

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JORDY LOPEZ ZAMORA,

Petitioner,

v.

JUDITH ALMODOVAR, in her official capacity
as Acting Field Office Director, New York Field
Office, U.S. Immigration & Customs Enforcement,
et al.,

Respondents.

No. 25 Civ. 8643 (RA)

**RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION
TO THE PETITION FOR A WRIT OF HABEAS CORPUS**

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Respondents respectfully submit this memorandum of law in opposition to the petition for a writ of habeas corpus, ECF No. 1, filed by petitioner Jordy Lopez Zamora (“Lopez Zamora” or “Petitioner”).

PRELIMINARY STATEMENT

Lopez Zamora, an alien without lawful status who is in removal proceedings, brings this habeas action to challenge his detention under 8 U.S.C. § 1226(a), which has been ongoing since February 2025. He received a hearing in January 2025 at which an immigration judge (“IJ”) denied bond because Lopez Zamora failed to establish that he did not pose a danger to the community. The decision was based largely on his arrest history, which included claims of rape and strangulation made by a fifteen-year old complaint with whom Lopez Zamora (then 26 years old) was engaged in a romantic relationship. Although the of rape and strangulation charges were dismissed on speedy trial grounds, the IJ analyzed the facts and circumstances surrounding those, and the other, charges against Lopez Zamora, and concluded that he posed a danger to the community. Petitioner appealed that decision to the Board of Immigration Appeals (“BIA”), which affirmed the order. The IJ also denied Lopez Zamora’s application for relief from removal, which he has also appealed to the BIA. That appeal remains pending.

Lopez Zamora filed this habeas action asserting that his detention is unlawful, notwithstanding his bond hearing, because the burden allegedly was not properly allocated at that hearing and therefore violates due process, in the alternative, that his eight-month detention entitles him to a new hearing. Those arguments are without merit. Under longstanding agency practice and controlling BIA precedent, at a bond hearing held pursuant to section 1226(a), an alien must demonstrate by a preponderance of the evidence that he is not a danger to the community or a flight risk. The Second Circuit’s *Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020), decision suggests that there is no due process infirmity in placing the burden of proof on an alien

detained under section 1226(a) at his initial bond hearing. Moreover, *Velasco Lopez* involved a prolonged detention claim—an individual who had been detained “for fifteen months without an end in sight *or* a determination that he was a danger or flight risk.” 978 F.3d at 855 (emphasis added). While Lopez Zamora attempts to make a prolonged detention argument, his eight-month detention has been accompanied by adequate procedural safeguards and is not unreasonably prolonged to warrant relief under *Velasco Lopez*. Moreover, even if he were to establish that the burden allocation was in error, he has not shown that it was prejudicial because there is no reason to believe that even if it were the government’s burden an IJ would have concluded differently based on the record.

Petitioner’s Administrative Procedure Act (“APA”) claim fares no better. He challenges as arbitrary and capricious BIA precedent from 1999—*Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)—a decision holding that the alien should bear the burden of proof to demonstrate, by a preponderance of the evidence, that his release would not pose a danger to the community and that he is not a flight risk. The BIA thoroughly, and thoughtfully, explained its reasoning for its allocation of the burden in immigration bond proceedings. Petitioner’s arguments to the contrary are unavailing.

Accordingly, for the reasons set forth below, the Court should deny the habeas petition.

LEGAL BACKGROUND

For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, arrest aliens subject to removal, and detain aliens during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232-37 (1960). Congress enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. “Detention during removal

proceedings is a constitutionally valid aspect of the deportation process.” *Velasco Lopez*, 978 F.3d at 848 (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”).

Section 1226(a) provides that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). The Attorney General and the Department of Homeland Security (“DHS”) thus have broad discretionary authority to detain an alien during removal proceedings.¹ *See* 8 U.S.C. § 1226(a)(1) (DHS “may continue to detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (highlighting that “subsection (a) creates authority for *anyone*’s arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions”). When an alien is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien[.]” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Adeniji*, 22 I. & N. Dec. at 1113). If DHS decides to release the alien, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8).

¹ Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General’s authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for aliens under section 1226(a) is “one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings.” *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

If DHS determines that an alien should remain detained during the pendency of his removal proceedings, the alien may request a custody redetermination hearing—*i.e.*, a bond hearing—before an IJ. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The IJ then conducts a bond hearing and decides whether to release the alien, based on a variety of factors to evaluate whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) does not provide an alien with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does § 1226(a) explicitly address the burden of proof that should apply or any particular factors that must be considered in bond hearings. Rather, it grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release an alien during removal proceedings. *See id.* at 576. In the exercise of this broad discretion, and consistent with the DHS regulations, the BIA—whose decisions are binding on immigration judges—has placed the burden of proof on the alien, who “must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” *Matter of Guerra*, 24 I. & N. Dec. at 38; *accord Matter of Adeniji*, 22 I. & N. Dec. at 1114. The BIA’s “to the satisfaction” standard is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).

