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Recommended Citation
CONSTITUTIONAL LAW—FIRST CIRCUIT CLEARLY UNCONVINCED BY LACK OF PROCEDURAL SAFEGUARDS IN PROVING NONCITIZENS’ FLIGHT RISK—HERNANDEZ-LARA V. LYONS, 10 F.4TH 19 (1ST CIR. 2021).

The Fifth Amendment guarantees several rights integral to both criminal and civil proceedings.1 Notably, the Due Process clause of the Fifth Amendment forbids the government from depriving an individual of liberty without certain protections.2 In Hernandez-Lara v. Lyons,3 the United States Court of Appeals for the First Circuit (“First Circuit”) considered whether the Due Process Clause of the Fifth Amendment entitles detained noncitizens to a bond hearing under section 1226(a) of the Immigration and National Security Act (“section 1226(a)”), and whether the government is required to prove by clear and convincing evidence that the noncitizen is a danger or a flight risk.4 Balancing competing interests, the First Circuit held that the government must prove a noncitizen to be a flight risk only by a preponderance of the evidence, ultimately lowering the standard of proof and ignoring the impact of implicit biases within the legal system.5

In 2013, Ana Ruth Hernandez-Lara (“Hernandez”) fled gang violence in El Salvador and entered the United States without being admitted or

1 See U.S. CONST. amend. V (codifying due process rights); see also Fifth Amendment, LEGAL INFO. INST., https://perma.cc/2K2G-WGXL (last visited Nov. 28, 2022) (providing summary of Fifth Amendment).
3 10 F.4th 19 (1st Cir. 2021)
4 See id. at 27 (presenting issue before court); 8 U.S.C. § 1226(a) (outlining standards for noncitizen bond hearings).
5 See Hernandez-Lara, 10 F.4th at 40 (concluding heightened standard of proof unnecessary in determining noncitizen flight risk); see also Fatma E. Marouf, Implicit Bias and Immigration Courts, 45 NEW ENG. L. REV. 417, 419 (2011) (acknowledging current structure of adjudication allows implicit bias to flourish). “While all judges have biases by virtue of being human, the specific conditions under which immigration judges (‘IJs’) decide cases render them especially prone to undue influence by implicit bias.” Id.; see also Judge Dana Leigh Marks, Who, Me? Am I Guilty of Implicit Bias?, 54 NO. 4 THE JUDGES’ J. 20, 21-22 (2015) (noting immigration courts’ structural vulnerability to implicit bias).
paroled. Pursuant to 8 U.S.C. § 1226(a), which “provides for discretionary detention of noncitizens during the pendency of removal proceedings,” the United States Immigration and Customs Enforcement (“ICE”) arrested and detained Hernandez in 2018. After one month, she was denied bond at a hearing and tasked with the burden of proving she was neither a danger to the community nor a flight risk. The immigration judge (“IJ”) ruled that Hernandez was a danger and ordered that she be detained until the

Hernandez was born in Usulutan [sic], El Salvador, in 1986. Before coming to the United States in 2013, her life was marred by abusive domestic relations and gang violence. Hernandez’s stepfather raped her when she was twelve years old and beat her mother throughout Hernandez’s childhood. History repeated when Hernandez’s stepfather’s son raped Hernandez’s then-eight-year-old daughter. Although Hernandez escaped her stepfather by living with her brother, she was unable to escape danger. Hernandez’s brother was a member of Mara 18 (the 18th Street Gang), and after he was imprisoned for gang-related crimes, the gang began threatening Hernandez in an effort to force her to assume her brother’s former gang responsibilities. Hernandez resisted those threats until late August 2013, when the gang told her aunts they intended to kill her and “throw [her] head in the river.” Hernandez immediately fled to the United States and ultimately established residency in Portland, Maine, where she worked at a recycling plant and was engaged to be married.

Id. at 24.

7 See id. at 23 (detailing Hernandez’s detention). Hernandez was detained “pending a determination of her removability.” Id.

