No. 19-1828

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHRISTIAN ROCHA,

Petitioner-Appellant,

v.

WILLIAM BARR, Attorney General, et al.,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of New Hampshire (No. 19-cv-410-JL)

BRIEF OF *AMICI CURIE*
Detention Watch Network, Families for Freedom, Greater Boston Legal Services, Harvard Immigration and Refugee Clinical Program, Immigrant Defense Project, National Immigration Project of the National Lawyers' Guild, and University of Maine Law School's Refugee and Human Rights Clinic

IN SUPPORT OF PETITIONER–APPELLANT
AND IN SUPPORT OF REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* state that no publicly held corporation owns 10% or more of the stock of any of the parties listed herein, which are nonprofit organizations and community groups.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored any part of the brief, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT OF INTEREST

Amici curiae Detention Watch Network, Families for Freedom, Greater Boston Legal Services, Harvard Immigration and Refugee Clinical Program, Immigrant Defense Project, National Immigration Project of the National Lawyers' Guild, and University of Maine Law School's Refugee and Human Rights Clinic, are immigrant rights organizations, law clinics, and legal service providers whose members and clients face the severe consequences of the Government's expansive and unconstitutional application of mandatory and prolonged immigration detention to individuals who have reintegrated into their communities following a past criminal conviction.[1]

Amici curiae have a profound interest in ensuring that the voices of our members and clients are included in the resolution of the legal issues in this case. Their stories, like Petitioner-Appellant Christian Rocha's, demonstrate the real-life outcome of the Government's position: arbitrary and prolonged deprivations of liberty that disregard the years during which our members and clients have lived law-abiding productive lives following their criminal convictions.

[1] *Amici curiae* submit this brief pursuant to Fed. R. App. P. 29(a)(2). Counsel for both Petitioner-Appellant and Respondents-Appellees have consented to the filing of this brief.

SUMMARY OF ARGUMENT

"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. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In the "special and narrow non-punitive circumstances" of immigration detention, due process requires "a special justification . . . [that] outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (internal quotation marks omitted) (internal citations omitted). Under the Supreme Court's precedent, only flight risk and dangerousness may justify civil immigration detention. *Id.*

In *Demore v. Kim*, the Supreme Court upheld the constitutionality of "brief" mandatory detention in the case of an individual who was promptly detained following his release from prison and conceded removability on the basis of those criminal offenses. 538 U.S. 508, 513 (2003). However, the Supreme Court preserved the ability of individuals to raise as-applied challenges to mandatory detention in other circumstances: including those who are instead subject to prolonged detention, or who were living productive lives in the community at the time of their detention, or who have substantial defenses to removability. *See id.* at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"); *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (preserving as-applied challenges based on the

intervening period between criminal and immigration custody); *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (preserving as-applied challenges based on the prolonged period of detention).

The case of Mr. Rocha, like the cases of many of our members and clients, demonstrates all three of these areas of constitutional concern. He has been detained for nearly a year without a bond hearing. He has been subject to a categorical, irrebuttable presumption of flight risk and dangerousness despite fifteen years of actual evidence that he has abided by the law and voluntarily maintained contact with federal immigration officials long after his past conviction. And he has substantial defenses to his deportation that he is being forced to pursue behind bars.

Any one of these factors demonstrates why due process requires a bond hearing in Mr. Rocha's case. The time he continues to languish in detention has constitutional meaning. The law-abiding life he led for the fifteen years prior to his abrupt immigration detention has constitutional meaning. His incentive to pursue his defenses to deportation has constitutional meaning. Due process demands a hearing to justify his continued detention.

This Court has repeatedly recognized these liberty interests. As this Court explained in *Saysana v. Gillen*, "[i]t is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks…By any logic, it stands to reason that the more remote in time a conviction becomes and the more

time after a conviction an individual spends in a community, the lower his bail risk is likely to be." 590 F.3d 7, 17-18 (1st Cir. 2009); *see also Castañeda v Souza*, 810 F.3d 15, 44 (1st Cir. 2005) (Torruella, J., concurring) (citing *Saysana* and opining that "subject[ng] a person to [mandatory] detention . . . after the condition justifying detention has been in existence for a considerable period of time . . . disregards what is by then self-evident—that said subject is neither a flight risk nor a danger to society"). With respect to prolonged detention, this Court has held that "the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under [Section 1226(c)]." *Reid v. Donelan*, 819 F.3d 486, 495 (1st Cir. 2016) ("*Reid I*"), *vacated and remanded in part on other grounds*, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. May 11, 2018).

