but that the loss of that income while respondent has been in detention, combined with the depletion of the family's savings due to paying the bills and any applicable legal fees, has resulted in a clear inability to pay a high bond amount. It may prove helpful to emphasize any exacerbating factors that may apply to a respondent's particular situation, including, but not limited to:

- Role of respondent as the family's primary breadwinner
- Responsibility for any minor children/spouse/extended family
- Length of time in detention
- Lack of savings prior to detention
- Shift in family responsibility post-detention (i.e., partner forced to work less and spend more time on childcare, etc.)
- Legal expenditures
- Impact of COVID-19 (i.e., on family's ability to work/retain childcare, etc.)
- Loss of family residence due to poverty
- Family resorting to food banks or soup kitchens

e. Alternatives to Detention

It is important to emphasize the need for the IJ to consider alternatives to detention (ATDs) and to note what ATDs might be appropriate for a particular respondent. Available ATDs used by Immigration and Customs Enforcement (ICE) include the following:

---

[15] This sixth factor may fit better under the "Danger to the Community" section, depending on the facts of a respondent's case.
[16] *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006).

- Conditional parole/release on own recognizance
- Telephonic monitoring
- Check-ins at ICE offices
- Home visits and check-ins
- Global positioning system (GPS) monitoring through an electronic ankle monitor

In general, respondent's counsel may consider advocating for a less-invasive ATD (i.e., some type of ICE check-in) and try to avoid recommending more-invasive ATDs (such as GPS monitoring). During the COVID-19 pandemic, ICE is conducting phone check-ins.

VI. Hearing Tips

a. Preliminary Matters

Because DHS now has to file evidence in advance of bond hearings, respondent's counsel will learn who the DHS attorney will be prior to the hearing. It may be worthwhile to reach out to DHS counsel in advance of the hearing to try to negotiate conditions of release, but it remains unlikely that DHS will make any stipulations. Because the government now bears the burden of proof under *Dubon Miranda*, DHS presents its position at the hearing first.

Respondent's counsel may object to any efforts by DHS to submit a Form I-213, "Summary of Cases," or a Statement of Probable Cause. Possible arguments are that neither one is a neutral document, they are frequently inaccurate, and they are potentially prejudicial.[17] Despite the District Court's instructions that DHS should submit evidence in advance of the hearing absent good cause, DHS may still try to submit evidence at the hearing. If DHS does so, respondent's counsel should immediately object based on the District Court's instructions and the respondent's right to have a meaningful opportunity to review and respond to evidence levied against them.

b. Strategy

If a respondent has a particularly strong removal case, respondent's counsel may consider emphasizing that point by preparing a brief description of the merits claim(s) that casts them in a positive light. The IJ will likely consider *prima facie* eligibility and/or viability in his or her flight risk analysis.

While the primary focus should remain on obtaining release on his or her own recognizance or keeping the bond amount low, respondent's counsel should come prepared with multiple suggestions for ATDs in order to effectively negotiate with DHS and the IJ (i.e., issue a counteroffer to a proposed bond consisting of a lower bond amount accompanied by ICE check-

[17] *See Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

ins). DHS may argue that certain ATDs are no longer possible due to COVID-19. However, multiple sources have indicated that DHS both continues to conduct telephonic check-ins during the pandemic and has installed ankle monitors where respondents are released on that particular condition.

Finally, for respondents who have previously had a bond hearing, it is important to recognize that hearings taking place under *Dubon Miranda* are new bond hearings being conducted pursuant to the preliminary injunction order. However, you may be able to use the prior bond proceedings to your client's advantage. For example, if respondent previously met their burden of showing they are not a flight risk or danger at the prior hearing, it may be possible to convince the IJ to—absent new evidence—find them eligible for release again at the new bond hearing, especially since the burden of proof has now shifted to the government. Thus, if DHS tries to argue that a respondent is a danger to her or his community, it may be helpful to note that the IJ already found the respondent not to be a danger via its previous grant of bond. Referencing a prior hearing also may prove helpful if DHS previously conceded helpful facts (i.e., a respondent's criminal conviction was *nolle prosequi*, etc.). Nevertheless, it is important to note that raising the prior bond proceedings may open the door for DHS to be able to discuss damaging information raised in the prior bond hearing.

c. Responding to Questions

Respondent's counsel may field a number of questions from the IJ. Questions about flight risk are likely to arise if the respondent's case is on appeal or the merits case appears weak on its face. If a respondent's merits case has already been before an IJ and is on appeal, the IJ will likely adopt a two-pronged analysis of flight risk: (1) the likelihood that a respondent will appear at court if the appeals case is remanded; and (2) the likelihood that a respondent will comply with a deportation order if the appeal is denied.

The IJ may also ask about ability to pay. One of the most common questions is regarding the maximum amount a respondent can pay. Respondent's counsel will need to respond with a dollar amount. It is important to emphasize to the IJ that the bond amount must be no greater than what is needed to ensure a respondent's appearance at court.

d. Rebuttal

DHS may mischaracterize events, particularly any incident that resulted in an arrest or criminal charges and/or convictions. Respondent's counsel should note any mischaracterizations promulgated by DHS while government counsel presents their case and address them on rebuttal. If DHS raises issues with which respondent's counsel is not familiar, respondent's counsel has the right to confer with the respondent and review the evidence being levied against them. Ideally, respondent's counsel will be able to prevent the admission of unanticipated damaging evidence. If

that is not possible, respondent's counsel may consider seeking a continuance in order to review said evidence with the respondent.

If you have any questions or require technical assistance, please email Jenny Kim (jenny@caircoalition.org) or Melody Vidmar (melody@caircoalition.org) at the Capital Area Immigrants' Rights (CAIR) Coalition Immigration Impact Lab.

INDEX TO EXHIBITS

Exhibit A	*Dubon Miranda v. Barr* Order, U.S. District Court for the District of Maryland
Exhibit B	*Dubon Miranda v. Barr* Memorandum, U.S. District Court for the District of Maryland
Exhibit C	*Dubon Miranda v. Barr* Notice of Preliminary Injunction (English and Spanish)
Exhibit D	*Dubon Miranda v. Barr* Instructions and Guidelines to Immigration Judges
Exhibit E	*Dubon Miranda v. Barr* Sample Bond Filing 1
Exhibit F	*Dubon Miranda v. Barr* Sample Bond Filing 2

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARVIN DUBON MIRANDA, *et al*.	*	
	*	
v.	*	Civil No. 20-1110
	*	
WILLIAM P. BARR, *et al*.	*	
	*	

* *

ORDER

For the reasons identified in the accompanying Memorandum, it is hereby Ordered that:

1. The plaintiffs' motion for a temporary restraining order and/or preliminary injunction (ECF 15), construed as a motion for a preliminary injunction, is GRANTED;
2. The defendants are ENJOINED as follows:
    a. Plaintiff Jose de la Cruz Espinoza SHALL RECEIVE, within 21 days of the entry of this Order, a new custody redetermination hearing (*i.e*., "bond hearing") where the (1) government bears the burden of proving, by clear and convincing evidence, that he is a flight risk or a danger to the community in order to justify continued detention; and (2) the Immigration Judge ("IJ") must consider his ability to pay a set bond amount and his suitability for release on alternative conditions of supervision;
    b. The Executive Office of Immigration Review ("EOIR") SHALL ENSURE that all future bond hearings conducted in the District of Maryland for individuals held pursuant to 8 U.S.C. § 1226(a) adhere to the following requirements: (1) the government must bear the burden of proving, by clear and convincing evidence, that a noncitizen is a flight risk or a danger to the community in order to justify detention; and (2) the IJ must consider a noncitizen's ability to pay a set bond

amount and his or her suitability for release on alternative conditions of supervision;

c. Any current § 1226(a) detainee known to have received a bond hearing in the District of Maryland not in conformance with the above requirements SHALL RECEIVE a new bond hearing on a schedule to be set after the filing of the status report required in (4), below;

3. The parties SHALL CONFER, within 21 days, in order to develop a plan for the following:

   a. Promptly identifying § 1226(a) detainees currently held pursuant to bond hearings that did not comport with the above requirements;

   b. Developing instructions to all IJs in the District of Maryland who conduct § 1226(a) bond hearings to inform them of the requirements of this Order;

   c. Developing a notice, in English, Spanish, and any other language deemed appropriate by the parties, summarizing the requirements of this Order for distribution to Immigrations and Customs Enforcement ("ICE") detainees in the District of Maryland;

4. Also within 21 days, the parties SHALL PROVIDE a status report to the court detailing the agreed-upon plan for the matters discussed in (3), after which the court will, if necessary, issue an updated Order; and

5. The Clerk shall SEND a copy of this Order and the accompanying Memorandum to counsel of record.

5/29/
Date

/
Catherine C. Blake
United States District Judge

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARVIN DUBON MIRANDA, *et al*.	*	
	*	
v.	*	Civil No. 20-1110
	*	
WILLIAM P. BARR, *et al*.	*	
	*	

* *

MEMORANDUM

Immigration and Customs Enforcement ("ICE") detainees Marvin Dubon Miranda, Ajibade Thompson Adegoke, and Jose de la Cruz Espinoza (the "lead plaintiffs"), filed a class action complaint and petition for writ of habeas corpus contesting the adequacy of the bond hearings that resulted in their detention. (ECF 1).[1] Now pending is the lead petitioners' motion for a temporary restraining order ("TRO") and/or a preliminary injunction. (ECF 15). The motion is fully briefed, and no hearing is necessary. For the reasons explained below, the motion will be granted.

BACKGROUND

I. Statutory and regulatory framework

The lead plaintiffs and the members of the proposed class are detained under 8 U.S.C. § 1226(a), the provision of the Immigration and Nationality Act ("INA") that governs the arrest and detention of noncitizens pending a decision on removal. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) provides that:

On a warrant issued by the Attorney General, an alien may be arrested and detained

[1] The lead plaintiffs name as defendants Attorney General William P. Barr; Chad F. Wolf, Acting Secretary of the U.S. Department of Homeland Security; Matthew T. Albence, Deputy Director and Senior Official Performing the Duties of the Director of Immigration and Customs Enforcement ("ICE"); James McHenry, Director of the Executive Office for Immigration Review; Janean A. Ohin, Acting Director of ICE's Baltimore Field Office; William Delauter, Corrections Bureau Chief of Frederick County Adult Detention Center; Jack Kavanagh, Director of the Howard County Department of Corrections; and Donna Bounds, Warden of Worcester County Detention Center. (ECF 1).

> pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c)[2] 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.

8 U.S.C. § 1226(a).

Pursuant to federal regulations, an ICE officer makes an initial custody determination upon arrest. *See* 8 C.F.R. § 236.1(c)(8). If the noncitizen can demonstrate that she is neither a flight risk nor poses a danger to the community, the ICE officer may release the noncitizen on bond or other conditions of release. *Id*. The noncitizen may later seek review of the initial bond determination by an Immigration Judge ("IJ") at a bond hearing. 8 C.F.R. § 1236.1(d)(1); *accord Jennings,* 138 S. Ct. at 847. Thereafter, the noncitizen may appeal the IJ's determination to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§ 1236.1(d)(3), 1003.1(b)(7).

