No.

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE
NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

CAROL WILLIAMS BLACK

KENNETH GENALO, DIRECTOR OF THE
NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

KEISY G.M.

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

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
JESSICA W. D'ARRIGO
JULIAN M. KURZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-3224

CAROL WILLIAMS BLACK,
Petitioner-Appellee,

–v.–

DIRECTOR THOMAS DECKER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ALEJANDRO MAYORKAS, SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, SHERIFF PAUL ARTETA, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ORANGE COUNTY, NEW YORK,
Respondents-Appellants.

No. 22-70

KEISY G.M.,
Petitioner-Appellant,

–v.–

THOMAS DECKER, NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MERRICK B. GARLAND, UNITED STATES ATTORNEY GENERAL, ALEJANDRO MAYORKAS,
Respondents-Appellees,

DAVID L. NEIL,
Defendant-Appellee.*

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Paul Arteta—the current Sheriff of Orange County—is automatically substituted in the caption for his predecessor in that office as a de-

---

August Term, 2022
Argued: Jan. 5, 2023
Decided: May 31, 2024

OPINION

Before: CHIN and CARNEY, *Circuit Judges*.†

These tandem appeals arise from habeas petitions brought under 28 U.S.C. § 2241 by legal permanent residents Carol Williams Black, in No. 20-3224 (Schofield, *J.*), and by Keisy G.M., in No. 22-70 (Cronan, *J.*). As directed by 8 U.S.C. § 1226(c), the government detained Black and G.M. pending their removal proceedings: Black, for seven months, and G.M., for twenty-one months. Neither had a bond hearing when first detained or during detention. Section 1226(c) mandates detention for noncitizens who are charged with removability based on certain prior convictions or on allegations of involvement with terrorism. As grounds for habeas relief, Black and Williams each asserted that the prolonged detentions without any bond hearing violated their Fifth Amendment due process rights. The district court adjudicating Black's petition granted relief,

---

fendant in No. 20-3224. We further grant G.M.'s unopposed motion to abbreviate his name as "Keisy G.M." in this opinion. The Clerk of Court is directed to amend the case caption to conform to the above.

† Circuit Judge Rosemary S. Pooler, originally a member of this panel, passed away on August 10, 2023. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b).

and he was released; the district court adjudicating G.M.'s petition denied relief. (He was later released for pandemic-related reasons.) Because each remains subject to possible detention, their appeals are not moot. On de novo review, we conclude that the constitutional guarantee of due process precludes a noncitizen's unreasonably prolonged detention under section 1226(c) without a bond hearing, and that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the proper framework for determining when and what additional procedural protections are due. In Black's case, we conclude that the district court properly required the government to show, at such a hearing, the necessity of his continued detention by clear and convincing evidence; it also correctly directed the IJ, in setting bond and establishing appropriate terms for potential release, to consider Black's ability to pay and alternative means of assuring appearance. We therefore affirm the district court's judgment granting habeas relief as to Black. As to G.M., we conclude that his detention had become unreasonably prolonged and accordingly reverse the district court's judgment denying habeas relief.

AFFIRMED, with respect to No. 20-3224, and REVERSED, with respect to No. 22-70.

CARNEY, *Circuit Judge*:

These tandem appeals arise from habeas petitions brought under 28 U.S.C. § 2241 by Carol Williams Black (in No. 20-3224) and by Keisy G.M. (in No. 22-70). Black and G.M. (together, "Petitioners") are two legal permanent residents ("LPRs") who were detained by the government for many months without a bond hearing under the authority of 8 U.S.C. § 1226(c), pending conclusion of their separate removal proceedings. Section 1226(c) directs that the government "shall detain" noncitizens who are charged with removability based on a prior conviction on specified criminal grounds or on allegations of involvement with terrorism. It makes no explicit provision for an initial or other bond hearing during the period of detention and places no limit on the duration of detention under its authority.

Black and Williams each sought habeas relief, asserting that the prolonged detentions by the government—Black, for seven months, and G.M., for twenty-one months—without any bond hearing violated their Fifth Amendment rights to due process. The district court adjudicating Black's petition granted him relief. *Black v. Decker*, No. 20-cv-3055 (LGS), 2020 WL 4260994, at *9-10 (S.D.N.Y. July 23, 2020). The district court adjudicating G.M.'s petition denied relief. *Keisy G.M. v. Decker*, No. 21-cv-4440 (JPC), 2021 WL 5567670, at *1-2, *13 (S.D.N.Y. Nov. 29, 2021).[1] The government appeals the district court's judgment granting Black's pe-

---

[1] G.M. was later released on grounds related to the COVID-19 public health emergency, by virtue of a nationwide injunction entered in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020). But the Ninth Circuit reversed the *Fraihat* order in October 2021. *Fraihat*, 16 F.4th 613, 647 (9th Cir. 2021). U.S. Immigration and Customs Enforcement ("ICE") is thus no longer barred by that injunction from detaining G.M., and section 1226(c), as we have noted, directs the detention of noncitizens in G.M.'s position. So far as our record reflects, ICE has not detained G.M. anew. Still, because ICE has not disclaimed its intent or the requirement to detain him, G.M. remains "threatened with[] an actual injury traceable to the [respondents] and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks omitted). Thus, G.M.'s appeal seeking a bond hearing continues to present a live controversy under Article III.

tition; G.M., for his part, appeals the district court's judgment denying his.

