

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**

BRIEF FOR RESPONDENT

DATE: February 10, 2025

Team Number 13

QUESTIONS PRESENTED

1. Whether a noncitizen's due process rights are violated under 8 U.S.C. § 1226(a), entitling them to a new bond hearing in which the government bears the burden, when the noncitizen has been detained 24 months and bore the burden themselves at the initial bond hearing.
2. Whether it is the role of the judiciary in a post *Loper Bright* legal landscape to independently interpret and determine if the state statute's *mens rea* requirement for the definition of "child neglect" must be greater than criminal negligence in order for a noncitizen to be found removable under 8 U.S.C. § 1227(a)(2)(E)(i).

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On January 30, 2023, Respondent Margarita Cooper had an initial bond hearing before an Immigration Judge in Morrison, Mayfair. R. at 3. At this bond hearing, the government suggested that her likely deportation under *Barton v. Barr* made her a flight risk and therefore her bail should be denied. R. at 7. The Immigration Judge ordered that Cooper remain detained because she had not met her burden of proving that she is not a danger to the community. R. at 8.

On August 2, 2023, Cooper moved for an additional bond hearing. R. at 9. On October 12, 2023, her motion was denied by the Morrison Immigration Court, which found no showing of a due process violation and that the burden of proof placed on Cooper was not met. R. at 11-12. Cooper appealed this decision, citing that the government must show that she poses a danger and has now been detained for ten months. R. at 14. On January 17, 2024, a three-member appellate panel denied the appeal finding that a new hearing would be redundant, and the burden of proof should remain on the noncitizen. R. at 16-17. On January 20, 2024, Cooper filed a Petition for Writ of Habeas Corpus arguing that her thirteen-month long detention without a new bond hearing could no longer be legally justifiable. R. at 18-21. On April 12, 2024, Cooper appealed the denial of a new bond hearing to the U.S. District Court for the District of Mayfair, and her petition was denied again. R. at 22. Cooper subsequently appealed to the Court of Appeals for the Fourteenth Circuit. R. at 25.

In addition to challenging her bond hearing, Cooper contested her removability in U.S. Immigration Court at her Master Calendar Hearing, asserting that her conviction for “criminally negligent child abuse–no injury” is not a categorically removable crime under section 237(a)(2)(E)(i) of Immigration and Nationality Act (hereinafter “INA”). R. at 34. This was denied by Judge Gonzalez of the Morrisonville Immigration Court on March 28, 2023. R. at 32-33. On June 30, 2023, Judge Roberts ordered Cooper to be removed to Freedonia. R. at 36. On July 1, 2023, Cooper then appealed to the Board of Immigration Appeals (hereinafter “BIA”) at the U.S. Department of Justice Executive Office for Immigration Review. R. at 37-38. On November 6, 2023, the board dismissed her appeal. R. at 41. Cooper’s challenge to her removability and her detention were consolidated on April 26, 2024. R. at 43.

On September 25, 2024, the Fourteenth Circuit ruled in favor of Cooper and reversed the District of Mayfair’s bond hearing decision, finding that the burden should not automatically be placed on the noncitizen and the administrative proceedings violated her due process rights. R. at 47-48. The court ordered a new bond hearing with a burden on the government to prove that Cooper was a flight risk or a danger to the community. R. at 50. The Fourteenth Circuit also reversed the decision of BIA, finding that Cooper’s conviction for child endangerment is not a crime of “child abuse” within the meaning of INA, and remanded the case to the Immigration Court to reconsider the issue of Cooper’s removability under INA §

237(a)(2)(E)(i). R. at 50. The U.S. Supreme Court granted certiorari on these issues on December 9, 2024. R. at 53.

II. STATEMENT OF FACTS

Respondent Margarita Cooper, a citizen of Freedonia who immigrated to the state of Mayfair in the United States at age four, has resided there for thirty-three years. R. at 30. Cooper is married to a U.S. citizen, and has two young daughters, Eloise and Penelope, who are U.S. citizens. *Id.* Cooper has been a lawful permanent resident since July 13, 2003. R. 10. Cooper is a sales representative at Bliss Oils, an essential oils store in Morrisonville, Mayfair. R. at 5. On November 15, 2023, Cooper celebrated being named Sales Representative of the Year with her co-workers. *Id.* Cooper's daughters were being watched by an older Bliss Oils employee during this time. R. at 6.

After the celebration, Cooper drove home and was pulled over by Officer Philip Jones of the Morrisonville Police Department for rolling through a stop sign. R. at 45. Officer Jones observed Cooper's slurred speech and smelled alcohol. *Id.* When Cooper failed a sobriety test, she was placed under arrest for driving under the influence, and Officer Jones allowed her to call her husband, Mario Cooper, to pick up their daughters at the station. *Id.* Cooper pleaded guilty to driving while intoxicated in violation of Mayfair Vehicle Code 14945 and criminally negligent child abuse in violation of section 1694, 4(a)(II) of the Mayfair Revised Statutes. *Id.*

On January 23, 2023, Cooper was apprehended by the U.S. Immigration and Customs Enforcement and entered removal proceedings as a result of her conviction

for criminally negligent child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). R. at 16. At Cooper's January 30, 2023, bond hearing, Judge Patel stated that the burden was on Cooper to prove that she would not be a danger to the community upon release because she is more familiar with her own circumstances. R. at 7. The government stated that Cooper was ineligible for section 240(a) cancellation of removal under *Barton v. Barr* due to her February 18, 2006, misdemeanor charge for possession of marijuana. *Id.* The government argued that because she would likely be removed from the U.S., she would have an incentive to evade immigration authorities. *Id.*

Cooper was denied bail, deemed a danger to her community, and was ordered to be detained for the duration of her removal proceedings under 8 U.S.C. § 1226(a). R. at 8. Cooper has since been detained at the Morrisonville County Detention Center since January 23, 2023. R. at 46. Cooper's family has since been under significant stress, as her husband had to find a new job as a security guard in order to provide for and take care of their two young daughters. R. at 8.

