

IN THE SUPREME COURT OF THE UNITED STATES

DAVID WEKESA, PETITIONER

v.

UNITED STATES ATTORNEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's detention under 8 U.S.C. 1226(c) without a bond hearing while his removal proceedings were pending violated the Due Process Clause of the Fifth Amendment.

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No. 22-6710

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-7) is not published in the Federal Reporter but is available at 2022 WL 17175818. The order of the district court (Pet. App. 8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2022. The petition for a writ of certiorari was filed on January 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 et seq., authorizes the removal of certain classes of noncitizens from the United States. 8 U.S.C. 1182, 1227.¹ Section 1226 authorizes the arrest and detention of noncitizens "pending a decision on whether [they are] to be removed from the United States." 8 U.S.C. 1226(a). In general, Section 1226(a) provides that, "pending such decision," the Secretary of Homeland Security (Secretary) "may continue to detain the arrested alien," 8 U.S.C. 1226(a)(1), and "may release the alien" on "bond" or "conditional parole," 8 U.S.C. 1226(a)(2)(A) and (B).²

Section 1226(c) makes an exception to that rule. Section 1226(c)(1) provides that the Secretary "shall take into custody any alien who" is removable on specified criminal or national-security grounds "when the alien is released" from criminal custody. 8 U.S.C. 1226(c)(1). Section 1226(c)(2) provides that the Secretary "may release an alien described in" Section 1226(c)(1) "only" as part of a witness-protection program. 8 U.S.C. 1226(c)(2).

A different statutory provision, 8 U.S.C. 1231(a), governs the detention of noncitizens during and beyond the "removal pe-

¹ This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

² Both 8 U.S.C. 1226 and 8 U.S.C. 1231 refer to the Attorney General, but Congress transferred the enforcement of those provisions to the Secretary. Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 n.1 (2021).

riod." 8 U.S.C. 1231(a)(2) and (6). In general, the removal period is a 90-day period that begins when a removal order becomes "administratively final" or when certain other criteria are satisfied. 8 U.S.C. 1231(a)(1)(B)(i); see 8 U.S.C. 1231(a)(1)(A) and (B). Section 1231(a)(2) provides that the Secretary "shall detain" a noncitizen "[d]uring the removal period," 8 U.S.C. 1231(a)(2), and Section 1231(a)(6) provides that the Secretary "may" detain a noncitizen "beyond the removal period" if the noncitizen is inadmissible, removable under certain provisions of law, "a risk to the community," or "unlikely to comply with the order of removal," 8 U.S.C. 1231(a)(6).

2. Petitioner is a native and citizen of Kenya. C.A. ROA 103. In August 2001, he was admitted to the United States on a nonimmigrant student visa. Id. at 7, 92. On June 30, 2010, the Department of Homeland Security (DHS) served petitioner with a notice to appear for removal proceedings, charging that he was subject to removal under 8 U.S.C. 1227(a)(1)(C)(i) for failing to maintain or comply with the conditions of his nonimmigrant status. C.A. ROA 90-92. On that same day, DHS arrested and detained petitioner under Section 1226(a). A.R. 1027-1028.³

In July 2010, an immigration judge (IJ) ordered petitioner's release on bond. C.A. ROA 93. Petitioner later conceded removability and obtained several continuances of his removal proceed-

³ "A.R." refers to the Administrative Record filed in No. 22-60611 in the court of appeals.

ings while he pursued relief. See A.R. 630-631, 777-778, 781-784, 787-788, 1008-1009, 1112; C.A. ROA 94-97.

In November 2018, following a guilty plea, petitioner was convicted of sexual assault, in violation of Tex. Penal Code Ann. § 22.011(a)(1)(A), and was sentenced to three years of imprisonment. C.A. ROA 7, 98-99. In June 2020, upon his release from state custody, DHS re-detained petitioner. A.R. 631 n.2.⁴ Later that same month, an IJ conducted a hearing pursuant to In re Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999), and determined that petitioner's conviction for sexual assault rendered him subject to detention under Section 1226(c). C.A. ROA 100. Petitioner did not appeal the IJ's custody order to the Board of Immigration Appeals (Board).

In December 2020, an IJ ordered petitioner's removal to Kenya. A.R. 666-667. In July 2021, the Board found insufficient the IJ's explanation of the reasons for his order and returned the record to the IJ for "preparation of a full decision." C.A. ROA 102. The following month, a different IJ issued a written decision ordering petitioner's removal. Id. at 103-112. In January 2022, the Board remanded the case to the IJ for further development of the record with respect to petitioner's "potential eligibility for relief from removal." A.R. 584.

⁴ DHS also served petitioner with an additional notice to appear, charging that his conviction for sexual assault rendered him removable under 8 U.S.C. 1227(a)(2)(A)(i). A.R. 970-972. DHS later dismissed that notice to appear and the accompanying charge. A.R. 966-969, 989.