On de novo review, we conclude that a noncitizen's constitutional right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing. We further decide that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the proper framework for determining when and what additional procedural protections are due such a detainee. In Black's case, the district court properly required the government to show at such a bond hearing, by clear and convincing evidence, the necessity of his continued detention. It further correctly directed the immigration judge ("IJ"), in setting his bond and establishing appropriate terms for his potential release, to consider his ability to pay and alternative means of assuring appearance. As to Black, we therefore affirm the district court's judgment. As to G.M., we conclude that his detention had become unreasonably prolonged, and accordingly, we reverse.

BACKGROUND[2]

I. Factual and Procedural History

A. Carol Williams Black

Black is a native and citizen of Jamaica who was admitted to the United States as an LPR in 1983 at the age of twenty-one. He has lived here for the past forty years. Before his detention in 2019, he lived in Mount Vernon, New York, with his wife of almost ten years and

---

[2] This factual statement is drawn from the evidence presented below, including the administrative materials before the IJs adjudicating Black's and G.M.'s cases. Any disputes are noted.

his stepdaughter. He owned and ran a boat repair business and was the sole income provider for his family. He was able, after working for ten years, to buy the home that he had been living in since 2007.

On December 4, 2019, ICE served Black with a Notice to Appear ("NTA") and took him into custody. The NTA charged him as removable under 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony conviction), and *id.* § 1227(a)(2)(E)(i) (child abuse, neglect, or abandonment), based on New York state convictions dating from 2000, when a jury convicted Black of sexual abuse in the first degree, *see* N.Y. Penal Law § 130.65(3), and endangering the welfare of a child, *see id.* § 260.10(1). Black was sentenced to and served concurrently five years' probation for each crime, completing his term in 2005.

ICE further determined that this criminal history made Black subject to detention under section 1226(c).[3] *See* 8 U.S.C. § 1226(c)(1)(B). During Black's seven-month detention, before he won habeas relief and was released on August 4, 2020, he appeared at seven master calendar hearings. At his fourth master calendar hearing, on March 16, 2020, the IJ denied his request for a change in custody status, found him to be ineligible for cancellation of removal, and denied his request for bond (and for a bond hearing).[4] At his seventh master calen-

---

[3] The full text of section 1226(c) appears at note 9, *infra*.

[4] In his May 2020 written decision, the IJ explained that he "d[id] not need to address whether [Black] poses a danger to the community or if there is a risk of flight because [he] does not have jurisdiction to adjudicate the custody issue since [Black] is mandatorily detained under INA § 236(c)." Black App'x at 100 (citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and *Shanahan v. Lora*, 583 U.S. 1165 (2018)).

dar hearing, on June 8, 2020, the IJ adjourned proceedings to allow his counsel time to obtain documents supporting his then-pending application for asylum and withholding of removal. On June 20, 2023, the IJ ordered removal; Black's appeal to the BIA is currently pending.

In June 2020, Black filed an amended petition for habeas relief under 28 U.S.C. § 2241, contending primarily that his detention without a bond hearing, which by then had reached the six-month mark, violated due process. Applying a fact-specific multifactor test, the district court granted relief. *Black*, 2020 WL 4260994, at *7-9.[5] The court determined that the Constitution "entitled [Black] to an individualized bond hearing before an IJ" at which the government would bear the burden of "justify[ing] by clear and convincing evidence that [Black] poses a risk of flight or a danger to the community." *Id.* at *8-9. It required the IJ to consider Black's "ability to pay and the availability of alternative means of assuring his appearance" when setting a bond amount. *Id.* at *9. On remand, the IJ conducted the required hearing and ordered Black's release on a $15,000 bond.

---

[5] The court considered: (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) the petitioner's asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime underlying his removal; (5) whether the immigration detention facility is different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner's detention is near conclusion. *See Black*, 2020 WL 4260994, at *7-9.

B. Keisy G.M.[6]

G.M. was born in the Dominican Republic in 1988. In 2011, he entered the United States as an LPR, and has mostly lived in the Bronx since then. In 2012, he was involved in a fight outside a restaurant in New York City; it led to state charges against him for robbery and possession of stolen property. He was released on bail during the criminal proceedings. In May 2015, he pleaded guilty to second-degree assault in connection with that incident and was sentenced to two years' imprisonment followed by three years of supervised release. In December 2016, after being released early on parole, G.M. began living with his mother to assist with her medical needs.

Four years later, on October 5, 2020, ICE arrested G.M. at his home and served him with an NTA charging him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) based on his 2015 guilty plea. Characterizing the crime as an aggravated felony, ICE determined that section 1226(c) required that G.M. be detained, and placed him in the Hudson County Correctional Facility ("HCCF"). Over the next several months, G.M. appeared at seven master calendar hearings after numerous adjournments, delays occasioned in part by the need for his newly retained counsel to prepare his application for deferral of removal under the Convention Against

---

[6] G.M. moves to supplement the record on appeal with the BIA's December 2021 decision remanding his case to the IJ for consideration of his CAT deferral claims. The government similarly moves to supplement the record with (1) the IJ's June 2022 decision on remand, (2) a filing receipt of G.M.'s appeal to the BIA on July 5, 2022, and (3) documentation from DHS pertaining to G.M.'s release from custody. We grant both motions.