Mr. Rocha's case presents this Court with an opportunity to continue to uphold the due process rights of immigrants who live, work, and raise their families in our communities following a past conviction only to be abruptly detained by U.S. Immigration and Customs Enforcement ("ICE") for months or years while they pursue their defenses to deportation. People like Mr. Rocha deserve more than to be locked away based on demonstrably false presumptions. Where an individual falls outside the "focused purpose" of mandatory detention, *Saysana*, 590 F.3d at 17, due process demands an individualized assessment of flight risk and dangerousness.

ARGUMENT

I. Without Access to Bond Hearings, the Law-Abiding Lives that People like Mr. Rocha Have Led Following a Criminal Conviction Will Be Rendered Constitutionally Meaningless.

The lives that our members and clients have built during the months, years, and decades of liberty following a past conviction have constitutional meaning. Mandatory detention is offensive to liberty everywhere, but particularly so when applied to immigrants who have already returned to their communities. Our members and clients have reestablished their lives following their past convictions, disproving any presumption of flight risk and dangerousness that may have otherwise applied. Depriving them of their liberty without a bond hearing ignores the plain facts and creates unique, reverberating harms to immigrants, their families, and the immigration system as a whole.

The Government points to no other context in which a past conviction carries with it an irrebuttable presumption of flight risk and dangerousness for someone living peaceably in the community. Our members and clients have accumulated months, years, and even decades of evidence eroding any presumption that may have attached to their long-ago convictions.

Nhan Phung Vu[2] exemplifies this point. A lawful permanent resident from Vietnam who has lived in the United States since he was just four years old, Mr. Vu was arrested and detained by immigration agents in a county jail in Massachusetts more than *ten years* after his release from custody for his past conviction. Immigration officials were prohibited from considering the law-abiding life that Mr. Vu had led in the decade preceding his abrupt detention, including his deep ties to the community. Far from a risk of flight or danger, Mr. Vu was tethered to his family. He was the primary caretaker and breadwinner for his family. During his detention, his wife and children lost their health coverage, which had been provided by Mr. Vu's employer. His stepson, who was suffering from Hodgkin's lymphoma, stopped receiving vital follow-up treatments he needed to recover from cancer. One of his daughters was unable to attend physical therapy, and his children were plagued by nightmares. And Mr. Vu's wife struggled to make mortgage payments without Mr. Vu's steady income.

Mr. Vu ultimately won release from detention after filing a petition for a writ of habeas corpus (based on the statutory argument now rejected in *Preap*). Once discretion was restored to immigration officials to consider his flight risk and danger-

[2] The facts of Mr. Vu's case are detailed in the filings in *Gordon, et al. v. Nielsen, et al.*, No. 13-cv-30125 (PBS) (D. Mass.).

ousness, no argument could be made preventing his release. Had Mr. Vu been afforded a bond hearing at the outset of his removal proceedings, he could have defended his removal proceedings from home, with his wife and children, and continued providing for his family, instead of being needlessly separated from them.

Similarly, **Gustavo Ferreira**[3] too experienced arbitrary detention without access to a bond hearing. Mr. Ferreira is a lawful permanent resident who immigrated to the United States from Brazil in 2004. Following his arrest for a nonviolent drug offense, Mr. Ferreira turned to faith as the foundation for his rehabilitation. In late 2010, he joined an Assembly of God Pentecostal Church and became Minister for Music. *Id.* He began studies in theology in the hopes of becoming a Christian Counselor. *Id.* Having overcome his addiction, Mr. Ferreira turned his attention to helping others, counseling those suffering from addiction through his church and speaking at Waterbury High School in Connecticut to warn students away from drugs. *Id.*

That same year, Mr. Ferreira met his wife and they moved in together. Three years later, on January 21, 2013, their son was born. Mr. Ferreira not only took care of his newborn son while his wife suffered from blindness connected to childbirth, but worked steadily as a carpenter to support his family. *Id.*

[3] The facts of Mr. Ferreira's case are detailed in the filings in, ECF No. 75 and ECF No. 106.

Mr. Ferreira was seized by ICE on June 16, 2013, while driving his son to a babysitter. *Id.* ICE determined that he was subject to mandatory detention based on his three-year-old drug conviction. *Id.* The life he had built and the ties that bound him to his community—his marriage, the birth of his son, his wife's blindness, his ministry and counseling—were given zero consideration under the mandatory detention scheme. As a predictable result, his detention had a devastating and needlessly harsh impact on his family, forcing his wife to move in with a friend because she could not afford rent. *Id.* Mr. Ferreira missed his son's first words, first teeth, and first birthday. *Id.* Mr. Ferreira spent eight months in detention before a district court granted a writ of habeas corpus ordering him a bond hearing on statutory grounds. Because discretionary authority was restored to the Immigration Judge as a result of that decision, Mr. Ferreira was promptly released on bond in March 2014.

