No. 20-1573

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KAREN ELIZABETH RIVERA-MEDRANO,

Petitioner – Appellee,

v.

ALEJANDRO N. MAYORKAS, Secretary, Department of Homeland Security; MARCOS CHARLES, Acting Field Office Director, Immigration and Customs Enforcement and Removal Operations,

Respondents – Appellants,

CHRISTOPHER BRACKETT, Superintendent, Strafford County Department of Corrections,

Respondent.

RESPONSIVE BRIEF FOR PETITIONER – APPELLEE

Appeal from the United States District Court
for the District of New Hampshire No. 20-cv-194-JD

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellee believes that oral argument will assist this Court in its consideration of the complex legal issues presented by this appeal. Resolution of these issues will have significant and far-reaching effects for Petitioner-Appellee and other noncitizens detained under 8 U.S.C. § 1231(a)(6). *See* Local Rule 34.0(a).

PRELIMINARY STATEMENT

Petitioner-Appellee Karen Elizabeth Rivera-Medrano is a 21-year-old asylum seeker who fled El Salvador when she was 18 years old because of sexual violence she suffered at the hands of her gang-affiliated stepfather. She does not speak or read English. She has no criminal record. She is subject to a reinstated order of removal and is applying for withholding of removal under the Immigration and Nationality Act ("INA") and protection under the Convention Against Torture ("CAT") (otherwise known as "withholding-only" proceedings). While her withholding-only proceedings were pending, Respondents-Appellants ("the government") subjected her to detention without a bond hearing at a pre-trial penal facility for more than eight months—from July 27, 2019 until her April 14, 2020 release by an Immigration Judge ("IJ") on bond after the District Court's April 4, 2020 habeas order requiring a bond hearing. Her withholding-only proceedings have lasted over 20 months since her initial detention, are ongoing, and are currently before this Court. *See Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. July 6, 2020).

Assuming that Ms. Rivera-Medrano was detained under 8 U.S.C. § 1231(a)[1],

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[1] There is a dispute in this case as to the government's detention authority. The government has maintained that noncitizens in "withholding-only" proceedings, like Ms. Rivera-Medrano, are subject to the post-final-order detention statute, 8 U.S.C. § 1231(a), and may be detained without a bond hearing for the duration of these proceedings. That interpretation is incorrect. Ms. Rivera-Medrano's custody

the central question in this case is whether 8 U.S.C. § 1231(a)(6) should be construed to require a bond hearing before a neutral decision maker after six months of incarceration for individuals like Ms. Rivera-Medrano who are pursuing bona fide claims to relief from removal that can take the government years to adjudicate and who have not engaged in dilatory tactics in seeking this relief.[2] The answer to this question is "yes."

Here, especially given that Ms. Rivera-Medrano's removal is not imminent and given that she has not engaged in dilatory tactics in seeking relief from removal, the District Court correctly interpreted Section 1231(a)(6) to provide Ms. Rivera-Medrano a bond hearing before an IJ after six months of detention to avoid

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is governed by 8 U.S.C. § 1226(a), which authorizes detention "pending a decision on whether [she] is to be removed from the United States," and entitles her to a bond hearing. There is a circuit split on this question, and the First Circuit has not addressed this issue. *Compare Guzman Chavez v. Hott*, 940 F.3d 867, 869 (4th Cir. 2019) (Section 1226 governs the detention of withholding-only proceedings); *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016) (same) *with Guerrero-Sanchez v. Warden York Cty. Prison*¸ 905 F.3d 208 (3d Cir. 2018) (8 U.S.C. § 1231 applies); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017) (same); *Martinez v. Larose*, 968 F.3d 555 (6th Cir. 2020) (same). In any event, this Court need not decide this question, as this issue is currently pending before the Supreme Court. *See Johnson v. Guzman Chavez*, No. 19-897. If the Supreme Court in *Guzman Chavez* finds that Section 1226 applies to noncitizens in "withholding-only" proceedings, then this Court should affirm the District Court's decision on that basis. In any event, for purposes of this appeal, Ms. Rivera-Medrano assumes—without conceding—that Section 1231 applied to her detention.

[2] A petition for certiorari is pending before the United States Supreme Court on a similar question. *See Garland v. Gonzalez*, No. 20-322. The petition was distributed for the Supreme Court's January 8, 2021 conference.

the serious constitutional questions that would otherwise be presented by her prolonged civil detention without a bond hearing. A29.[3] In support of this conclusion, the District Court relied on the Third Circuit's reasoning in *Guerrero-Sanchez v. Warden, York County Prison*, which joined the Ninth Circuit and held that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (i.e., 180 days) of custody." *See* A27; *Guerrero-Sanchez v. Warden, York County Prison*, 905 F.3d 208, 226 (3d Cir. 2018); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (noting that "[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound"); *Gonzalez v. Barr*, 955 F.3d 762, 786-788 (9th Cir. 2020) (*reaffirming Diouf* and citing *Guerrero-Sanchez*), *cert. petition pending* in No. 20-322; *but see Martinez v. Larose*, 968 F.3d 555, 565-66 (6th Cir. 2020) (declining to adopt the Third and Ninth Circuit's "general rule that aliens detained under § 1231(a) must receive a bond hearing after a specific lapse of time"). On appeal, this Court should join the Third and Ninth Circuits in establishing this general rule.

Contrary to the government's claims, Section 1231(a)(6) does not bar a bond hearing. The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), has

[3] All references to "A" and "R" indicate the government's Addendum and Record Appendix, respectively.

already held that Section 1231(a)(6) is "ambiguous," and interpreted this statute to contain an "implicit 'reasonable time' limitation" of six months, after which detention is permitted only if removal is "reasonably foreseeable" *and* there are sufficient public safety concerns to "justify[] confinement within that reasonable removal period." *Id.* at 682, 700-01; *see also Guerrero-Sanchez*, 905 F.3d at 223 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018)). The District Court's decision in this case simply reads the statute to require a procedure—a custody hearing before an IJ—to determine whether there are sufficient public safety or flight risk concerns to continue Ms. Rivera-Medrano's confinement beyond six months.

The District Court's ruling is consistent with *Zadvydas*. *Zadvydas* dealt with two noncitizens who were ordered removed after having been admitted to the United States, but the government could not locate a country amenable to receive them. As a result, the government sought to detain these noncitizens indefinitely under Section 1231(a)(6). *Zadvydas* "had no occasion to address the due process concerns posed by prolonged detention of someone" in Ms. Rivera-Medrano's situation, who is still seeking relief from removal and where no one knows how long her proceedings will last, and when, if ever, she may be deported. *See Guerrero-Sanchez*, 905 F.3d at 220. As the District Court correctly pointed out, the facts in *Zadvydas*, "where the removal order was final but was no longer

attainable," is distinguishable from Ms. Rivera-Medrano's situation, "where h[er] withholding-only claim was pending." A27.

Indeed, *Zadvydas* supports the relief that the District Court granted in this case. *Zadvydas* recognizes that due process requires that immigration detention "bear[] [a] reasonable relation" to a valid government purpose and be accompanied by adequate procedures to ensure that those goals are being served. *Zadvydas*, 533 U.S. at 690. *Zadvydas* recognizes that as the length of detention increases, so too do the procedures required to ensure detention is still justified. *Id.* at 691. Additionally, *Zadvydas* recognizes that—even if removal is reasonably foreseeable—detention is only permissible beyond six months if there is a sufficient "risk of the alien's committing further crimes" to warrant confinement during that period. *Id.* at 700. In sum, a bond hearing implements the statutory limit that *Zadvydas* recognizes.

There is no question that Section 1231(a)(6) can be read to afford IJ bond hearings after six months of detention, as the government's own regulations provide for heightened procedural protections after six months for all individuals under the statute, 8 C.F.R. § 241.4(k), release on bond pursuant to those procedures, 8 C.F.R. § 241.5(b), and IJ hearings for individuals deemed "specially dangerous" and subject to prolonged confinement. 8 C.F.R. § 241.14(k). These regulations prove that Section 1231 can be construed to provide bond hearings for

detentions that exceed six months.

Finally, the government argues for the first time in this case that these same regulations implementing *Zadvydas*—which provide for a paper-only custody review by Department of Homeland Security ("DHS") officials at six months, and permit release on bond, *see* 8 C.F.R. §§ 241.4(k), 241.5(b)—are sufficient to address any due process concerns.[4] *See* Govt's Brief at 28-30. Because the government never advanced this argument before the District Court, this argument has been waived. *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"). In any event, this paper-only review process is constitutionally deficient. Outside the national security context, the Supreme Court has never expressly upheld the constitutionality of detention beyond six months absent the bedrock due process protection of a hearing before a neutral decision maker. Furthermore, reading Section 1231(a)(6) to require only a paper review conducted by the jailing authority has resulted in the needless incarceration of individuals who pose no flight risk or danger—in some cases, for

[4] Given the government's position, it appears that the dispute in this case is narrow, as the parties apparently agree that (i) detention under Section 1231(a)(6) is discretionary, not mandatory, and (ii) the government must determine whether continued confinement is warranted after six months. The parties, however, disagree only about *how* that determination is to be made: at a hearing before a neutral IJ, or via paper review by DHS officials.

years. This is especially evident here where, as a result of this paper-only process, the government continued to detain Ms. Rivera-Medrano as a "flight risk," *see* R350, despite the fact that the IJ subsequently rejected this flight risk assessment during an April 14, 2020 in-person bond hearing after the District Court's April 4, 2020 decision. It seems that, were it not for the District Court's April 4, 2020 decision in this case requiring a bond hearing, Ms. Rivera-Medrano still would be detained today.

