Nos. 20-1037, 20-1119

United States Court of Appeals

For the First Circuit

GILBERTO PEREIRA BRITO, individually and on behalf of all those similarly situated; FLORENTIN AVILA LUCAS, individually and on behalf of all those similarly situated; JACKY CELICOURT, individually and on behalf of all those similarly situated, *Petitioners-Appellants/Cross-Appellees*,

v.

WIILIAM P. BARR, Attorney General, U.S. Department of Justice; TIMOTHY S. ROBBINS, Acting Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement; CHAD WOLF, Secretary, U.S. Department of Homeland Security; JAMES MCHENRY, Director, Executive Office of Immigration Review, U.S. Department of Justice; ANTONE MONIZ, Superintendent of the Plymouth County Correctional Facility; YOLANDA SMITH, Superintendent of the Suffolk County House of Corrections; STEVEN SOUZA, Superintendent of the Bristol County House of Corrections; CHRISTOPHER BRACKETT, Superintendent of the Strafford County Department of Corrections; LORI STREETER, Superintendent of the Franklin County House of Corrections, *Respondents-Appellees/Cross-Appellants*.

On Appeal from a Judgment of the U.S District Court for the District of Massachusetts

BRIEF OF AMICI CURIAE MASSACHUSETTS, CONNECTICUT, CALIFORNIA, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON IN SUPPORT OF PETITIONERS-APPELLANTS/ CROSS-APPELLEES AND AFFIRMANCE IN PART AND REVERSAL IN PART

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STATEMENT OF INTEREST

Massachusetts, Connecticut, California, Delaware, the District of Columbia, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington (collectively, the "Amici States") respectfully submit this brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure as *amici curiae* in support of Petitioners-Appellants/Cross-Appellees, a class of noncitizens held in immigration detention as a result of constitutionally flawed bond hearings. The class members, who include residents of some of the Amici States, are detained pursuant to 8 U.S.C. § 1226(a), which governs the detention of noncitizens who do not have a serious criminal history and who are not subject to an order of removal. Although each section 1226(a) detainee is entitled to an individualized bond hearing at which an immigration judge will determine whether he or she may be released during the pendency of removal proceedings, many detainees are denied release even though they present no risk of flight and pose no threat to the community. This is because section 1226(a) bond hearings lack necessary due process protections, resulting in a process that is impermissibly weighted in favor of detention.

Amici States have a significant interest in ensuring that noncitizens are not needlessly removed from their families, communities, jobs, and schools during the

pendency of removal proceedings. Approximately 27.5 million noncitizens reside in Amici States, including many of the class members and their families. These individuals make important economic, social, and cultural contributions to Amici States. Detention causes traumatic family separations within Amici States, disrupts employment and academic pursuits, limits immigrant taxpayer contributions to state economies, undermines public health and safety, and results in greater social costs and government expenditures needed to address the hardships suffered by the detainees and their families during the period of detention. For these reasons, it is vital that section 1226(a) detention be limited only to those situations where it is necessary to protect the community or to assure future court appearances.

As the Supreme Court has repeatedly acknowledged, "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added). Requiring the federal government to bear the burden of proof in section 1226(a) bond hearings and satisfy a heightened evidentiary standard are basic protections necessary to prevent erroneous or unnecessary deprivations of an individual's liberty. And, as Amici States well know through their own experience with comparable civil commitment schemes, adherence to these basic procedural protections properly safeguards the constitutionally protected right to individual

liberty—and the government's interest in avoiding unnecessary detention—without compromising public safety.

SUMMARY OF ARGUMENT

By its terms, section 1226(a) applies only to noncitizens who are not accused of any criminal wrongdoing, who have no serious criminal history or connection to terrorism, and who have not been ordered removed from the country. Many of these individuals pose no danger to the community and will voluntarily appear for hearings in their removal proceedings. Yet thousands of these individuals are needlessly detained pending removal proceedings each year.

Subjecting section 1226(a) detainees to unnecessary detention for the duration of their removal proceedings causes direct and lasting harm to these individuals, their families and communities, and the Amici States. Many section 1226(a) detainees have been present in the United States for decades and are the spouses, parents, or close relatives of United States citizens or permanent residents. They are valued employees and students, leaders and members of communities and community organizations, economic providers for their families, and sources of stability and emotional support for their spouses, children, families, and friends. These individuals pay millions of dollars in state and federal taxes and contribute to their localities and states in myriad other ways. Many of them will ultimately

establish that they are entitled to remain in the United States. For these reasons, there is a strong public interest in avoiding their unnecessary detention.

