Docket No. 27-1005

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,
PETITIONER,

v.

MARGARITA COOPER,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR PETITIONER

DATE: February 09, 2025 Team Number 24

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II. Whether the Fourteenth Circuit erred in finding that the Board of Immigration Appeals ("BIA") is not owed any deference and that the BIA's construction of the term a "crime of child abuse," as it is used in 8 U.S.C. § 1227(a)(2)(E)(i), is overbroad.

STATEMENT OF THE CASE

Statement of the Facts

Respondent Margarita Cooper is a citizen of Freedonia and has lived in the state of Mayfair since entering the United States ("U.S.") in 1999. (R. 2, 32.) Respondent became a lawful permanent resident of the U.S. on July 13, 2003. (R. 2.) On February 18, 2006, only three years after attaining legal residence in the U.S., Respondent was convicted of misdemeanor possession of marijuana (50 grams) in violation of Mayfair Health and Safety Code Section 11573. (R. 30-32.)

On November 15, 2022, precisely thirty minutes before midnight, Respondent was pulled over in Morrisonville, Mayfair, for rolling a stop sign and subsequently arrested for driving under the influence ("DUI") and criminally negligent child abuse. (R. 28.) After exhibiting signs of slurred speech and a stench of alcohol, Respondent was revealed to have a blood alcohol level of 0.16, double the legal limit for driving. (R. 45, 57.) Respondent was accompanied by her two minor children, Eloise age nine and Penelope age six, who were picked up by Respondent's husband prior to Respondent's transportation to Morrisonville Police Department Central Station. (R. 20, 29, 45.) Prior to Respondent's arrest, Respondent's children were "playing with essential oils" while Respondent was celebrating a recent achievement in her job at Bliss Oils. (R. 5.) While Respondent has shown remorse for her actions, Respondent has not withheld from drinking following her arrest or from driving her personal vehicle. (R. 7.)

Following Respondent's arrest, Respondent's family has exhibited feelings of stress. (R. 8.) Nonetheless, Respondent's husband is currently employed as a security guard after previously quitting his job. (R. 8.) Respondent currently remains detained following her arrest by U.S. Immigration and Customs Enforcement ("ICE") agents, pending removal. (R. 10.)

Procedural History Below

On January 10, 2023, Respondent pleaded guilty and was convicted in the Superior Court of Mayfair to the crimes of driving while intoxicated in violation of Mayfair Vehicle Code Section 14945 and "criminally negligent child abuse–no injury" in violation of section 1694, 4(a)(II) of the Mayfair Revised Statutes. (R. 45.) On January 23, 2023, Respondent was apprehended by ICE and entered into removal proceedings as a result of her conviction for criminally negligent child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) ("§ 1227(a)(2)(E)(i)"). (R. 10.) At the initial bond hearing, the Immigration Judge ("IJ") informed Respondent that due to her familiarity "with her own circumstances," Respondent had the burden to prove that she was not a danger to the community. (R. 6-7.) Subsequently, Respondent admitted to continuing to consume alcohol and drive her vehicle since the day of her arrest. (R. 7.) Based on this admission and Respondent's prior misdemeanor marijuana conviction, the IJ denied Respondent bail. (R. 7-8.)

On June 30, 2023, the IJ sustained the Department of Homeland Security's ("DHS") order of deportation, determining that Respondent's conviction is categorically "a crime of child abuse." (R. 35-36.) Respondent appealed in contest of

her removability, arguing that her conviction was not categorically a "crime of child abuse" within the meaning of § 1227(a)(2)(E)(i). (R. 34.) The BIA dismissed Respondent's appeal, affirmed the IJ's decision, and clearly stated "that the meaning of the term 'crime of child abuse' in [§ 1227(a)(2)(E)(i)] is sufficiently broad to include criminally negligent acts of child abuse that do not result in actual harm or injury." (R. 41.) Respondent appealed to the U.S. Court of Appeals for the Fourteenth Circuit. (R. 42.)

On August 2, 2023, Respondent petitioned for a new bond hearing, claiming that her detention was prolonged in violation of her due process rights and that the government should bear the burden of proving that Respondent is a danger to the community or a flight risk. (R. 9.) The IJ denied Respondent's petition and properly held that "prolonged detention alone does not violate due process" and "the burden of proof falls upon Respondent" to demonstrate that she is not a danger to the community. (R. 11-12.) Respondent appealed and the BIA issued a decision on January 17, 2024, holding that a noncitizen being held in prolonged detention under 8 U.S.C. § 1226(a) ("§ 1226(a)") is *not* entitled to a new bond hearing in which the government bears the burden of proof. (R. 13, 16.) Respondent already received a bond hearing upon her detention and without a legitimate due process violation, a new hearing would be redundant and would offer no new information. (R. 17.) Respondent appealed to the District Court, which affirmed the BIA's decision and *again* agreed with the Government, denying Respondent's request for a new bond hearing. (R. 18, 22.) The District Court properly found that it is not uncommon for

lengthy removal proceedings to increase detention time, and that Respondent is greater equipped to prove her own case at a bond hearing than the Government is. (R. 24.) Again, Respondent appealed to the Fourteenth Circuit. (R. 25.)

On April 26, 2024, the Fourteenth Circuit consolidated Respondent's two cases and on September 25, 2024, the Fourteenth Circuit reversed both the District Court's and BIA's decisions. (R. 43, 50.) First, the Fourteenth Circuit held that prolonged detention under § 1226(a) is a due process violation, warranting an additional bond hearing where the government bears the burden of proof. (R. 45-46.) Second, the Fourteenth Circuit held that the BIA's construction of § 1227(a)(2)(E)(i) is overbroad and that the BIA is not owed any deference; therefore, Respondent's conviction is not a "crime of child abuse, child neglect, or child abandonment." (R. 45, 48.)

