UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION

JESSICA PATRICIA BARAHONA-MARTINEZ,

Petitioner,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of the Department of Homeland Security,

MERRICK GARLAND, in his official capacity as Attorney General of the United States;

PATRICK J. LECHLEITNER, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement;

MELLISSA B. HARPER, in her official capacity as Field Office Director of the New Orleans Field Office of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations;

ELEAZAR GARCIA, in his official capacity as Warden of South Louisiana ICE Processing Center;

Respondents.

Civil Action No. _____

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

1. Petitioner Jessica Patricia Barahona-Martinez ("Petitioner" or "Ms. Barahona-Martinez"), by and through undersigned counsel, submits this petition for a writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2241, the All Writs Act, 28 U.S.C. § 1651, and Article I, Section 9 of the United States Constitution, to remedy her unlawful detention. In support of this Petition and complaint for injunctive relief, Petitioner alleges as follows.

INTRODUCTION

2. Petitioner is an asylum seeker from El Salvador and single mother of three children who has been detained pending removal proceedings for over *six years,* even though she has won asylum twice and poses no danger or flight risk.

3. Petitioner entered the United States with her children on or around May 31, 2016, fleeing persecution she faced in El Salvador as a lesbian, and because the government had falsely identified her as a gang member. She was released under conditions of supervision set by U.S. Immigration and Customs Enforcement ("ICE"). Although she complied with these conditions for more than a year, she was arrested and detained by ICE on June 26, 2017. The sole reason for her arrest and detention was an Interpol Red Notice that was based on a Salvadoran warrant related to a charge of aggravated extortion for up to $30—a charge for which she had initially been acquitted.

4. Critically, that Interpol Red Notice has since been deleted, yet Ms. Barahona-Martinez remains in immigration detention, now entering her 75th month.

5. Ms. Barahona-Martinez was granted asylum twice by an immigration judge ("IJ"), most recently in November 2019, on the grounds that she faces persecution on account of her sexual orientation. In sustaining the government's appeal of that grant, the Board of Immigration Appeals ("BIA" or "Board") did not address the merits of her asylum claim.

Instead, in a two-to-one decision, over a strong dissent, it held that Petitioner was ineligible for asylum under the "serious nonpolitical crime" bar. The majority relied on the then-pending Interpol Red Notice and the Salvadoran warrant to find there were "serious reasons" for believing she had committed such a crime. The dissenting Board member pointed out that Petitioner had not only been acquitted of the alleged offense once, but had also submitted credible evidence to back up her claim of innocence.

6. Ms. Barahona-Martinez appealed the BIA's decision to the Court of Appeals for the Fourth Circuit, which granted her a stay of removal pending appeal, reflecting it assessment of the likelihood of her success on the merits of her appeal.

7. In April 2023, the Commission for the Control of Interpol's Files ("Interpol Commission"), acting on a request by newly retained pro bono counsel, permanently deleted the Interpol Red Notice that had been lodged against Ms. Barahona-Martinez. Her pro bono counsel has since filed a motion to reopen proceedings before the BIA on this ground, as it is relevant to the Board's analysis of whether the serious nonpolitical crime bar applies to Petitioner's case and renders her ineligible for asylum. The government has agreed to hold her appeal in abeyance in light of the pending motion to reopen, yet ICE continues to detain Ms. Barahona-Martinez as her removal proceedings continue.

8. ICE's statutory basis for detaining Petitioner in 2017 was Immigration and Nationality Act ("INA") § 236(a), 8 U.S.C. § 1226(a), the statute that governs detention pending removal proceedings for individuals arrested on an immigration warrant. Upon information and belief, the government will assert it is now detaining her under INA § 241(a), 8 U.S.C. § 1231(a), the statute that governs detention of individuals with final administrative orders of removal, even though that statute does not take effect when a removal order has been judicially

stayed. *See* 8 U.S.C. § 1231(a)(1)(B) (providing that the removal period that triggers § 1231(a) detention does not occur where "the removal order is judicially reviewed and if a court orders a stay of the removal" until "the date of the court's final order"); *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1332 (11th Cir. 2021) (agreeing with other circuit courts "that section 1231(a) does not govern the detention of [a noncitizen] whose removal has been stayed pending a final order from the reviewing court") (collecting cases). Regardless of which statute applies, Ms. Barahona-Martinez's continued detention is unlawful and violates her due process rights.

9. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. CONST. amend. V. It is well established that "the Due Process Clause applies to all persons within the United States, including [noncitizens], whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). These protections afford Ms. Barahona-Martinez the substantive right to be free from unjustified deprivations of liberty and the procedural right to an individualized review of her detention before a neutral arbiter. *See id.* at 690.

10. Now surpassing six years, Ms. Barahona-Martinez's detention bears no reasonable relationship to the government's legitimate purposes for detention—protecting against danger and flight risk. As a matter of due process, she is therefore entitled to immediate release under reasonable conditions of supervision. In the alternative, the government must provide her with a constitutionally adequate bond hearing, i.e., one where the government bears the burden of showing that she poses a danger or flight risk that cannot be sufficiently addressed through alternatives to detention.

11. Ms. Barahona-Martinez respectfully petitions this Court for a writ of habeas corpus to remedy her unlawful detention. Absent relief from this Court, she will continue to be

detained while her application for asylum is decided, which, in light of her pending motion to reopen, could easily take another year or more.

12. Ms. Barahona-Martinez respectfully requests that the Court use its authority under 28 U.S.C. § 2243 to order Respondents to file a return within three days, unless they can show good cause for additional time. *See* 28 U.S.C. § 2243.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus authority); 28 U.S.C. § 1331 (federal question jurisdiction); U.S. CONST. art. I, § 9, cl. 2 (Suspension Clause); and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act).

14. Federal district courts have jurisdiction to hear habeas claims by noncitizens challenging both the lawfulness and the constitutionality of their detention. *See Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Zadvydas*, 533 U.S. at 687. Ms. Barahona-Martinez's current detention, as imposed by Respondents, constitutes a "severe restraint[] on [her] individual liberty," such that she is "in custody in violation" of the law. *See Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist.*, 411 U.S. 345, 351 (1973); 28 U.S.C. § 2241(c)(3).

15. Venue properly lies with this Court under 28 U.S.C. §1391(e) because Petitioner is physically present and in the custody of Respondents at the South Louisiana ICE Processing Center in Basile, Louisiana, within the jurisdiction of the Western District of Louisiana. *See* 28 U.S.C. § 2241(d).

16. Venue is proper within the Lafayette Division because Respondent Eleazar Garcia has a principal place of business within this District, and a substantial part of the events giving rise to the claims in this action took place in this District. Respondent Garcia's principal place of business is the South Louisiana ICE Processing Center where Petitioner is detained and it is located in Basile, Louisiana which is within the Lafayette Division. W.D. La. Local Civ. R. 77.3.