SUMMARY OF THE ARGUMENT

We respectfully ask the Court to affirm the decision of the Fourteenth Circuit and find Cooper is entitled to a bond hearing in which the government bears the burden of proving she is a danger or a flight risk, because the inequitable nature of her initial bond hearing in combination with the duration of her detention clearly constitutes an impermissible due process violation under the *Mathews* test. Additionally, we ask the Court to find that Cooper is not subject to removal because her conviction under the Mayfair statute is not a removable offense under the INA

since it fails the categorical approach, is against Congressional intent, and conflicts with the rule of lenity, affording no deference to the BIA's erroneous interpretation to the contrary.

ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review in this instant case is *de novo*, as both issues involve a question of law.

II. COOPER IS ENTITLED TO A BOND HEARING IN WHICH THE GOVERNMENT BEARS THE BURDEN OF PROVING THAT SHE IS A FLIGHT RISK OR A DANGER TO THE COMMUNITY BECAUSE HER PROLONGED DETENTION VIOLATES HER CONSTITUTIONAL RIGHT TO DUE PROCESS.

Prolonged pretrial detention poses one of the greatest unchecked threats to the Fifth Amendment's Due Process Clause in the United States today, as it regularly deprives persons of "life, liberty, or property, without due process of law." *See generally* Kendall Huennekens, Note, *Long Over-Due Process: Proposing A New Standard for Pretrial Detainees' Length of Confinement Claims*, 71 Duke L. Rev. 1647 (2022). While this court has articulated that freedom from confinement is the most significant liberty interest there is and has reinforced that liberty is the norm and detention the "carefully limited exception," thousands of individuals throughout the country are placed in detention indefinitely as they await the outcomes of their immigration proceedings, often without any meaningful opportunity for a bond hearing with adequate procedural safeguards. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020). In an attempt to justify this severe deprivation of liberty, such as that faced by Cooper, the

government repeatedly states that Congress has the authority to make rules for noncitizens that would be unacceptable if applied to citizens. *Demore v. Kim*, 538 U.S. 510, 511 (2003).

However, that unjust contortion of Congress’ plenary power is an insufficient justification, because even that plenary power is not without constitutional limitations. *Zadvydas*, 533 U.S. at 679. The Due Process Clause applies to all persons within the United States, “including aliens, whether their presence is lawful, unlawful, or permanent.” *Id.* In *Zadvydas*, this Court recognized that government detention is only permissible when it is subject to adequate procedural protections, or in certain special and narrow circumstances limited to “specially dangerous individuals,” reinforcing a constitutional presumption in favor of liberty and freedom, even for noncitizens. *Id.* at 690. Clearly, even if it were true that noncitizens have a diminished right to liberty, fair bond hearings with proper safeguards would still be required due to the fundamental interest at stake. *See Velasco Lopez*, 978 F.3d at 851. When noncitizens such as Cooper do not have meaningful eligibility for bond, as is the case when they bear the burden of proof, they are arbitrarily denied due process. *See id.*

A. Cooper’s Detention is a Constitutional Due Process Violation Because it is Prolonged and Bears No Reasonable Relation to its Alleged Purpose.

Cooper’s ongoing and prolonged detention is a due process violation because detention must have a “reasonable relation” to its purpose, and the government has not proven that she is either a danger to the community or a flight risk. *See Zadvydas v. Davis*, 533 U.S. at 690. Detention requires even greater governmental

justification when it is prolonged, as the deprivation of liberty is greater. *Velasco Lopez*, 978 F.3d at 851. Although 8 U.S.C § 1226(a) does not define prolonged detention, courts typically consider detention prolonged when its duration is six months or longer. *See Rodriguez v. Garland*, 53 F.4th 1189, 1999-2000 (9th Cir. 2022). Here, Cooper has been in detention for 24 months, approximately four times that duration, which is assuredly within the meaning of prolonged.

While duration of detention alone may not sustain a due process challenge, the prolonged nature of her detention coupled with the inadequacy of her first bond hearing necessitates review of the process she is owed. *Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 277 (3d. Cir. 2018) (holding duration alone did not sustain a due process challenge only where there was no allegation of constitutional defect in an initial bond hearing). The government alleges that the purpose of Cooper's detention is to prevent her from absconding or posing a danger to the community, but it fails to demonstrate any reasonable relationship between that purpose and her detention in a clear and articulable manner. Cooper has an immense interest in remaining in the United States; she has built her life here over the past 25 years with her husband and her two young children, who are all American citizens. Given that Cooper's prolonged detention raises clear due process concerns, the balancing test established in *Mathews* must be used to analyze the procedural protections this particular situation demands and whether a due process violation exists. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

- i. *The Mathews Test unequivocally weighs in favor of Cooper because her private interests in freedom and liberty outweigh the governmental interest in detention.*

In *Mathews*, this court prescribed three factors to consider when determining whether an administrative proceeding violates due process: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value of any procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional procedures would entail. *Id.* at 321.