Neither § 1226(a) nor its implementing regulations specify who bears the burden of proof at bond hearings, but the BIA currently requires that the noncitizen "show to the satisfaction of the Immigration Judge that he or she merits release on bond." *See In Re Guerra,* 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *accord Brito v. Barr*, 395 F. Supp. 3d 135, 145 (D. Mass. 2019). Moreover, while § 1226(a) prescribes a minimum bond amount—$1,500—there is no explicit requirement either in the statute or the regulations that an IJ consider, when setting bond, a noncitizen's ability to pay. *See, e.g., In re Castillo-Cajura*, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009)

[2] Section 1226(c) provides for mandatory detention pending removal for certain classes of noncitizens. *See* 8 U.S.C. § 1226(c). The parties agree that § 1226(c) does not apply here.

(noting, in an unpublished opinion, that "an alien's ability to pay the bond amount is not a relevant bond determination factor").

II. Lead plaintiffs[3]

A. Marvin Dubon Miranda

Mr. Dubon Miranda is a 35-year old man from El Salvador who has been in the United States for over ten years. (Compl. ¶¶ 33, ECF 1). Prior to his detention, he resided in Baltimore City, Maryland, with his partner, who is dying of end-stage renal disease. (Compl. ¶¶ 6, 33). He is seeking withholding of removal and protection under the Convention Against Torture ("CAT") related to his resistance to MS-13 control of his community in El Salvador. (*Id*. ¶ 33). Mr. Dubon Miranda and his ex-wife co-parent their 13-year old son, who lives in Maryland with his mother. (*Id*. ¶¶ 33–34). Prior to his detention, Mr. Dubon Miranda worked as a construction worker to financially support himself, his partner, and his son. (*Id*. ¶ 37).

Mr. Dubon Miranda was taken into ICE custody on December 12, 2019, after being sentenced to 60 days incarceration for driving under the influence ("DUI"). (Compl. ¶ 33). He had previously been convicted of a DUI in 2017 and states that he struggles with alcohol dependence. (*Id*. ¶ 35). On February 26, 2020, Mr. Dubon Miranda had a bond hearing in Baltimore Immigration Court in front of IJ Elizabeth Kessler. (*Id*. ¶ 38). He was represented by counsel and presented evidence in support of his request for release on bond. (*Id*.). Upon finding that Mr. Dubon Miranda had failed to prove he was not a danger to the community, however, the IJ denied bond. (*Id*. ¶ 39).

At the time the Complaint was filed, Mr. Dubon Miranda was in ICE custody at the Howard County Detention Center ("HCDC"). (*Id*. ¶ 6). On May 18, 2020, however, Mr. Dubon

[3] As explained more fully below, the claims for injunctive relief by two of the three lead plaintiffs are now moot.

Miranda's application for withholding of removal was granted, and he was released from ICE custody. (*See* ECF 20).[4]

B. Ajibade Thompson Adegoke

Mr. Thompson is a 42-year old man from Nigeria who came to the United States in 2017 on a tourist visa. (Compl. ¶ 41). Prior to his detention, he worked as a driver for a Baltimore company, and had no criminal record except for traffic violations. (*Id*. ¶¶ 43–44). He is seeking asylum on the basis of threats to him and his family by members of a political party in Nigeria. (*Id*. ¶ 41). Mr. Thompson's wife and five children remain in Nigeria, and due to his detention, Mr. Thompson was unable to contact them to determine whether they are safe. (*Id*.). Mr. Thompson has strong ties to the Jehovah's Witness community in Baltimore. (*Id*.).

Mr. Thompson was charged with theft in October 2019, which he contends was based on a supermarket employee's mistaken belief that Mr. Thompson was stealing from the store. (Compl. ¶ 42). The police issued Mr. Thompson a citation instructing him to appear in court at a later date. (*Id*.). Mr. Thompson inadvertently missed his court date, but, upon realizing his mistake, he went to the courthouse on October 19, 2019, and turned himself in. (*Id*.). The theft charge was dropped on November 15, 2019, but Mr. Thompson was held until November 18, 2019, when he was taken into ICE custody. (*Id*.).

On December 2, 2019, Mr. Thompson had a bond hearing at the Baltimore Immigration Court before IJ Kessler. (Compl. ¶ 45). He appeared *pro se* via video teleconferencing, did not know he would be having a bond hearing that day, and did not know what was expected of him during the hearing. (*Id.*). The IJ did not ask him what his financial situation was, nor did she ask

[4] The Joint Notice informing the court of Mr. Dubon Miranda's release indicates that he was released from Worcester County Detention Center, (*see* ECF 20), while the Complaint states that he was being detained at HCDC, (*see* Compl. ¶ 6). This discrepancy has no bearing on the outcome of this motion, as there is no dispute that Mr. Dubon Miranda was in ICE custody prior to his release.

Mr. Thompson to tell the court why he was neither a danger nor a flight risk. (*Id.*). The IJ ultimately set bond at $15,000, an amount Mr. Thompson was unable to pay. (*Id.*). He later requested a bond reduction to $5,000, to which the court did not respond. (*Id.* ¶ 46).

At the time the Complaint was filed, Mr. Thompson was detained at the Worcester County Detention Center. (*Id.* ¶ 7). On May 7, 2020, however, Mr. Thompson's application for asylum was granted and he was released. (*See* ECF 18).

C. Jose de la Cruz Espinoza

Mr. de la Cruz Espinoza is a 25-year old man from Mexico who came to the United States in 2008, when he was 14 years old. (Compl. ¶ 49). Prior to his detention, Mr. de la Cruz Espinoza resided in Georgetown, Delaware, with his wife, with whom he runs a landscaping company, and their four U.S. citizen children. (*Id.*). Mr. de la Cruz Espinoza is currently seeking Cancellation of Removal relief ("42B Cancellation") and asylum. (*Id.*).

Mr. de la Cruz Espinoza was taken into ICE custody as a result of pending criminal charges for two counts of Second Degree Assault and Malicious Destruction of Property Valued <$1,000, which arose from a dispute between Mr. de la Cruz Espinoza and his brother. (Compl. ¶ 50).[5] After Mr. de la Cruz Espinoza's daughter called the police, Mr. de la Cruz Espinoza was arrested, and his criminal bond initially set at $1,500. (*Id.*). At a bail review hearing, however, the judge ordered Mr. de la Cruz Espinoza released on his own recognizance. (*Id.*). Before Mr. de la Cruz Espinoza could be released, ICE took Mr. de la Cruz Espinoza into custody and brought him to HCDC. (*Id.*)

On February 19, 2020, Mr. de la Cruz Espinoza had a bond hearing in the Baltimore Immigration Court in front of IJ Kessler. (Compl. ¶ 54). He was represented by counsel and

[5] According to the Complaint, no one was harmed in the dispute and Mr. de la Cruz Espinoza's wife (who was present at the time) and brother both wish for the charges to be dropped. (Compl. ¶ 50).

requested bond be set at $5,000. (*Id*.). According to the Complaint, Mr. de la Cruz Espinoza's bond hearing lasted approximately five to ten minutes, he did not know it was his burden to prove that he is not a danger to the community nor a flight risk, and he had trouble understanding what was happening due to a language barrier. (*Id*. ¶¶ 54–55). The IJ set bond at $20,000, which Mr. de la Cruz Espinoza asserts is too high for him or his family to pay. (*Id*. ¶ 55).

On March 4, 2020, Mr. de la Cruz Espinoza had another hearing before IJ Kessler, at which he appeared *pro se*. (Compl. ¶ 56). Mr. de la Cruz Espinoza asked the IJ to reconsider bond due to his inability to pay. (*Id*.). The IJ denied the request, stating she could only reduce bond if he filed a motion showing changed circumstances. (*Id*.).[6] Mr. de la Cruz Espinoza remains detained at HCDC.

III. The class action complaint

The lead plaintiffs bring this class action on behalf of themselves and all people who are or will be detained under 8 U.S.C. § 1226(a), and had or will have a bond hearing before the Baltimore Immigration Court in Baltimore, Maryland. (Compl. ¶ 4). At bond hearings held in Baltimore Immigration Court, a noncitizen seeking release on bond bears the burden of proving that she is neither a danger to the community nor a flight risk. (*Id*. ¶¶ 26, 30). Moreover, there is no requirement that IJs in the Baltimore Immigration Court consider an individual's ability to pay when setting bond amounts, which are frequently set between $8,000 and $15,000 and—unlike in the criminal context—must be paid upfront and in full. (*Id*. ¶ 27).

On behalf of themselves and all members of the proposed class, the lead plaintiffs bring

[6] According to the Complaint, the government introduced at this hearing a form I-213 stating that Mr. de la Cruz Espinoza accepted voluntary departure and returned to Mexico in 2011, which would make him ineligible for 42B Cancellation of Removal relief. (Compl. ¶ 56). Mr. de la Cruz Espinoza states that did not have a chance to review this document before the hearing, but asserts that he did not return to Mexico in 2011, nor has he left the United States at all since 2008. (*Id*.; de la Cruz Espinoza Decl. ¶ 15, ECF 1-15).

two claims for relief. In Count One, they allege that Fifth Amendment due process is violated when the government detains individuals under § 1226(a) absent the following procedures: (1) a bond hearing where the *government* bears the burden to justify continued detention by proving by clear and convincing evidence that the individual is a flight risk or a danger to others; and (2) an assessment of an individual's ability to pay bond and the suitability of alterative conditions of release. (Compl. ¶¶ 69–70). Because the lead plaintiffs, "and all members of the proposed class, are or will be detained without receiving a bond hearing with these basic requirements," they allege that their detention violates the Fifth Amendment. (*Id*. ¶ 71). In Count Two, the lead plaintiffs allege that their detention also violates the INA because a correct interpretation of § 1226(a) requires that the government "adequately consider[] detained individuals' financial circumstances and whether alternative nonmonetary conditions of release would sufficiently mitigate flight risk." (*Id*. ¶¶ 74–75). The lead plaintiffs seek class certification, declaratory relief, and an order that each member of the class be released unless provided with a new bond hearing. (*Id*. at 27).

IV. TRO and/or preliminary injunction

On May 5, 2020, the lead plaintiffs filed a motion for a TRO and/or a preliminary injunction, asking the court to immediately order new bond hearings that (1) shift the burden of proof to the government to demonstrate, by clear and convincing evidence, that a noncitizen is a flight risk or poses a danger to the community; and (2) consider a noncitizen's ability to pay bond and suitability for alternative conditions of release. (Mot. at 1–2, ECF 15-1). The lead plaintiffs assert that they are likely to succeed on the merits of the class action complaint, and that they will suffer irreparable harm if the court declines to impose a TRO or preliminary injunction. The lead plaintiffs argue that continued detention pursuant to procedurally flawed

bond hearings in itself constitutes irreparable harm, but also that "the threat of irreparable harm is especially severe in light of the COVID-19 pandemic." (*Id*. at 2).

In response, the defendants first argue that the court does not have jurisdiction over the lead plaintiffs' claims because (1) the lead plaintiffs failed to exhaust their administrative remedies, and (2) 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B) strip the district court of jurisdiction to review discretionary judgments of the Baltimore Immigration Court. (Opp'n at 2–3, 12–16, ECF 19-1). The defendants also contend that the lead plaintiffs' claims fail to make the required showing to justify imposition of a TRO or preliminary injunction. (*Id*. at 3, 27–28).

