20-3712 (L)
21-1044 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUNIOR ONOSAMBA-OHINDO, on behalf of himself and all others similarly situated,

Petitioner-Appellee-Cross-Appellant,

[caption continued on next page]

On Appeal from the United States District Court
for the Western District of New York

BRIEF OF COMMUNITY ORGANIZATIONS AND LEGAL SERVICE PROVIDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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Dated: November 29, 2021
Brooklyn, NY

ANTONIO LOPEZ AGUSTIN, on behalf of himself and all others similarly situated,

Petitioner-Appellee-Cross-Appellant

– v. –

JEFFREY J. SEARLS, in his official capacity as Acting Director of the Buffalo Federal Detention Facility,

Respondent-Appellant-Cross-Appellee,

MERRICK B. GARLAND, in his official capacity as Attorney General for the United States; JAMES McHENRY, in his official capacity as Director of the Executive Office for Immigration Review, the Executive Office for Immigration Review; MATTHEW ALBENCE, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of Immigration and Customs Enforcement; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security,

Respondents-Appellants.

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STATEMENT OF INTEREST

Amici curiae are not-for-profit organizations that represent and/or support noncitizens who are detained by Immigration and Customs Enforcement ("ICE") and subject to immigration proceedings within the Second Circuit.[1] *Amici* include the The Bronx Defenders, Brooklyn Defender Services, the Erie County Bar Association Volunteer Lawyers Project, the Immigrant Rights Clinic of Washington Square Legal Services, the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, The Legal Aid Society, Make the Road New York, Neighborhood Defender Service of Harlem, New York Legal Assistance Group, Queer Detainee Empowerment Project, Rapid Defense Network, and UnLocal, Inc. Detailed statements of interest are included as Appendix A.

SUMMARY OF ARGUMENT

Amici submit this brief to illustrate the destructive and unnecessary real-world consequences of the Board of Immigration Appeals' ("BIA") interpretation of 8 U.S.C. § 1226(a). The case summaries provided herein demonstrate that requiring ICE to carry the burden of proof in § 1226(a) bond hearings and requiring immigration judges to consider non-bond alternatives to detention and noncitizens' ability to pay when setting bond results in more reliable custody determinations,

[1]Pursuant to Fed. R. App. P. 29(a)(4), *amici* state that none of *amici* are corporations, no party counsel authored any part of the brief, and no person or entity other than *amici* contributed money to prepare or file it.

minimizes harm to immigrant families and communities, and serves the overall public interest. Further, *amici's* experiences representing clients before immigration courts in the Second Circuit show that the class-wide relief ordered by the district court is appropriate and necessary in light of the government's blanket policy of refusing to place the burden of proof on ICE in § 1226(a) bond hearings, even when required under binding Second Circuit precedent. *See Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020). *Amici* urge this Court to reject the government's arguments in this case and affirm the district court.

I. Placing the Burden of Proof on ICE in § 1226(a) Bond Hearings Prevents the Arbitrary Detention of Individuals Who Do Not Present Any Cognizable Danger or Flight Risk

Under the BIA's interpretation of 8 U.S.C. § 1226(a), ICE is not required to present any evidence to justify the detention of individuals in removal proceedings. These bond hearings begin with a blanket presumption that release of the detained person will result in danger to the community and flight, which the detained individual must then disprove. As the following stories illustrate, the BIA's interpretation of § 1226(a) leads to bond denials based on unreliable evidence or no evidence at all, resulting in detention that is unnecessary to protect the public or prevent evasion of immigration laws. In contrast, when ICE carries the burden of proof, as required by *Onosamba-Ohindo* and many other district courts within this Circuit in individual cases, immigration judges ("IJs") are more likely to deny bond only where the evidence demonstrates a cognizable danger to the public or risk of

flight, thus vindicating "the public's interest in seeing that individuals who need not be jailed are not incarcerated," *Velasco Lopez*, 978 F.3d at 857, and protecting the "imporan[t] and fundamental" right to be free from arbitrary detention, *id.* at 851 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

A. Requiring Noncitizens to *Disprove* Dangerousness and Flight Risk Results in Bond Denials Despite Lack of Evidence

When the burden of proof rests with the noncitizen, IJs routinely deny bond based on the absence of evidence, rather than affirmative evidence showing flight risk or dangerousness.

This was the case for **Javier Castillo,**[2] who fled violent homophobic threats in Honduras and sought asylum in the United States. He had no criminal history. At Javier's bond hearing, ICE presented no evidence. Nevertheless, the IJ held that Javier failed to meet his burden to show that he was not a flight risk and denied bond. Javier appealed, and the BIA affirmed. Javier was released by a federal court order in July of 2020 after more than fourteen months of detention. Following his release, Javier has attended all required check-in meetings with ICE, stayed in touch with counsel regarding his court dates, and complied with the conditions of release. Although the IJ also denied Javier's application for asylum, on appeal the BIA found that the IJ displayed such pervasive prejudice during Javier's hearing that remand was necessary

[2] "Javier Castillo" is a pseudonym to protect Mr. Castillo's identity. The facts of his case are detailed in a declaration by his counsel. *See* Decl. of Alexandra Lampert, of Brooklyn Defender Services (on file with counsel).

for reconsideration of his asylum application by a different IJ. Absent federal court intervention, Javier would likely have remained detained, including during the ten months it took to litigate a successful appeal, despite ICE's failure to provide any evidence that his detention served a legitimate purpose.

