THE DUE PROCESS OWED TO NONCITIZENS: STANDARDIZING THE BURDEN IN § 1226(A) BOND HEARINGS WITH THE HELP OF *HERNANDEZ-LARA* AND *VELASCO LOPEZ*

Sharon Shaji†

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† Head *de•novo* Editor, *Cardozo Law Review* (Vol. 44); J.D. Candidate, Benjamin N. Cardozo School of Law (June 2023). Many thanks to Professor Hasan Shafiqullah for his time and thoughtful guidance on this Note as well as his invaluable work in this field, including on *Velasco Lopez v. Decker*. I would also like to thank my incredible colleagues at *Cardozo Law Review* for their excellent edits and Professor Alma Magaña for her feedback. Finally, I am grateful to Niara, Peter, Amanda, and Kelsey for their unwavering support and friendship throughout law school.

INTRODUCTION

The Supreme Court distinguishes immigration detention from criminal detention as "nonpunitive in purpose and effect."[1] However, investigations have consistently found immigration detention to be abusive, unsanitary, overcrowded, torturous, and fatal.[2] These conditions combined with prolonged detention create prison atmospheres erasing any practical distinctions between punitive and nonpunitive detention

1 Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *accord* Wong Wing v. United States, 163 U.S. 228, 235 (1896).

2 *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382–92 (2014); Megan Shields Casturo, Comment, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PA. ST. L. REV. 825, 835–39 (2018); Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME (July 12, 2019, 2:01 PM), https://time.com/5623148/migrant-detention-centers-conditions [https://perma.cc/CNC6-TL3C]; TAYLOR KOEHLER, CTR. FOR VICTIMS OF TORTURE, BACKGROUNDER: ARBITRARY & CRUEL: HOW U.S. IMMIGRATION DETENTION VIOLATES THE CONVENTION AGAINST TORTURE AND OTHER INTERNATIONAL OBLIGATIONS (2021), https://www.cvt.org/sites/default/files/attachments/u93/downloads/arbitrary_and_cruel_d5_final.pdf [https://perma.cc/8JVK-9BES]; Serena Marshall, Lana Zak & Jennifer Metz, *Doctor Compares Conditions for Unaccompanied Children at Immigrant Holding Centers to 'Torture Facilities*,' ABC NEWS (June 23, 2019, 3:51 PM), https://abcnews.go.com/Politics/doctor-comparesconditionsimmigrantholding-centers-torture-facilities/story?id=63879031 [https://perma.cc/F293-M6XM]; *Challenging Unconstitutional Conditions in CBP Detention Facilities*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/litigation/challenging-unconstitutional-conditions-cbp-detention-facilities [https://perma.cc/UT52-7ZTG].

for detainees.[3] Concerningly, the United States has excessively relied on detention as part of its immigration policy.[4] As of November 2021, 22,438 noncitizens were being held in detention.[5] This number peaked under the Trump administration when over 55,000 noncitizens were held in detention at one point.[6] The vast majority of detained noncitizens—seventy-six percent—have no pending criminal charges nor are convicted criminals.[7] Yet, while most detained noncitizens are held in private detention centers, many are held alongside criminal defendants in county jails and state prisons, further blurring the line between immigrant and criminal detention.[8]

3 *See* Gretchen Frazee, *A Look Inside the Facilities Where Migrant Families Are Detained*, PBS NEWSHOUR (Aug. 26, 2019, 5:44 PM), https://www.pbs.org/newshour/nation/new-trump-rules-would-detain-families-longer-this-is-where-they-would-stay [https://perma.cc/SKX7-RLD4]. In *Wong Wing*, the Supreme Court held that although immigration detention was nonpunitive, the hard labor to which Wong Wing was subjected was punitive in nature and thus an unconstitutional violation of the noncitizen's due process. *See Wong Wing*, 163 U.S. at 235–38. Recently, thousands of detained noncitizens have claimed to be subjected to forced labor in detention centers, resulting in a number of lawsuits. *See* Annie Hollister, *Litigating ICE's "Voluntary Work Program,"* ONLABOR (Apr. 10, 2020), https://onlabor.org/litigating-ices-voluntary-work-program [https://perma.cc/8LGT-3DX3]; Kristine Phillips, *Thousands of ICE Detainees Claim They Were Forced into Labor, a Violation of Anti-Slavery Laws*, WASH. POST (Mar. 5, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/05/thousands-of-ice-detainees-claim-they-were-forced-into-labor-a-violation-of-anti-slavery-laws [https://perma.cc/8TFQ-V8D2].

4 *See generally* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Tanvi Misra & Ariel Aberg-Riger, *'I Became a Jailer': The Origins of American Immigrant Detention*, BLOOMBERG: CITYLAB (July 20, 2021, 7:30 AM), https://www.bloomberg.com/news/features/2021-07-20/the-origins-of-american-immigration-detention [https://perma.cc/LRH5-WJVL] ("The [United States] incarcerates more noncitizens than anywhere else in the world."); *Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/VXS5-89J9].

5 *ICE Detainees*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/8AXQ-B5X5].

6 *Id.*

7 *Id.* As of November 2021, 76% of detained noncitizens were detained for immigration violations as opposed to criminal charges. *Id.*

8 Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html (last visited Jan. 31, 2023); *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics [https://perma.cc/L2LX-XG8M]; *Immigration Detention 101*, *supra* note 4; *see* Jolie McCullough, *Migrants Arrested by Texas in Border Crackdown Are Being Imprisoned for Weeks Without Legal Help or Formal Charges*, TEX. TRIB. (Sept. 27, 2021, 5:00 AM), https://www.texastribune.org/2021/09/27/texas-border-migrants-jail [https://perma.cc/R2XK-55E8]; Hamed Aleaziz, *Internal Investigators Told ICE to Stop Sending Immigrants to a Prison in Louisiana Because of a Culture That Can Lead to Abuse*, BUZZFEED NEWS (Dec. 15, 2021, 7:28 PM), https://www.buzzfeednews.com/article/hamedaleaziz/ice-private-prison-louisiana-conditions [https://perma.cc/DZ6Z-YSG6].

One of the ways Congress has authorized the detention of noncitizens is through 8 U.S.C. § 1226(a).[9] Although § 1226(a) detainees are not yet found removable, they can be imprisoned for months and even years in the aforementioned conditions while simply awaiting the outcome of their removal proceedings.[10] In other words, many noncitizens who may ultimately overcome the charges for which they are detained, or who will be granted relief from removal, are held in detention for the duration of their case.[11] However, the detention of a noncitizen under § 1226(a) can be reviewed through a bond redetermination hearing.[12] This Note focuses on the burden of proof in § 1226(a) bond hearings. More specifically, this Note examines how the current burden allocation in § 1226(a) bond hearings denies noncitizens their due process.

In the absence of guidance from the Supreme Court, federal circuit courts of appeals have produced a variety of approaches to burden of proof allocation in § 1226(a) bond hearings.[13] Consequently, the due process that a noncitizen facing § 1226(a) detention receives and their freedom is, at best, impacted and, at worst, determined simply by their geographic location in the United States.[14] *Hernandez-Lara v. Lyons* and *Velasco Lopez v. Decker*, two recent cases from the First and Second Circuits, involve due process challenges to the burden of proof in § 1226(a) bond hearings.[15] While both courts shift the burden of proof to the government, the two circuits differ in the stage of proceedings in which the burden is shifted and the standard of proof the government is required to meet.[16]

Given the stark differences in outcomes from differing burden allocations and the liberty interests at stake, this Note argues that the burden of proof allocation for § 1226(a) bond hearings should be standardized in three ways: (1) the government should bear the burden of proof; (2) the government should meet this burden only through clear

9 8 U.S.C. § 1226(a). Section 1226(a) authorizes discretionary detention of noncitizens pending their removal proceedings. *Id.*

10 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 28 (1st Cir. 2021); Velasco Lopez v. Decker, 978 F.3d 842, 851–52 (2d Cir. 2020).

11 *See Hernandez-Lara*, 10 F.4th at 28; *Velasco Lopez*, 978 F.3d at 851–52.

12 *See infra* Section I.B. Bond redetermination hearings will be referred to as "bond hearings" throughout this Note. ICE initially decides whether to grant a bond. So, when a noncitizen appeals ICE's decision, the noncitizen is requesting a bond redetermination. However, in practice, the simplified term "bond hearings" is frequently used. *See infra* Section I.B.

13 *See infra* Part II.

14 *See infra* Parts II–III.

15 *See infra* Part II.

16 *See infra* Part II.

and convincing evidence; and (3) this burden allocation should apply to all § 1226(a) bond hearings as a bright-line rule.[17]

This Note proceeds in three Parts. Part I begins with an overview on the problematic structure of the immigration court system, how § 1226(a) is currently applied, and the history of burden shifting in § 1226(a) bond hearings. Part I then explains the due process owed to noncitizens, followed by an examination of relevant Supreme Court decisions concerning challenges to immigration detention. Part II summarizes the facts and holdings of *Hernandez-Lara* in the First Circuit and *Velasco Lopez* in the Second Circuit. Through four key points, Part III argues that a hybrid of the *Hernandez-Lara* and *Velasco Lopez* holdings is the appropriate solution to the issue of burden in § 1226(a) bond hearings. The first Section analyzes the nature of the burden, the questionable statutory interpretation of § 1226(a) by immigration courts, and the realities of detention, ultimately concluding that the government should bear the burden of proof. The second Section examines why liberty interests and the nature of immigration detention necessitate the clear and convincing evidence standard. The third Section analyzes why the government's interest in keeping the current burden allocation fails. Finally, the fourth Section explains why a bright-line rule for this new burden allocation is better than an as-applied approach.

I. BACKGROUND

A. *An Overview of Immigration Courts*

The issue of immigration detention is inextricably linked to the structure of immigration courts.[18] Immigration courts are administrative courts housed under the Department of Justice (DOJ)'s Executive Office for Immigration Review (EOIR).[19] Roughly 500 immigration judges (IJs) adjudicate the country's removal proceedings.[20] Appeals from IJ's

17 *See infra* Part III.

18 *See generally* Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076 (2021).

19 8 C.F.R. § 1003.0(a) (2023). Immigration courts are not Article III courts. *See* N.Y.C. BAR, REPORT ON THE INDEPENDENCE OF THE IMMIGRATION COURTS 1 (2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020792-IndependentImmigrationCourts.pdf [https://perma.cc/4W6C-6BLX].