8 See id. at 23 (stating result of first bond hearing). In October of 2018, “the IJ held a bond hearing at which, consistent with immigration regulations, the burden of proof was placed on Hernandez to prove she was neither a danger to the community nor a flight risk.” Id. at 24; see also In re Guerra, 241 & N. Dec. 37, 40 (B.I.A. 2006) (presenting factors judges use in assessing whether noncitizen merits release on bond); Hernandez-Lara v. Immig. & Cust. Enf’t, Acting Dir., 560 F. Supp. 3d 531, 540 (D.N.H. 2019) (ruling on Hernandez’s initial request bond request). Hernandez presented evidence that she lacked a criminal record or history of arrest, had good moral character, and maintained ties to the community she resided in because both of her parents and two of her three siblings reside in the United States. See Hernandez-Lara, 560 F. Supp. 3d at 534.
completion of her removal proceedings. Hernandez applied for asylum and protections under the Convention Against Torture, but both requests were denied.

Hernandez then filed a petition for a writ of habeas corpus in the United States District Court for the District of New Hampshire seeking release. In the alternative, Hernandez requested a new bond hearing, arguing that the Due Process Clause of the Fifth Amendment required the government to bear the burden of proving she was a danger or a flight risk by clear and convincing evidence. Agreeing with Hernandez, the district court

The government’s response provided an apt demonstration of how the burden of proof can affect immigration bond hearings. Government counsel produced a so-called “Red Notice” published by El Salvador through [INTERPOL]. The notice identifies Hernandez, describes the activities of Street Gang 18 (much as Hernandez described them), and simply states that Hernandez is subject to an arrest warrant in El Salvador under El Salvadoran “Article 13 of the Special Law Against Acts of Terrorism.”

Hernandez-Lara, 10 F.4th at 24. As a result, Hernandez was incarcerated for over ten months with criminal inmates at the Strafford County Jail. Id. at 28. But for the relief order in the subsequent action, Hernandez would have still been incarcerated for more than two years after being detained. Id. Beyond those constraints, Hernandez was unable to speak, read, or write English. See Lara v. Barr, 962 F.3d 45, 55 (1st Cir. 2020) (reviewing IJ’s denial of Hernandez’s asylum application).

The IJ had previously denied Hernandez’s asylum, withholding, and CAT claims on the merits, finding her credible but also concluding that “she failed to demonstrate that her familial connection to her brother was ‘one central reason’ that the gang singled her out” and that “the police would have protected [her] from the gang if she had reported the threats because the police had protected her from her ex-partner in the past.


Less than a week later, the same IJ who conducted Hernandez’s first bond hearing held a second hearing in accordance with the district court’s order. The government relied once again on the Red Notice and additionally argued that Hernandez was a flight risk because her asylum claim had been denied by both the IJ and the Board of Immigration Appeals (BIA), though it was pending before this court at the time. Hernandez countered that the Red Notice was defective, as it contained no factual allegations that Hernandez committed any crime or was part of any gang activity, and that she has no history of
ordered the IJ to conduct a second bond hearing where the government would bear that burden of proof.\textsuperscript{13} As a result, the IJ released Hernandez on bond.\textsuperscript{14} On appeal, the First Circuit agreed with the government’s contention that it need only prove the detainee’s flight risk by a preponderance of the evidence but otherwise upheld the district court’s order.\textsuperscript{15}

The Due Process Clause of the Fifth Amendment “forbids the Government [from] ‘depriv[ing]’ any ‘person . . . of . . . liberty . . . without due process of law.’”\textsuperscript{16} Freedom from imprisonment embodies the essence of that liberty, and the Supreme Court has consistently reaffirmed that “liberty is the norm.”\textsuperscript{17} Civil commitment is one circumstance constituting a deprivation of liberty that deserves adequate due process protections.\textsuperscript{18} While Congress may implement rules for noncitizens that would otherwise be unacceptable for citizens, the government’s power to detain noncitizens pending removal is still subject to constitutional limitations.\textsuperscript{19} Regardless of an individual’s criminal conviction. As to flight risk, Hernandez argued she had a meaningful chance of relief in her appeal before us and that she had family ties, employment, and a residence in Maine to which she would return.

\textit{Id.}  \textsuperscript{13} See Hernandez\textsuperscript{-}Lara, 10 F.4th at 23 (reviewing lower court’s finding of need to prove flight risk by clear and convincing evidence).

\textsuperscript{14} See id. (outlining procedural history). Hernandez’s bond was set at $7,500, and the IJ stressed the burden shift to the government. \textit{Id.} at 25. The IJ concluded that it was not clear and convincing that she was a danger, and also determined that “given her community ties, fixed address, and work history,” Hernandez was not a flight risk. \textit{Id.} at 26.