If, after the bond hearing, the IJ concludes that the alien should not be released, or the IJ has set a bond amount that the alien believes is too high, the alien may appeal to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). Moreover, if the alien’s

circumstances materially change, he may request a subsequent hearing, *see* 8 C.F.R. § 1003.19(e), and the outcome of that hearing is also appealable to the BIA, *see Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989).

FACTUAL BACKGROUND

A. Lopez Zamora's Immigration and Criminal History

Lopez Zamora is a native and citizen of Ecuador, who entered the United States illegally and without inspection in 2016. *See* Declaration of Deportation Officer Michael Charles (“Charles Decl.”) ¶ 3.

1. Criminal History

On August 31, 2024, he was arrested and charged in Queen Criminal Court with (1) Strangulation in the Second Degree, in violation of N.Y.P.L. 121.12, (2) two counts of Rape in the Third Degree, in violation of N.Y.P.L. 130.25-2,² (3) Assault in the Third Degree, in violation of N.Y.P.L. 120.00-1, (4) three counts of Endangering the Welfare of a Child, in violation of N.Y.P.L. 260.10-1, and (5) Harassment in the Second Degree, in violation of N.Y.P.L. 240.26-1. Charles Decl. ¶ 4. These charges were based on a [REDACTED]

[REDACTED]

² A person is guilty of rape in the third degree when being twenty-one or more years old, he or she engages in vaginal, oral, or anal sexual conduct with another person less than seventeen years old. N.Y.P.L. 130.25-2(4)-(6).

[REDACTED]

[REDACTED] ECF 8-2 at 28-29³ (September 1, 2024 Queens County Criminal Court complaint).

Following Lopez Zamora's arrest, on September 1, 2024, an order of protection was issued against him on behalf of the Complainant. Charles Decl. ¶ 5. [REDACTED]

[REDACTED]

[REDACTED] ECF No. 8-2 at 33 (November 16, 2024 Queens County Criminal Court complaint).

On November 16, 2024, Lopez Zamora was arrested again. Charles Decl. ¶ 6. He was charged with Criminal Contempt in the Second Degree, in violation of NYPL § 215.50-03, Harassment in the Second Degree, in violation of NYPL § 240.26-03, and Disorderly Conduct, in violation of N.Y.P. L. 240.20, for violating the parameters of the order of protection. *Id.* ¶ 6.

[REDACTED]

[REDACTED]

[REDACTED] ECF No. 8-2 at 32-33. [REDACTED]

[REDACTED]

[REDACTED] *See id.* at 34.

On November 18, 2024, Lopez Zamora was arrested for a third time. Charles Decl. ¶ 7. He was charged in Queens Criminal Court with Criminal Possession of Stolen Property in the Fifth Degree, in violation of N.Y.P.L. 165.40, and Driving by Unlicensed Operator, in violation of Vehicle & Traffic Law 509-1. *Id.* ¶ 7. [REDACTED]

[REDACTED]

³ All page numbering to exhibits that Petitioner has moved to file under seal are to the page numbers printed in the bottom right corner of the page.

ECF

No. 8-2 at 35-36 (November 19, 2024 Queens County Criminal Court complaint). Lopez Zamora was also unable to produce a valid driver's license during this interaction with police. *Id.* at 35.

On December 6, 2024, Lopez Zamora pleaded guilty to Disorderly Conduct, in violation of N.Y.P.L. 240.20, for the conduct related to violating the order of protection. Charles Decl. ¶ 6. He was sentenced to Time Served and fined. *Id.* The Criminal Contempt and Harassment charges were covered by the guilty plea to Disorderly Conduct. On the same day, the Strangulation in the 2nd Degree and the Rape in the Third Degree charges were dismissed on speedy trial grounds, pursuant to C.P.L. 170.30(1)(e). *Id.* ¶ 4. The remaining charges related to the August 31, 2024 arrest were Adjourned in Contemplation of Dismissal pursuant to N.Y.P.L. 170.55. *Id.* ¶ 4.

On March 13, 2025 (after Lopez Zamora was in ICE custody, as discussed below), the charges related to the November 18, 2024 arrest for driving a stolen vehicle and driving without a license were dismissed on speedy trial grounds pursuant to C.P.L. 170.30(1)(e). *Id.* ¶ 7.