20 *An Article I Immigration Court—Why Now Is the Time to Act: A Summary of Salient Facts and Arguments*, NAT'L ASS'N OF IMMIGR. JUDGES (Feb. 20, 2021) [hereinafter *An Article I Immigration Court—Why Now Is the Time to Act*], https://www.naij-usa.org/images/uploads/newsroom/Article_1_-_NAIJ_summary-of-salient-facts-and-arguments_2.20.2021.pdf [https://perma.cc/AZ7Z-79M9].

decisions are reviewed by the system's single appellate body, the Board of Immigration Appeals (BIA).[21] Select decisions can be further appealed to federal district or circuit courts.[22] EOIR operates under the authority of the Attorney General.[23] In the respective ascending order, decisions from BIA, the appointed EOIR Director, and the Attorney General create binding precedent within the immigration court system.[24] Federal circuit court decisions only bind IJs within their own circuit.[25] The Attorney General also supervises the DOJ attorneys prosecuting immigration cases in federal courts.[26] Remarkably, as a result, "the chief prosecutor is also the chief judge."[27]

The politicization of the aforementioned roles, particularly under the Trump administration, has been well documented.[28] Consequently, adjudication of immigration issues is particularly subject to the shifting political whims of the executive branch.[29] The Department of Homeland Security (DHS), also under the executive's control, houses the enforcement and prosecutorial arm of the immigration system, U.S. Immigration and Customs Enforcement (ICE).[30] Citing the incredible conflict of interest within the system and a myriad of constitutional concerns, immigration lawyers, judges, and advocates have been calling for reform for years, especially for the establishment of immigration courts as independent Article I courts.[31]

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21 8 C.F.R. § 1003.1(b) (2023); U.S. DEP'T OF JUST., IMMIGR. CT. PRAC. MANUAL ch. 6 (2022).

22 *See* 8 U.S.C. § 1252; KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10762, NO JUDICIAL REVIEW OF FACT FINDINGS FOR CERTAIN DISCRETIONARY IMMIGRATION RELIEF, RULES SUPREME COURT 1 (2022).

23 *See* U.S. Dep't of Just., Org. & Functions Manual § 17(A) (2023); Greg Chen, *Why America Needs an Independent Immigration Court System*, AM. IMMIGR. LAWS. ASS'N (Jan. 20, 2022), https://www.aila.org/infonet/aila-submits-statement-for-congressional-hearing [https://perma.cc/D33F-N4ZL].

24 *An Article I Immigration Court—Why Now Is the Time to Act*, *supra* note 20.

25 IMMIGR. EQUAL., ASYLUM MANUAL § 2 (2020), https://immigrationequality.org/asylum/asylum-manual [https://perma.cc/BT3F-P7L6].

26 *Featured Issue: Immigration Courts*, AM. IMMIGR. LAWS. ASS'N (May 5, 2022), https://www.aila.org/advo-media/issues/all/immigration-courts [https://perma.cc/9R9L-P2BU].

27 *Id.*

28 *See* N.Y.C. BAR, *supra* note 19, at 2–3. *See generally* Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192 (2018).

29 *See Immigration Courts Aren't Real Courts. Time to Change That.*, N.Y. TIMES (May 8, 2021), https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html (last visited Jan. 31, 2023); N.Y.C. BAR, *supra* note 19, at 2–3.

30 *Organizational Chart*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/organizational-chart [https://perma.cc/A85C-SFVV].

31 N.Y.C. BAR, *supra* note 19, at 1–3; *An Article I Immigration Court—Why Now Is the Time to Act*, *supra* note 20; AM. BAR ASS'N, ACHIEVING AMERICA'S IMMIGRATION PROMISE 1–3 (2021),

The political branches' plenary power over immigration matters is well established and has been consistently reaffirmed.[32] As a result, the Supreme Court employs "a highly deferential standard of review" to issues related to both Congress and the executive branch's broad discretionary oversight in immigration.[33] However, the Supreme Court has also expressed concerns on the unreviewable nature of many executive branch immigration decisions.[34] While the Court is still highly deferential, court decisions have slowly chipped away at the government's absolute plenary authority, particularly through due process challenges.[35]

B. *Section 1226(a) and Removal Proceedings*

Section 1226(a) of the Immigration and Nationality Act provides that ICE may arrest and detain noncitizens while removal proceedings are pending.[36] Alternatively, ICE may release the noncitizen on a bond of at least $1,500 or on conditional parole.[37] The § 1226(a) detention power is discretionary, unlike detention under § 1226(c) where noncitizens that are convicted of certain crimes are mandatorily detained during the pendency of their removal proceedings.[38] Critically, § 1226(a) does not address the issue of burden of proof—neither the degree required nor the

https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf [https://perma.cc/HHU4-3VS6].

32 *See, e.g.*, Ping v. United States, 130 U.S. 581 (1889) (describing the political branches' exclusive authority over immigration matters as a foreign affairs power); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (emphasizing government immigration regulations as "largely immune from judicial control"); Kleindienst v. Mandel, 408 U.S. 753 (1972) (refusing to intervene in the executive's discretionary immigration power); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding Trump's travel ban on a number of Muslim-majority countries due to the President's broad discretionary powers in immigration and national security matters).

33 Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 30–41 (2019); *see also The Supreme Court, 2018 Term—Leading Cases*, 133 HARV. L. REV. 392, 392, 401 (2019).

34 Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 912 (2015).

35 Ray, *supra* note 33, at 31; *see infra* Section I.E.

36 8 U.S.C. § 1226(a)(1).

37 *Id.* § 1226(a)(2). For an explanation of parole in an immigration context, see *The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (Jan. 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law_2023_update.pdf [https://perma.cc/GE2A-GVNR], and Linus Chan, *Weighing Pain: How the Harm of Immigration Detention Must Be Factored in Custody Decisions*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 865, 871–75 (2021).

38 *Compare* 8 U.S.C. § 1226(a), *with id.* § 1226(c).

holder of the burden.[39] When a noncitizen is arrested and put into removal proceedings, the power to detain under § 1226(a) lies initially with the immigration officer.[40] If detained, the noncitizen can seek to have the decision reviewed by an IJ at a bond redetermination hearing.[41] However, EOIR is not required to provide a bond hearing within any particular time frame.[42] As a result, a detained noncitizen can suffer in detention for months before the initial detention decision is reviewed.[43] If the noncitizen is again not granted bond at the hearing or seeks further review of the bond amount, the noncitizen can appeal to BIA.[44]

It is well established that discretionary detention power and mandatory detention are constitutional.[45] Moreover, § 1226(e) makes clear that this discretionary judgment is not subject to review.[46] However, § 1226(e) does not prohibit noncitizens from challenging "the statutory framework that permits [their] detention without bail."[47] Given that § 1226(e) does not explicitly bar habeas corpus review, as is required for such a preclusion, federal courts have jurisdiction to review "constitutional challenge[s] to the legislation authorizing [a noncitizen's] detention without bail."[48] Similarly, the Supreme Court has held that

39 *Id.* § 1226(a). Section 1252(a), the predecessor to § 1226(a), was silent on the issue of the burden as well. 8 U.S.C. § 1252(a) (1952); Brief of Amici Curiae the American Civil Liberties Union and the New York Civil Liberties Union in Support of Petitioner-Appellee and Affirmance at 3–5, Velasco Lopez v. Decker, 978 F.3d 842 (2d Cir. 2020) (No. 19-2284) [hereinafter ACLU Amici Curiae Brief].

40 8 C.F.R. § 236.1(b)(1) (2023).

41 *Id.* § 236.1(d)(1).

42 HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 11 (2019).

43 *See Velasco Lopez*, 978 F.3d at 847.

44 8 C.F.R. § 236.1(d)(3). To clarify, noncitizens seeking a § 1226(a) bond hearing are detained. Thus, this Note uses the words "noncitizens" and "detainees" interchangeably in the context of discussions about § 1226(a) bond hearings.

45 *See generally* Demore v. Kim, 538 U.S. 510 (2003) (holding mandatory detention without an individualized safety or flight risk determination constitutionally permissible); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (finding that mandatory detention without a statutory right to periodic bond hearings is constitutional); Zadvydas v. Davis, 533 U.S. 678 (2001) (affirming the government's right to detain noncitizens for removal purposes as long as removal is reasonably foreseeable in the future); Nielsen v. Preap, 139 S. Ct. 954 (2019) (finding that DHS's mandatory detention authority under § 1226(c) does not expire and can be exercised against qualifying noncitizens at any point).

46 8 U.S.C. § 1226(e) ("No court may set aside any action or decision . . . regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").

47 *Demore*, 538 U.S. at 516–17.

48 *Id.* at 517. A writ of habeas corpus is a challenge to illegal imprisonment, specifically a challenge to one's continued detention or the restraint on one's liberty. Alexandra Lampert & Zoey Jones, Brooklyn Def. Servs., *Litigating Habeas Corpus for Immigration Detainees*, VERA INST. OF JUST. (Jan. 21, 2021), https://www.vera.org/knowledge-bank/VERA-Habeas-PPT-Jan-2021.pdf [https://perma.cc/43FV-538T].

§ 1252(b)(9) does not bar review of constitutional challenges to detention.[49] Rather, § 1252(b)(9) only bars review of discretionary decisions to seek removal or detention, the process by which removability is determined, and removal orders with some exceptions.[50]

C. *The Shift from Favoring Liberty to Favoring Detention*

The modern history of the burden in § 1226(a) discretionary bond hearings has two major phases: the period before the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was passed in 1996 and the period after IIRIRA.[51] Pre-IIRIRA, BIA applied a "presumption in favor of liberty" in § 1226(a) bond hearings.[52] *In re Patel* had been long relied on for this presumption.[53] Up until 1981, most deportable noncitizens were released by ICE pursuant to its authority to grant conditional parole.[54]

In the 1970s and 1980s, a tough-on-crime national stance became popular.[55] As part of this stance, which also significantly contributed to our modern mass incarceration crisis, politicians targeted undocumented persons in the United States, blaming them for a general rise in crime and overuse of social resources.[56] These sentiments influenced the passage of IIRIRA, which ultimately "recast[] unauthorized migration as a crime."[57] IIRIRA was intended to, among many other things, help effectuate removal orders by decreasing the obstacles to deporting non-detained

49 *Jennings*, 138 S. Ct. at 839–41.

50 SMITH, *supra* note 42, at 16–17; *see* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact.").

51 *See* SMITH, *supra* note 42, at 5–8.

52 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 26 (1st Cir. 2021).

53 *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) ("[A noncitizen] generally is not and should not be detained or required to post bond *except* on a finding that he is a threat to the national security . . . or that he is a poor bail risk." (emphasis added) (citations omitted)).

54 *See* Misra & Aberg-Riger, *supra* note 4; Carl Lindskoog, *How the Haitian Refugee Crisis Led to the Indefinite Detention of Immigrants*, WASH. POST (Apr. 9, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants [https://perma.cc/W8M6-BMBD].