\textsuperscript{15} See id. at 23 (clarifying appropriate standard to determine danger or flight risk at bond hearing).

\textsuperscript{16} Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (applying Due Process Clause to duration of post-removal detention); see also U.S. CONST. amend. V (establishing fundamental right to due process of law).

\textsuperscript{17} See Zadvydas, 533 U.S. at 690 (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); United States v. Salerno, 481 U.S. 739, 755 (1987) (holding Bail Reform Act’s mandatory detention based on dangerousness does not violate Due Process Clause); see also Foucha, 504 U.S. at 80 (cautioning against minimizing individual’s important and fundamental right to liberty).

\textsuperscript{18} See Addington v. Texas, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”); see, e.g., Jackson v. Indiana, 406 U.S. 715, 731 (1972) (holding civil commitment violated due process rights); Humphrey v. Cady, 405 U.S. 504, 512 (1972) (recognizing procedural safeguards afforded to civil commitment proceedings); In re Gault, 387 U.S. 1, 20 (1967) (“Due process of law is the primary and indispensable foundation of individual freedom.”); Specht v. Patterson, 386 U.S. 605, 608 (1967) (determining proceedings for indeterminate commitment of convicted sex offender is subject to Due Process Clause).

\textsuperscript{19} See Demore v. Kim, 538 U.S. 510, 522-23 (2003) ("[S]ince Mathews, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."); see also Zadvydas, 533 U.S. at 695 (highlighting
legal citizenship in the United States, due process applies to all persons brought before the court.\textsuperscript{20}

The discretionary detention provision, section 1226(a) of the Immigration and Nationality Act, provides that “the government ‘may release’ a detained noncitizen on ‘bond . . . or conditional parole.’”\textsuperscript{21} To begin the release process, an officer from ICE makes the initial determination regarding continued detention, and if the officer chooses continued detention, a noncitizen can seek review through a bond hearing before an IJ.\textsuperscript{22} For decades, section 1226(a)’s silence as to the applicable burden of proof in bond hearings and the party that bears that burden was perceived by the Board of Immigration Appeals (“BIA”) to establish a presumption in favor of liberty pending removal proceedings.\textsuperscript{23} In 1996, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which included mandatory detention requirements that the Immigration and Naturalization Service (“INS”) and then the BIA soon adopted.\textsuperscript{24} Although the initial regulations applied to the custody determination by an arresting officer, BIA precedent similarly required that a noncitizen must establish “to

\textsuperscript{20} See Zadvydas, 533 U.S. at 693 (applying due process rights to noncitizens detained within the country’s borders); see also Mathews v. Diaz, 426 U.S. 67, 77 (1976) (explaining due process “protects every [noncitizen] from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”).

\textsuperscript{21} \S 1226(a) (outlining discretionary detention of noncitizens pending removal). When the government does not claim that a noncitizen committed an offense identified under \S 1226(c), \S 1226(a) controls the decision. See Hernandez-Lara, 10 F.4th at 26 (deeming \S 1226(a) to be controlling provision); see also \S 1226(c) (requiring government to detain noncitizens who committed certain criminal offenses for duration of removal proceedings); Demore, 538 U.S. at 513 (stating Attorney General must detain noncitizens that are removable because they committed specified crimes).

\textsuperscript{22} See 8 C.F.R. §§ 236.1(c)(8), 236.1(d)(1) (authorizing offer to release a noncitizen and noncitizen to request “amelioration of the conditions under which he or she may be released”). To avoid continued detention, the noncitizen “must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding.” \S 236.1(c)(8). Subsequently, an IJ’s decision to continue detention may be further appealed to the BIA. See \S 236.1(d)(3) (allowing noncitizen to file appeal within days of IJ’s decision under \S 236.1(d)(2)(i)).

\textsuperscript{23} See In re Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (“An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk.”).\textsuperscript{24}

the satisfaction of the immigration judge[,] that he or she merits release on bond,” and asks the noncitizen to prove that he or she is neither a danger to the community nor a flight risk.  