DISCUSSION

I. Mr. Dubon Miranda's and Mr. Thompson's release from detention

As an initial matter, the court considers the impact of Mr. Dubon Miranda's and Mr. Thompson's release from detention. As they have been released from ICE custody, their claims for injunctive relief are now moot. *See United States v. Hardy*, 545 F. 3d 280, 283 (4th Cir. 2008) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." (citation omitted)). The mootness of Mr. Dubon Miranda's and Mr. Thompson's claims does not, of course, affect Mr. de la Cruz Espinoza's claims; Mr. de la Cruz Espinoza could, based on his own claims regarding the deficiencies of his bond hearing, represent the entire proposed class. But in light of the timing of Mr. Dubon Miranda's and Mr. Thompson's releases, and the real possibility that Mr. de la Cruz Espinoza may also be released prior to the resolution of this case, the court deems it prudent to explain why the mootness of proposed class members' claims does not prevent courts from reaching the merits in a case involving "inherently transitory claims" such as these.

In *Cty. of Riverside v. McLaughlin*, which involved a class action constitutional challenge

by pretrial detainees, the Supreme Court held "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction." *See* 500 U.S. 44, 52 (1991). The *McLaughlin* Court observed that "some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires," *id*. at 52 (citations and brackets omitted), and that "[i]n such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution," *id*.

Here, the claims alleged in the Complaint fall squarely in the category of "inherently transitory" claims. "The 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013) (citation omitted). That is this case. The lead plaintiffs and members of the proposed class are (or were) subject to § 1226(a) detention, the length of which "cannot be ascertained at the outset, and [] may be ended at any time[.]" *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975), and describing claims by pretrial detainees challenging conditions of detention as those that are "inherently transitory"); *see also Brito*, 395 F. Supp. 3d at 146 (§ 1226(a) detainees' claims that their bond hearings were constitutionally and statutorily inadequate "satisfie[ed] the inherently transitory exception").

Accordingly, even if all three of the lead plaintiffs' claims were moot here, the court could proceed to the merits pursuant to the "relation back" doctrine. The court need not decide at this time whether Mr. Dubon Miranda and Mr. Thompson remain proper class representatives, as no class has yet been certified. *See Geraghty*, 445 U.S. at 407.

II. Jurisdiction

The court next considers the defendants' argument that the court lacks jurisdiction to consider the lead plaintiffs' claims. The defendants argue that (1) the lead plaintiffs were required to exhaust their administrative remedies before pursuing relief in federal court, and (2) 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B) bar federal court jurisdiction over the claims. For the reasons explained below, both arguments fail, and the court may exercise jurisdiction here.

A. Administrative exhaustion

Federal regulations provide that noncitizens subject to § 1226(a) detention may file with the BIA "[a]n appeal relating to bond and custody determinations." *See* 8 C.F.R. § 1236.1(d)(3); *see also* 8 C.F.R. § 1003.1(b)(7). But administrative exhaustion is *required* only for challenges to final orders of removal. *See Jarpa v. Mumford*, 211 F. Supp. 3d 706, 710 (D. Md. 2016) (citing 8 U.S.C. § 1251(d)(1)). Where exhaustion is not required by statute, "sound judicial discretion must govern the Court's decision of whether to exercise jurisdiction absent exhaustion." *Id*. at 710–11 (citing *Welch v. Reno*, 101 F. Supp. 2d 347, 351 (D. Md. 2000) (further citation omitted)); *see also Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) ("In the habeas context, exhaustion is a prudential rather than jurisdictional requirement").

"In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). The Supreme Court has outlined "at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion": (1) where "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim"; (2) where "an administrative remedy may be inadequate because of

some doubt as to whether the agency was empowered to grant effective relief"; and (3) where "an administrative remedy may be inadequate [because] the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id*. at 146–47 (citations and quotation marks omitted).

Here, the claims raised in the Complaint fall into the first and third *McCarthy* circumstances. As to the first circumstance, the lead plaintiffs' and proposed class members' continued deprivation of liberty, without the bond hearing procedures they claim are constitutionally and statutorily required, "constitutes the kind of irreparable harm which forgives exhaustion." *See Jarpa*, 211 F. Supp. 3d at 711 (citation omitted). As the *Jarpa* court reasoned, "if . . . continued detention is indeed unconstitutional, every subsequent day of detention without remedy visits harm anew. Further, because the harm is loss of liberty, it is quintessentially the kind of harm that cannot be undone or totally remedied through monetary relief." *Id*. (citation omitted). As to the third circumstance, it is clear here that the administrative remedy may be inadequate, as the BIA appears to have predetermined the issues presented in the Complaint. As noted above, the BIA has consistently held that "[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond," *see Guerra,* 24 I. & N. Dec. at 40; *see also In Re Adeniji*, 22 I. & N. Dec. 1102, 1102 (B.I.A. 1999), and, in several unpublished opinions, has stated that an IJ need not consider a noncitizen's ability to pay a set bond amount, *see Castillo-Cajura*, 2009 WL 3063742, at *1; *In re Sandoval-Gomez*, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008).

Before exercising its discretion to excuse exhaustion, however, the court must decide whether the "'twin purposes of protecting administrative agency authority and promoting judicial efficiency'" are outweighed by the lead plaintiffs' and proposed class members' interest in

prompt resolution of their claims. *See Jarpa*, 211 F. Supp. 3d at 712 (quoting *Volvo GM Heavy Truck Corp. v. U.S. Dep't of Labor*, 118 F.3d 205, 208–09 (4th Cir. 1997)). Here, the court finds that the lead plaintiffs' claims do not present a threat to administrative agency authority or judicial efficiency. Even if the court were to grant all of the lead plaintiffs' claims, the ultimate decision of whether to detain or release the members of the proposed class would remain within the executive branch. And deciding the legal and constitutional questions raised in the Complaint here may, in fact, promote judicial efficiency, as a decision on the merits of these claims may prevent future litigation on these same issues. Accordingly, the court will exercise its discretion to excuse administrative exhaustion here.

B. 8 U.S.C. §§ 1226(e), 1252(a)(2)(B)

Section 1226(e), which governs judicial review of action taken pursuant to § 1226(a), provides that:

> 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.

8 U.S.C. § 1226(e). A district court thus cannot review custody determinations that an IJ, pursuant to her delegated authority, has made regarding a noncitizen's detention or release. *See Jennings*, 138 S. Ct. at 841 (citation omitted). Section 1226(e), however, does not preclude challenges to "the Government's detention authority under the 'statutory framework' as a whole," or challenges to the "constitutionality of the entire statutory scheme under the Fifth Amendment." *Id*. Section 1252(a)(2)(B) similarly provides, in relevant part, that:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is

> specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). While this provision, like § 1226(e), precludes judicial review of discretionary action by an IJ, "[i]t does not limit habeas jurisdiction over questions of law." *See Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) (citation and quotation marks omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (§ 1252(a)(2)(B)(ii) does not bar challenges to the extent of the Attorney General's authority to detain a noncitizen, as "the extent of that authority is not a matter of discretion").

The defendants characterize the lead plaintiffs' claims as challenges to the IJ's weighing of evidence and factual findings and argue that, accordingly, §§ 1226(e) and 1252(a)(2)(B) strip this court of jurisdiction to hear the claims. (Opp'n at 15). But the lead plaintiffs' claims are not, in fact, challenges to the IJ's weighing of evidence and factual findings. They are challenges to the procedures used during § 1226(a) bond hearings, which, argue the lead plaintiffs, violate due process and the INA. These claims are outside the scope of the jurisdiction-stripping provisions of §§ 1226(e) and 1252(a)(2)(B). *See Hernandez*, 872 F.3d at 988, (claims that the "discretionary process itself was constitutionally flawed" are not barred by §§ 1226(e) and 1252(a)(2)(B) (citation omitted)); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 688–89 (D. Mass. 2018) (section 1226(e) does not bar constitutional challenges to the immigration bail system); *Gordon v. Shanahan*, No. 15 CV. 261, 2015 WL 1176706, at *2 (S.D.N.Y. Mar. 13, 2015) (section 1226(e) does not deprive the court of jurisdiction over constitutional and statutory challenges to detention).[7] Accordingly, the court has jurisdiction over the lead plaintiffs' claims and will proceed to the merits of their motion.

[7] Unpublished opinions are cited for the persuasiveness of their reasoning, not for any precedential value.

III. TRO or preliminary injunction

A party seeking a preliminary injunction must establish: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in favor of issuing the preliminary injunction; and (4) that the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). Where, as here, a requested injunction is mandatory rather than prohibitory,[8] the party seeking the injunction must also demonstrate that "a mandatory preliminary injunction [is] necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court's ability to enter ultimate relief on the merits of the same kind." *In re Microsoft Corp. Antitrust Litig*., 333 F.3d 517, 526 (4th Cir. 2003), *abrogated on other grounds by eBay, Inc. v. MercExchange, L.L.C*., 547 U.S. 388 (2006).

"The standard for a temporary restraining order is the same as a preliminary injunction." *Maages Auditorium v. Prince George's Cty., Md*., 4 F. Supp. 3d 752, 760 (D. Md. 2014), *aff'd*, 681 F. App'x 256 (4th Cir. 2017); *see* Fed. R. Civ. P. 65. Because the lead plaintiffs seek injunctive relief lasting beyond the fourteen-day limit for TROs, and the defendants have had an opportunity to oppose the requested relief, *see* Fed. R. Civ. P. 65(b)(2), (a)(1), the court will construe the lead plaintiffs' motion as one for a preliminary injunction.

For the reasons explained below, the lead plaintiffs have established the necessary elements to justify a mandatory preliminary injunction.

[8] "Whereas mandatory injunctions alter the status quo, prohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.'" *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)).

A. Likelihood of success on the merits

i. Due process claim: burden of proof

The lead plaintiffs claim that Fifth Amendment due process entitles them, and all members of the proposed class, to a bond hearing where the government bears the burden of proving, by clear and convincing evidence, dangerousness or risk of flight. As explained above, neither the INA nor its implementing regulations speak to the burden of proof at § 1226(a) bond hearings, and the BIA has held that the burden lies with the noncitizen. *See Guerra*, 24 I. & N. Dec. at 37, 40. But, as the lead plaintiffs point out, when faced with challenges to the constitutionality of these hearings, district courts in the First, Second, Ninth, and Tenth Circuits have concluded that due process requires that the *government* bear the burden of justifying a noncitizen's § 1226(a) detention. *See, e.g., Singh v. Barr*, 400 F. Supp. 3d 1005, 1017 (S.D. Cal. 2019) ("[T]he Fifth Amendment's Due Process Clause requires the Government to bear the burden of proving . . . that continued detention is justified at a § 1226(a) bond redetermination hearing."); *Diaz-Ceja v. McAleenan*, No. 19-CV-00824-NYW, 2019 WL 2774211, at *11 (D. Colo. July 2, 2019) (same); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018) (same); *Pensamiento*, 315 F. Supp. 3d at 692 (same). While jurisdictions vary on the standard of proof required, *compare, e.g., Darko*, 342 F. Supp. 3d at 436 (clear and convincing standard) *with Pensamiento*, 315 F. Supp. 3d at 693 ("to the satisfaction of the IJ" standard), the "consensus view" is that due process requires that the burden lie with the government, *see Darko*, 342 F. Supp. 3d at 435 (collecting cases).