55 Kerwin, *supra* note 28, at 193.

56 *Id.*

57 *Id.* (quoting Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. ON MIGRATION & HUM. SEC. 1, 8 (2018)).

noncitizens.[58] IIRIRA pushed immigrant detention into overdrive by deputizing local police to act as ICE agents through § 1357(g),[59] incentivizing localities and corporations to profit tremendously off the "immigrant detention complex" and authorizing enormous funding increases for immigration enforcement.[60] Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) a few months prior to IIRIRA.[61] AEDPA, among other things, expanded the criminal grounds for deportation and, in turn, IIRIRA established the modern mandatory detention regime for criminally convicted noncitizens—§ 1226(c).[62] Together, AEDPA and IIRIRA reified the foundations for "crimmigration."[63]

Notably, with regards to § 1226(a), IIRIRA solely increased the bond minimum from $500 to $1,500.[64] IIRIRA did not address the process by which discretionary bond hearings were held.[65] The Immigration and Naturalization Service (INS),[66] however, shifted from a presumption in

58 *See* Velasco Lopez v. Decker, 978 F.3d 842, 848–49 (2d Cir. 2020). In essence, the more often potentially removable noncitizens are detained, the easier it is to locate and deport them.

59 *See* 8 U.S.C. § 1357(g). Section 1357(g) authorizes agreements between DHS and state and local police. Deputized officers are authorized to act on behalf of ICE, including executing ICE warrants and making detention and bond recommendations, among many other things. This program is the subject of significant critique for its costliness and racially motivated over-policing of immigrant communities. *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (July 8, 2021), https://www.americanimmigrationcouncil.org/research/287g-program-immigration [https://perma.cc/WGS4-27QY].

60 Melina Juárez, Bárbara Gómez-Aguiñaga & Sonia P. Bettez, *Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation*, 6 J. ON MIGRATION & HUM. SEC. 74, 76 (2018).

61 *Id.* at 75; *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

62 *See* Juárez, Gómez-Aguiñaga & Bettez, *supra* note 60, at 75, 77–78; *see* Hernandez-Lara v. Lyons, 10 F.4th 19, 26–27 (1st Cir. 2021).

63 *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015). Crimmigration refers to the problematic merging of criminal law and immigration law over time. For example, criminal charges not only carry potential criminal law penalties for noncitizens, but often entail additional immigration penalties. This has led to increased criminalization and subsequent incarceration of noncitizens. *Id.* at 1–3; *see* Tanvi Misra, *The Rise of 'Crimmigration,'* BLOOMBERG: CITYLAB (Sept. 16, 2016, 2:01 PM), https://www.bloomberg.com/news/articles/2016-09-16/c-sar-garc-a-hern-ndez-on-the-rise-of-crimmigration [https://perma.cc/76SL-D75J]; Heidi Altman & Marta Ascherio, *5 Reasons to End Immigrant Detention*, NAT'L IMMIGRANT JUST. CTR. (Sept. 14, 2020), https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention [https://perma.cc/WJC6-GNWM].

64 *Hernandez-Lara*, 10 F.4th at 27.

65 *See id.*

66 INS was the predecessor agency to DHS. DHS and its subagency ICE were created after the 9/11 terror attacks—the restructuring marked a renewed focus on noncitizens as national security threats. *See* Camille J. Mackler, *Immigration Policy Before and After 9/11: From the INS to DHS—*

favor of liberty to a presumption in favor of detention at the initial custody determination.[67] The noncitizen was now responsible for demonstrating to the immigration officer that they were neither dangerous nor a bail risk.[68] BIA then adopted this shift by applying the presumption of detention standard to § 1226(a) bond hearings, notwithstanding the lack of this presumption for bond hearings in either § 1226(a) or the corresponding regulation, 8 C.F.R. § 236.1.[69]

D. *The Due Process Owed to Noncitizens*

Although Congress is authorized to create immigration and naturalization rules "that would be unacceptable if applied to citizens," the Supreme Court has also acknowledged that there are constitutional limits to such power.[70] Most importantly for this discussion, noncitizens present in the United States are entitled to due process protections under the Fifth Amendment regardless of their immigration status.[71] Whether a noncitizen received due process in a bond hearing is not a discretionary issue and, thus, is properly subject to judicial review.[72] Habeas review in this context can include evaluating whether the initial detention process was constitutionally adequate, as well as whether detention conditions have become constitutionally inadequate.[73]

When depriving a person of liberty, procedural due process has traditionally demanded adequate notice and a reasonable opportunity to be heard.[74] Substantive due process has demanded that interferences with a person's liberty interest be fair and reasonable and for a legitimate governmental interest.[75] Specifically, in nonpunitive detention, due

Where Did We Go Wrong?, JUST SEC. (Sept. 9, 2021), https://www.justsecurity.org/78132/immigration-policy-before-and-after-9-11-from-the-ins-to-dhs-where-did-we-go-wrong [https://perma.cc/SW99-F2H9].

67 *Hernandez-Lara*, 10 F.4th at 26–27; *see* 8 C.F.R. § 236.1(c) (2023).

68 *See* Velasco Lopez v. Decker, 978 F.3d 842, 849 (2d Cir. 2020).

69 *Id.*; *In re* Adeniji, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999) ("From the outset, therefore, the regulations under the IIRIRA have added as a requirement for ordinary bond determinations under section 236(a) of the Act that the alien must demonstrate that 'release would not pose a danger to property or persons,' even though section 236(a) does not explicitly contain such a requirement."); *see In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

70 Demore v. Kim, 538 U.S. 510, 521–23 (2003); Zadvydas v. Davis, 533 U.S. 678, 688–92 (2001).

71 *Velasco Lopez*, 978 F.3d at 850; *see* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

72 *Velasco Lopez*, 978 F.3d at 850.

73 *Id.*

74 Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 125 (2018).

75 *See id.*

process requires a particularly strong justification in order to deprive a person of their liberty.[76] The Court has recognized two legitimate, special justifications for the detention of noncitizens: (1) to aid in removal, including ensuring noncitizens' presence at legal proceedings, and (2) to protect the community where noncitizens pose a danger.[77]

In *Mathews v. Eldridge*, the Supreme Court established a balancing test to be used in determining whether due process had been granted in an administrative proceeding.[78] Accordingly, in due process challenges to immigration proceedings, such as in *Hernandez-Lara* and *Velasco Lopez*, courts have employed the *Eldridge* three-part balancing test.[79] Courts must balance: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest."[80] In the context of the § 1226(a) challenges, the *Eldridge* factors are applied to evaluate if due process is afforded to a noncitizen when the noncitizen bears the burden of proof to demonstrate that they are neither a danger to the community nor a flight risk.[81]

The *Eldridge* balancing test has provided a pathway for federal courts to somewhat diminish the overreaching plenary power of the executive branch and, at times, to restore due process for noncitizens in detention and removal proceedings.[82] When considering the government's interest and balancing it against the remaining factors, the courts must essentially evaluate the merits of previously unreviewable immigration policy decisions.[83] Critically, financial and societal costs are part of the *Eldridge* calculus.[84] As a result, federal courts have employed the *Eldridge* test for judicial activism in this area.[85]

76 "[A] special justification . . . [must] outweigh[] the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 127 (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001)).

77 David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002).

78 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

79 *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 27–28 (1st Cir. 2021); Velasco Lopez v. Decker, 978 F.3d 842, 851 (2d Cir. 2020).

80 *Hernandez-Lara*, 10 F.4th at 28.

81 *See id.* at 27–28; *Velasco Lopez*, 978 F.3d at 852.

82 Landau, *supra* note 34, at 911–26.

83 *See id.* at 882.

84 *Hernandez-Lara*, 10 F.4th at 32–33; *Velasco Lopez*, 978 F.3d at 855.

85 Landau, *supra* note 34, at 882–83.

E. *Guidance (or Lack Thereof) from the Supreme Court*

The Supreme Court has not explicitly addressed the question of burden in § 1226(a) discretionary bond hearings.[86] However, the Court's other decisions related to immigrant detention provide a framework for thinking about the issue of burden and due process. In *Zadvydas v. Davis*, the Court found that the detention of a noncitizen must "bear[] [a] reasonable relation to the purpose for which the noncitizen [is detained]."[87] In Zadvydas's case, it was impossible to effectuate his removal order.[88] Thus, continued detention of Zadvydas did not serve the government's purpose and was a violation of his due process rights.[89] Despite BIA deciding otherwise, the Court reiterated the principle that "liberty is the norm" and detention is "the carefully limited exception."[90] Further, the Court identified ICE's custody review procedure, requiring Zadvydas to prove he was not dangerous, as constitutionally inadequate.[91] Two years later, in *Demore v. Kim*, the Court upheld Kim's mandatory detention under § 1226(c).[92] The Court found it was constitutionally permissible to detain noncitizens without individualized determinations of dangerousness or flight risk.[93] Congress had acted within its authority when classifying a certain class of noncitizens as presumptively unbailable due to dangerousness concerns.[94] Thus, Kim's detention was reasonably related to the government's purpose.[95] The differing outcomes in *Zadvydas* and *Demore* set the stage for determining what types of detention under § 1226(a) are constitutionally permissible and what procedures are constitutionally adequate.

86 *See generally* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75 (2016).

87 Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (second alteration in original) (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (finding indefinite detention of the plaintiff noncitizens unconstitutional where both noncitizens were ordered deported but refused entry by other countries).

88 *See id.* at 684–85, 702.

89 *See id.* at 690–94. Alarmingly, Justice Thomas continues to peddle the view that "the Due Process Clause does not 'apply to laws governing the removal of aliens'" and that *Zadvydas* should be overruled. Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1835–36 (2022) (Thomas, J., concurring) (quoting Sessions v. Dimaya, 138 S. Ct. 1204, 1245 (2018) (Thomas, J., dissenting)).

90 United States v. Salerno, 481 U.S. 739, 755 (1987); *see Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992))); *supra* Section I.C.

91 Holper, *supra* note 86, at 104–05; *see Zadvydas*, 533 U.S. at 691–92.

92 *See* Demore v. Kim, 538 U.S. 510 (2003).

93 *Id.* at 519–20, 524–25.

94 Holper, *supra* note 86, at 105.

95 *Demore*, 538 U.S. at 518–22, 527–28.

In 2018, *Jennings v. Rodriguez* was a major missed opportunity for the Supreme Court to provide lower courts with procedural guidance on immigration bond hearings.[96] *Jennings* concerned statutory and constitutional challenges to prolonged detention from a class of noncitizens detained under §§ 1225(b), 1226(a), and 1226(c).[97] Rejecting the statutory argument against detention, the Court held that detained noncitizens were not entitled to periodic bond hearings after six months of detention.[98] The Court further found that the Ninth Circuit misapplied the canon of constitutional avoidance to read a limit on the duration of detention into the law.[99] Subsequently, the Court declined to reach the noncitizens' constitutional due process challenges and remanded the case with instructions to reexamine the issue of class certification before examining the constitutional issues.[100] *Jennings* left open the constitutional due process arguments against the burden allocation in § 1226(a) bond hearings, which is where this Note picks up.[101]

II. CIRCUIT SPLIT

A. *First Circuit:* Hernandez-Lara v. Lyons

1. Facts and Procedural History

In 2013, Ana Ruth Hernandez-Lara left El Salvador and entered the United States without inspection in order to escape severe domestic violence, rape, and gang violence.[102] Hernandez-Lara eventually settled in Maine, found work at a recycling plant, and built a life in the United States.[103] In September 2018, ICE arrested Hernandez-Lara and decided to detain her under § 1226(a).[104] One month after her detention began, Hernandez-Lara received a bond hearing.[105] At the hearing, Hernandez-Lara had the burden of proving, by clear and convincing evidence, that

96 Rosenbaum, *supra* note 74, at 132–38. *See generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

97 *Jennings*, 138 S. Ct. at 839.