- a. Cooper's private interest is substantial because she is being deprived of her fundamentally protected liberty.

Beginning with the first factor, Cooper's private interest in her freedom is indisputably substantial. Courts have consistently held that individuals in detention have a strong private liberty interest in their freedom from imprisonment, especially where duration is significant. *Velasco Lopez*, 978 F.3d at 851. In *Velasco Lopez*, the Second Circuit held that an affected private interest in freedom was substantial where an individual was held in detention for 15 months and consequently prevented from maintaining employment, seeing his family or friends outside normal visiting hours, and accessing the internet or his phone. *Id.*

Cooper's interest in her freedom is affected by her ongoing detention as she is experiencing the same deprivations as the noncitizen in *Velasco Lopez*. The court in *Velasco Lopez* emphasized duration, and Cooper has been detained for 24 months now, nine months longer than the individual in *Velasco Lopez*. Her confinement has prevented her from seeing her two young daughters or her husband outside of

regular visiting hours, maintaining her employment, having access to the internet or communications, or generally contributing to society. Prior to detention, Cooper was an integral part of her family and community, working at Bliss Oils where she was awarded Sales Representative of the Year. Detention has deprived Cooper substantially of the life she has lawfully and diligently built here as a permanent resident for the majority of her life. It has similarly deprived her family and community of her monetary contribution, forcing her family into financial hardship. Therefore, this first factor weighs clearly in favor of Cooper because her affected interest in her freedom is incredibly significant.

b. The risk of erroneous deprivation is high due to the limiting circumstances of detention.

Looking to the second factor, placing the burden of proof on Cooper creates an extraordinary risk of erroneous deprivation, as there are extreme limitations on her ability to prove her case when she has been detained for two years. This increased risk has been acknowledged in multiple courts because detained individuals often suffer procedural difficulties due to the harsh circumstances of detention.

Hernandez-Lara v. Lyons, 10 F.4th 19, 26 (1st Cir. 2021). In *Hernandez-Lara*, the First Circuit acknowledged that the risk of error is heightened when detained individuals bear the burden of proof, because they often face difficulties gathering evidence to prove their case and communicating with counsel, since access to phone calls and visits are generally limited. *Id.* at 30. Moreover, the First Circuit has acknowledged that it is far more difficult for individuals to prove two negatives (lack of dangerousness and lack of flight risk) by clear and convincing evidence,

rather than to prove a cause for concern, especially when ambiguities result in an adverse inferences against the detainee. *Id.* at 30; *Velasco Lopez*, 978 F.3d at 851. Noncitizens are often put in the impossible position of rebutting evidence that does not exist because the government is not required to produce anything. *Id.*

Although the Fourth Circuit and Ninth Circuits have held that current procedures adequately protect due process because individuals have several opportunities to appeal, this is still insufficient to minimize risk of error when the burden of proof remains on the detained individual at each stage. *Miranda v. Garland*, 34 F.4th 338, 346 (2022); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1197 (9th Cir. 2022). Cooper's detention and its resulting limitations, compounded by the immense difficulty of proving two negatives to satisfaction demonstrates the risk of error present when burden is improperly allocated.

Furthermore, allocation of burden alone is overwhelmingly outcome-determinative of not only bond hearings, but also immigration proceeding outcomes, thus increasing the grievous extent of potentially wrongful detention. *See generally* Jose Jesus Martinez III, Note, *The Impact of Pretrial Detention On Immigration Proceedings, An Empirical Analysis*, 121 Colum. L. Rev. 1517 (2021). Whether a noncitizen is released critically affects their ability to defend against removal, as detained individuals are limited from gathering evidence and consulting counsel for their deportation proceedings just as they are in their bond hearings. *See Hernandez-Lara*, 10 F.4th at 34.

For instance, Cooper was deemed ineligible for cancellation of removal because she was convicted of an offense under 8 U.S.C. § 1182(a)(2) during her initial seven years of residence within the U.S. *Barton v. Barr*, 590 U.S. 222, 225 (2020) (stating that to qualify for cancellation of removal, an applicant must reside in the U.S. continuously for seven years after having been admitted without committing an offense under 8 U.S.C. § 1182(a)). However, the date of Cooper's misdemeanor conviction for marijuana possession allegedly precluding her from cancellation is February 18, 2006, and it is only known that she entered the country sometime in 1999. This unclear timeframe does not eliminate the possibility that this misdemeanor conviction happened after seven years of continuous residence and does not in fact preclude her from cancellation of removal at all. Without the ability to meaningfully gather documentation about her entry into the U.S., Cooper's wrongful detention could fatally impact her removal proceeding, which does not comport with any notion of due process of law. When detention hinders individuals from having a meaningful ability to gather evidence on their own behalf, the risk of erroneous deprivation increases.

Courts have also recognized the probable value of allocating the burden of proof to the government due to its access to substantial resources, thereby reducing the risk of erroneous deprivation without undue burden, as the government already has incentive to gather such evidence. *Velasco Lopez*, 978 F.3d at 853. In *Velasco Lopez*, the Second Circuit held that a new bond hearing with a shifted burden mitigated the risk of error where a detained individual had criminal charges and

was originally denied bail due to a cited lack of information about the charges, thus resulting in an adverse inference as to their dangerousness. *Id.* The court emphasized that error of risk is greatly minimized when burden is shifted to the government because of the government's access to numerous databases, information from state and local authorities, and their broad authority to obtain most other information more easily than a defendant. *Id.*

Cooper, like the noncitizen in *Velasco Lopez*, was unable to successfully prove she was not a danger to the community or a flight risk partly on the basis of her criminal charges. Since the government has greater access to her criminal records, the risk of error would be significantly minimized if the burden were shifted to them. It is for these reasons that the second factor weighs in Cooper's favor.