The defendants concede that "a growing chorus of district courts" have concluded that due process requires that the government bear the burden of proof at § 1226(a) bond hearings. (Opp'n at 22). But the defendants also point out that some courts to consider the issue have

concluded otherwise. In *Borbot v. Warden Hudson Cty. Corr. Facility*, the Third Circuit analyzed a § 1226(a) detainee's claim that due process entitled him to a second bond hearing where "[t]he duration of [] detention [was] the sole basis for [the] due process challenge." 906 F.3d 274, 276 (3d Cir. 2018). The *Borbot* court noted that the detainee "[did] not challenge the adequacy of his initial bond hearing," *id*. at 276–77, and ultimately held that it "need not decide when, if ever, the Due Process Clause might entitle an alien detained under § 1226(a) to a new bond hearing," *id*. at 280. But, in analyzing the detainee's claims, the *Borbot* court stated that it "perceive[d] no problem" with requiring that § 1226(a) detainees bear the burden of proof at bond hearings. *Id*. at 279. Several district courts in the Third Circuit have subsequently concluded that *Borbot* compels a finding that due process does not require that the government bear the burden of proof at § 1226(a) bond hearings. *See, e.g.*, *Gomez v. Barr*, No. 1:19-CV-01818, 2020 WL 1504735, at *3 (M.D. Pa. Mar. 30, 2020) (collecting cases).

Based on its survey of the case law, the court is more persuaded by the reasoning of the district courts in the First, Second, Ninth, and Tenth Circuits. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citation omitted). While detention pending removal is "a constitutionally valid aspect of the deportation process," such detention must comport with due process. *See Demore v. Kim*, 538 U.S. 510, 523 (2003). Although the Supreme Court has not decided the proper allocation of the burden of proof in § 1226(a) bond hearings, it has held, in other civil commitment contexts, that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires *the state to justify confinement* by proof more substantial than a mere preponderance of the evidence." *See Addington v. Texas*, 441 U.S. 418, 427 (1979)

(addressing the standard of proof required for mental illness-based civil commitment) (emphasis added).

Application of the *Mathews v. Eldridge* balancing test lends further support to the lead plaintiffs' contention that due process requires a bond hearing where the government bears the burden of proof. In *Mathews*, the Supreme Court held that "identification of the specific dictates of due process generally requires consideration of three distinct factors": (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. 319, 335 (1976). While the court acknowledges that requiring the government to bear the burden of proof at § 1226(a) hearings would impose additional costs on the government, those costs are likely outweighed by the noncitizen's significant interest in freedom from restraint, and the fact that erroneous deprivations of liberty are less likely when the government, rather than the noncitizen, bears the burden of proof. (*See* Decl. of Former Immigration Judge Denise Noonan Slavin ¶ 6, ECF 1-8 ("On numerous occasions, *pro se* individuals appeared before me for custody hearings without understanding what was required to meet their burden of proof. . . . *Pro se* individuals were rarely prepared to present evidence at the first custody hearing[.]"))

With respect to the quantum of proof required at § 1226(a) bond hearings, the court notes that "the overwhelming majority of district courts have . . . held that, in bond hearings under § 1226(a), due process requires the government to bear the burden of justifying detention by clear and convincing evidence." *Hernandez-Lara v. Immigration & Customs Enf't, Acting Dir.*, No.

19-CV-394-LM, 2019 WL 3340697, at *3 (D.N.H. July 25, 2019) (collecting cases). As the *Hernandez-Lara* court reasoned, "[p]lacing the burden of proof on the government at a § 1226(a) hearing to show by clear and convincing evidence that the noncriminal alien should be detained pending completion of deportation proceedings is more faithful to *Addington* and other civil commitment cases," *id*. at *6, "[b]ecause it is improper to ask the individual to 'share equally with society the risk of error when the possible injury to the individual'—deprivation of liberty—is so significant," *id*. (quoting *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011)) (further citation omitted).

Moreover, on the quantum of proof question, the court finds instructive evolving jurisprudence on challenges to prolonged detention pursuant to 8 U.S.C. § 1226(c). As noted in note 2, *supra*, § 1226(c) mandates detention of noncitizens deemed deportable because of their convictions for certain crimes. *See Jennings*, 138 S. Ct. at 846. Although § 1226(c) "does not on its face limit the length of the detention it authorizes," *id*., the Supreme Court has not foreclosed the possibility that unreasonably prolonged detention under § 1226(c) violates due process, *id*. at 851. Indeed, many courts have held that when § 1226(c) becomes unreasonably prolonged, a detainee must be afforded a bond hearing. *See, e.g., Reid v. Donelan*, 390 F. Supp. 3d 201, 215 (D. Mass. 2019); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018); *Jarpa,* 211 F. Supp. 3d at 717. Notably, courts in this district and elsewhere have ordered § 1226(c) bond hearings where the government bears the burden of justifying continued detention by clear and convincing evidence. *See Duncan v. Kavanagh*, --- F. Supp. 3d ----, 2020 WL 619173, at *10 (D. Md. Feb. 10, 2020); *Reid*, 390 F. Supp. 3d at 228; *Portillo,* 322 F. Supp. 3d at 709–10; *Jarpa*, 211 F. Supp. 3d at 721. As the *Jarpa* court explained, "against the backdrop of well-settled jurisprudence on the quantum and burden of proof required to pass constitutional muster in civil detention

proceedings generally, it makes little sense to give Mr. Jarpa at this stage fewer procedural protections than those provided to" civil detainees in other contexts. *See Jarpa*, 211 F. Supp. 3d at 722 (citing *United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010)).

In light of the above, the court is satisfied that the lead plaintiffs have shown a likelihood of success on the merits of their claim that due process requires § 1226(a) bond hearings where the government must bear the burden of proving dangerousness or risk of flight. As to the quantum of proof required at these hearings, the court is persuaded that requiring a clear and convincing standard is in line with the Supreme Court's reasoning in *Addington*, as well as consistent with the bond hearings ordered in cases involving § 1226(c) detention.

ii. Due process claim: ability to pay and suitability for release on alternative conditions of release

The lead plaintiffs also claim that Fifth Amendment due process entitles them, and all members of the proposed class, to a bond hearing where the IJ considers the noncitizen's ability to pay a set bond amount and her suitability for release on alternative conditions of supervision. The defendants counter that due process does not so require, and also asserts that at Mr. de la Cruz Espinoza's bond hearing, the IJ *did* consider his ability to pay, (Opp'n at 26).

As an initial matter, the court considers whether the IJ at Mr. de la Cruz Espinoza's bond hearing considered his ability to pay. According to the Complaint, there is no requirement that IJs in Baltimore Immigration Court consider an individual's ability to pay when setting a bond amount. (Compl. ¶ 27 & n.8). The defendants assert that because Mr. de la Cruz Espinoza's motion for bond included arguments about his financial situation, the IJ did, in fact, consider his ability to pay. (Opp'n at 26). The court is not persuaded. The fact that an argument was raised does not *ipso facto* mean it was considered. Neither the transcript of Mr. de la Cruz Espinoza's bond hearing, (ECF 15-11), nor the IJ's order of bond, (ECF 1-18), suggest that the IJ actually

considered ability to pay. Accordingly, without clear evidence to the contrary, the court accepts the lead plaintiffs' allegation that the IJ did not consider Mr. de la Cruz Espinoza's ability to pay when setting bond.

The question remains whether due process requires that an IJ consider ability to pay and suitability for alternative conditions of release at a § 1226(a) bond hearing. As explained above, detention pending removal must comport with due process. *See Demore,* 538 U.S. at 523. Due process requires that detention "bear[s] [a] reasonable relation to the purpose for which the individual [was] committed." *See Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Federal regulations and BIA decisional law suggest that the purpose of § 1226(a) detention is to protect the public and to ensure the noncitizen's appearance at future proceedings. *See* 8 C.F.R. §§ 1003.19, 1236.1; *Guerra*, 24 I. & N. Dec. at 38. But, the lead plaintiffs argue, when IJs are not required to consider ability to pay or alternative conditions of release, a noncitizen otherwise eligible for release may end up detained solely because of her financial circumstances.

Several courts to consider the question have concluded that § 1226(a) detention resulting from a prohibitively high bond amount is not reasonably related to the purposes of § 1226(a). In *Hernandez v. Sessions*, the Ninth Circuit held that "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions, [is] necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings[.]" *See* 872 F.3d at 990–91. While the *Hernandez* court did not explicitly conclude that a bond hearing without those considerations violates due process, *see id*. at 991 ("due process *likely* requires consideration of financial circumstances and alternative conditions of release" (emphasis added)), the court in *Brito* did reach that conclusion, *see* 415 F.

Supp. 3d at 267. The *Brito* court held that, with respect to § 1226(a) bond hearings, "due process requires an immigration court consider both an alien's ability to pay in setting the bond amount and alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances." *Id*. at 267. Relatedly, in *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018), which involved noncitizens held in civil immigration detention pursuant to 8 U.S.C. § 1225(b),[9] the court—relying on the Ninth Circuit's reasoning in *Hernandez*—held that "an IJ must consider ability to pay and alternative conditions of release in setting bond for an individual detained under § 1225(b)." *Id*. at 338. To hold otherwise, the *Abdi* court reasoned, would implicate "the due process concerns discussed in *Hernandez*, which are equally applicable to detentions pursuant to § 1225(b)."[10]

The court is persuaded by the reasoning of *Hernandez*, *Brito*, and *Abdi*. If an IJ does not make a finding of dangerousness or substantial risk of flight requiring detention without bond (as in Mr. de la Cruz Espinoza's case), the only remaining purpose of § 1226(a) detention is to secure a noncitizen's appearance at future proceeding.[11] The set bond amount, then, must be reasonably related to this purpose. But where a bond amount is set too high for an individual to pay, she is effectively detained without bond due to her financial circumstances. It is axiomatic that an individual may not be imprisoned "solely because of his lack of financial resources." *See*

[9] 8 U.S.C. § 1225(b) authorizes indefinite, mandatory detention for certain classes of noncitizens. *See Jennings*, 138 S. Ct. at 842 (citing 8 U.S.C. §§ 1225(b)(1) and (b)(2)).

[10] The court notes that both *Hernandez* and *Abdi* reference now-invalidated precedent in both the Ninth and Second Circuits requiring the government to provide civil immigration detainees periodic bond hearings every six months. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1089 (9th Cir. 2015), *abrogated by Jennings*, 138 S. Ct. at 852; *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015), *abrogated by Jennings*, 138 S. Ct. at 852. But *Jennings,* which was decided on statutory interpretation grounds, explicitly did not include a constitutional holding. *See Jennings*, 138 S. Ct. at 851 ("[W]e do not reach th[e] [constitutional] arguments."). And, as the *Hernandez* court noted, "the Supreme Court's review of our holding . . . that noncitizens are entitled to certain unrelated additional procedural protections during the recurring bond hearings after prolonged detention does not affect our consideration of the lesser constitutional procedural protections sought at the initial bond hearings in this case." 872 F.3d at 983 n.8.