For these reasons and the reasons explained below, the District Court correctly found that the government's further detention of Ms. Rivera-Medrano beyond six months is not permitted under 8 U.S.C. § 1231(a)(6) and the Due Process Clause without a bond hearing at which the government justifies her detention under clear and convincing evidence. This Court should affirm the District Court's habeas order.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the District Court's April 4, 2020 order because it is a final decision of the U.S. District Court for the District of New Hampshire. *See* 28 U.S.C. §§ 1291, 1294(1).

STATEMENT OF THE ISSUES

1. Whether the District Court correctly concluded that Petitioner who is in withholding-only proceedings can no longer be detained beyond six months

under 8 U.S.C. § 1231(a)(6) without a bond hearing before an Immigration Judge, especially where (i) Petitioner's removal is not imminent given the pendency of these proceedings and (ii) Petitioner, as the District Court found, is not pursuing immigration relief in bad faith or engaging in dilatory tactics.

2. Alternatively, whether Petitioner's prolonged detention without a bond hearing during the pendency of her withholding-only proceedings violates the Due Process Clause under the reasonableness standard adopted by this Court in *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016), *vacated and remanded in part*, Nos. 14-1270, 14-1803, 14-1823, 2018 U.S. App. LEXIS 23859, 2018 WL 4000993 (1st Cir. May 11, 2018).

3. Whether the District Court correctly concluded that, at a bond hearing under 8 U.S.C. § 1231(a)(6), the government must bear the burden by clear and convincing evidence to justify continued confinement.

STATEMENT OF THE CASE

The central question in this case is whether 8 U.S.C. § 1231(a)(6) should be construed to require a bond hearing before a neutral decision maker after six months of incarceration for individuals like Petitioner Karen Elizabeth Rivera-Medrano who are pursuing bona fide claims to relief from removal that can take the government years to adjudicate and who have not engaged in dilatory tactics in seeking this relief.

Ms. Rivera-Medrano is a 21-year-old asylum seeker who fled El Salvador when she was 18 years old after being sexually assaulted by her gang-affiliated stepfather. A19. She does not speak or read English. The government subjected her to detention under 8 U.S.C. § 1231(a)(6) for more than eight months while her withholding-only proceedings were pending—from July 27, 2019 until her April 14, 2020 release by an IJ on bond after the District Court's April 4, 2020 habeas order requiring a bond hearing. A21. At no point during this eight-month period did the government provide Ms. Rivera-Medrano a bond hearing to determine if she posed a flight risk or a danger to the community. A21.

On February 3, 2020, Ms. Rivera-Medrano filed a petition for a writ of habeas corpus in the District Court for the District of New Hampshire, arguing that her detention without a bond hearing violated 8 U.S.C. § 1231(a)(6) and the Fifth Amendment's Due Process Clause. A19. Ms. Rivera-Medrano argued that, even assuming she was detained under 8 U.S.C. § 1231(a)(6) instead of 8 U.S.C. § 1226(a), her detention had become unconstitutional by exceeding a reasonable period of time without a bond hearing. R7-33.

On April 4, 2020, the District Court granted her habeas petition. R18-30. On April 14, 2020, an IJ granted her release on a $3,000 bond at a bond hearing at the Boston Immigration Court because the government could not justify her detention by clear and convincing evidence. Though the BIA subsequently

reversed this bond decision on November 18, 2020, Ms. Rivera-Medrano is currently not being detained while she pursues relief in her withholding-only proceedings, including before this Court in a petition for review. *See Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. July 6, 2020).

STATUTORY AND LEGAL BACKGROUND

A. Withholding-Only Proceedings

When the government believes that an individual who has previously been removed has reentered the United States without authorization, the removal order may be "reinstated from its original date." 8 U.S.C. § 1231(a)(5).

While the reinstatement process generally allows for summary expulsion without any opportunity to appear before an IJ, DHS's regulations create an "exception" for those who express a fear of being harmed in the country of removal. 8 C.F.R. § 241.8(e). The regulations implement the United States's non-refoulment obligations under the CAT and statutory withholding of removal. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478-01 (Feb. 19, 1999); 8 U.S.C. § 1231(b)(3). Under the regulations, a DHS asylum officer first determines whether the individual "has a reasonable fear of persecution or torture." 8 C.F.R. § 208.31(e). Those whom the DHS officer has found to have a "reasonable fear" are placed in withholding-only proceedings before an IJ, where they can apply for

withholding of removal and protection under the CAT. *See* 8 C.F.R. § 208.31(e); 8 C.F.R. § 208.16(b).

Withholding of removal is required where an individual's "life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). CAT protection is afforded to those who establish that "it is more likely than not that [they] would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Both withholding and CAT relief are mandatory: "the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility." *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

Withholding-only proceedings before an IJ operate much like ordinary removal proceedings. Individuals in withholding-only proceedings receive the full panoply of procedures available to individuals in removal proceedings under 8 U.S.C. § 1229a, including the right to present and confront evidence. *See generally* 8 C.F.R. § 1208.31(e). However, in withholding-only proceedings, the IJ may adjudicate only claims for withholding and CAT relief.

The IJ's decision in withholding-only proceedings is appealable to the BIA by the noncitizen or the government. *See* 8 C.F.R. § 1208.31(e). If the BIA rules against the noncitizen, the noncitizen may petition for review of the decision by the court of appeals. *See* 8 U.S.C. § 1252(a)(1). A petition for review must always be

filed within 30 days of "the date of the final order of removal." *See* 8 U.S.C. § 1252(b)(1); *see also Garcia v. Session*, 856 F.3d 27, 35 (1st Cir. 2017). Those found to have *bona fide* claims by DHS are entitled to remain in the United States during administrative proceedings and, if granted a stay of removal by the circuit court, pending judicial review. This legal process routinely takes longer than six months, and often takes years. *See, e.g.*, *Martinez v. LaRose*, 968 F.3d 555, 557-558 (6th Cir. 2020) (pending withholding-only case that has lasted almost three years); *Gonzalez v. Sessions*, 325 F.R.D. 616, 622, 626 (N.D. Cal. 2018) (certifying class of individuals detained six months or longer pending withholding-only proceedings); *see also* David Hausman, Fact-Sheet: Withholding-Only Cases and Detention, ACLU Immigrants' Rights Project 2 (Apr. 19, 2015), perma.cc/35PC-GBH6.

B. Prolonged Detention Under Section 1231(a)

The INA generally provides two sources of detention authority: the detention of individuals whose immigration proceedings are pending is governed by 8 U.S.C. § 1226, while that of noncitizens whose legal process has concluded in a final order of removal that merely awaits execution is governed by 8 U.S.C. § 1231. Section 1226 authorizes the detention of a noncitizen "pending a decision on whether [the noncitizen] is to be removed from the United States." 8 U.S.C. § 1231(a). Unless subject to mandatory detention provisions not at issue here, a noncitizen detained under Section 1226 may be released on bond or on conditions

and is entitled to a bond hearing before an IJ.

By contrast, Section 1231 applies to the detention of noncitizens whose immigration proceedings have concluded. Subject to certain exceptions, Section 1231(a)(1) requires the removal of individuals with final administrative removal orders during a 90-day "removal period." 8 U.S.C. § 1231(a)(1)(B).

During this 90-day "removal period," Section 1231(a)(2) requires that DHS "shall detain the alien," and may not release those found inadmissible or deportable on certain grounds. *See* 8 U.S.C. § 1231(a)(2). However, the statute provides that individuals "*may* be detained beyond the [90-day] removal period" where the individual is deportable or inadmissible on certain grounds, or "has been determined . . . to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6) (emphasis added). Thus, after 90 days, the statute does not require detention, but rather provides that it "may" continue when, *inter alia*, the individual presents a risk of danger or flight.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court found Section 1231(a)(6) "ambiguous" as to the length of detention it authorized. *Id.* at 697. Applying the doctrine of constitutional avoidance, the Court construed Section 1231(a)(6) to contain an "implicit 'reasonable time' limitation" of six months. *Id*. at 682. After six months, the Court concluded, the statute permits continued detention only if: (1) there is a "significant likelihood of removal in the

reasonably foreseeable future"; and (2) there is sufficient "risk of the alien's committing further crimes" to warrant confinement during that period. *Id*. at 700-01.