Years of deep family and community ties are not the only factors that judges must ignore in the face of an irrebuttable presumption of flight risk and danger. Many of the noncitizens affected by the Government's position in this case come to the attention of federal immigration authorities precisely because they affirmatively present themselves to immigration officials, either by submitting applications to the Department of Homeland Security, through travel and re-entry at a port of entry, or otherwise complying with the law. Yet none of this proof of lack of flight risk or danger can be shown under a mandatory detention scheme.

Mr. Rocha himself submitted to background checks when he renewed his green-card. Far from being an individual attempting to evade immigration authorities, he has voluntarily availed himself of immigration officials. Mr. Rocha is not alone. **Y Viet Dang**[4] is a longtime lawful permanent resident from Vietnam who was detained without a bond hearing in 2010, when he applied for U.S. citizenship and came to immigration authorities to check the status of his application. He was detained and deprived of a bond hearing based on two decade-old convictions involving possession of a firearm and theft, for which he was eligible for relief from removal. In the ten years that had passed since his release from criminal custody, Mr. Dang had reintegrated into his community, working and raising his U.S. citizen child with his U.S. citizen wife, a U.S. Army lieutenant. At no time did he attempt to elude immigration authorities; in fact, he repeatedly made himself available to immigration officials through his applications to renew his lawful permanent resident card and to become a U.S. citizen.

As a federal court noted when it granted a habeas petition in his case on statutory grounds, ICE waited almost ten years with no explanation to take Mr. Dang into custody. The court noted that "it appears from the record that Petitioner Dang is very

[4] The facts of Mr. Dang's case are detailed in *Dang v. Lowe*, No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780 (M.D. Pa. May 7, 2010) (Report and Recommendation).

likely to appear for his removal proceedings based on the various other applications he has filed over the years with ICE and the fact that he appeared to have cooperated with ICE with respect to these applications." After winning his habeas petition, Mr. Dang was released on bond. Like many others affected by the Government's position in this case, no purpose was served by his mandatory detention.

Mr. Rocha is thus not alone, and will not be the only one harmed by a decision that permits mandatory detention without considering the years he lived a law-abiding and productive life following his past conviction. U.S. Citizenship and Immigration Services has recently issued guidance directing it to continue and expand its practice of issuing Notices to Appear and referring cases to ICE for potential initiation of removal proceedings against a noncitizen who applies for an immigration benefit.[5] Mandatory detention will therefore ensnare many more individuals with old convictions who come forward to apply for citizenship, the renewal of green cards, and other immigration benefits like Mr. Rocha. Despite voluntarily submitting to background checks and working with immigration officials, these individuals will be irrebuttably deemed flight risks and dangers under the Government's expansive interpretation of the mandatory detention statute.

[5] Policy Memorandum 602-0050.1, Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, https://www.uscis.gov/news/alerts/updated-guidance-implementation-notice-appear-policy-memorandum

Any concerns that the Government may have about flight risk or danger can be addressed adequately at a bond hearing where the actual facts can be taken into account. This is demonstrated by the available data. In *Gordon*, a class action lawsuit brought by immigrants in Massachusetts subjected to mandatory detention well after their release from criminal custody that resulted in bond hearings, immigration judges ordered release in 51% of cases.[6] Thus, rather than merely rubber-stamping bond applications, immigration judges with bond authority can carefully consider the facts and circumstances of each individual's case, assessing whether a person's family and community ties and lack of indicia of flight risk or any criminal record following a past conviction warrant release on bond. By doing so, they can prevent unnecessary detention and all the harms that come with ignoring the facts in favor of a false presumption.

[6] *See* Adriana Lafaille & Anant Saraswat, Supreme Court Case Has Echoes in Massachusetts, ACLU MASS. (Aug. 5, 2018), https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts (reporting that 51% of the hearings ordered through *Gordon v. Nielsen* resulted in the grant of bond).

II. Without Access to Bond Hearings, People like Mr. Rocha Will Languish In Detention for Months and Years Without Justification.

The need for a bond hearing is particularly pronounced where, as here, detention extends for months or longer without review. Immigration detention is indistinguishable from punitive incarceration, and individuals like Mr. Rocha face years of detention without individualized review.