[11] The defendants offer no purpose for § 1226(a) detention beyond protecting the community and securing a noncitizen's appearance at future proceedings.

Bearden v. Georgia, 461 U.S. 660, 661–62, 665 (1983) (automatic revocation of probation for inability to pay a fine, without considering whether efforts had been made to pay the fine, violated due process and equal protection); *cf. Tate v. Short*, 401 U.S. 395, 398 (1971) ("The Constitution['s equal protection clause] prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."). In the pretrial detention context, multiple Courts of Appeals have held that deprivation of the accused's rights "to a greater extent than necessary to assure appearance at trial and security of the jail . . . would be inherently punitive and run afoul of due process requirements." *See Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)) (quotation marks omitted); *accord ODonnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018); *see also Duran v. Elrod*, 542 F.2d 998, 999 (7th Cir. 1976); *accord Villarreal v. Woodham,* 113 F.3d 202, 207 (11th Cir. 1997).

There is no suggestion that the IJs in Baltimore Immigration Court impose prohibitively high bond amounts with the intent of denying release to noncitizens who do not have the means to pay. But without consideration of a § 1226(a) detainee's ability to pay, where a noncitizen remains detained due to her financial circumstances, the purpose of her detention—the lodestar of the due process analysis—becomes less clear. As the Ninth Circuit explained,

> Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. . . . [It is a] common-sense proposition that when the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose.

Hernandez, 872 F.3d at 991.

The defendants assert that an IJ need not consider a noncitizen's ability to pay a set bond

amount because it had a "reasonable basis to enact a statute that grants the Executive branch discretion to set bonds to prevent individuals, whose 'continuing presence in the country is in violation of the immigration laws,' from failing to appear," and that § 1226(a) passes muster under rational basis review. (Opp'n at 25–26 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)). But the appropriate analysis for a procedural due process challenge is the *Mathews* balancing test, not rational basis review, which is used to analyze equal protection claims, *see, e.g., Schweiker v. Wilson*, 450 U.S. 221, 234–35 (1981), and substantive due process claims, *see, e.g., Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999). And, in applying the *Mathews* test, the court agrees with the Ninth Circuit's conclusion that "the government's refusal to require consideration of financial circumstances is impermissible under the *Mathews* test because the minimal costs to the government of [] a requirement [that ICE and IJs consider financial circumstances and alternative conditions of release] are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals' physical liberty." *See Hernandez*, 872 F.3d at 993.

Accordingly, the court is satisfied that the lead plaintiffs have shown a likelihood of success on the merits of their claim that due process requires a § 1226(a) bond hearing where the IJ considers a noncitizen's ability to pay a set bond amount and the noncitizen's suitability for alternative conditions of release.

iii. INA claim

The lead plaintiffs' final claim is that "Section 1226(a), as correctly interpreted, requires that the bond or other conditions of release for detained individuals be reasonably calculated to secure the individual's appearance at future proceedings," and that "[a] reasonable bond or reasonable conditions of release cannot be determined without adequately considering detained

individuals' financial circumstances and whether nonmonetary conditions of release would sufficiently mitigate flight risk." (Compl. ¶¶ 74–75). The relief sought on this claim, however, is identical to that sought on the due process claim discussed in Part III.A.ii, *supra*: a preliminary injunction requiring a bond hearing where an IJ considers a noncitizen's ability to pay a set bond amount and the suitability of alternative conditions of release. As the court has already found a likelihood of success on the merits of that claim, the court need not address the INA claim in order to grant the relief sought. Accordingly, the court will not at this time discuss the merits of this claim.

B. Irreparable harm

Having found that the lead plaintiffs have shown a likelihood of success on the merits of their constitutional claims, the court turns to the second requirement for obtaining a preliminary injunction: a showing of irreparable harm. The deprivation of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Hernandez*, 872 F.3d at 994. As the Ninth Circuit explained in *Hernandez*,

> it follows inexorably from our conclusion that the government's current policies are likely unconstitutional—and thus that members of the plaintiff class will likely be deprived of their physical liberty unconstitutionally in the absence of the injunction—that Plaintiffs have also carried their burden as to irreparable harm.

Hernandez, 872 F.3d at 995. The court agrees.

The lead plaintiffs also argue that the potential for irreparable harm has "escalated precipitously" in light of the COVID-19 pandemic. (Mot. at 29). COVID-19, the infectious respiratory disease caused by the novel coronavirus, poses particular risks to those in correctional and detention facilities. The Centers for Disease Control ("CDC") has warned that once introduced, COVID-19 may spread more quickly in detention facilities relative to other

environments. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html; *see also Coreas v. Bounds*, --- F.3d ---- 2020 WL 1663133, at *2 (D. Md. Apr. 3, 2020) ("Prisons, jails, and detention centers are especially vulnerable to outbreaks of COVID-19."). This is due in part to the close living arrangements of detainees, which impede social distancing efforts, and also because many facilities limit access to soap and paper towels, and prohibit alcohol-based hand sanitizers. *Interim Guidance,* CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html; *see also Coreas*, 2020 WL 1663133, at *2; (Decl. of Dr. Jaime Meyer ¶¶ 9, 11, 29, 33, ECF 1-26). Moreover, there is an increased risk of developing serious illness related to COVID-19 for individuals with certain underlying health conditions. *See Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html. While the lead plaintiffs do not allege that they have underlying conditions placing them at higher risk, this may not be true of other members of the proposed class. (*See* Dr. Meyer Decl. ¶ 15 ("[P]eople in jails and prisons are more likely than people in the community to have chronic underlying health conditions, including diabetes, heart disease, chronic lung disease, chronic liver disease, and lower immune systems from HIV."). Moreover, at least one court to consider the question has found that the "increased likelihood of severe illness and death [from COVID-19] if a preliminary injunction is not entered" constitutes irreparable harm. *See Fraihat v. U.S. Immigration & Customs Enf't*, --- F. Supp. 3d ----, 2020 WL 1932570, at *1, 27 (C.D. Cal. Apr. 20, 2020) (where proposed class members were detainees with a range of serious health conditions).

Accordingly, the lead plaintiffs have shown irreparable harm on the basis of their continued detention pursuant to a bond hearing that was likely constitutionally deficient. While the court need not find that the COVID-19 pandemic presents an independent basis for irreparable harm, the court considers the proposed class members' heightened risk of contracting COVID-19 while detained as a factor strengthening their showing.

C. Balance of the equities and the public interest

Turning to the third and fourth requirements for obtaining a preliminary injunction, the court notes that the balancing of the harm and the public interest merge when the government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, it is clear that these factors weigh in favor of granting injunctive relief. Despite the defendants' assertion to the contrary, the granting of a preliminary injunction does not seriously infringe on the government's interest in enforcing its immigration laws. (*See* Opp'n at 29). Rather, the requested injunction would simply require the government to provide the proposed class members with new bond hearings where additional procedures are observed. While the court acknowledges this would impose costs on the government, "[f]aced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *See Hernandez*, 872 F.3d at 996 (citation and quotation marks omitted). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (further citation omitted).

D. Sufficiently demanding circumstances

As noted above, because the lead plaintiffs seek a mandatory rather than prohibitory

preliminary injunction, they must also establish that "a mandatory preliminary injunction [is] necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court's ability to enter ultimate relief on the merits of the same kind." *In re Microsoft*, 333 F.3d at 526. This heightened standard is necessary because "[m]andatory preliminary injunctions generally do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Id*. (citation, quotation marks, and alterations omitted). In other words, "the circumstances [must be] sufficiently demanding for the award of mandatory relief." *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004).

Here, the lead plaintiffs have demonstrated that the exigencies of the situation demand the mandatory preliminary injunction sought. As explained above, the lead plaintiffs have shown that they are likely to succeed on the merits of their constitutional claims. Consequently, their continued detention pursuant to bond hearings that likely do not comport with due process "unquestionably constitutes irreparable injury." *See Elrod*, 427 U.S. at 373; *see also Brito*, 415 F. Supp. 3d at 270 (noting that loss of liberty is a "severe form of irreparable injury" (citation omitted)). In *Sage*, which involved a gas company's request for a mandatory preliminary injunction to obtain immediate possession of property to build a gas pipeline, the Fourth Circuit found that the heightened standard for seeking a mandatory preliminary injunction was satisfied where prompt relief was necessary to serve important public interests "in good time." *Sage*, 361 F.3d at 818, 830. In further justifying its conclusion that a mandatory preliminary injunction was appropriate, the Fourth Circuit stated that "without this mandatory relief, [the gas company] would face other irreparable harm such as increased construction costs and losses from its breach of gas supply contracts." *Id*. Here, the public interest is similarly served by the award of prompt

relief, *see supra* Part III.C, and the "other irreparable harm" that the lead plaintiffs and members of the proposed class face—namely, the heightened risk of contracting COVID-19—is significantly more serious than the potential monetary losses in *Sage*. *Cf. Coreas*, 2020 WL 1663133, at *13 ("[I]n the event that a detainee or staff member were found to have COVID-19, . . . there would be a high likelihood of irreparable health consequences [for petitioners with underlying health conditions] that could not be alleviated without release."). Accordingly, the court finds that the circumstances here are "sufficiently demanding" to justify the imposition of a mandatory preliminary injunction. *See Sage*, 361 F.3d at 830.

IV. Scope of relief

Having found that the imposition of a preliminary injunction is warranted here, the only question remaining is the scope of injunctive relief. "[C]ourts may enter class-wide injunctive relief before certification of a class." *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 376 (D. Md. 2019) (citing *Rodriguez v. Providence Community Corrections*, 155 F. Supp. 3d 758, 766 (M.D. Tenn. 2015); *Newberg on Class Actions* § 4:30 (5th ed. 2013)). On behalf of themselves and the members of the proposed class, the lead plaintiffs seek an injunction requiring the Executive Office of Immigration Review ("EOIR") to ensure that § 1226(a) detainees receive bond hearings at the Baltimore Immigration Court that comport with due process. (*See* ECF 15-18). The lead plaintiffs also ask the court, *inter alia*, to enjoin EOIR to provide each class member currently detained with a bond hearing complying with the above requirements within fourteen days. (*Id.*). The defendants do not mount any specific challenges to the scope of injunctive relief requested.

Based on the court's finding that significant constitutional rights are at stake, and the risk of irreparable harm, the court will issue a class-wide preliminary injunction mandating that §

1226(a) bond hearings implement procedures that adequately protect the due process rights of noncitizens. At these bond hearings, the government must bear the burden of justifying continued detention by clear and convincing evidence, and the IJ must consider the noncitizen's ability to pay a set bond amount and suitability for release on alternative conditions. The court will order (1) that Mr. de la Cruz Espinoza receive a new bond hearing within 21 days, and (2) that future § 1226(a) bond hearings in this district comport with the above requirements. Moreover, the court will order the parties to confer within 21 days and develop a plan for promptly identifying and providing new bond hearings to § 1226(a) detainees currently held pursuant to hearings that did not comport with the above requirements. Additional details of the preliminary injunction will be articulated in an order issued concurrently with this memorandum.