Torture ("CAT"). COVID-19 restrictions then in place at HCCF hampered preparation.

In March 2021, the IJ denied G.M.'s application for CAT deferral, but in December 2021, on appeal, the BIA remanded for further analysis of G.M.'s claims that he would likely be tortured if he was returned to the Dominican Republic. In June 2022, the IJ again denied CAT relief, and G.M. again appealed. Since then, both G.M. and the government have submitted further briefing to the BIA, but no decision has issued.

G.M. sought habeas relief in May 2021, after about seven months of detention, alleging that his continued detention without a bond hearing violated his due process rights. Using the same multifactor test that Judge Schofield applied in Black's case, the district court reached a different conclusion and in November 2021 denied G.M.'s petition. *G.M.*, 2021 WL 5567670, at *7-13. By that time, G.M. had been detained for thirteen months and twenty-four days.

In July 2022, G.M. was released under a nationwide injunction entered in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021).[7] He ultimately spent twenty-one months in detention, and never received a bond hearing.

II. The Government's Detention Authority Under 8 U.S.C. § 1226

Section 1226 of title 8 authorizes the government to detain a noncitizen "pending a decision on whether the

---

[7] As noted above, *supra* note 1, the Ninth Circuit has since vacated the nationwide injunction that allowed G.M.'s release, *Fraihat*, 16 F.4th at 647, but as of this writing ICE has not returned him to detention.

alien is to be removed from the United States." 8 U.S.C. § 1226(a); *see also Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018) ("Section 1226(a) generally governs the process of arresting and detaining . . . aliens pending their removal.").[8] As the Court instructed in *Jennings*, "[s]ection 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien" pending a removal decision, and "'may release' an alien detained under § 1226(a) 'on bond . . . or conditional parole.'" 583 U.S. at 288 (ellipses in original) (quoting 8 U.S.C. § 1226(a)).

Under section 1226(c), however, noncitizens who have committed one of certain listed offenses or who have been identified by the government as involved in terrorist activities are subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(A)-(D). As mentioned above, this subsection specifies that the "Attorney General *shall* take into custody" any such noncitizen. *Id.* (emphasis added).[9] It addresses and allows release in extremely

---

[8] This opinion uses "noncitizen" rather than "alien" to refer to a "person not a citizen or national of the United States." *See* 8 U.S.C. § 1101(a)(3) (defining "alien"). *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103-04 (2009) (using "undocumented immigrant" instead of "illegal"). In quoted text, however, we retain the language used by the writer.

[9] Section 1226(c)(1) provides in full:

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, limited circumstances: "only if the Attorney General decides . . . that release of the alien from custody is necessary for [witness protection purposes]." *Id.* § 1226(c)(1)-(2).

The Supreme Court has held that detention under section 1226(c) without an *initial* bond determination does not, on its face, violate the detainee's due process rights where detention is "for the limited period of . . . removal proceedings." *Demore v. Kim*, 538 U.S. 510, 531 (2003). In *Demore*, Hyung Joon Kim, an LPR who had been detained under section 1226(c) for six months, challenged the constitutionality of the statute, arguing that detention with "no determination that he posed either a danger to society or a flight risk" violated his due process rights. *Id.* at 514, 530-31. The Supreme Court disagreed. Finding that Congress was "justifiably concerned" that criminal noncitizens would "fail to appear for their removal hearings in large numbers," the Court held that Congress "may," consistent with due process restrictions on government power, "require that persons such as respondent be detained for

---

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c).

the brief period necessary for their removal proceedings" without an initial bond hearing. *Id.* at 513-14.[10]

The Supreme Court has also ruled that section 1226(c) itself authorizes prolonged detention. Indeed, it has construed the statute, together with section 1226(a), to provide that detention "*must* continue 'pending a decision on whether the alien is to be removed from the United States.'" *Jennings*, 583 U.S. at 303 (emphasis in original) (quoting 8 U.S.C. § 1226(a)). And the text of section 1226(c) does not require a bond hearing after some predetermined period of detention: in *Jennings*, the Court rejected the Ninth Circuit's reading of section 1226 to include a six-month cap as "implausible," and