- c. The government's interest supports it bearing the burden of proof because it would minimize financial and administrative costs.

Finally, looking to the third factor, the consideration of governmental interest supports placing the burden of proof on the government in Cooper's bond hearing. While courts have recognized the government's interest in the prompt execution of removal orders, this interest is distinguishable from the one at hand regarding the burden of proof. *Hernandez-Lara*, 10 F.4th at 32; see Rosie Gruen, Comment, *Scrutinizing National Security: A Call for Clear and Convincing Evidence in 1226(a) Prolonged Detention Cases*, 2024 U. Chi. Legal F. 453, 454 (2024) (stating vague claims of "national security concerns" by the government may be given great deference clearing the way for their illegitimate pretextual use, when in reality they

may bear little relation to individual detention decisions and therefore hinder due process). Shifting the burden of proof to the government promotes its interest in minimizing the devastating impact of purposeless incarceration.

In *Hernandez-Lara*, the First Circuit found that shifting the burden to the government would support its interest in conserving costs, since it would eliminate risk of error and limit the use of detention to only those citizens who are actually dangerous or a flight risk, saving the public from expending substantial resources on needless detention. *Id.* Detaining people who possess no risk for a prolonged period can be more costly for the government in the long run than it would to simply provide evidence it likely already had at a bond hearing. *Id.* at 33. The court also noted that unnecessary detention imposes substantial societal costs, as it “separates families and removes from the community breadwinners, caregivers, parents, siblings, and employees.” *Id.*

The government has not provided evidence that Cooper poses any actual risk or danger to the community, and her ongoing detention has therefore been a drain on the limited financial and administrative resources of the government every day that it continues. Detention has high costs, and there are far less costly supervisory mechanisms that exist that would serve the government’s interests in protecting the public and ensuring future court appearances, such as release on bond which incentivizes compliance by returning bond money upon appearance. Kendall Huennekens, Note, *Long Over-Due Process: Proposing A New Standard for Pretrial Detainees’ Length of Confinement Claims*, 71 Duke L. Rev. 1647, 1676-1677 (2022).

Cooper's unnecessary detention continues to be burden to the government and its taxpayers as it deprives her daughters of a caregiver and breadwinner, deprives her husband of a partner, and deprives the community of her contributions as an employee. Without the government sufficiently proving that she is a danger or flight risk, governmental interest in her continued detention is nonexistent and is therefore unjustifiable. Therefore, because all factors weigh in favor of Cooper, there is a clear due process violation under the *Mathews* Test.

B. The Government Must Bear the Burden of Proof by Clear and Convincing Evidence Pursuant to Both Jurisprudence and the Legislative History of the INA.

The government must bear the burden of proof by clear and convincing evidence in Cooper's bond hearing. Notably, there is no allocation of burden in 8 U.S.C. § 1226(a), nor any standard of proof requirement. *Velasco Lopez*, 978 F.3d at 848. However, the legislative history of the INA clearly demonstrates that the government was intended to bear this burden and uphold constitutional presumptions of liberty, which is further supported by extensive legal precedent. *Id.*

- i. The legislative history of the INA suggests the government must bear the burden of proof because Congress deliberately did not amend 1226(a) to allocate burden as it did with 1226(c).*

Cooper was incorrectly allocated the burden of proof in her bond proceeding. If noncitizens held in discretionary detention were intended to bear the burden of proof, Congress would have amended the discretionary detention statute when they amended the mandatory detention statute to make this instruction clear. In 1996, Congress amended the INA by passing the Illegal Immigration Reform and

Immigrant Responsibility Act (“IIRIRA”), which targeted noncitizens in removal proceedings who did not appear for their hearings. *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Rsrv. L. Rev. 75, 87 (2016). This amendment codified a requirement of mandatory detention under 8 U.S.C. § 1226(c) for individuals convicted of certain crimes, like murder and terrorism, based on a congressional finding that individuals accused of these crimes posed a heightened bail risk as a class. *Id.* at 86. This amendment further codified that those detained noncitizens must bear the burden of proof in any application for release. *Id.* at 87.

Notably, Congress did not amend § 1226(a), the discretionary provision under which Cooper is currently detained, to include any similar language mandating the burden of proof be allocated to the noncitizen. *Id.* at 92. The express allocation of burden in certain parts of the statute and the express absence of such language in § 1226(a) show that Congress intentionally did not put the burden on noncitizens detained under this section, simultaneously supporting the notion that Cooper is not of a class that presumptively requires detention. Therefore, there is no statutory basis to apply this burden to Cooper’s bond proceeding.