For example, decorated Gulf War veteran **Warren Hilarion Joseph**[7] faced over three years in immigration detention before he won his case to remain in the U.S. and ultimately became a U.S. citizen. Mr. Joseph came to the United States as a lawful permanent resident from Trinidad, enlisting in the U.S. Army when he was twenty-one. He served in combat positions in the First Gulf War, was injured in the line of duty, received commendations for his valiant service and his rescue of fellow soldiers, and was honorably discharged.

Like many other combat veterans, Mr. Joseph fell upon hard times after returning home. In 2001, Mr. Joseph was arrested for unlawfully purchasing a handgun for individuals to whom he owed money. He received a probation sentence, and with the support of his family was able to find a good job. When he moved to his mother's

[7] The facts of Mr. Joseph's case are detailed in his habeas petition and declaration. *See* Petition for Writ of Habeas Corpus, *Joseph v. Aviles*, No. 2:07-cv-02392-JLL (D.N.J. May 11, 2007); Decl. of Warren Hilarion Joseph (on file with counsel).

house and failed to inform his probation officer, however, Mr. Joseph was found guilty of violating probation and was sentenced to six months.

Little did Mr. Joseph realize that after his six-month criminal sentence was over, he would then spend ***three and a half years***—seven times the length of his sentence—in Hudson County Correctional Facility, in Kearney, New Jersey. He vividly recalls spending his first night in immigration detention sleeping on a concrete floor before a bed was available, pressing his injured foot into the cold ground to numb the pain, wondering when he would ever get out. His wartime injury worsened over years in the jail, until he had to be hospitalized for surgery, making it difficult for him to walk.

The indignities of the jail and the uncertainty of whether he would ever be released made detention almost too much to bear. Suffering from post-traumatic distress disorder, Mr. Joseph felt insecure and targeted in the jail. He was deeply pained to be separated from his U.S. citizen children and family members. His mother and sister were forced to travel across state lines to see him, though the jail sometimes turned them away.

Mr. Joseph was ultimately granted a form of relief called "cancellation of removal" in light of his positive equities and ties to the community, allowing him to retain his lawful permanent resident status. He became a U.S. citizen, and remains

proud of the work he and other veterans have done to protect this country. But he will never get back the three and a half years of his life he lost to prolonged detention.

Similarly, the ***two-and-a-half years*** **Astrid Morataya**[8] spent in detention carried all the punitive effects of an indeterminate criminal sentence. A longtime lawful permanent resident, Ms. Morataya has lived in the United States since she was eight years old, after fleeing violence in Guatemala. The mother of three U.S. citizen children, Ms. Morataya was placed in removal proceedings in 2013 on the basis of a 1999 low-level drug distribution conviction for which she was sentenced to probation. She received her conviction more than a decade prior to her removal proceedings, during a period in her life when she was the victim of ongoing sexual abuse, including a violent kidnapping and rape.

Ms. Morataya ultimately testified against her abuser in court, aiding in his successful prosecution. When she was placed in removal proceedings years later, she was eligible for a "U visa" based on her cooperation with law enforcement and an "inadmissibility waiver" due to her strong positive equities. She was ultimately granted this relief, and remains in the U.S. with her family to this day.

[8] The facts of Ms. Morataya's case are detailed in a declaration by her attorney. *See* Decl. of Claudia Valenzuela, Esq. of the National Immigrant Justice Center (on file with counsel).

For the entirety of the two and a half years it took to resolve her removal case, however, Ms. Morataya was detained at the McHenry County Jail in Woodstock, Illinois and Kenosha County Correctional Center in Kenosha, Wisconsin. Guards treated her as an inmate, and punished her as one. She was twice placed in solitary confinement, once for having a sugar packet in her uniform that she forgot to dispose at mealtime, and once for not being ready to leave her cell because she had begun menstruating and lagged behind her cellmates while trying to secure menstrual pads.

The years of Ms. Morataya's detention also weighed heavily on her family. She missed birthdays, holidays, her youngest daughter's first day of kindergarten, and her son's high school graduation. Worst of all, she was forced to stand by when her youngest child, at five years of age, became the subject of a protracted and traumatic custody battle due to her detention.

Because of these harms, federal courts have routinely intervened to order bond hearings when a person's detention has become prolonged. Every circuit to address the issue of prolonged detention, including this Court in *Reid I,* has concluded that due process cabins prolonged detention. 819 F.3d at 494 (collecting cases). Mr. Rocha's detention is already approaching a year with no end in sight. Mr. Rocha should not be forced to wait until years before he is able to breathe free again.

III. Without Access to Bond Hearings, People Like Mr. Rocha Will Be Effectively Punished for Pursuing Defenses to Deportation.