The Supreme Court has twice reaffirmed *Zadvydas*'s construction of Section 1231(a)(6). *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018); *Clark v. Martinez*, 543 U.S. 371, 379 (2005). In *Jennings,* the Court held that two other immigration detention statutes—8 U.S.C. § 1225(b) and 8 U.S.C. § 1226(c)—could not be read to require bond hearings after six months of detention, observing that "a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." *Jennings*, 138 S. Ct. at 844. Unlike Sections 1225(b) and 1226(c), the Court explained that Section 1231(a)(6) is "ambiguous" because it provides that the government "may" release people under the statute, does not specify a fixed period of confinement, and includes no "specific provision authorizing release." *Id*. at 844, 846; *see also Clark*, 543 U.S. at 378.

In the context of withholding-only proceedings, the Third Circuit joined the Ninth Circuit in holding that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (i.e., 180 days) of custody." *See Guerrero-Sanchez v. Warden, York County Prison*, 905 F.3d 208, 226 (3d Cir. 2018); *see also Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011); *Gonzalez v.*

Barr, 955 F.3d 762, 786-788 (9th Cir. 2020) (reaffirming *Diouf* by citing *Guerrero-Sanchez*), *cert. petition pending* in No. 20-322. The Sixth Circuit reached a different conclusion, though only in passing, without analysis, and where the petitioner did not raise this legal issue and then explicitly conceded it at argument. *See Martinez v. Larose*, 968 F.3d 555, 565-66 (6th Cir. 2020) (simply stating that, "[w]hile we concur with the Third and Ninth Circuits that Melara and similarly situated petitioners are detained under § 1231(a), we are not imposing a general rule that aliens detained under § 1231(a) must receive a bond hearing after a specific lapse of time, as those circuits did"). Petitioner asks this Court to join the Third and Ninth Circuits on this important question.

C. Regulations Under Section 1231

After *Zadvydas*, the government modified its regulations under Section 1231 to implement the decision. *See Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Fed. Reg. 56967-01 (Nov. 14, 2001).

Under the regulations now in place, DHS must conduct file custody reviews at set intervals for individuals detained under Section 1231: before the 90-day removal period expires; again at six months; and again one year after that. *See* 8 C.F.R. §§ 241.4(k), 241.13.

These paper-only administrative reviews, conducted by the jailing authority itself, provide:

- no in-person, adversarial hearing;
- no neutral decision-maker;
- no opportunity to call witnesses;
- no ability to challenge the government's evidence of flight risk and danger; and
- no administrative appeal.

Moreover, the individual bears the burden of proving a negative "to the satisfaction of" DHS—namely, that their release would not pose a danger to the community or significant flight risk. 8 C.F.R. § 241.4(d)(1).

Noncitizens whose removal is not reasonably foreseeable but have been designated as "specially dangerous" (because they have been convicted of certain violent crimes and are likely to commit a violent crime if released due to mental illness) are treated differently under the regulations. They do receive custody reviews by IJs at in-person, adversarial hearings. 8 C.F.R. §§ 241.14(f), (h), (i). At the hearing, the government "shall have the burden of proving, by clear and convincing evidence," that continued detention is warranted. *Id.* at 241.14(h)(1). For so long as the IJ orders continued detention, the noncitizen has the right to further periodic IJ hearings every six months. *Id.* at 241.14(k)(3).

STATEMENT OF FACTS

A. Ms. Rivera-Medrano's First Removal Proceedings

Petitioner Karen Elizabeth Rivera-Medrano was born in El Salvador. She came to the United States when she was 18 years old on November 27, 2017

seeking protection because of sexual violence perpetrated by her stepfather. A19; R12-13. When Ms. Rivera-Medrano was young, her stepfather physically hit and sexually assaulted her by inappropriate touching. R13. She, through her family members, contacted the police. R13. Yet her stepfather fled the scene prior to the police's arrival. R13. The police did not follow up with her family. R13.

In 2017, the stepfather appeared in town again and forced Ms. Rivera-Medrano to deliver a suspicious bag (which presumably contained drugs or weapons) to a possible gang member. R13. Later in the same year, the stepfather abducted and raped her at a nearby river. R13. She went to the police station immediately with her mother. R13. However, the police did not take any action. R13.

After this rape, Ms. Rivera-Medrano fled El Salvador and presented herself to the Customs and Border Protection ("CBP") at a port of entry to seek asylum on November 27, 2017, in Brownsville, Texas. A19; R13. CBP immediately detained her. A19. Subsequently, following her credible fear interview ("CFI"), the asylum officer found her fear credible and legally valid and referred her for a removal proceeding before the IJ to decide her asylum claim. A19.

On January 30, 2018, while *pro se*, Ms. Rivera-Medrano had a video hearing before an IJ from the San Antonio Immigration Court. A19; R70-85. At that hearing, the IJ failed to (i) advise her of the availability of *pro bono* legal service

providers and (ii) ascertain whether she had received a list of such providers. R70-85. This failure was a violation of 8 C.F.R. § 1240.10(a)(2). Similarly, even though the IJ told Ms. Rivera-Medrano that she had the right "to appeal the [Immigration] Court's decision[,]" the IJ did not ascertain whether she had received a document notifying her of her appeal rights. R70-85. This failure was another violation of the IJ's duties. *See* 8 C.F.R. § 1240.10(a)(3). Lastly, the IJ failed to provider her an option of withdrawal of an application for admission despite her being apparently eligible for the relief under 8 C.F.R. § 1235.4. Ms. Rivera-Medrano, who "was not represented by counsel, could not afford counsel, and did not speak English, . . . gave up her asylum claim because of the difficulty of representing herself." A19. Consequently, the IJ issued a final order of removal, and the government deported her to El Salvador.

B. Ms. Rivera-Medrano's Reinstatement of Removal and Withholding-Only Proceedings

Back in El Salvador, Ms. Rivera-Medrano feared her stepfather. As a result, she left El Salvador again on October 23, 2018. A20. She moved to Mexico and then attempted to present herself to CBP agents in July 2019, just as she did before on November 27, 2017. A20; R15. However, that option was not available because the Mexican police officers were blocking the path to the United States border. R15. Hence, she crossed the Rio Grande River on a raft and immediately surrendered herself to CBP on or about July 27, 2019. A20.

Because she was previously deported, CBP reinstated her prior removal order. A20. Because she expressed her fear of return, an asylum officer provided a reasonable fear interview ("RFI") to her in August 2019. A20. The asylum officer concluded that Ms. Rivera-Medrano's fear was credible and reasonably valid and thus referred her case to the Boston Immigration Court for withholding-only proceedings. A20; R91-116.

On October 9, 2019, while detained and *pro se*, Ms. Rivera-Medrano had her first hearing before an IJ at the Boston Immigration Court. R118-123. At that time, she was detained at the Suffolk County House of Corrections in Boston, Massachusetts. R119. At this hearing, the IJ advised her of various rights. The IJ also told her that she would "have a reasonable opportunity to examine . . . the evidence against [her.]" R120-121. The IJ gave her 13 business days to find legal representation and warned her that she might have to represent herself if she could not find counsel by October 29, 2019. R122-123. On October 10, 2019, one day after the first hearing, the government transferred her to the Strafford County Department of Corrections ("SCDOC") in Dover, New Hampshire. R125.

On October 29, 2019, Ms. Rivera-Medrano had her second hearing. R129-136. She represented herself. R131. The IJ continued her case to November 12, 2019 to have her prepare and submit an application for withholding of removal and CAT. R133-135.

On November 12, 2019, following the IJ's instruction, Ms. Rivera-Medrano—though she does not speak or read English—submitted her application for protection in English after using a dictionary and receiving assistance from her cellmates at the SCDOC. R140, 152.

On November 22, 2019, Ms. Rivera-Medrano had her last hearing before the IJ. R148-234. At the outset of the hearing—though the IJ provided instructions to her on how the proceedings would be conducted—the IJ did not remind her about her right to examine evidence to be used against her. R149-156. The IJ also asked whether she had any corroborating or other objective evidence in support of her relief. She said "no." R150. During the hearing, she went into detail about the sexual assault she experienced at the hands of her stepfather. R164-228. Due to this trauma, she frequently cried during her testimony, which led the IJ to offer her tissues and water and the opportunity for breaks. E.g., R165, 179-180, 186.

In the middle of the hearing and during Ms. Rivera-Medrano's cross-examination, counsel for DHS introduced the I-213 form and documents related to her 2017 CFI to the Immigration Court. R200. While the IJ asked Ms. Rivera-Medrano about the admission of the documents as part of record, he never offered or explained her right to have an opportunity to examine them. R200. As a result, Ms. Rivera-Medrano had to rely on her memory to answer the questions posed by the IJ and DHS counsel on purported inconsistencies between the information in

the CFI report and in-court testimony. While she received a copy of these documents at the hearing, this process was not meaningful since she could not read English.