PARTIES

17. Petitioner Jessica Patricia Barahona-Martinez is an asylum seeker who has been detained in immigration custody for over six years. She was first detained at the Peninsula Regional Jail in Williamsburg, Virginia. In October 2018, Respondents transferred Ms. Barahona-Martinez to the Caroline Detention Facility in Bowling Green, Virginia. In October 2020, Respondents transferred Ms. Barahona-Martinez to the South Louisiana ICE Processing Center in Basile, Louisiana, where she is presently detained.

18. Respondent Alejandro Mayorkas is the Secretary of the Department of Homeland Security ("DHS"). As the Secretary of DHS, Respondent Mayorkas is responsible for the administration of immigration laws and policies pursuant to 8 U.S.C. § 1103. He supervises DHS's components including ICE and, as such, he is a legal custodian of Petitioner. He is sued in his official capacity.

19. Respondent Merrick Garland is the Attorney General of the United States. As Attorney General, Respondent Garland oversees the immigration court system, including the immigration judges who conduct bond hearings as his designees, and is responsible for the administration of immigration laws pursuant to 8 U.S.C. § 1103(g). He is legally responsible for administering Petitioner's removal and bond proceedings, including the standards used in those proceedings, and as such, he is a legal custodian of Petitioner. He is sued in his official capacity.

20. Respondent Patrick J. Lechleitner is the ICE Deputy Director and Senior Official Performing the Duties of the Director. In that capacity, he is a legal custodian of Petitioner. He is sued in his official capacity.

21. Respondent Mellissa B. Harper is ICE's Field Office Director of the New Orleans Field Office of ICE Enforcement and Removal Operations. As Field Office Director, Respondent

Harper oversees ICE's enforcement and removal operations in the New Orleans District which includes Louisiana. Petitioner is currently detained within this area of responsibility and, as such, Respondent Harper is a legal custodian of Petitioner. She is sued in her official capacity.

22. Respondent Eleazar Garcia is the superintendent and warden of the South Louisiana ICE Processing Center, where Ms. Barahona-Martinez is currently being held. Respondent Garcia is an employee of the GEO Group and is a legal custodian of Petitioner. He is sued in his official capacity.

EXHAUSTION OF REMEDIES

23. No statutory exhaustion requirement applies to a petition challenging immigration detention under 28 U.S.C. § 2241. *See, e.g.*, *Montano v. Texas*, 867 F.3d 540, 542 (5th Cir. 2017) ("Unlike 28 U.S.C. § 2254, Section 2241's text does not require exhaustion."); *Robinson v. Wade*, 686 F.2d 298, 303 n.8 (5th Cir. 1982) ("[S]ection 2241 contains no statutory requirement of exhaustion like that found in section 2254(b) . . . ."). Ms. Barahona-Martinez's claims—that her prolonged detention is unconstitutional because it is not reasonably related to a legitimate governmental purpose and that she has not received a constitutionally adequate process to justify such detention—are not subject to any statutory requirement of administrative exhaustion, and thus, exhaustion is not a jurisdictional prerequisite. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

24. To the extent that any prudential considerations might lead the Court to consider requiring exhaustion as a matter of discretion, the Supreme Court has recognized that courts should not require exhaustion where there is an "unreasonable or indefinite time-frame for administrative action." *Id*. at 147. Exhaustion is thus not appropriate where the petitioner "may suffer irreparable harm if unable to secure immediate judicial consideration of [her] claim." *Id*.

25. In any event, Ms. Barahona-Martinez has exhausted the administrative remedies available to her. She has repeatedly requested that the ICE Louisiana Field Office and the ICE ERO Headquarters in Washington, D.C. review her custody status, most recently on August 28 and September 5, 2023. These requests have all been ignored or denied. She has also requested a new bond hearing under agency regulations, arguing that her circumstances have "changed materially" since her last bond hearing. 8 C.F.R. § 1003.19(e). Upon information and belief, the government will take the position that the immigration court no longer has jurisdiction to provide her a bond hearing given her final administrative order of removal from the BIA. However, even if an immigration judge were to grant her a new bond hearing, it would be the constitutionally deficient hearing provided for under the regulations—one where she bears the burden to prove lack of danger and flight risk. *See Matter of R-A-V-P*, 27 I. & N. Dec. 803, 804 (BIA 2020) ("[W]e have clearly held that section 236(a) places the burden of proof on the [noncitizen] to show that he merits release on bond."); *Matter of Fatahi*, 26 I. & N. Dec. 791, 795 n.3 (BIA 2016) (same).

26. Exhaustion is further futile because the agency does not have power to decide constitutional claims. *See Monteon-Camargo v. Barr*, 918 F.3d 423, 429 (5th Cir. 2019), *as revised* (Apr. 26, 2019) ("Due process claims . . . are generally exempt from the exhaustion doctrine because they are not within the purview of the BIA."); *see also Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012) (exhaustion not required where "it would have been futile" because the agency would clearly reject the constitutional claims).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. Barahona-Martinez's Immigration Proceedings

27. Ms. Barahona-Martinez is a 40-year-old native and citizen of El Salvador.

28. Due to her sexual orientation as a gay woman, the Salvadoran police falsely claimed that Ms. Barahona-Martinez had committed a crime of aggravated extortion involving up to $30 in association with the MS-18 gang. She spent ten months in pretrial detention before being acquitted in 2015 when the trial court found no evidence to sustain the charge against her.

29. Because of her imputed affiliation with MS-18—which the government broadcasted on her arrest—upon her release from pre-trial detention, Ms. Barahona-Martinez started to receive death threats from a rival gang, the Mara Salvatrucha ("MS-13"). She therefore fled El Salvador in May 2016 with her three children, then ages 11, 13 and 15.

30. Ms. Barahona-Martinez entered the United States on or around May 31, 2016, and subsequently sought asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").

31. Shortly after entering the United States, Petitioner and her children were apprehended by border patrol. Ms. Barahona-Martinez was then released on her own recognizance by ICE around June 2, 2016. She and her three children went to live with her lawful permanent resident sister in Virginia. For the next year, Ms. Barahona-Martinez complied with all her conditions of release, including biweekly and then monthly check-ins with ICE.

32. However, unbeknownst to Petitioner, after she fled El Salvador, the Salvadoran government appealed her acquittal and sought to retry her for the same offense. After an appellate court ordered a new trial and she failed to appear—as she was already in the United States—the Salvadoran government issued a warrant against her and then sought an Interpol Red Notice, which was issued around January 27, 2017.

33. About five months later, on Friday, June 23, 2017, Petitioner reported to ICE as usual. This time, however, she was instructed by ICE to go back to her home for the weekend,

say goodbye to her children, and report back to the detention center on Monday, June 26, 2017.