Similarly, **Victor Mérida**[3] was forced to endure an extra seven months of detention because he was required to bear the burden of proof at his bond hearing. Originally from Guatemala, Victor has lived in New York for two decades, supporting his family through his construction job and helping to raise his partner's daughter and care for his partner's elderly mother, who is paralyzed.

After his sole arrest, and while the criminal charges were still pending, ICE detained Victor. At his immigration bond hearing three months later, Victor submitted 86 pages of evidence, including letters of support and evidence showing that his single arrest would resolve in a non-criminal violation for driving while ability impaired by alcohol. DHS submitted no evidence. Despite this, the IJ denied bond based on the arrest, finding that Victor had not established that he was not a danger to the public. While he was detained, Victor's family struggled to pay bills, including the internet Victor's partner's daughter required for remote schooling. Without

[3] "Victor Mérida" is a pseudonym used to protect Mr. Mérida's identity. The facts of his case are detailed in a declaration by his counsel. *See* Decl. of Julie Dona, of The Legal Aid Society (on file with counsel).

Victor's help, his partner was unable to carry her mother up and down the stairs to their home and was forced to cancel her mother's medical appointments.

After Javier filed a habeas petition and a federal district court ordered a burden-shifted bond hearing, the IJ found that DHS failed to establish that Victor was a danger to the public or a flight risk, and released him on $7,500 bond, more than nine months after he was detained.

As these stories show, even where there is minimal or no evidence of dangerousness or flight risk, IJs routinely deny bond when the noncitizen bears the burden of proof. This increases the risk of erroneous results, forcing noncitizens to endure unnecessarily prolonged detention.

B. The Government's Proposed Burden of Proof Allocation Results in Bond Denials Based on Unreliable Evidence

In other cases, ICE does offer some explanation or evidence in support of detention, but the evidence submitted is often of questionable reliability. It is not uncommon for ICE to point exclusively to unproven criminal charges and spurious gang membership allegations contained in internal ICE memoranda. Because ICE carries no burden of proof, IJs often deny bond because the detained person is unable to refute these allegations. As the following stories illustrate, requiring individuals in detention to *disprove* criminal allegations turns the presumption of innocence on its head and results in months and years of civil imprisonment based on allegations that never result in a conviction or a criminal sentence.

Angel Guzman,[4] for instance, was denied bond solely based on unproven allegations. Angel legally entered the United States in 2008 but overstayed his visa and became the father to a U.S. citizen son in 2016. When his son was seven months old, Angel was charged with misdemeanor child endangerment for allegedly holding his son against the wishes of the mother and throwing a pillow at the mother, in a criminal complaint that was not corroborated by a signed statement. Angel, who had no prior arrest history, maintained his innocence, and was released on his own recognizance by the criminal court judge. While the case was still open, ICE arrested Angel outside the Bronx courthouse where he was attending a court date to resolve these charges. At his immigration bond hearing, Angel provided letters of support, family photographs, criminal case records, and a letter from his criminal defense attorney stating that a non-criminal disposition was likely for the open case and that the district attorney had not yet provided any supporting evidence. ICE filed no evidence corroborating the criminal charge. Nevertheless, the IJ denied bond based solely on the unproven allegation.

Just as Angel was unable to disprove the uncorroborated criminal charge against him, disproving gang membership allegations contained in internal ICE memoranda presents a near-impossible hurdle for noncitizens. Unlike in the criminal court system, there are no discovery rights in immigration proceedings. *See*, *e.g.*,

[4] The facts of Angel's case are detailed in a declaration. *See* Decl. of Suchita Mathur, of The Bronx Defenders (on file with counsel).

Sanchez v. Barr, 919 F.3d 1193, 1196 (9th Cir. 2019) (Paez, J., concurring) (noting that immigration proceedings "have no established right to appointed counsel, [and] no right to discovery"). Noncitizens therefore cannot access any of the ICE records on which these allegations are presumably based. Similarly, ICE does not make the authors of these documents available to testify, and noncitizens have no Sixth Amendment nor statutory right to cross examine the authors unless they are called as witnesses by ICE. *See*, *e.g., Barry v. Gonzales*, 224 F. App'x 32, 35 (2d Cir. 2007). Thus, while locked away in detention—often *pro se*—noncitizens are routinely required to produce evidence to refute documents they have no right to see, and which contain accusations from unidentified sources. Often the only evidence available to noncitizens in these circumstances is their own testimony, which IJs frequently find insufficient to meet their burden to disprove gang allegations.

Francisco Flores Pérez[5] was denied bond based on unsubstantiated gang allegations. Francisco is the father of two U.S.-born children, including a son with cerebral palsy. He is a much-beloved member of his community in upstate New York, where, prior to his detention, he worked at a greenhouse and volunteered at a community center. In 2002, Francisco was shot by a gang member against whom he

[5] "Francisco Flores Pérez" is a pseudonym to protect Mr. Pérez's identity. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Danielle Krumholtz, of The Bronx Defenders (on file with counsel).

later testified at grand jury proceedings. ICE subsequently arrested and detained Francisco.