At the end of her hearing, the IJ concluded her case. The IJ rejected Ms. Rivera-Medrano's withholding of removal and CAT protection claims based on an adverse credibility finding, primarily relying on DHS's cross-examination of Ms. Rivera-Medrano using the 2017 CFI and I-213 documentation that she could not even examine. R244-251. Despite this rejection, the IJ stated that, "[i]f the court were to have judged [her] credibility based on her testimony before the court upon being questioned by the court, then this court very well may have found [her] credible." R250. The IJ also noted that Ms. Rivera-Medrano's case "[wa]s a sympathetic case" and "it is clear that something happened to [her], which has affected her to this day." R246-247. Further, while the government also took the issue with the purported discrepancy as well, it "[did]n't dispute that this 2017 [sexual] assault occurred." R222.

On December 9, 2019, *pro se* Petitioner filed her notice of appeal to the BIA. R253. On January 10, 2020, Ms. Rivera-Medrano secured counsel for her BIA appeal. Ms. Rivera-Medrano also filed a motion to remand with corroborating evidence in support of her claims. R269-331. On June 30, 2020, the BIA dismissed Ms. Rivera-Medrano's appeal and denied her motion.

On July 6, 2020, Ms. Rivera-Medrano filed a petition for review of the BIA's decision with this Court. *See Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. July 6, 2020). On August 13, 2020, this Court granted her motion to stay removal during the review of her petition for review. *See* Petitioner-Appellee's Notice of Relevant Proceedings, No. 20-1573 (1st Cir. Aug. 17, 2020). This petition for review is pending before this Court as of the filing of this responsive brief.

C. Ms. Rivera-Medrano's Habeas Action At Issue in This Case

On February 3, 2020, while her BIA appeal was pending, Ms. Rivera-Medrano filed a petition for a writ of habeas corpus in the District Court for the District of New Hampshire. R7-33. At the time of filing her petition, she had been detained for more than six months (since July 27, 2019) without a bond hearing. The government asserts, however, that it conducted post-order custody reviews under 8 C.F.R. § 241.4 and determined "that she would be a flight risk if released and that her removal in the future is reasonably foreseeable." R350.

In her habeas petition, Ms. Rivera-Medrano argued that her prolonged detention without a bond hearing violated 8 U.S.C. § 1231(a)(6) and the Due Process Clause—even assuming that Section 1231(a)(6) governs the detention of withholding-only proceedings—for two reasons: first, her detention already lasted more than six months without any indication of when her withholding-only

proceedings would be completed; and second, even assuming no general six-month rule applies, the detention nonetheless exceeded a reasonable period of time under the reasonableness standard adopted by this Court in *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016). R7-33. Ms. Rivera-Medrano sought an individualized bond hearing to determine if her continued imprisonment was justified.

On March 17, 2020, the government moved to dismiss Ms. Rivera-Medrano's petition. R333-345. On April 4, 2020, the District Court denied the government's motion to dismiss and granted Ms. Rivera-Medrano's habeas petition. A18-30. First, the District Court noted that "it [wa]s unnecessary to decide which statute [8 U.S.C § 1231 or § 1226] governs Rivera-Medrano's detention." A25. The District Court held that, "[e]ven if § 1231(a) applies, as the [government] urge[s], Rivera-Medrano would be entitled to a bond hearing under the Due Process Clause of the Fifth Amendment." A25. Thus, the District Court "assume[d], without deciding, that § 1231(a) applies to Rivera-Medrano." A25.

Second, the District Court adopted the reasoning of the Third Circuit's decision in *Guerrero-Sanchez v. Warden, York County Prison*, 905 F.3d 208 (3d Cir. 2018) and held that Ms. Rivera-Medrano was entitled to a bond hearing because she "ha[d] been detained for more than eight months" and the government "acknowledge[d] ongoing [withholding-only] proceedings without an estimate of when they will conclude." A25. In support of this conclusion, the District Court

noted that the government "ha[d] not shown . . . that Rivera Medrano [wa]s pursuing that relief in bad faith or without a legal right to do so." A28.

Third, the District Court found that, at the bond hearing, "[t]he remedy for a prolonged detention" was for the government to "bear[] the burden of proving by clear and convincing evidence that [Ms. Rivera-Medrano] should not be released on bond." A29.

D. Events Since the District Court's Decision

Following the District's Court's April 4, 2020 decision, the IJ conducted a bond hearing on April 14, 2020. At the hearing, the government conceded that Ms. Rivera-Medrano was not a danger to the community. Instead, the government argued that she was a flight risk. *See* Exhibit 1, Motion for Judicial Notice, No. 20-1573 (1st Cir. Apr. 19, 2021).[5] However, the government did not submit any evidence in support of its flight risk argument. Conversely, Ms. Rivera-Medrano submitted extensive evidence, including the letters from the community pledging to support her financially and logistically. *See* Exhibit 2, Motion for Judicial Notice. After careful review, the IJ, on April 14, 2020, rejected DHS's argument, finding that "DHS did not offer evidence of [Petitioner] previously failing to

[5] This decision was issued in writing on May 29, 2020. Petitioner has concurrently filed a motion asking this Court to take judicial notice of this decision and other records referenced in this section. *See* Motion for Judicial Notice, No. 20-1573 (1st Cir. Apr. 19, 2021).

appear" and that DHS did not argue that Petitioner "had previously escaped from authorities or avoided prosecution." *See* Exhibit 1, Motion for Judicial Notice.

On November 18, 2020, the BIA reversed the IJ's release order. *See* Exhibit 3, Motion for Judicial Notice. In its decision, the BIA mistakenly believed that Ms. Rivera-Medrano's bond hearing was "conducted pursuant to *Brito v. Barr*, 395 F. Supp. 3d 135 (D. Mass. 2019)."[6] Moreover, the BIA held that the government met its burden despite the government having failed to submit any documentary evidence in support of its argument that Ms. Rivera-Medrano was a risk of flight. Because the BIA's decision constitutes an error of law[7], Petitioner filed a motion to enforce the habeas judgment before the District Court in order to prevent her

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[6] In the *Brito* class action lawsuit, the Court concluded, in part, that "due process requires the government prove at § 1226(a) bond hearings an alien's dangerousness by clear and convincing evidence or risk of flight by a preponderance of the evidence." *Brito v. Barr*, 415 F. Supp. 3d 258, 263 (D. Mass. 2019). This decision is currently on appeal before this Court and was argued on December 9, 2020. *See* Case Nos. 20-1037, 20-1119.

[7] There are several errors the BIA committed in its November 18, 2020 bond decision. In addition to incorrectly referencing *Brito* as the reason for the bond hearing, the BIA's decision casts aside the fact that DHS presented no tangible of evidence of risk of flight and ignores evidence presented by Ms. Rivera-Medrano demonstrating that she is not a flight risk. The BIA did not even address the IJ's finding of positive equities. Indeed, the BIA failed to analyze how DHS could have met the burden under clear and convincing evidence when it failed to submit any evidence to the IJ demonstrating that Ms. Rivera-Medrano is a flight risk. Lastly, while the BIA took administrative notice of its assessment that Ms. Rivera-Medrano had "no pending application for relief," this assessment was incorrect. On July 6, 2020, Ms. Rivera-Medrano had appealed to this Court the BIA's decision denying her withholding of removal. *See Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. July 6, 2020).

redetention. *See Rivera-Medrano v. Acting Sec'y, United States Dep't of Homeland Sec.*, No. 20-cv-194-JD, 2021 U.S. Dist. LEXIS 12585, at *3-4 (D.N.H. Jan. 22, 2021). Ultimately, Ms. Rivera-Medrano withdrew her motion because, on December 11, 2020, the parties reached an agreement whereby she would not be detained while her First Circuit Court of Appeals' petition for review (20-1667) and this appeal are pending so long as she complies with certain conditions. *See* Exhibit 4, Motion for Judicial Notice (reflecting parties' agreement, though the District Court declined to enter it as an order); *see also Rivera-Medrano v. Acting Sec'y, United States Dep't of Homeland Sec.*, No. 20-cv-194-JD, 2021 U.S. Dist. LEXIS 12585 (D.N.H. Jan. 22, 2021).

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error and its conclusions of law *de novo*. *Hilton v. Kerry*, 754 F.3d 79, 86 (1st Cir. 2007).

SUMMARY OF ARGUMENT

The District Court correctly held that Ms. Rivera-Medrano could not be detained for more than six months under Section 1231(a)(6) without a bond hearing at which the government must justify her detention by clear and convincing evidence, especially where her removal was not imminent and where she did not engage in dilatory tactics or seek relief from removal in bad faith.

Because Section 1231(a)(6) is ambiguous on this question, it should be read

to generally require a bond hearing at six months in light of the structure of the statute, the Supreme Court's reasoning in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and the severe constitutional concerns presented by prolonged detention without a hearing before a neutral decision maker. Both Sections 1231(a)(6) and 1226(a) contain the same operative language: that the government "may" detain certain individuals. Because Section 1226(a) has long been read to afford an IJ bond hearing, Section 1231(a)(6) can also be so read. And the District Court's decision to require such a hearing in this instance avoids the serious constitutional problems posed by permitting prolonged detention—which can last years—without a hearing before a neutral decision maker to determine that incarceration is required.