34. Ms. Barahona-Martinez did exactly as she was told and reported back to ICE at the detention center, at which point ICE detained her on a warrant. She has been held in ICE custody ever since.

35. Ms. Barahona-Martinez's then-immigration counsel requested a bond hearing to contest Petitioner's detention. At the hearing held on July 25, 2017, one month after Petitioner's arrest, Petitioner and her counsel learned for the first time about the Interpol Red Notice and the Salvadoran warrant. Lacking any information about either of these documents, her immigration counsel tried to withdraw his request for bond. The government attorney, however, insisted that the hearing go forward and the IJ denied Petitioner bond on the grounds that she posed a danger, relying solely on the Interpol Notice.

36. Ms. Barahona-Martinez subsequently was granted asylum twice by the IJ. The first grant of asylum in April 2018 was on account of her imputed gang membership. The BIA reversed that decision, but remanded for the IJ to consider her applications for withholding of removal and CAT protection, which the IJ had failed to consider in the original proceedings. Following a motion to reconsider, the Board also remanded for the IJ to consider her application for asylum based on her membership in the particular social group of lesbian women in El Salvador.

37. On remand, in a decision issued on November 26, 2019, the IJ granted Petitioner asylum and withholding based on her sexual orientation. Critically, the IJ concluded—for the second time—that Petitioner was credible and met her burden of proof to show that there was no probable cause to believe she had committed a serious nonpolitical crime, which would have barred her from asylum. The IJ relied on testimony from an alibi witness and from Petitioner's

Salvadoran criminal defense attorney, both of whom the IJ also found credible. The alibi witness testified as to Petitioner's whereabouts during the alleged offense; her defense attorney testified to the motivations of the police in fabricating the charge against Petitioner in retaliation for her sexual orientation. The IJ also cited country conditions evidence regarding the arbitrary arrest and targeting of LGBTQ+ individuals by the Salvadoran police as corroboration for Ms. Barahona-Martinez's claim of innocence.

38. The government appealed the IJ's decision and, on November 5, 2021, in a two-to-one decision, the BIA vacated the IJ's grant of asylum and withholding of removal. Instead of addressing the merits of Petitioner's asylum claim, the BIA found her ineligible for asylum under the serious nonpolitical crime bar, reversing the IJ's finding to the contrary. The dissenting Board member pointed out how Petitioner had not only been acquitted of the alleged offense once, but had also submitted credible evidence to back up her claim of innocence. He stated that if these were not enough to meet Petitioner's burden that the serious nonpolitical crime bar does not apply, "I cannot help but wonder what is."

39. In February 2022, after filing a timely petition for review with the Fourth Circuit, Petitioner sought and received a stay of removal pending appeal. Although briefing on the appeal was completed in March 2022 and the case was submitted on the briefs in October, 2022, to date no decision has issued.

40. In March 2023, Petitioner, via pro bono counsel, challenged the Interpol Red Notice before the Interpol Commission on the grounds that the Notice violated various principles and guidelines. Her counsel requested provisional deletion based on her asylum seeker status, and permanent deletion based on substantive and procedural errors with the Notice, including evidence of pretextual prosecution due to her status as a lesbian woman in El Salvador. On April

7, 2023, Petitioner learned that the Commission had *permanently* deleted the Interpol Red Notice. Notably, the Commission deleted the Red Notice just *three weeks* after her request—a record response time, reflecting the significant flaws of the Red Notice. Moreover, the Commission recommended that the Interpol General Secretariat use the information submitted by Petitioner in future compliance reviews, highlighting the invalidity of the Notice and El Salvador's abuse of Interpol's systems in requesting it.[1]

41. After deletion of the Interpol Red Notice, Ms. Barahona-Martinez secured pro bono counsel who filed a motion to reopen her case based on these changed circumstances. The BIA had relied on the Interpol Red Notice to support its conclusion that she was not eligible for asylum under the serious nonpolitical crime bar. The motion to reopen urges the Board to revisit its analysis now that the Commission has deleted that Notice.

42. In light of her recently filed motion to reopen, the government has agreed to hold Ms. Barahona-Martinez's appeal before the Fourth Circuit in abeyance pending the Board's consideration of that motion. If the motion is granted, Petitioner's removal proceedings will continue either before the Board or on remand back to the IJ. And if the motion is denied, Petitioner will have the opportunity to appeal that decision and pursue consolidated appeals before the Fourth Circuit.

43. Either way, Ms. Barahona-Martinez's proceedings will continue for many months or even years. Thus, unless this Court intervenes, Petitioner's already-unconscionable amount of time in detention will be further extended.

[1] This is consistent with reports from other organizations who have called on the Office for Civil Rights and Civil Liberties to launch an investigation into DHS's use of unreliable information originating from El Salvador's authorities in immigration proceedings, resulting in civil rights abuses, wrongful arrests and deportations. *See* Ltr. to Dep't of Homeland Sec., Off. for C.R. & C.L. (June 6, 2023), https://tinyurl.com/3mu7kt8y.

Toll of Ms. Barahona-Martinez's Detention on Her and Her Family

44. Ms. Barahona-Martinez has been in ICE detention since June 26, 2017, a period now exceeding six years.

45. Between June 26, 2017 and October 2020, ICE detained Ms. Barahona-Martinez at two different facilities in Virginia: first the Peninsular Regional Jail, and then the Caroline Detention Facility. In October 2020, she was inexplicably transferred to the South Louisiana ICE Processing Center in Basile, Louisiana, where she has remained since.

46. Due to her transfer to Louisiana, Ms. Barahona-Martinez has been unable to see her family—including her three children and sister—except on two occasions in the last three years.

47. The conditions at these facilities are just as—if not more so—restrictive and punitive as the conditions in prison or jail.

48. Ms. Barahona-Martinez has been experiencing severe and intrusive symptoms of Post-Traumatic Stress Disorder ("PTSD") and Major Depressive Disorder as a result of her prolonged detention and separation from her children.

49. Ms. Barahona-Martinez suffered extreme abuses in El Salvador, including being persecuted for her sexual orientation, threatened with death and extortion by gang members, and wrongfully arrested and beaten in a Salvadoran jail. She fled to the United States for protection from those harms. Instead, her six-plus years in detention have exacerbated and deepened her trauma. As her detention continues to drag on with no end in sight, Ms. Barahona-Martinez's symptoms have increased in both frequency and intensity. A psychological evaluation concluded that her condition had deteriorated to a point where, unless released immediately from detention, she might never be able to lead the semblance of a normal life.

50. While in detention, Ms. Barahona-Martinez has been repeatedly targeted by other detainees and officers because of her sexual orientation. Her physical health has also worsened. As recently as August 7, 2023, Ms. Barahona-Martinez was sent to the emergency room because of debilitating stomach pain, whose source is still not yet diagnosed.