At his bond hearing, ICE argued that Francisco was a gang member based on an unsubstantiated note about gang affiliation in his RAP sheet.[6] This information was likely an error stemming from an incident years earlier when Francisco was the victim of a crime and had told the police he thought the perpetrator was gang affiliated. At his bond hearing, Francisco submitted letters from the District Attorney thanking Francisco for his help prosecuting the shooter from the 2002 incident, a letter from his former criminal attorney stating that "there were no allegations that [Francisco] was a gang member or . . . affiliated with a gang," letters from his employer, family, and friends—all of whom described Francisco as hard-working and caring—and proof of his eligibility for lawful status in the United States. Nevertheless, the IJ denied bond, citing the alleged gang affiliation referenced in his RAP sheet.

In **Jose Padilla's**[7] case, baseless allegations of gang membership resulted in an entire year of unnecessary immigration detention. Prior to his detention by ICE, Jose

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[6] RAP sheets are notoriously unreliable. *See* The Legal Action Center, *The Problem of RAP Sheet Errors: An Analysis*, 1 (2013), https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf (examining 3,499 New York RAP sheets and finding at least 30% to have errors); *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (noting that "there may also be increased possibility of error [in a RAP sheet] the farther the information spreads from its original source.").

[7] The facts of Mr. Padilla's case are detailed in his habeas petition. *See Padilla Raudales v. Decker*, No. 19-cv-1934 (PGG), Dkt. No. 1 (S.D.N.Y. Aug. 08, 2019); *see also* Decls of Suchita Mathur and Zoe Levine, of Bronx Defenders (on file with counsel).

was living in Hempstead, New York, where his father, a barber, was training Jose in the craft. Jose's high school teachers described him as "motivated," and he was known to fellow students as a "good person," and a "kid with a big heart, always supporting others." He was also actively involved in his church community.

In Jose's bond hearing, ICE submitted a memorandum alleging that the Hempstead gang unit had identified Jose as a member of the 18th Street Gang. The allegations contained in the memorandum were not attributed to a specific officer, did not provide dates or locations of alleged incidents, and failed to identify alleged gang associates. Jose's counsel submitted records from the Hempstead police showing that, although her client had been questioned various times in and near his apartment building, he was never identified as an 18th Steet Gang member nor arrested for any gang-related offense. In fact, his only arrest was for simple drug possession. After a district court-ordered bond hearing in which ICE was required to carry the burden of proof and was unable to submit any additional evidence substantiating the gang membership allegation, the same IJ granted bond and Jose returned to his family after nearly a year of senseless imprisonment. Since his release, Jose has been living peacefully in his community and is in close communication with his counsel about upcoming immigration court hearings.

Requiring noncitizens to disprove such gang affiliation allegations is problematic not only because of the opacity of ICE records, but because such allegations often involve "systemic racial profiling, overly-aggressive enforcement

techniques, and serious lack of reliability concerns."[8] This is demonstrated by the experiences of Jose, whose Hempstead police file revealed that he was routinely racially profiled and questioned as a "hispanic male" living in a "known gang area," resulting in an unsubstantiated suggestion of gang affiliation that seems to have triggered his arrest and detention by ICE. Thus, requiring noncitizens to rebut unproven criminal charges and gang membership allegations not only results in detention that serves no legitimate purpose, but also perpetuates the racial disparities that pervade criminal law enforcement.[9]

II. Without Class-Wide Relief, Noncitizens Will Continue to Experience Unnecessarily Prolonged Detention, Causing Extraordinary Hardship for Noncitizens and Their Families, Including U.S.-Citizen Children

Without class-wide relief from this Court, detained individuals within the Second Circuit must file a habeas petition in federal court to receive a constitutionally adequate bond hearing where ICE bears the burden of proof. Litigation of these individual habeas petitions burdens the federal courts and creates hardships for petitioners, who must also prepare for a potential court-ordered bond hearing, while simultaneously litigating their immigration cases, all from detention.

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[8] New York Immigration Coalition, CUNY School of Law Immigrant & Non-Citizen Rights Clinic, *Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* 23 (2018); *see also* Rebecca A. Hufstader, Note, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. Rev. 671, 692, 697-98 (2015).

[9] *See generally* Walter A. Ewing, Daniel E. Martinez & Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, American Immigration Council Special Report (July 1, 2015).

While the individuals whose stories are included here were represented by *pro bono* counsel, most detained immigrants in New York and nationwide are *pro se*. No right to appointed counsel is recognized in removal proceedings, and nationally, a mere nineteen percent of detained noncitizens are represented by counsel in their removal proceedings.[10] Nor is there an established right to appointed counsel in federal habeas proceedings. Therefore, class-wide relief is critical for *pro se* litigants, who must gather all relevant evidence and submit all filings themselves, from behind a prison wall.

But as the below stories show, whether represented or *pro se*, detained individuals face incredible barriers when seeking a remedy for unconstitutional detention in federal court. It is unjust and inefficient to require detained individuals, whose detention may already be unconstitutionally prolonged at the time of filing a habeas petition, to endure additional months of detention awaiting the adjudication of their constitutional claim.