[10] The U.S. Department of Justice's Executive Office for Immigration Review ("EOIR") reported as of October 2023 that a removal decision is completed in 94% of "detained cases" within six months of the start of detention. Exec. Off. for Immigr. Rev., Adjudication Statistics: Percentage of DHS-Detained Cases Completed Within Six Months 1 (Oct. 12, 2023), available at https://www.justice.gov/eoir/page/file/1163631/download [https://perma.cc/KBY8-Y8X2]. EOIR counts a "detained case" as "complete" upon "initial case completion." *Id.* at 1 n.1. It defines "initial case completion" as "the first dispositive decision rendered by an immigration judge," including "an order of removal, relief, voluntary departure, termination, or other." Exec. Off. for Immigr. Rev., Statistics Yearbook Fiscal Year 2018, at 6 (2019), available at https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/GEY2-99CC]. This statement suggests that when a noncitizen is ordered removed but appeals that order, the case still counts as "complete" for the purpose of this statistic, even though the noncitizen remains detained pending a final decision on appeal. These are the circumstances faced by Petitioners. In some cases, noncitizens have waited in detention for more than four years without a decision, and without an individual bond determination—despite the distinct possibility that the proceeding will not culminate in removal. *See Reid v. Donelan*, 17 F.4th 1, 8 n.7 (1st Cir. 2021).

warned that "there is no justification for" identifying such a time limit "without any arguable statutory foundation." *Id.* at 296-97, 311-12.

Read together, then, *Demore* and *Jennings* instruct that (1) due process does not require an *initial* bond determination for those detained under section 1226(c), and (2) section 1226's text cannot be construed to require a bond hearing after any particular fixed period of detention.

Critically, however, *Demore* and *Jennings* leave open the question whether prolonged detention under section 1226(c) without a bond hearing will *at some point* violate an individual detainee's due process rights. They also do not teach what procedures due process may require, and whether due process principles (as opposed to section 1226(c)'s terms) may properly be understood to call for a bright-line rule as to timing or in any other respect. Indeed, the Court—having reached a statutory decision —remanded *Jennings* to the Ninth Circuit for consideration of the constitutional arguments in the first instance. *Id.* at 312.[11] We now face the same questions.

DISCUSSION

We review de novo a district court's grant or denial of a habeas petition brought under 28 U.S.C. § 2241. *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020).

---

[11] Neither the Ninth Circuit nor the District Court for the Central District of California has yet ruled on the merits of the constitutional challenge. The most recent decision in the *Jennings* litigation is a remand from the Ninth Circuit instructing the district court "to follow . . . the Supreme Court's instructions in *Jennings*." *Rodriguez v. Barr*, No. 20-55770, 2021 WL 4871067, at *1 (9th Cir. Oct. 19, 2021).

Black and G.M. agree that the government may detain noncitizens under section 1226(c) without an initial bond determination and that section 1226(c) applies to them. Both argue that their prolonged detentions without a bond hearing violated their due process rights. They urge that precedent supports adoption of a bright-line rule requiring a bond hearing after a section 1226(c) detention passes the six-month mark.[12]

The government counters that, while in "an extraordinary case" a section 1226(c) detainee may have grounds to bring an as-applied constitutional challenge to the statute, neither Black's nor G.M.'s appeal presents such a case. Black Gov't Br. at 25-33; G.M. Gov't Br. at 31-36. Further, in the government's view, to impose a bright-line rule requiring bond hearings after six months' detention as a constitutional matter would conflict with *Jennings* and *DeMore*.

We consider, first, whether a noncitizen's right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing. Concluding that it does, we then address how a court is to determine whether a noncitizen's detention has become so prolonged that such rights are fairly placed at issue.

---

[12] G.M. frames his arguments under both the procedural and substantive due process rubrics, arguing that his detention under section 1226(c) runs afoul of the Supreme Court's general instruction that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Because the procedural and substantive due process inquiries overlap, and because—as G.M. acknowledges—any distinction between the resulting remedies would be "largely academic in this case," G.M. Reply Br. at 17-18 n.6, we do not separately address substantive due process concerns.

Finally, we address the procedures and standards applicable to Black's bond hearing.

I. A noncitizen's right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing.

The Supreme Court long ago held that the Fifth Amendment entitles noncitizens to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The Constitution establishes due process rights for "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Accordingly, and as the Supreme Court recognized in *Zadvydas*, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. In light of the constitutional concerns identified by the Supreme Court and this Court in connection with the Executive's detention of noncitizens, and the authorities discussed below, we conclude that due process bars the Executive from detaining such individuals for an unreasonably prolonged period under section 1226(c) without a bond hearing.

In *Zadvydas*, for example, the Court heard a noncitizen's challenge to prolonged detention under 8 U.S.C. § 1231(a)(6). *Id.* at 682, 684-85.[13] Recognizing that the proceedings at issue were "civil, not criminal," and therefore "nonpunitive in purpose and effect," it pointed

[13] Section 1231(a)(1)(A) allows the government ninety days to remove a noncitizen ("removal period") once a final removal order is issued. 8 U.S.C. § 1231(a)(1)(A). Section 1231(a)(6) authorizes detention beyond that removal period for certain categories of removable noncitizens, and places no explicit temporal limit on such a detention. *Id.* § 1231(a)(6).

out that the government offered "no sufficiently strong special justification here for indefinite civil detention." *Id.* at 690. In response to the government's proffered justification of "preventing danger to the community," the Court explained that "[i]n cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." *Id.* at 691 (emphasis in original). It ultimately avoided the constitutional challenge to section 1231(a)(6), however, by "constru[ing] the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682. Thus, it held that the "statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689.