CONCLUSION

For the foregoing reasons, the court will grant the lead plaintiffs' motion for a TRO and/or a preliminary injunction, (ECF 15), construed as a preliminary injunction. The court will order relief narrowly tailored to resolve the deficiencies in the Baltimore Immigration Court's current § 1226(a) bond hearing procedures. A separate order follows, which will detail the obligations of the parties in fulfilling the mandates of the injunction.

5/29/
Date

/
Catherine C. Blake
United States District Judge

Exhibit C

NOTICE OF PRELIMINARY INJUNCTION IN DUBON MIRANDA, ET AL. V. BARR, ET AL., NO 1:20-CV-01110 (D. MD.) REGARDING BOND HEARINGS IN THE BALTIMORE IMMIGRATION COURT PURSUANT TO 8 U.S.C. § 1226(a)

On May 29, 2020, the U.S. District Court for the District of Maryland issued a preliminary injunction ("Order") in *Dubon Miranda, et al., v. Barr, et al.*, No. 1:20-cv-01110-CCB, 2020 WL 2794488 (D. Md. May 29, 2020). The injunction applies to "all people who are or will be detained under 8 U.S.C. § 1226(a) [section 236(a) of the Immigration and Nationality Act (INA)], and had or will have a bond hearing before the Baltimore Immigration Court in Baltimore, Maryland." A copy of the District Court's preliminary injunction order is attached to this notice.

Pursuant to the district court's order, at all future bond hearings conducted for individuals to whom the preliminary injunction applies, as set forth above: (1) the government must bear the burden of proving, by clear and convincing evidence, that a noncitizen is a flight risk or a danger to the community in order to justify detention; and (2) the immigration judge must consider a noncitizen's ability to pay a set bond amount and his or her suitability for release on alternative conditions of supervision.

Individuals currently detained subsequent to a bond hearing before the Baltimore Immigration Court that did not adhere to the above requirements, and to which the Order applies, are entitled to a new custody redetermination hearing, also known as a bond hearing, which will be automatically set by the immigration court. At this bond hearing, you may present evidence of your financial ability to pay any potential bond amount or your eligibility for release on conditions of supervision, including by providing written documents or witnesses. You also may testify at your bond hearing.

Evidence Submission

Information about any of the following topics may be relevant to your ability to pay:

- Your income and last salary received
- Income of your spouse or domestic partner
- Assets you have available to meet monetary bond amount, including cash in any bank account, investments, and personal or real property in the United States or abroad (house, car, etc.)
- The amount of your monthly mortgage/rental payments
- Any debts you or any member of your household must pay, such as medical expenses and child-support/care expenses
- Other expenses, debts, or circumstances that would impair your ability to pay.

If you intend to present evidence, you may submit documents and/or a witness list either at your hearing, or by filing them with the Immigration Court before your hearing by sending a copy via mail or email to:

Baltimore Immigration Court
George Fallon Federal Building
31 Hopkins Plaza, Rm. 440
Baltimore, MD 21201
Baltimore.Immigration.Court@usdoj.gov (available until September 11, 2020)

If you file your documents/witness list with the Immigration Court prior to your hearing, a copy must also be served via mail, hand-delivery, or email to:

Department of Homeland Security (DHS)
Office of the Principal Legal Advisor
Fallon Federal Building
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201
ICEeServiceBAL@ice.dhs.gov

If you submit documents at the hearing, you must bring a copy for the DHS attorney. The Immigration Judge will then consider whether you should be detained without bond or whether, in his or her discretion, you should be released on conditions of supervision and/or a bond.

Unless good cause is shown, if DHS intends to present evidence at the hearing, DHS should submit a copy of any such evidence to the Immigration Court and to you sufficiently in advance of the hearing to provide you a meaningful opportunity to review and respond to such evidence. If DHS submits evidence during the hearing, it should provide you a copy of all documents. You may ask the Immigration Court for additional time to review and respond to the evidence submitted. The Immigration Judge has discretion to grant your request for a continuance where good cause is shown.

Right to an Attorney and Right to Request a Continuance

You may be represented at your bond hearing, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an immigration court. If you wish to be represented, your attorney or representative should appear with you at your bond hearing. If you do not appear with an attorney at your bond hearing and wish to be represented, you may ask the judge for more time to find an attorney or representative. You may also ask the judge for more time if you wish to gather evidence in support of your request for release on conditions of supervision and/or a bond.

Appeal

If you disagree with the immigration judge's decision at the end of the hearing, you can appeal the decision by filing Form EOIR-26 with the Board of Immigration Appeals within 30 days of the decision.

Contact Information

If you have any questions, please contact your attorney or call a pro bono legal service provider using the detention facility hotline code for Ayuda (8984), Capital Area Immigrants' Rights (CAIR) Coalition (1686), or Catholic Immigration Services, Inc. (1565). When you call, state that you are requesting assistance on bond because you saw this *Miranda* notice. In addition, you may consult the List of Pro Bono Legal Service Providers at https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.

AVISO DE LA ORDEN JUDICIAL PRELIMINAR DEL CASO, DUBON MIRANDA, ET AL. V. BARR, ET AL., NO 1: 20-CV-01110 (D. MD.), SOBRE LAS AUDIENCIAS DE FIANZA EN LA CORTE DE INMIGRACIÓN DE BALTIMORE EN CONFORMIDAD CON 8 U.S.C. § 1226 (a)

El 29 de mayo de 2020, la Corte del Distrito de los Estados Unidos para el Distrito de Maryland publicó una orden judicial preliminar ("Orden") en *Dubon Miranda, et al., v. Barr, et al.,* No. 1: 20-cv-01110- CCB, 2020 WL 2794488 (D. Md. 29 de mayo de 2020). El mandato se aplica a "todas las personas que están o estarán detenidas bajo 8 U.S.C. § 1226 (a) [sección 236 (a) de la Ley de Inmigración y Nacionalidad (INA)], y que tuvieron o tendrán una audiencia de fianza ante la Corte de Inmigración de Baltimore en Baltimore, Maryland." Se adjunta a este aviso una copia de la orden judicial preliminar de la Corte del Distrito.

De acuerdo con la orden de la Corte del Distrito, en todas las audiencias de fianza en el futuro que se ejecuten para aquellos quienes son sujetos a la orden judicial preliminar, como se ha establecido en el párrafo anterior: (1) el gobierno, para poder justificar detención, tiene que cargar el peso de comprobar, con pruebas claras y decisivas, que la persona sin ciudadanía es un riesgo de fuga o un peligro para la comunidad; y (2) el juez de inmigración debe considerar la capacidad de la persona sin ciudadanía de poder pagar la cantidad de fianza impuesta y su adecuación para la liberación bajo condiciones de supervisión alternas.

Las personas actualmente detenidas después de recibir una audiencia de fianza ante la Corte de Inmigración de Baltimore que no cumplió con los requisitos mencionados anteriormente, y quienes son sujetos a esta Orden, tienen el derecho a una nueva audiencia de redeterminación en su custodia, también conocida como una audiencia de fianza, que será programada automáticamente por la corte de inmigración. En esta audiencia de fianza, usted puede presentar pruebas sobre su capacidad financiera de pagar cualquier cantidad de fianza posible o su elegibilidad para la liberación bajo condiciones de supervisión, incluso presentando documentos escritos o testigos. También puede testificar en su audiencia de fianza.

Presentación de Pruebas

Información sobre cualquiera de los siguientes temas puede ser pertinente a su capacidad de pagar:

- Su ingreso y el último salario recibido
- El ingreso de su esposo/a o pareja doméstica

- Los bienes que tiene disponibles para cumplir el pago monetario de la fianza, incluyendo efectivo en cualquier cuenta bancaria, inversiones y propiedades personales o inmuebles en los Estados Unidos o en el extranjero (casa, automóvil, etc.)
- La cantidad de sus pagos mensuales de hipoteca / alquiler
- Cualquier deuda que usted o cualquier miembro de su hogar deba pagar, como gastos médicos y gastos de manutención / cuidado de niños.
- Otros gastos, deudas o circunstancias que afectarían su capacidad de pagar.

Si tiene la intención de presentar pruebas, puede presentar los documentos y / o la lista de testigos durante su audiencia, o puede someterlos directamente a la Corte de Inmigración antes de su audiencia por correo o correo electrónico a:

Baltimore Immigration Court
George Fallon Federal Building
31 Hopkins Plaza, Rm. 440
Baltimore, MD 21201
Baltimore.Immigration.Court@usdoj.gov (disponible hasta el 11 de septiembre del 2020)

Si somete sus documentos / lista de testigos a la Corte de Inmigración antes de su audiencia, también se debe enviar una copia por correo, entregar por mano o correo electrónico a:

Department of Homeland Security (DHS)
Office of the Principal Legal Advisor
Fallon Federal Building
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201
ICEeServiceBAL@ice.dhs.gov

Si presenta documentos en la audiencia, debe traer una copia para el fiscal. Luego, el juez de inmigración considerará si debe ser detenido sin fianza o si, a su discreción, debe ser liberado bajo condiciones de supervisión y / o una fianza.

Al menos que se demuestre una causa buena, si el fiscal tiene la intención de presentar pruebas en la audiencia, el fiscal debe someter una copia de dicha prueba a la Corte de Inmigración y a usted con suficiente anticipación a la audiencia para brindarle una oportunidad apropiada de revisar y responder a tal evidencia. Si el fiscal presenta las pruebas durante la audiencia, debe darle a usted una copia de todos los documentos. Usted puede pedirle a la Corte de Inmigración tiempo adicional para revisar y responder a las pruebas presentadas. El Juez de Inmigración tiene

discreción para otorgarle su petición de continuar la audiencia (una continuación) si se demuestra una causa buena.

El Derecho a un Abogado y el Derecho de Peticionar una Continuación

Usted puede ser representado en su audiencia de fianza, sin costo al gobierno, por un abogada/o u otra persona autorizada y calificada para representar a personas ante una corte de inmigración. Si desea ser representada/o, su abogada/o o representante debe presentarse con usted en su audiencia de fianza. Si no se presenta con un abogada/o en su audiencia de fianza y desea ser representada/o, puede pedirle al juez más tiempo para buscar un abogada/o o representante. También puede pedirle al juez más tiempo si desea reunir pruebas en apoyo de su solicitud de liberación bajo condiciones de supervisión y / o una fianza.

Apelación

Si no está de acuerdo con la decisión del juez de inmigración al final de la audiencia, puede apelar la decisión sometiendo el Formulario EOIR-26 ante la Junta de Apelaciones de Inmigración dentro de 30 días de la decisión.

Datos de Contacto

Si tiene alguna pregunta, por favor comuníquese con su abogada/o o llame a un proveedor de servicios legales *pro bono* utilizando el código de línea gratuita del centro de detención para Ayuda (8984), Capital Area Immigrants' Rights (CAIR) Coalition (1686), o Catholic Immigration Services, Inc. (1565).. Cuando llame, diga que está solicitando asistencia con fianza porque vio este aviso de *Miranda*. Además, puede consultar la Lista de Proveedores de Servicios Legales *Pro Bono* en https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.