A. Immigration Courts Refuse to Apply *Velasco Lopez*, Even for Noncitizens Identically Situated to the Petitioner in that Case

In *Velasco Lopez*, this Court upheld a district court habeas order requiring additional procedural protections for a noncitizen detained under § 1226(a) for nearly fifteen months. The Second Circuit did not address what procedures were

[10] TRAC Immigration, *State and County Details on Deportation Proceedings in Immigration Court*, (last accessed Nov. 24, 2021), https://trac.syr.edu/phptools/immigration/nta/.

constitutionally due in all § 1226(a) bond hearings, but held that, at a minimum, "individuals subject to prolonged detention under § 1226(a) must be afforded process in addition to that provided by the ordinary bail hearing." *Velasco Lopez*, 978 F.3d at 854. This Court noted that "a presumptively constitutional period of detention does not exceed six months," and that "[o]n any calculus, Velasco Lopez's fifteen-month incarceration without a determination that his continued incarceration was justified violated due process." *Id.* at 855 n.13.

Despite this ruling, IJs within the Second Circuit uniformly take the position that they cannot apply *Velasco Lopez* to grant a burden-shifted bond hearing in any case absent a federal court order.[11] As a consequence—outside of the noncitizens afforded the class relief on appeal in this case—New York IJs have refused to provide bond hearings that comply with the procedural requirements of *Velasco Lopez*, even for noncitizens detained as long or longer than fifteen months.

For example, **Matthias Greer,**[12] a young asylum-seeker with a single disorderly conduct violation based on a marijuana possession charge, was detained under

[11] *See* Declaration of Myriah J. Heddens, filed in L.M.U. v. King, No. 21-cv-03978, Dkt. No. 1-17 (S.D.N.Y. May 04, 2021) (documenting 13 IJ denials to conduct burden-shifted bond hearings under *Velasco Lopez* between November 2020 and April 2021).

[12] Matthias Greer is a pseudonym and has been used for readability. The facts of Matthias's case are detailed in his civil complaint. L.M.U. v. King, No. 21-cv-03978, Dkt. No. 1 (S.D.N.Y. May 04, 2021); *see also* Decl. of Julie Dona, of The Legal Aid Society (on file with counsel).

§ 1226(a) for over sixteen months without being provided with a bond hearing compliant with *Velasco Lopez*.

A few days before Christmas of 2019, ICE detained Matthias. He was held in near-solitary conditions for months due to the COVID-19 pandemic, separated from other inmates as well as friends and family. His mental health deteriorated, leading jail medical staff to prescribe him medication to address depression, anxiety, and sleeplessness. At Matthias's only bond hearing, ICE submitted a conclusory police memo alleging that Matthias was a gang member. The IJ had explicitly rejected the allegations of this same memo at Matthias's merits hearing, finding that Matthias was not a gang member. The IJ denied bond, however, concluding that Matthias did not meet his burden to disprove this same gang membership allegation the IJ had previously dismissed.

After Matthias had been detained for over fifteen months, he requested a burden-shifted bond hearing pursuant to *Velasco Lopez*. The IJ denied the request, stating: "The court is cognizant of the 'on any calculus' language in *Velasco-Lopez*. However, this administrative court has no power to address a constitutional question, *i.e.*, whether Respondent's prolonged detention has given rise to a due process violation. That is for a fed[eral] district court to decide." When Matthias filed a complaint in federal court challenging the government's failure to comply with *Velasco Lopez*, ICE voluntarily released him after nearly eighteen months of detention.

Matthias has been living peacefully with his family and has attended all of his immigration court hearings since his release.

Similarly, **Pedro Cua Garcia**[13] was unnecessarily separated from his family for more than seven months, yet the IJ in his case likewise refused Pedro's request to conduct a procedurally adequate bond hearing, despite the applicability of the holding in *Velasco Lopez*.

Pedro, originally from Guatemala, has worked steadily in the same Brooklyn community for ten years as a painter and volunteered as a church security guard, financially and emotionally supporting his wife and two young U.S.-citizen children. After struggling with an alcohol problem, he was charged twice with alcohol-related driving offenses, which resolved with a single vehicle infraction. Charging documents reflect that he was sitting in a parked car during both of these arrests, and, in the case of the second arrest, he was actually asleep. He was also arrested following an argument with his wife and was later charged with violating an order of protection by calling her on her cellphone. He and his wife have since reconciled, and she has supported him throughout his immigration proceedings.

In August of 2020, ICE arrested Pedro at his home and placed him in removal proceedings in New York, and detained him at a New Jersey jail. His wife struggled to pay rent in his absence, and she feared they would become homeless. The children,

[13] The facts of Mr. Garcia's case are detailed in a declaration by his counsel. *See* Decl. of Andrew Lyubarsky, Esq., of Brooklyn Defender Services (on file with counsel).

then ages two and five, were distraught, crying throughout the day for him and asking when he would come back home.

In October 2020, Pedro had a bond hearing where he was required to bear the burden. ICE filed only a RAP sheet and his I-213, an ICE internal memorandum that included information relevant to his immigration case. Despite the fact that Pedro filed over 100 pages of evidence, including letters of support from his wife, family, employers, and church leaders, the IJ denied bond.