51. The prolonged separation from her family has inflicted enormous psychological anguish on Ms. Barahona-Martinez. When one of her sisters was dying of cancer in 2022, ICE denied all of the family's requests for an opportunity for them to see each other in person one last time. Ms. Barahona-Martinez expressed suicidal ideations in the wake of her sister's passing.

52. Ms. Barahona-Martinez's detention has also been extremely difficult on her family. Her three children especially have suffered from the separation from their mother and the distress caused by her detention, resulting in depression, negative impact on their schooling, and a burden on the oldest daughter to care for her two younger siblings. These harms in turn cause extreme stress and feelings of helplessness for Ms. Barahona-Martinez.

53. Ms. Barahona-Martinez and her counsel have repeatedly requested that she be released from detention, or at a minimum, transferred back to a facility in Virginia, closer to her family. These requests have all been ignored or rejected by ICE.

Lack of Any Meaningful Consideration of the Need for Petitioner's Detention

54. During her more than six years of detention, Petitioner has received only one cursory bond hearing at the very outset of her detention, over 73 months ago. Since then, she has received only minimal and superficial administrative custody reviews by ICE, her own jailor.

55. As described above, Ms. Barahona-Martinez appeared before the IJ on July 25, 2017 for an extremely short bond hearing where she bore the burden of proof and the IJ found her a danger based on solely the Interpol Red Notice. No evidence or testimony was taken

regarding the validity of the Notice, nor were any other factors considered that would have been relevant to Ms. Barahona-Martinez's suitability for release on bond or other conditions of supervision. For example, the IJ never considered whether alternatives to detention, including electronic monitoring, would have mitigated any of the government's concerns with flight risk or danger.

56. At no point in the intervening years has a neutral arbiter considered Ms. Barahona-Martinez's detention. On December 4, 2020, the IJ denied her request for another bond hearing on the basis that she failed to show a material change in circumstances, a regulatory requirement for a new bond hearing. *See* 8 C.F.R. § 1003.19(e).

57. On August 25, 2023, her pro bono counsel submitted a request to the immigration court for a new bond hearing based on the deletion of the Interpol Red Notice. Although that request remains pending, upon information and belief, the government will likely argue that the immigration court lacks jurisdiction to conduct a bond hearing given the final BIA removal order. And even if the immigration court were to order a bond hearing, that hearing will not satisfy due process as the burden of proof will be on Ms. Barahona-Martinez, rather than on the government. Nor will the IJ need to consider alternatives to detention or her ability to pay bond, if one is imposed.

58. If released, Ms. Barahona-Martinez would finally be reunited with her family after over six years apart. She has numerous family members in the United States—including her U.S. citizen niece and lawful permanent resident sister—who have agreed to act as her sponsors and provide her a place to stay if she is released from immigration detention.

LEGAL BACKGROUND AND ARGUMENT

Ms. Barahona-Martinez Is Held Under Discretionary Authority, 8 U.S.C. § 1226(a)

59. Ms. Barahona-Martinez is detained pursuant to 8 U.S.C. § 1226(a), which permits but does not require detention of noncitizens during the pendency of their immigration proceedings.

60. Congress has authorized DHS to detain noncitizens during their removal proceedings. *See generally Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018) (discussing authority to detain under 8 U.S.C. §§ 1225(b), 1226(a), 1226(c)). The general "discretionary" immigration detention statute, § 1226(a), enables noncitizens to seek release from ICE and the IJ.

61. Specifically, § 1226(a) provides that the government may "detain the arrested [noncitizen]" or "may release the [noncitizen] on (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole[.]" 8 U.S.C. § 1226(a)(1)-(2).

62. The statute and implementing regulations are silent as to which party carries the burden of proof. Under the BIA's current interpretation of § 1226(a), a noncitizen in DHS custody "must establish to the satisfaction of the Immigration Judge" that he is not a danger, flight risk, or threat to national security for bond to be set. *Matter of Guerra*, 24 I. & N. Dec. 37, 37–38 (BIA 2006).[2]

Due Process Requires Reasonable Fit Between Detention and Government's Purpose as Well as Adequate Procedural Protections

63. The Fifth Amendment's guarantee of due process applies to all persons physically

[2] Prior to 1999, however, the government interpreted the statute to impose a presumption of release and required the government to bear the burden of justifying detention. *See Matter of Patel*, 15 I. & N. Dec. 666, 666–67 (BIA 1976). The BIA abruptly reversed course after decades of that practice, *see Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999), without justification and contrary to due process principles.

within the United States, "whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693. While the government may detain noncitizens pending removal proceedings, it must do so consistent with due process. *See, e.g.*, *Okpala v. Whitaker*, 908 F.3d 965, 971 (5th Cir. 2018) ("The Fifth Amendment's Due Process Clause protects individuals in removal proceedings."); *Lozano-Castaneda v. Garcia*, 238 F. Supp. 2d 853, 861 (W.D. Tex. 2002) ("This Court agrees that the fundamental right to be free from bodily restraint is not reserved exclusively for citizens; rather, 'all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments.'") (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

64. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690. Preventive detention, like the detention at issue here, is a "'carefully limited exception'" to the "'norm'" of liberty. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). "Two separate inquiries are necessary" to determine if preventive detention is constitutional. *Schall v. Martin*, 467 U.S. 253, 263 (1984). First, to comport with due process, detention must "'bear [a] reasonable relation to the purpose for which the individual [was] committed.'" *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *Reno v. Flores*, 507 U.S. 292, 305 (1993) (there must be "a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose"). Second, detention must also be accompanied by "adequate procedural protections" to ensure that it is actually serving those purposes. *Zadvydas*, 533 U.S. at 690 (citing *Kansas v. Hendricks*, 521 U.S 346, 356 (1997); *Salerno*, 481 U.S. at 746).

65. As detention increases in length, a greater governmental interest as well as

heightened procedural protections are required to justify the greater deprivation of liberty. *See Zadvydas*, 533 U.S. at 691; *Schall*, 467 U.S. at 269 (noting that "a legitimate purpose will not justify . . . confinement amounting to punishment"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed"); *Salerno*, 481 U.S. at 747 n.4 *(*detention cannot be "excessively prolonged . . . in relation to [its] regulatory goal"); *Demore*, 538 U.S. at 513, 529 n.12 (upholding "brief period" of mandatory detention as reasonably related to government purpose, emphasizing the "very limited time of the detention at stake").

66. Moreover, given the gravity of the liberty deprivation at stake, when the government subjects individuals to preventive detention, due process requires that jailers bear the burden of proof to justify that detention. *See, e.g.*, *Foucha*, 504 U.S. at 81–82, 86 (holding unconstitutional a state civil commitment statute that "place[d] the burden on the detainee to prove that he is not dangerous"); *Addington v. Texas*, 441 U.S. 418, 427 (1979) ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.").

