No. 19-2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANA RUTH HERNANDEZ-LARA,

Petitioner-Appellee,

v.

TODD LYONS, Acting Director, Immigration and Customs Enforcement,

Respondent-Appellant,

CHRISTOPHER BRACKETT, Superintendent, Strafford County Department of Corrections,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RESPONSE BRIEF OF PETITIONER-APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the District Court properly decided that due process requires the Government to prove that a noncriminal noncitizen is dangerous or a flight risk by clear and convincing evidence in order to justify detention.

2. Whether the Due Process Clause requires that the Government justify continued detention by clear and convincing evidence where the noncriminal noncitizen was detained for more than ten months in a penal setting.

STATEMENT OF THE CASE

I. HISTORICAL ALLOCATION OF THE BURDEN OF PROOF

A. Statutory Background

Title 8 U.S.C. § 1226 generally governs detention during immigration removal proceedings. Section 1226(c), which mandates detention before an order of removal has issued, applies only to noncitizens who have committed one or more enumerated criminal offenses. This case does not involve the detention of a noncitizen who is subject to Section 1226(c).

Instead, this case concerns detention under Section 1226(a), which is applicable to *noncriminal* noncitizens, and which provides the Government general, discretionary authority to detain noncitizens during removal proceedings. Under this section, a noncitizen is subject to release on bond or other conditions while the removal proceedings are pending. 8 U.S.C. § 1226(a)(1) and (2). The

regulations direct United States Immigration and Customs Enforcement ("ICE") agents to make an "initial custody determination." 8 C.F.R. § 1236.1(c)(8).

If ICE seeks continued detention or imposes a bond the person cannot afford, the noncitizen has the right to seek review of ICE's custody determination at a "custody redetermination hearing"—commonly referred to as a "bond hearing"—before an Immigration Judge ("IJ") to seek release pending final removal proceedings. 8 C.F.R. § 236.1(d)(1). At the bond hearing, the IJ may decide to detain the noncitizen pending a removal decision or may choose to release the noncitizen on bond or conditional parole. 8 U.S.C. § 1226(a)(1)–(2). Section 1226(a) is silent as to whether the noncitizen or the Government bears the burden of proof at the bond hearing—which presents the central question in this case.

In the Immigration and Nationality Act ("INA"), whenever Congress has intended for a noncitizen to carry the burden of proof, it has stated that intent expressly. In Section 1226(c)(2), for example, Congress was explicit that a criminal noncitizen would carry the burden of proof when seeking release from custody. 8 U.S.C. § 1226(c)(2) ("The Attorney General may release an alien . . . if . . . the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled

proceeding."). Unlike Section 1226(c)(2), however, Section 1226(a) does not state who must carry the burden of proof.

B. The BIA's Shifting of the Burden of Proof Imposed in Bond Hearings

The Board of Immigration Appeals ("BIA") originally, and for many years, placed the burden of proof on the Government to justify detention of noncriminal noncitizens in an effort to protect individual liberty interests, holding that there was a presumption of freedom. *See Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976); *In re Kwun*, 13 I. & N. Dec. 457, 464 (BIA 1969) ("In our system of ordered liberty, the freedom of the individual is considered precious. No deportable alien should be deprived of his liberty pending execution of the deportation order unless there are compelling reasons and every effort should be made to keep the period of any necessary detention at a minimum.").

In 1997, however, the Department of Justice promulgated regulations that required the noncitizen, in the context of ICE's initial custody determination, to "demonstrate to the satisfaction of the officer that . . . release would not pose a danger to property or persons, and that the alien is likely to appear for any proceedings." 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8)).

Two years later, in 1999, in the *Adeniji* case, the BIA then overturned its long-standing presumption of freedom established in *Patel*, and extended the new DOJ regulations governing the release decision by arresting immigration officers

to bond hearings before immigration judges. In so doing, the BIA shifted the burden to the noncitizen—without considering any due process implications.[1] *See In re Adeniji*, 22 I. & N. Dec 1102 (BIA 1999) (holding that "respondent must demonstrate that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings."). Notably, the *Adeniji* case presented a unique set of facts. *First*, Mr. Adeniji mistakenly agreed to bear the burden at the hearing. *Id.* *Second*, although Mr. Adeniji had been convicted of an aggravated felony, Section 1226(c) was inapplicable because he was released from custody prior to the effective date of the statute. *Id.* *Third*, at the bond hearing, the BIA incorrectly applied 8 C.F.R. § 236.1(c)(8)—which applied to a noncitizen's initial arrest and processing by ICE and explicitly placed the burden of proof on the noncitizen. *Id.* It should have applied 8 C.F.R. § 236.1(d)(1), which applied to bond hearings occurring after the initial determinations in 8 C.F.R. § 236.1(c)(8), and which was silent as to the burden of proof.

Notwithstanding the unique facts presented in its *Adeniji* decision, the BIA has extended the burden of proof allocation in that case to all Section 1226(a) detainees in subsequent decisions. *See Matter of Fatahi* 26 I. & N. Dec. 791, 793

[1] In any event, the BIA has generally taken the position that it is not empowered to consider constitutional claims. *See Matter of G-K-*, 26 I. & N. Dec. 88 (BIA 2013) (the BIA does not "have the authority to rule on the constitutionality of the statutes they administer. . . . ").

(BIA 2016); *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) ("The burden is on the alien to show to the satisfaction of the [immigration judge] that he or she merits release on bond."). Under this system, noncitizens are stripped of their liberty unless they can prove a negative—namely, that they do not pose a danger or flight risk that justifies their imprisonment.

II. FACTUAL BACKGROUND

Petitioner-Appellee in this case, Ana Ruth Hernandez-Lara, is an asylum seeker from El Salvador who was denied a bond hearing at which the Government was required to meet the burden of proof, and, as a result, was imprisoned by the Government for over ten months, beginning September 20, 2018. Resp't App. 008.[2]

A. Ana Flees El Salvador and Seeks Asylum in the United States

Ana was born and raised in a poor and depressed area within the city of Usulutan in El Salvador. Resp't App. 217. She never attended school and started working at the age of nine. *Id*. At age 12, she was physically and sexually assaulted by her stepfather. *Id*. She gave birth to her first child when she was 16 years old. *Id*. After her child was born, Ana escaped her abusive home and moved in with her younger brother and her cousin. *Id*. Even then, though, it was hard for

[2] Citations to the Respondent's Appendix are made herein as "Resp't App. __."

Ana to protect her daughter. Ana's stepfather's son raped her daughter when the child was only eight years old. *Id.*

Moreover, the 18th Street Gang (also known as Mara 18), a ruthless and powerful criminal gang organization operating throughout El Salvador, which terrorized and otherwise controlled the colony where she lived, recruited Ana's brother to join the gang. Resp't App. 217–218. For years, gang members tried to recruit Ana, but her brother was successful in protecting her from getting involved. Resp't App. 218. In 2010, though, Ana's brother was arrested, convicted of crimes related to his gang membership, and sentenced to serve 30 years in a Salvadoran prison. Resp't App. 217–18. After he was convicted, gang members threatened Ana that, if she did not take over her brother's former gang responsibilities, her brother would be beaten in prison. *Id.* Indeed, the next time Ana visited her brother in prison, he was badly beaten. Resp't App. 218. Her brother then encouraged her to flee the country, out of fear that the gang would harm her. *Id.*

As her brother had predicted, gang members continued to pressure and threaten Ana. In late August 2013, members of the gang descended on Ana's aunt's home. Resp't App. 219–20. Thankfully, Ana was not there, but the gang members informed her aunt that they intended to kill Ana and "throw [her] head in the river." *Id.* Fearing for her life, Ana fled El Salvador the next day. *Id.*

On or around September 28, 2013, Ana entered the United States near Laredo, Texas. Resp't App. 220. From there, she spent nine months in Houston, Texas; three years in Maryland; and then moved to Portland, Maine in February 2017. *Id*. While in Portland, Ana worked at a local recycling plant, rented an apartment, established friendships, and became engaged to be married. *Id*.