Soon after, Pedro filed a motion asking the IJ for a new burden-shifted bond hearing in light of *Velasco Lopez*. The IJ denied the motion, and, just as in Matthias's case, noted that "in absence of a bright-line rule from the Second Circuit, and the Court's lack of authority to address constitutional issues in this case, the Court will not follow *Velasco Lopez*." The IJ then directed Pedro to file a habeas petition in federal court because the IJ would "not engage in the requested burden shifting unless ordered to do so by a District Court or in the case of subsequent binding precedent or a bright-line rule."

After Pedro filed his habeas—and after nearly eight months of detention—ICE discretionarily released Pedro on his own recognizance, demonstrating that even ICE did not believe that he was such a danger to the community or risk of flight that he should remain detained. Since then, Pedro has returned to his community and continued to support his family as a painter of high-end residential developments in New York.

Even more concerningly, **Ricardo Davis**[14] was detained for over three and a half years without a bond hearing at which ICE was required to justify his detention, despite this Court's decision in *Velasco Lopez*.

After fleeing gang and police violence in the Bahamas, Mr. Davis settled with his U.S. citizen sister and her two daughters in New York. After being detained by ICE and held for over three years, Mr. Davis, through his pro bono counsel, asked the IJ to hold a bond hearing that complied with *Velasco Lopez*. Even though Mr. Davis's detention had lasted much longer than that of the petitioner in *Velasco Lopez*, the IJ denied his request and imposed the burden on Mr. Davis. The IJ then denied bond on dangerousness grounds, even though Mr. Davis's criminal history was minor, temporally distant, and nonviolent.[15]

Three months later, ICE released Mr. Davis pursuant to *Fraihat v. ICE* where a district court had ordered ICE to evaluate individualized COVID-related health risks in detention decisions. 445 F. Supp. 3d 709, 722 (C.D. Cal. 2020), *order clarified*, No. EDCV 19-1546 (JGB) (SHKx), 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *and rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021).[16] When making a determination about

[14] "Ricardo Davis" is a pseudonym to protect Mr. Davis's identity. The facts of his case are detailed in a declaration by his counsel. *See* Decl. of Liliana Giacoma, Esq., of Brooklyn Defender Services (on file with counsel).

[15] Mr. Davis was convicted of misdemeanor petit larceny, misdemeanor possession of a controlled substance, and a disorderly conduct violation.

[16] On October 20, 2021, the Ninth Circuit reversed the district court's decision, finding meet the preliminary injunction standards had not been met. *Fraihat*, 16 F.4th 613. As of the time of filing, the injunction remains in place.

whether to release someone under *Fraihat*, ICE considers flight risk and dangerousness. *See Fraihat*, 2020 WL 6541994, at *10. Therefore, just like in Matthias's and Pedro's cases, even ICE did not find that Mr. Davis was such a danger or flight risk that he did not warrant release.

As these stories show, the months and years of unnecessary detention experienced by these individuals and countless others may have been avoided by properly placing the burden on ICE at the outset.

B. Noncitizens Experience Extraordinary Hardships While Detained, Including Barriers to Challenging Their Detention While Litigating Their Immigration Cases

While in immigration detention, noncitizens face many barriers, including a lack of access to information and to counsel, and serious psychological stressors that compound the other challenges. These hurdles can make it prohibitively difficult for individuals to prove a negative at immigration bond hearings, resulting in erroneous deprivations of liberty, which in turn impairs noncitizens' ability to defend themselves from deportation.

It can be exceedingly difficult for detained noncitizens to access court records and documentary evidence necessary to prove that they are neither a flight risk nor a danger to their communities at their bond hearings. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting that individuals in immigration detention "have little ability to collect evidence"). Under current bond procedures, even individuals who ultimately win their release are often forced to remain in detention additional months or years

while they gather evidence, much of which is already in the government's possession. As this Court noted in *Velasco Lopez*, "[e]ven where information relevant to bail was on file with the Government, Velasco Lopez struggled to obtain it. For example, ICE refused to provide Velasco Lopez with his own DACA records which were in the Government's possession and highly relevant." 978 F.3d at 853. In contrast, this Court noted that, in order to acquire documents, "the Government had substantial resources to deploy. Those resources include computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities." *Id.*

Preparation for immigration proceedings requires substantial fact-gathering that is distinct from—and often completely unrelated to—the question of flight risk and danger to the community. The arduousness of preparing for both proceedings, including gathering documents and letters of support, preparing applications and statements, and communicating with witnesses and counsel, prolongs detention and interferes with noncitizens' ability to pursue forms of immigration relief to which they may be statutorily entitled. "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, Without Justice For All 107 (1985)).