67. The government must also meet a heightened standard of proof and establish by clear and convincing evidence that its interest in preventive detention outweighs an "individual's strong interest in liberty." *Salerno*, 481 U.S. at 750; *see also Addington*, 441 U.S. at 424 (same for civil commitment); *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 285–86 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation proceedings); *Chaunt v. United States*, 364 U.S. 350, 355 (1960) (same for denaturalization). This principle applies even more forcefully to prolonged confinement, which requires stronger procedural safeguards. *See Addington*, 441 U.S. at 423.

Prolonged Immigration Detention Without A Constitutionally Adequate Bond Hearing Violates Due Process

68. The Supreme Court has recognized only two valid purposes for civil detention in the immigration context—to mitigate the risks of danger to the community and to prevent flight. *See Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 531 (Kennedy, J., concurring). In *Demore,* the Court found that mandatory detention—i.e., detention without a bond hearing— was reasonably related to these two purposes during the "brief" period that removal proceedings are pending, and thus did not violate due process.[3] 538 U.S. at 513; *see also id.* at 523. The Court, however, has not addressed the constitutionality of *prolonged* detention without a bond hearing, nor the kind of procedural protections that are constitutionally required for such a bond hearing when detention becomes prolonged. *See Jennings*, 138 S. Ct. at 851 (remanding for consideration of constitutional arguments in the first instance).

69. Relying on the bedrock due process principles set forth above, however, circuit courts and district courts across the country have generally held that the government cannot detain noncitizens for a prolonged period of time without providing a constitutionally adequate bond hearing to ensure that such detention is reasonably related to its purpose. Thus, where detention becomes prolonged under 8 U.S.C. § 1226(a), due process requires an additional bond hearing where the burden is on the government, as compared to the bond hearing that is provided at the outset of detention which places the burden on the detainee. *See, e.g.*, *Hernandez-Lara v. Lyons*, 10 F.4th 19, 28–35, 46 (1st Cir. 2021) (ordering bond hearing with burden on government for noncitizen who was detained for 10 months); *Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d

[3] This holding was based not only on the brevity of such detention—typically between one and a half and five months—but also on statistics showing that noncitizens singled out for mandatory detention under the statute based on their criminal history posed a heightened risk of danger and flight. *Demore*, 538 U.S. at 528.

Cir. 2020) (same for noncitizen detained 15 months); *Khan v. Byers*, 568 F. Supp. 3d 607, 612–13 (E.D. Va. 2021) (detained three years); *Hulke v. Schmidt*, 572 F. Supp. 3d 593, 602 (E.D. Wis. 2021) (detained almost two years); *J.G. v. Warden, Irwin Cnty. Det. Ctr.*, 501 F. Supp. 3d 1331, 1340–41 (M.D. Ga. 2020), *appeal dismissed*, 2021 WL 3089259 (11th Cir. May 18, 2021) (same); *Rajesh v. Barr*, 420 F. Supp. 3d 78, 83 (W.D.N.Y. 2019) (detained over one year); *Diaz-Ceja v. McAleenan*, No. 19-cv-824, 2019 WL 2774211, at *10 (D. Colo. July 2, 2019) (detained two years and four months).[4]

70. Courts reach the same conclusion, whether they apply the Supreme Court's substantive due process principles from the cases discussed above or the well-known balancing test under *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976): Due process requires the government to provide a new bond hearing for petitioners facing prolonged detention under § 1226(a), and the government bears the burden of proof at such a hearing.[5] *Compare Ixchop Perez v.*

[4] Courts are somewhat divided over the burden of proof the government must carry, with most finding that the dangerousness and flight risk must both be proven by clear and convincing evidence, *see e.g.*, *Velasco Lopez*, 978 F.3d at 855–56, but a few finding that dangerousness must be established through clear and convincing evidence, and flight risk may be proven by a preponderance of the evidence, *see e.g.*, *Hernandez-Lara*, 10 F.4th at 36. And two circuit courts have held post-*Jennings* that due process does not require the government to bear the burden of proof. *See Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022); *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022). However, *Miranda* addressed § 1226(a) detention in general, not the procedures required in the context of prolonged detention, 34 F.4th at 358, and *Rodriguez Diaz* was limited to the facts of an as-applied challenge of an individual detained 14 months, nowhere near the amount of time at issue here. 53 F.4th at 1207.

[5] Some courts have held that due process requires that the government bear the burden of showing flight risk or danger at any bond hearing under § 1226(a), including ones at the outset of detention. *See, e.g.*, *Darko v. Sessions*, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (noting "there has emerged a consensus view that where . . . the government seeks to detain a [noncitizen] pending removal proceedings, it bears the burden of proving that such detention is justified" under § 1226(a)) (collecting cases); *Rajnish v. Jennings*, No. 3:20-CV-07819-WHO, 2020 WL 7626414, at *8 (N.D. Cal. Dec. 22, 2020) (concluding that first bond hearing violated due process because it placed the burden on noncitizen rather than the government); *but see Miranda*, 34 F.4th at 346. The unfairness of requiring a detained person to show the *lack* of danger and flight risk—rather than requiring the government to show the presence of either—is readily apparent in Ms. Barahona-Martinez's case.

McAleenan, 435 F. Supp. 3d 1055, 1062 (N.D. Cal. 2020) (collecting cases)), *with J.G.*, 501 F. Supp. 3d at 1335 (collecting cases)).[6]

71. To determine the requirements of due process under the *Mathews* test, courts consider (1) the private interest affected, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. 424 U.S at 335; *see also United States v. McKown*, 930 F.3d 721, 731 (5th Cir. 2019) (applying *Mathews*). In ordering new bond hearings with the burden on the government, these courts have found that the *Mathews* factors all weigh in favor of detained noncitizens.

72. First, there is a significant interest at stake when noncitizens face prolonged detention and an extended amount of time since their last bond hearing. *See, e.g.*, *Velasco Lopez*, 978 F.3d at 853 (no matter what level of due process may have been sufficient at the moment of

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At the bond hearing she received at the outset of her detention, it was her burden to show why she was not a danger or flight risk, despite lacking any information about the Interpol Red Notice that had been lodged against her, and which the IJ found presumptively made her a danger. The bond hearing suffered from an additional flaw in that the IJ was not required to consider whether alternatives to detention—like GPS monitoring, curfew or even house arrest—could have sufficiently addressed the government's concerns without requiring her detention and separation from her children.