98 *Id.* at 842–43.

99 *Id.* at 843.

100 *Id.* at 851–52.

101 *See* Rosenbaum, *supra* note 74, at 132–38.

102 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 23–24 (1st Cir. 2021).

103 *Id.* at 24.

104 *Id.*

105 *Id.*

"she was neither a danger to the community nor a flight risk."[106] Although Hernandez-Lara had no criminal history in the United States or El Salvador and had significant ties to her family and community in Maine, the court found that she had not met her burden and cited an INTERPOL "Red Notice" identifying her.[107] The notice described the activities of Mara 18—the gang she had fled five years prior—and vaguely stated she was subject to an arrest warrant in El Salvador.[108] The notice did not contain any specific allegations of crimes or dangerous acts committed by Hernandez-Lara.[109] Although Hernandez-Lara denied involvement, and the IJ admitted there was a possibility that she was wrongly identified or an innocent member of Mara 18, the IJ found that Hernandez-Lara's lack of evidence rebutting the notice did not allow her to meet her burden.[110] Thus, Hernandez-Lara remained in detention in New Hampshire awaiting her removal proceedings.[111]

In April 2019, Hernandez-Lara filed a petition for a writ of habeas corpus in federal district court.[112] She argued that due process entitled her to a bond hearing where the government, not her, would be required to prove dangerousness or flight risk by clear and convincing evidence to justify her detention.[113] In July 2019, Hernandez-Lara's petition was granted, and the district court ordered the IJ to hold a second bond hearing for Hernandez-Lara where the government would have to prove that she was dangerous or a flight risk by clear and convincing evidence in order to justify her continued detention.[114] Hernandez-Lara was granted bond at the second hearing; the IJ found that the government, as a result of the burden shift, could not meet its evidentiary requirements for detention.[115] After over ten months in detention, Hernandez-Lara was released.[116] The government appealed the district court's decision.[117]

106 *Id.* at 24–25.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* at 25.

111 *Id.*

112 *Id.*

113 Hernandez-Lara v. Immigr. & Customs Enf't, Acting Dir., 560 F. Supp. 3d 531, 533 (D.N.H. 2019), *aff'd in part, rev'd in part, sub nom. Hernandez-Lara*, 10 F.4th 19.

114 *See id.* at 540.

115 *Hernandez-Lara*, 10 F.4th at 25–26.

116 *Id.* at 26.

117 *Id.*

2. Holding

The First Circuit affirmed the district court's order of a second bond hearing where the government, not the noncitizen, bore the burden of proof.[118] The court also affirmed that the government must prove dangerousness by clear and convincing evidence.[119] The court reversed the district court's finding with respect to the standard required for proving flight risk, holding that the government was only required to prove flight risk by a preponderance of the evidence.[120] With its decision, the court established a bright-line rule for the burden standard in § 1226(a) discretionary bond hearings.[121]

Applying the *Eldridge* balancing test, the court found the three factors all cut in favor of Hernandez-Lara.[122] The private interest affected, Hernandez-Lara's liberty, was substantial.[123] Her detention deprived her of relations with her family and her employment for ten months.[124] The court noted that Hernandez-Lara was detained in county jail with criminal inmates and would have remained there for more than two years if not for the district court order.[125] Neither the option to end detention through voluntary departure[126] nor the finite duration of removal proceedings diminished the significant deprivation of the liberty interest here.[127]

In considering the second factor, risk of error, the court noted that detention overwhelmingly hindered noncitizens' ability to access counsel and gather evidence.[128] Language barriers and unfamiliarity with the immigration system procedures put noncitizens at an additional disadvantage.[129] Where the noncitizen both bears the burden of proof and is required to prove two negatives, these considerations become

118 *Id.* at 46.

119 *Id.* at 40–41.

120 *Id.*

121 *Id.* at 45–46.

122 "[T]he private interest affected is commanding; the risk of error from [placing the burden of proof on the noncitizen] is substantial; and the countervailing governmental interest . . . is comparatively slight." *Id.* at 35 (alterations in original) (quoting Santosky v. Kramer, 455 U.S. 745, 758 (1982)).

123 *Id.* at 28.

124 *Id.*

125 *Id.*

126 *Id.* at 29 (noting that voluntary departure to end detention is "like telling detainees that they can help themselves by jumping from the frying pan into the fire," as it can result in lifelong banishment).

127 *Id.* at 29–30.

128 *Id.* at 30.

129 *Id.* at 30–31.

outcome-determinative against the noncitizen.[130] Hernandez-Lara's prolonged detention demonstrated the error that this burden risked and the significant resulting consequences.[131]

In its evaluation of the third factor, the court recognized the government's legitimate interest in the "prompt execution of removal orders."[132] However, the court distinguished that the issue at hand was not the government's right to detain but who bore the burden at bond hearings.[133] Given the risk of error when a noncitizen bears the burden, detaining a noncitizen that ultimately does not pose a flight risk fails to serve the government's interest.[134] Given the government's incentive to gather evidence and its access to resources, a burden shift would not hinder the relevant government interest in any substantial way.[135] Finally, the court considered the public interest as a component of the government's interest.[136] The detention of noncitizens pending removal proceedings, particularly prolonged and erroneous detention, leads to substantial financial and societal costs.[137] Thus, the court found the final factor also provided a basis for burden shifting.[138]

On the question of standard of proof, the court affirmed that clear and convincing evidence was required for proving dangerousness.[139] The second *Eldridge* factor and the government's more comprehensive access to evidence of a noncitizen's danger risk necessitated a standard that appropriately reflected the liberty interest at stake.[140] However, the court found the risk of error in flight risk determinations was considerably less, allowing for a lower standard of proof: mere preponderance of the evidence.[141] The court noted that noncitizens have access to the most relevant information for flight risk such as family information, community ties, employment records, and housing information.[142] Moreover, flight risk is more closely connected to the government's interest in effectuating removal orders compared to danger risk.[143] The court found a preponderance of the evidence standard for flight risk

130 *See id.* at 31.

131 *Id.*

132 *Id.* at 32.

133 *Id.*

134 *See id.*

135 *Id.* at 33.

136 *Id.* at 32.

137 *Id.* at 33.

138 *Id.*

139 *Id.* at 39–40.

140 *Id.*

141 *Id.* at 40.

142 *Id.*

143 *Id.*

reflected these differences and aligned with the standard required for flight risk determination in criminal bail hearings.[144]

B. *Second Circuit:* Velasco Lopez v. Decker

1. Facts and Procedural History

Carlos Velasco Lopez, at the age of four, left Mexico and entered the United States without inspection.[145] Since 2000, he grew up and built a community in New York with his family.[146] In high school, he eventually applied for Deferred Action for Childhood Arrivals (DACA) and was approved in 2013.[147] After high school, Velasco Lopez became a sous chef as well as a caretaker to his ill mother.[148] In 2016, he pled guilty to driving while impaired.[149] Then, in March 2017, Velasco Lopez faced charges relating to a local bar fight.[150] However, he denied any involvement in the altercation.[151] In late 2017, his DACA renewal application was denied and he lost his DACA status.[152] In February 2018, Velasco Lopez was arrested for the unlicensed operation of a vehicle and driving while intoxicated.[153] He was transferred to ICE custody and put in detention pursuant to § 1226(a).[154] Between February and April 2018, ICE failed to produce Velasco Lopez for four different criminal court appearances related to the bar altercation.[155] A criminal court bench warrant for Velasco Lopez was also issued, while he was in immigration detention, for failing to appear in criminal court for his February 2018 arrest.[156]

In May 2018, three and half months after his detention began, Velasco Lopez finally received a bond hearing.[157] At the hearing, Velasco Lopez bore the burden of proof to show that he was neither a danger to the community nor a flight risk in order to be eligible for bond.[158] In part

144 *Id.* at 40–41.

145 Velasco Lopez v. Decker, 978 F.3d 842, 846 (2d Cir. 2020).

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 847.

151 *Id.*

152 *Id.* at 846.

153 *Id.* at 847.

154 *Id.* at 845, 847.

155 *Id.* at 847.

156 *Id.*

157 *Id.*

158 *Id.*

because of his outstanding charges, he was unable to meet this burden.[159] The IJ denied bail on June 21, 2018.[160] The charges against Velasco Lopez related to the bar altercation were dismissed on June 25, 2018.[161] Yet, he remained in detention.[162] He was granted a second bond hearing in October 2018.[163] Here, Velasco Lopez was unable to produce charging documents from the February 2018 arrest in sufficient detail as requested by the IJ.[164] Thus, an adverse inference was made against him even though this information was not available because he was unable to answer the criminal court charges due to his immigration detention.[165] Again, Velasco Lopez was denied bail.[166]

By April 2019, Velasco Lopez had been in detention for fourteen months pending his removal proceedings.[167] He filed a petition for a writ of habeas corpus in federal district court.[168] Velasco Lopez raised a due process challenge to his prolonged incarceration despite the government not proving he was a bail risk.[169] The district court granted the petition and ordered a new bond hearing where the burden was shifted to the government to prove by clear and convincing evidence that Velasco Lopez was dangerous or a flight risk.[170] At this new hearing, the court found the government failed to meet its new burden, and Velasco Lopez was released on $10,000 bond.[171] The government appealed the district court's order.[172]

2. Holding

The Second Circuit held that the district court correctly shifted the burden to the government for the new bond hearing and correctly ordered the application of a clear and convincing evidentiary standard for

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 Velasco Lopez v. Decker, No. 19-cv-2912, 2019 WL 2655806, at *1 (S.D.N.Y. May 15, 2019).

169 *Velasco Lopez*, 978 F.3d at 850. Note that Velasco Lopez did not challenge his initial detention. *Id.*

170 *Velasco Lopez*, 2019 WL 2655806, at *4.

171 *Velasco Lopez*, 978 F.3d at 848.