The federal government has failed to demonstrate how its policy of allocating the burden of proof to the detainee in section 1226(a) bond hearings properly balances the important individual, government, and public interests at stake. To be sure, the federal government has a substantial interest in promoting public safety and ensuring that noncitizens appear for future hearings, which may sometimes weigh in favor of and justify detention. But the Due Process Clause does not allow the federal government to deny individuals their freedom without first showing that the asserted justifications for civil detention outweigh the individuals' constitutionally protected right to liberty. Yet in the context of immigration detention under section 1226(a), the federal government insists that the *detainee*, who is not accused of a crime and has no serious criminal history, justify why they should *not* be detained by showing that they are not a flight risk and not dangerous. By doing so, the government asks the detainee to "share equally with society the risk of error," *Addington,* 441 U.S. at 427, which is untenable under the Due Process Clause.

The experience of Amici States with comparable civil commitment schemes shows that the government's interests can be satisfied through a process that provides adequate due process protections. Indeed, many state-level civil

commitment procedures involve individuals who, based on their documented individual histories, could pose a risk of danger to themselves or others. Even so, states throughout the country allocate the burden of proof to the government, apply a heightened standard of proof, and require courts to consider alternatives to physical restraint. This consistency of experience throughout the country shows that these basic procedural safeguards in civil detention proceedings are not only widely accepted, but also properly balance the important individual and governmental interests at stake and ensure that any resulting detention is reasonably related to its purpose. As such, this Court should affirm the district court's holdings that require these due process protections in section 1226(a) bond hearings.

ARGUMENT

I. Unnecessary Immigration Detention is Against the Public Interest Because It Hurts Individuals, Families, Communities, and the States.

By its policy requiring a section 1226(a) detainee to prove the absence of risk in order to be released, the Board of Immigration Appeals has made detention under section 1226(a) essentially presumptive. The consequence of this policy is to permit detention—potentially for years—in cases where it is unnecessary to protect a legitimate government interest. The policy also imposes significant

harms on detainees; their children, families, and communities; and the Amici States.[1]

In addition to the intrinsic deprivation of liberty it imposes, immigration detention has many collateral consequences. Detention often means loss of employment and severe short-term and long-term economic losses for detainees; a reduced likelihood of obtaining counsel and winning relief from removal; an increased risk of long-term physical and emotional health problems due to detention conditions; and harder-to-measure but still devastating costs like humiliation and shame. Families, deprived of wage-earners, must draw on public benefits; marriages and relationships are compromised and lost; and children, cut off from their parents, suffer both emotional distress and the loss of life opportunities. Meanwhile, states collect less tax revenue and spend more on social benefits to support broken families.

Sometimes these costs of detention may be necessary to protect the public or to assure future immigration court appearances. But, as the petitioners correctly assert, and the District Court correctly held, due process requires that the government bear the burden of justifying why detention—with all of the substantial costs that flow from it—is necessary.

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[1] *See generally* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1, 4 (2017) ("[The] individual bears the direct costs and inconvenience associated with detention. In addition, the detainee's family, employer, government, and the detention center bear societal costs.").

a. Unnecessary immigration detention imposes severe economic and health harms on detainees.

Unnecessary detention imposes severe economic harms on detainees. Many detainees are lawfully present and authorized to work, but lose their jobs while they are detained.[2] The cost of unemployment is felt immediately, and its effects are long-lasting. Detention not only eliminates short-term jobs but also limits future access to the job market. Even years after release, people released prior to legal proceedings are almost 25% more likely to have jobs than those who are detained. "Initial pretrial release," according to one study, "increases the probability of employment in the formal labor market three to four years after the bail hearing by 9.4 percentage points, a 24.9 percent increase from the detained defendant mean."[3] In addition to being less likely to find work after their eventual

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[2] *See* Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U. S. Attorney Wished to Detain*, 30 Am. J. Crim. L. 45, 65 (2002) ("The price to the defendant of pretrial incarceration is clearly his or her loss of freedom, [and] loss of income from work which can no longer be performed…."); Albert W. Alschuler, *Preventative Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510, 517 (1986) ("The jobs of detained defendants frequently disappear, and friendships and family relationships are disrupted.").

[3] Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Ec. Rev. 201, 204 (2018).

release, detainees who do find work have significantly lower hourly wages and annual incomes.[4]

In addition to these economic impacts, detention prejudices the detainee's prospects of success in the underlying case. In addition to their inability to earn an income to pay counsel, significant communication barriers prevent detained immigrants from finding and retaining counsel. *See Lyon v. Immigration and Customs Enforcement*, 171 F. Supp. 3d 961, 982 (N.D. Cal. 2016) (describing prejudice to detainees as a result of telephone restrictions, including obstacles to contacting counsel). One study found only 14% of detainees represented at removal hearings as against 66% of immigrants who were released from detention or never detained.[5] And immigrants represented by counsel are far more likely to win relief from removal—10.5 times more likely, according to a study reported in

[4] Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11-12 (2010), https://tinyurl.com/v7lbbvu (estimating the downstream lost wages and income of formerly-incarcerated people) ("Past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks, and reduced yearly earnings by 40 percent."); Dobbie et al., *supra* n. 3, at 227 ("Formal sector earnings [for criminal defendants on pretrial release] are $948 higher per year over the same time period, a 16.1 percent increase from the mean, and the probability of having any income is 10.7 percentage points higher, a 23.2 percent increase from the mean.").