Detention also isolates noncitizens from their family and communities, limiting the ability to gather character evidence to demonstrate that they are neither a flight

risk nor a threat to the community, showings that are prerequisites to obtaining bond when noncitizens bear the burden of proof. In addition, detained individuals frequently experience restricted access to telephones, sometimes finding it "virtually impossible to place a call—any call—that connect[s] to the outside world."[17] Indeed, "arbitrary transfers across facilities" and "exorbitant telephone rates further impair detainees' ability to maintain communication with family and community members."[18]

One of the named plaintiffs in this case, **Antonio Lopez Agustin**,[19] personally experienced the difficulty of fighting his deportation while detained. Antonio arrived in the United States over two decades ago, at age sixteen. In 2019, Antonio was arrested at a workplace raid, even though he has no violent or dangerous criminal history. ICE detained him in Louisiana, far from his family and friends.[20] After over three months of detention, Antonio had a bond hearing. He submitted evidence showing extensive ties to his community, including that he is raising an eight-year-old U.S.-citizen daughter, was preparing to buy the home he had lived in for eight years, and had multiple neighbors and friends personally assuring that he would appear at all

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[17] Julie Harumi Mass & Carl Takei, *Forget about Calling a Lawyer or Anyone at All if You're in an Immigration Detention Facility*, ACLU Immigrant Rights Blog (June 15, 2016).
[18] *See* Ruben Loyo & Carolyn Corrado, *Locked Up But Not Forgotten: Opening Access to Family & Community in the Immigration Detention System* 3 N.Y.U. School of Law Immigrant Rights Clinic (2010).
[19] All the facts of Antonio Lopez Agustin's case are taken from the Joint Appendix, JA21-23.
[20] Antonio has several traffic infractions and one misdemeanor conviction for possessing false identification from 2005, for which he was sentenced to one-year supervised release.

immigration proceedings. Yet, just five minutes into the hearing, the NY IJ denied bond, saying that Antonio had not met his burden to prove that he is not a flight risk. At the time that this class action was filed, Antonio had been detained for more than seven months. His partner and daughter suffered in his absence, both emotionally and financially. In detention, Antonio struggled to communicate with his *pro bono* attorney and friends and family to collect evidence for his application for cancellation of removal.

Additionally, for noncitizens with prior or pending criminal cases, the improper allocation of the burden is, in effect, a requirement that they relitigate charges that were dismissed, may later be dismissed, or have been resolved with non-criminal dispositions, which makes the acquisition of these hard-to-get documents critical to securing release. As the story of **Carlos Velasco Lopez** illustrates, immigration detention itself can prevent noncitizens from resolving open criminal cases, which in turn can be used as a basis to deny bond and have negative consequences for immigration relief.

Carlos, whose case reached this Court in *Velasco Lopez*, is a long-time New York resident who came to the United States from Mexico when he was four years old. He thrived at school in Westchester County, earning a place on the honor roll and winning awards for perfect attendance.[21] After graduating in 2013, he entered a

[21] The facts of Carlos Velasco Lopez's case are detailed in this Court's decision; *see also* Decl. of Julie Dona, The Legal Aid Society (on file with counsel).

culinary institute and continued to live and care for his stepmother, who has numerous health issues.

ICE detained Carlos and placed him in removal proceedings. While in detention, ICE repeatedly refused to produce Carlos to criminal court, preventing him from resolving his pending cases related to alleged involvement in a bar fight and driving while intoxicated, although he had strong arguments in his defense.

Carlos received two immigration bond hearings where he submitted voluminous evidence demonstrating that he was not a danger or flight risk. With the burden of proof on Carlos, the IJ denied bond, partly based on the charges that remained pending as a result of ICE's failure to produce him to criminal court. Because of the unresolved nature of Carlos's cases, "[t]he immigration judge concluded that he did not have all the relevant facts before him and thus made adverse inferences against Velasco Lopez and again denied bail." *Velasco Lopez*, 978 F.3d at 847.

Carlos was fortunate enough to have *pro bono* counsel represent him in seeking habeas relief, challenging the constitutionality of the prior bond proceedings. The district court granted his petition and ordered a new bond hearing where ICE bore the burden by clear and convincing evidence. At this hearing, the IJ found that ICE has failed to meet its burden and released Carlos on $10,000 bond.

Since his release, Carlos has returned to his community in Westchester, where he has lived peacefully, attended court hearings, and continued to support his family,

working in an upscale restaurant.

Jim Marco Cabanillas Lazo[22] also personally experienced the difficulty of collecting evidence for his immigration case while detained. Jim is a 54-year-old father of two U.S. citizen daughters, a loving partner to the mother of his children, and an active church member who has lived in the United States for more than 20 years. He was detained by ICE due to criminal charges—currently under appeal—related to a fake license and vehicle registration. In his absence, his partner was required to triple her hours at a minimum wage job to compensate for Jim's lost income, move the family into a single bedroom, and find alternative childcare for their nine- and eleven-year-old daughters, who were struggling emotionally. At the same time, his partner undertook the weighty task of assisting in the preparation of his application for cancellation of removal, which requires extensive evidentiary support, while also preparing numerous materials for his bond hearing.

After almost eighteen months in criminal and immigration custody, the IJ held a bond hearing where Jim bore the burden of proof. Even though Jim had no criminal convictions and no violent charges of any kind, the IJ found that he did not carry his burden as to dangerousness, and denied bond based on his plea to a violation for possession of a fake license and registration.

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[22] The facts of Jim Marco Cabanillas Lazo's case are detailed in a declaration by his counsel. *See* Decl. of Zoey Jones, Esq., of Brooklyn Defender Services (on file with counsel).