Even in *Demore*, where the Court upheld the facial constitutionality of detention under section 1226(c) without a bond hearing, it did so while emphasizing the apparent brevity of detentions pending removal. 538 U.S. at 527-31. In concluding that such mandatory detention comported with substantive due process, the Court highlighted two key distinctions between section 1226(c) detention and section 1231(a)(6) detention, the detention authority at issue in *Zadvydas*.

First, it observed that the noncitizens in *Zadvydas*—having been ordered removed but still being detained in the United States—"were ones for whom removal was 'no longer practically attainable,'" depriving detention of "its purported immigration purpose" of facilitating removal. *Id.* at 527.

Second, the Court pointed out that "the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,'" while "the detention [in *Demore*] is of a much shorter duration." *Id.* at 528. It cited data presented by the government to the effect that, for 85% of section 1226(c) detainees, "removal proceedings are completed in an average time of 47 days and a median of 30 days," and that "[i]n the remaining 15% of cases, in which the alien appeals the decision . . . , appeal takes an average of four months, with a median time that is slightly shorter."[14] *Id.* The Court's emphasis on this "limited" period of detention strongly suggests a view that, while it found detention without an initial bond determination to be facially constitutional, "indefinite" and "potentially permanent" detention without a bond hearing would violate due process. *Id.* at 529-31.

More than a decade later, this Court applied *Zadvydas* and *Demore* to a challenge to prolonged detention under section 1226(c) without a bond hearing—the same type of challenge we now address. In *Lora v. Shanahan*, Alexander Lora was detained under section 1226(c) based on a drug-related conviction. 804 F.3d 601, 605 (2d Cir. 2015). After four months in detention, he sought habeas relief, challenging on due process grounds his continued detention without a bond hearing.

---

[14] It appears that in *Demore* the government incorrectly informed the Court and that "[d]etention normally lasts twice as long as the Government then said it did." *Jennings*, 583 U.S. at 343 (Breyer, *J.*, dissenting); *see also* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, Supreme Ct. of the U.S. at 1 (Aug. 26, 2016), available at https://on.wsj.com/2sUWIGk [https://perma.cc/U3KR-C56W] (letter "to correct and clarify statements the government made in its submissions in *Demore v. Kim* . . . which this Court relied upon in its opinion").

Id. This Court, heeding the *Demore* Court's "[e]mphas[is] [on] the relative brevity" of section 1226(c) detention "in most cases," read Supreme Court precedent as having "made clear that the indefinite detention of a non-citizen raises serious constitutional concerns." *Id.* at 604, 606 (internal quotation marks and alterations omitted). We avoided those concerns, however, and followed *Zadvydas* by reading into section 1226(c) "an implicit temporal limitation" requiring that detainees be afforded a bond hearing after six months. *Id.* at 606.

The Supreme Court's subsequent decision in *Jennings* invalidated *Lora*'s statutory approach. *See Shanahan v. Lora*, 583 U.S. 1165 (2018). But in doing so, the Court did not answer the question whether due process places *any* limits on the government's detention authority under section 1226(c).[15] The Court's reversal of our statutory holding in *Lora* did not resolve the constitutional concerns we expressed in that case.

Our post-*Jennings* decision in *Velasco Lopez v. Decker*, concerning the government's discretionary detention authority under section 1226(a), highlighted the gravity of these concerns.[16] Velasco Lopez was taken

[15] As already noted with respect to *Jennings*, *supra* note 11, neither this Court nor the Ninth Circuit has since had occasion to address the due process challenges that the Supreme Court left open in *Jennings* and *Lora*.

[16] Section 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and

into detention under section 1226(a). 978 F.3d at 846-47. Three and a half months later, he had an initial bond hearing, but bore the burden of proving that he was neither a flight risk nor dangerous. *Id.* at 847, 849 (citing *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006)). He had another bond hearing five months after the first, again unsuccessfully bearing the burden of proof. *Id.* at 847. After fourteen months in detention, he sought and was granted habeas relief. *Id.* at 847-48.

On appeal, we decided his petition on constitutional grounds. Recognizing the *Jennings* Court's admonition that section 1226(a) may not be read as implicitly imposing any specific procedural protections, *id.* at 851, we concluded that "Velasco Lopez's prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process," *id.* at 855. Notably, we rejected the government's contention that *Jennings* foreclosed all relief for Velasco Lopez, observing that the Court in *Jennings* had "expressly declined to reach the constitutional issues." *Id.* at 857.

> (2) may release the alien on—
>
> > (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> >
> > (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a).

Accepting the government's assertion that the Constitution "provides no basis for requiring bond hearings whenever the detention of a criminal noncitizen under § 1226(c)" exceeds any set duration, G.M. Gov't Br. at 31, we nonetheless read *Zadvydas*, *Demore*, *Jennings*, and *Velasco Lopez* to suggest strongly that due process places *some* limits on detention under section 1226(c) without a bond hearing. We cautioned accordingly in *Lora* (as mentioned above) that "serious constitutional concerns" would arise absent "some procedural safeguard in place for immigrants detained for months without a hearing." 804 F.3d at 614. The Constitution does not permit the Executive to detain a noncitizen for an unreasonably prolonged period under section 1226(c) without a bond hearing; at some point, additional procedural protections —like a bond hearing—become necessary.