[5] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, 34-35 (2015).

2015, and fully 11 times more likely according to 2017 data.[6] Detention prevents immigrants who have valid arguments for why they can remain in the United States—whether long-time permanent residents fighting removal charges or newer arrivals seeking asylum—from presenting those arguments.

Detainees may also suffer a range of other serious harms. For example, a detainee may lose housing as a result of detention and will need to replace it upon release.[7] Some detainees also suffer lasting emotional harm resulting from traumatic experiences in detention. Indeed, immigration detainees may experience rape, sexual abuse, and physical abuse in custody, sometimes at epidemic levels.[8]

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[6] *Id.* at 9 (In an empirical study of six years of removal cases, detainees with attorneys had their cases terminated or obtained immigration relief 21% of the time, fully ten-and-a-half times more than the 2% rate for those fighting their cases pro se.); Jennifer Stave et al., Vera Institute of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 6 (Nov. 2017), https://tinyurl.com/r6pfsub (projecting, based on existing data, that 48 percent of deportation cases will end successfully for represented clients in a New York City immigration court, a "1,100 percent increase from the observed 4 percent success rate for unrepresented cases").

[7] Baughman, *supra* n. 1, at 5 (estimating loss of housing at 23%).

[8] *See, e.g.,* Alice Speri, *Detained, Then Violated*, The Intercept (Apr. 11, 2018), https://tinyurl.com/ybburtda (reporting on 1,224 complaints of sexual abuse in ICE custody over a seven year period).

Inhumane living conditions, inadequate medical care, and pervasive staff disrespect inflict physical pain and emotional distress, humiliation, and anxiety.[9]

b. Unnecessary immigration detention harms children and families.

Detained immigrants have spouses, children, and other close relatives who are U.S. citizens or permanent residents. Across the country, more than 17 million U.S. citizens have at least one foreign-born parent,[10] 4.1 million U.S. citizen children live with an undocumented parent, and 1.2 million U.S. citizen adults are married to an undocumented immigrant.[11] Whether authorized on unauthorized,

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[9] *See, e.g.,* DHS Office of Inspector General, *Concerns about ICE Detainee Treatment and Care at Detention Facilities* (Dec. 2017) (revealing "problems that undermine the protection of detainees' rights, their humane treatment, and the provision of a safe and healthy environment"); California Department of Justice, *Immigration Detention in California* iii-iv (Feb. 2019), https://tinyurl.com/w7m4rb7 (discussing findings including "delayed or inadequate medical care" and "inadequate mental health staffing and services"). Detainees are also at increased risk of COVID-19 infection, illness, and death due to the large numbers of immigrants held in close quarters where social distancing is impossible. *See also* Scott A. Allen & Josiah Rich, *Letter to Congressional Leaders* (Mar. 19, 2020), https://tinyurl.com/s6yjwtb (noting that the Department of Homeland Security's medical experts have acknowledged the "serious medical risks" of COVID-19 infection and death among the population of immigration detainees because of the "tinderbox" way in which infection can spread rapidly among detainees).

[10] American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 2019), https://tinyurl.com/y8nntehd.

[11] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://tinyurl.com/sygcwmv (last visited May 11, 2020).

many of these immigrants provide important emotional and financial support for U.S. citizen children, and their detention seriously harms their family members.[12]

Detention can sever these relationships, whose strength and preservation are critical not just to detainees and their families, but to the broader community. Physical distance, communication barriers, and the stress of absence "place[] strain on marriages and serious romantic relationships."[13] Some studies have shown that "[i]ncarcerated men who are married are about three times more likely to have their marriages fail than those who are not incarcerated, with the probability of divorce increasing with time served."[14] Absent sources of emotional and financial support, families suffer both psychological and economic distress. As "household incomes drop[] precipitously," families struggle to pay the bills, lose their housing, and go without food.[15]

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[12] American Immigration Council, *supra* note 10.

[13] National Healthy Marriage Resource Center, *Incarceration and Family Relationships: A Fact Sheet* (2010), https://tinyurl.com/y75bsqjx. Even in the relatively compact Northeast, the class members in this case are often detained at great distances from their families. For instance, immigrant Connecticut residents who are class members are detained out of state – most frequently at the Bristol County Jail in North Dartmouth, Massachusetts. The jail is an average driving distance of 134 miles from Connecticut's six largest cities.