For these reasons, this Court should affirm the District Court's decision.

ARGUMENT

I. MS. RIVERA-MEDRANO WAS ENTITLED TO A BOND HEARING AFTER SIX MONTHS OF DETENTION UNDER 8 U.S.C. § 1231(a)(6) AND THE DUE PROCESS CLAUSE, ESPECIALLY WHERE HER REMOVAL WAS NOT IMMINENT AND WHERE SHE DID NOT ENGAGE IN DILATORY TACTICS OR SEEK RELIEF FROM REMOVAL IN BAD FAITH.

A. Prolonged Detention Without a Hearing Before a Neutral Decision Maker Presents Serious Constitutional Concerns.

The District Court's construction of Section 1231(a)(6) was necessary to avoid serious due process concerns arising from Ms. Rivera-Medrano's over six-month period of incarceration under the statute. Because Ms. Rivera-Medrano was

subjected to civil immigration detention, due process required an individualized hearing to determine if her imprisonment was justified.

The Due Process Clause prohibits prolonged incarceration without adequate procedural safeguards. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. Immigration detention, like all civil detention, is justified only where "it bears a reasonable relation to [its] purpose." *Id*. (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)). Thus, any incarceration incident to removal must both "bear[ ] [a] reasonable relation" to valid government purposes, and be accompanied by adequate procedural protections to ensure that there is a demonstrated need for detention. *Id*. The purpose of immigration detention is to protect against danger and flight risk while removal proceedings are pending. *Id*. at 690-91. Detention is thus arbitrary and violates due process where an individual does not pose a sufficient danger or flight risk.

The Due Process Clause protects at a minimum "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 277 (1855). Blackstone recognized the right to bail "in any Case whatsoever." 4 WILLIAM BLACKSTONE, ANALYSIS OF THE LAWS OF ENGLAND 148 (6th ed., Clarendon Press 1771). The

Framers brought that tradition to the Constitution and early federal statutes. *Jennings*, 138 S. Ct. at 863-64 (Breyer, J., dissenting).

Consistent with that tradition, the Supreme Court has repeatedly recognized that civil detention requires an individualized hearing before a neutral decision maker to ensure the person's confinement serves the government's goals. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on dangerousness, where the government bears the burden of proof by clear and convincing evidence); *Kansas v. Hendricks*, 521 U.S. 346, 374 (1997) (upholding civil commitment when there are "proper procedures and evidentiary standards," including an individualized hearing on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279-81 (1984) (upholding detention pending a juvenile delinquency determination where the government proves dangerousness in a fair adversarial hearing with notice and counsel). Because due process prohibits civil detention that is excessive in relation to the governmental interest, it also requires procedures to ensure that detention remains reasonable rather than excessive. *Salerno*, 481 U.S. at 747.

And when faced with prolonged confinement, the Supreme Court has

required heightened procedures to ensure that the length of detention remains reasonable in relation to its purpose. *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."); *Jackson*, 406 U.S. at 736 (holding that detention beyond the "initial commitment" for an individual found incompetent to stand for trial requires additional safeguards, including individualized consideration of dangerousness); *Foucha*, 504 U.S. at 76 n.4 (holding "insanity acquittees may be initially held" on less rigorous procedures, but must be afforded individualized hearings concerning flight risk or danger when detention is prolonged).

Applying these principles, the Supreme Court recognized in *Zadvydas* that detention under Section 1231(a) beyond six months presents serious constitutional concerns, observing that "Congress previously doubted the constitutionality of detention for more than six months." 533 U.S. at 701.

Here, Ms. Rivera-Medrano's entitlement to process is even stronger than in *Zadvydas,* which involved noncitizens who had exhausted their defenses to removal and been finally ordered removed. By contrast, Ms. Rivera-Medrano has been found to have a *bona fide* claim to relief that would prevent her removal, and as a result is entitled to remain in the United States for the time it takes to

adjudicate those claims. *See* 8 C.F.R. § 208.31(e). As explained above, this process often takes years.

B. *Zadvydas* and the District Court's Holding Provide Complementary Interpretations of Section 1231(a)(6).

The government argues that Section 1231(a)(6) cannot be read to authorize a bond hearing after six months for two reasons. First, the government contends that Section 1231(a)(6) "says nothing at all about bond." *See* Govt's Brief at 17-19. Second, the government contends that the District Court's decision is inconsistent with the rule in *Zadvydas* because Ms. Rivera-Medrano is not being subjected to indefinite detention where her removal cannot be effectuated, but rather is challenging her removal in withholding-only proceedings. *See* Govt's Brief at 22-28. The government is incorrect on both counts.

1. <u>Section 1231(a)(6) is ambiguous.</u>

Section 1231(a)(6) does not bar a bond hearing, and the Supreme Court in *Zadvydas* already held that this statute is ambiguous and therefore subject to a limiting construction that avoids lengthy detention without meaningful review. *See* *Zadvydas*, 533 U.S. at 697. The requirement of a bond hearing effectuates this limiting construction.

As the Third Circuit explained, this ambiguity exists "because § 1231(a)(6), unlike other provisions in the INA, does not provide for detention for a specified period of time, uses the word 'may' to describe the detention authority rather than

'shall,' and lacks an express exception to detention provided for in the provision." *Guerrero-Sanchez*, 905 F.3d at 223; *compare* 8 U.S.C. § 1231(a)(2) (providing the Attorney General "shall detain" and [u]nder no circumstance during the removal period . . . release" individuals inadmissible or deportable on certain grounds). Moreover, the statute is silent as to the custody procedures required to implement it.

The government's position ignores the application of the doctrine of constitutional avoidance in the face of this ambiguity. Under this doctrine, this Court should "not to reach constitutional issues where alternative grounds for resolution are available." *See Am. Civil Liberties Union v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir. 2013). This doctrine "comes into play when there are 'two plausible constructions' of a statute." *See United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2011). For over a century, the federal courts have construed immigration statutes to include additional procedures to avoid due process problems. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (construing immigration statute to require hearing to avoid constitutional problem); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (same). Here, Section 1231(a)(6) is ambiguous on the issue of whether it "authorize[s] long-term detention" of noncitizens without a bond hearing—an ambiguity that requires an assessment of what procedures are constitutionally required under the statute to protect the liberty

interests that are impacted during such long-term detention. *See Zadvydas*, 533 U.S. at 697.

In *Zadvydas*, the Supreme Court construed Section 1231(a)(6) to avoid the "serious constitutional problem" posed by the indefinite detention of noncitizens with final orders of removal whom the government could not remove due to repatriation issues with their countries of origin. 533 U.S. at 690. In so doing, the *Zadvydas* Court interpreted Section 1231(a)(6) to "contain an implicit 'reasonable time' limitation" of six months to avoid the "serious constitutional problem" posed by the prolonged detention of noncitizens whose removal was not reasonably foreseeable. *Id.* at 682. The Court concluded that it was "fairly possible" to read an implicit limitation into Section 1231(a)(6) because it provides that the Attorney General "may" detain. Detention under the statute is permissible only if removal is "reasonably foreseeable" *and* there is "risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period." *Id.* at 700-01. Thus, *Zadvydas* interpreted Section 1231(a)(6) to require an assessment of the need for continued confinement in all cases exceeding six months. *Id.* As applied to Ms. Rivera-Medrano, a bond hearing implements the statutory limit that *Zadvydas* recognizes.

Finally, while the government argues that Section 1231(a)(6) cannot be read to require IJ bond hearings because the statute "says nothing at all about bond," *see*

Govt's Brief at 17, the government's own regulations implementing Section 1231(a)(6) contradict this interpretation. For example, these regulations provide the following: custody reviews at six months (a rule promulgated to implement *Zadvydas*); release on bond pursuant to those custody reviews; and a hearing before an IJ for individuals deemed "specially dangerous." 8 C.F.R. §§ 241.4, 241.5(b), 241.13, 241.14(a)(2), (f-k). While the government claims that Section 1226(a) and Section 1231(a)(6) differ because Section 1226(a) provides that the government "may release the alien . . . on bond"—whereas Section 1231(a)(6) does not expressly mention "bond" as a condition of release, *see* Govt's Brief at 19—another regulation the government ignores already construes Section 1231(a)(6) to authorize release *on bond* following a custody review under the statute. *See* 8 C.F.R. § 241.5(b) (providing that release order under Section 1231(a)(6) "may require the posting of a bond").