SUMMARY OF THE ARGUMENT

Upon appeal, the Government respectfully urges this Court to rightfully reinstate the decisions of both the BIA and District Court and uphold the IJ's removal order and denial of an additional bond hearing for the following reasons.

The Fourteenth Circuit erroneously held that Respondent is entitled to a new bond hearing, shifting the burden to the government due to her prolonged detention. However, this conclusion is flawed for three reasons. First, Respondent's pre-removal discretionary detention is not "prolonged" because, while removal proceedings take time, detention during this period is not indefinite. Second, even if Respondent's detention is deemed "prolonged," absent a showing that the initial proceedings were constitutionally inadequate, duration alone does not constitute a due process

violation. Lastly, even if this Court finds that an additional bond hearing is required, Respondent still bears the burden as required by law. Regardless, the Government has already satisfied this burden by presenting evidence that Respondent poses both a danger to the community and a flight risk.

Furthermore, the Fourteenth Circuit erred in holding that the BIA is not owed any deference in their interpretation of the phrase "crime of child abuse" as it is used in § 1227(a)(2)(E)(i) for two reasons. First, a statutory interpretation analysis supports the finding that the BIA's interpretation of a "crime of child abuse" is persuasive. This is supported by a plain language, broad reading, and legislative history approach to interpreting § 1227(a)(2)(E)(i). Second, Respondent's state conviction categorically meets the federal definition of child abuse, so a mens rea greater than criminal negligence is not required.

ARGUMENT

I. Respondent is not entitled to a new bond hearing—where the Government bears the burden of proof—solely due to the duration of her 8 U.S.C. § 1226(a) detention.

Detention during removal proceedings is a constitutionally valid aspect of the deportation process. *Demore v. Kim*, 538 U.S. 510, 523 (2003). Since its enactment in 1952, the Immigration and Nationality Act ("INA") has provided for discretionary detention pending removal proceedings. *Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020). Specifically, § 1226(a), shown below, sets out the default rule which authorizes the Attorney General to arrest and detain noncitizens during removal proceedings, as well as the discretion to release the noncitizen on bond or conditional parole. *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018).

> **(a) Arrest, detention, and release**
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on-
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General;
> (B) conditional parole; …

8 U.S.C. § 1226(a).

Accordingly, noncitizens detained pending removal may seek release on bond by proving to the satisfaction of the determining officer that they are neither a danger to the community nor a flight risk. *Nielson v. Preap*, 586 U.S. 392, 395-96 (2019). Because the question of whether due process requires a new bond hearing under § 1226(a) is a purely legal issue, appellate courts review it *de novo*. *Demore*, 538 U.S. at 516-17.

Therefore, this Court should reverse the Fourteenth Circuit's holding and deny Respondent a new bond hearing for three independent reasons. First, Respondent's detention is not unconstitutionally "prolonged." Second, there is no constitutional requirement for noncitizens to receive new bond hearings based solely on the duration of their detention. Lastly, even if the Court requires another bond hearing, the Government does not bear the burden, but has met it regardless.

A. Respondent's length of detention is not prolonged and therefore, is not a due process violation.

It has not been established below that Respondent's detention is prolonged. In fact, this Court has declined to impose a specific time limit on detention under § 1226(a). *Jennings*, 583 U.S. at 306 (holding that § 1226(a) neither mandates periodic

bond hearings after six months nor shifts the burden of proof to the government). Although the plurality opinion in *Jennings* is not binding, it remains highly persuasive in interpreting the statutory framework of § 1226(a), as no other precedent from this Court addresses this specific provision. *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1217 n.6 (11th Cir. 2016).

Further, detention under § 1226(a) is not prolonged when removal remains reasonably foreseeable, particularly when delays result from the noncitizen's own litigation choices. *Contant v. Holder* 352 F. App'x 692, 694-95 (3d Cir. 2009). In *Contant*, the Third Circuit held that the noncitizen's nineteen-month detention under § 1226(a) was neither prolonged nor a "removable-but-unremovable limbo," since removal remained reasonably foreseeable, as the noncitizen could be deported to his country of origin. *Id*. The court also noted that the length of the noncitizen's detention was extended due to the noncitizen's own requests. *Id*. Alternatively, the Ninth Circuit has held that detention under § 1226(a) becomes unconstitutionally "prolonged" after six months, requiring a new bond hearing. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1090 (9th Cir. 2015), rev'd and remanded, *Jennings*, 583 U.S. at 314. However, these rulings were based on the misinterpretation of this Court's decision in *Zadvydas v. Davis*. *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, this Court held that 8 U.S.C. § 1231(a)(6) does not permit indefinite detention, establishing six months as a presumptively reasonable period. 533 U.S. at 689. After six months, noncitizens must be released if they can show no significant likelihood of removal in the reasonably foreseeable future. *Id*. at 701.

Nonetheless, *Zadvydas* does not apply to this case because it was concerned with prolonged post-removal-period detention. *Id*. Here, Respondent was detained "pending a decision on whether [she] is to be removed from the United States." 8 U.S.C. § 1226(a); s*ee Zadvydas*, 533 U.S. at 697 (noting that "post-removal-period detention, unlike detention pending a determination of removability . . . has no obvious termination point"). Moreover, nothing in the record indicates that Respondent cannot be removed to Freedonia, nor is she in indefinite detention as it will conclude upon the completion of her removal proceedings. *See Contant*, 352 F. App'x at 694-95. Rather, Respondent's removal proceedings were continued due to her own appeals and cancellation of removal application. (R. 26, 37, 42.) Therefore, while Respondent may perceive her detention as "prolonged" or indefinite, legally speaking, it is far from it.