[14] *Id.*

[15] Ajay Chaudry et al., The Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 28-33 (Feb. 2010), https://tinyurl.com/tje4ylm.

This enforced and unnecessary separation is hardest on children. Separated from their parents, children are more likely to struggle in school academically and behaviorally, and are more likely to drop out.[16] As they develop antisocial behaviors, they are more likely to engage in criminal activity and to be arrested.[17] Some children of detainees may ultimately be placed in the child welfare system and are at increased risk of abuse and neglect.[18] Because detention of a parent is an "adverse childhood experience," children of detainees face serious lifelong health consequences and are at increased risk of depression, suicide attempts, sexually transmitted infections, smoking, and alcoholism.[19] The stress and anxiety can even cause diminished cognitive functioning.[20] Whether their parents are

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[16] *See* Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 29 (2011) ("A review of the literature on children whose mothers are detained found that those children's lives are greatly disrupted… resulting in heightened rates of school failure and eventual criminal activity."); Susan D. Phillips et al., *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* 67-68 (Jan. 2013), https://tinyurl.com/rlq5tbn (reviewing studies showing "increased behavioral problems in schools and increased need for mental health services" and "negative educational and mental health outcomes").

[17] Baughman, *supra* n. 1, at 7.

[18] Phillips et al., *supra* n. 16, at 22, 26.

[19] Shanta R. Dube et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 J. Preventative Medicine 268, 274-75 (2003).

[20] Jennifer H. Suor et al., *Tracing Differential Pathways of Risk: Associations Among Family Adversity, Cortisol, and Cognitive Functioning in Childhood,* Child Development, Vol. 86, 1142-58 (2015).

lawfully present or undocumented when detained pending removal proceedings, many U.S. citizen children are the unintended victims of unnecessary civil immigration detention.

c. Unnecessary immigration detention harms states' economic and social interests.

Some of the individual and family costs arising from unnecessary immigration detention are ultimately paid by the states.[21] During pretrial incarceration, detainees' loss of freedom results in many losing jobs and homes. Taxpayers are "left to pay the rising costs of detention, while absorbing the social and financial impact of newly dislocated family members."[22] Consequently, the states are doubly burdened here: Their revenues drop because of reduced economic contributions and tax payments by detained immigrants, and their expenses rise because of increased social welfare payments in response to the harms caused by unnecessary detention.

Immigrants drive state economies and contribute directly to the state fisc. Although many immigration detainees are authorized to work, undocumented

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[21] Of course, state taxpayers are also taxed by the federal government for the costs of unnecessary detention. In federal fiscal year 2018, the federal government—funded in part by residents of the Amici States—spent an average of $208 per day to detain each immigrant. Laurence Benenson, National Immigration Forum, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply* (May 9, 2018), https://tinyurl.com/yc8dobng.

[22] Douglas L. Colbert, et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763 (2002).

immigrants also contribute significantly to the economy.[23] When they are at liberty and working, undocumented residents pay state and local taxes—more than $11.7 billion worth each year.[24] They pay federal taxes too: Undocumented workers contributed $13 billion to the Social Security Trust Fund in 2013,[25] and taxpayers without social security numbers paid $23.6 billion in income taxes in 2015.[26] In Connecticut, undocumented immigrants earn $3.6 billion, spend $3.1 billion, and pay $197.4 million in state and local taxes each year.[27] Meanwhile, in Massachusetts, they earn $5.8 billion, spend $4.9 billion, pay $252.5 million in state and local taxes each year.[28] But when they are in immigration custody, detainees neither earn money nor pay taxes—and as their economic prospects diminish post-release, so do their tax payments.

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[23] Migration Policy Institute, *supra* n.11 (more than 7 million undocumented immigrants across the country are employed).

[24] Lisa C. Gee et al., *Undocumented Immigrants' State & Local Tax Contributions*, Institute on Taxation and Economic Policy (Mar. 2017), https://tinyurl.com/utzgeel.

[25] Steven Goss et al., Social Security Administration, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds* (2013), https://tinyurl.com/zg634jy.

[26] Alexia Fernández Campbell, *Trump Says Undocumented Immigrants Are an Economic Burden. They Pay Billions in Taxes*, VOX (Oct. 25, 2018), https://tinyurl.com/y5o5ec8l.

[27] New American Economy, *Immigrants and the Economy in Connecticut*, https://tinyurl.com/t72bezt.

[28] New American Economy, *Immigrants and the Economy in Massachusetts*, https://tinyurl.com/sgbmwpg.