172 *Id.* at 846.

proving dangerousness and flight risk.[173] The court identified that the issue was whether an ongoing detention had become unlawful, and as a result, "whether additional procedural protections [had then become] necessary."[174] This was not a due process challenge to § 1226(a) detention as a whole.[175] Notably, the court emphasized that the holding did not establish a bright-line rule with regards to when a bond hearing with a shifted burden was required by due process.[176]

Applying the *Eldridge* balancing test, the court found all three factors weighed heavily in favor of Velasco Lopez.[177] The court highlighted the condition of his detention and its impact on his liberty interest: Velasco Lopez's detention was "indistinguishable" from the conditions of criminal incarceration, while lacking the same procedural protections afforded to criminal defendants.[178] As his detention became prolonged, the deprivation of his interest grew.[179] With no apparent end in sight for his detention, the first factor solidly weighed in Velasco Lopez's favor.[180]

Regarding the second factor, the court found the process given to Velasco Lopez resulted in a significant risk of error.[181] Velasco Lopez's detention not only impeded his ability to produce evidence for his bond hearings, but it also prevented him from resolving his pending criminal charges.[182] Although out of Velasco Lopez's control, the pending charges resulted in an adverse inference about his dangerousness.[183] Citing *Zadvydas*, the court emphasized that the procedural protections owed to a noncitizen increase with prolonged detention.[184] A bond hearing with a burden shifted to the government would mitigate the risk of error at issue in the second factor.[185] Moreover, prolonged detention increased the opportunity for the government to find the necessary evidence to prove dangerousness or flight risk.[186]

Lastly, the court recognized the government's interest in effectuating removal orders and preventing noncitizens from committing crimes.[187]

173 *Id.* at 856–57.

174 *Id.* at 851.

175 *See id.* at 850.

176 *Id.* at 855 n.13.

177 *Id.* at 851–55.

178 *Id.* at 850–51.

179 *Id.* at 852.

180 *Id.*

181 *Id.*

182 *Id.* at 852–53.

183 *Id.*

184 *Id.* at 853 (citing Zadvydas v. Davis, 533 U.S. 678, 701 (2001)).

185 *Id.*

186 *Id.*

187 *Id.* at 854.

However, "prolonged detention of noncitizens who are neither dangerous nor a risk of flight," like Velasco Lopez, do not serve these interests.[188] The court found that long-term deprivation of a noncitizen's liberty interest required a stronger governmental interest than that required for short-term detention.[189] Burden shifting in bond hearings once detention is prolonged would ensure the necessary stronger interest is established to justify continued detention.[190] Thus, in addition to the societal costs posed by prolonged detention, the third factor also cut in favor of a burden shift.[191]

On the issue of the standard of proof in bond proceedings with a shifted burden, the court found that a clear and convincing evidence standard for proving both dangerousness and flight risk was appropriate.[192] Relying on Supreme Court precedent and the standard of proof employed in other types of civil detention proceedings, the court held that the potential injury, deprivation of one's liberty, was too great "to allocate the risk of error evenly between the [noncitizen] and the Government."[193] The heightened standard of clear and convincing evidence, compared to a preponderance of the evidence, provided better procedural protections for such a fundamental interest.[194]

C. *The Other Circuits*

There has been a relatively recent increase in burden shifting to the government in bond hearings.[195] However, these shifts are not all alike.[196] For example, the Ninth Circuit adopted a burden shift in *Casas* bond hearings.[197] *Casas* bond hearings are for noncitizens detained "under § 1226(c) but who have a stay of removal pending a petition for review, or have had their case remanded to the BIA."[198] Under *Casas-Castrillon*

188 *Id.* at 854–55.

189 *Id.* at 855.

190 *Id.* at 854.

191 *Id.*

192 *Id.* at 857.

193 *Id.* at 856 ("[I]t is improper to allocate the risk of error evenly between the individual and the Government when the potential injury is as significant as the individual's liberty.").

194 *Id.* at 856–57.

195 Holper, *supra* note 18, at 1107–08, 1108 nn.214, 217.

196 *See id.*

197 *See* Singh v. Holder, 638 F.3d 1196, 1200 (9th Cir. 2011); Marisol Orihuela & Ahilan T. Arulanantham, *Prolonged Detention and Bond Eligibility: Recent Ninth Circuit Developments*, ACLU 2–3 (Sept. 9, 2008), http://www.endisolation.org/wp-content/uploads/2013/03/Casas_Advisory_NinthCircuit.pdf [https://perma.cc/CG2G-CE3J]. *See generally* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008).

198 Orihuela & Arulanantham, *supra* note 197, at 3.

v. Dep't of Homeland Security, where prolonged detention is found, the government must bear the burden of proving dangerousness and flight risk by clear and convincing evidence.[199] In *Singh v. Holder*, the Ninth Circuit again shifted the burden to the government in § 1226(a) bond hearings.[200] Singh was initially detained pursuant to § 1226(a) and pending a judicial review of his stayed removal order.[201] As a result, he was held in detention for almost four years during the pendency of these proceedings.[202] There, the court required that the government prove by clear and convincing evidence that Singh's continued detention was justified.[203]

Section 1226(a) burden-shifting arguments have failed in both the Third and Fourth Circuits.[204] The Third Circuit, in *Borbot v. Warden Hudson County Correctional Facility*, found that even after fourteen months of detention pursuant to § 1226(a), Borbot was not entitled to a second bond hearing where the government must carry the burden of justifying Borbot's continued detention.[205] However, in *German Santos v. Warden Pike County Correctional Facility*, the Third Circuit clarified that due process "limits detention without a bond hearing to a 'reasonable' period," making as-applied challenges to § 1226(c) mandatory detentions permissible.[206] The Third Circuit further held that the government must prove by clear and convincing evidence that continued detention is justified where prolonged detention is found.[207]

Most recently, the Ninth Circuit, in *Rodriguez Diaz v. Garland*, rejected a *Velasco Lopez*– and *Hernandez-Lara*–type burden shift, opting instead to follow the Third and Fourth Circuits.[208] Emphasizing the flexibility of the *Eldridge* balancing test and relying on *Demore*, the court found that "the private interest of a detained alien under § 1226(a) is lower than that of a detained U.S. citizen, and [that] governmental interests are significantly higher in the immigration detention context."[209]

199 *Id.* at 6.

200 *Singh*, 638 F.3d at 1200.

201 *Id.* at 1201.

202 *Id.* at 1203.

203 *Id.* at 1200.

204 *See* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274 (3d Cir. 2018); Miranda v. Garland, 34 F.4th 338 (4th Cir. 2022).

205 *Borbot*, 906 F.3d at 275–80 ("Borbot cites no authority, and we can find none, to suggest that duration alone can sustain a due process challenge by a detainee who has been afforded the process contemplated by § 1226(a) and its implementing regulations.").

206 German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 208 (3d Cir. 2020); *see also* Rodriguez Diaz v. Garland, 53 F.4th 1189, 1228 n.7 (9th Cir. 2022) (Wardlaw, J., dissenting).

207 *German Santos*, 965 F.3d at 213.

208 *Rodriguez Diaz*, 53 F.4th at 1204–05.

209 *Id.* at 1206–10, 1213.

While distinguishing Rodriguez Diaz's situation from that of Singh's, the Ninth Circuit declined to say whether *Singh* was still good law and indicated that recent Supreme Court decisions on the matter may have nullified the court's past decisions.[210]

While some circuits have addressed the burden, albeit in different ways, other circuits have not been presented the issue and, presumably, maintain BIA's current burden allocation in bond hearings.[211] These differences result in disparate outcomes for § 1226(a) detainees in different parts of the country since the burden and standard allocations heavily impact, and even determine, the outcomes of bond proceedings.[212] In essence, a noncitizen's due process rights and liberty unacceptably vary depending on their location.[213] Standardizing the burden can help resolve some of these disparities by keeping § 1226(a) bond procedures consistent throughout the country.

III. ANALYSIS

A. *The First and Second Circuits Correctly Shifted the Burden Back to the Government*

1. The Outcome-Determinative Nature of the Burden Denies Noncitizens Due Process

Placing the burden of proof in § 1226(a) bond hearings on noncitizens can be outcome-determinative and, thus, inherently unfair. Noncitizens are required to meet the difficult requirement of proving two different negatives in order to obtain their freedom.[214] To demonstrate that they are not dangerous nor a flight risk, noncitizens are often put in the position of rebutting evidence that does not exist because the government is not required to present anything.[215] Even more concerningly, since the government is not held to any standard in these proceedings, noncitizens have been put in the impossible position of

210 *Id.* at 1196, 1202 n.4.

211 *See generally* Holper, *supra* note 18, at 1107–08, 1108 n. 214; Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021); Velasco Lopez v. Decker, 978 F.3d 842 (2d Cir. 2020).

212 *See infra* Section III.D.

213 *See infra* Section III.D.

214 *See Hernandez-Lara*, 10 F.4th at 31 ("[A]s a practical matter it is never easy to prove a negative." (quoting Elkins v. United States, 364 U.S. 206, 218 (1960))).

215 Brief for Brooklyn Defender Services et al. in Support of Petitioner-Appellee at 4–6, *Velasco Lopez*, 978 F.3d 842 (No. 19-2284) [hereinafter BDS Amici Curiae Brief].

rebutting faulty or unproven allegations.[216] The conditions of detention compound these difficulties by severely limiting any access detainees may have to evidence or attorneys.[217] As a result, noncitizens are set up for failure in § 1226(a) hearings—both Hernandez-Lara and Velasco Lopez would have likely been released at their initial bond hearing if the government had bore the burden instead.[218] As Justice Breyer noted in his dissent in *Jennings*, "[t]he Due Process Clause foresees eligibility for bail as part of 'due process,'" and "[b]ail is 'basic to our system of law.'"[219] By virtue of bearing the burden, noncitizens' eligibility for bail is minimized.[220] In comparison, when the government carries the burden, its ability to detain noncitizens is drastically decreased.[221] These disparate outcomes based on who bears the burden call into question the fairness and meaningfulness of process in § 1226(a) hearings.[222] When noncitizens do not have meaningful eligibility for bail, as is the case when they bear the burden of proof, noncitizens are arbitrarily detained and denied due process.[223] Furthermore, if the allocation of burden alone overwhelmingly dictates the outcome of the proceeding, then it inevitably results in cases of erroneous detention; the noncitizen's actual level of dangerousness or flight risk does not determine detention as is required by due process.[224]

2. BIA's Original Burden Shift Was Erroneous

BIA erroneously departed from decades of precedent when it shifted the burden in § 1226(a) hearings from the government to the noncitizen to reflect INS's burden shift.[225] In making the shift, BIA incorrectly relied on 8 C.F.R. § 236.1(c)(8), which requires noncitizens to prove to the detaining ICE officer that they are not a flight risk nor a danger to the

216 *See id.* at 7–11. *See generally* Rebecca A. Hufstader, Note, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671 (2015).

217 BDS Amici Curiae Brief, *supra* note 215, at 16–26.

218 *See Hernandez-Lara*, 10 F.4th at 26–31; *Velasco Lopez*, 978 F.3d at 846.

219 Jennings v. Rodriguez, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) (quoting Schilb v. Kuebel, 404 U.S. 357, 365 (1971)); *see* Rosenbaum, *supra* note 74, at 135.

220 *See generally* Holper, *supra* note 86.

221 *Id.*

222 *See supra* Part II.

223 *See Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting).

224 *See supra* Section I.D.