II. We evaluate procedural due process challenges to prolonged section 1226(c) detention under the *Mathews* framework.

When do additional procedural protections become constitutionally necessary? We begin by surveying other courts' approaches to this question post-*Jennings*. We then conclude that the *Mathews* framework applies generally, and will govern in individual cases.

A. Courts' Approaches Post-*Jennings*

As described, neither the Supreme Court nor this Court has squarely decided a due process challenge to an individual's prolonged detention under section 1226(c). After *Jennings*, courts have taken a variety of approaches.

1. The S.D.N.Y. Approach

Courts in the Southern District of New York have used a multifactor, case-by-case analysis to determine whether the section 1226(c) petitioner's detention has become "unreasonable or unjustified." *E.g.*, *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018); *see also Jack v. Decker*, No. 21-cv-10958, 2022 WL 4085749, at *10 (S.D.N.Y. Aug. 19, 2022) (collecting cases taking this approach). In *Cabral*, Judge Koeltl highlighted that the *Jennings* court "left open the possibility that individual detentions without bond hearings might be so lengthy as to violate due process" and stressed the *Jennings* Court's emphasis on "the flexible nature of the Due Process Clause." 331 F. Supp. 3d at 260. Observing that courts in the district had taken a "case-by-case approach to petitions for bail hearings," and rejecting the argument that the Constitution mandates a hearing in every case at six months, he identified the factors that had been considered as follows:

(1) the length of time the petitioner has been detained;

(2) the party responsible for the delay;

(3) whether the petitioner has asserted defenses to removal;

(4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable;

(5) whether the detention facility is meaningfully different from a penal institution for criminal detention;

(6) the nature of the crimes committed by the petitioner; and

(7) whether the petitioner's detention is near conclusion.

Id. at 261 (spacing altered).

2. The Third Circuit Approach

Since *Jennings*, the Third Circuit is the only federal court of appeals to have squarely ruled on the questions posed here.[17] *See German Santos v. Warden Pike County Corr. Facility*, 965 F.3d 203 (3d Cir. 2020). There, petitioner German Santos was detained under section 1226(c) for over two-and-a-half years without a bond hearing, and sought habeas relief on due process grounds. *Id.* at 207-08.

Like the S.D.N.Y. courts, the Third Circuit "explicitly declined to adopt a presumption of reasonableness or unreasonableness of any duration." *Id.* at 211. Instead, it undertook a "highly fact-specific inquiry" that considered four factors: "the duration of detention,"

---

[17] In 2021, the First Circuit addressed the appeal of a class of section 1226(c) detainees who argued that "all persons detained under section 1226(c) have a constitutional right to a hearing concerning the reasonableness of their continued detention after they have been detained longer than six months." *Reid*, 17 F.4th at 7. In rejecting this contention, the *Reid* court acknowledged "that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention under section 1226(c)," *id.* (internal quotation marks and alterations omitted), but did not address when and under what circumstances additional procedural protections are due.

The Fifth Circuit, in an unpublished opinion, also rejected a noncitizen's constitutional challenge to his continued detention under section 1226(c). In doing so, it focused instead on the statutory text, which as discussed above allows release in only extremely limited circumstances. *Wekesa v. United States Att'y*, No. 22-10260, 2022 WL 17175818, at *1 (5th Cir. Nov. 22, 2022). One panel member wrote in dissent that he "would instead hold that Wekesa's prolonged detention without a bond hearing implicates due process protections and must be analyzed further." *Id.* at *2 (Dennis, *J.*, dissenting).

"whether the detention is likely to continue," "the reasons for the delay," and "whether the alien's conditions of confinement are meaningfully different from criminal punishment." *Id.* at 210-11 (internal quotation marks and alterations omitted). Applying these factors, the court concluded that German Santos's detention had become unreasonably long and ordered a bond hearing at which the government must justify continued detention by clear and convincing evidence. *Id.* at 212-14.

3. The Velasco Lopez *Approach*

Our October 2020 decision in *Velasco Lopez* bears on our determination here. As discussed, *Velasco Lopez* dealt with a Deferred Action for Childhood Arrivals recipient's challenge to his prolonged detention under the government's discretionary section 1226(a) authority. 978 F.3d at 847. We identified the "dispositive" issue there as "whether Velasco Lopez's ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Id.* at 851.

We held that the three-factor balancing test established in *Mathews*, 424 U.S. at 335, applied.[18] *See Velasco Lopez*, 978 F.3d at 851. The Supreme Court in *Mathews* identified three factors bearing on the constitutional need for procedural protections: (1) "the private interest that will be affected by the official action";

---

[18] In *Mathews*, the Supreme Court considered whether due process "requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." 424 U.S. at 323. It concluded that an evidentiary hearing was not required before termination of disability benefits and that the existing administrative procedures comported with due process. *Id.* at 349.