Unnecessary detention leaves states needing to buy more services with their diminished resources. Foster care for children of detained parents can cost states $26,000 per year for each child.[29] Each child who drops out of school after the trauma of a parent's detention will have an estimated long-term cost to society of about $260,000.[30] Families who lose a wage-earner and require public benefits will require new public spending.[31] And detention, because it cuts job market ties and loosens social cohesion, can contribute to future offending, imposing on society the costs of crime, enforcement, and prosecution for individuals who ultimately prevail in their immigration proceedings and win the right to remain in their adopted country.[32]

While detention may ultimately be necessary in some cases, and the resulting costs unavoidable, the Due Process Clause demands adequate procedural protections before detaining a person in order to safeguard against unnecessary or erroneous deprivations of liberty.

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[29] Nicholas Zill, National Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* 3 (May 2011), https://tinyurl.com/rs4ewv6.

[30] Jason Amos, Alliance for Excellent Education, *Dropouts, Diplomas, and Dollars: U.S. High Schools and the Nation's Economy* 2 (2008), https://tinyurl.com/y9dxmwh3.

[31] Colbert, *supra* note 22, at 1763.

[32] *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 715 (2017).

II. Due Process Requires Adequate Procedural Safeguards in Section 1226(a) Bond Hearings.

The Supreme Court has repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425 (1979; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."). Based on these bedrock principles, federal courts have consistently held that adequate due process protections are required in immigration detention. And Amici States, in implementing other forms of civil detention, provide these same due process protections by statute. Accordingly, there is a broad foundation for this Court to affirm the district court's holding that the Due Process Clause requires application of adequate procedural safeguards in section 1226(a) bond hearings.

a. To justify detention under section 1226(a), due process requires the government to prove by clear and convincing evidence that a noncitizen presents a danger to the community or a risk of flight.

Due process protections extend to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693. These protections apply to both civil and criminal detention, including immigration detention. *Id*. at 690. *See Denmore v. Kim*, 538 U.S. 510, 523 (2003). In section 1226(a) bond hearings, due process

requires adequate procedural protections "to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (quoting *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008)).[33] And while the government certainly has legitimate interests in protecting the public and in ensuring that noncitizens in removal proceedings appear for hearings, any detention incidental to removal must "bear[ ] [a] reasonable relation to [its non-punitive] purpose" under the statute. *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). In other words, liberty must be the norm, and detention "the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

A basic tenet of due process is that the government must bear the burden of proving that detention is justified. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (detention of persons acquitted by reason of insanity); *Salerno*, 481 U.S. at 752 (pre-trial detention in criminal proceedings); *Addington*, 441 U.S. at 431-33 (civil commitment of persons with mental illness). This is because allocating the

[33] The Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), held only that, as a matter of statutory interpretation, Sections 1225(b), 1226(a) and 1226(c) of Title 8 of the U.S. Code do not give detained aliens the right to periodic bond hearings during the course of their detention. *Jennings* did not overrule *Singh*'s constitutional holdings regarding the burden of proof in immigration bond hearings. *See, e.g., Ixchop Perez v. McAleenan*, No. 19-05191, 2020 WL 1181492, at *4 (N.D. Cal. Jan. 23, 2020) (collecting cases).

burden of proof to an individual, rather than the government, minimizes "the importance and fundamental nature of the individual's right to liberty" and fails to adequately safeguard against arbitrary government action. *Foucha*, 504 U.S. at 80. For this reason, "there has emerged a consensus view [among federal district courts] that where . . . the government seeks to detain an alien pending removal proceedings, it bears the burden of proving that such detention is justified." *Darko v. Sessions*, 342 F. Supp. 3d 429, 435 (S.D.NY. 2018).[34]

Similarly, the Due Process Clause requires that serious deprivations—which plainly include involuntary confinement—occur only after the government satisfies a heightened standard of proof. *See, e.g., Addington*, 441 U.S. at 424, 43; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) ("[W]e have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake."). This is because the minimum standard of proof tolerated by the Due Process Clause must reflect "not only the weight of

[34] *See, e.g., Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018) ("where a non-criminal alien's liberty may be taken away, due process requires that the government prove that detention is necessary."), *appeal dismissed by gov't*, No 18-1691 (1st Cir. Dec. 26, 2018); *Vargas v. Wolf*, No. 19-02135, 2020 WL 1929842, at *5-*7 (D. Nev. Apr. 21, 2020); *Ixchop*, 2020 WL 1181492, at *5; *Hernandez Arellano v. Sessions*, No. 6-6625, 2019 WL 3387210, at *11-*12 (W.D.N.Y. July 26, 2019); *Hernandez-Lara v. ICE*, No. 19-394, 2019 WL 3340697, at *4 (D.N.H. July 25, 2019); *Diaz-Ceja v. McAleenan*, No. 19-824, 2019 WL 2774211, at *10-*12 (D. Colo. July 2, 2019), *Brevil v Jones*, No. 17-1529, 2018 WL 5993731, at *4 (S.D.N.Y. Nov. 14, 2018). *See also Singh*, 638 F.3d at 1205 (government bears burden to justify detention during judicial review of removal order).