B. Ana's Detention and Habeas Petition

On December 22, 2017, a deportation officer learned that Ana was the "subject" of a Red Notice from the International Criminal Police Organization ("Interpol"). Resp't App. 214. Nearly nine months passed, however, without any further investigation or enforcement action. *Id*. Then, the deportation officer learned that Ana was employed by a trash recycling plant in Portland, Maine. Resp't App. 215. After surveilling the area, on September 20, 2018, the deportation officer conducted a traffic stop and took both Ana and her fiancé into custody after "determining they were in violation of the INA." *Id*.

Ana sought a bond hearing before an IJ under Section 1226(a). Resp't App. 009. On October 18, 2018, the IJ held the bond hearing and, consistent with the BIA's post-*Adeniji* practice, required Ana to shoulder the burden of proof by proving she was not dangerous or a flight risk. Despite the fact that she has no criminal history, the IJ found that Ana had failed to prove that she was not a danger to the community and denied her bond, based solely on the Government's

presentation of a two-page Red Notice from the Interpol. *See* Resp't App. 024–036.

An Interpol Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action. Resp't App. 013. Such notices typically contain information related to the crime for which the person is wanted. Resp't App. 013–14.

However, the Red Notice in this case, issued by El Salvador, was deficient. It did not contain any facts or allege a clear charge, and it merely relied on a general description of the purported gang organizations[3] to which Ana is (falsely) alleged to belong. Resp't App. 038–39, 040–71. In fact, Dr. Theodore Bromund, an expert on the Interpol Red Notice system, found Interpol violated its own rules when it published this deficient notice, stating it "should not have been published both because it is vague, and because, by failing to relate facts to the offense and to link the individual to the alleged offenses, it fails both parts of the coherence test." Resp't App. 067. Indeed, courts have questioned the legitimacy of Red Notices altogether. *See, e.g.*, *Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274,

[3] Contrary to the Government's assertion that Ana is wanted for belonging only to the 18th Street Gang, *see* Resp't Br. at 12, the Red Notice also accuses her of somehow also belonging to a *rival* gang organization—namely, "13 TLS," which is apparently linked to MS-13. Resp't App. 033, 038, 321–322. This is partly why the IJ questioned sufficiency of the Red Notice. Resp't App. 033 (questioning whether it was "an inter-rival [gang] thing").

280 (3d Cir. 2018) (Roth, J., dissenting) (noting that Interpol Red Notices can be "misappropriated by" foreign governments and that an individual should not be held in custody based solely on a Red Notice); *see also Lara v. Barr*, 962 F.3d 45, 48 n.3 (1st Cir. 2020) (noting that, "[i]n the United States, an INTERPOL Red Notice alone is not a sufficient basis to arrest").

During the bond hearing, even the IJ expressed concern about the Red Notice, but found that Ana had not established a lack of dangerousness anyway, stating, "I don't see that there is sufficient evidence explaining why these allegations are being brought against her." Resp't App. 032–33. Apparently feeling constrained by the BIA's post-*Adeniji* burden allocation regime, though, the IJ concluded that the Red Notice was dispositive: "As it is [Ana's] burden of proof to show by clear and convincing evidence she is not a danger, I find, based on this Red Notice, she has failed to meet that burden." *Id.* The IJ denied Ana's bond request and ordered that she be detained during her immigration proceedings. *Id.* As the IJ's statements make clear, Ana's bond request was denied because she—not the Government—was allocated the burden of proof. If the burden was shifted to the Government, the IJ's statements strongly suggested that the result would not be the same.

On April 16, 2019, Ana brought the underlying petition for a writ of habeas corpus to challenge her detention. Resp't App. 008. Ana advanced two claims for

relief: (i) that, at the initial bond hearing, due process required that the Government bear the burden of proving, by clear and convincing evidence, dangerousness or flight risk; and (ii) in the alternative, that due process required the Government justify Ana's detention by clear and convincing evidence because of her prolonged detention—over six months at the time of filing. Resp't App. 020–22. She sought an order that would release her from detention or require the immigration court to hold a constitutionally adequate bond hearing at which the Government would be required to justify any further detention by proving dangerousness or flight risk by clear and convincing evidence. Resp't App. 022–23.

C. District Court Grants Habeas Petition and Orders New Bond Hearing

On July 25, 2019, the District Court denied the Government's motion to dismiss and granted Ana's habeas petition. *Hernandez-Lara v. Immigration & Customs Enf't*, 2019 U.S. Dist. LEXIS 124144, at *17–18 (D.N.H. July 25, 2019) (Resp't App. 465–67). The District Court ordered a new bond hearing before an IJ, requiring that, this time, the Government "bear the burden of justifying [Ana's] detention by clear and convincing evidence." *Id.*

On July 31, 2019, the same IJ, who previously had denied Ana bond, conducted a bond hearing in accordance with the District Court's Order. App.

054–70.[4] The Government failed to produce any additional documents or evidence to support the allegations contained in the Red Notice, and thus, was unable to meet its burden. App. 066–67. The IJ ordered Ana released from detention on $7,500 bond, emphasizing that the burden reallocation changed the outcome of Ana's second bond hearing:

> Because the burden of proof is now on the Government, I do find that to be outcome determinative in this case for the reasons I stated in [the first bond hearing]. While she does have accusations, absent any other details or any other evidence, I'm able to conclude that it isn't clear and convincing to show that she's a danger, especially where she has no other criminal history here in the United States.

App. 066–67. In other words, Ana was directly prejudiced by having to shoulder the burden of proof at her original October 18, 2018 bond hearing.

On September 23, 2019, the Government filed a notice of appeal of the District Court's Order. The appeal was docketed in this Court as No. 19-2019. On April 28, 2020, this Court ordered that the oral argument of the instant habeas appeal be heard together with *Doe v. Tompkins*, No. 19-1368, and *Pereira Brito v. Barr*, Nos. 20-1037 & 20-1119. *See* Scheduling Order Document: 00117582375, No. 19-2019 (1st Cir. Apr. 28, 2020). *Doe* and *Pereira Brito* involve the same legal issue—namely whether placing the burden of proof on noncitizens at immigration bond hearings under Section 1226(a) violates the Due Process Clause.

[4] Citations to the Petitioner-Appellee's Appendix are made herein as "App. __."

D. Ana's Removal Proceedings Are Ongoing

While the foregoing has been occurring, additional proceedings have also been conducted concerning Ana's requests for relief from removal (including asylum, withholding of removal, and Convention Against Torture). In November 2018, an IJ denied Ana's requests, a decision affirmed by the BIA. *Lara*, 962 F.3d at 58. However, on June 15, 2020, this Court vacated the BIA's removal order and remanded to the agency,[5] finding that the IJ violated Ana's statutory right to counsel by failing to allow Ana a reasonable and realistic period of time to secure counsel. *Id*. at 52–53, 56. Ana's relief from removal case is currently pending before the BIA. Based on this Court's opinion, it is likely that the BIA will remand her case to the Boston Immigration Court to allow her to present her immigration relief arguments there with the assistance of counsel.

SUMMARY OF THE ARGUMENT

Due process is a guaranteed right, which is deeply rooted in the Constitution. Moreover, the Supreme Court has explicitly held that due process protections apply to *all* persons in the United States, whether they be present legally or illegally, temporarily or permanently, and this Court has continuously defended and protected that right for over 100 years.

[5] In its Brief, the Government inaccurately stated that "[h]er petition for review remains pending" with this Court. *See* Resp't Br. 13.

In this case, the IJ violated Ana's due process rights by requiring her to bear the burden of proving that she was neither a danger nor a flight risk and, therefore, the District Court's decision must be affirmed.

Specifically, as detailed herein, Ana was entitled to a new bond hearing because (1) due process requires the Government to bear the burden in bond hearings concerning noncriminal noncitizens, and (2) due process also required a second hearing because Ana had been subject to prolonged detention.