B. Even if Respondent's detention is deemed "prolonged," its duration alone is not a due process violation.

The First, Second, Third, Fourth, and Ninth Circuits have applied the three-part *Mathews* balancing test to due process challenges of noncitizens' prolonged detention under § 1226(a). *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *see generally Diaz v. Garland*, 53 F.4th 1189, 1206 (9th Cir. 2022). Under the *Mathews* balancing test, due process generally requires courts to consider three distinct factors:

> *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-35 (emphasis added).

Respondent's claim nonetheless fails under the *Mathews* balancing test. *Diaz*, 53 F.4th at 1206-07.

1. Respondent has not been erroneously deprived of her private interest.

"[T]he private interest at stake is freedom from detention, a liberty interest which 'lies at the heart of the liberty that [the Due Process] Clause protects.'" *Miranda v. Garland*, 34 F.4th 338, 359 (4th Cir. 2022) (quoting *Zadvydas*, 533 U.S. at 690). However, in evaluating a noncitizen's private interest under the first prong of the *Mathews* balancing test, courts should not count the months of detention in isolation, but rather should consider the broader context. *Diaz*, 53 F.4th at 1208. Specifically, courts should consider the review processes which the noncitizen received and that were available to them during their time in detention, the cause of their prolonged detention, and the likelihood of their removal. *Id*.

In *Diaz*, the Ninth Circuit held that under the first prong of the *Mathews* balancing test, the noncitizen's private interest weighed in his favor because of the noncitizen's fourteen-month § 1226(a) detention. *Id*. at 1207. However, as stated above, the court was applying now overruled precedent that referred to detentions longer than six months as automatically "prolonged." *Id*. Nevertheless, the Ninth Circuit stated that the noncitizen's interest was still diminished by several factors: (1) the noncitizen received a bond hearing within two months of detention; (2) the noncitizen had the opportunity to receive another bond hearing before an IJ if materially changed circumstances were shown; (3) prolonged detention arose from

the noncitizen's challenges to the IJ's denial of immigration relief; and (4) the noncitizen was subject to a removal order. *Id*. at 1207-08.

Like the noncitizen in *Diaz*, although Respondent has a private interest in being released, such interests are diminished because: (1) she was afforded a bond hearing within one month in detention; (2) had the opportunity to motion for a redetermination hearing, which she exercised; (3) what Respondent characterizes as delays are not delays at all, as they were primarily caused by her own repeated challenges to the IJ's denial of immigration relief; and (3) Respondent was subject to a removal order and found ineligible for cancellation of removal, making her removal highly likely and her detention far from indefinite. 53 F.4th at 1207; (R. 9, 26, 32, 34, 37, 42.)

2. Existing BIA procedures sufficiently protected Respondent's liberty interest and mitigated the risk of erroneous deprivation.

Noncitizens receive the fundamental features of due process: notice and an opportunity to be heard. *See Mathews*, 424 U.S. at 333. Hence, through § 1226(a) and its accompanying code of federal regulation, Congress and the executive branch provide noncitizens ample protections to satisfy due process. *Diaz*, 53 F.4th at 1219; *see* 8 C.F.R. § 236.1.

The agency's decision to detain noncitizens under § 1226(a) is subject to numerous layers of review, each offering the noncitizen the opportunity to be heard by a neutral decision maker. *See Diaz*, 53 F.4th at 1209-10. For instance, under § 1226(a), noncitizens not only receive initial bond hearings but, if denied release on bond, may also request a subsequent bond hearing based on materially changed

circumstances. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19(e). Noncitizens also have the opportunity to appeal any adverse bond decisions to the BIA. *See* 8 C.F.R. § 236.1(d)(3). Further, noncitizens may seek limited habeas review in federal district court of any "questions of law or constitutional questions." *Martinez v. Clark*, 36 F.4th 1219, 1224 (9th Cir. 2022). Such layers of review ensure that the risk of erroneous deprivation would be "relatively small" and additional procedural unnecessary. *See Yagman v. Garcetti*, 852 F.3d 859, 865 (9th Cir. 2017) (upholding a scheme that offered the opportunity to present evidence and arguments to a reviewer).

The Third Circuit has held that a noncitizen's fourteen-month detention did not sustain a due process challenge because the noncitizen was "granted meaningful [judicial] process" provided by § 1226(a) and its accompanying regulation. *Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 277 (3d Cir. 2018). In *Borbot*, the noncitizen received both a prompt bond hearing at which he was represented by counsel, and the opportunity to obtain a redetermination hearing if materially changed circumstances were shown. *Id*. at 278-79. On the other hand, in *Velasco Lopez*, the Second Circuit held the procedures under § 1226(a) to be constitutionally inadequate as applied to the noncitizen who received an initial bond hearing. *Lopez*, 978 F.3d at 846-47. However, in *Velasco Lopez*, the noncitizen's detention was prolonged and the opportunity for bail nonexistent due to the government's delay in the criminal case and its withholding of crucial information. *Id*. at 853.