The inquiry into whether noncitizens are entitled to bond hearings, at which they bear the burden to prove that they are neither a danger nor flight risk, is guided by the three-part balancing test initially set forth in Mathews v. Eldridge.  The Mathews factors are:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards; and (3) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Importantly, the Court noted that due process is “flexible” and dependent on the accompanying circumstances, as it should apply to “the
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generality of cases, not the rare exceptions.**28 Courts are also careful to consider the unique circumstances of noncitizens because they are not guaranteed legal representation, may struggle to gather adequate evidence, and often lack proficiency in English.29 However, the government maintains a recognized interest in the prompt execution of removal orders that must be weighed against the principle that “control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature.”30

28 Mathews, 424 U.S. at 344; Wyatt, supra note 26, at 606-07 (highlighting court’s reasoning). “All that is necessary is that the procedures be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’” Mathews, 424 U.S. at 349 (quoting Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970)).


Nearly two-thirds of noncitizens in removal proceedings proceed pro se. For those held in detention during the removal process, representation rates are even lower: a 1992 government study found that only 22% percent of detainees retained counsel, a number that is almost certainly lower today given the vast increase in detention over the last decade. Kaufman, supra, at 114. Emily Ryo, Detained: A Study of Immigration Bond Hearings, 50 LAW & SOC’Y REV. 117, 119 (2016) (discussing significant correlation between legal representation and being granted bond); Moncrieffe v. Holder, 569 U.S. 184, 201 (2013) (noting detained noncitizens “have little ability to collect evidence”); Castaneda-Delgado v. INS, 525 F.2d 1295, 1299 (7th Cir. 1975) (recognizing lack of English proficiency among circumstances leading to difficulty obtaining counsel); Santosky v. Kramer, 455 U.S. 745, 763 (1982) (highlighting heightened risk of error where government attorneys are expert on hearing process); Elkins v. United States, 364 U.S. 206, 218, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) (discussing general difficult of proving negative in court). “Claims often fall and rise on testimony alone. Cultural and linguistic misunderstandings are common.” Dickerson, supra (recognizing impact of lack of proficiency in English). Courts also recognize that “[t]he State’s attorney usually will be an expert on the issues contested and the procedures employed at the factfinding hearing” as well as the difficulty in proving a negative such as demonstrating a lack of danger. Santosky, 455 U.S. at 763. Additionally, courts are aware of the heavy burden placed on detainees to prove a negative such as demonstrating a lack of danger. Elkins, 364 U.S. at 218.

In *Hernandez-Lara*, the First Circuit held that under section 1226(a), “due process requires the government to either: (1) prove by clear and convincing evidence that [a noncitizen] poses a danger to the community or (2) prove by a preponderance of the evidence that [a noncitizen] poses a flight risk.” With a focus on which party should bear the burden of proof, the court considered the first factor in the *Mathews* test and acknowledged that Hernandez suffered a significant deprivation of liberty that constituted a private interest at stake. Importantly, the majority recognized that while “removal proceedings have an endpoint and that the liberty interest of a noncitizen detained under § 1226(a) may therefore be slightly less weighty,” the court emphasized that it is only slightly less. Next, the court reasoned that the second factor in the *Mathews* test also weighed heavily in favor of Hernandez because noncitizens have no guaranteed right to counsel in removal proceedings, will likely experience difficulty in gathering evidence on their own, often lack proficiency in English, are generally unfamiliar with immigration law and procedures when compared to government officials, and face the increased difficulty of proving a negative in meeting their burden of proof. With regard to the final *Mathews* factor, the court determined the

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31 10 F.4th 19, 41 (1st Cir. 2021) (determining due process requirements for continued detention of noncitizens).

32 See id. at 28-30 (discussing Hernandez’s deprivation of liberty in detention process).

33 *Hernandez-Lara*, 10 F.4th at 29-30 (discussing uncertainty of detention times).

34 See id. at 31 (elaborating how allocation of the burden of proof affects risk of erroneous deprivation of liberty).

With a record of employment, family relations, a settled place in the community, and no arrests, Hernandez would seem to have been a good candidate for conditional release on bail. Indeed, no party claims that she has absconded or committed any crime during the year and a half that she has been out on bail. Yet as the IJ’s rulings make clear, the placement of the burden of proof on Hernandez decisively exploited her inability to rebut the Red Notice, even though it did not specify a single act of criminal or dangerous conduct.
public interest in placing the burden of proof on the detainee is uncertain when compared to the potential of the current procedure to enforce needless detentions that entail “substantial social and financial costs.”