225 *See supra* Section I.C; Binger Ctr. for New Ams., *Outline of Advanced "Burden of Proof" ("BOP") Arguments to Raise in Bond Appeals and Habeas Petitions*, UNIV. OF MINN. L. SCH., https://www.law.umn.edu/sites/law.umn.edu/files/outline_of_advanced_burden_of_proof_arguments.pdf [https://perma.cc/8G3Z-S4WC].

community.[226] However, § 236.1(d)(1), which pertains to bond hearings in immigration court, only states that IJs have the authority to detain, release, and determine bond amounts.[227] It does not address who bears the burden of proof in immigration court bond hearings.[228] Whereas § 1226(c), which concerns mandatory detention of criminal noncitizens, expressly allocates the burden of proof to the noncitizen to prove they are not dangerous and will appear for future appearances.[229] Where the noncitizen satisfies their burden, the arresting agency is given the authority to discretionarily release them.[230] In § 1226(a), language concerning the necessary burden of proof or holder for release of the noncitizen is absent.[231] This express allocation of burden in certain parts of the statute and silence as to the burden in other sections of the same statute indicate that Congress intentionally did not put the burden on noncitizens detained under § 1226(a).[232] Thus, there was no regulatory or statutory basis for BIA's original burden shift.

Moreover, BIA's shift contradicts traditional legal theory, where the burden of proof is carried by the party who seeks the law's intervention.[233] Both criminal and civil confinement proceedings adhere to this theory.[234] For example, the Supreme Court in *Addington v. Texas* and *Foucha v. Louisiana* placed the burden of proof on the government for civil commitment of mentally ill persons.[235] The Supreme Court has repeatedly characterized immigration detention as a similar type of nonpunitive civil detention.[236] Keeping with the Court's civil proceeding analogies, BIA's original burden shift in bond hearings was inconsistent with traditional legal theory and civil proceedings. The government is the party seeking the court's intervention in § 1226(a) bond hearings—the government is asking the court to authorize the continued detention of

226 Binger Ctr. for New Ams., *supra* note 225; 8 C.F.R. § 236.1(c)(8) (2023).

227 § 236.1(d)(1); *see* Binger Ctr. for New Ams., *supra* note 225.

228 *See* § 236.1(d)(1).

229 Binger Ctr. for New Ams., *supra* note 225; 8 U.S.C. § 1226(c).

230 § 1226(c); ACLU Amici Curiae Brief, *supra* note 39, at 7–8.

231 § 1226(a); ACLU Amici Curiae Brief, *supra* note 39, at 3–8.

232 *See* Binger Ctr. for New Ams., *supra* note 225 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting Nken v. Holder, 556 U.S. 418, 430 (2009))).

233 Holper, *supra* note 86, at 112.

234 *Id.*

235 *See* Velasco Lopez v. Decker, 978 F.3d 842, 856 (2d Cir. 2020) (discussing the holdings of *Addington v. Texas*, 441 U.S. 418 (1979), and *Foucha v. Louisiana*, 504 U.S. 71 (1992)).

236 *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *accord* Wong Wing v. United States, 163 U.S. 228, 235–36 (1896).

the noncitizen.[237] However, by shifting the burden back to the government, the First and Second Circuits correctly realigned the discretionary bond process with the norm.[238]

3. Realities of Detention Necessitate a Burden Shift

Many noncitizens are erroneously and arbitrarily detained because ICE's custody determination practices fail to provide noncitizens with due process.[239] In the initial § 1226(a) custody determination, noncitizens bear the burden of proving to ICE that they are not a danger or flight risk.[240] Due to the short time frame of this decision, noncitizens often are unable to procure an attorney or gather substantial evidence.[241] This automatically increases the chance that noncitizens will be detained.[242] Moreover, the government has steadily compromised the due process owed to noncitizens by conflating the power to deport with the power to detain.[243] One study of 33,413 cases in New York between 2013 and 2019 revealed that ICE had manipulated risk assessment tools to overwhelmingly detain noncitizens under § 1226(a), even though they presented a low risk of flight and danger.[244] These noncitizens were detained without the required justifications, making their detention constitutionally impermissible.[245] The study also indicated that executive immigration policy has forced discretionary detention to become drastically less discretionary in practice.[246] In other words, political factors, such as Trump's no-release agenda, may have more influence on a noncitizen's detention than a noncitizen's actual dangerousness or flight risk. Thus, ICE consistently fails to make constitutionally required individualized assessments when depriving noncitizens of their liberty.[247]

237 Holper, *supra* note 86, at 112.

238 *See id.*

239 ACLU Amici Curiae Brief, *supra* note 39, at 15–20.

240 8 C.F.R. § 1236.1(c)(8) (2023).

241 ACLU Amici Curiae Brief, *supra* note 39, at 15–16. ICE makes its initial custody determination within forty-eight hours, often less, of apprehending the noncitizen. 8 C.F.R. § 287.3(d) (2023).

242 ACLU Amici Curiae Brief, *supra* note 39, at 15–17.

243 Cole, *supra* note 77, at 1038–39.

244 Robert Koulish & Katherine Evans, *Injustice and the Disappearance of Discretionary Detention Under Trump: Detaining Low Risk Immigrants Without Bond* 1–10 (Interdisc. Lab'y of Computational Soc. Sci., Working Paper No. 5, 2020), https://ilcss.umd.edu./static/a73728db900a72fbcd053d6a307c5878/disappearance-of-discretionary-detention.pdf [https://perma.cc/4K33-LKFS].

245 *See id.*

246 *See id.*; ACLU Amici Curiae Brief, *supra* note 39, at 18.

247 Koulish & Evans, *supra* note 244, at 1.

These failures of ICE necessitate bond hearings that adequately review ICE's determinations to ensure all § 1226(a) detainees are properly detained. Accordingly, a burden shift to the government provides an opportunity for a meaningful review of ICE's custody decision as it forces the government to present reliable evidence to justify detention.[248]

Detention compromises a noncitizen's access to counsel and ability to gather evidence, which, in turn, harms the noncitizen in immigration proceedings.[249] Detained noncitizens are far less likely to have representation than non-detained individuals.[250] This is problematic, considering that the average detainee is unfamiliar with the intricacies of immigration law proceedings.[251] As a result, unrepresented detainees are unaware of potential opportunities for relief or are unable to pursue a beneficial course of action that they otherwise would with the help of an attorney.[252] These obstacles are often compounded by a detainee's unfamiliarity with English, psychological deterioration from detention, and inability to effectively gather evidence due to their isolated location.[253] Regardless of representation, many detainees also have limited resources.[254] By bearing the burden in § 1226(a) bond hearings, detainees are forced to allocate their limited resources to gathering evidence for two different, simultaneous cases—their bond hearing and their removal proceedings.[255] These disadvantages create hearings with severely imbalanced equities.[256] Shifting the burden to the government in § 1226(a) bond hearings would help reduce erroneous detention and, thus, put noncitizens in more equitable positions in immigration proceedings.[257] Even when detention is justified under § 1226(a), shifting

248 Holper, *supra* note 86, at 121.

249 *See generally* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011).

250 *Id.* at 378–80; *Access to Counsel*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/issues/access-counsel [https://perma.cc/M9DE-9PH4]. For a discussion on efforts to decrease this gap, including a pilot public defender program for detained immigrants, see Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193 (2019), and Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485 (2018).

251 Michael Tan, *The Biden Administration Is on the Wrong Side in This Crucial Supreme Court Immigration Case*, ACLU (Jan. 7, 2022), https://www.aclu.org/news/immigrants-rights/the-biden-administration-is-on-the-wrong-side-in-this-crucial-supreme-court-immigration-case [https://perma.cc/ZAU2-VS4B]; *see Access to Counsel*, *supra* note 250.

252 *See generally* Markowitz et al., *supra* note 249.

253 BDS Amici Curiae Brief, *supra* note 215, at 16–27.

254 *See Access to Counsel*, *supra* note 250.

255 BDS Amici Curiae Brief, *supra* note 215, at 19–21.

256 *See supra* Section III.A.

257 *See* BDS Amici Curiae Brief, *supra* note 215, at 16–27.

the burden would help alleviate some inequities by decreasing the disproportionate strain placed on the noncitizen.[258]

The increasingly prolonged nature of detention under § 1226(a) requires procedural safeguards to prevent the risk of erroneous deprivation of liberty.[259] One of the ways the Supreme Court distinguished *Demore* from *Zadvydas* was on the ground that Demore's detention was much shorter in duration.[260] The Court relied on government data that § 1226(c) detention lasted "roughly a month and a half in the vast majority of cases . . . and about five months" where the noncitizen appealed, compared to Zadvydas's three years and counting.[261] As the *Velasco Lopez* court noted, "[w]here the Supreme Court has upheld detention during the pendency of removal proceedings, it has been careful to emphasize the importance of the relatively short duration of detention."[262] Aside from the fact that the data relied on by the *Demore* court was faulty,[263] detention under § 1226(a) increasingly reflects durations closer to Zadvydas than those of Demore.[264] Velasco Lopez was detained for fifteen months in conditions indistinguishable from criminal detention.[265] Likewise, Hernandez-Lara would have been detained for over two years if habeas relief had not been ordered.[266] Singh, in the Ninth Circuit, was detained for an astounding four years.[267] Similarly, an investigation of § 1226(a) detainees in Boston and Hartford revealed that "one in four was incarcerated for two years or longer."[268] Consider that the average immigration case in fiscal year 2021 was pending for 955 days, while the average case in fiscal year 2003, when *Demore* was being heard,

258 *See id.*

259 *See generally* Freya Jamison, Note, *When Liberty Is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, 5 COLUM. HUM. RTS. L. REV. ONLINE 146, 150–52 (2021).

260 Demore v. Kim, 538 U.S. 510, 528 (2003). Recall the differing outcomes in *Demore* and *Zadvydas*; Demore's detention was upheld, while Zadvydas's detention was found to be impermissible. *See supra* Section I.E.

261 *Demore*, 538 U.S. at 529–30.

262 Velasco Lopez v. Decker, 978 F.3d 842, 852 (2d Cir. 2020).

263 Jamison, *supra* note 259, at 154 ("The government later admitted that [the] statistic [they relied on] was erroneous; in fact, at the time that *Demore* was decided, detention under § 1226(c) typically lasted 113 days if the immigrant did not appeal their underlying immigration case and nearly a year if the immigrant did appeal. The Court even acknowledged that its statistic was not representative of Mr. Kim's case, as he had been detained for six months . . . ." (footnote omitted)).

264 *See* Jamison, *supra* note 259, at 150–54.

265 *See Velasco Lopez*, 978 F.3d at 855.

266 Hernandez-Lara v. Lyons, 10 F.4th 19, 28 (1st Cir. 2021).

267 Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011).

268 *Hernandez-Lara*, 10 F.4th at 30 (citation omitted).

was pending for only 282 days.[269] These durations reflect a trend toward prolonged detention generally, including under § 1226(a).[270] Given this trend and the record-breaking backlog of cases in the immigration court system, a proper burden is one that minimizes the risk of a noncitizen being erroneously or unnecessarily stuck in prolonged detention.[271] A burden shift to the government in § 1226(a) bond hearings is a practical procedural safeguard that helps minimizes such risks.