Contrary, here, Respondent cannot show that the procedures in § 1226(a) were inadequately applied nor lack any due process element. Respondent received several

layers of review provided by the extensive procedural protections under § 1226(a), including (1) an initial bond hearing before a neutral decision maker, (2) the opportunity to be represented by counsel and to present evidence, (3) the right to appeal, and (4) the right to seek a new hearing when circumstances materially change. *See generally* 8 U.S.C. § 1226(a)(1)—(2); 8 C.F.R. §§ 236.1, 1003.19. Like the noncitizen in *Borbot*, Respondent received a bond hearing within the first month of her detention, during which she was represented by counsel. *Borbot*, 906 F.3d at 278; (R. 3.) Respondent also sought a redetermination bond hearing without any materially changed circumstances. (R. 9.) Instead, Respondent contended that the government should bear the burden of proving she was a danger to the community or a flight risk. (R. 9.)

Lastly, Respondent was given a fair and impartial tribunal. The IJs and the BIA have the guidance of a non-exhaustive list of factors outlined in *In re Guerra* to utilize in determining whether bond is warranted and under what conditions. *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. §1003.19(d) ("The determination of the [IJ] as to custody status or bond may be based upon any information that is available to the [IJ] or that is presented . . . by the [noncitizen] or Service."). During Respondent's bond hearing, at which she was represented by counsel, the IJ explicitly expressed concerns about Respondent being a danger to the community and provided her with the opportunity to present evidence to the contrary. (R. 6.) Only after hearing both Respondent and the Government's arguments, did the IJ reach a decision and deny Respondent bond. (R. 7-8.) Having received this

meaningful judicial process, Respondent is not entitled to additional protections under the Fifth Amendment. *Diaz*, 53 F.4th at 1219.

3. The Government has a strong interest in preventing dangerous noncitizens from remaining in the U.S.

This Court has specifically instructed that when applying the *Mathews* balancing test, courts must heavily consider the executive and legislative branch's considerable authority over immigration matters. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). This is especially true when determining whether noncitizens may be released on bond while pending removal proceedings. *Diaz*, 53 F.4th at 1208. Under the third *Mathews* balancing test factor, the government has a strong interest in "protecting the public from dangerous…[noncitizens]." *Demore*, 538 U.S. at 515 (noting the government's justifications for the mandatory detention policy in § 1226(c)). This interest becomes particularly significant as the risk of noncitizens absconding escalates when their removal becomes more imminent. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 544 (2021).

A DUI, which Respondent was convicted of, is inherently a dangerous offense,[1] and the presence of two minor children in the car significantly amplifies the risk, endangering not only the driver, but also the vulnerable passengers. *See United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000) (emphasizing that

[1] "About 32% of all traffic crash fatalities in the U.S. involve drunk drivers (with BACs of .08 g/dL or higher). In 2022, there were 13,524 people killed in these preventable crashes." National Highway Traffic Safety Admin., Alcohol-Impaired Driving: 2022 Data (No. 813578, Aug. 2024), https://www.nhtsa.gov/risky-driving/drunk-driving (as visited Feb. 2025).

"[t]he very nature of the crime of [a DUI] presents a 'serious risk of physical injury' to others. . ."); (R. 45, 57.) Respondent also admitted to continuing to drink and drive, albeit separately, even after her conviction, which increases the likelihood of reoffending. (R. 7.) Reoffending would not only force the Government to expend additional resources to apprehend Respondent and repeat the entire criminal and immigration process, but also places Respondent, her children—her previous victims—and the public at serious risk. *See Demore,* 538 U.S. at 518-19 (emphasizing that releasing criminal noncitizens could lead to recidivism and increase the government's burden to locate and detain noncitizens again); *see also Johnson v. Arteaga-Martinez*, 596 U.S. 573, 580 (2022) (reaffirming that detention helps mitigate risks by ensuring appearance at proceedings and protecting public safety). Thus, the Government has a compelling interest in continuing Respondent's detention to protect public safety, ensure compliance with future immigration proceedings, and minimize financial burdens.

C. If an additional bond hearing is required, Respondent still bears the burden of proof.

There is no precedent set by this Court requiring the government to prove a noncitizen's flight risk or dangerousness when detained under § 1226(a). *Jennings*, 583 U.S. at 306. Further, this Court should not aim to create that precedent now, as Respondent has failed to identify any specific reason why the bond procedures in § 1226(a) unconstitutionally apply to her. *Compare Sopo*, 825 F.3d at 1220 (finding that the bond procedures in § 1226(a) are constitutionally adequate).

Although not explicitly stated in § 1226(a), the Immigration and Naturalization Service ("INS") and the BIA have created precedent in which noncitizens detained under § 1226(a) are subject to detention unless the noncitizen is able to show "to the satisfaction of the [IJ] that he or she merits release on bond." *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999) ("[T]he [noncitizen] must demonstrate that 'release would not pose a danger to property or persons,' even though [§1226(a)] does not explicitly contain such a requirement.").

1. Under established precedent, Respondent bore the burden of proof in her bond hearing and failed to satisfy it.

The requirement under § 1226 (a) for a noncitizen to bear the burden of proof in bond hearings does not violate due process, as noncitizens—particularly those with legal representation—possess greater knowledge of their own circumstances and personal history than the government does. *Miranda v. Garland*, 34 F.4th 338, 361-62 (4th Cir. 2022). Moreover, to the extent that a noncitizen has difficulties or is unable to obtain such information, the procedures in § 1226(a) allow the noncitizen to raise that fact for the IJ's consideration. *Diaz*, 53 F.4th at 1212; *compare Lopez*, 978 F.3d at 853 (holding the noncitizen's § 1226(a) bond hearing unconstitutional due to the government's uncharacteristic misconduct in withholding crucial information from the noncitizen about his criminal case).