2. The District Court's Decision is Consistent with *Zadvydas.*

The District Court's decision is consistent with *Zadvydas*. *Zadvydas* concerned two noncitizens who were ordered removed after having been admitted to the United States, but the government could not locate a country amenable to receive the deportable aliens. As a result, the government sought to detain these noncitizens indefinitely under Section 1231(a)(6). As the Third Circuit correctly noted in *Guerrero-Sanchez*—which was adopted by the District Court in this

case—*Zadvydas* "had no occasion to address the due process concerns posed by prolonged detention of someone" like Ms. Rivera-Medrano who is still seeking relief from removal. *See Guerrero-Sanchez*, 905 F.3d at 220. Rather, *Zadvydas* addressed only the detention of noncitizens who have "exhausted all administrative and judicial challenges to removal, including applications for relief from removal, and are only waiting for their removal to be effectuated." *Id.*

Indeed, *Zadvydas* supports the relief that the District Court granted in this case. *Zadvydas* recognizes that due process requires that immigration detention "bear[] [a] reasonable relation" to a valid government purpose and be accompanied by adequate procedures to ensure that those goals are being served. *Zadvydas*, 533 U.S. at 690. *Zadvydas* recognizes that as the length of detention increases, so too do the procedures required to ensure detention is still justified. *Id.* at 691. In other words, the District Court faithfully applied *Zadvydas*'s holding that Section 1231(a)(6) contains an "implicit 'reasonable time' limitation" of six months, after which the government must make a showing justifying the detention. *Zadvydas*, 533 U.S. at 682, 701.

The government suggests that the limitation *Zadvydas* read into Section 1231(a)(6) is confined to cases in which removal is not reasonably foreseeable. *See* Govt's Brief at 6-7, 24. Setting aside the fact that Ms. Rivera-Medrano's removal is ***not*** imminent because she is seeking relief from removal, *Zadvydas*

contains no such limitation. *Zadvydas* held that, *even if removal is reasonably foreseeable*, detention is only permissible beyond six months if there is a sufficient "risk of the alien's committing further crimes" to warrant confinement during that period—an assessment that requires an evaluation of dangerousness and flight risk. *Id.* at 700. A bond hearing implements this statutory limit that *Zadvydas* recognizes. Moreover, simply because the government was unable to deport the noncitizens in *Zadvydas* does not mean that this is the *only* factual context in which *Zadvydas*'s interpretation of Section 1231(a)(6) applies. *See Guerrero-Sanchez*, 905 F.3d at 221 ("While *Zadvydas* limited the *substantive* scope of § 1231(a)(6)," it left open "construing § 1231(a)(6) to include additional *procedural* protections during the statutorily authorized detention period," to avoid constitutional concerns); *see also NLRB v. Canning*, 573 U.S. 513, 589 (2014) (noting the "fallacy of the inverse") (Scalia, J. concurring).

C. The District Court's Holding Does Not Conflict with the Supreme Court's Decision in *Jennings v. Rodriguez*.

The government also asserts that the District Court's holding conflicts with *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). *See* Govt's Brief at 19-22. In *Jennings*, the Supreme Court reversed a ruling by the Ninth Circuit holding that 8 U.S.C. § 1226(a) could not read to require periodic custody hearings under the canon of constitutional avoidance. Under the government's theory, because Section 1226(a)'s "may be released" language does not "even remotely support[]

the imposition of" periodic bond hearings, *see* 138 S. Ct. at 847, the District Court's holding is likewise erroneous because Section 1231(a) "does not set forth a bond-hearing requirement." *See* Govt's Brief at 20. This Court should reject this argument for two reasons.

First, *Jennings* reaffirmed *Zadvydas*'s application of the constitutional avoidance canon to Section 1231(a)(6). The *Jennings* Court noted that, unlike 8 U.S.C. §§ 1226 and 1225, "Congress left the permissible length of detention under § 1231(a)(6) unclear." *See Jennings*, 138 S. Ct. at 844. The *Jennings* Court also reaffirmed that Section 1231(a)(6) is "ambiguous" because it does not specify a fixed period of confinement, provides that the government "may" release people under the statute, and includes no "specific provision authorizing release" in limited circumstances. *Id*. at 844, 846. Again, this ambiguity permits Section 1231(a)(6) to be construed to provide for a bond hearing consistent with the statutory limit recognized in *Zadvydas*. Moreover, Section 1231(a)(6) contains no "specific provision authorizing release," unlike Section 1225 and 1226. *Id*. at 844, 846. In other words, throughout its opinion in *Jennings*, the Supreme Court repeatedly underscored that "a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." *Id*. at 844; *see also id*. at 846-47, 850 ("As we have explained, the key statutory provision in *Zadvydas* said that the [noncitizens] in question 'may,' not 'shall,' be detained, and

that provision also failed to specify how long detention was to last.”).

Second, to the extent that Section 1226(a)’s “may be released” language appears similar to Section 1231(a)(6)’s “may be detained” language, the government claims that *Jennings* rejected an unstated bond-hearing requirement under Section 1226(a), and therefore requires rejecting that requirement for Section 1231(a)(6). *See* Govt’s Brief at 21. This argument is incorrect. The *Jennings* Court held that Section 1226(a) cannot be read to require “*periodic* bond hearings every six months” because Section 1226(a)’s text did not support this requirement. In so holding, the Court was focused on “periodic bond hearings.” Here, Ms. Rivera-Medrano is not advancing a claim that Section 1231(a)(6) must be construed to provide a *periodic* bond hearing every six months, and the District Court did not order such “periodic” hearings. Rather, what Ms. Rivera-Medrano argued before the District Court is that construing Section 1231(a)(6) to allow the government to detain her for more than six months without *a bond hearing* would raise constitutional concerns and violate the Due Process Clause. Nothing in *Jennings* suggested that Section 1226(a) did not require bond hearings *at all*—which is the issue here in interpreting Section 1231(a)(6). To the contrary, *Jennings* expressly observed that noncitizens “detained under § 1226(a) receive bond hearings at the outset of detention.” 138 S. Ct. at 847 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)). *Jennings* therefore provides no reason to question the

bond hearing requirement under either Section 1226(a) or 1231(a)(6).

The government suggests that this Court should adopt the Sixth Circuit's holding in *Martinez v. Larose*, 968 F.3d 555 (6th Cir. 2020), and reverse the District Court's decision to provide a bond hearing. *See* Govt's Brief at 22. In *Martinez*, the Sixth Circuit found that no bond hearing can be provided under Section 1231(a)(6). 968 F.3d at 565-66. But the Sixth Circuit reached this conclusion in a cursory paragraph without any meaningful analysis. And for good reason: the conclusion reached in *Martinez* was not even presented and was raised by the Sixth Circuit *sua sponte*. The noncitizen there did not argue that he had a right to a hearing under Section 1231(a)(6). He made only two arguments: (1) that he was entitled to a hearing under Section 1226(a) (the issue currently being considered by the Supreme Court in *Johnson v. Guzman Chavez*, No. 19-897); and (2) that, because his detention itself violated due process, he was entitled to outright release (or, alternatively, a bond hearing). He also expressly conceded that Section 1231 cannot be read to require a bond hearing following *Jennings*. *See* Appellant's Opening Brief at 3, *Martinez v. LaRose*, No. 19-3908 (6th Cir. Nov. 6, 2019) Dkt. 26 (stating that Section 1231(a) "does not require bond hearings"). As explained above, however, the petitioner's apparent concession concerning Section 1231 and *Jennings* was incorrect. The *Martinez* Court also never addressed *Zadvydas*'s construction of Section 1231, the textual differences

the Supreme Court identified between the statutes at issue in *Jennings* and Section 1231, or DHS's own existing regulations providing for IJ hearings under Section 1231. Nor did the *Martinez* Court meaningfully engage with the thorough analyses from the Third and Ninth Circuits.

D. The Custody Review Process is Constitutionally Inadequate.

The government erroneously argues that the existing DHS regulations providing for periodic custody reviews are sufficient to protect Ms. Rivera-Medrano's liberty interests. *See* Govt's Brief at 28-30. The government claims that the District Court ignored this argument. However, the government never raised this claim before the District Court, and therefore it is waived. R333-345; *see also Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 51 (1st Cir. 2006) ("Under the familiar raise-or-waive rule, legal theories not asserted in the lower court cannot be broached for the first time on appeal.").

Even if this Court entertains this argument, this argument lacks merit. Due process requires an in-person bond hearing before a neutral decision maker, rather than a mere "paper review" done by the jailing agency. The requirement of an in-person hearing is clear from *Zadvydas*. However, under DHS's "paper review" process, the detainee cannot present witnesses, or even see (let alone challenge) the government's evidence. And there is no appeal. *See* 8 C.F.R. § 241.4(d). The Supreme Court emphasized that Section 1231(a)(6) raises constitutional concerns

partly because the "sole procedural protections" are administrative, lack judicial review, and place the burden of proof on the detainee. *See Zadvydas*, 533 U.S. at 691-92. The *Zadvydas* Court also observed that it had required more robust procedures even for the protection of property. *See id*. at 692 (citing, *inter alia*, *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., concurring)).