Concluding that the Mathews factors weighed heavily in favor of Hernandez, the court rejected the government’s contention that precedent precludes it from placing any burden of proof on the government. The court then addressed the extent of that burden, noting that applying a “heightened standard of proof . . . reflects the value society places on individual liberty.” Coupled with the heightened risk of prejudicial error and the government’s accessibility to evidence of dangerousness, the court perceived no reason to vary from the approach requiring the government to prove by clear and convincing evidence that a noncitizen presents a danger. In the court’s examination of flight risk, however, the majority reasoned that the preponderance standard of proof results in less potential for error because detainees possess more knowledge of the relevant factors to defend assertions of their potential risk of flight when compared to the government. Further, a noncitizen’s flight risk is closely connected to the government’s interest in the prompt execution of removal proceedings and the consistent requirement for clear and convincing evidence, whereas seeking detention on the basis of

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35 See id. at 33 (summarizing court’s reasoning). The court agreed that the government’s interest in the prompt execution of the removal orders is a legitimate interest, but the government failed to explain how this interest prevails in situations where a noncitizen is not a flight risk. See id. The court also expressed concern with the substantial societal costs of detention as “needless detention of those individuals thus ‘separates families and removes from the community breadwinners, caregivers, parents, siblings and employees’ that impacts society in in intangible ways that are difficult to calculate in dollars and cents.” Id. (quoting Lopez v. Decker, 978 F.3d 842, 855 (2d Cir. 2020)). See Mathews, 424 U.S. at 335 (examining government’s interests in detention).

36 See Hernandez-Lara, 10 F.4th at 39 (deciding government bears burden of proving dangerousness or flight risk under § 1226(a)).

37 See id. at 39-40 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)) (Sobelof, J., concurring in part and dissenting in part). The court additionally highlighted several circumstances requiring the government to justify detention through clear and convincing evidence, such as involuntary commitment, terminating parental rights, and denaturalizing an individual. Id. at 40. The court also differentiated cases where detention is at issue from civil matters not involving detention, stating, “in contrast to cases in which liberty from detention is at issue, in ‘monetary disputes between private parties . . . society has a minimal concern with the outcome . . . [and so] plaintiff’s burden of proof is a mere preponderance of the evidence.’” Id.

38 See id. (holding government must prove dangerousness by clear and convincing evidence).

39 See id. (“[T]here is less risk of error from a preponderance standard on this issue because, as noted, detained citizens possess knowledge of many of the most relevant factors, such as their family and community ties, place of residence, length of time in the United States, and record of employment.”). Additionally, with the burden being placed on the government, noncitizens are not tasked with proving a negative, such as proving they did not flee prosecution or fail to appear in court. Id. Provided these considerations, “the probable value of a heightened standard of proof is thus less apparent when it comes to flight risk.” Id.
danger is not typically applied to cases involving risk of flight, and thus does not require the same burden of proof.\textsuperscript{40} 

Noncitizens’ due process rights are overwhelmingly threatened by the difficulty in overcoming implicit biases within the legal system involving detainees and immigrants.\textsuperscript{41} In \textit{Hernandez-Lara}, the court overlooked the volume of cases and discretion afforded to judges that creates a culture of uncertainty for noncitizens.\textsuperscript{42} Further, the informality of immigration courts poses a threat to an impartial adjudication of a noncitizen’s proceeding.\textsuperscript{43} The structural arrangement of the immigration courts within the DOJ undermines judicial independence because of the DOJ’s close alignment with those prosecuting noncitizens.\textsuperscript{44} Accordingly, the First Circuit correctly

\textsuperscript{40} See id. (providing underlying reasoning for decision). The court also pointed out that “[i]n the analogous context of pretrial criminal detention under the Bail Reform Act, where flight risk is a factor, the government need only prove flight risk by a preponderance of the evidence in order to continue detention.” \textit{Id.} (quoting United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991)).

\textsuperscript{41} See \textit{Marouf}, supra note 5, at 428-29 (discussing reasons implicit bias is especially likely to influence decision-making in immigration context).

Among all judges, however, IJs have the weakest structural and professional norms to remain impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and have the highest degree of independence through lifetime appointments, IJs are career civil servants within the Department of Justice.

\textit{Id.}; Dickerson, supra note 29 (stating prevention of implicit bias in immigration courts is daunting).