[6] Applying the same due process principles, courts have similarly required bond hearings placing the burden on the government where detention under other immigration statutes has grown prolonged. These include mandatory detention pending removal proceedings under 8 U.S.C. § 1226(c), which applies to noncitizens charged with removal on certain criminal grounds, *see, e.g.*, *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020) (ordering bond hearing for noncitizen detained for over two and a half years); *Pedro O. v. Garland*, 543 F. Supp. 3d 733, 739 (D. Minn. 2021) (detained for over 13 months); *M.D.F. v. Johnson*, No. 3:20-CV-0829-G-BK, 2020 WL 7090125, at *1 (N.D. Tex. Dec. 3, 2020) (detained one year and ten months), as well as detention under 8 U.S.C. § 1231(a), which applies to individuals with final administrative orders of removal during the removal period, *see, e.g.*, *Michelin v. Oddo*, No. 3:23-CV-22, 2023 WL 5044929, at *8 (W.D. Pa. Aug. 8, 2023) (ordering bond hearing with burden on government for noncitizen detained for over 18 months); *Cabrera Galdamez v. Mayorkas*, No. 22 CIV. 9847 (LGS), 2023 WL 1777310, at *9 (S.D.N.Y. Feb. 6, 2023) (detained for 16 months); *Smith v. Tsoukaris*, No. CV 21 -11214 (KM), 2022 WL 17082502, at *2–3 (D.N.J. Nov. 18, 2022) (detained "660 days [passed] since his last bond hearing" which "raises due process concerns").

initial detention "'as the period of . . . confinement grows,'" so do the required procedural protections) (quoting *Zadvydas*, 533 U.S. at 701).

73. Second, the risk of erroneous deprivation is high under the government's current procedures, which require noncitizens to prove two negatives—the absence of flight risk and lack of danger. *See Hernandez-Lara*, 10 F.4th at 31 (noting how burden on the individual to "prov[e] a negative . . . can often be more difficult than proving a cause for concern"). Noncitizens subject to immigration detention often are not represented by counsel, experience difficulty in gathering evidence on their own behalf, lack full proficiency in English, and are less likely to understand immigration law or procedures governing contested issues; conversely, DHS is represented by counsel in every bond proceeding and has both the authority and means to obtain information about the noncitizen, underscoring the imbalance between the parties and the risk of noncitizens being subject to erroneous detention if forced to bear the burden of proof. *See Hernandez-Lara*, 10 F.4th at 30–31; *Hulke*, 572 F. Supp. 3d at 600 ("The comparative burden on the Government to prove up danger and flight risk is especially small given that, at bond hearings, the Government is always represented by an attorney who is (presumably) prepared to address these arguments if a petitioner were to raise them."); *see also Velasco Lopez*, 978 F.3d at 855 ("ICE and DHS can access the records of other federal agencies and local law enforcement and routinely do so for purposes of the merits proceedings.").

74. Lastly, courts find that placing the burden on the government will not hinder governmental interest and may in fact promote the government's interest in minimizing unnecessary detention. *See Velasco Lopez*, 978 F.3d at 854 (finding government's interest in "minimizing the enormous impact of incarceration in cases where it serves no purpose" to be "paramount" under the *Mathews* test and emphasizing detention's high cost to taxpayers);

Hernandez-Lara, 10 F.4th at 33 (noting how "such unnecessary detention imposes substantial societal costs"); *J.G.*, 501 F. Supp. 3d at 1340 ("The Government also has a strong interest in avoiding erroneous deprivations of liberty. Incarceration that serves no legitimate purpose wastes taxpayers' money and hinders judicial efficiency.").

Ms. Barahona's Prolonged Detention Violates Due Process

75. While the Fifth Circuit has yet to address the constitutionality of prolonged immigration detention, it has recognized, in the context of nonimmigration civil detention, that due process permits the government to detain someone only for a duration of time that bears some reasonable relation to the purpose for which they were committed. *See Harris v. Clay Cnty.*, 47 F.4th 271, 277 (5th Cir. 2022) (holding that plaintiff's detention of six years after he was found incompetent to stand trial violated *Jackson*); *see also United States v. Hare*, 873 F.2d 796, 800 (5th Cir. 1989) ("['D]etention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.'") (quoting *Salerno*, 481 U.S. at 747 n.4). And the Fifth Circuit "consider[s] a person detained for deportation to be the equivalent of a pretrial detainee" whose "constitutional claims are considered under the due process clause." *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000); *see also Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330, 338 (S.D. Tex. 2020) ("Immigration detainees are civil detainees, and thus, entitled to the same constitutional due process protections as pretrial detainees.").

76. District courts within the circuit have thus imposed due process restrictions on immigration detention, ordering outright release or bond hearings with additional protections where detention has become prolonged. *See, e.g.*, *Kambo v. Poppell*, No. SA-07-CV-800-XR, 2007 WL 3051601, at *20 (W.D. Tex. Oct. 18, 2007) (granting petitioner's release under habeas where government failed to provide a "reasonable justification" for continued detention under §

1226(a) and petitioner was detained for almost one year with no reasonably foreseeable end date to detention); *Ayobi v. Castro*, No. SA-19-CV-01311-OLG, 2020 WL 13411861, at *6–9 (W.D. Tex. Feb. 25, 2020) (ordering third bond hearing with burden on government where petitioner was "now approaching his one-thousandth day in detention" under § 1226(a)); *see also M.D.F.*, 2020 WL 7090125, at *1 (noting that "continued detention is likely constitutionally suspect by at least the twenty month mark" and ordering bond hearing with burden on government for petitioner detained under § 1226(c) for 22 months) (collecting cases); *Maniar v. Warden Pine Prairie Corr. Ctr.*, No. 6:18-CV-00544, 2018 WL 11544220, at *5–6 (W.D. La. July 11, 2018) (same for petitioner detained under § 1226(c) for 10 months, noting that six months is a "benchmark" for considering challenges to civil detention).

77. Ms. Barahona-Martinez has been detained for over six years—more than 74 months or 2200 days. By every measure used in district and circuit courts across the country, her detention has been prolonged. Indeed, compared to these other cases, Ms. Barahona-Martinez's case is an outlier: During her more than six years of detention she received only one bond hearing—an extremely cursory one in which the IJ ordered her detained as a danger based solely on the existence of an Interpol Red Notice, since discredited, and without even considering whether conditions of supervision, including electronic monitoring, would sufficiently address the government's concerns. Since that time, she has had no other opportunity to seek release through a bond hearing. This alone is a gross violation of her due process rights.

78. Moreover, she has never received the kind of constitutionally adequate bond hearing that due process requires, one where the burden is on the government to show by clear and convincing evidence that she poses a danger or flight risk that could not be addressed through alternatives to detention including electronic monitoring and other forms of supervision.

As discussed above, the Supreme Court has long made clear that, where the government seeks to deprive an individual of a "particularly important individual interest[]," it must bear the burden of proof by clear and convincing evidence. *See, e.g.*, *Addington*, 441 U.S. at 424. In cases like Ms. Barahona-Martinez's, where she has been subjected to prolonged detention of over *six years*, there is a significant interest at stake and a "clear and convincing" evidence standard provides the appropriate level of procedural protection. *See id.* at 423–24.