- ii. *The government must bear the burden of proof because legal and judicial precedent consistently reinforce it as necessary to uphold due process.*

The burden shifting from the government to the noncitizen under § 1226(a) is significantly flawed. *See Velasco Lopez*, 978 F.3d at 849. The BIA historically interpreted the statutory silence of § 1226(a) as an implicit presumption of freedom during removal proceedings, in line with the constitutional notions of liberty and

due process. *Id.* Following the enactment of IIRIRA, the Immigration and Naturalization Service, not Congress, implemented new regulations for initial post-arrest custody determinations that placed the burden on the noncitizen in initial custody determinations, not bond hearings. *Id.* However, the BIA began applying this standard to bond hearings without any regulatory basis. The BIA erroneously departed from decades of precedent by shifting this burden to the noncitizen in contrast with a long-standing presumption of freedom established in previous decisions. See Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Rsrv. L. Rev. 75 (2016).

Further, jurisprudence and legal theory overwhelmingly demonstrate that the government must bear this burden. Traditionally, the party seeking the law's intervention is the party who bears the burden of proof, which in this case is the government. See *Addington v. Texas*, 441 U.S. 418, 418 (1979). It is also the government that bears the burden of proof throughout the history of civil detention jurisprudence. *Id.* In *Addington*, a civil commitment case, this court found that the government must bear the burden of proof by clear and convincing evidence because risk of error must be mitigated when such a significant liberty interest is implicated. *Id.* at 428. Seeing as Cooper is similarly facing civil commitment, has the same interest at stake, and has the government seeking the law's intervention, the government must bear the burden of proof here by clear and convincing evidence. For these reasons, it is of the utmost important that the burden be placed on the government.

III. THE FOURTEENTH CIRCUIT PROPERLY INTERPRETED THE MAYFAIR STATUTE AND THE BIA'S INTERPRETATION OF SECTION 237(a)(2)(E)(i) IS NOT OWED DEFERENCE BY THIS COURT BECAUSE IT WAS ERRONEOUSLY OVERBROAD.

The Fourteenth Circuit properly held that the BIA's interpretation of "crime of child abuse" under INA § 237(a)(2)(E)(i) is overbroad not entitled judicial deference. Courts must independently interpret ambiguous constitutional and statutory provisions and decide all relevant questions of law when reviewing agency actions. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024); Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2018).

To determine whether a noncitizen is subject to removal based on a state conviction, the categorial approach must be applied. *Mellouli v. Lynch*, 575 U.S. 798, 804 (2015); *Taylor v. United States*, 495 U.S. 575, 596 (1990). To be a categorically removable offense under this approach, every conviction under the state statute must require all elements of the generic offense. *Taylor*, 495 U.S. at 602; *see also Moncrieffe v. Holder*, 569 U.S. 184, 184-85 (2013). Additionally, the longstanding principle of lenity in immigration law argues that ambiguities in removal statutes should be interpreted in favor of noncitizens. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001). There is no question that the text of INA § 237(a)(2)(E)(i) is ambiguous. The contested issues are (i) whether deference is owed to the BIA's interpretation and (ii) whether the Mayfair conviction is a categorically removable offense.

This Court should affirm the decision of the Fourteenth Circuit rejecting the BIA's interpretation of section 237(a)(2)(E)(i) because the court properly exercised

independent statutory interpretation in the wake of *Loper Bright*. Here, the BIA’s interpretation was clearly erroneous as the categorical approach requires more than criminal negligence for a noncitizen to be found removable for a crime of child neglect because criminally negligent child abuse was not considered an element of the generic crime of child abuse in 1996, and it is contrary to Congress’ intent because it was not defined in the INA.

A. The Judiciary Has Independent Authority in Statutory Interpretation Because of This Court’s Decision in *Loper Bright* and Codification from Both the Executive and Legislative Branches.

The Fourteenth Circuit properly held that the BIA’s interpretation of the crime of child abuse was overbroad. The BIA explained in the *Matter of Velazquez-Herrera* that the “crime of child abuse” “mean[s] any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child.” 27 I&N Dec. 503, 512 (BIA 2008). The BIA further articulated in *Matter of Soram* that “[they] . . . find no convincing reason to limit offenses under section 237(a)(2)(E) of the Act to those requiring proof of actual harm or injury to the child.” 25 I&N 378, 381 (BIA 2010). Based on the *Loper Bright* decision, analogous cases remanded in its wake, and the codification of independent judicial interpretation authority by both the legislative and executive branches, the BIA’s interpretation was improper.

- i. *No deference is owed to the BIA's interpretation because Loper Bright overruled Chevron deference to agency interpretation.*

The Fourteenth Circuit correctly rejected the BIA's interpretation because *Loper Bright Enterprises v. Raimondo* eliminated the deference that courts were required to grant agencies like the BIA based on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to interpret statutory provisions for more than 40 years. 603 U.S. 369, 412-13 (2024); 467 U.S. 837 (1984).

Under *Loper Bright*, courts need not defer to agency interpretations of ambiguous statutes. 603 U.S. at 412-13. (“...courts need not and...may not defer to an agency interpretation of the law simply because a statute is ambiguous.”). Accordingly, courts can independently interpret ambiguous statutory provisions. *Id.* In this interpretation, courts are instructed to apply traditional tools of statutory construction to determine the “best reading” of a statute. *Id.* at 434. *Loper Bright* reaffirmed that it is “‘emphatically’ the ‘province and duty of the judicial department to say what the law is’” *Id.* at 385, 412, citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). *Loper Bright* further affirms that the role of the judiciary is to determine the best reading of the law, rather than assess whether someone else has reasonably interpreted the law. Therefore, the judiciary, not the BIA, must define the scope of section 237(a)(2)(E)(i).