B. *The Clear and Convincing Standard Is the Appropriate Standard of Proof*

1. The Liberty Interest at Stake Is Too Great for a Lesser Standard

Together, a proper burden allocation and an appropriate standard of proof minimizes the risk of erroneous detention.[272] Given the fundamental importance of the liberty interest at stake, a high standard of proof should be applied to both dangerousness and flight risk determinations in § 1226(a) bond hearings.[273] Standards of proof reflect the value of the right that is threatened.[274] Section 1226(a) bond hearings concern the noncitizen's liberty interest—arguably the most important interest of all.[275] Thus, the noncitizen's interest here is entitled to a corresponding heightened protection.[276] Allocations of burden and standard of proof serve to "allocate the risk of error" between the

269 *Immigration Court Processing Time by Outcome*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php [https://perma.cc/D2LT-HNCV].

270 Brief of Amici Curiae for Americans for Immigrant Justice, et al. in Support of Respondents at 31, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204); *see Hernandez-Lara*, 10 F.4th at 28–30.

271 There was a record-breaking backlog of 1,936,504 immigration cases pending nationwide at the time this Note was written in 2022. As of March 2023, the number is now 2,097,244 cases. *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/PWE5-RBHA].

272 *See generally* Holper, *supra* note 86.

273 *See supra* Section I.D.

274 Addington v. Texas, 441 U.S. 418, 425 (1979). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Id.* (alterations in original) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (1971) (Sobeloff, J., concurring in part and dissenting in part)).

275 *See supra* Section I.D. *See generally* Cole, *supra* note 77.

276 *See* Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) ("[D]ue process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both "particularly important" and "more substantial than mere loss of money."'" (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982))).

government and the noncitizen.[277] A clear and convincing standard would require the government to produce more reliable evidence than it currently is required to in order to justify detention.[278] In *Hernandez-Lara* and *Velasco Lopez*, both circuits found that a clear and convincing standard was necessary when weighing both the increased risk of error from placing the burden on the noncitizen and the government's advantage in accessing evidence of dangerousness.[279]

The *Hernandez-Lara* court is mistaken in its conclusion that the risk of error for flight risk determinations is not high enough to necessitate a standard stronger than the preponderance standard.[280] First, the court overestimates the noncitizen's ability to gather and present information while incarcerated.[281] The court claims the noncitizen has more access to information related to flight risk factors as opposed to information on their dangerousness.[282] Second, the court assumes that a burden shift without an elevated standard of proof is sufficient because the detainee only needs to rebut the government's claims with "readily available" evidence.[283] However, this evidence is not actually readily available.[284] Many detainees are often isolated far from their families and communities, have restricted access to phones and visitors, possess minimal legal knowledge to present arguments successfully on their own, and have limited English proficiency.[285] Even when detainees have knowledge of what information to collect or who to contact, many family and community members that can provide this information are hesitant to come forward and inadvertently put themselves in danger with ICE.[286] Thus, shifting the burden alone is not enough. The government must be held to a standard higher than the preponderance standard to counteract the inherent disadvantages detainees face in these proceedings.[287]

277 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 39–40 (1st Cir. 2021); Velasco Lopez v. Decker, 978 F.3d 842, 855–56 (2d Cir. 2020).

278 Holper, *supra* note 86, at 121; *see supra* Section III.A.1.

279 *Hernandez-Lara*, 10 F.4th at 40; *Velasco Lopez*, 978 F.3d at 855–56; *see supra* Section III.A.

280 *See Hernandez-Lara*, 10 F.4th at 40.

281 *See supra* Section III.A.3.

282 *Hernandez-Lara*, 10 F.4th at 40 ("[D]etained citizens possess knowledge of many of the most relevant factors, such as their family and community ties, place of residence, length of time in the United States, and record of employment.").

283 *Id.*

284 *See* BDS Amici Curiae Brief, *supra* note 215, at 16–27.

285 RUBEN LOYO & CAROLYN CORRADO, N.Y.U. SCH. OF L. IMMIGRANT RTS. CLINIC, LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM 3–4 (2010), https://www.law.nyu.edu/sites/default/files/upload_documents/Locked%20Up%20but%20Not%20Forgotten.pdf [https://perma.cc/6GYT-72P7].

286 BDS Amici Curiae Brief, *supra* note 215, at 18.

287 *See id.* at 16–28.

Further, it is unlikely that elevating the standard impairs the government in any substantial way.[288] Bond hearings are a review of the initial custody determination.[289] Thus, the government should have already collected and used much of the necessary evidence for bond hearings in its initial custody determination.[290]

The court in *Hernandez-Lara* also justified a lower standard for flight risk determinations because it claimed there is a closer nexus between flight risk and the government's interest in effectuating removal orders.[291] However, data indicates that flight risk among noncitizens is not the problem the government makes it out to be.[292] In a national study of removal proceedings from 2008 to 2018, "83% of nondetained immigrants with completed or pending removal cases attended all their hearings."[293] When represented by a lawyer, which is drastically more accessible where a noncitizen is not detained, the appearance rate increases to 96%.[294] Moreover, of those noncitizens with removal orders for failure to appear, 15% had their removal order overturned.[295] This study indicates that detention may not be necessary to meet the government's interest, especially in light of the fact that § 1226(a) detainees have not been ordered removed.[296]

2. If Immigration Detention Is Civil Detention, It Must Align with Civil Proceedings

The *Hernandez-Lara* court is wrong to justify the preponderance standard for flight risk determinations in § 1226(a) bond hearings by using comparisons to criminal court procedures.[297] The Supreme Court

288 *Id.* at 26–28.

289 *See supra* notes 40–41 and accompanying text.

290 BDS Amici Curiae Brief, *supra* note 215, at 26–28 (noting that "[t]he Government is generally in a better position than a detained [noncitizen] to gather and present evidence" (citing Linares Martinez v. Decker, No. 18-CV-6527, 2018 WL 5023946, at *3 (S.D.N.Y. Oct. 17, 2018))).

291 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 40 (1st Cir. 2021).

292 INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, MEASURING *IN ABSENTIA* REMOVAL IN IMMIGRATION COURT 4 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf [https://perma.cc/RGV3-Q967].

293 *Id.*

294 *Id.*

295 *Id.*

296 *See* Velasco Lopez v. Decker, 978 F.3d 842, 854 n.10 (2d Cir. 2020). *See generally* EAGLY & SHAFER, *supra* note 292.

297 *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 40 (1st Cir. 2021) ("Second, although the Court has consistently required a clear and convincing standard when the government seeks to detain on

has repeatedly characterized immigration detention as a type of nonpunitive civil detention.[298] Thus, immigrant detention standards should reflect standards used in other civil confinement proceedings.[299] In *Addington v. Texas*, the Court held that the preponderance standard was insufficient to meet the due process demands necessary for the civil confinement of mentally ill persons.[300] Further, the Court held that a clear and convincing standard was required at minimum to deprive petitioners of their liberty rights.[301] Accordingly, to be consistent with the Court's holdings on immigrant detention and civil detention, the government should be required to prove both dangerousness and flight risk by clear and convincing evidence in § 1226(a) bond hearings.

The *Hernandez-Lara* court's rationale here is also weak because § 1226(a) detainees are not entitled to the same procedural protections as criminal defendants.[302] Most importantly, noncitizen detainees are not entitled to government-appointed counsel as are criminal defendants.[303] Similarly, the Federal Rules of Evidence do not constrain immigration courts.[304] Thus, immigrant detainees are left without the same procedural protections as criminal defendants.[305] Along with the punitive nature of immigrant detention, these differences have led to many scholars calling for the criminal procedural protections to apply in immigration

the basis of danger, most of those cases do not involve risk of flight. In the analogous context of pretrial criminal detention under the Bail Reform Act, where flight risk is a factor, the government need only prove flight risk by a preponderance of the evidence in order to continue detention."). Compare the First Circuit's justification with the federal pretrial detention statute, which, except in certain circumstances, places the burden on the government to prove by clear and convincing evidence that a person poses a flight risk or danger before the person can be detained pending trial. 18 U.S.C. § 3142(f)(2) ("The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.").

298 *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *accord* Wong Wing v. United States, 163 U.S. 228, 235–36 (1896).

299 *See* Holper, *supra* note 86, at 96–106. "There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense." Addington v. Texas, 441 U.S. 418, 428 (1979).

300 *Addington*, 441 U.S. at 426–27.

301 *Id.* at 432–33.

302 *See generally* Holper, *supra* note 18.

303 *See* 8 U.S.C. § 1362; Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (citing 18 U.S.C. § 3142(f)); *supra* Section III.A.3.

304 CATH. LEGAL IMMIGR. NETWORK, INC., PRACTICE ADVISORY: RULES OF EVIDENCE IN IMMIGRATION COURT PROCEEDINGS 4–6 (2020), https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings [https://perma.cc/DGF2-NALS].

305 *See generally id.* at 4–19.

proceedings.[306] While these arguments are strong, recent Supreme Court decisions and the Court's overall deference to the political branches on immigration matters do not indicate that the Court is interested in drastically changing the inner workings of immigration proceedings.[307] If the Court insists on recognizing immigration detention as a type of civil detention, alignment with civil detention standards is necessary in the absence of other procedural safeguards.[308]

C. *An Unshifted Burden Fails to Meaningfully Serve the Government's Interest*

An unshifted burden fails to meaningfully serve the government's interest because it results in erroneous detention, and the cost of such detention outweighs any purpose detention serves. The main argument in defense of immigrant detention is that it serves the government's interest by protecting the community and helping effectuate removal orders.[309] The Court has repeatedly recognized that detention of noncitizens found to be dangerous or a flight risk qualifies as a legitimate interest, justifying nonpunitive detention.[310] However, if the burden in § 1226(a) bond hearings results in the erroneous and arbitrary detention of many noncitizens who do not actually pose a danger or a flight risk, then the government's interest is not being served by such detention nor is the detention justified.[311] BIA's improper burden allocation in § 1226(a) bond hearings creates opportunity for this type of unjustified detention.[312] Thus, shifting the burden to the government and applying the appropriate standard does not harm the government. Instead, it helps to minimize errors and ensure the government's interest is being met.

The government's interest is actually harmed by the significant financial and societal costs it incurs through detention, especially erroneous detention.[313] Taxpayers foot the bill for ICE's detention costs—$2.8 billion for the fiscal year 2022.[314] The average cost of ICE detention

306 *See generally* Holper, *supra* note 18; García Hernández, *supra* note 2.

307 *See supra* Sections I.A–I.B, I.E.

308 *See* Holper, *supra* note 86, at 95–97, 117–21.

309 *See generally* Cole, *supra* note 77.

310 Rosenbaum *supra* note 74, at 132, 139–41.

311 *See supra* Section III.A.