Juggling multiple obligations in Jim's absence prohibited his partner from collecting evidence in time to be filed in immigration court to support his application for cancellation of removal. The IJ denied requests to postpone the immigration hearing, despite evidence that his partner was turned away from the hospital to collect critical evidence several times due to a language barrier. At the merits hearing, the IJ refused to accept evidence that Jim's partner had been unable to obtain by the hearing filing deadline and denied Jim's application to stay in the United States. As a result of the continued separation, his youngest daughter began to experience panic attacks. Jim remained in detention for an additional eight months, until a federal court required an IJ to hold a constitutionally adequate bond hearing, at which he was released on bond. Jim appealed the denial of his application for cancellation of removal and his case was remanded back to the BIA where it remains pending.

As Jim's case demonstrates, noncitizens face enormous obstacles in litigating their immigration case while simultaneously challenging detention, all while they suffer behind bars.[23] Because immigration courts refuse to apply *Velasco Lopez* absent

[23] The COVID-19 pandemic has also significantly affected noncitizens' ability to access the information and documents they need., and severely curtailed access to counsel during the extended quarantine. *See, e.g., Jimenez v. Decker*, No. 21-cv-880 (VSB), 2021 WL 826752, at *7 (S.D.N.Y. Mar. 3, 2021) (noting petitioner's "difficulties in arranging communication with counsel to robustly defend himself in his bond and merits proceedings" because "in-person visitation has been limited due to COVID-19 safety protocols implemented by the jail" and collecting cases reflecting the impact of suspension of in-person visitation and challenges of remote communication methods).

a federal court order, class-wide relief is necessary to mitigate these unnecessary obstacles and to ensure constitutionally adequate bond hearings.

III. Failure To Consider Non-Bond Alternatives to Detention and Ability to Pay Results in Unnecessarily Prolonged Detention

New York IJs uniformly deny their authority to impose alternatives to detention when making custody determinations under 8 U.S.C. § 1226(a). This practice persists despite clear authority to the contrary. *See* 8 U.S.C. § 1226(a) (". . . [T]he Attorney General may release the alien on[] bond of at least $1,500 . . . *containing conditions prescribed by the Attorney General*) (emphasis added); *Hernandez v. Sessions*, 872 F.3d 976, 984 (9th Cir. 2017) (referencing that an IJ ordered petitioner "released from custody upon filing of a $5,000 bond and enrollment in the "Alternatives to Detention" program."); *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 95 (BIA 2009) (noting that "the language [of 8 C.F.R. § 1236.1(d)(1)] suggests that the Immigration Judge has broad authority to review and modify the terms imposed by the DHS on an [noncitizen's release from custody.").

As the following examples show, however, where IJs are required to consider alternatives to detention in their custody determinations, such consideration often results in the release of individuals who would otherwise have remained imprisoned, thus demonstrating that this detention was unnecessary to protect the community or prevent flight.

Noe Hernandez[24] is one such case. Noe came to the United States with his family at age ten. During his adolescence, he began to identify as gay but was harshly rejected by his family and physically abused by his partners. He developed substance abuse problems and was arrested two times on related charges. In July 2020, Noe was arrested by ICE based on his undocumented status. At his bond hearing, Noe's counsel submitted letters from Noe's family, friends, employer, religious community, AA sponsors, and substance abuse counselors, documenting his participation in substance abuse treatment programs and commitment to beating his addiction. In addition, he submitted a letter from his current social worker that provided a thorough release plan that built upon Noe's prior rehabilitation and AA programs and resources and would help ensure that he maintained sobriety.

The IJ, however, found that Noe had not disproven his dangerousness and denied bond. Although Noe's counsel argued that imposition of detention alternatives, such as continued treatment and a strong post-release plan, could mitigate any risk of danger, the IJ did not address these alternatives and whether they were considered in her assessment regarding future dangerousness. After a district court-ordered hearing in which ICE carried the burden and the IJ was required to consider detention alternatives, the IJ granted a $5000 bond, finding that any risk of

[24] The facts of Mr. Hernandez's case are detailed in a declaration by his counsel. *See* Decl. of Michelle Doherty, Esq., of Brooklyn Defender Services (on file with counsel).

danger could be adequately mitigated by requiring Noe to continue attending AA, engage in counseling, and not drive. Noe is set for a hearing on his asylum application in 2022, has not been rearrested, and continues to comply with all conditions of his release.

Roland Graham[25] is a father and grandfather who has been a lawful permanent resident of the United States since 1993. In 2019, ICE detained Roland and initiated removal proceedings based on convictions for marijuana possession. ICE refused to release Roland despite the fact that he had no violent offenses nor history of absconding and suffered from health conditions exacerbated by detention, including PTSD, debilitating osteoarthritis, and a stomach ulcer. A district court ordered that Roland be provided with a bond hearing in which ICE carried the burden of proof and the IJ was required to consider alternatives to detention and ability to pay. The IJ found that ICE met its burden as to both dangerousness and flight risk, but that these risks could be adequately mitigated through imposition of electronic monitoring and supervision by an ICE officer. Roland's asylum application is currently on appeal, he has not been rearrested, and he continues to comply with all conditions of his release.