In July 2022, after conducting additional proceedings, an IJ denied all relief and ordered petitioner's removal. A.R. 89-138. On November 3, 2022, the Board dismissed petitioner's appeal. A.R. 2-4. On November 14, 2022, petitioner filed in the court of appeals a petition for review and a motion for a stay of removal. 22-60611 C.A. Docs. 1, 2.

3. In July 2021, while his first appeal to the Board was still pending, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Northern District of Texas. C.A. ROA 5-26. In his petition, petitioner contended that his detention under Section 1226(c) had become "unreasonably prolonged," in violation of the Due Process Clause of the Fifth Amendment, id. at 24, and that he was entitled to "immediate release or an individualized bond hearing," id. at 12.

The government opposed petitioner's habeas petition, arguing that his continued detention under Section 1226(c) was "reasonable" because his removal proceedings were still pending. C.A. ROA 84; see id. at 81-87. In February 2022, the district court denied the habeas petition "[b]ased upon the facts and the law set forth in" the government's opposition. Pet. App. 8.

On November 22, 2022, the court of appeals affirmed in an unpublished opinion. Pet. App. 4-7. The court observed that an "alien detained under Section 1226(c)(1) may be released only if the alien's release is necessary for witness-protection purposes"

under Section 1226(c)(2). Id. at 5. The court determined that “[b]ecause [petitioner] d[id] not meet the statutory requirements for release under Section 1226(c)(2), the district court did not err by denying [his] Section 2241 petition.” Ibid. Judge Dennis dissented, expressing the view that the majority had identified “no convincing argument” for “its summary rejection” of petitioner’s due process claim. Id. at 6. Construing the district court’s decision as “conclud[ing] that the Due Process Clause did not apply to [petitioner’s] detention at all,” Judge Dennis would have vacated and remanded for that court to “determine in the first instance whether [petitioner’s] prolonged detention violate[d] the Due Process Clause.” Id. at 7.

4. On November 29, 2022, the court of appeals denied petitioner’s motion for a stay of removal pending its disposition of his petition for review of the Board’s November 3, 2022 decision. 22-60611 C.A. Doc. 29-2. Petitioner filed a second motion for a stay of removal, which the court denied. 22-60611 C.A. Doc. 43-2 (Jan. 10, 2023).

On January 26, 2023 -- ten days after the date his petition for a writ of certiorari was filed, but before it was docketed -- petitioner filed a motion in the court of appeals to voluntarily dismiss his petition for review. 22-60611 C.A. Doc. 44. On February 15, 2023, the court of appeals granted the motion and dismissed his petition. 22-60611 C.A. Doc. 53-2. At the same time, the court denied petitioner’s motion to reconsider the second

stay denial as moot. Ibid. On that same day, DHS removed petitioner to Kenya. App., infra, 2a.⁵

ARGUMENT

Petitioner contends (Pet. 15-24) that his detention under 8 U.S.C. 1226(c) without a bond hearing while his removal proceedings were pending violated the Due Process Clause. But petitioner's challenge to his Section 1226(c) detention is now moot for two independent reasons. First, after the court of appeals issued its decision below, petitioner was removed from the United States, and he is no longer in DHS custody. Second, even if petitioner had not been removed, Section 1226(c) would no longer be the basis for his detention because his removal proceedings are no longer pending. In any event, this case would be a poor vehicle for this Court's review because the court of appeals did not squarely address petitioner's due process challenge to his Section 1226(c) detention. The petition for a writ of certiorari should be denied.

⁵ In October 2022, when his appeal of the February 2022 denial of his first Section 2241 petition was still pending in the court of appeals, petitioner filed a second Section 2241 petition in the United States District Court for the Northern District of Texas, challenging the constitutionality of his continued detention. 22-cv-2253 D. Ct. Doc. 3, at 1 (Oct. 6, 2022). In April 2023, the magistrate judge recommended that the second petition be denied as moot in light of petitioner's removal to Kenya. 22-cv-2253 D. Ct. Doc. 12, at 4 (Apr. 4, 2023); see 22-cv-2253 D. Ct. Doc. 11-1 (Feb. 27, 2023) (warrant of removal/deportation). In May 2023, the district court adopted the magistrate judge's recommendation and dismissed the petition as moot. 22-cv-2253 D. Ct. Doc. 13, at 1 (May 17, 2023).

1. "Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.'" Chafin v. Chafin, 568 U.S. 165, 171 (2013). "The 'case-or-controversy requirement subsists through all stages of federal judicial proceedings.'" Id. at 172 (citation omitted). "'It is not enough that a dispute was very much alive when suit was filed'; the parties must 'continue to have a "personal stake"' in the ultimate disposition of the lawsuit." Ibid. (brackets and citation omitted). "There is thus no case or controversy, and a suit becomes moot, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Ibid. (citation omitted).