Applied to *Loper Bright*, the BIA's broad definition of “crime of child abuse,” adopted in *Matter of Velazquez-Herrera*, and *Matter of Soram*, is no longer applicable and warrants no judicial deference. 27 I&N Dec. at 512; 25 I&N at 381. The BIA articulated the broad interpretation of section 237(a)(2)(E)(i) in these

matters by reasoning that the crime of child abuse includes a *mens rea* of criminal negligence. The BIA put forth this interpretation under *Chevron*, but *Loper Bright* now sets the applicable precedent, and consequently the interpretation should no longer be given any deference.

While this Court held in *Skidmore v. Swift & Co.* that agencies should be given deference, not control, insofar as their interpretation is persuasive, *Skidmore* is not applicable in this instant case because the BIA's interpretation of section 237(a)(2)(E)(i) was erroneous since the categorical approach requires more than negligence. 323 U.S. 134, 140 (1944). Therefore, this Court should affirm the Fourteenth Circuit's holding that no deference is owed to the BIA's interpretation of what constitutes a crime of child abuse following the *Loper Bright* decision.

- a. Judgements for removal in directly analogous cases have been vacated and remanded because of *Loper Bright*.

Since *Loper Bright* was decided, this Court has vacated thirteen judgements that were decided under *Chevron* deference and remanded them for reconsideration under *Loper Bright*. Six cases involved immigration, and two of those six involved a crime of child abuse.

In *Diaz-Rodriguez v. Garland*, where a noncitizen challenged removal based on California's felony child endangerment conviction, the Ninth Circuit upheld the BIA's interpretation of a crime of child abuse, reasoning that the statute was ambiguous. 55 F.4th 697, 735 (9th Cir. 2022). The court held that the BIA's interpretation was entitled to *Chevron* deference, and under the categorical approach, the California state statute matched the federal generic crime of child

abuse. *Id.* Similarly, in *Bastias v. U.S. Attorney General*, where a noncitizen challenged removal based on a conviction for child neglect in Florida, the Eleventh Circuit reviewed the BIA’s interpretation. 42 F.4th 1266, 1275-76 (2022). The court held that because *Chevron* deference applies to agency interpretations of ambiguous statutes, the BIA’s interpretation that the crime of child abuse included the noncitizen’s conviction under Florida law was reasonable and a basis for removal. *Id.*

In July 2024, this Court vacated both judgments and remanded the cases to the Ninth and Eleventh Circuits respectively “for further considerations in light of *Loper Bright*.” *Diaz-Rodriguez v. Garland*, 144 S.Ct. 2705 (Mem) (2024); *Bastias v. Garland*, 144 S.Ct. 2704 (Mem) (2024). Because this Court has already vacated and remanded two decisions with analogous facts and state statutes in light of *Loper Bright*, it is in line with this Court’s precedent to uphold the Fourteenth Circuit’s independent interpretation of INA § 237(a)(2)(E)(i) and grant no deference to the BIA’s interpretation.

ii. *The judiciary has authority to interpret statutes because of codification from the legislative and executive branches.*

Even if *Loper Bright* is interpreted narrowly, both the legislative and executive branches enshrined the broad power of interpreting ambiguous statutes in the judiciary. Under the APA, the legislature codified statutory interpretation as a function of the court. 5 U.S.C. § 706. The APA directs reviewing courts to “decide all relevant questions of law” and “interpret statutory provisions independently” relating to administrative agencies. *Id.* While “shall” is codified instead of “must,”

the Notes to Decision highlight that the judiciary should exercise independent judgment in interpreting the statute, and that “the role of the reviewing court under the [APA] is to independently interpret the statute and effectuate the will of Congress subject to constitutional limits” citing *Loper Bright*. 5 U.S.C.A. § 706, Notes of Decision, 7a. Independent judgment of court (Westlaw)). Moreover, this is explicitly confirmed in the *Loper Bright* decision, which states that “courts need not and under [the] APA may not defer to an agency interpretation.” 603 U.S. at 413.

Further, the executive branch, through signing into law and executing the APA, underscores the decision in *Loper Bright*. Therefore, the court has the sole authority to independently interpret ambiguous statutes.

B. The BIA’s Interpretation Was Erroneous and Has No Statutory Support Because it Fails the Categorical Approach and is Contrary to Congressional Intent.

A crime of child abuse that results in no injury is not a categorically removable offense under the INA. This Court must independently interpret the Mayfair conviction for “criminally negligent child abuse–no injury” to categorically constitute a “crime of child abuse, child neglect, or child abandonment” under § 237(a)(2)(E)(i) of the INA, 8 U.S.C. § 1227(a)(2)(E)(i). Based on an independent interpretation, this Court should find that “a crime of child abuse” requires more than criminal negligence for a noncitizen to be found removable for a crime of child neglect. The BIA’s interpretation to the contrary was erroneous and overbroad because it did not align with the categorical approach and had no statutory basis because it is contrary to Congress’ intent when it enacted the statute.

Courts must “judge” and interpret statutes using traditional tools of statutory construction, including textual analysis, legislative history, and established canons of interpretation. *Loper Bright*, 603 U.S. at 434. Here, the categorical approach is used to assess whether a noncitizen is removable under the INA for a state conviction. *Mellouli*, 575 U.S. at 804. This Court should find that the conviction under the Mayfair statute criminalizing criminally negligent child abuse is not a removable offense because it does not categorically fall within the scope of child abuse in section 237(a)(2)(E)(i). In 1996 when the INA was amended to include child abuse, most states did not consider child abuse a crime if there was only a *mens rea* of criminal negligence, and Congress did not intend for it to be a removable offense because it was not included in the INA. *Id.* at 915.