2. Immigration Proceedings

On February 13, 2025, Lopez Zamora was encountered by Homeland Security Investigations (“HSI”) Special Agents and arrested. *Id.* ¶ 8. During processing, he was issued and served with a Notice to Appear (“NTA”), the document used to commence removal proceedings, charging him as removable pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 8. The NTA was filed with the immigration court the same day. *Id.* The following day, on February 14, 2025, Lopez Zamora was transferred to the Orange County Jail in Goshen, New York, where he has remained since that date. *Id.* ¶ 9.

On February 18, 2025, ICE filed evidence with the immigration court, including Lopez Zamora's RAP Sheet and a copy of Lopez Zamora's Department of State visa application he filed from Ecuador in April 2016, to establish alienage. *Id.* ¶ 10.

On February 20, 2025, Lopez Zamora appeared, via video teleconference ("VTC") and without counsel, for his first master calendar hearing before an IJ at the Varick Immigration Court in New York. *Id.* ¶ 11. During that hearing, he was advised regarding the nature of immigration proceedings and his right to obtain counsel and connected with the New York Immigration Family Unity Project. *Id.* During the hearing Lopez Zamora requested help from the IJ in obtaining physical therapy due to recent back and leg surgeries, and after the hearing, ICE relayed Lopez Zamora's medical concerns to the medical unit at the Orange County Jail. *Id.*

On February 24, 2025, an attorney from Brooklyn Defender Services filed a notice of appearance on Petitioner's behalf. *Id.* ¶ 12. On March 5, 2025, Petitioner, through counsel, filed a Motion to Terminate Proceedings arguing that ICE had not established alienage and therefore could not sustain the charge of removability in the NTA. *Id.* ¶ 13.

On March 6, 2025, Lopez Zamora was not produced for the second master calendar hearing due to a quarantine at the Orange County Jail. *Id.* ¶ 14. The hearing did not proceed because counsel for Lopez Zamora did not obtain his client's consent to proceed without his presence. *Id.* On that date, the IJ acknowledged receipt of the Motion to Terminate. ICE opposed termination, pointing to the visa application as proof of alienage. *Id.* The IJ scheduled a third master calendar hearing for March 11, 2025. *Id.* That same day, after the hearing, the IJ issued an Order denying Lopez Zamora's Motion to Terminate. *Id.*

On March 11, 2025, Lopez Zamora was again not produced for the master calendar hearing due to a quarantine at the Orange County Jail. *Id.* ¶ 15. At the hearing, his counsel admitted to the

allegations and conceded the charge of removability in the NTA. *Id.* A master calendar hearing was scheduled for March 18, 2025 for Lopez Zamora to file any relief applications. *Id.* On March 17, 2025, Lopez Zamora filed an application for relief from removal. *Id.* ¶ 16.

On March 18, 2025, Lopez Zamora appeared, via VTC from the Orange County Jail, with counsel for his fourth master calendar hearing. *Id.* ¶ 17. At the hearing, the IJ scheduled an individual merits hearing for Lopez Zamora’s relief application for May 6, 2025. *Id.* Later that same day, the IJ rescheduled the individual merits hearing for May 14, 2025. *Id.*

3. Bond Hearing, Bond Decision and Appeal

On April 21, 2025, Lopez Zamora filed a Motion for a Bond Hearing pursuant to 8 C.F.R. § 1003.19. *Id.* ¶ 18. On April 22, 2025, the Immigration Court scheduled a bond hearing for April 29, 2025. *Id.* ¶ 19. On April 28, 2025, Lopez Zamora filed evidence in support of his request for bond and ICE filed evidence in opposition to the request. *Id.* ¶ 20.

On April 29, 2025, an IJ held a bond hearing; Lopez Zamora was present via VTC. *Id.* ¶ 21. At the conclusion of the hearing, the IJ denied bond, concluding that Lopez Zamora had not met his burden of proof to show that he was not a danger to the community. *Id.*

On May 12, 2025, the IJ issued a thorough decision analyzing the evidence on both sides and memorializing the decision to deny bond. *Id.* ¶ 24; ECF No. 8-5 (“Bond Decision”). Of particular concern to the IJ was the fact that [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED]

Id.

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 5.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In sum, the IJ found that Lopez Zamora had not established to her satisfaction that he does not pose a danger to persons or property. *Id.* Given the finding that Lopez Zamora poses a danger to the community, the IJ did not reach flight risk. *Id.* at 6.

On May 2, 2025, Lopez Zamora filed a Notice of Appeal to the BIA of the decision denying bond. Charles Decl. ¶ 22. On August 5, 2025, the BIA dismissed the appeal, affirming the IJ’s determination that Lopez Zamora did not meet his burden of proof to establish that he would not present a danger to the community if released from custody. *Id.* ¶ 30; Exhibit 1 (“BIA Bond Appeal Decision”). The BIA found that the IJ appropriately considered Lopez Zamora’s three arrests, and concluded that while Lopez Zamora denies the criminal conduct, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Bond Appeal Decision at 2.