First, freedom from unjustified detention or any form of physical restraint is one of the most paramount protections afforded by the Due Process Clause. Because of the serious liberty interest at stake in civil detention cases, the Supreme Court has consistently required the Government to bear the burden of proof. Where a noncitizen does not have diminished due process rights, requiring the Government to bear the burden of proof in a noncitizen's civil immigration detention case satisfies the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and is consistent with analogous caselaw.

As also detailed below, due process requires that the Government meet its burden by a quantum of clear and convincing evidence, a holding reached by the overwhelming majority of district courts to have analyzed the question.

Further, Ana suffered prejudice from the due process violation and, as such, a second bond hearing was the proper remedy for the prejudice she suffered from her first bond hearing.

Second, when detention becomes unreasonably prolonged, as Ana's was, due process requires a bond hearing at which the Government bears the burden by clear and convincing evidence.

For these reasons, Ana respectfully requests that this Court affirm the District Court's decision granting habeas relief.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DUE PROCESS REQUIRES THE GOVERNMENT TO BEAR THE BURDEN OF PROVING ANA WAS A DANGER OR FLIGHT RISK BY CLEAR AND CONVINCING EVIDENCE.

A. Due Process Requires the Government to Bear the Burden of Proof at Noncriminal Noncitizens' Immigration Court Bond Hearings

"No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. It is without question that a noncitizen is a "person," *see Wong Wing v. United States*, 163 U.S. 228, 238 (1896), and "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "In our society liberty is the norm, and detention prior to trial or without trial is the carefully

limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). These protections apply to both civil and criminal detention, including immigration detention, *id.*, because, as the Supreme Court has repeatedly recognized, physical detention is one of the most serious deprivations the government can impose. *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protections." (emphasis added)).

In civil detention cases, the Supreme Court has repeatedly held that the allocation of the burden to the Government is necessary to comply with the procedural safeguards afforded by the Due Process Clause. *See id.* at 427 (holding that deprivation of liberty 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"). Where the Court has permitted civil detention, in fact, it has relied on the fact that the Government bore the burden of proof by at least clear and convincing evidence. *See, e.g.*, *Salerno*, 481 U.S. at 750, 752 (noting "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Kansas v. Hendricks*, 521 U.S. 346, 352–53 (1997) (jury trial and proof beyond reasonable doubt). Conversely, the Court has struck down civil detention schemes that place the burden of proof on the detainee. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Zadvydas*, 533 U.S. at 692

(finding post-final order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

1. DUE PROCESS PRINCIPLES APPLY TO ANA'S CIVIL IMMIGRATION DETENTION.

Contrary to the Government's argument here, these well-established due process protections for civil detention cases apply with equal force to Ana's immigration detention. Indeed, the Supreme Court has explicitly relied on civil detention cases when deciding immigration cases. In *Zadvydas*, for example, the Supreme Court affirmed the constitutional presumption of freedom from restraint, finding that due process "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. at 693. The Government in its brief, however, sidesteps the import of *Zadvydas*. Instead, the Government claims that its power to detain within the immigration context somehow abrogates the noncitizen's due process rights. To do so, it contends that the *Demore v. Kim*, 538 U.S. 510 (2003) and *Carlson v. Landon*, 342 U.S. 524 (1952) decisions diminish due process requirements for Section 1226(a) bond hearings. They do not.

First, the Government incorrectly suggests that the Supreme Court's holding in *Demore* requires this Court to ignore the holdings in *Addington* and *Foucha* and to find that the burden was properly placed on Ana at her bond hearing under

§1226(a). *See* Resp't Br. 24–27.[6] *Demore*, however, is inapplicable here for the reasons articulated by the District Court below:

> In *Demore*, the Court considered whether § 1226(c), which imposes mandatory detention on criminal aliens during removal proceedings, violates the Due Process Clause. 538 U.S. at 513–14. The Court acknowledged in *Demore* that, in exercising its broad immigration powers, Congress may make rules "that would be unacceptable if applied to citizens." *Id*. at 521 (internal quotation marks omitted). And it recognized its prior rulings holding that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Id*. at 523.
>
> As other courts have noted, however, *Demore* has only limited relevance to the challenge at issue here. *See Martinez*, 2018 U.S. Dist. LEXIS 178577, 2018 WL 5023946, at *4; *Pensamiento*, 315 F. Supp. 3d at 692. ***Demore* involved a class of criminal aliens for which Congress has determined that mandatory detention, with very limited opportunities for bail, is necessary and reasonable.** 538 U.S. at 518–20; *see* 8 U.S.C § 1226(c). **By contrast, under § 1226(a), detention of noncriminal aliens pending removal proceedings is discretionary, not mandatory.** *See* 8 U.S.C. § 1226(a). As noted above, **the Supreme Court has not spoken on what process is due under this statute.**

Hernandez-Lara, 2019 U.S. Dist. LEXIS 124144, at *14–15 (brackets in original) (emphasis added) (Resp't App. 461–62).

The fact that the *Demore* Court was considering criminal noncitizens was central to its reasoning, and it emphasized that the "narrow detention policy" at

[6] Citations to the Government's Brief are made herein as "Resp't Br. __."

issue there was reasonably related to the Government's purpose of effectuating removal and protecting public safety. 538 U.S. at 526–28. By contrast, the detention statute here—Section 1226(a)—applies broadly to individuals with no criminal records at all. *Cf. Zadvydas*, 533 U.S. at 691 (concluding indefinite detention raised due process concerns because the detention statute at issue there did "not apply narrowly to 'a small segment of particularly dangerous individuals,' . . . but broadly to [noncitizens] ordered removed for many and various reasons, including tourist visa violations" (quoting *Hendricks*, 521 U.S. at 368)).

In fact, *Demore* placed great reliance on the voluminous record before Congress, which showed that the population of "criminal noncitizens" subject to the mandatory detention statute posed a heightened categorical risk of flight and danger to the community. *See* 538 U.S. at 518–21 (citing studies and congressional findings regarding the "wholesale failure by the INS to deal with increasing rates of criminal activity by [noncitizens]"). In contrast, Congress made no comparable findings regarding the noncriminal population at issue here. Indeed, Congress has *authorized* bond hearings for noncitizens like Ana. *Accord Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *14–15 (explaining that, unlike Section 1226(c), detention under Section 1226(a) "is discretionary, not mandatory") (Resp't App. 461–62). Thus, with *Demore* bearing "only limited relevance" to the issues presented, the District Court properly relied on other, more

relevant cases. *See id.* at *17–18 (citing, among others, *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Darko v. Sessions*, 342 F. Supp. 3d 429 (S.D.N.Y. Oct. 3, 2018); and *Martinez v. Decker*, 2018 U.S. Dist. LEXIS 178577 (S.D.N.Y. Oct 17, 2018)) (Resp't App. 465).

Similarly, the Government's reliance on the nearly seventy-year-old *Carlson* decision to assert that Congress gave the Attorney General broad discretion under the statute "to advance a legitimate government purpose," Resp't Br. at 21, is misplaced. The individuals in *Carlson* were detained in light of Congress's then-judgment that the Communist Party posed a heightened risk to national security. 342 U.S. at 528 n.5, 541–42. Not only does it relate to statutes no longer in effect, *Carlson* does not even address, much less resolve, the question of burden of proof. *See Perez v. McAleenan*, 435 F. Supp. 3d 1055, 1061 (N.D. Cal. Jan. 23, 2020) (holding *Demore* and *Carlson* to be "off-point" to the issues raised here). To be clear, any "authority delegated to the Attorney General is still subject to the requirements of Due Process," *id.* at 1060, and, as such, *Carlson* is not instructive here.[7]

[7] The Government's citation to *Reno v. Flores*, 507 U.S. 292 (1993), Resp't Br. 21-22, is similarly inapposite. There, the Court held that, to satisfy due process, detained juvenile noncitizens must have the right to a hearing on the initial deportability and custody determination. *Id.* at 309. The decision said nothing as to the required procedures and burdens at such a hearing and, as such, does not inform the issues raised in this case.