\textsuperscript{42} See Dep’t of Justice, supra note 30 (showing more than 1,250,000 immigration cases pending at end of 2020). Over the course of a decade, the number of pending immigration cases has increased 379%. \textit{Id.} Further, as apprehension of undocumented persons hit record highs, “the burden on the immigration system is only likely to increase.” \textit{Hernandez-Lara}, 10 F.4th at 54, n. 19 (Lynch, J., dissenting); see also Dep’t Homeland Sec., supra note 30 (displaying increased number of border apprehensions); Dickerson, supra note 29 (“336 people from 13 countries and even more ethnic backgrounds appeared in San Francisco’s immigration court recently over three days.”). An increased volume in cases is directly correlated to an increased number of mistakes. \textit{See id.} (“Experts say the conditions that immigration judges work under – fast paced, high pressure and culturally charged – make more misjudgments all but inevitable.”).

\textsuperscript{43} See \textit{Marouf}, supra note 5, at 424 (highlighting factors contributing to impartial adjudication in immigration court); Dickerson, supra note 29 (noting disadvantages posed against many detainees despite legal representation). Informalities that can contribute to impartial adjudication include the fact that the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned-out judges are allowed to play an inquisitorial role. \textit{Marouf}, supra note 5, at 424. “Even when lawyers are involved, they say immigrants who are educated, articulate and white have an easier time gaining the court’s sympathy.” \textit{Dickerson}, supra note 29.

\textsuperscript{44} See \textit{Marks}, supra note 5, at 429 (recognizing structural abnormalities of immigration courts allowing for implicit bias to flourish).

I am struck by the fact that my current work environment does not project an image which inspires faith in our court’s freedom from bias. This is because the immigration court system is housed in a law enforcement agency, the U.S. Department of Justice, which is closely aligned with those who are the prosecutors in our courts (Department of Homeland Security (DHS) trial counsel). This structural arrangement has caused
perceived the risk of error when determining dangerousness but erred in its failure to extend the same conclusion to its flight risk analysis.\textsuperscript{45}

Despite the court’s extensive analysis of the \textit{Mathews} factors, the majority discounted the procedural difficulties faced by noncitizens by deciding to lower the standard of proof with respect to flight risk.\textsuperscript{46} While noncitizens may possess relevant knowledge of the factors considered, detention impairs their ability to access the appropriate resources to prepare their cases and develop an adequate defense against removal.\textsuperscript{47} As such, the court’s reliance on the pretrial criminal detention context under the Bail Reform Act incorrectly justified the preponderance standard’s ability to balance “competing interests as fairly as it does in a criminal bail hearing.”\textsuperscript{48} While the government in criminal trials may face more hurdles, the court ignores the reality that “removal hearings, like criminal trials, are ‘fraught with

\textsuperscript{45} See \textit{Hernandez-Lara}, 10 F.4th at 38 (rejecting value of heightened standard of proof).

\textsuperscript{46} See \textit{id.} at 30-31 (acknowledging procedural hurdles facing noncitizens that pose risk of error).

\textsuperscript{47} See \textit{Hernandez-Lara}, 10 F.4th at 40 (stating noncitizens are best suited to provide evidence on relevant factors); \textit{Kaufman}, supra note 29, at 116 (noting concern of detention’s impact on a noncitizen’s removal defense). “Detainees have limited ability to locate witnesses, gather evidence, or conduct research in preparation for their removal hearing. For those who attempt to find representation, the remote location of detention facilities, transfers, restrictive detention policies, and the inability to earn money while in detention impede access to counsel.” \textit{Kaufman}, supra note 29, at 116. Notably, immigration detention is the only form of detention where the government is not required to provide an attorney. \textit{See id.} at 117 (differentiating due process protections in noncitizen removal proceedings from other civil detention contexts).

\textsuperscript{48} See \textit{Hernandez-Lara}, 10 F.4th at 41 (comparing circumstances of detention).

Of course, the analogy to criminal pretrial detention has its limits. Criminal defendants, for example, have a right to government-appointed counsel, 18 U.S.C. § 3142(f), while section 1226(a) detainees do not, 8 U.S.C. § 1362. But those differences cut both ways: While they suggest the section 1226(a) detainee may have fewer resources with which to marshal evidence and argument, they also suggest that the government traditionally encounters more hurdles in criminal rather than civil proceedings.