The Fourteenth Circuit improperly characterized the government to be "more equipped with…resources," noting that noncitizens often appear pro se and have difficulty gathering evidence. (R. 47.) However, throughout the proceedings, Respondent was adequately represented by counsel and never alleged difficulty

obtaining evidence. (R. 3.) Moreover, although Respondent and her counsel mistakenly believed that the burden rested on the Government to prove she was a danger to the community or a flight risk, that does not excuse Respondent's repeated failure to present mitigating evidence to the contrary. (R. 9.) Instead, the only evidence Respondent has offered are her ties to the U.S., her retail job, her husband, and her children—whom she endangered while driving intoxicated. (R. 5-8.)

2. Even if the Court were to shift the burden of proof to the Government, it has already fulfilled its burden.

While the Fourth Circuit places the burden of proof on noncitizens during § 1226(a) bond proceedings, the Ninth Circuit requires the government to prove by clear and convincing evidence that a noncitizen poses a danger to the community or a flight risk to justify continued detention under § 1226(a). *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011). This includes presenting evidence of a noncitizen's criminal history, lack of rehabilitation efforts, and strong incentives to flee. *See id*. at 1205 (holding that the government failed to meet its burden because the noncitizen's offenses were substance abuse crimes, and the noncitizen provided evidence showing that he had ceased using drugs).

Moreover, in bond proceedings, it is proper for the IJ to consider not only the nature of a criminal offense, but also the specific circumstances surrounding the noncitizen's conduct. *See Guerra,* 24 I&N Dec. 37 at 40 (stating that an IJ can determine whether a noncitizen should be released from immigration custody based on how extensive, recent, and serious the noncitizen's criminal activity is). DUI is a significant adverse consideration in bond proceedings. *Matter of Siniauskas*, 27 I. &

N. Dec. 207, 209 (BIA 2018). In *Siniauskas*, the BIA found the noncitizen a danger to the community despite a decade-old DUI conviction, participation in Alcoholics Anonymous, and assurances of reform, because a recent DUI arrest undermined claims of rehabilitation and safety. *Siniauskas* 27 I. & N. Dec. at 209; *see Matter of Roberts*, 20 I&N Dec. 294, 303 (BIA 1991) (noting that a noncitizen's "assurances" alone are not sufficient to "show genuine rehabilitation").

In the present case, the IJ considered evidence presented by the Government, including Respondent's DUI and criminally negligent child abuse police report, and plea agreement. (R. 7-8, 55-57.) Further, Respondent informed the IJ that she continued to drink and drive. (R. 7.) Thus, the only evidence that both the Government and Respondent presented confirmed that Respondent was—and remains—a danger to the community. (R. 8.)

The Government also raised the issue of Respondent's potential ineligibility for immigration relief due to her prior misdemeanor possession of marijuana conviction. (R. 7-8.) The IJ correctly agreed with the Government that this increased Respondent's likelihood of being removed from the U.S., thereby heightening the risk of Respondent absconding prior to the conclusion of her proceedings. (R. 7-8.) Notably, Respondent was denied cancellation of removal due to her prior misdemeanor conviction and was ordered removed to Freedonia. (R. 32-33, 36.) Thus, while the Government should not bear the burden of proof in § 1226(a) bond hearings, it has nonetheless satisfied the burden by presenting evidence of Respondent's continued danger to the community and flight risk.

II. The Fourteenth Circuit erred in deciding that the BIA's construction of 8 U.S.C. § 1227(a)(2)(E)(i) is overbroad.

Lawful permanent residents are authorized to live in the U.S. but are subject to removal when convicted of serious crimes. *Barton v. Barr*, 590 U.S. 222, 225 (2020). The removal of lawful permanent residents is permitted under 8 U.S.C. § 1227. *Id.* at 234. The Court reviews the BIA's interpretation of a "crime of child abuse" in § 1227(a)(2)(E)(i) *de novo*, reviewing questions of law anew, without giving deference to lower court decisions. *Garcia v. Barr*, 969 F.3d 129, 132 (5th Cir. 2020).

Mayfair Revised Statutes Section 1694

> 4. A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.
> (a) Where no death or injury results, the following shall apply:
> (II) An act of child abuse when a person acts with criminal negligence is a class 2 misdemeanor

(R. 54.)

Respondent pleaded guilty to Section 1694, 4(a)(II) of the Mayfair Revised Statutes ("§ 1694, 4(a)(II)"), shown above. (R. 54.) § 1694, 4(a)(II) satisfies the elements of the generic federal law, shown below, making the state conviction a categorically removable offense. (R. 49, 55.)

> (E)(i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.

8 U.S.C. § 1227(a)(2)(E)(i).

Removal of noncitizens—even lawful permanent residents that have built their roots in the U.S.—is a "wrenching" process, yet a necessary one, for those who have made the immoral decision of committing serious crimes. *Barton*, 590 U.S. at 240. Recognizing this, Congress not only enacted legislation to remove noncitizens who have amassed serious criminal records, but also instituted the ability to preclude cancellation of removal of noncitizens when such crimes occur. *Id.*

Thus, this Court should reverse the Fourteenth Circuit's decision because (1) the BIA's interpretation of a "crime of child abuse" as seen in § 1227(a)(2)(E)(i) is highly persuasive, and (2) under the categorical approach, a mens rea greater than criminal negligence is not required.

A. Using canons of statutory interpretation, the BIA's interpretation of "crime of child abuse" is persuasive.

When a statute is ambiguous, the judiciary has the responsibility to exercise their longstanding authority of interpreting laws enacted by Congress. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). While the Court is no longer required to adhere to agency interpretations when they are reasonable, the Court can consider agency interpretations persuasive when interpreting the meaning of statutes. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 374 (2024). Opinions of relevant agencies act to guide courts based on their expertise in the subject areas. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Canons of statutory interpretation are used by courts to interpret Congress' intent when drafting ambiguous statutes, focusing on aspects such as the linguistic context, plain meaning of the statutory text, and legislative history. *Loper Bright Enterprises*, 603 U.S. at 434.