the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer,* 455 U.S. 745, 755 (1982). In the context of civil detention, the individual's interest is "of such weight and gravity that due process requires the [government] to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington*, 441 U.S. at 427. And "[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," the "clear and convincing" standard of proof is appropriate when the government seeks to detain a noncitizen as dangerous or a risk of flight. *See Singh*, 638 F.3d at 1203-04 (quoting *Addington*, 441 U.S. at 427); *see also Foucha*, 504 U.S. at 81-83. Accordingly, many federal district courts have required the government to meet this heightened evidentiary standard in section 1226(a) bond hearings. *See, e.g.*, *Vargas*, 2020 WL 1929842, at *7; *Ixchop*, 2020 WL 1181492, at *5; *Hernandez Arellano*, 2019 WL 3387210, at *12; *Hernandez-Lara*, 2019 WL 3340697, at *7; *Brevil*, 2018 WL 5993731, at *4.[35] This Court should similarly hold that the Due

[35] While the district court correctly held that the government must prove a detainee's dangerousness by clear and convincing evidence, it erred in holding that the government need prove flight risk by only a preponderance of the evidence. *Brito v. Barr*, 415 F. Supp. 3d 258, 267 (D. Mass. 2019). In concluding that a bifurcated standard of proof was appropriate in section 1226(a) bond hearings, the district court relied primarily on the Bail Reform Act and cases involving criminal pretrial detention. Amici States agree with Petitioners that due process requires a

Process Clause requires the government to prove a section 1226(a) detainee's dangerousness and risk of flight by clear and convincing evidence.

b. State laws consistently allocate the burden of proof to the government in civil commitment proceedings and require proof by clear and convincing evidence.

In addition to the emerging "consensus view" of the federal courts, state-level civil commitment practices supply "concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona*, 501 U.S. 624, 640 (1991); *see also Addington*, 441 U.S. at 426 (looking to near unanimity of states in requiring clear and convincing evidence for involuntary commitment of the mentally ill). States have myriad civil commitment procedures, which have existed for decades.[36] These procedures are generally used to commit individuals who pose a serious risk to themselves or others, such as individuals who require involuntary

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more protective standard for section 1226(a) detainees, who have no serious criminal history and are not accused in a removal proceeding of any criminal wrongdoing. These individuals are detained in connection with civil proceedings where they could face substantial repercussions, including an order of removal, by failing to appear. *See, e.g.*, 8 U.S.C. § 1229a(b)(5). For these reasons, other civil commitment schemes (such as those described *infra* pp. 20-22) supply a better benchmark for what due process requires with respect to detention under section 1226(a) than the Bail Reform Act. As discussed *infra* pp. 20-22, these schemes are uniform in requiring that the government satisfy at least the "clear and convincing" standard of proof.

[36] *See, e.g.*, *Rockwell v. Cape Cod Hosp.,* 26 F.3d 254, 259-60 (1st Cir. 1994) (tracing history of involuntary commitment of the mentally ill in Massachusetts).

inpatient treatment due to serious mental health or substance abuse issues,[37] or individuals who have been deemed sexually dangerous or violent.[38] To be sure, state civil commitment procedures vary from state-to-state. But all of these procedures require the government (or the private party seeking commitment) to prove why detention is necessary in each individual case, and to satisfy at least the clear and convincing evidence standard of proof.[39] Because state civil commitment

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[37] *See, e.g.*, Treatment Advocacy Ctr., State Standards for Civil Commitment (July 2018), https://tinyurl.com/y9odv3gt (surveying state involuntary civil commitment procedures for mental illness).

[38] Minnesota Department of Human Services, *Compilation of Sex Offender Civil Commitment Statutes*, https://tinyurl.com/yczjj7yh.