\textit{Id.}
serious consequences’’ for noncitizens.\footnote{See Lara v. Barr, 962 F.3d 45, 59 (1st Cir. 2020) (Lipez J., concurring) (quoting Castaneda-Delgado v. Immigr. & Naturalization Serv., 525 F.2d 1295, 1301 (1975)).}

Minimizing the absence of the Sixth Amendment right to counsel in immigration proceedings and the lack of consideration of the implicit biases within the legal system ultimately led the First Circuit to incorrectly lower the standard required for the government to prove a noncitizen is a flight risk.\footnote{See Lara, 962 F.3d at 54 (“The statutory right to counsel is a fundamental procedural protection worthy of particular vigilance.”); Dickerson, supra note 29 (acknowledging implicit bias in immigration court decisions).}

Rather than lowering the standard necessary to prove a noncitizen is a flight risk, the First Circuit should have acknowledged the struggles that plague immigration courts and outlined potential solutions to alleviate the implicit biases within the system.\footnote{See Marks, supra note 5 (stating efforts to reduce implicit bias must combine personal effort and structural support); see also Marouf, supra note 5, at 443 (suggesting immigration reform not enough to remedy structural barriers to more deliberate decision-making). The Comprehensive Immigration and Reform Act of 2010 proposed increasing the number of IJs, the number of ICE and Customs and Border Protection (“CBP”) officials, and recommended a legalization program. See Marouf, supra note 5, at 443-44 (discussing suggested reforms).} Because immigration cases will likely remain complex, the system requires a restructuring that will allow for IJs to maintain increased independence from the DOJ and United States law enforcement agencies.\footnote{See Marks, supra note 5 (“Our nation’s immigration courts are fast-moving dockets governed by intricate and sometimes almost incomprehensible statutes, teeming with diverse foreign languages and cultures, set in the context of a law whose very origins were explicitly discriminatory and prejudiced.”); Dickerson, supra note 29 (“[J]udges often must decide the fate of foreign families in the time it takes to consume a fast-food lunch . . . ”); see also Marouf, supra note 5, at 446 (encouraging transformation of immigration court system).} One plausible suggestion is for immigration courts to become “Article I court[s] with a single level of review by an Article III court.”\footnote{See Marouf, supra note 5, at 446 (suggesting solution for restructuring court system to reduce implicit bias).} An alternative option allows for the restoration of three panels of judges reviewing cases and increasing the diversity of those panels, which allows for the combination of different viewpoints for discussion to ensure

This proposed structural reform would increase the independence of IJs by removing them from the Department of Justice, improve their sense of esteem and their pride in their place within the judiciary, set a higher standard for decisionmaking [sic], eliminate problems with the BIA, and expand the scope of judicial review, as issues currently reviewed by the BIA would be reviewed by federal judges, all of which would help reduce implicit bias for the reasons discussed above. Thus, structural reform of the immigration adjudication process should play an integral role in discussions of comprehensive immigration reform.

\textit{Id.}
the most logical outcome prevails.\textsuperscript{54} To effectively combat the complexity and bias underlying the United States immigration system, courts should carefully consider the need for comprehensive reform before changing standards of proof that profoundly impact noncitizens.\textsuperscript{55}

In \textit{Hernandez-Lara}, the First Circuit interpreted the Due Process Clause of the Fifth Amendment as requiring the government to prove by clear and convincing evidence that a noncitizen is a danger and to prove by a preponderance of the evidence that a noncitizen is a flight risk. By circumventing the impact of implicit biases in the legal system, especially within the immigration courts, the court was able to lower the standard of proof and dismiss concerns about noncitizens’ ability to rebut government evidence without adequate resources. By failing to consider the hardships faced by noncitizens and contemplate practical solutions to combat implicit bias, the First Circuit’s ruling ensures that the risk of erroneous decision making will endure into the foreseeable future, and countless noncitizens persons will remain unjustly detained.

\textit{Shannah Colbert}

\textsuperscript{54} See id. (highlighting need for more female members and people of color to reduce implicit bias). With a more balanced panel, implicit bias can be kept in check through discussing and defending reasoning. \textit{Id.} at 447.

\textsuperscript{55} See id. at 447-48 (noting further exploration of immigration adjudication reforms necessary to provide individuals fair and impartial hearings).