1. The plain language of "crime of child abuse" does not require a mens rea greater than criminal negligence.

Interpreting words by their ordinary meaning is the default method utilized by courts in determining Congress' intent when language in a statute is not otherwise defined. *Perrin v. U. S.*, 444 U.S. 37, 42 (1979). Mens rea refers to a person's mental intent when committing a crime and can range in degree from criminal negligence to intent to cause injury. *Ibarra v. Holder*, 736 F.3d 903, 908 (10th Cir. 2013).

A threat of injury, even if no actual injury occurs, is sufficiently encompassed by the plain language of the statutory phrase "crime of child abuse." *See Matter of Soram*, 25 I. & N. Dec. 378, 381 (BIA 2010). This is seen in *Matter of Soram*, which held that a state statute that specifies crimes of child abuse that occur with no injury warrants removal under the meaning of "crime of child abuse" in § 1227(a)(2)(E)(i). *Matter of Soram*, 25 I. & N. Dec. at 381*; but see Ibarra*, 736 F.3d at 918 (stating that "negligently permitting the [petitioner's] children to be placed in a situation where they might have been injured, when no injury occurred, does not fit the generic federal definition of child 'abuse, neglect, or abandonment' in 8 U.S.C. § 1227(a)(2)(E)(i)"). In *Matter of Soram*, a citizen of Micronesia was convicted under a Colorado statute for "child abuse—no injury— knowingly or recklessly." *Id.* at 378. Despite a lack of injury, the BIA considered the state-by-state analysis used in deciphering endangerment-type offenses, of which half of states did not specify the degree of harm required in their definitions of child abuse. *Matter of Soram*, 25 I. & N. Dec. at 383; *but see Garcia v. Barr*, 969 F.3d 129, 136 (5th Cir. 2020) (acknowledging harm as a relevant element of "crime of child abuse" under Texas

law). Rather, the BIA noted that endangerment-type offenses were used to define crimes of child abuse and viewed the phrase "may endanger" to mean "there is a reasonable probability that the child's life or health will be endangered from the situation in which the child is placed." *Id.* at 384 (quoting *People v. Hoehl*, 568 P.2d 484, 486 (Colo. 1977)). Additionally, this Court in *Perrin* stated that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" in deciding whether commercial bribery of private employees prohibited by a state criminal statute constituted bribery. 444 U.S. at 42. Further, this Court found that the respondents' actions constituted bribery upon a plain meaning analysis of the statute, which considered the historical and common law use of the term "bribery." *Perrin*, 444 U.S. at 315; *see Florez v. Holder*, 779 F.3d 207, 212 (2d Cir. 2015) (using Black's law dictionary, which defined "child abuse" as "[a]n act or failure to act that presents an imminent risk of serious harm to a child," in deciphering the plain language of the statutory phrase).

Congress' use of the phrase "crime of child abuse" in § 1227(a)(2)(E)(i) is no different than the twenty-eight states that do not specify the degree of harm required when defining child abuse. *Matter of Soram*, 25 I. & N. Dec. at 383. While the majority of states did not define child abuse, legislation has overwhelmingly criminalized child abuse provisions into instilling the "'ordinary, contemporary, and common' meaning of a crime of child abuse" to encompass child endangerment. *Id.* at 387. Under the common usage of a "crime of child abuse" and the BIA's definition of endangerment-type offenses, which are used in place of a degree of harm, there is a reasonable

probability that Respondent's children's lives were in danger when Respondent drove intoxicated. 25 I. & N. Dec. at 384; (R. 11.) Additionally, the Court should apply the ordinary-meaning canon of construction as used when defining the ambiguous term "bribery" in *Perrin*. 444 U.S. at 42. When applying Black's law dictionary's definition of "child abuse" as the established legal usage, an element of injury is not required. *Florez*, 779 F.3d at 212; *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (explaining that in regard to the INA, "we are bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotation marks omitted).

2. The statutory phrase "crime of child abuse" should be read broadly.

A statute should be read broadly when Congress intended for it to include a wide range of offenses. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 509 (BIA 2008). While a broad reading of a statute is not intended to supersede the statute's language, when read broadly, the statute should have an expansive meaning, taking Congress' intent into consideration and not limit its meaning to the text. *Id.* at 515.

Not all rigorous interpretations of a statute are unreasonable, yet rather are necessary to protect vulnerable populations, such as children. *Florez*, 779 F.3d at 212. In *Florez*, the DHS commenced removal proceedings under § 1227(a)(2)(E)(i) against respondent, a citizen of Honduras and lawful permanent resident of the U.S. *Id.* at 208. Respondent faced two convictions for endangering the welfare of a child: one for acting in concert with another person in the rape of a teenage girl, and another for driving while intoxicated with his two children, ages one and nine, in the car. *Id.* at

209. The court in *Florez* agreed with the BIA's interpretation of the statutory phrase "crime of child abuse" as broad and an intentional act by Congress to permit removal when there is a sufficiently high risk to a child. *Florez*, 779 F.3d at 212; *but see Ibarra v. Holder*, 736 F.3d 903, 908 (10th Cir. 2013) (holding that negligently leaving children home alone where they might be hurt is not a crime of child abuse). Additionally, *Chen v. Ashcroft* illustrated that a statutory phrase being over or underinclusive does not deem it unreasonable. *Chen v. Ashcroft*, 381 F.3d 221, 227 (3d Cir. 2004). In *Chen*, the court considered whether respondent was eligible for asylum to flee persecution by the Chinese government. The court found the BIA's rigid interpretation of the asylum statute reasonable as to promote efficient administration and avoid problematic factual inquiries. *Id.* at 222; *but see Loper Bright Enterprises*, 603 U.S. at 371; *but see United States v. Johnson*, 826 F. Supp. 439, 441 (S.D. Fla. 1993) (The doctrine of lenity should be applied when there is ambiguity in immigration statutes by applying the more merciful application of the law.).