In short, Supreme Court precedent supports the District Court's decision, holding that due process requires that the Government satisfy the burden of proof in Section 1226(a) bond hearings. Indeed, the overwhelming majority of federal courts to evaluate this issue—including decisions issued since the underlying District Court's Order was published—have so held. *See, e.g.*, *Garcia v. Decker*, No. 20-cv-1345 (LJL), 2020 U.S. Dist. LEXIS 50879 (S.D.N.Y. Mar. 24, 2020); *Medley v. Decker*, No. 18-cv-7361 (AJN), 2019 U.S. Dist. LEXIS 213666 (S.D.N.Y. Dec. 11, 2019); *Aguirre v. Barr*, No. 19-cv-7048 (VEC), 2019 U.S. Dist. LEXIS 140065 (S.D.N.Y. Aug. 19, 2019); *De La Cruz v. Decker*, No. 19-cv-7375 (AKH), 2019 U.S. Dist. LEXIS 229673 (S.D.N.Y. Sep. 13, 2019); *Miranda v. Barr*, No. 20-1110, 2020 U.S. Dist. LEXIS 94283 (D. Md. May 29, 2020); *Perez v. McAleenan*, 435 F. Supp. 3d 1055 (N.D. Cal. January 23, 2020); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. May 21, 2018); *Alvarez Figueroa v. McDonald*, Civil Action No. 18–10097–PBS, 2018 U.S. Dist. LEXIS 80781, at *15–16 (D. Mass. May 14, 2018); *Doe v. Tompkins*, Case No. 18-cv-12266-PBS, 2019 U.S. Dist. LEXIS 22616, at *4 (D. Mass. Feb. 12, 2019); *Diaz-Ortis v. Tompkins*, Case No. 18-cv-12600-PBS, 2019 U.S. Dist. LEXIS 14155, at *3–4 (D. Mass. Jan. 29, 2019); *Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 U.S. Dist. LEXIS 178577, at *13 (S.D.N.Y. Oct 17, 2018); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. Oct. 3, 2018); *Portillo v. Hott*, 322 F. Supp. 3d 698 (E.D.

Va. July 3, 2018); *but see Basri v. Barr*, 2020 U.S. Dist. LEXIS 91836, at *21–22 (D. Colo. May 11, 2020).

2. THE THIRD CIRCUIT'S DECISION IN *BORBOT* DOES NOT, AND SHOULD NOT, CHANGE THIS COURT'S BURDEN ALLOCATION.

The Government relies on the *Borbot* decision from the Third Circuit to support its argument that Ana was afforded adequate due process. *See Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274 (3d Cir. 2018). But, as the District Court correctly pointed out, that decision relies on a factually distinguishable scenario not applicable here. Also, *Borbot* is not controlling in this Circuit and its reasoning is not persuasive. This Court should instead adopt the reasoning of the many other courts that have rejected *Borbot*'s reasoning.

First, the *Borbot* decision is factually distinguishable from this case. In contrast to the core argument made by Ana and relied on by the District Court, the detainee in *Borbot* only argued that, because of the passage of time, he was entitled to a second bond hearing at which the Government bears the burden of proof. *Borbot*, 906 F.3d at 277, 279. The Third Circuit held that Mr. Borbot's detention had not become unreasonably prolonged and that it therefore was not necessary to decide "when, if ever, the Due Process Clause might entitle an alien detained under §1226(a) to a new bond hearing." *See id.* at 280. In other words, the detainee in *Borbot*, unlike Ana, "did not challenge the adequacy of his intitial bond hearing."

See Resp't Br. 37–39. Indeed, the Third Circuit found that Mr. Borbot sought "to compel a second bond hearing despite *alleging no constitutional defect* in the one he received." *Borbot*, 906 F.3d at 279 (emphasis added). This is not the case here, as Ana has alleged—and established at the District Court—a defect in her initial bond hearing. As the District Court explained:

> Unlike the petitioner in *Borbot*, [Ana] alleges that she suffered a constitutional violation at her intial § 1226(a) bond hearing. *Borbot* is therefore not on point, and the court does not rely on it.

Resp't App. 452 n.1.

Second, the Third Circuit in *Borbot* did not acknowledge—let alone discuss—the civil detention precedents discussed above. *Borbot*, therefore, carries minimal persuasive weight. Indeed, in another immigration detention case, the Third Circuit applied those very precedents to require the Government to justify prolonged detention by clear and convincing evidence. *See Guerrero-Sanchez v. Warden*, 905 F.3d 208, 224 n.12 (3d Cir. 2018).

Additionally, many other courts have rejected the application of *Borbot* in this context. *See, e.g.*, *Doe v. Tompkins*, 2019 U.S. Dist. LEXIS 22616, at *2 (D. Mass. Feb. 12, 2019) ("The Government argues that the Third Circuit's recent decision in *Borbot* [] throws this holding into doubt. It does not."); *Barrientos v. Barr*, 2019 U.S. Dist. LEXIS 123470, at *5 n.3 (W.D.N.Y. June 24, 2019) ("Respectfully, *Borbot* is neither binding on this Court nor particularly persuasive.

To the contrary, all the same constitutional concerns at issue for § 1226(c) detainees are present—and are even more persuasive—in the case of a § 1226(a) detainee." (quotation marks, brackets, and citations omitted)); *Miranda v. Barr*, 2020 U.S. Dist. LEXIS 94283 at *23–24 (D. Md. May 29, 2020) ("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.").

3. REQUIRING THE GOVERNMENT TO JUSTIFY DETENTION BY PROVING DANGEROUSNESS OR FLIGHT RISK SATISFIES *MATHEWS V. ELDRIDGE'S* BALANCING TEST.

The Government argues that existing Section 1226(a) procedures are sufficient under the three-factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), and – therefore – satisfy due process. Resp't Br. at § VII(B). As an initial matter, it is not at all clear that the *Mathews* test applies to Ana's primary argument regarding the burden allocation at her initial bond hearing.[8] As aptly stated by one District Court, "the *Mathews* formulation is not the most appropriate for the current circumstances. *Mathews* involved the termination of

[8] To the extent that courts which have considered arguments raised in this case have applied *Mathews*, it has almost always been in the context of a prolonged detention argument. In its Brief, the Government incorrectly contends that Ana never made a prolonged detention argument, but – yet – still argues that *Mathews* applies to this case. *See* Resp't Br. 24, 29–34. As discussed in detail *infra*, the Government is incorrect and the prolonged nature of her detention is Ana's alternative argument for relief.

social security benefits, not the deprivation of an individual's liberty. Instead, the court follows the framework established in the most closely analogous situation – involuntary civil detention pending trial or mental health treatment." *Diaz-Ceja v. McAleenan*, 2019 U.S. Dist. LEXIS 110545, at *25 (citing, *inter alia, Addington*) (other citations omitted). Similarly, the District Court in this case – which held that the burden misallocation violated due process and, therefore, did not reach Ana's prolonged detention argument – did not apply the *Mathews* test, finding, instead, that *Addington* "is particularly instructive." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *11 (Resp't App. 458).

To the extent that the *Mathews* test applies, as the Government contends, its application actually *supports* the District Court's holding. *See Miranda v. Barr*, 2020 U.S. Dist. LEXIS 94283, at *24 (D. Md. May 29, 2020) ("Application of the *Mathews v. Eldridge* balancing test lends further support to the … conclusion that due process requires a bond hearing where the government bears the burden of proof."). Specifically, the *Mathews* test requires an examination of the following factors: 1) the private interest at stake; 2) the risk of erroneous deprivation of that interest and the value of any additional procedural safeguards; and 3) the Government's interest, including the administrative burden of additional safeguards. 424 U.S. at 334–35.

First, under the *Mathews* analysis, Ana's liberty interest is recognized as the highest of individual rights. "In cases involving individual rights, whether criminal or civil, the standard of proof at minimum reflects the value society places on the individual liberty." *Addington v. Texas*, 441 U.S. at 425 (brackets, quotation marks, and citation omitted).