- i. The categorical approach requires more than criminal negligence for a noncitizen to be found removable for a crime of child neglect.*

Applying the categorical approach, the Mayfair conviction for “criminally negligent child abuse—no injury” does not constitute a “crime of child abuse, child neglect, or child abandonment” under INA § 237(a)(2)(E)(i) and 8 U.S.C. § 1227(a)(2)(E)(i). If a state law is broader and criminalizes more conduct than the federal definition, it is not categorically a removable offense. *Moncrieffe*, 569 U.S. at 184-85. When determining whether a criminal conviction qualifies for removal under the categorical approach, if there is no uniform definition, courts must compare the state statute to the “generic” definition of the federal offense at the time the statute was enacted, based on the “ordinary meaning” of the crime at the

time Congress enacted the statute and how it was used in the state criminal codes at that time. *Id.* (holding that where the state offense did not match the federal definition of an aggravated felony under INA a noncitizen was not removable); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) (establishing that courts must look to the ordinary meaning of the crime at the time Congress enacted the statute).

Removable offenses cannot categorically include convictions under a law that “criminalizes conduct that most other states would not consider” a crime. *Gonzales v. Duenas Alvarez*, 549 U.S. 183, 190-91 (2007). It is more likely that a state statute creates a crime that is broader and falls outside of the generic federal crime if there is a “realistic probability” that the state would actually apply that statute to conduct that would not be criminalized by the generic definition of the crime. *Id.* at 193.

In *Ibarra v. Holder*, the BIA argued that the noncitizen’s conviction in Colorado for “child abuse—negligence—no injury” was categorically a “crime of child abuse, child neglect, or child abandonment” under the INA, and therefore the noncitizen was subject to removal. 736 F.3d 903, 905 (10th Cir. 2013). The Tenth Circuit applied the categorical approach and compared the elements of the state conviction to the generic federal definition of the crime. *Id.* Finding that the Colorado statute criminalized conduct that was broader than the federal definition by including negligent acts with no injury, the court ultimately held that the conviction was not a categorically removable offense. *Id.* at 908-09. Moreover, this Court held in *Taylor* that the categorical approach must be used to analyze the

statutory elements of a prior conviction to determine whether it qualifies as a removable conviction under the federal statute. 495 U.S. at 599-602.

When reviewing the ordinary meaning of child abuse in 1996 when the statute was amended, the majority of states did not criminalize child abuse only when it involved criminal negligence and no injury—a higher *mens rea* than negligence was required. *Ibarra*, 736 F.3d at 915, 918 (“the majority of states in 1996, at least thirty-three, did not criminalize endangering children or exposing them to a risk of harm absent injury if there was only a culpable mental state of criminal negligence”). Like in *Ibarra*, here the BIA improperly relied on a “growing acceptance” of a broader definition of child abuse, rather than the actual consensus of the crime in 1996. *Id.* at 918.

When the Mayfair statute is then compared to the 1996 definition, it is clear that the offenses do not have the same elements. The Mayfair statute criminalizes a broader range of conduct, criminal negligence without injury, which was not widely considered child abuse by federal law in 1996. Like in *Moncrieffe*, where this Court held that the state offense did not match the federal definition of an aggravated felony under the INA and deemed a noncitizen to not be removable, here the Mayfair conviction does not match the federal 1996 definition and Cooper should not be subject to removal. 569 U.S. at 184-85. The Mayfair statute criminalizes negligent acts of child abuse with no injury, and only a criminally negligent act was committed—her children were not injured. Additionally, Cooper satisfies the “realistic probability test” put forth by *Gonzales* because Mayfair *actually*

prosecuted this conduct that falls outside the 1996 generic definition of child abuse. 549 U.S. at 193. Therefore, the BIA's interpretation of child abuse in this case was erroneous and unreasonably overbroad because it was inconsistent with the legal consensus in 1996 and criminalizes a wider range of conduct. Because of this, it is not persuasive, and Cooper is not subject to removal.

Additionally, if this Court holds that criminally negligent conduct without injury qualifies as “child abuse” under the categorical approach such that noncitizens would be subject to removal, other expansive definitions of crimes by the BIA could subject thousands of lawful permanent residents to the risk of removal for other minor crimes. To prevent setting the precedent of an overreaching criminal statute from being erroneously applied, the BIA’s interpretation of a crime of child abuse must not be accepted.

The December 2024 case of *Quito-Guachichulca v. Garland* offers insight as to how circuit courts are independently interpreting similar immigration statutes where agencies are not automatically given deference after the overturning of *Chevron*. The Eighth Circuit found that the BIA’s interpretation of a state conviction was not subject to deference in the wake of *Loper Bright* and failed the categorical approach. *Quito-Guachichulca v. Garland*, 122 F.4th 732, 734 (8th Cir. 2024). The court held that where a noncitizen was convicted of third-degree criminal sexual conduct in Minnesota, the state statute was broader than the federal definition of rape and therefore the conviction failed the categorical approach such that the noncitizen was not subject to removal. *Id.* at 739. The Eighth Circuit

reasoned that “the government’s views [are no longer treated] as controlling or even ‘especially informative’ [citing *Loper Bright*]” and therefore “[d]eference to the Board...is now a relic of the past.” *Id.* at 735. This Court should similarly find that “a crime of child abuse” fails the categorical approach where the BIA’s interpretation in *Mayfair* is broader than the federal definition.