(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." *Mathews*, 424 U.S. at 335. Applying these factors to Velasco Lopez's section 1226(a) detention, we determined that the district court "appropriately addressed the [asserted due process] violation by ordering a new hearing at which the Government was called upon to justify continued detention." *Velasco Lopez*, 978 F.3d at 855.

B. The *Mathews* framework applies.

Here, we conclude that due process challenges to prolonged detention under section 1226(c) should also be reviewed under *Mathews*. Many courts have applied the *Mathews* factors, as we did in *Velasco Lopez*, to determine what process is due to noncitizens in removal proceedings. *Velasco Lopez*, 978 F.3d at 851; *see, e.g.*, *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203-07 (9th Cir. 2022) (collecting cases that applied *Mathews* to determine process due to section 1226(a) detainees, and then assuming without deciding that *Mathews* applied to petitioner); *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (applying *Mathews* to conclude that due process did not require additional procedural protections for section 1226(a) detainee); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27-28, 41 (1st Cir. 2021) (applying *Mathews* and concluding that government must prove that section 1226(a) detainee poses a danger to the community or a flight risk); *German Santos*, 965 F.3d at 213 (applying *Mathews* and concluding that at ordered bail hearing, government must show by clear and convincing evidence that section 1226(c) detainee should stay detained); *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 225 (3d Cir. 2018) (applying *Mathews* to identify due process requirements for noncitizen detained pursuant to ICE's section 1231 authority).[19]

The Supreme Court has also, in other contexts, applied *Mathews* to examine the adequacy of procedures provided to individuals in custody, including noncitizens legally present in the United States. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (applying *Mathews* to assess whether due process entitled enemy combatant to evidentiary hearing to contest the basis for his detention); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (observing that *Mathews* governs evaluation of noncitizen's claim that she was denied due process at her exclusion hearing); *Addington v. Texas*, 441 U.S. 418, 425-33 (1979) (observing that *Mathews* applies to assess

---

[19] The statutory holding in *Guerrero-Sanchez*—that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (i.e., 180 days) of custody," *Guerrero-Sanchez*, 905 F.3d at 226—was later abrogated by the Supreme Court in *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 576 (2022). *Arteaga-Martinez*, however, dealt only with whether the text of section 1231(a)(6) can be read to require, after six months of detention, a bond hearing at which the government bears the burden of proof. *See id.* It said nothing about the applicability of the *Mathews* framework to a *constitutional* challenge to prolonged detention under section 1231(a)(6), and the Court remanded the case for consideration of the constitutional claims in the first instance. *Id.* at 583. No further decisions in that litigation have been reported.

adequacy of procedural safeguards for people subject to civil commitment).[20]

As the Ninth Circuit put it, *Mathews* "remains a flexible test," and takes account of individual circumstances. *Rodriguez Diaz*, 53 F.4th at 1206. It allows for what might appear to be "conflicting outcomes." *Id.* Applying *Mathews* comports with the Supreme Court's guidance in *Jennings* that "'due process is flexible,' . . . and . . . 'calls for such procedural protections as the particular situation demands.'" 583 U.S. at 314 (alteration omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). And it can account for those concerns that the S.D.N.Y. and the Third Circuit have considered when deciding when detention has become unreasonably prolonged, and the detainee entitled to a bond hearing.

Thus, *Mathews* provides the proper framework to assess Black's and G.M.'s respective due process challenges.

The government offers three reasons not to apply the *Mathews* framework here. We find none persuasive. First, it contends that *Velasco Lopez* does not govern. It stresses that Velasco Lopez was detained under section 1226(a), rather than section 1226(c). Because he was already entitled to a bond hearing, the government asserts, his challenge focused not on the threshold need for a hearing but rather on whether the hearing procedures utilized were satisfactory. *See Velasco Lopez*, 978 F.3d at 851-54.

---

[20] *But see Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002) (stating, in due process challenge to sufficiency of property forfeiture notice, that "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

None of this suggests to us that *Mathews* should not apply to Petitioners' claims here. That *Velasco Lopez* dealt with section 1226(a) detention means only that the case is not directly binding here, not that its reasoning is irrelevant.[21] As to *Velasco Lopez*'s discussion of the differences between detention under section 1226(a) and under section 1226(c), that discussion followed the Court's determination that the *Mathews* framework governed the challenge. We discussed those differences, in fact, as part of our analysis of the first and second *Mathews* factors. *See id.* So that observation carries little persuasive weight.

Second, the government argues that *Demore* applies directly here and forecloses our application of *Mathews*. But we do not read *Demore* so broadly. *Demore* upheld the government's authority under section 1226(c) to detain noncitizens without an initial bond hearing "for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513, 531. It said nothing about whether due process may *eventually* require a hearing. If *Demore* had, in fact, foreclosed the due process challenge now before us, the *Jennings* Court would have had no reason to remand to the Ninth Circuit "to consider . . . in the first instance" the detainees' argument that "[a]bsent . . . a bond-hearing requirement, . . . [section 1226(c)] would violate the Due Process Clause of the Fifth Amendment." *Jennings*, 583 U.S. at 291, 312.

---

[21] And even so, the dispositive issue is the same: as remarked earlier, we phrased it as "whether Velasco Lopez's ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Velasco Lopez*, 978 F.3d at 851.