[25] The facts of Mr. Graham's case are detailed in a declaration by his counsel. *See* Decl. of Edward McCarthy, Esq., of Brooklyn Defender Services (on file with counsel).

Consideration of ability to pay is also critical to ensuring that noncitizens are not arbitrarily forced to remain in detention. For example, **Muhammad Yasin**[26] is a college educated teacher who fled ethnic and religious violence in Pakistan and sought asylum at the U.S. border in 2016. Immigration authorities found that he possessed a credible fear of persecution in Pakistan, but nevertheless detained him under § 1226(a). At Muhammad's bond hearing, the IJ found that Muhammad had established he was not dangerous but did not disprove all risk of flight—despite his credible claim for asylum and community ties—and therefore imposed a $20,000 bond. This far exceeded what Muhammad could pay. After nearly nine months of detention, community fundraisers succeeded in paying the bond and Muhammad was released. He attended all of his subsequent immigration hearings, won his asylum case, and has now applied for lawful permanent residence.

As the above stories underscore, the BIA's policy of forcing noncitizens to bear the burden of proof at § 1226(a) bond hearings, and of failing to require consideration of financial circumstances and non-bond alternatives, imposes substantial costs on noncitizens and their families. Moreover, the policy leads to erroneous results with crushing consequences. ICE's detention decisions are frequently arbitrary and compound systemic racism and biases against noncitizens. All too often, once ICE is required to justify the decision to detain an individual, it cannot do so.

[26] The facts of Mr. Yasin's case are detailed in a declaration by his counsel. *See* Decl. of Molly Lauterback, Esq., of Brooklyn Defender Services (on file with counsel).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully ask this Court to affirm the district court decision and find that ICE, rather than the detained noncitizen, is required to bear the burden of proof by clear and convincing evidence at § 1226(a) bond hearings for both flight risk and dangerousness, and that immigration judges at these hearings are required to meaningfully consider alternatives to monetary bond and ability to pay.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4), because the brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Garamond.

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APPENDIX A:

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 30,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents nondetained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal petitions for writs of habeas corpus challenging unlawful immigration detention.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 35,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS represented Alexander Lora, the petitioner in *Lora v. Shanahan*, 803 F.3d 601 (2d

Cir. 2015) in his removal proceedings and habeas corpus proceedings and has brought dozens of challenges to prolonged immigration detention.

The Erie County Bar Association Volunteer Lawyers Project, Inc. ("VLP") is a non-profit provider of quality free civil legal services for low-income people. VLP has been representing detained immigrants since 1990 and has grown to be the largest provider of free immigration representation in New York State outside of New York City. VLP has provided services through the New York Immigrant Family Unity Project (NYIFUP) since 2014 at the Batavia Immigration Court which is housed in the Federal Detention Facility located in Batavia, NY.

Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases before this Court and others, challenging the legality and constitutionality of the government's detention authority and its failure to provide immigrants in detention with due process of law.

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention without bond pending removal proceedings.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Legal Aid's Immigration Law Unit (the "ILU") is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. Part of the ILU's work consists of representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and in habeas proceedings in the Southern District of New York.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

Neighborhood Defender Service of Harlem ("NDS") is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in

addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, housing court, and civil court, as well as in immigration and custody proceedings. NDS has a strong interest in protecting its clients and all New Yorkers from inappropriate prolonged detention and harmful separation from their families and communities as they pursue claims for relief from deportation in immigration court.

The New York Legal Assistance Group ("NYLAG") is a leading not-for-profit civil legal services organization advocating for adults, children, and families that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG's Immigrant Protection Unit (IPU) provides New York immigrant communities experiencing poverty with comprehensive legal services through consultation and direct representation. IPU represents detained and non-detained immigrants in removal proceedings, as well as immigrants with final orders of removal who face imminent removal from the United States.

Prisoners' Legal Services of New York ("PLS") is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals incarcerated in New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings under the Institutional

Hearing Program, in addition to noncitizens in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in the U.S. District Court for the Western District of New York and on petitions for review and appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in protecting the due process rights of incarcerated and detained persons and minimizing the harmful effects of prolonged detention.

The **Queer Detainee Empowerment Project** ("QDEP") assists folks coming out of immigration detention in securing structural, health/wellness, educational, legal, and emotional support and services. QDEP works to organize around the structural barriers and state violence that LGBTQIA TS & GNC detainee/undocumented folks face related to their immigration status, race, sexuality, and gender expression/ identity. QDEP is committed to assisting folks in building lives outside of detention, to breaking down the barriers that prevent folks from building fulfilling and productive lives, and to keeping queer families intact by demanding an end to deportations/ detention/ policing. QDEP believe in creating a narrative of thriving, not just surviving.

Rapid Defense Network ("RDN") is a New York State nonprofit legal services organization RDN has extensive experience litigating detention issues in the New York and New Jersey District Courts. RDN also engages in impact litigation and habeas corpus litigation across the country.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal's Legal Team provides free legal representation to immigrants facing deportation. UnLocal's Education and Outreach Team provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, places of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include individuals who have faced detention without bond during the pendency of their removal proceedings.