By leaving "crime of child abuse" undefined, Congress deliberately left the statutory phrase open to interpretation to encompass any conviction related to the well-being of a child and to hold those who have been convicted of the maltreatment of a child accountable. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 514. Had Congress intended to limit the definition of a "crime of child abuse," Congress would have explicitly defined the phrase as they did when defining a "crime of domestic

violence" in § 1227(a)(2)(E)(i).[2] *See generally Johnson*, 826 at 441. The Second Circuit accurately concluded that the act of a father arrested for driving while intoxicated with his two young children in the car is a crime of child abuse. *Florez*, 779 F.3d at 211. Due to the parallel nature of the facts, the Court should abide by the Second Circuit's reasoning that a "crime of child abuse" should be read broadly, as Congress intended for the statute to be expansive and not limit punishments available for child abusers. *Florez*, 779 F.3d at 212. While the Tenth Circuit in *Ibarra* held that the petitioner's plea of "cruelty of a child" did not fit the BIA's definition of child abuse because the petitioner's conviction did not require intent or injury, the facts of the present case are materially different. 736 F.3d at 909. While the petitioner in *Ibarra* was convicted for leaving her children home alone, this is not comparable to the more severe and traumatic nature of driving while intoxicated with two young children in the car. *Id.* at 905. Further, based on the reasoning by the court in *Chen*, the overinclusive nature of the phrase "crime of child abuse" is not unreasonable, as a broad reading of "crime of child abuse" acts to promote the protection of children in the judicial system—the most vulnerable population protected by the law—from harm. 381 F.3d at 227.

[2] "...the term "crime of domestic violence" means any crime of violence … against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws…" § 1227(a)(2)(E)(i).

3. Legislative history indicates a longstanding history of promoting child protection.

Legislative history acts as an indication of whether agency interpretations accurately reflect Congress' intent when drafting a statute. *See Mondragon-Gonzalez v. AG of the United State*s, 884 F.3d 155, 159 (3d Cir. 2018). Information on whether the legislature has been silent, expressive, or changing on the meaning of statutory definitions can imply Congress' stance on a topic. *Taylor v. U.S.*, 495 U.S. 575, 576 (1990); *see also Barton*, 590 U.S. at 240 (emphasizing that Congress can amend the law at any time).

Congress has expressed a longstanding intent to make offenses harming children grounds for removal, as evidenced by evolving legislation that has shaped the common understanding of child abuse in federal law by the BIA. *See Mondragon-Gonzalez*, 884 F.3d at 159. The court in *Mondragon-Gonzalez* was faced with the question of whether the petitioner, who was on an immigrant visa while convicted in state court for unlawful contact with a minor, was eligible for removal under § 1227(a)(2)(E)(i). *Mondragon-Gonzalez*, 884 F.3d at 157. Due to the ambiguous nature of the statutory phrase "crime of child abuse," the court prioritized the legislative history of the statute in determining that the BIA's interpretation was reasonable. *Mondragon-Gonzalez*, 884 F.3d at 159; *but see United States v. Johnson*, 826 F. Supp. 439 at 441 (arguing that if Congress intended for a statute to be read broadly, then Congress should have used clearer terms). The court ruled in favor of the BIA's broad definition of the statutory phrase "crime of child abuse," shown below, as in constructing a permissible interpretation of the phrase, the BIA surveyed ways that

numerous state and federal laws defined crimes of child abuse. *Mondragon-Gonzalez*, 884 F.3d at 158-59.

> [A]ny offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals….

Mondragon-Gonzalez, 884 F.3d at 158-59.

The court in *Mondragon-Gonzalez* described Congress' intent in making crimes that harm children deportable offenses as "evident," and further recognized the BIA's subsequent opinion that crimes of child abuse are not limited to crimes involving injury. *Id.* at 159. Further, in *Matter of Velazquez-Herrera*, in considering whether the respondent's assault conviction constituted a "crime of child abuse," the BIA recognized the accepted meaning of "child abuse" held in 1996, the year Congress drafted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). 24 I. & N. Dec. at 507; *See Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, div. C, 110 Stat 3009 (1996). The accepted meaning of "child abuse" by federal authority was the "understanding that 'child abuse' encompassed the physical and mental injury, sexual abuse or exploitation, maltreatment, and negligent or neglectful treatment of a child." *Id.* at 511. Additionally, the enactment of the IIRIRA marked a pivotal point by Congress, as immigration law did not previously subject noncitizens convicted of crimes against children to a particular disadvantage compared to noncitizens convicted of other crimes. *Id.* at 509.