Exhibit D

Dubon Miranda v. Barr

Instructions and Guidelines to Immigration Judges

On May 29, 2020, the U.S. District Court for the District of Maryland issued a preliminary injunction ("Order") in *Dubon Miranda, et al., v. Barr, et al.*, No. 1:20-cv-01110-CCB, 2020 WL 2794488 (D. Md. May 29, 2020). A copy of the district court's Order is attached. The injunction applies to "all people who are or will be detained under 8 U.S.C. § 1226(a) [section 236(a) of the Immigration and Nationality Act (INA)], and had or will have a bond hearing before the Baltimore Immigration Court in Baltimore, Maryland." Memorandum at *6, *28–29. As such, at all future bond hearings conducted pursuant to the Order for individuals held in connection with 8 U.S.C. § 1226(a): (1) the government must bear the burden of proving, by clear and convincing evidence, that a noncitizen is a danger to the community or a flight risk in order to justify detention; and (2) the Immigration Judge must consider a noncitizen's ability to pay a set bond amount and his or her suitability for release on alternative conditions of supervision. Order at *1–2.

Individuals who are currently detained under 8 U.S.C. § 1226(a) who had a bond hearing before the Baltimore Immigration Court and are entitled to a new bond hearing pursuant to the Order, shall receive a new bond hearing.

The following are guidelines for Immigration Judges to apply in light of the Order:

1. The government bears the burden of proving by clear and convincing evidence that an alien detained pursuant to 8 U.S.C. § 1226(a) is a flight risk or a danger to the community in order to justify detention.

2. Unless good cause is shown, the government should submit all of its supporting evidence to the Court and the noncitizen sufficiently in advance of the hearing to provide the noncitizen a meaningful opportunity to review and respond to such evidence. If evidence is filed during the hearing, the government should serve a copy of all documents on the noncitizen.

3. Immigration Judges may continue to rely on the non-exclusive list of factors set forth in *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), to assess an alien's dangerousness and flight risk.

4. The Order does not change the rule that Immigration Judges should only set a bond or consider alternative conditions of supervision if the government has not first established that the alien is a threat to national security or a danger to persons or property. *See Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009).

5. If the Immigration Judge determines that the government has not met its burden of showing the alien is a threat to national security or a danger to persons or property, the Immigration Judge will then consider whether the government has met its burden of establishing that the individual is a flight risk. If the government has met its burden of establishing that the alien is a flight risk, the Immigration Judge will then consider whether the alien can be released on bond or alternative conditions of supervision.

6. When an Immigration Judge decides that an alien is eligible for release on bond, he or she must affirmatively inquire into the alien's financial circumstances and make an individualized assessment of the alien's current ability to pay the bond amount to be set.

Instructions and Guidelines to Immigration Judges

7. In assessing an alien's ability to pay, Immigration Judges should consider all relevant evidence in the record.[1] Immigration Judges may also inquire into any additional evidence presented relevant to an alien's ability to pay, including but not limited to:

    - The alien's individual income and employment history
    - Income of the alien's spouse or domestic partner
    - Assets available to meet a monetary bond amount, including personal or real property in the United States or abroad
    - Other expenses, debts, or circumstances that would impair ability to pay.

8. An Immigration Judge may assess an alien's financial circumstances based on the alien's sworn testimony alone or, where necessary, an Immigration Judge may require the alien to provide corroborative evidence concerning the alien's financial circumstances.

    In addition to the alien's sworn testimony, other relevant evidence may include:

    - Documentation concerning the alien's (or the alien's spouse's or domestic partner's) wages, salary, or other earnings, including pay stubs, bank records, tax returns, or similar documents
    - Evidence of monthly mortgage/rental payments
    - Evidence of debts such as medical expenses and child-support/care expenses
    - Evidence of any other assets in the United States or abroad.

9. When setting, re-determining, or reviewing the terms of any alien's release, the Immigration Judge should not set a bond at a greater amount than needed to ensure the alien's appearance. The Immigration Judge must also consider whether alternative conditions of supervision may be sufficient to mitigate flight risk.

10. When rendering a decision in which a bond is set, if the parties have not stipulated to the bond amount or conditions of release, the Immigration Judge should explain why, whether orally or in writing, the bond amount is appropriate in light of any evidence of the alien's financial circumstances. The Immigration Judge should also explain why he or she did or did not order alternative conditions of supervision.

11. The Immigration Judge is not required to release any § 1226(a) detainee for whom he or she has determined that no bond or alternative conditions of release would be sufficient to ensure the alien's appearance.

---

[1] By regulation, information collected pursuant to the Order to determine an alien's financial ability to pay a bond "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d).

Dubon Miranda v. Barr

Instructions and Guidelines to Immigration Judges

12. Nothing in the District Court's Order changes the requirement that if an Immigration Judge sets a bond, the bond cannot be less than the amount set by statute at 8 U.S.C. § 1226(a)(2), which is currently $1,500.

Please contact your Assistant Chief Immigration Judge with any questions or concerns.

Exhibit E

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of:	
	File No.: A
	Immigration Judge Elizabeth A. Kessler
In bond proceedings	
	Next Hearing Date: June 15, 2020 8:30 AM

RESPONDENT'S REQUEST ON BOND

Respondent (" "), through undersigned counsel, hereby provides notice to this Court that, in accordance with the order from the United States District Court for the District of Maryland ("District Court"), he will receive a new custody redetermination hearing on June 15, 2020. In this hearing, the Government will bear the burden of proof by clear and convincing evidence to demonstrate that he is a flight risk and/or a danger to the community. *See Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB at 9 (D. Md. May 29, 2020) (order granting preliminary injunction) ("Order," attached hereto as **Exhibit A**). Mr. respectfully requests this Court grant him release on his own recognizance, release on his own recognizance with check-in conditions, and/or a bond of $1,500. Mr. requests that the Government provide any supporting evidence it plans to submit three business

days in advance of the bond hearing to the Court and Respondent.[1] Mr. , through undersigned counsel, submits the following evidence in support of his request:

STATEMENT OF THE CASE

On May 29, 2020, the District Court ordered, by granting plaintiffs' motion for a preliminary injunction, that Mr. , as a named plaintiff in the action, receive "a new custody redetermination hearing" in which the "(1) government bears the burden of proving, by clear and convincing evidence, that he is a flight risk or a danger to the community . . . and (2) the Immigration Judge . . . must consider his ability to pay a set bond amount and his suitability for release on alternative conditions of supervision." *Id.* Pursuant to these new requirements for custody redetermination hearings, Mr. requests that this Court grant him release on his own recognizance, release on his own recognizance with monitoring conditions, and/or a $1,500 bond. *Id.*

APPLICABLE LEGAL STANDARD

The District Court's Order places the burden on the Government to prove, by clear and convincing evidence, that a noncitizen is a danger to the community or a flight risk. The Government's evidence must produce a "firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Shaw v. Sessions*, 898 F.3d 448, 458 (4th Cir. 2018). In meeting its lofty burden of proving that a noncitizen is a danger to the community, the Government cannot rely on mere unfounded allegations regarding a noncitizen's criminal history. *See id*.

[1] The sole reason Mr. is not specifically requesting that the Government provide Form I-213, "Record of Inadmissible/Deportable Alien," in advance as part of its supporting evidence to this Court is because Mr. received Form I-213 at his Master Calendar Hearing on March 4, 2020.

If the Government fails to meet its weighty burden, the IJ can release the individual on his or her own recognizance. If the IJ deems bond necessary, an IJ must make an individualized assessment of a noncitizen's current ability to pay the bond amount to be set. *See* Order at 9. The bond amount may not be set at a greater amount than what is needed to ensure the noncitizen's appearance at court proceedings. *See Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB at 21 (D. Md. May 29, 2020) (memorandum). The District Court's Order also requires an IJ to consider a noncitizen's suitability for alternative supervisory conditions, alone or in combination with a set bond. Order at 9-10.

ARGUMENT

I. The Government cannot satisfy its heavy burden of proving that Mr. is a danger to any other person or the community.

Mr. is an involved father and husband who serves his community. He shares parenting responsibilities with his wife ("Ms. "), playing with his four children, helping them with their homework, and attending their concerts and soccer games. Letter of Support from (" Letter") at 12, attached hereto as **Exhibit B**. He volunteers as a teacher, usher, accountant, and musician at church. *Id.* at 12. Mr. has no criminal convictions beyond minor traffic violations. Notably, Mr. was released on his own recognizance after his most recent appearance in criminal court in the District Court of Maryland for Harford County in February 2020 (Release from Commitment attached hereto as **Exhibit C**). The charges at issue stemmed from a misunderstanding by his oldest daughter, who heard yelling, grew nervous, and called the police. Letter at 13. The police never spoke to Mr. 's brother, who did not file a report or press charges. *Id.* at 13. While Ms. did briefly speak to the police, her nerves made it difficult for her to explain that Mr. had caused neither her nor his brother any harm. *Id*. at 13.

Both Ms. and Mr. 's brother want the charges dropped. *Id.* at 13. Mr. is a man who makes efforts to *improve* the lives of his family and fellow community members, not to make them dangerous.

II. The Government cannot satisfy its weighty burden to prove that Mr. is a flight risk, as he plans to stay with his family and see his appeal through to completion.

Mr. 's incredibly strong family and community ties in the area weigh in favor of a determination that he is not a flight risk. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). For the past five years, he has lived in Delaware with his children (all U.S. citizens) and his wife. *See id.* at 40 (identifying existence of a fixed residence, length of residence, and family ties as factors to consider when assessing flight risk); Letter at 12. His siblings live nearby, his parents are deceased, and he has no relationship with his extended family in Mexico. Letter at 14. Mr. runs his own landscaping business alongside his wife. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (identifying employment history as a factor to consider when assessing flight risk); Letter at 12. He is also currently appealing his merits case to the Board of Immigration Appeals (Notice of Appeal attached hereto as **Exhibit D**). Due to his community and family ties and potential future relief, the Government cannot satisfy its heavy burden of proving that Mr. is a flight risk.

III. Since the Government has not met its lofty burdens, Mr. requests that this Court, after considering his ability to pay, grant him a bond of $1,500.

Mr. and his family are unable to pay a high bond amount due to their business's dwindling income, their lack of savings, and the costs of supporting four minor children. His wife has struggled to generate significant income from their landscaping business since his detention, as he did much of the strenuous manual labor. Letter at 12. The COVID-19

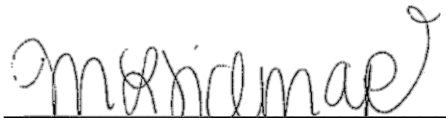
pandemic has also diminished the amount of available landscaping work. *Id.* at 13. In balancing her landscaping work with childcare, Ms. has had to ask her two oldest daughters to help care for their young siblings while still attending school. *Id.* at 13; Letter of Support from at 26, attached hereto as **Exhibit E**.

The family's financial difficulties have been exacerbated by Mr. legal proceedings and continued detention. The family's savings have been almost entirely depleted between attorney's fees for the initial bond hearing and keeping the landscaping business operational. Letter at 13. Ms. had to take out a loan to finish paying Mr. attorney from his initial bond hearing, forcing him to proceed *pro se* in his merits case. *Id.* at 13. Ms. has been forced to rely on tax returns to pay monthly bills and on food pantries to feed herself and the children as the family's financial situation has grown increasingly dire. *Id.* at 13.