[39] *See, e.g.*, Ala. Code § 22-52-37(a)(8) (requiring "clear, unequivocal and convincing evidence"); Alaska Stat. § 47.30.735(c) (requiring "clear and convincing evidence"); Ariz. Rev. Stat. § 36-540(A) (same); Ark. Code § 20-47-214(b)(2); Cal. Welf. & Inst. Code § 5346(a) (same); Colo. Rev. Stat. § 27-65-111(1) (same); Conn. Gen. Stat. § 17a-498(c)(3) (same); Del. Code tit. 16, § 5011(a) (same); Fla. Stat. § 394.467(1) (same); Ga. Code § 37-3-1(8) (same); Haw. Rev. Stat. § 334-60.5(j) (same); Idaho Code § 66-329(11) (same); Iowa Code § 229.12(3)(c) (same); Kan. Stat. §59-2966(a) (same); Ky. Rev. Stat. § 202B.160(2) (same); La. Rev. Stat. § 28:55(E)(1) (same); Me. Rev. Stat. tit. 34-B, § 3864(6)(A) (same); Md. Code Health-Gen. § 10-632(e)(2) (same); Mich. Comp. Laws § 330.1465 (same); Minn. Stat. §§ 253B.09, subd.1(a), 253B.18, subd.1(a), 253D.07, subd. 3 (same); Miss. Code § 41-21-73(4) (same); Mont. Code § 53-21-126(2) (same); Neb. Rev. Stat. § 71-925(1) (same); Nev. Rev. Stat. § 433A.310(1) (same); N.J. Stat. Ann. § 30:4-27.15(a) (same); N.M. Stat. § 43-1-11(E) (same); N.C. Gen. Stat.§ 122C-268(j) (requiring "clear, cogent, and convincing evidence"); N.D. Cent. Code § 25-03.1-19 (requiring "clear and convincing evidence"); Ohio Rev. Code § 5122.15(H) (same); Okla. Stat. tit. 43A, § 5-415(C) (same); Or. Rev. Stat. § 426.130 (same); 50 Pa. Cons. Stat. § 7304(f) (same); R.I. Gen. Laws § 23-1.10-12(d) (same); S.C. Code § 44-17-580(A) (same); S.D. Codified Laws § 27A-10-9.1 (same); Tenn. Code Ann. § 33-6-502 (setting forth standards to determine

procedures incorporate these basic procedural safeguards, the Supreme Court has upheld their constitutionality under the Due Process Clause. *See Kansas v. Hendricks*, 521 U.S. 346, 353-56 (1997) (upholding state civil commitment procedure for sexually dangerous persons where the government was held to the clear and convincing evidence standard); *Addington*, 441 U.S. at 426-27, 432-33.

State-level experience with civil commitment also illustrates that the government's interests can be satisfied even when the government bears the burden of proof and is held to a heightened evidentiary standard. Indeed, even though state commitment procedures are invoked when there may be some reason a person

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"substantial likelihood of harm"); Tex. Health & Safety Code § 574.034(a) (requiring "clear and convincing" evidence); Utah Code § 62A-15-631(16) (same); Vt. Stat. tit. 18, § 7625(b)(same); Va. Code § 37.2-817 (same); Wash. Rev. Code § 71.05.310 (requiring "clear, cogent, and convincing evidence"); W. Va. Code § 27-5-4(k)(2) (same); Wis. Stat. § 51.20(13)(e) (requiring "clear and convincing" evidence); Wyo. Stat. § 25-10-110(j) (same); *Riese v. St. Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 209 Cal. App. 3d 1303, 1322 (1987) (requiring "clear and convincing evidence" for involuntary treatment); *In re Nelson*, 408 A.2d 1233, 1236 (D.C. 1979) (requiring "clear and convincing" evidence for involuntary civil mental health commitment); *In re Stephenson*, 367 N.E.2d 1273, 1278 (Ill. 1977) (same); *Jones v. State*, 477 N.E.2d 353, 360 (Ind. Ct. App. 1985) (same); *Matter of G.P.*, 40 N.E.3d 989, 995 (Mass. 2015*), abrogated on other grounds by Matter of a Minor,* --N.E.3d --, 2020 WL 1271003 (Mass. Mar. 13, 2020) (requiring clear and convincing evidence for involuntary commitments under Mass. Gen. Laws ch. 123, § 35); *In re J.D.*, 40 N.E.3d 471, 476 (Mass. App. Ct. 2020) (requiring proof beyond a reasonable doubt for involuntary commitments under Mass. Gen. Laws ch. 123 §§ 7-8); *In re N.B.*, 672 S.W.2d 191, 191 (Mo. Ct. App. 1984) (requiring "clear, cogent, and convincing evidence" for mental health commitment); *In re Sanborn*, 545 A.2d 726, 733 (N.H. 1988) (requiring "clear and convincing" evidence for mental health commitment); *Boggs v. New York City Health & Hosps. Corp.*, 132 A.D.2d 340, 342-43 (N.Y. App. Div. 1987) (same).

is dangerous to themselves or others (such as by virtue of serious mental illness or substance use disorder), the states nonetheless provide procedural protections that appropriately balance the government and individual interests at stake. The same is true here. The governmental interests at section 1226(a) bond hearings—public safety, ensuring future appearances, and the efficient administration of the court system—can all be served consistently with rigorous procedural protection of the detainee's liberty interest. And as in all other civil commitment procedures, the Due Process Clause requires the government to bear the burden of proof and satisfy a heightened evidentiary standard before depriving a person of their liberty.

c. The Due Process Clause requires the immigration court to consider ability to pay and alternative conditions of release.