The Government's brazen suggestion that Ana has less of a liberty interest at stake because she can "unilaterally decide to end [her] detention at any time by simply conceding to removal and being released into [her] home country," Resp't Br. 29–30, flies in the face of this country's founding principles, the Constitution, Supreme Court precedent, and common sense. Due process "protects every [noncitizen] from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted). Physical detention is one of the most serious deprivations the government can impose. *Addington*, 441 U.S. at 425 ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections."). Moreover, deportation is of a "grave nature," is a "drastic measure," and "often amount[s] to lifelong 'banishment or exile.'" *Sessions v. Dimaya*, 136 S. Ct. 1204, 1213 (2018) (quoting *Jordan v. De George*, 341 U.S. 223, 231 (1951)); *see also Bridges v. Wixon*, 326 U.S. 135, 147 (1945)

("Deportation may result in the loss 'of all that makes life worth living.'") (citation omitted). For noncitizens, just as citizens, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Foucha*, 504 U.S. at 83 (quoting *Salerno*, 481 U.S. at 755).

The District Court correctly noted that the "existence of this unenviable choice does not justify placing a lower burden of proof on the government." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *17 n.2 (Resp't App. 464 n.2); s*ee also Singh*, 638 F.3d at 1204 ("We are not persuaded that a lower standard of proof is justified by putting people like Singh to the choice of remaining in detention, potentially for years, or leaving the country and abandoning their challenges to removability even though they may have been improperly deemed removable."); *Cruz v. Decker*, 2019 U.S. Dist. LEXIS 147731, at *19–20 (S.D.N.Y. Aug. 27, 2019) (declining to "accept the Government's retort that Petitioner is free to end his detention by voluntarily agreeing to leave the United States" and suggesting that prolonged detention could be "used as a tool to pressure detainees into self-deportation"). This is especially so for Ana, who seeks protection from persecution and even murder in her native El Salvador. It would violate fundamental fairness to force such individuals to choose between defending their rights to safety in the United States and their rights against arbitrary detention.

Second, Ana's case clearly demonstrates the risk of an erroneous deprivation of a noncriminal noncitizen's private liberty interest when the burden of proof is misallocated. As the IJ's decisions make plain, the misallocation of the burden of proof in this case was outcome determinative, resulting in Ana being erroneously detained. Resp't App. 032–33; App. 066–67. There can be no doubt of the value of the additional safeguard of a properly allocated burden of proof here, as the IJ explained:

> Because the burden of proof is now on the Government, I do find that to be outcome determinative in this case for the reasons I stated in [the first bond hearing]. While she does have accusations, absent any other details or any other evidence, I'm able to conclude that it isn't clear and convincing to show that she's a danger, especially where she has no other criminal history here in the United States.

App. 066–67.

Third, the *Mathews* test considers the Government's interest. In its brief, the Government misstates the interest at issue as "increas[ing] the probability that aliens who are ordered removed are in fact removed." Resp't Br. 34. Even if that were the proper interest to consider, Ana's fundamental liberty interest, as discussed *supra*, would unquestionably trump the Government's asserted interest (particularly where Section 1226(a) unambiguously contemplates noncriminal noncitizens obtaining bond and, accordingly, not being detained pending a final decision on removal). However, as one District Court aptly explained, "[T]he

governmental issue at stake in this motion is the ability to detain [Ana] *without providing [her] with another bond hearing [with the proper burden allocation]*, not whether the government may continue to detain [her]." *Reyes v. Bonnar*, 362 F. Supp. 3d 762, 777 (N.D. Cal. 2019) (italics in original).

As properly construed, the Government interest (i.e., the cost and burden of a bond hearing with the proper burden of proof allocated to the Government) is minimal. The Government is in the best position to establish that a person is a danger to the community and flight risk by, among other things, producing records from federal, state, and local law enforcement, as well as other documents that are at the Government's fingertips, but that are extremely difficult for detained immigrants to obtain. Given the resources available to the Government, there is little risk to its ability to meet its burden of proof. *See Aguirre v. Barr*, No. 19-cv-7048 (VEC), 2019 U.S. Dist. LEXIS 140065, at *12–13 (S.D.N.Y. Aug. 19, 2019) ("A hearing is just that: a hearing. It is not a conclusive determination that Petitioner should be released; it simply puts that question to a detached and neutral factfinder applying a constitutional burden of proof . . . [ensuring] that the Government does not stack the deck against Petitioner in that hearing.").

The Government is represented by attorneys familiar with immigration court procedures, while the noncitizen is often unrepresented and frequently lacks English proficiency. Ana falls in this category. *See Reid v. Donelan*, 819 F.3d

486, 498 (1st Cir. 2016); *see also Miranda v. Barr*, 2020 U.S. Dist. LEXIS 94283, at *25 (D. Md. May 29, 2020) (noting that "[o]n numerous occasions, *pro se* individuals appeared before [the IJ] for custody hearings without understanding what was required to meet their burden of proof."); *Lara*, 962 F.3d at 55 (noting that Ana "does not speak, read, or write English"); *cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (requiring the state to support its allegations during parental rights termination proceedings by at least clear and convincing evidence because the parents are "often poor, uneducated, or members of minority groups [and] such proceedings are often vulnerable to judgments based on cultural or class bias[,]" whereas, "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. . . [t]he State's attorney usually will usually be an expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family").

Moreover, the Government's attorneys are far more able to produce documents and other evidence to meet their burden than are incarcerated noncitizens, who would otherwise be tasked with obtaining records—including documents, marriage and birth certificates, or actuarial risk statistics—while in detention, where they have limited access to the Internet, mail, phone, and a reduced ability to pay for and store records. *See Lara*, 962 F.3d at 55–56 (explaining detainees' access to phone calls and visits are generally limited); *see*

also Moncrieffe v. Holder, 569 U.S. 184, 200–01 (2013) (noting that immigrant detainees "have little ability to collect evidence").

In sum, under the *Mathews* balancing test, Ana's liberty interests far outweigh the burden on the Government imposed by a requirement that it provide sufficient procedural safeguards to guard against erroneous deprivation of her liberty. Here, like in *Santosky*, "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Santosky*, 455 U.S. at 758; *see also Diaz-Ceja v. McAleenan*, Civil Action No. 19-cv-00824-NYW, 2019 U.S. Dist. LEXIS 110545, at *27–28 (D. Colo. July 2, 2019) ("[A]llocating the burden to a noncitizen to prove that he should be released on bond under § 1226(a) violates due process as it assigns the risk of error to the party with the greater interest in their individual liberty as balanced against the Government's interests.").

4. THE DISTRICT COURT'S HOLDING (AND RELIANCE ON *SINGH*) IS NOT INCONSISTENT WITH *JENNINGS*.

The Government seeks to discount the District Court's Order and its reliance on the Ninth Circuit's decision in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) (holding that due process requires the Government to prove dangerousness or flight risk by clear and convincing evidence at a "*Casas*" hearing for a noncitizen who had been detained for a prolonged period), suggesting that the District Court's

Order and *Singh* are inconsistent with the later Supreme Court decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Resp't Br. 22–23. But, as the Government admits, the *Jennings* decision "does not squarely resolve the constitutional issue here." *Id.* Rather, in *Jennings*, the Supreme Court found only that the *text of the statute* could not be construed to require the Government to bear the burden of proof by clear and convincing evidence at a bond hearing. *Jennings*, 138 S. Ct. at 847–48 ("Nothing in § 1226(a)'s text" requires the placement of the burden on the Government at bond hearings under the canons of statutory interpretation). The Supreme Court made clear, in fact, that it did not resolve any constitutional issues. *Id*. at 851 (stating "we do not reach" "respondents' constitutional arguments on their merits").