CONCLUSION

WHEREFORE, Mr. respectfully requests this Court give him release on his own recognizance, release on his own recognizance with monitoring conditions, and/or a bond of $1,500.

Date: June 10, 2020



Melody L. Vidmar
Capital Area Immigrants' Rights
(CAIR) Coalition
1612 K Street NW, Suite 204
Washington, DC 20006
(202) 916-8185
melody@caircoalition.org

Pro Bono Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I served a complete copy of the foregoing and exhibits on Counsel for the Department of Homeland Security at the following address via the Department of Homeland Security's e-service portal:

Office of the Chief Counsel
U.S. Immigration and Customs Enforcement
Department of Homeland Security
Fallon Federal Building
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Eleanor Gourley

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of:	
	File No.: A
In bond proceedings	Immigration Judge Elizabeth A. Kessler
	Next Hearing Date: June 15, 2020 8:30 AM

INDEX TO EXHIBITS

Exhibit A	*Dubon-Miranda v. Barr* Order, U.S. District Court for the District of Maryland
Exhibit B	Letter of Support from
Exhibit C	Release from Commitment, District Court of Maryland for Harford County
Exhibit D	Notice of Appeal
Exhibit E	Letter of Support from

Exhibit F

[redacted]

Pro Bono Counsel for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of:	
[redacted]	File No.: A# [redacted]
In Removal Proceedings	

Immigration Judge Elizabeth Kessler

Custody Redetermination Hearing
Request for: [redacted]

MOTION AND MEMORANDUM OF LAW IN SUPPORT OF BOND

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

Date: June 12, 2020

In the Matter of:

[redacted]

File No.: A# [redacted]

In bond proceedings

Immigration Judge Elizabeth Kessler

Custody Redetermination Hearing
Request for: [redacted]

Respondent's Request on Bond

[redacted], through *pro bono* counsel, respectfully requests that this Court set a new bond hearing for [redacted] on June 19, 2020, pursuant to the court's order in *Miranda v. Barr*. *Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB, at 1 (D. Md. May 29, 2020) ("Order," Exhibit 1). In this hearing, the Government must prove, by clear and convincing evidence, that the continued detention of [redacted] is warranted because he is either a flight risk and/or a danger to the community. It also requires consideration of his ability to pay a bond and alternative conditions to detention. *Id.* On April 27, 2020, [redacted] had a custody redetermination hearing in which the Court found him eligible for bond, setting the amount at $10,000. He remains in custody because he cannot afford to pay $10,000 to secure his release.

[redacted] respectfully requests this Court grant him release on his own recognizance, release on his own recognizance with check-in conditions, and/or the statutory minimum bond of $1,500. [redacted] also requests that the Government provide any supporting evidence it plans to introduce three business days in advance of the bond hearing to the Court and undersigned counsel.

I. Background

[redacted] is a citizen and national of [redacted]. Respondent's Reasonable Fear Interview Transcript. He first entered the United States without inspection in 2004 and voluntarily departed to [redacted] in 2006. *Id.* [redacted] returned to the United States in 2007 and was deported to [redacted] in or around 2009. *Id.* Fearing for his life, he fled again to the United States in July 2019 and was detained in January 2020. *Id.*; Affidavit of [redacted], Exhibit 2 at ¶ 10. He is seeking Withholding of Removal and protection under the Convention Against Torture. Respondent's Form I-589. [redacted] is currently being held in [redacted] Detention Center. Respondent's Reasonable Fear Interview Transcript.

On April 27, 2020, [redacted] appeared *pro se* in a custody redetermination hearing in which he bore the burden of proving that he was eligible for bond. Respondent's Bond Order, Exhibit 3; *See In Re Guerra,* 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (previously requiring the noncitizen must "show to the satisfaction of the Immigration Judge that he or she merits release on bond"). The Court set a bond amount of $10,000 without explicitly considering or documenting [redacted]'s ability to pay.

II. Applicable Legal Standard

The District Court's May 29, 2020 Order in *Miranda v. Barr* places the burden on the Government to prove, by clear and convincing evidence, that a noncitizen is a danger to the

community or a flight risk. Order at 1. The Government's evidence must produce a "firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Shaw v. Sessions*, 898 F.3d 448, 458 (4th Cir. 2018). Thus, in meeting its lofty burden of proving that a noncitizen is a danger to the community, the Government cannot rely on mere allegations regarding a noncitizen's criminal history.

If the Government fails to meet its weighty burden, the IJ can release the individual on his or her own recognizance. If the IJ deems bond necessary, an IJ must make an individualized assessment of a noncitizen's current ability to pay the bond amount to be set. *See* Order at 1. The bond amount may not be set at a greater amount than what is needed to ensure the noncitizen's appearance at court proceedings. *See Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB, at 21 (D. Md. May 29, 2020) (memorandum). The District Court's Order also requires an IJ to consider a noncitizen's suitability for alternative supervisory conditions, alone or in combination with a set bond. Order at 1-2.

III. Argument

a. [redacted]'s current lack of financial resources demonstrate his inability to pay bond above the statutory minimum, and indicate that he should be released on alternative conditions of supervision.

Pursuant to the *Miranda v. Barr* order, a new factor to be considered in bond hearings is a noncitizen's ability to pay a set bond amount and his suitability for release on alternative conditions of supervision. Order, at 1. Here, [redacted]'s depleted financial resources due to his lengthy detention and limited ability to pay weigh in favor of this Court granting release on alternative conditions of supervision. [redacted] previously worked in construction, but he has been detained since or about January 2020 and has been unable to earn any income. Exhibit 2 at ¶¶ 8-10. Because of this sudden decrease in earnings, [redacted]'s family lacked the funds to make rent payments

and were recently evicted from their apartment. Letter of Support from [redacted], Exhibit 4. Should the Court decide to set a cash bond, the minimum statutory bond of $1500 is more than enough to incentivize [redacted] to attend future hearings.

b. [redacted] is not a danger to any other person or the community.

If released, [redacted] would pose no danger to other people or their property, and has no convictions that would subject him to mandatory detention under INA § 236(c). [redacted] was arrested for assault on or about January 26 or 27, 2020, after disarming a neighbor who pulled out a knife in front of [redacted]'s children after the men had been drinking at home one evening. Exhibit 2 at ¶ 10. The police were called, [redacted] stayed in his apartment, did not attempt to flee, and believed he had nothing to fear from the police since he did nothing wrong. *Id.* at ¶ 11. [redacted] has not been convicted, and the Government has not otherwise suggested that he is a danger.

c. [redacted] has a stable family and work history and poses no flight risk.

[redacted]'s family and community ties, employment history, and his proven commitment to the immigration process demonstrate that he is motivated to appear for future hearings and has the necessary support system in place to help him do so. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (identifying existence of a fixed residence, length of residence, and family ties as factors to consider when assessing flight risk).

[redacted] and his partner live in [redacted], Maryland and are raising three children together while expecting another baby. Exhibit 4. They are committed to raising their children in the United States. *Id.* The two older children attend school at [redacted] School in [redacted], Maryland. *Id.* [redacted] and his family regularly attend church in [redacted]. *Id.*

[redacted] has American citizen friends and relatives that think highly of him and want to assist him in succeeding in the United States. Attached to this memorandum is a letter of support from [redacted]'s coworker [redacted], who lives at [redacted]. In his letter, [redacted] states that [redacted] is a great worker and that [redacted] hopes to continue working with [redacted] after he is released from detention. *See* Letter of Support from [redacted], Exhibit 5. [redacted]'s aunt, [redacted], has also written a letter to this Court in support of [redacted]. Letter of Support from [redacted], Exhibit 6. [redacted] currently lives at 7[redacted]. *Id.* Because [redacted] has navigated the path from a green card to citizenship, she provides a useful source of support for [redacted] as he pursues his own legal claim for relief.

Courts also consider a noncitizen's eligibility for discretionary relief because a respondent who has a high likelihood of obtaining relief has a greater motivation to appear for removal proceedings. *See Matter of Andrade*, 19 I.&N. Dec. 488, 490 (BIA 1987). [redacted] has already filed a Form I-589 with this Court, setting out the basis for his claims. Respondent's Form I-589. [redacted] seeks release so that he can better work to press his claims for relief without the challenges imposed by detention in [redacted].

IV. COVID-19

In weighing the *Miranda* factors discussed above, we urge this Court to also consider the deleterious effects of continuing to hold [redacted] in custody during the current COVID-19 pandemic. [redacted] is detained at [redacted] where there have been suspected cases of COVID-19. Unfortunately, [redacted] has not tested detainees, in accordance with its testing protocol which the District Court for Maryland has stated "does not sufficiently protect the detainee population." *Coreas, et al. v. Bounds, et al.*, No. TDC-20-0780, at 10 (D. Md. May 20, 2020). Further, [redacted]

has not implemented any social distancing measures nor accommodations to protect detainees with high-risk health conditions. *Id.* at 11

The COVID-19 pandemic has spread at an alarming rate and has now infected over a million people in the United States and thousands of people within the State of Maryland. Totals, *Coronavirus COVID-19 Global Cases by Johns Hopkins CSSE,* Johns Hopkins Coronavirus Res. Ctr., https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited June 8, 2020). The World Health Organization ("WHO") has declared COVID-19 a global pandemic, the Governor of Maryland has declared a state of emergency, and the President of the United States has declared a national emergency. The Centers for Disease Control and Prevention ("CDC") estimates that, as of June 8, 2020, there have been 1,956,494 confirmed cases and 110,932 confirmed deaths in the United States. *Id.*

[redacted]'s continued confinement at the [redacted] undeniably exposes him to an unreasonable risk of contracting COVID-19 and, once contracted, an unreasonable risk that he will suffer serious if not fatal symptoms. These risks are so grave that exposing *anyone* unwillingly to such a risk would "violate[] contemporary standards of decency." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). The mandates of physical distancing and sheltering in place, adopted by governments throughout the country and across the world, are unprecedented and reflect a clear message that the risks [redacted] now faces are not ones society is willing to tolerate or accept. *Cf. id*.

Given this unique combination of risks, it is ever more important that the Court uphold the principle that "[i]n our society liberty is the norm, and detention prior to trial […] is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739, 755 (1987). Because detention itself now poses a grave threat to [redacted]'s health, safety, and mortality, his right to pretrial liberty has never

been stronger.

V. Conclusion

WHEREFORE, [redacted] respectfully requests that this Court set a hearing for bond redetermination for [redacted], and release him on his own recognizance, release him on his own recognizance with monitoring conditions, and/or grant a bond of $1,500.

Respectfully submitted,

Date: June 12, 2020

Table of Exhibits

Exhibit Number	Description
1	*Dubon Miranda v. Barr*, No. 1:20-cv-01110-CCB, at 1 (D. Md. May 29, 2020)
2	Affidavit of [redacted]
3	Bond Order
4	Letter of Support from [redacted]
5	Letter of Support from [redacted]
6	Letter of Support from [redacted]