79. Application of the *Mathews* factors reinforces this conclusion. Turning to the first factor, Ms. Barahona-Martinez has a significant private interest at stake—"[f]reedom from . . . . physical restraint" which "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Moreover, she has now been detained for over *six years* since her last and only bond hearing, and there is "no end in sight." *Velasco Lopez*, 978 F.3d at 846; *see also id*. at 852 (first factor weighed in petitioner's favor where he was detained for 15 months); *Hernandez-Lara*, 10 F.4th at 29–30 (same for petitioner who was detained for ten months and whose length of future detention was "impossible to predict" and had the potential to be "quite lengthy"); *Lopez Reyes v. Bonnar*, 362 F. Supp. 3d 762, 776 (N.D. Cal. 2019) (petitioner's detention for 22 months, with his last bond hearing occurring 16 months before, created a "strong private interest" in receiving a new bond hearing).

80. Turning to the second *Mathews* factor, the risk of erroneous deprivation is high for Ms. Barahona-Martinez without the requested additional protections. First, the government's current procedures require that in order for her to get a new hearing she must show a material change in circumstances, and the government does not consider the increased length of detention as such a material change. *See Velasco Lopez*, 978 F.3d at 852 ("There is no administrative mechanism by which [petitioner] could have challenged his detention on the ground that it

reached an unreasonable length."); *see also Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 958 (N.D. Cal. 2019) (noting government's position that petitioner "has not established materially changed circumstances" where motion for bond redetermination was based on prolonged nature of his detention) (internal citation omitted).

81. Moreover, even if Ms. Barahona-Martinez could get a new hearing based on the deletion of the Interpol Red Notice, the bond hearing she would be entitled to, like the one she received at the outset of her detention, would by default place the burden on her rather than the government. *See J.G.*, 501 F. Supp. 3d at 1338 ("Even if a subsequent bond hearing is granted, an incarcerated noncitizen faces the same problems he encountered at his first bond hearing.").

82. Just as in *Hernandez-Lara*, Ms. Barahona-Martinez "would seem to have been a good candidate for conditional release on bail" given her record of complying with release conditions, extensive family relations, and lack of criminal history in the United States, but by placing the burden on her, she was unable to make the required showing. 10 F.4th at 31. Unless the government bears the burden of showing flight risk or danger at a new bond hearing, Petitioner would continue to face a risk of being erroneously deprived of her liberty. *See id.* ("This very case evidences how the allocation of the burden of proof can affect the likelihood of such error.").

83. As for the third *Mathews* factor, while the government has an interest in detaining noncitizens based on danger or flight risk, if an individual poses neither a risk of flight or danger—as is the case here—the government has no legitimate interest in detaining her. *See Velasco Lopez*, 978 F.3d at 854. Thus, the government itself has an interest in a bond hearing procedure that will minimize the risk of erroneous detention and the human and financial cost associated with such unnecessary detention. *Supra* ¶ 74. And as discussed above, the government

will inevitably have more information as proceedings lengthen compared to a noncitizen like Ms. Barahona-Martinez, who is detained, non-English speaking, at the mercy of her jailers, and far from her family and counsel. *Supra* ¶ 73. Thus, "the longer detention continues, the greater the need for the Government to justify its continuation." *Velasco Lopez*, 978 F.3d at 855.

84. Petitioner's case illustrates the magnitude of the societal cost: the single mother and breadwinner for three children, she has been separated from her family, removed from the community, and deteriorating mentally and physically in detention for over six years. There is "no public interest that any of this serves[.]" *Id*.

85. Overall, the fundamental nature of Ms. Barahona-Martinez's liberty interest and the risk of erroneously depriving her of that interest far outweigh any governmental interest at stake. Thus, the balance of factors falls overwhelmingly in Ms. Barahona-Martinez's favor and her continued detention over six years, without any end in sight, violates due process.[7]

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[7] The § 1226(a) analysis of *Mathews* factors discussed above is applicable when determining Ms. Barahona-Martinez's due process rights under § 1231(a) as well, should the Court decide that her detention is governed by that statute. *See Cabrera Galdamez*, 2023 WL 1777310, at *4 ("Given the largely parallel due process concerns at issue in § 1226(a) and § 1231(a)(6), and that both provisions concern immigration detention as a matter of discretion, the *Mathews* test is appropriate to apply here"). Accordingly, if Ms. Barahona-Martinez is detained pursuant to § 1231(a), she is entitled to another bond hearing as a matter of due process under that statute as well. *Supra* ¶ 70 n.6. Moreover, for the same reasons that due process requires certain procedural protections when detention under § 1226(a) becomes prolonged, so too should the government bear the burden of justifying detention by clear and convincing evidence when her detention under § 1231(a) becomes prolonged. *See Zavala v. Martin*, No. CV 21-500 WES, 2022 WL 684147, at *6 (D.R.I. Mar. 8, 2022) (relying on First Circuit's *Hernandez-Lara* decision on § 1226(a) to conclude that the government should bear the burden of showing danger or flight risk to justify petitioner's detention under § 1231(a) in withholding-only proceedings); *Michelin*, 2023 WL 5044929, at *8 (concluding the same, citing the Third Circuit's decision in *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208 (3d Cir. 2018), which placed burden on government in prolonged § 1226(c) detention case); *Cabrera Galdamez*, 2023 WL 1777310, at *8 (holding that the government must bear burden of demonstrating by clear and convincing evidence that a petitioner under § 1231(a) was a danger or flight risk); *see also Joseph v. Decker*, No. 18-CV-2640(RA), 2018 WL 6075067, at *12 (S.D.N.Y. Nov. 21, 2018) ("The overwhelming majority of courts have concluded, post-*Jennings*, that when unreviewed detention has become unreasonable, the government must bear the burden

Due Process Entitles Ms. Barahona-Martinez to Immediate Release, or Alternatively, An Immediate Bond Hearing with Appropriate Procedural Protections

86. In sum, there is no justifiable reason for detaining Ms. Barahona-Martinez, and she has not been afforded the procedural protections necessary to safeguard her interests.

87. To remedy this due process violation, Ms. Barahona-Martinez seeks immediate release from ICE custody so that she can reunite with her three children, sister, and other family in Virginia, seek the psychological and physical treatment she needs, and litigate her immigration case from outside detention. This Court has the authority to order immediate release. *See Zadvydas*, 533 U.S. at 692; *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (habeas courts have "broad discretion allowed in fashioning the judgment granting relief to a habeas petitioner"); *Kambo*, 2007 WL 3051601, at *20 (granting release where government failed to provide a "reasonable justification" for continued detention that had no reasonably foreseeable end date).