In its order, the District Court correctly explained that *Jennings* did not address the due process issue raised by Ana's petition. *See Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *6 ("Although the Court held that the statute does not mandate that the government meet a clear and convincing evidence standard in § 1226(a) bond hearings, it left open the question whether the Due Process Clause places such a burden on the government at these hearings.") (Resp't App. 452); *see also Vargas v. Wolf*, 2020 U.S. Dist. LEXIS 69511, at *16 (D. Nev. April 21, 2020) ("*Jennings* expressly declined to reach the merits of the parties'

constitutional arguments . . . ."); *Singh v. Barr*,[9] 400 F. Supp. 3d 1005, 1017–18 (S.D. Cal. 2019) ("Because *Jennings* expressly addressed itself to the mandates of the INA, and not the Constitution, the procedural due process holding in *Singh* . . . still stand[s]."); *Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1146–47 (N.D. Cal. March 27, 2018) ("The [*Jennings*] Court did not engage in any discussion of the specific evidentiary standard applicable to bond hearings, and there is no indication that the Court was reversing the Ninth Circuit as to that particular issue."). Thus, *Jennings* left open the question of what due process requires, and subsequent courts, including the District Court below, have properly answered it.

In short, the *Jennings* decision did not vacate *Singh* and does not compel a reversal of the District Court's Order because the *Singh* decision and the District Court's Order were based on constitutional interpretation, whereas the *Jennings* decision was based on constitutional avoidance. *See Singh v. Barr*, 400 F. Supp. 3d at 1014 (explaining that the procedural due process holding in *Singh* withstands *Jennings*). Thus, the Government's argument that *Singh* is inconsistent with *Jennings* is incorrect. *See* Resp't Br. at 22.[10]

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[9] *Singh v. Barr* is a decision of the District Court for the Southern District of California, and is cited herein as "*Singh v. Barr*" to distinguish it from the Ninth Circuit's *Singh v. Holder* decision (which is referred to simply as "*Singh*" herein).

[10] The Government additionally suggests that *Singh* is inapplicable because it dealt with a "*Casas* bond hearing" for prolonged detention, not an initial bond hearing. Resp't Br. 23. This argument was correctly rejected by another court because it

Accordingly, as detailed above, due process requires the Government to bear the burden of proving dangerousness or flight risk at a noncriminal noncitizen's bond hearing, and the Government has proffered no persuasive arguments to the contrary.

B. Due Process Requires the Government to Justify Detention by Clear and Convincing Evidence.

The District Court went a step further, and properly decided, in accord with a growing consensus of courts, that due process requires the Government to meet its burden by a quantum of clear and convincing evidence at Section 1226(a) bond hearings. *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144 (Resp't App. 447–467). In short, in order for the Government to constitutionally justify the detention of a noncriminal noncitizen, it must prove the noncitizen is a danger or a flight risk *by clear and convincing evidence*.

As the Supreme Court noted in *Addington*, requiring the government to bear the burden of proof, and by an elevated standard, is crucial to alleviate the risk that

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would create a dual system of burdens, depending on the hearing. *See Perez v. McAleenan*, 435 F. Supp. 3d at 1061 (rejecting the government's "attempt to cabin *Singh* to only apply to *Casas* hearings" as "illogical" since such interpretation would "create a system in which a detained noncitizen bears the burden at their initial bond hearing, but the burden then shifts at a *Casas* hearing"). In any event, for the reasons set forth above, the principles which the *Singh* court relied on apply equally to initial bond hearings. *See Singh*, 638 F.3d at 1205 ("[R]egardless of the stage of the proceedings, the same important interest is at stake – freedom from prolonged detention.") (brackets, quotation marks, and citation omitted).

the factfinder might deprive an individual of liberty "based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington*, 441 U.S. at 427. Similarly, a hearing in which the Government must meet the burden of proof is warranted because "due process places a heightened burden of proof . . . [when] the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *Singh*, 638 F.3d at 1204; *see also Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *13 ("A bail hearing under § 1226(a) involves more than a mere exchange of money; thus, the burden should not be shared equally by the alien and the government.") (citing *Addington*, 441 U.S. at 423–24) (Resp't App. 460). Therefore, due process requires *more* procedural safeguards, including a heightened burden of proof, to guard against erroneous deprivation of liberty.

The Supreme Court has required that the Government satisfy a heightened burden of proof before depriving a person of a significant liberty interest, including in the immigration context. *See Woodby v. INS*, 385 U.S. 276, 277 (1966) (holding that the Constitution requires the Government to "establish the facts supporting deportability by clear, unequivocal, and convincing evidence" in removal proceedings); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (holding that the Government bears the burden of proof by clear and convincing evidence in denaturalization proceedings). Moreover, the Court has repeatedly recognized that

physical detention is one of the most serious deprivations of liberty the government can impose. *See Addington v. Texas*, 441 U.S. at 425 ("[C]ivil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protections.") (emphasis added); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972).

Similarly, the Government is also required to meet its burden of proof by clear and convincing evidence when it seeks to involuntarily commit a person to a mental hospital, terminate a person's parental rights, detain a criminal defendant based on danger to the community, or confine a legally insane person after he completed his criminal sentence. *Addington*, 441 U.S. at 433; *Santosky*, 455 U.S. at 747–48; *Salerno*, 481 U.S. at 741; *Foucha*, 504 U.S. at 86. Among the "various civil cases" involving citizens and noncitizens, the Supreme Court has always held that due process requires "the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests." *Addington*, 441 U.S. at 424.

In accordance with these principles, the Ninth Circuit addressed what standard of proof the Government must meet in a Section 1226(a) bond hearing, and held that the standard must be clear and convincing evidence. *Singh*, 638 F.3d at 1204–05. In fact, the overwhelming majority of district courts that have analyzed the question have reached the same conclusion. *See Aparicio-Larin v.*

Barr, 2019 U.S. Dist. LEXIS 121126, at *20 (W.D.N.Y. July 20, 2019); *Nzemba v. Barr*, 2019 U.S. Dist. LEXIS 119126, at *22 (W.D.N.Y. July 17, 2019); *Singh v. Barr*, 400 F. Supp. 3d 1005, 1018 (S.D. Cal. 2019); *Lopez v. Decker*, 2019 U.S. Dist. LEXIS 82881, at *10 (S.D.N.Y. May 15, 2019); *Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 U.S. Dist. LEXIS 178577, at *13 (S.D.N.Y. Oct 17, 2018); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. Oct. 3, 2018); *Perez v. McAleenan*, 2020 U.S. Dist. LEXIS 45567, at *15–16 (N.D. Cal. January 23, 2020); *Vargas v. Wolf*, 2020 U.S. Dist. LEXIS 69511, at *18 (D. Nev. April 21, 2020); *Miranda v. Barr*, No. 20-1110, 2020 U.S. Dist. LEXIS 94283, at *26 (D. Md. May 29, 2020).

Finally, under the same analysis discussed above in Section I.A.3., the requirement that the Government bear the burden of proof by clear and convincing evidence is also supported by the application of the three-factor balancing test from *Mathews*. *See supra* Section I.A.3.

C. Ana Suffered Prejudice from the Due Process Violation and a Second Bond Hearing was the Proper Remedy.

Likely because it cannot, the Government fails to even argue that the District Court was incorrect when it found that Ana suffered prejudice from the misallocation of burden. Even before the District Court, the Government declined to affirmatively respond to Ana's argument that she suffered prejudice. *Compare* Resp't App. 383–388 (Ana's brief in support of habeas relief) *with* Resp't App.

443–446 (the Government's reply brief).[11] As such, the Government has effectively waived this issue. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); *see also Rando v. Leonard*, 826 F.3d 553, 557 (1st Cir. 2016) (appellant waived an issue that she articulated only in a single sentence before the district court and in a footnote of her appellate brief).

Even if this issue were not waived, however, there can be no doubt that Ana suffered prejudice.[12] The District Court found that "it is beyond dispute that [Ana]

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[11] *But see* App. 027 (the Government's counsel stated at the oral argument that he did not know "if the IJ would have made a different decision had he said the burden of proof is on the government").