312 *See supra* Section III.A.

313 The government's interest includes an evaluation of the public interest. *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 32 (1st Cir. 2021).

314 Press Release, Am. Immigr. Council, Biden Budget Request on Immigration Is a Missed Opportunity for Meaningful Change (May 28, 2021), https://www.americanimmigrationcouncil.o

per adult per day is $134.[315] Velasco Lopez's unnecessary fifteen-month detention cost taxpayers about $60,000.[316] In addition to economically destabilizing families and communities, detention commonly traumatizes and psychologically harms those in detention and their communities outside.[317] If the burden had been properly allocated to the government at his initial bond hearing, Velasco Lopez's detention and, subsequently, these costs could have been significantly minimized. Where detention is unjustified or prolonged, government resources are further drained through lengthy appeals and habeas petitions.[318] Similarly, a proper burden allocation could decrease the need for these proceedings.[319] These costs become even more unjustifiable when considering that effective alternatives to detention, which serve the government's interest, exist at a fraction of the cost of detention.[320] Unnecessary spending and societal harm are plainly against public interest.

D. *A Bright-Line Rule Is Better Than a Case-by-Case Approach*

Combined with a burden shift and a heightened standard placed on the government, a bright-line approach is the most protective of noncitizens' liberty interests in § 1226(a) bond proceedings. Unlike in *Hernandez-Lara*, the court in *Velasco Lopez* did not find a need to take a bright-line approach.[321] Instead, the Second Circuit held that an as-applied balancing approach was sufficient to determine when a new hearing with a shifted burden was necessary for prolonged detention

rg/news/biden-budget-request-immigration-missed-opportunity-meaningful-change [https://perma.cc/42HV-H9QL].

315 Velasco Lopez v. Decker, 978 F.3d 842, 854 n.11 (2d Cir. 2020) (citing U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., BUDGET OVERVIEW: FISCAL YEAR 2018 CONGRESSIONAL JUSTIFICATION 14 (2018)).

316 *Id.*

317 *See Hernandez-Lara*, 10 F.4th at 33 ("[States'] revenues drop because of reduced economic contributions and tax payments by detained immigrants, and their expenses rise because of increased social welfare payments in response to the harms caused by unnecessary detention." (alteration in original)); Juárez, Gómez-Aguiñaga & Bettez, *supra* note 60, at 76–81.

318 BDS Amici Curiae Brief, *supra* note 215, at 27–28.

319 *See id.* at 27–29.

320 *See Alternatives to Immigration Detention: An Overview*, AM. IMMIGR. COUNCIL (Mar. 17, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/alternatives_to_detention_an_overview.pdf [https://perma.cc/7DMY-VAPT]; Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017).

321 *See Velasco Lopez*, 978 F.3d at 855 n.13. Velasco Lopez did not challenge § 1226(a) bond hearings as a whole, but rather his prolonged detention. *Id.* at 850.

under § 1226(a).[322] Under the *Velasco Lopez* holding, the burden remains unshifted at an initial § 1226(a) bond hearing.[323] Only when the court decides that factors lean toward a determination that detention is unnecessarily prolonged does the government have to justify its continued detention of the noncitizen under a shifted burden.[324] Without a standardization of when the burden should be shifted, the same risks of erroneous and arbitrary detention under § 1226(a) persist at the initial bond hearing.[325] Moreover, different circuits vary in what factors are taken into account to determine when a new hearing is necessary to justify continued detention.[326] Thus, determinations of when prolonged detention becomes a violation of due process is subjective to the circuits.[327] For two § 1226(a) detainees in the same exact circumstances, the difference between one being free and another remaining detained can come down to location.[328] Such disparate outcomes and arbitrary deprivations of liberty can be avoided by applying a shifted and heightened burden to all § 1226(a) bond hearings.

An unstandardized or as-applied approach to the burden shift creates conditions for some § 1226(a) detainees to first have their due process rights violated by prolonged detention, and then have only the *potential* opportunity for relief. After a § 1226(a) detainee has exhausted their appeals from their initial custody determination, the custody decision can only be reconsidered in light of changed circumstances or by a writ of habeas corpus.[329] Changed circumstances, such as specific health risks due to a pandemic, a change in laws, or a new basis of relief from removal, may help some detainees.[330] However, not all erroneously

322 *See id.* at 851–55.

323 *See generally id.*

324 *See id.* at 855.

325 *See supra* Section III.A.

326 Jamison, *supra* note 259, at 156–62.

327 *See id.* at 149, 156–62.

328 *See id.*

329 8 C.F.R. § 1003.19(e) (2023); CHILD.'S IMMIGR. L. ACAD., NUTS AND BOLTS OF HABEAS CORPUS PETITIONS CHALLENGING IMMIGRATION DETENTION (2021), https://cilacademy.org/wp-content/uploads/2021/08/Practice-Advisory-Nuts-and-Bolts-Imm-Detention-Habeas.pdf [https://perma.cc/6Y2M-G5B9]; *see* Kate Melloy Goettel, Ranjana Natarajan, Claudia Valenzuela & Anam Rahman, *Habeas Corpus and Prolonged Detention*, FED. BAR ASS'N (May 2019), https://www.fedbar.org/wp-content/uploads/2019/12/FBA-2019_-Habeas-Prolonged-Detention-PPT-pdf.pdf [https://perma.cc/F2AY-QFVV].

330 *See* Eileen Blessinger, Hiroko Kusuda, Glenda McGraw Regnart & Andres Murguia, *Bond and Custody: Mandatory Detention, Bond Redetermination, & Appeal*, FED. BAR ASS'N (2019), https://www.fedbar.org/wp-content/uploads/2019/12/Bond-FBA-2019-Updated-13MAY2019-pdf.pdf [https://perma.cc/SF3K-QA6J]; *see also Sample Motion & Exhibits in Support of Bond Redetermination Hearing Based upon Changed Circumstances*, IMMIGRANT DEF. PROJECT,

detained noncitizens can claim changed circumstances. Further, habeas corpus filings are not a practical or efficient way to deal with such erroneous detentions.[331] Due to their lack of representation, many detainees do not know the option exists.[332] Even if they do, the habeas process is lengthy and expensive.[333] It compounds an already prolonged detention and forces detainees to allocate severely limited resources to another legal battle.[334] Moreover, the granting of habeas petitions in prolonged detention cases varies widely among circuits.[335] A bright-line approach to § 1226(a) bond hearings helps minimize the risk of erroneous detention, avoiding the need for later changed circumstances or habeas proceedings. As a result, a burden shift, heightened standard, and bright-line approach have the capacity to reduce administrative burdens in an already overburdened system.[336]

https://www.immigrantdefenseproject.org/wp-content/uploads/Template-Motion-for-Bond-Redetermination-Pro-se-version_3.22.20-1.pdf [https://perma.cc/J96Q-HKAS]. For example, *Fajardo v. Decker*, 22 Civ. 3014, 2022 WL 17414471, at *3–4 (S.D.N.Y. Dec. 5, 2022), involves discussion of a defendant's motions based on a material change in circumstances.

331 *See* Holper, *supra* note 18, at 1128–35.

332 *See id.* at 1128–30.

333 *See id.* at 1128.

334 *See supra* Section III.A.3.

335 Jamison, *supra* note 259, at 163–72.

336 *See id.* at 183–84; BDS Amici Curiae Brief, *supra* note 215, at 27–29.

CONCLUSION

Given the disparate outcomes and potential due process violations among different burden allocations in § 1226(a) bond hearings, it is imperative to resolve the circuit split swiftly.[337] Borrowing from both *Hernandez-Lara* and *Velasco Lopez*, the risk of erroneous detention and due process violations is best mitigated if the government bears the burden of proof by a clear and convincing standard in all § 1226(a) bond hearings. This proposed standardization better serves both the government's interest and noncitizens' interests than BIA's current burden allocation.

Relevantly, the Supreme Court decided two cases this past term that dealt directly with the issue of bond hearings and burden allocation, albeit in the context of noncitizens detained under 8 U.S.C. § 1231(a)(6).[338] Both *Garland v. Aleman Gonzalez* and *Johnson v. Arteaga-Martinez* asked whether noncitizens with final orders of removal and who are detained under § 1231(a)(6) are statutorily entitled to bond hearings after six months of detention, at which the government must prove to an IJ by clear and convincing evidence that the noncitizen is a danger to the community or a flight risk.[339] In an 8-1 opinion, the Court answered no.[340] The Court reiterated its holding in *Jennings*, making clear that a statutory basis for the right to a periodic bond hearing does not exist under § 1226(a) or § 1231(a)(6).[341] However, the Court again left open the constitutional challenges to prolonged detention for lower courts to

337 *See supra* Part II.

338 *See* Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022). The two cases were heard together as companion cases. Section 1231(a)(6) permits detention of noncitizens with removal orders beyond the ninety-day removal period.

339 *Arteaga-Martinez*, 142 S. Ct. at 1830; *Aleman Gonzalez*, 142 S. Ct. at 2063.

340 Justice Sotomayor, writing for majority in *Arteaga-Martinez*, explained that § 1231(a)(6)

> says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required. Faithfully applying our precedent, the Court can no more discern such requirements from the text of § 1231(a)(6) than a periodic bond hearing requirement from the text of § 1226(a).

Arteaga-Martinez, 142 S. Ct. at 1833. The Court also reversed *Aleman Gonzalez*'s holding that district courts lack jurisdiction under § 1252(f)(1) of the INA to decide requests for class-wide injunctive relief. *Aleman Gonzalez*, 142 S. Ct. at 2063. See Alyssa Aquino, *Advocates Wary of Justices' Limits on Immigration Relief*, LAW360 (June 22, 2022, 10:33 PM), https://www-law360-com.ezproxy.yu.edu/articles/1504665/advocates-wary-of-justices-limits-on-immigration-relief [https://perma.cc/M8QK-MCAP], for a discussion on the negative impacts of the *Aleman Gonzalez* decision on noncitizens.

341 *Arteaga-Martinez*, 142 S. Ct. at 1832–33. Concerningly, the Court lightly insinuates, but does not decide either way, that § 1226(a) might be read to not even require a bond hearing. *Id.*

decide.[342] Although both disappointing decisions, *Aleman Gonzalez* and *Arteaga-Martinez* at least suggest that a future due process challenge to detention procedures may be a viable avenue to standardizing burden allocation under § 1226(a).

[342] *Id.* at 1834–35. Both cases presented due process challenges to § 1231 detention. Section 1231 detention is not reviewed by a neutral arbiter, no appeals process exists, and detained noncitizens have no ability to challenge government assessment of danger and flight risk. Grace Dixon, *Migrants Argue for High Court to Uphold Bond Hearings*, LAW360 (Nov. 23, 2021, 5:42 PM), https://www-law360-com.ezproxy.yu.edu/articles/1442897/migrants-argue-for-high-court-to-uphold-bond-hearings [https://perma.cc/RB8R-DER4].