In Mr. Rocha's case, like so many others, it is precisely because he is pursuing his substantial defenses to deportation that he is being forced to languish in detention. Individuals, like Mr. Rocha, may have substantial arguments that they are eligible for various forms of discretionary relief from deportation. Those forms of relief often require immigration judges to consider a noncitizen's rehabilitation and the passage of time following a criminal record. *See, e.g.*, *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Applying an irrebutable presumption of flight risk and dangerousness to individuals who are pursuing any such defenses to deportation effectively punishes people for pursuing their claims.

This is because the pursuit of termination or relief can take times. **Sayed Omargharib**,[9] a lawful permanent resident for twenty-eight years, was a successful hairdresser in Washington, D.C. when he was arrested by immigration agents and detained for nearly two years due to a larceny conviction for having taken two pool cues following a dispute with an opponent in a local pool league. The Department of Homeland Security charged Mr. Omargharib with an "aggravated felony,"

[9] The facts of Mr. Omargharib's case are detailed in *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). *See also* Decl. of Steffanie Lewis, Esq. (on file with counsel).

charges that the U.S. Court of Appeals for the Fourth Circuit ultimately rejected two years later. *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014).

Although Mr. Omargharib was eventually vindicated, his abrupt mandatory detention did its damage. While detained, Mr. Omargharib lost both his home and his job. His credit was destroyed. He missed his son's high school graduation and struggled to find any stable housing after his release.

The experience of detention can be so punitive that some people may feel compelled to agree to their own deportation simply to be free from imprisonment. Consider the story of **Arnold Giammarco**.[10] An honorably discharged veteran of the U.S. Army and Connecticut National Guard, Mr. Giammarco lived in the United States for fifty years before federal immigration agents decided to detain him without access to a bond hearing. Although Mr. Giammarco had applied for citizenship when he was serving in the military, no action had been taken on his application. After he left military service, he suffered emotional difficulties leading to drug addiction and

[10] The facts of Mr. Giammarco's story are detailed in Complaint, *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_giammarco_complaint.pdf/. *See also* Decl. of Sharon Giammarco (on file with counsel); *U.S. Army Veteran Returns Home After YLS Clinics Secure Settlement* (Jul. 27, 2017), https://law.yale.edu/yls-today/news/us-army-veteran-returns-home-after-yls-clinics-secure-settlement.

ended up with criminal convictions for drug possession and petty theft. But he managed to turn his life around. He overcame addiction and found work, earning several promotions to become a nighttime production manager at McDonald's. He and his partner Sharon married and focused their life on raising their little girl.

In 2011, seven years after Mr. Giammarco's last conviction, federal immigration agents came to his home, ordered him to lie face down on the ground, handcuffed him and took him away from his family. He was required to wear a prison uniform, and was shackled during his appearances in court. Held without access to a bond hearing, Mr. Giammarco watched helplessly as his family liquidated their savings fighting his case. In detention, he suffered daily indignities, the worst of which was being physically separated from his family by plexiglass during visitation. Unable to hold his two-year-old daughter, Mr. Giammarco agreed to his own deportation.

Many people are not able to pursue their defenses once deported. Because Mr. Giammarco was pursuing a citizenship claim, however, he was able to pursue it from abroad. In 2017, a federal court recognized that Mr. Giammarco's citizenship application had been valid, and he was finally able to return home to the United States as a U.S. citizen. In the end, his mandatory immigration detention had served no purpose other than to punish Mr. Giammarco, a second time, for old convictions, and separate him from his American family.

Mr. Rocha's substantial defense to deportation relates to challenging the Government's expansive view of what constitutes an "aggravated felony" barring cancellation of removal in the context of drug offenses. Many of the Government's expansive readings of the "aggravated felony" provision have been rejected by the Supreme Court, including in the drug context. *See, e.g.*, *Moncrieffe v. Holder*, 133 U.S. 1678 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006). People like Mr. Rocha should not be forced to languish in detention for years while they pursue their defenses to deportation.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences of denying bond hearings to individuals who languish in detention, fighting their cases, after having lived peaceably in our communities for months and years following a past criminal conviction. Such horrific outcomes demand at minimum a bond hearing. *Amici* respectfully urge this Court to hold that Mr. Rocha is entitled to a bond hearing.

Dated: November 6, 2019
New York, NY

Respectfully submitted,

s/ Alina Das

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that the foregoing Brief of Amici Curiae is proportionately spaced, has a typeface of 14 points or more and, according to computerized count on Microsoft Word, contains 4,304 words.

Dated: November 6, 2019
New York, NY

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CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF System on November 6, 2019.

I certify that I have served counsel for all participants in the case, and that for registered CM/ECF users, service will be accomplished by the Appellate CM/ECF System:

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