Unsurprisingly, the existing procedures can result in unjustified prolonged incarceration. In one case, an individual detained for seven years had received a single DHS file review deeming him a flight risk, with no notice, no interview or opportunity to contest the government's findings, and no appeal. *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951-52 (9th Cir. 2008); *see also Diouf*, 634 F.3d at 1092 (describing individual detained nearly two years based on DHS paper custody reviews, only to be released by an IJ after a bond hearing where he was found to pose no flight risk or danger); *Hamama v. Adducci*, 285 F. Supp. 3d 997, 1018 n.12 (E.D. Mich. 2018), *rev'd on other grounds*, 912 F.3d 869 (6th Cir. 2018), *cert. denied*, No. 19-294, 2020 WL 3578681 (U.S. July 2, 2020) (noting, in class action challenging prolonged detention, the "strong evidence" that custody reviews for class members "were not undertaken in a good faith effort to detain only those who were flight and safety risks" and that "[v]irtually every detainee who had a . . . review was denied release, and given a terse written statement that the Government was still interested in removing the detainee; there is no indication

that any legitimate bond issue was even considered").

Zadvydas follows from a long line of due process case law clarifying that the Constitution requires in-person hearings—rather than mere paper reviews—where significant interests are at stake. *See supra* Section I.A (citing cases). The Supreme Court had also held that the government may not terminate welfare benefits or public utilities, or even recover excess Social Security benefits, without providing an in-person hearing. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (government's failure to provide an in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Memphis Light, Gas & Water Div. v. Craft*, 98 S. Ct. 1554, 1564 (1978) (due process requires, at a minimum, an opportunity for utility clients to argue cases with designated employees prior to termination of their utilities); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (in-person hearing required for recovery of excess Social Security payments where beneficiary was at fault because "written review hardly seems sufficient to discharge the Secretary's statutory duty to . . . assess the absence of 'fault'"). It follows logically from these cases that when physical liberty is at stake, the Constitution requires an in-person hearing, especially when the government seeks to deprive persons of their liberty for a prolonged period of time.

Ms. Rivera-Medrano's case is a perfect example of why the role of a neutral

decision maker is critical—in this case, an IJ. During Ms. Rivera-Medrano's detention, ICE apparently conducted post-order custody reviews under 8 C.F.R. § 241.4(d), and concluded that Ms. Rivera-Medrano should be detained as a flight risk. R350. Despite these reviews, the same IJ who previously denied her withholding of removal and CAT protection claims based on purported discrepancies between fear interview notes and her in-court testimony granted her bond on April 14, 2020 after careful consideration of all the evidence submitted by Ms. Rivera-Medrano. The IJ concluded that Ms. Rivera-Medrano was not a flight risk. *Compare* R237 *with* Exhibit 1, Motion for Judicial Notice. In this case, were it not for the District Court's decision, Ms. Rivera Medrano could still be in detention today—which would have accumulated to over 20 months as of the filing of this responsive brief.

Further, the requirement of an in-person bond hearing is also supported by the application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 334-45 (1976). The Third Circuit in *Guerrero-Sanchez* applied this balancing test to find that a bond hearing is required. 905 F.3d at 225-26. Here, Ms. Rivera-Medrano's liberty interest is recognized as the highest of individual rights. "Under § 1231(a)(6), '[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound' and 'the risk of an erroneous deprivation of liberty in the absence of a hearing

before a neutral decisionmaker is substantial.'" *Id*. (quoting *Diouf*, 634 F.3d at 1091-92). Indeed, the risk of error is apparent in this case where the government elected to detain Ms. Rivera-Medrano as a flight risk following post-order custody reviews, *see* R350, yet the IJ ultimately concluded that she was not a flight risk during her April 14, 2020 bond hearing. Lastly, the potential burden on the government "of requiring a bond hearing before an immigration judge is diminished in light of [the] estimation that the incidence of these hearings will be manageable since the vast majority of removal orders are executed well before six months." *Guerrero-Sanchez*, 905 F.3d at 225. Thus, this Court should require the government to provide a bond hearing once the detention of a noncitizen in withholding-only proceedings exceeds six months, absent dilatory tactics or imminence of removal.

E. The District Court Correctly Applied this Six-Month General Rule Upon Finding that Ms. Rivera-Medrano's Removal Was Not Imminent and She Did Not Engage In Dilatory Tactics or Seek Relief from Removal in Bad Faith.

The District Court correctly applied the general rule above—namely, that a detained noncitizen in withholding-only proceedings is generally entitled to a bond hearing after six months of custody—to Ms. Rivera Medrano where her removal was not imminent and where she did not engage in dilatory tactics or seek relief from removal in bad faith.

First, the District Court correctly acknowledged that removal was not

imminent here given the pendency of her withholding-only proceedings. As the District Court noted, the government "acknowledge[] on going proceedings without an estimate of when they will conclude." A29; *see also Guerrero-Sanchez*, 905 F.3d at 226 n.15 (agreeing with the Ninth Circuit that, if the 180-day threshold has been crossed, but the alien's release or removal is imminent, then the government is not required to afford the alien a bond hearing before an immigration judge).

Second, the District Court correctly made factual findings that the government had failed to show that Ms. Rivera-Medrano "is pursuing … [immigration] relief in bad faith or without a legal right to do so." A28. There is no basis to overturn this factual finding under the deferential "clear error" standard of review. *See Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 152 (1st Cir. 1990) (under clear error review, noting that "Rule 52(a) commands, and our precedents ordain, that deference be paid to the trier's assessment of the evidence"). Contrary to the government's characterization of the cause of prolonged detention, the only continuance Ms. Rivera-Medrano requested before the IJ was to seek counsel. R129-136. This continuance was merely for thirteen business days (even then, the government transferred her to a remote facility one day after her first hearing). R129-136. This Court previously emphasized that noncitizens' statutory right to counsel "is a fundamental procedural protection

worthy of particular vigilance." *See Hernandez Lara v. Barr*, 962 F.3d 45, 54 (1st Cir. 2020). As to the other continuance, it was the IJ who gave her time to submit an application for withholding of removal and CAT protection. R138-146. The government did not oppose this continuance. R138-146.

In short, throughout her immigration proceedings, Ms. Rivera-Medrano has diligently invoked her rights to contest her removal. Given Petitioner's diligence, the government, in effect, asks this Court to punish her for exercising her legal right to contest removal. *See* Govt's Brief at 24-25 ("Although she has the right to pursue these claims, doing so does not automatically translate into a right to live at liberty in the United States."); R350 (ICE claiming that Ms. Rivera-Medrano should be detained because "her removal in the future is reasonably foreseeable" despite the fact that she is contesting removal in proceedings that can last years). This Court, like the District Court, should reject this argument. *See* A28 (District Court holding that "[c]ourts generally do not consider bona fide immigration proceedings, initiated by the alien, as grounds to deny a bond hearing under § 1231(a)(6)."); *Reid*, 819 F.3d at 500 n.4 (noting that "there is a difference between 'dilatory tactics' and the exercise of an alien's rights to appeal"); *Guerrero-Sanchez*, 905 F.3d at 220; *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("We cannot 'effectively punish' these aliens for choosing to exercise their legal right to challenge the Government's case against

them.”), *abrogated in part on other grounds by Jennings*, 138 S. Ct. at 847; *Hoang Minh Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (same), *abrogated in part on other grounds by Jennings*, 138 S. Ct. at 847; *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1218 (11th Cir. 2016) (same), *vacated and dismissed as moot by*, 890 F.3d 952 (11th Cir. 2018).

II. ALTERNATIVELY, EVEN IF THIS COURT DECLINES TO ADOPT A GENERAL SIX-MONTH RULE, MS. RIVERA-MEDRANO’S DETENTION HAD BECOME UNREASONABLY PROLONGED UNDER THE REASONABLENESS INQUIRY IN *REID.*

Even if this Court declines to adopt a general six-month for the statutory interpretation of Section 1231(a)(6), this Court can still affirm the District Court’s holding because her detention had become unreasonably prolonged under the reasonableness inquiry in *Reid v. Donelan. See* 819 F.3d 486 (1st Cir. 2016), *vacated and remanded in part*, Nos. 14-1270, 14-1803, 14-1823, 2018 U.S. App. LEXIS 23859, 2018 WL 4000993 (1st Cir. May 11, 2018); *see also Rosaura Bldg. Copr 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).

Although this Court has yet to determine the question presented in this case implicating detention under Section 1231(a)(6), this Court in *Reid* previously addressed prolonged mandatory detention under 8 U.S.C. § 1226(c)—a statute that, unlike Section 1231(a)(6) which permits discretionary detention, governs the

mandatory detention of individuals whose immigration proceedings are pending. *Reid*, 819 F.3d at 494. This Court held that "[t]he concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns." *Id*. Accordingly, even though mandatory detention under Section 1226(c) is not "indefinite," this Court construed Section 1226(c) to include an implicit "reasonable" time limit on the period for which detention without a bond hearing was statutorily authorized under the doctrine of constitutional avoidance. *Id*. at 498-99. This Court declined to require a bond hearing after six months of detention. *Id*. at 495-97. Instead, this Court held that the reasonableness of mandatory detention must be assessed on an individual basis, in light of factors such as:

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

Id. at 500; *see also Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 211-13 (3d Cir. 2020) (adopting similar reasonableness inquiry for due process limitations to prolonged mandatory detention).[8]

Here, all of the *Reid* factors strongly weigh in Ms. Rivera-Medrano's favor.