Thus, this Court should find that all conduct encompassed in the *Mayfair* state statute does not fit within the federal offense of “child abuse” such that a conviction for child abuse under the *Mayfair* statute is not a basis for removal and the BIA’s interpretation is not persuasive under *Skidmore* deference because the categorical approach requires more than criminal negligence.

- ii. *There is no statutory support that child abuse is a removable offense because Congress did not intend to include criminally negligent child abuse without injury under INA § 237(a)(2)(E)(i).*

This Court should further find that the *Mayfair* conviction for “criminally negligent child abuse–no injury” does not categorically constitute a “crime of child abuse, child neglect, or child abandonment” under INA § 237(a)(2)(E)(i) because it has no statutory basis and is contrary to Congress’ intent. Congress did not intend to include criminally negligent behavior that does not result in injury as a basis for removal, and the BIA’s interpretation improperly expands the statute.

As this Court articulated in *Ibarra*, it “do[es] not defer to agency interpretations of statutes until the []traditional tools of statutory construction yield no relevant congressional intent[]” 736 F.3d at 910, citing *Exxon Corp. v. Lujan*, 970 F.2d 757, 762 (10th Cir.1992). As the categorical approach makes clear,

in 1996 most states' criminal codes did not criminalize child abuse if the minimum *mens rea* was criminal negligence. There is little evidence that Congress did either. Congress did not define "crime of child abuse" in INA § 237(a)(2)(E)(i). Whereas the INA does specifically define other deportable offenses, including crimes relating to controlled substances, destructible devices, and domestic violence, child abuse is not defined. *See* INA § 237(a)(2)(B)(i), (2)(C), and (2)(E)(i).

A definition would have been included for child abuse if Congress intended to include criminally negligent conduct with no injury. By interpreting the Mayfair conviction as categorically constituting a crime of child abuse under the INA, the BIA is attempting to impermissibly rewrite the law. Only Congress can make laws and expand statutory definitions, not agencies like the BIA. Congress "[s]ays in a statute what it means and means in a statute what it says there[']". *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). In the INA, Congress did not delegate to any agency unchecked discretion to redefine the removable offense of a crime of child abuse based on silence in the statute. Therefore, because the INA does not define "crime of child abuse, child neglect, or child abandonment," its definition should not be expanded beyond the prevailing consensus of criminal codes in 1996 by an agency.

Additionally, the BIA improperly relied on a "growing acceptance" in 1996 of a broader definition of child abuse, rather than the actual consensus at the time. Based on the lack of definition in the INA, legislative intent suggests an alignment with state definitions in 1996, which also did not define child abuse as including

criminally negligent acts with no injury. Congress did not intend to make criminally negligent acts of child abuse removable under section 237(a)(2)(E)(i), and this Court should not find otherwise.

C. The BIA’s Interpretation Was Also Improper Because Ambiguities in Removal Statutes Should Be Interpreted in Favor of Noncitizens.

The immigration rule of lenity is a well-established principle in immigration law that argues that ambiguities in removal statutes should be interpreted in favor of noncitizens, with the goal of limiting the punishment of removal. *Cardoza-Fonseca*, 480 U.S. at 449; *St. Cyr*, 533 U.S. at 320; *see also Taylor*, 495 U.S. at 596; *see also* Brief for Am. Immigr. Laws. Ass’n as Amicus Curiae Supporting Pet’r, *Monsalvo Velázquez v. Garland*, No. 23-929 (U.S. Jan. 31, 2025), at 14; *see also* Nancy Morawetz, N.Y.U. Sch. L. Pub. L. Rsch. Paper No. 24-46, *Strict Construction of Deportation Statutes After Loper Bright* (Sept. 9, 2024), <https://ssrn.com/abstract=4953892>.

While this rule was largely ignored by courts in the wake of *Chevron*, in a post *Loper Bright* landscape, it should return to its rightful position as a guiding principle. On August 29, 2024, the American Immigration Lawyers Association (“AILA”) filed an amicus brief arguing that the immigration rule of lenity must resolve an ambiguous removal statute in favor of the noncitizen post *Loper Bright*. *See* Brief for Am. Immigr. Laws. Ass’n as Amicus Curiae Supporting Pet’r, *Monsalvo Velázquez v. Garland*, No. 23-929 (U.S. Jan. 31, 2025), at 14. In *Loper Bright*, this Court suggested that courts “must” exhaust all traditional tools of statutory interpretation, which includes this rule. 603 U.S. at 454. This strict

construction calls for ambiguous removal statutes to be decided to limit removal of noncitizens. *See Morawetz*, Strict Construction at 5-6. Therefore, because deference will no longer be given to agency interpretations and traditional tools of statutory interpretation should be utilized, in consideration with the rule of lenity this Court should interpret section 237(a)(2)(E)(i) in favor of Cooper such that she is not subject to removal.

CONCLUSION

For these reasons, we respectfully request the court to affirm the Fourteenth Circuits decision and find Respondent Margarita Cooper is entitled to a bond hearing under 8 U.S.C. § 1226(a) in which the government bears the burden of proof and Respondent Margarita Cooper is not removable because the Mayfair state statute includes a *mens rea* of mere criminal negligence which is not a removable offense under 8 U.S.C. § 1227(a)(2)(E)(i).

Respectfully submitted,
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