4. Removal Proceedings

On May 7 and 8, 2025, Lopez Zamora filed evidence in support of his application for relief from removal. Charles Decl. ¶ 23; *see also id.* ¶ 16. On May 14, 2025, Lopez Zamora appeared, via VTC from the Orange County Jail, with counsel for his individual hearing. *Id.* ¶ 25. At the beginning of the hearing, the Orange County Jail lost internet connection, and the case was rescheduled for May 30, 2025. *Id.*

On May 30, 2025, Lopez Zamora appeared, via VTC from the Orange County Jail, with counsel for his individual hearing. *Id.* ¶ 27. He testified in support of his application for relief. *Id.* At the conclusion of the hearing, the IJ denied Lopez Zamora's application and ordered him removed to Ecuador. *Id.*; *see also* ECF No. 8-6 (May 30, 2025 IJ Oral Decision).

On June 12, 2025, Lopez Zamora timely filed a Notice of Appeal of the IJ's May 30, 2025 decision denying his application for relief from removal. *Id.* ¶ 28. On August 11, 2025, the BIA issued a briefing schedule and ordered the parties to submit their briefs by September 2, 2025. *Id.* ¶ 31. After Lopez Zamora requested an extension, which was granted, he filed his appeal brief on September 22, 2025. *Id.* ¶¶ 32-34. The appeal remains pending a decision with the BIA. *Id.* ¶ 34.

B. Lopez Zamora's Habeas Petition

On October 20, 2025, Lopez Zamora filed a habeas petition in this Court under 28 U.S.C. § 2241. *See* ECF No. 1 ("Petition" or "Pet."). Petitioner asserts a Fifth Amendment and an APA claim, alleging that his ongoing detention violates his right to procedural due process because he was not afforded a "constitutionally adequate bond hearing" in which the government bears the burden. Pet. ¶ 92. He further alleges that the BIA's precedential *Matter of Adeniji*, 22 I&N Dec. 1102, decision, which shifted the burden to established eligibility for release to detainees, is arbitrary and capricious. *Id.* ¶¶ 105-09. He asks the Court to direct that he be provided a bond hearing at which the government "bear[s] the burden of establishing by clear and convincing

evidence that continued detention is justified and that no alternative to detention will suffice, and at which ability to pay is considered, and at which unsubstantiated criminal allegations from preliminary criminal complaints are not given undue weight.” Pet. Prayer for Relief ¶ 4.

On October 23, 2025, Lopez Zamora filed a motion to seal various exhibits to the Petition, including the Guzman declaration, the evidence submitted during the bond proceeding, the IJ’s May 12, 2025 Bond Decision, and the IJ’s May 30, 2025 decision ordering his removal. ECF Nos. 7-8. The government took no position on Lopez Zamora’s motion to seal. *See* ECF No. 7 at 1.

ARGUMENT

I. The Court Should Deny the Petition Because Lopez Zamora’s Detention Is Lawful and Comports with Due Process

Lopez Zamora has no right to be released during the pendency of his immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.”). Importantly, “when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.” *Demore*, 538 U.S. at 528. And as the Supreme Court has ruled, “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and quotation marks omitted). Due process demands only that the government provide “‘adequate procedural protections’ to ensure that the government’s asserted justification for physical confinement ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint.’” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008) (quoting *Zadvydas v. Davis*, 533 U.S. 679, 690-91 (2001)).

During his removal proceedings, Petitioner received numerous procedural safeguards. He appeared before an IJ multiple times over the past eight months and has received both a bond

hearing and a merits hearing on his application for relief from removal. After he was denied bond, that determination was affirmed by the BIA. He was also denied relief from removal, and has appealed that decision to the BIA. In short, Lopez Zamora has received ample process.

A. Lopez Zamora’s Initial Bond Hearing Was Constitutionally Adequate

Contrary to Lopez Zamora’s assertions, at an initial bond hearing under section 1226(a), due process does not require the government to bear the burden of establishing that an alien is a danger or flight risk, much less by clear and convincing evidence. Indeed, *Velasco Lopez*—and its application of the *Mathews* balancing test—confirms that due process does not require the burden always to be placed on the government at a section 1226(a) bond hearing. *See* 978 F.3d at 851-55. When assessing the validity of procedures in the immigration context, courts must “weigh heavily” the fact “that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature.” *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Courts also must consider that Congress “emphatic[ally]” intended the government’s discretionary decisions regarding detention to be “presumptively correct and unassailable except for abuse.” *Carlson*, 342 U.S. at 540.