[12] Ana does not concede that she was required to demonstrate prejudice here. Instead, because a misallocated burden of proof is a structural error, it constitutes a *per se* prejudice. *See Wilder v. United States*, 806 F.3d 653, 658 (1st Cir. 2015); *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (holding that erroneous instruction on the "reasonable doubt" standard of proof was a structural error). The impermissible burden shift is an error that "infect[s] the entire [hearing] process" and "necessarily render[s] [the hearing] fundamentally unfair." *Wilder*, 806 F.3d at 658 (citations omitted). *See also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954) (reversing agency action where Board of Immigration Appeals did not follow its own regulation requiring it to exercise its discretion independently without requiring a showing of prejudice); *Navia-Duran v. Immigration & Naturalization Service*, 568 F.2d 803, 808 (1st Cir. 1977) (same, where agency violated its own regulation by failing to provide an arrestee with warnings about the use of statements in deportation proceedings and the right to counsel) (citing *Accardi*, 347 U.S. 260); *see also Lara*, 962 F.3d at 58–60 (Lipez, J. concurring) (explaining why this Court should not require a showing of prejudice when a noncitizen's statutory right to counsel was violated). However, because Ana was clearly prejudiced, the Court need not reach this issue here.

suffered prejudice from this [burden misallocation] constitutional deprivation," observing that "[t]he record makes clear that[, even with the misallocated burden of proof,] this was a close case for the IJ and that, had the government borne the burden of proving danger, the IJ may well have found the evidence deficient." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *18 (Resp't App. 465). Indeed, Ana's second bond hearing demonstrated that the District Court's observation was correct. *See* App. 066 ("Because the burden of proof is now on the Government, I do find that to be outcome determinative in this case . . . .").

Ana suffered prejudice not only because she was forced to bear the burden of proof, but also because the evidence that the IJ relied on in her initial bond hearing did not establish dangerousness or flight risk by clear and convincing evidence. There was no reliable evidence presented that demonstrated that Ana, who has never been charged or convicted of a criminal offense, was dangerous. In fact, Ana submitted evidence demonstrating that she has no arrest record; of her ties to Portland, Maine; and of her good moral character. Resp't App. 013. The only evidence that the Government submitted at Ana's initial bond hearing was an I-213 form (Record of Deportable/Inadmissible Alien), the immigration report, and a two-page Red Notice (containing a mere description of the purported gang organization) from Interpol issued by El Salvador. *Id.* Moreover, Ana explained why she thought she was falsely accused of being a gang member. Resp't App.

032 (explanation of her gang brother). Under the incorrect burden allocation, though, the IJ found, "[a]s it is [noncitizen]'s burden of proof to show by clear and convincing evidence she is not a danger, I find, based on this Red Notice, she has failed to meet that burden, so I am going to order the request for a change in custody be denied." Resp't App. 033.

The Red Notice did not even allege that Ana committed any specific crime and did not contain information constituting criminal behavior. Resp't App. 013. Rather, it only falsely indicated that Ana was associated with multiple gang groups. *Id.* Gang affiliation evidence, like the Red Notice here, has been regarded as risky and error-prone. *See Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 (9th Cir. 2013) ("Determining whether an individual is an active gang member presents a considerable risk of error."); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1199 (N.D. Cal. Nov. 20, 2017) ("DHS sometimes makes an inference of gang membership from conduct, clothing, or associations that are far from unequivocal evidence of that conclusion."). The Red Notice contained no evidence of reasonable suspicion that Ana engaged in dangerous or criminal activity. In fact, the IJ even doubted that the Red Notice was sufficient evidence. Resp't App. 032–33 ("I don't see that there is sufficient evidence explaining why these allegations are being brought against her. She claims that they're street gangs, but it looks like I don't know if that's because this is an inter-rival thing or she was an innocent

member or somehow wrongly identified."). Nevertheless, the IJ found Ana failed to demonstrate that she was not a danger based on the Red Notice, and denied her bond, *only because* she bore the burden of proof. Resp't App. 033.

If there had been any doubt that Ana suffered prejudice (and there was not), it was dispelled by the outcome of her subsequent July 31, 2019 bond hearing. After being granted a new hearing with the burden of proof of clear and convincing evidence properly on the Government to justify detention, Ana received a different outcome. The IJ properly held that the Government failed to meet its burden of showing that she was either a danger or a flight risk and Ana was, accordingly, released from detention:

> . . . I'm able to conclude that it isn't clear and convincing to show that she's a danger, especially where she has no other criminal history here in the United States . . . With respect to flight risk, . . . I also note the countervailing evidence in this record, including community ties, lack of criminal record, fixed address, work history, and support from the community. When balancing all those factors together, considering it is the Government's burden, I am satisfied that a release from custody and her bond of $7,500 would assure her presence for either removal or, if the case is granted a PFR for further proceedings before the Board of Immigration Appeals in the court.

App. 066–67. Importantly, the IJ emphasized the effect that the burden shift in Ana's second bond hearing had on the outcome:

> Because the burden of proof is now on the Government, I do find that to be outcome determinative in this case for the reasons I stated in [the first bond hearing].

App. 067. Thus, it is "beyond dispute that [Ana] suffered prejudice from this [burden misallocation] constitutional deprivation" at her first bond hearing and such burden misallocation was indeed outcome determinative.[13] *See Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *18 (Resp't App. 465).

II. ALTERNATIVELY, DUE PROCESS REQUIRED A SECOND HEARING BECAUSE ANA'S DETENTION WAS PROLONGED.

As the District Court held, the fact that the burden was misallocated to Ana is a sufficient basis on which to correctly resolve this case. However, a second, alternative reason also required Ana to have been granted a second bond hearing at which the Government would bear the burden of proof by clear and convincing evidence. Specifically, because Ana's detention was prolonged, due process required a second hearing with the proper burden allocation and standard. *See Rosaura Bldg. Corp v. Municipality of Mayagüez*, 778 F.3d 55 (1st Cir. 2015) ("[t]he de novo standard of review does not limit this Court to the district court's rationale, as we may affirm on 'any ground revealed by the record'") (citation omitted).

[13] As this Court has held in the context of a removal proceeding, the prejudice element of a due process claim is met "when it is shown that an abridgement of due process is likely to have affected the outcome of the proceedings." *See Pulisir v. Mukasey*, 524 F.3d 302, 311 (1st Cir. 2008).

A. When Detention is Prolonged, the Due Process Clause Requires a Second Bond Hearing, with the Proper Burden Allocation and Standard.

The First Circuit and numerous other courts have recognized that due process requires a subsequent bond hearing to justify continued confinement when detention of a noncitizen has exceeded a reasonable period of time. *See Reid v. Donelan*, 819 F.3d at 502 (vacated on other grounds); *Doe v. Smith*, 2017 U.S. Dist. LEXIS 208322, at *24–25 (D. Mass. Dec. 19, 2017); *Neziri v. Johnson*, 187 F. Supp. 3d 211, 216 (D. Mass. May 5, 2016); *Geegbae v. McDonald*, No 10-10852-JLT, 2010 U.S. Dist. LEXIS 115896, at *5–6 (D. Mass. Nov. 1, 2010); *Balasundaram v. Chadbourne*, 716 F. Supp. 2d 158, 160 (D. Mass. 2010); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116, 127 (D. Mass. 2009); *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 176 (D. Mass. 2009); *Winkler v. Horgan*, 629 F. Supp. 2d 159, 161 (D. Mass. 2009) ("[W]here the detention is not brief and removability is not clear [the length of detention] raises colorable due process concerns."); *see also Diop v. ICE/Homeland Security*, 656 F.3d 221, 233 (3d Cir. 2011) ("In short, when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.").