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[8] Although *Jennings* abrogates the statutory holding of *Reid*, this Court's constitutional reasoning in *Reid* remains persuasive authority.

A. The Total Length of Detention

Ms. Rivera-Medrano's 8-month detention without a bond hearing was unreasonable in length. *See Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months."); *Guerrero-Sanchez*, 905 F.3d at 223-26 (same); *Diouf*, 634 F.3d at 1086 (same); *Gonzalez*, 955 F.3d at 787-88. Thus, the length of Ms. Rivera-Medrano's detention demands a bond hearing to determine if her imprisonment was justified.

B. The Foreseeability of Proceedings Concluding in the Near Future

Ms. Rivera-Medrano faced prolonged detention in the future, and her removal was not (and is not) imminent. Her withholding-only proceedings are still pending and will not conclude for a significant period of time. As the District Court noted, the government has been unable to provide "an estimate of when they will conclude." A29. In total, her case has been pending for over 20 months (since July 27, 2019), and it is currently before this Court. *See Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. July 6, 2020). Thus, Ms. Rivera-Medrano's appeal will not be decided for several months or years.

Moreover, should Ms. Rivera-Medrano prevail on her appeal, this Court likely will remand her case to the BIA to provide a new hearing on her withholding of removal and CAT protection claims, which will extend her proceedings at least for several additional years. Accordingly, the prospect of Ms. Rivera-Medrano's

future detention weighs strongly in favor of providing her a bond hearing.

C. Comparison to Criminal Sentence

This factor heavily weighs in favor of Ms. Rivera-Medrano since she has no criminal history in the United States or elsewhere.

D. Promptness or Delay

As set forth above, Ms. Rivera-Medrano did not cause any delay of her withholding-only proceedings. *See supra* Section I.E. Once again, the District Court in this case appropriately made the factual finding that the government had failed to show that she is pursuing relief "in bad faith or without a legal right to do so." A28. This Court should not punish her for exercising her legal rights in contesting removal.

E. Likelihood of a Final Removal Order

It is unlikely that Ms. Rivera-Medrano's withholding-only case will be dismissed by this Court. She has raised meritorious defenses against removal. In particular, she has raised strong arguments on appeal that the IJ violated her statutory right to examine evidence against her under 8 U.S.C. § 1229a(b)(4)(B). *See* Pet's Brief at 22-33, *Rivera-Medrano v. Garland*, No. 20-1667 (1st Cir. Sept. 22, 2020). Moreover, this violation caused significant prejudice to her case because, if given the opportunity, she could have provided reasonable explanations on the purported discrepancies between her in-court testimony and credible fear

interview notes. A reasonable explanation is likely to have convinced the IJ to find that her testimony was credible.

F. Detention Conditions

Lastly, the detention conditions at the SCDOC demonstrate that Ms. Rivera-Medrano's detention was unreasonable. Despite being a civil immigration detainee, Ms. Rivera-Medrano was detained under penal conditions—first, at the Suffolk County House of Corrections in Massachusetts and, second, at the SCDOC in New Hampshire. Such conditions rendered her continued imprisonment unreasonable. *See Chavez-Alvarez*, 783 F.3d at 478 (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*, 825 F.3d at 1218, 1221 ("Sopo's civil immigration detention is in a prison-like facility").

In sum, Ms. Rivera-Medrano's detention has exceeded a reasonable period of time, and she was entitled to an individualized bond hearing.[9]

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[9] If this Court holds that 8 U.S.C. § 1231(a)(6) could not be read to require a hearing at which the government must justify prolonged detention of Ms. Rivera-Medrano, it must find that Section 1231(a)(6) is unconstitutional as applied to Ms. Rivera-Medrano.

III. THE DISTRICT COURT CORRECTLY FOUND THAT THE GOVERNMENT MUST JUSTIFY MS. RIVERA-MEDRANO'S DETENTION AT A BOND HEARING UNDER A CLEAR AND CONVINCING EVIDENCE STANDARD.

The District Court correctly held that, at the bond hearing, due process requires that the government prove that Ms. Rivera-Medrano's prolonged detention is justified by clear and convincing evidence. The Supreme Court has repeatedly made clear that when the government seeks to deprive an individual of a "particularly important individual interest[]," due process requires that it bear the burden of proof by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 424, 427 (1979) (holding that "[t]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"); *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence in parental termination cases); *Woodby*, 385 U.S. at 285, 286 (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt v. United States*, 364 U.S. 350, 354-55 (1960) (requiring the same for denaturalization cases).

The Supreme Court has often relied on the fact that the government bears the burden of proof to find civil detention constitutional. *See*, *e.g.*, *Salerno*, 481 U.S. at 750 (holding the Bail Reform Act constitutional in part because the statute requires that "the Government must convince a neutral decisionmaker by clear and

convincing evidence that no conditions of release can reasonably assure the safety of the community or any person"); *Hendricks*, 521 U.S. at 352-57 (upholding statute enabling civil commitment of sex offenders because it "unambiguously requires a finding of dangerousness either to one's self or to other" in jury trial in which the state bears burden of proof); *Foucha*, 504 U.S. at 82 (finding that the "statute places the burden on the detainee to prove that he is not dangerous" and therefore was "not enough to defeat [detainee]'s liberty interest under the Constitution in being freed from indefinite confinement").

The Constitution requires no less when the government subjects individuals to prolonged detention under its immigration authority. *See Zadvydas*, 533 U.S. at 690-92 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee and relying on prior precedents from other civil detention contexts, including *Foucha*, *Hendricks*, and *Salerno*); *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (requiring that the government bear the burden of justifying prolonged immigration detention by clear and convincing evidence); *see also Diop v. ICE/Homeland Security*, 656 F.3d 221, 235 (3d Cir. 2011) (requiring that the government bear the burden of justifying prolonged detention under Section 1226(c)).

Even under the three-part *Mathews* test, placing the burden of the government by clear and convincing evidence is reasonable for several reasons.

See Mathews, 424 U.S. at 335. As to the first *Mathews* factor evaluating the private interest that will be affected by the official action, Ms. Rivera-Medrano's liberty interest is recognized as the highest of individual rights. *See Addington*, 441 U.S. at 425 ("In cases involving individual rights, whether criminal or civil, the standard of proof at minimum reflects the value society places on the individual liberty."). Prolonged detention deprives noncitizens of a profound liberty interest. *Zadvydas*, 533 U.S. at 690.

As to the second *Mathews* factor addressing the risk of an erroneous deprivation of such interest through the procedures used—and the probable value, if any, of additional or substitute procedural safeguards—Ms. Rivera-Medrano's case demonstrates the risk of an erroneous deprivation of a noncitizen's private liberty interest when the burden of proof is misallocated on the noncitizen. As the IJ's April 14, 2020 bond decision makes plain, the burden and standard of proof was outcome determinative. Indeed, despite the lengthy detention of Ms. Rivera-Medrano, the government was not able to produce any evidence before the IJ during the April 14, 2020 bond hearing to show that she is a flight risk. *See* Exhibit 1, Motion for Judicial Notice, No. 20-1573 (1st Cir. Apr. 19, 2021).

As to the third *Mathews* factor addressing the government's interest, the government's interest here (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 persuading the neutral decision maker.

Although this Court in *Reid* did not address the burden of proof, district courts in this Circuit likewise have found that the government bears the burden of justifying prolonged detention by clear and convincing evidence. *See Doe v. Smith*, No. 17-11231-LTS, 2017 U.S. Dist. LEXIS 208322, *17 (D. Mass. Dec. 19, 2017) (citing cases); *see also Neziri v. Johnson*, 187 F. Supp. 3d 211, 217 n.6 (D. Mass. 2016) ("ICE's discretionary determination as to the risk of danger or flight that Neziri poses does not suffice, as that determination appears not to have been made after a hearing at which [ICE] bears the burden of proof.") (internal quotation marks omitted); *Singh*, 638 F.3d at 1203-05 (holding that, at a Section 1226(a) bond hearing, the IJ erred in not requiring the government to show by clear and convincing evidence that petitioner was a danger and a flight risk).[10]

CONCLUSION

For the foregoing reasons, Ms. Rivera-Medrano requests that this Court affirm the ruling below.

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[10] There are three pending cases before this Court on the issue of the burden of proof and applicable standard during 8 U.S.C. § 1226(a) bond hearings. *See Pereira Brito v. Barr*, Nos. 20-1037 & 20-1119; *Doe v. Tompkins*, No. 19-1368; *Hernandez-Lara v. DHS*, No. 19-2019. Oral argument in these cases was held on December 9, 2020.

Dated: April 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) [no more than 13,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The brief, containing 12,994 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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Gilles Bissonnette (No. 123868)

Dated: April 19, 2021

CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on April 19, 2021 including the opposing counsel at the Office of Immigration Litigation, Civil Division, United States Department of Justice, P.O. Box 878, Ben Franklin Station, Washington, DC 20042.

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Dated: April 19, 2021