In *Velasco Lopez*, the district court did not address the length of the petitioner’s Section 1226(a) detention. No. 19 Civ. 2912 (ALC), 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019). Instead, the district court agreed with the petitioner’s primary claim that, regardless of the length of his detention, his prior bond hearings violated due process because the government had not borne the burden to justify detention by clear and convincing evidence. *Id.* On appeal, despite the government squarely presenting the issue of burden of proof at an initial § 1226(a) bond hearing, the Second Circuit affirmed the district court’s judgment based solely on its application of the three-factor *Mathews v. Eldridge* balancing test to the petitioner’s alternative prolonged-detention claim. *See Velasco Lopez*, 978 F.3d at 855. In its *Mathews* analysis, the Second Circuit

repeatedly emphasized the petitioner’s length of detention—15 months—and expressly declined “to establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden.” *Id.* at 855 n.14. This strongly supports the government’s position that placing the burden of proof on the alien at an initial section 1226(a) bond hearing comports with due process.⁴

With respect to the first *Mathews* factor—the private interest at stake—the Second Circuit noted the “interest in being free from imprisonment” and emphasized that the petitioner has spent “nearly fifteen months” in detention. *Id.* at 851. Furthermore, “[t]he longer the duration of incarceration, the greater the deprivation,” and the court of appeals stressed that the petitioner did not have an “administrative mechanism” to “challenge[] his detention on the ground that it reached an unreasonable length.” *Id.* at 852. But even though it is true as a general matter that freedom from physical restraint “lies at the heart of the liberty that [the Due Process] Clause protects,” *Zadvydas*, 533 U.S. at 690 (punctuation omitted), the Supreme Court has clarified that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens,” *Demore*, 538 U.S. at 522 (quoting *Mathews*, 426 U.S. at 79-80).

While the “Fifth Amendment entitles aliens to due process of law in deportation proceedings,” it is also true that “detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.” *Demore*, 538 U.S. at 523. Any assessment of the private interests at stake must therefore account for the fact that the Supreme Court has never held that

⁴ For the reasons discussed in this section, the government respectfully disagrees with the district court decisions that have held that due process requires the government to bear the burden to justify *any* continued detention under section 1226(a), even in the absence of prolonged detention. *See* Pet. ¶ 55 (citing cases).

aliens with no right to remain in the United States have a constitutional right to be released from custody during the pendency of removal proceedings, and in fact has held the opposite. *See id.* at 530; *Carlson*, 342 U.S. at 538. Further, consideration of the private interest must also account for how aliens without lawful status are not simply asserting a right to be at liberty, but rather a right to be at liberty in the United States. *Cf. Flores*, 507 U.S. at 306 (“Congress eliminated any presumption of release pending deportation[.]”).

In discussing the second *Mathews* factor—the risk of erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards—the Second Circuit again emphasized the petitioner’s “lengthy” detention. *See Velasco Lopez*, 978 F.3d at 852. In that context, the court acknowledged that, at the beginning of a detention period, the government may have “little to no information about a detained individual,” but that rationale becomes less persuasive “the longer detention lasts.” *Id.* at 853. “[A]s the period of detention grows, so do the required procedural protections no matter what level of due process may have been sufficient at the moment of initial detention.” *Id.* (cleaned up). *Velasco Lopez* thus held that “individuals subject to *prolonged detention* under § 1226(a) must be afforded process *in addition to that provided by the ordinary bail hearing[.]*” *Id.* at 854 (emphases added).

To the extent Petitioner challenges his initial § 1226(a) bond hearing as constitutionally inadequate, that challenge should be rejected; the existing framework and processes he received under § 1226(a) provide extensive safeguards to protect against arbitrary deprivation of liberty while also ensuring that aliens do not abscond or commit crimes while removal proceedings are ongoing. As explained above, aliens detained under § 1226(a) receive three levels of review, from a DHS officer, an IJ, and the BIA. During that process, Petitioner was allowed to present any

evidence—and he did so—that might bear on the issues of dangerousness or flight risk, which the IJ considered. *See* 8 C.F.R. § 1003.19(d) (IJ may consider “any information that is available . . . or that is presented to him or her by the alien or [DHS]”), with the possibility of further review in the event of changed circumstances, *see id.* §§ 236.1(d)(3), 1236.1(d)(3). The existing procedures under § 1226(a) are flexible, permitting an IJ to consider a wide range of factors and evidence. *Matter of Guerra*, 24 I. & N. Dec. at 40-41. The IJ’s Bond Decision makes clear that she carefully considered the circumstances surrounding Lopez Zamora’s arrests, not just the allegations in the criminal complaints (which were sworn by NYPD officers based on complaints relayed by the 15-year-old Complainant, her mother, and the owner of the stolen license plates), but also the Lopez Zamora’s explanations regarding the incidents. *See* Bond Decision at 3-5. She further considered the fact that the rape and strangulation charges had only been dismissed on speedy trial grounds. *See id.* at 4.