The BIA's definition of a "crime of child abuse" is intended to reflect Congress' intent, rather than reformulate it. *Mondragon-Gonzalez*, 884 F.3d at 158-59. Based on the BIA's definition, Respondent's actions constituted a "crime of child abuse" as Respondent put her children at risk due to the diminished capacity she possessed while driving intoxicated. (R. 5.) Even if no physical injury occurred, Respondent's two young children being forced to watch their mother get in the driver's seat while intoxicated, drive while intoxicated, dangerously run a stop sign, subsequently get pulled over and arrested, and urgently picked up by their father will undeniably impair the children's "mental well-being." (R. 5-6, 45.); *Mondragon-Gonzalez*, 884 F.3d at 158-59. Further, Respondent's actions align with Congress' definition of "child abuse" when drafting the IIRIRA. *Matter of Velazquez-Herrera,* 24 I. & N. Dec. at 507, 511. Parallel to the meaning of "child abuse" by federal authority, Respondent's actions all constituted mental injury, maltreatment, and negligent treatment of a child. *Id.* at 511. Respondent had clear options to not inflict such harm on her children, such as refraining from drinking knowing she intended to drive her children or calling her husband to pick them up; yet, Respondent made the decision to commit a crime of child abuse. (R. 5-6.)

B. Under the categorical approach, a mens rea greater than criminal negligence is not required.

Under the categorical approach, a state conviction triggers removal only when the statutory crime is categorized as a removable offense under generic federal law. *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015). The categorical approach disregards the noncitizen's actual conduct and focuses on the minimum conduct criminalized by the

state statute. *Garcia*, 969 F.3d at 135. In an effort to promote fairness and maximize judicial and administrative efficiency, the categorical approach precludes relitigating prior convictions. *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013). Further, the modified categorical approach is applied when state statutes include numerous crimes and allows courts to determine which particular offense the noncitizen was convicted of violating. *Garcia*, 969 F.3d at 135.

A noncitizen's removability is predicated on the *actual* conduct in which they were convicted. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 515. In *Garcia*, the court determined whether the petitioner's conviction for "sexual assault of a child" under Texas Penal Code was a categorical match to a "crime of child abuse" as defined by the BIA. 969 F.3d at 134. The petitioner, a citizen of Mexico and lawful permanent resident of the U.S., raped and impregnated his fourteen-year-old stepdaughter. *Id.* at 131. Using the categorical approach, the court in *Garcia* found that the petitioner's state conviction satisfied numerous factors encompassed by the BIA's generic definition of a crime of child abuse, including that the offense be committed against a person under eighteen, the act be committed with at least criminal negligence, and that the act impairs a child's physical or mental well-being. *Id.* at 135-136. Thus, the petitioner's conviction under the statute matched the BIA's definition of a crime of child abuse, making the petitioner removable under § 1227(a)(2)(E)(i). *Id.* at 136. Opposingly, *Matter of Velazquez-Herrera* exemplified a state crime that did not match a federal crime under the categorical approach. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 515. In *Matter of Velazquez-Herrera*, respondent, a citizen of Mexico and

resident of the U.S., was convicted for assaulting a five-year-old girl. *Id.* at 504. Respondent's conviction was not established categorically as a "crime of child abuse," yet rather as a "crime of violence," due to the BIA's adherence to respondent's original conviction of "assault." *Id.* at 515, 517. The "sexual assault of a child" conviction in *Garcia* is differentiated from the "assault" conviction in *Matter of Velazquez-Herrera* because § 1227(a)(2)(E)(i) is specific to an offense committed against a child. *See Garcia v. Barr*, 969 F.3d at 135; *see Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 517. Additionally, the modified categorical approach was used in *Akinsade v. Holder*, where the court used the record of conviction to determine that the state statute which the petitioner was convicted under was divisible; thus, the petitioner was convicted for offenses involving fraud *or* deceit. *Akinsade v. Holder*, 678 F.3d 138, 145 (2d Cir. 2012).

The state statute which Respondent was convicted is a categorical match because the mens rea requirement for crimes of child abuse is no greater than criminal negligence as defined in federal law. *See generally id*. Like *Garcia* and unlike *Matter of Velazquez-Herrera*, Respondent's conviction is a categorical match to the generic federal law. 969 F.3d at 136; 24 I. & N. Dec. at 515. The court in *Garcia* rejected the petitioner's argument that the state statute was broader than the generic federal law of child abuse under § 1227(a)(2)(E)(i) because the "Board's definition requires an act that constitutes maltreatment or that impairs a child's physical or mental well-being." *Garcia*, 969 F.3d at 136. Additionally, the assault conviction in *Matter of Velazquez-Herrera* differs from Respondent's child neglect plea as

Respondent's plea directly involves the infliction of harm upon a child, which the text of § 1227(a)(2)(E)(i) is explicitly constructed to protect. 24 I. & N. Dec. at 515; (R. 5, R. 54.) Additionally, Mayfair Revised Statutes Section 1694 is not divisible because subsection (4)(a)(II) "does not contain 'several different crimes, each described separately,'" so the modified categorical approach does not apply.[3] (R. 54.); *see Ibarra*, 736 F.3d at 916 (citing *Moncrieffe*, 569 U.S. at 189).

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to reverse the Fourteenth Circuit's decision and hold that noncitizens are: (1) not entitled to new bond hearings–where the government bears the burden of proof–solely due to "prolonged" § 1226(a) detention**;** and (2) removable under § 1227(a)(2)(E)(i) because a "crime of child abuse" does not require a mens rea greater than criminal negligence.

Respectfully submitted,

Team 24
Counsel for Petitioner

[3] If the Court finds that the state statute is divisible in nature, then it is still a categorical match to the federal law under the modified categorical approach. *See generally Garcia*, 969 F.3d at 135. Comparably to *Akinsade*, where the petitioner's conviction was divisible upon a consultation of the record, § 1694(4)(a) can be satisfied by either death *or* injury. *Akinsade*, 678 F.3d at 145; (R. 56.)