Due process also requires immigration courts to consider alternative conditions of release and an individual's ability to pay bond at hearings under section 1226(a). There is no legitimate governmental interest served by setting bond at an amount higher than what will assure a released detainee's appearance at future hearings. To determine what amount would provide "enough incentive" to appear, an immigration court must consider the detainee's financial circumstances. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017). In addition, the government cannot continue to detain a civil detainee "for inability to post money bail" if the individual's "appearance at trial could reasonably be assured by one of the alternate forms of release." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir.

1978) (en banc); *see also United States v. Mantecon-Zayas*, 949 F.2d 548, 551-52 (1st Cir. 1991) (if the court sets bond at an amount higher than a defendant can pay, the court must explain why "the particular requirement is an indispensable component of the conditions for release"). Meaningful consideration of alternatives to release and ability to pay bond helps ensure that detention is the last resort and used sparingly. *See Hernandez*, 872 F.3d at 991. For this reason, many state civil commitment procedures require courts to consider whether less restrictive alternatives to commitment are available before involuntarily committing a person to a facility.[40]

[40] *See, e.g.*, Alaska Stat. § 47.30.735(d); Ariz. Rev. Stat. § 36-540(B); Cal. Welf. & Inst. Code § 5346(d)(5)(B); Conn. Gen. Stat. § 17a-498(c)(3); Del. Code tit. 16, § 5011(a); D.C. Code § 21-545(b)(2); Fla. Stat. § 394.467(1)(b); Ga. Code § 37-3-83; Haw. Rev. Stat.§ 334-60.2(3); Idaho Code § 66-329(11); 405 Ill. Comp. Stat. 5/3-810; 405 Ill. Comp. Stat. 5/3-811; Ky. Rev. Stat. § 202A.026; La. Rev. Stat.§ 28:55(E)(1); Md. Code Health-Gen. § 10-632(e)(2); Minn. Stat. §§ 253B.09, subd.1(a), 253B.18, subd.1(a); Miss. Code §§ 41-21-73(4), (6); Neb. Rev. Stat. § 71-925(1); Nev. Rev. Stat. § 433A.310(6); N.J Stat. Ann. § 30:4-27.1(c); N.M. Stat. § 43-1-11(E)(3); Ohio Rev. Code § 5122.15(E); 50 Pa. Cons. Stat. § 7304(f); R.I. Gen. Laws § 40.1-5-8(j); S.D. Codified Laws § 27A-10-9.1; Tenn. Code Ann. § 33-6-502; Utah Code § 62A-15-631(16); Va. Code § 37.2-817(D); Wash. Rev. Code § 71.05.240(3); W. Va. Code § 27-5-4(k)(1)(D); Wyo. Stat. § 25-10-110(j); *In re Amanda H.*, 79 N.E.3d 215, 227 (Ill. App. Ct. 2017) ("[S]ections 3-810 and 3-811 both require the court to consider alternatives to treatment in an inpatient facility before involuntarily committing a person on an inpatient basis, and section 3-811 requires the court to order the least restrictive available treatment alternative that is appropriate."); *Matter of Minor*, --N.E.3d --, 2020 WL 1271003, at *10 (Mass. Mar. 13, 2020).

Consideration of alternative conditions of release and affordability of bond is also consistent with federal and state laws governing the pretrial release of criminal defendants. *See id.* at 993 ("[T]he Supreme Court has recognized that criminal detention cases provide useful guidance in determining what process is due non-citizens in immigration detention."). The federal Bail Reform Act, for example, requires that criminal pretrial detention be justified by a finding that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," and prohibits any "financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(e). Similarly, almost every state has a constitutional or statutory presumption of pretrial release in connection with most criminal offenses,[41] and the vast majority of states require a determination as to whether alternative conditions of release will adequately assure the defendant's appearance.[42]

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[41] National Conference of State Legislatures, *Pretrial Release Eligibility* (Mar. 13, 2013), https://tinyurl.com/ticuazm.

[42] National Conference of State Legislatures, *Pretrial Release Conditions* (Sept. 15, 2016), https://tinyurl.com/yab4d6wh (surveying state law on alternative conditions of release);
National Conference of State Legislatures, *Pretrial Detention* (June 7, 2013), https://tinyurl.com/y8adpzh2 ("Commonly, state laws require the court to determine . . . that no release conditions will reasonably assure the defendant's appearance.").

CONCLUSION

This Court should affirm the district court's judgment, except insofar as it held that the federal government need prove risk of flight in a section 1226(a) bond hearing by only a preponderance of the evidence; in that respect the judgment should be vacated and the Court should direct entry of a judgment declaring that due process requires that the federal government prove risk of flight by clear and convincing evidence.

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I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,482 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit and served upon all participants in the case via the Court's CM/ECF system.

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