Nor does the length of Lopez Zamora’s 8-month detention mandate a second bond hearing with an altered burden of proof. The Second Circuit has declined to establish a “bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden.” *Velasco Lopez*, 978 F.3d at 855 n.13. *Cf. Melo v. Arteta*, No. 22 Civ. 9912 (JGK), 2023 WL 5206890, at *5 (S.D.N.Y. Aug. 11, 2023) (concluding in § 1226(c) case where the petitioner was held for 14 months without a bond hearing, that “the length of the petitioner’s detention is not unreasonable” and collecting cases). At this point, the IJ has ordered the Petitioner removed to Ecuador, and he remains in detention while he appeals that decision; he raises no argument that the government has unduly prolonged the appeals process in his case (indeed, his counsel requested an extension of the briefing schedule). *Cf. Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1210 (9th Cir. 2022) (“Although further review of his removal order would take additional

time and could thereby prolong his detention, [petitioner] has not demonstrated that the fact of the review process following its ordinary course itself created a due process violation.”); *Prieto-Romero*, 534 F.3d at 1063-65 & n.9 (similar); *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) (similar).

Moreover, in this case, the IJ already made a finding of dangerousness. *See* Bond Decision at 5. Lopez Zamora does not explain how that finding would be altered if the burden were shifted to the government. *Cf. Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) (to establish a due process claim, an alien “must, in order to prevail, allege some cognizable prejudice fairly attributable to the challenged process”). Regardless of who bore the burden, Lopez Zamora’s criminal history would still have been before the IJ and there is no reasonable basis for believing that the IJ would have reached a difference result, on these facts, even if the government bore the burden. *See Maldonado-Velasquez*, 274 F. Supp. 3d 11, 13–14 (D. Mass. 2017) (finding any error was not prejudicial where the BIA had determined that “the evidence in the record about the respondent’s numerous arrests on serious charges is sufficient to support the IJ’s finding of dangerousness” and “[t]his court sees no reasonable basis for believing that this conclusion would be altered by shifting the burden to the government to re-introduce this same evidence at a new bond hearing.”).

Finally, regarding the third *Mathews* factor—the government’s interest—the Second Circuit recognized that the government’s important interests in detaining aliens under § 1226(a) to ensure that aliens do not abscond and do not commit crimes are “well established and not disputed.” *Velasco Lopez*, 978 F.3d at 854. Section 1226(a) reflects Congress’s intent to afford “broad discretion” to the government in determining which individuals should remain detained during removal proceedings, *Preap*, 586 U.S. at 409, and to increase the probability that aliens

who are ordered removed are in fact removed, H.R. Rep. No. 104-469(I), at 123 (1996). The government's interests in maintaining the existing procedures for § 1226(a) bond hearings are thus significant.

B. Lopez Zamora Is Not Entitled to the Other Relief He Seeks

Even if the Court were to order a new bond hearing at which ICE bears the burden of establishing danger or flight risk, the Court should not require the IJ to consider alternatives to detention and ability to pay a bond or restrict the IJ's ability to consider evidence of arrests that did not result in convictions. *See* Pet. ¶¶ 50, 68-81, Prayer for Relief, ¶ 4.

1. The Immigration Judge should not be required to consider alternatives to detention or ability to pay.

If an IJ determines at a bond hearing that an alien presents a danger to the community, the inquiry concludes, and the alien is not eligible for release. *See, e.g., Carlson*, 342 U.S. at 544 (no denial of due process where there is reasonable cause to believe that release on bail would endanger safety); *Lantigua v. Decker*, No. 17 Civ. 4880 (LGS), 2017 WL 5054567, at *4 (S.D.N.Y. Oct. 27, 2017) (“Once there is a determination that the alien is a danger to the community, the IJ need not consider whether the alien is a flight risk.” (citations omitted)). Recently in *Black v. Decker* the Second Circuit squarely held, in the § 1226(c) context, that ability to pay and alternatives to detention only serve to assure the alien's appearance, and such considerations are relevant “only once the IJ has determined that the noncitizen does not pose a danger to the community.” 103 F.4th 133, 155, 158-59 (2d Cir. 2024) (citing *Carlson*, 342 U.S. at 539-42 (finding no due process violation where there is cause to believe alien's release would pose a safety risk)). It is only “[a]t that point, [that] refusing to consider ability to pay and alternative means of assuring appearance creates a serious risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons.” *Id.* at 158. Indeed, the court further “stress[ed] that a showing of

dangerousness by clear and convincing evidence would foreclose any possibility of bond. The IJ would then have no reason to consider financial circumstances or alternatives to detention.” *Id.* at 159.