Similarly, the Supreme Court has also found that, in civil detention cases, due process requires heightened procedures when confinement is prolonged. *See*

McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."); *cf. Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("duration of commitment" must bear "reasonable relation" to its purpose). In *Zadvydas*, the Supreme Court applied this long-standing principle to the immigration context in holding that immigrants are "persons" entitled to due process, and that due process requires "adequate procedural protections" to ensure that prolonged detention serves valid government goals." 533 U.S. at 690, 693. As such, this same principle must be applied to Section 1226(a) proceedings. Moreover, "[a]s the length of average detention under § 1226 grows, so too do the aliens' liberty interests." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *17 (citing *Hernandez v. Decker*, 2018 U.S. Dist. LEXIS 124613, at *33 (S.D.N.Y. July 25, 2018); *Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *29) (Resp't App. 464); *see also Doe v. Smith*, 2017 U.S. Dist. LEXIS 208322, at *18. In fact, the majority of federal courts to have addressed the issue have held that, where detention is prolonged, "the alien's potential loss of liberty is so severe" that the Government bears the burden of justifying it by clear and convincing evidence. *Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 213–14 (3d Cir. 2020) ("[W]e see no basis for abandoning the settled rule that when a party stands to lose his liberty,

even temporarily, we hold the Government to a higher burden of proof."); *see also*, *e.g.*, *Singh*, 638 F.3d at 1203 ("Given the substantial liberty interest at stake … we hold that the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond …."); *Guerrero-Sanchez*, 905 F.3d at 224 n.12 (citing *Singh* for the proposition); *Nguti v. Sessions*, 259 F. Supp. 3d 6 (W.D.N.Y. May 2, 2017); *but see Borbot*, 906 F.3d at 279–80.

B. Ana's Detention – Which Was More Than Ten Months – Was Unreasonably Prolonged.

The Government erroneously states that, "[u]nlike *Singh*, however, the Petitioner in this case did not make any claim of prolonged detention; indeed, at the time she filed her habeas petition on April 16, 2019, she had been detained just under seven months."[14] Resp't Br. at 24. This is unambiguously wrong. In fact, Ana explicitly argued that her detention had been prolonged and that she was,

[14] The majority of the Government's brief is taken verbatim from the opening briefs in *Brito* and *Doe* and this misstatement comes verbatim from those two briefs. *See* Respondents-Appellants' Opening Brief in *Doe*, No. 19-1368, Document: 00117476953, at 34 ("Unlike *Singh*, however, the Petitioner in this case did not make any claim of prolonged detention; indeed, at the time he filed his habeas petition on October 30, 2018, he had been detained just over two months."); *see also* Respondents-Appellees' Principal and Response Brief, No. 20-1037, Document: 00117617441, at 38 ("Unlike *Singh*, however, the Petitioners' arguments did not rest on any claim of prolonged detention.").

therefore, entitled to a second bond hearing in both her habeas petition and in her opposition to the Government's motion to dismiss.

In fact, an entire section of her habeas petition was titled: "**Detention Has Been Prolonged Due to the Constitutionality Inadequate Bond Hearing**." *See* Resp't App. 015. Then, in her objection to the Government's motion to dismiss, Ana again proffered an entire section of the pleading titled: "**Because Ana's Detention Is Unreasonably Prolonged, Due Process Requires a Bond Hearing Where the Government Bears the Burden of Proof**." *See* Resp't App. 388. As such, *Singh* is very much applicable, because Ana challenged her prolonged detention and was, in fact, subject to prolonged detention for an unreasonable period of time.

In assessing whether the detention of criminal noncitizens pursuant to Section 1226(c) has become unreasonably prolonged, this Court has enumerated the following nonexclusive factors: "the total length of detention; the foreseeability of proceedings concluding in the near future (or in the likely duration of future detention); the period of detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order" (the "*Reid*

factors"). *Reid*, 819 F.3d at 500.[15] Each of the applicable[16] *Reid* factors demonstrates that Ana's detention was unreasonably prolonged.

First, Ana was detained for more than ten months. As the District Court aptly reasoned, "several courts have recognized that '[t]he country has seen a dramatic increase in the average length of detention since *Demore*.'" *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *16 (quoting *Hernandez v. Decker*, 2018 U.S. Dist. LEXIS 124613, at *33; *Diaz-Ceja*, 2019 U.S. Dist. LEXIS 110545, at *29) (Resp't App. 463). "In fact, the average time aliens spend in detention during the pendency of removal proceedings has increased by at least ten-fold. [Ana] provides a case in point: she has been detained for over 10 months (over 300 days)." *Hernandez-Lara*, 2019 U.S. Dist. LEXIS 124144, at *16–17 (Resp't App. 463–64).

[15] According to the Supreme Court's holding in *Zadvydas*, after six months, the detention of noncitizens who have had final removal orders entered against them is presumptively considered unreasonably prolonged, and the Constitution requires the government to justify detention at a new bond hearing. By contrast, in *Reid*, this Court applied an individualized reasonableness analysis to criminal noncitizens detained pursuant to Section 1226(c). Neither decision is exactly on point here, where Ana is a noncriminal noncitizen against whom no final removal order has issued. Because Ana's detention was clearly unreasonably prolonged, even under the *Reid* factors for *criminal* noncitizens, however, this Court need not decide the issue of *when* detention becomes unreasonably prolonged in the Section 1226(a) context.

[16] The factor that considers the period of detention as compared to the criminal sentence is inapplicable in this case, as Ana is a *noncriminal* noncitizen.

Second, even now, there is no foreseeable end to the conclusion of Ana's proceedings, as her removal proceedings are still pending. Because this Court granted her petition for review, her removal proceedings will begin anew.

Third, while the immigration authorities did not engage in delay tactics in this case, as this Court noted in *Reid*, detention could become unreasonable even in the absence of the Government's delay. 819 F.3d at 499. This is particularly true here, where there was no delay attributable to the noncitizen. *See* Resp't App. 392–94 (no evidence that Ana used dilatory tactics to delay her removal proceedings).

Fourth, there is a strong chance that Ana's proceedings will not culminate in a final removal order. This Court found Ana's claims in her petition for review meritorious when it vacated the BIA's removal order and remanded to the agency on June 15, 2020. *See Lara*, 962 F.3d at 58. Ana's relief from removal case is currently pending before the BIA. Based on this Court's opinion, it is likely that the BIA will remand her case to the Boston Immigration Court to allow her to present her immigration relief arguments there with the assistance of counsel.

In addition to the *Reid* factors, the fact that Ana's incarceration was under penal conditions at the Strafford County Department of Corrections further demonstrates the unreasonableness of her continued imprisonment. *See Chavez-Alvarez v. AG United States*, 783 F.3d 478 (3d Cir. 2015) (explaining that "we

cannot ignore the conditions of confinement" and that "merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures"); *Sopo v. United States AG*, 825 F.3d 1199, 1218, 1221 (11th Cir. 2016) ("Sopo's civil immigration detention is in a prison-like facility"); *Rocha v. Barr*, 422 F. Supp. 3d 472, 482 (D.N.H. 2019) (considering the imprisonment condition at the Strafford County Department of Corrections under the *Reid* analysis because it "is a penal facility").

And finally, the unreasonableness of Ana's prolonged detention is further established by the fact that her initial bond hearing, as detailed above, was not meaningful because she was required to shoulder the burden of proving lack of dangerousness.[17] *See supra* Section I.

For all these reasons, it is clear that Ana's detention was unreasonably prolonged and, accordingly, she was entitled to a new bond hearing in which the Government bore the burden by clear and convincing evidence.

[17] Further, Ana could not access the Immigration Court again for a subsequent hearing for bond reconsideration pursuant to 8 C.F.R. § 1003.19(e) because there were no material changes to her case to support such as a request—the ever-lengthening period of custody is not considered a material change by the Immigration Court. Without any material change in circumstances, Ana was foreclosed from pursuing another bond hearing and would remain detained while her removal hearing continued without a precise end date.

CONCLUSION

Petitioner-Appellee, Ana Ruth Hernandez-Lara, asks the Court to affirm the judgment of the District Court in all respects. Alternatively, this Court should find that, due to her prolonged detention, due process entitled Ana to a second bond hearing, at which the Government would need to justify her detention by proving she was a danger or a flight risk by clear and convincing evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, I certify that this Brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 Point Font.

Dated: September 30, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 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.

Dated: September 30, 2020

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