88. If this Court does not find release appropriate, due process demands, at a minimum, an individualized bond hearing with adequate procedural safeguards against the unlawful deprivation of Ms. Barahona-Martinez's liberty. In ordering a bond hearing, this Court should require that (1) the government bear the burden of justifying detention by clear and convincing evidence, and (2) the court must consider Ms. Barahona-Martinez's ability to pay bond and alternatives to detention.

89. Placing the burden on DHS by clear and convincing evidence here is consistent with the majority of courts' decisions on § 1226(a), *supra* ¶¶ 69–70, as well as on prolonged

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of proof at a bond hearing by clear and convincing evidence, to ensure the preservation of the detainees' fundamental liberty interests") (internal citation omitted). Lastly, Ms. Barahona-Martinez should be released if § 1231(a) applies because her removal is plainly not "reasonably foreseeable," so her continued detention violates *Zadvydas*, 533 U.S. at 699–700.

detention in other contexts, *supra* ¶ 70 n.6.

90. Moreover, due process requires consideration of alternatives to detention and Ms. Barahona-Martinez's ability to pay bond.

91. Alternatives to detention not only place a far lesser burden on noncitizens, they have also proven to be effective. ICE's alternatives to detention program—the Intensive Supervision and Appearance Program ("ISAP")—has achieved remarkable success in ensuring appearance at immigration court hearings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings" and finding government had no reason to refuse to consider alternatives to money bonds "in light of the empirically demonstrated effectiveness of such conditions").[8] Given the proven success of these programs, the government cannot meet its burden of justifying continued detention unless it shows no alternative conditions of release would reduce flight risk and ensure Ms. Barahona-Martinez's future appearance at any court proceedings.

92. Failure to consider financial circumstances when setting bond is unconstitutional because it is not reasonably related to the government's legitimate purposes for a bond hearing—ensuring future attendance and protecting the community. *See Zadvydas*, 533 U.S. at 690 (noting detention must "bear[] [a] reasonable relation to [its] purpose") (internal citation omitted); *Hernandez*, 872 F.3d at 994 (concluding that government's failure to consider ability to pay and

[8] Alternatives to detention like ISAP are also far more cost-effective for the government. *See* American Immigration Lawyers Association, *The Real Alternatives to Detention*, AILA (June 18, 2019), https://tinyurl.com/44bphzns (noting the daily cost of alternatives to detention was less than 7% of that of detention). Meanwhile, according to ICE's own estimates, detention costs taxpayers approximately $124 to $149 per day. Dep't of Homeland Sec., *U.S. Immigration and Customs Enforcement Budget Overview, Fiscal Year 2023*, at 24 (Mar. 2022), https://tinyurl.com/593nsbbe. Based on just the low end of that spectrum, Petitioner's detention has already cost taxpayers over $275,000.

alternative conditions of release has "created a system of immigration bond determinations that does not adequately provide a reasonable connection between detention and legitimate governmental interests[,]" in violation of due process).

93. Accordingly, courts have held that the government violates noncitizens' constitutional rights when it fails to consider their ability to pay when setting bond amounts or considering their eligibility for alternative, nonmonetary conditions of release. *See, e.g.*, *Hernandez*, 872 F.3d at 990–91 (holding that "consideration of the [class of § 1226(a)] detainees' financial circumstances, as well as of possible alternative release conditions, [is] necessary to ensure that the conditions of their release will be reasonably related to the governmental interest"); *Shokeh v. Thompson*, 369 F.3d 865, 871 (5th Cir. 2004), *dismissed as moot*, 375 F.3d 351 (5th Cir. 2004) ("[T]he language of *Zadvydas* compels the conclusion that the bond must be low enough that the immigrant is able to meet it."); *Ogunmola v. Barr*, No. 6:19-CV-06742-EAW, 2020 WL 13554804, at *5 (W.D.N.Y. Apr. 29, 2020) ("[T]he Court finds that both due process and BIA precedent require the IJ to consider ability to pay and alternative conditions of release in setting bond [in hearings for individual detained under § 1226(a)].") (collecting cases); *see also Maniar*, 2018 WL 11544220, at *6 ("To justify [petitioner's] ongoing prolonged detention [under § 1226(c)], due process requires that he be given an individualized hearing before a neutral decision maker, who should determine whether his detention is justified by clear and convincing evidence of flight risk or danger, even after consideration [of] whether alternatives to detention could sufficiently mitigate that risk"); *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018) (holding that IJs "*must* consider ability to pay and alternative conditions of release in setting bond for an individual detained under § 1225(b)").

CLAIMS FOR RELIEF

COUNT ONE

Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution

94. Petitioner realleges and incorporates by reference paragraphs 1 through 93 above.

95. Ms. Barahona-Martinez's continued detention violates her due process because her detention bears no reasonable relationship to its purpose—preventing danger and flight risk—and because she has not received the kind of procedural protections that due process requires to justify such a prolonged deprivation of liberty, i.e., a meaningful hearing before an impartial adjudicator where the government bears the burden of proving that her detention is justified.

96. Ms. Barahona-Martinez poses no danger or flight risk, certainly not of the magnitude that would justify more than six years of detention. To the extent that she presents any danger or flight risk at all, these concerns can be addressed by imposing reasonable conditions of supervision, including electronic monitoring or even house arrest if necessary. The government's failure even to consider her for release under alternatives to detention is a violation of her right to due process.

97. In addition, the only procedure that she has received has been one bond hearing six years ago—where she bore the burden of proof and where the IJ did not even consider alternatives to detention—and, thereafter, rubberstamped administrative custody reviews conducted by the same agency that is responsible for jailing her. The government's failure to provide her with a meaningful hearing to justify her prolonged detention is a violation of her right to due process.

98. For all these reasons, Petitioner's ongoing prolonged detention is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

99. Issue an Order to Show Cause within three days of the filing of this Petition, pursuant to 28 U.S.C. § 2243, ordering Respondents to state the basis for Ms. Barahona-Martinez's continued detention;

100. Declare that Respondents' prolonged detention of Ms. Barahona-Martinez violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution;

101. Issue a Writ of Habeas Corpus and order Ms. Barahona-Martinez's immediate release under reasonable conditions of supervision

102. Order, in the alternative, that within ten days, Respondents schedule her for a hearing before this Court or the immigration court at which: (1) to continue detention, the government must establish by clear and convincing evidence that Ms. Barahona-Martinez presents a risk of flight or danger even after consideration of alternatives to detention that could mitigate any risk that Ms. Barahona-Martinez's release would present; and (2) if the government cannot meet its burden, Ms. Barahona-Martinez be ordered released on appropriate conditions of supervision, taking into account her ability to pay any bond;

103. Award Ms. Barahona-Martinez her costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412; and,

104. Grant such further relief as the Court deems just and proper.

Dated: September 6, 2023

Respectfully submitted,

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