There is no difference in the “dangerousness” required to be shown under *Velasco Lopez* or *Black*; that is to say, neither requires any more or any less dangerousness than the other. And once that showing is made, there is no “risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons.” *Black*, 103 F.4th at 158. Nor is there a risk that an alien will be erroneously detained for an extended period because he or she is “unable to prove that” they are not a danger to the community. *Velasco Lopez*, 978 F.3d at 853. The alien will have already received “process in addition to that provided by the ordinary bail hearing,” *id.* at 854; the government will have already shown dangerousness by the heightened “standard of proof that provides the appropriate level of procedural protection,” *id.* at 856; and due process is thus satisfied under the *Mathews* framework, *Black*, 103 F.4th at 159. In light of *Black*’s clear holding, there is no reason for this Court to re-weigh the *Mathews* factors and decide whether alternatives to detention must be considered for an alien who has been shown by clear and convincing evidence to present a danger to society.

Further, an order requiring the IJ to consider alternatives to detention and ability to pay, would interfere with the “broad discretion” afforded to an IJ in determining an alien’s eligibility for release on bond. *See Matter of Guerra*, 24 I. & N. Dec. at 40; *see also Carlson*, 342 U.S. at 541. While an alien’s financial situation may be one of several discretionary factors that an IJ may consider when determining bond, an IJ has discretion to take into account various factors depending on the circumstances of the case, and “may choose to give greater weight to one factor

over others, as long as the decision is reasonable.” *Matter of Guerra*, 24 I. & N. Dec. at 40 (providing non-exhaustive list of discretionary factors IJs may consider).

2. *The Immigration Judge has broad discretion to consider Lopez Zamora’s three arrests*

Nor is there any basis in law for the Court to preclude the IJ from considering the facts and circumstances of Lopez Zamora’s arrests. *See, e.g., Reid v. Decker*, No. 19 CIV. 8393 (KPF), 2020 WL 996604, at *12 (S.D.N.Y. Mar. 2, 2020) (denying petitioner’s request that court “direct[] the IJ not to give undue weight to the allegations underlying the dismissed charges”).⁵ Petitioner does not dispute that an IJ or the BIA may consider arrests reports or charging documents in its discretionary analysis. Pet. ¶ 72. “[T]he Second Circuit has made clear that in granting or denying discretionary relief, IJs may consider the conduct underlying criminal charges, even if the charges did not result in a conviction.” *Reid*, 2020 WL 996604, at *12; *see Wallace v. Gonzales*, 463 F.3d 135, 139 (2d Cir. 2006) (per curiam) (declining “to prevent an IJ or BIA from considering an applicant’s anti-social conduct—whether leading to a conviction...or no legal judgment whatsoever—as an adverse factor in evaluating an application for discretionary relief”).

Without merit is Petitioner’s argument that an IJ cannot assume that the facts contained in arrest reports or charging documents are true. *See* Pet. ¶ 72.⁶ An IJ may, as was the case here, consider “any evidence in the record that is probative and specific.” *Matter of Guerra*, 24 I. & N.

⁵ The sole decision cited by Petitioner in which a court imposed such a condition, *L.G. v. Choate*, 744 F. Supp. 3d 1172 (D. Colo. 2024), offers no rationale for imposing the condition and is readily distinguishable. In that case, unlike here, the court had “very limited information about the IJ’s findings or the evidence presented during the bond redetermination hearing other than that the IJ found Petitioner to be a danger to the community.” *Id.* at 1184.

⁶ Petitioner’s reliance on cases in which the government must establish a criminal conviction to establish removability or on criminal matters is misplaced. *See* Pet. ¶¶ 72-73, 76-77. This is not a situation in which an IJ is basing a deportation decision on Petitioner’s past arrests, rather the IJ was making a discretionary determination whether Petitioner should be released on bond pending his removal proceedings and was evaluating whether he posed a danger to the community.