Petitioner's challenge to his Section 1226(c) detention is now moot for two independent reasons. First, after the court of appeals issued its decision below, petitioner was removed from the United States to Kenya. App., infra, 2a. As a result, petitioner's detention has ended, and he is no longer in DHS custody. Accordingly, petitioner no longer has a concrete interest in the relief sought in his habeas petition -- namely, "immediate release or an individualized bond hearing." C.A. ROA 12.

Second, even if petitioner had not been removed, Section 1226(c) would no longer be the basis for his detention. Section 1226 governs detention "pending" removal proceedings, 8 U.S.C. 1226(a), and petitioner's removal order became "administratively final" on November 3, 2022, when the Board dismissed his appeal, 8 U.S.C. 1231(a)(1)(B)(i); see 8 U.S.C. 1101(a)(47)(B)(i); A.R.

2-4. At that point, petitioner's "removal period" began, 8 U.S.C. 1231(a)(1)(B)(i), and the basis for his detention shifted from Section 1226 to Section 1231, see 8 U.S.C. 1231(a)(2). Although the basis for his detention could have shifted back to Section 1226 if, for example, the court of appeals had granted his petition for review and remanded the case to the Board for further proceedings, that did not happen. Instead, petitioner moved to voluntarily dismiss his petition for review, see 22-60611 C.A. Doc. 44, and the court of appeals granted his motion on February 15, 2023, see 22-60611 C.A. Doc. 53-2. Because Section 1226(c) would no longer be the basis for petitioner's detention even if he had not been removed, his challenge to his Section 1226(c) detention no longer presents a live controversy.

2. In any event, this case would be a poor vehicle for this Court's review because the court of appeals did not squarely address petitioner's due process challenge to his Section 1226(c) detention. Although the court of appeals acknowledged petitioner's argument that "his continued detention without an individualized bond hearing violates his due process rights," the court upheld the denial of petitioner's habeas petition on the ground that petitioner "does not meet the statutory requirements for release under Section 1226(c)(2)," Pet. App. 5, and petitioner did not seek rehearing to ask the court to clarify the basis for its decision. Because the court did not squarely address petitioner's due process challenge, see Pet. 8 (stating that the court's deci-

sion "does not address the constitutional issue raised in the petition"), further review is not warranted, see Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view").⁶

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIAN M. BOYNTON
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Attorney General

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Attorneys

MAY 2023

⁶ Because the court of appeals did not squarely address petitioner's due process challenge, petitioner errs in asserting (Pet. 21) that the decision below conflicts with German Santos v. Warden Pike County Correctional Facility, 965 F.3d 203 (3d Cir. 2020), in which the court determined, after conducting a "highly fact-specific" inquiry under the Due Process Clause, that a particular noncitizen's Section 1226(c) detention without a bond hearing had become unreasonable. Id. at 210 (citation omitted); see id. at 212-213. Petitioner's reliance (Pet. 24) on Leslie v. Attorney General, 678 F.3d 265 (3d Cir. 2012), and Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003), is also misplaced. Those decisions -- which construed Section 1226(c) to authorize detention for only a "reasonable" amount of time, Leslie, 678 F.3d at 269 (citation omitted); Ly, 351 F.3d at 270 -- have been abrogated by this Court's decision in Jennings v. Rodriguez, 138 S. Ct. 830, 846-847 (2018), which rejected such an interpretation of the statute as impermissible.

APPENDIX

Warrant of removal/deportation (executed Feb. 15, 2023)1a

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

WARRANT OF REMOVAL/DEPORTATION

Subject ID: 368483610

File No: 098 061 746

Event No: DAL2006000512

Date: November 10, 2022

To any immigration officer of the United States Department of Homeland Security:

DAVID SONNY WEKESA

(Full name of alien)

who entered the United States at Unknown Place on August 17, 2001
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

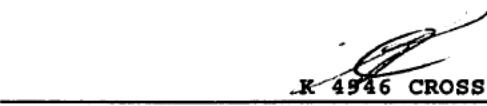
- an immigration judge in exclusion, deportation, or removal proceedings
- a designated official
- the Board of Immigration Appeals
- a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

237a1Ci, 237a1Ci, 237a2Ai, 237a1B

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

Salaries and Expenses, Department of Homeland Security 2022



K 4946 CROSS

(Signature of immigration officer)

SDDO

(Title of immigration officer)

November 10, 2022, Alvarado, TX

(Date and office location)

To be completed by immigration officer executing the warrant: Name of alien being removed:

DAVID SONNY WEKESA

Port, date, and manner of removal: JFK; 02/15/2023; Kenya Airways Flight #3



Photograph of alien removed



Right index fingerprint of alien removed

David.

(Signature of alien being fingerprinted)

McGILL A/MA DO

(Signature and title of immigration officer taking print)

Departure witnessed by: J. MARIA DO

(Signature and title of immigration officer)

If actual departure is not witnessed, fully identify source or means of verification of departure:

If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here.

Departure Verified by: J. MARIA DO

(Signature and title of immigration officer)