Dec. at 40–41 (finding no error in the IJ’s consideration of information regarding respondent’s alleged involvement in a drug trafficking scheme in dangerousness determination, even when respondent had not been convicted); *see also* *Barrientos v. ICE Field Off. Dir.*, 667 F. App’x 184 (9th Cir. 2016) (recognizing that “IJs are not limited to considering *only* criminal convictions in assessing whether an alien is a danger to the community. Any evidence in the record that is probative and specific can be considered.” (quoting *Matter of Guerra*, 24 I. & N. Dec. at 40)); *Maldonado-Velasquez*, 274 F. Supp. 3d at 14 (“in making dangerousness determinations, immigration judges are permitted to consider juvenile offenses or conduct that did not result in a conviction”); *accord* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody status or bond may be based on any information that is available to the Immigration Judge or that is presented to him or her by the alien or [ICE].”). In *Arias-Minaya v. Holder*, a case cited by Petitioner (Pet. ¶ 74), the First Circuit explained “there is no per se bar to the agency’s consideration of hearsay-laden police reports where convictions have not followed” and this rule was “especially uncontroversial” when the charges were only dropped because the complaining witness failed to appear for trial and the petitioner was afforded the opportunity to challenge the report. 779 F.3d 49, 54–55 & 55n.4 (1st Cir. 2015); *cf. Matter of Grijalva*, 19 I. & N. Dec. 713, 721 (BIA 1988) (“Although the police reports here are hearsay in nature, this does not mean that they are inadmissible in the respondent’s deportation proceedings.”). Similarly, here, the charges were only dropped on speedy trial grounds and Lopez Zamora responded to the allegations in his affidavit.

The IJ did not merely assume that the allegations in the criminal complaints were true, she analyzed the facts alleged and the Lopez Zamora’s countervailing explanations. *See* Bond Decision at 3-5. The BIA affirmed finding that the “record supports the Immigration Judge’s finding that

the respondent, [REDACTED]

[REDACTED] BIA Opinion at 4. “An Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept a respondent’s account where other plausible views of the evidence are supported by the record.” *Matter of D-R-*, 25 I. & N. Dec. 445, 445, 453-55 (BIA 2011). And “[t]he decision of whether and to what extent to accord weight to evidence lies within the sound discretion of the IJ.” *Reid*, 2020 WL 996604, at *12; *see also, e.g., Doe v. Decker*, No. 20 Civ. 4232 (KPF), 2020 WL 4937395, at *10 (S.D.N.Y. Aug. 21, 2020) (rejecting similar request, noting “It is not the province of this Court to limit the evidence to be considered by the Immigration Judge”); *Jovel v. Decker*, No. 20-cv-308 (GBD)(SN), 2020 WL 1502038, at *10 (S.D.N.Y. Mar. 24, 2020) (“IJs may consider conduct underlying criminal charges, whether or not the conduct resulted in a conviction.”).

II. Lopez Zamora’s APA Claim Is Without Merit

Lopez Zamora takes issue with a precedential BIA decision, *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1110–12 (BIA 1999), in which the BIA determined that, at bond hearings held pursuant to § 1226(a), the alien bears the burden of demonstrating “to the satisfaction of the immigration judge” (*i.e.*, by a preponderance of the evidence) that the alien’s release would not pose a danger to the community and that the alien is likely to appear for future hearings. Petitioner argues that *Matter of Adeniji* applied the wrong federal regulation, “constituted an unexplained rule change,” and failed to consider important aspects of the problem, and is thus arbitrary and capricious. Pet. ¶¶ 86-90. None of those challenges have merit.

In *Matter of Adeniji*, the BIA analyzed the standards governing bond hearings for aliens detained under the general bond provisions of § 1226(a). In reaching its decision, the BIA relied

on 8 C.F.R. § 236.1(c)(8) to find that the alien should carry the burden of proof. 22 I. & N. Dec. at 1112. The BIA recognized that 8 C.F.R. § 236.1(c)(8) did not by its terms apply directly to an immigration judge, *id.*, but it held that the standards articulated in that regulation could be applied to bond hearings before an immigration judge because 8 C.F.R. § 3.19(a) (now 8 C.F.R. § 1003.19(a)) provides that “[c]ustody and bond determinations made by [ICE] pursuant to 8 C.F.R. part 236 may be reviewed by an immigration judge pursuant to 8 C.F.R. part 236.” 22 I. & N. Dec. at 1112. Thus, the BIA concluded that § 3.19(a) permits immigration judges to review an alien’s custody under the same standard that governs the initial agency custody review. *Id.*

In outlining its reasons for applying 8 C.F.R. § 236.1(c)(8), the BIA laid out the reasons for why the provision was intended to be part of permanent regulations and would apply to immigration judges. *See* 22 I. & N. Dec. at 1112. As noted by a district court addressing an argument that the BIA’s reasoning in *Matter of Adeniji* amounted to a violation of the APA, the BIA “recognized that it was departing from previous BIA precedent and applied a regulation codifying that shift promulgated by the [INS]. That regulation also acknowledged the shift and explained the agency’s reasoning.” *Maldonado-Velasquez*, 274 F. Supp. 3d at 13 n.1 (citations omitted). The *Matter of Adeniji* decision thus cannot be characterized as arbitrary or capricious, and Petitioner’s APA claim is without merit.

CONCLUSION

For the foregoing reasons, the Court should deny Lopez Zamora’s habeas petition.

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 8,524 words.