Third, the government posits that "the *Mathews* framework does not necessarily apply simply because a case involves a procedural due process claim." Black Gov't Reply Br. at 17-18. It seeks support in the observation that "the Supreme Court has not referred to the *Mathews* balancing test in any case involving a challenge to immigration detention—including *Demore*—since [*Landon*]," G.M. Gov't Br. at 27-28. Largely for the reasons already discussed, however, this contention, too, fails. *Demore* did not present a due process challenge of the sort we now address. And the absence of a *Mathews* reference in any immigration detention decision since *Landon* means little when, so far as we can see, the Court has not had any subsequent occasion to address such a constitutional challenge at all.[22] We agree with the government that not all procedural due process challenges require courts to apply the *Mathews* framework. *See Dusenbery*, 534 U.S. at 167-68. But the *Mathews* framework is apt for Petitioners' challenges.

As a final note, we find it troubling that the government offers no alternative framework for application here. Rather, it states only that "in an extraordinary case, a noncitizen detained under § 1226(c) may have grounds to bring an as-applied challenge asserting that his detention is unconstitutional," and then summarily concludes that Black's and G.M.'s appeals "present[] no such case." G.M. Gov't Br. at 31; *see also* Black Gov't Br. at 25. In our view, these appeals raise precisely such as-applied challenges, and are properly assessed under *Mathews*.

---

[22] *Demore* ruled on a due process challenge to the facial constitutionality of section 1226(c); *Zadvydas* and *Jennings* were decided on statutory grounds.

In adopting the flexible *Mathews* framework to assess, case by case, whether an individual's prolonged section 1226(c) detention violates due process, we also join the First and Third Circuits in rejecting a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention—in the context of a Congressional mandate, in the immigration context, to detain. *See Reid v. Donelan*, 17 F.4th 1, 7-9 (1st Cir. 2021); *German Santos*, 965 F.3d at 211. More broadly, we, too, "explicitly decline[] to adopt a presumption of reasonableness or unreasonableness of any duration" of detention. *German Santos*, 965 F.3d at 211.

Demore and *Zadvydas* imply, we agree, that any immigration detention exceeding six months without a bond hearing raises serious due process concerns.[23]

[23] Black argues that we should now simply adopt as law the constitutional analysis motivating our statutory ruling in *Lora* and hold that section 1226(c) detention beyond six months, without a bond hearing, per se violates a detainee's due process rights. G.M. argues similarly that, under *Lora*, a noncitizen's detention is likely to become unreasonable at the six-month mark. In *Lora*, we read into section 1226(c) "an implicit temporal limitation," "in order to avoid serious constitutional concerns." *See* 804 F.3d at 606. We read *Zadvydas* and *Demore* to "suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention." *Id.* at 615. *Zadvydas* was explicit that six months was a "presumptively reasonable period of detention" in the context of post-removal-period detention under section 1231(a)(6). 533 U.S. at 700-01. Much like our holding in *Lora*, the Supreme Court's statutory holding in *Zadvydas*, it explained, was motivated by constitutional concerns. *See id.* (describing Congress as "previously doubt[ing] the constitutionality of detention for more than six months"). Similarly, although the *Demore* Court upheld the facial constitutionality of Kim's prolonged detention without a bond determination under

We nevertheless conclude that the Supreme Court's pronouncements in this context do not support imposing a bright-line rule as a matter of constitutional law.

The Supreme Court's jurisprudence regarding the government's authority to detain removable noncitizens under 8 U.S.C. § 1231(a)(6), while not binding here, is instructive. In *Zadvydas*, the Supreme Court recognized a "presumptively reasonable period of detention" of "six months," and required that beyond this period, if "there is no significant likelihood of removal in the reasonably foreseeable future, the Government . . . respond with evidence sufficient to rebut that showing" to justify continued detention. 533 U.S. at 701. This was the closest the Court has come to adopting a bright-line rule.

And *Jennings*, while also decided on statutory grounds, similarly suggests that a bright-line rule would be inappropriate in the constitutional context. The Court's remand order cautioned that "[d]ue process . . . calls for such procedural protections *as the particular situation demands*." 583 U.S. at 314 (emphasis added) (internal quotation marks omitted).

Here, too, the flexible due process analysis counsels against establishing a bright-line rule. Instead, courts hearing due process challenges to prolonged section 1226(c) detention should apply the *Mathews* framework to determine, case by case, whether and when due pro-

section 1226(c), it also stated that such detention was authorized only for the "limited period of his removal proceedings." 538 U.S. at 531. Kim himself had already been detained for six months, but the length of his detention was not at issue—only "the constitutionality of § 1226(c) itself." *Id.* at 514, 530-31.

cess requires that a particular detained noncitizen receive a bond hearing.

III. Due process entitled Black and G.M. to individualized bond hearings to determine whether their continued detentions were justified.

Turning to Black's and G.M.'s claims, we evaluate their respective circumstances under the *Mathews* factors: (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." *Mathews*, 424 U.S. at 335.

A. <u>Their Private Interests</u>

In both cases, "the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851 (citing *Hamdi*, 542 U.S. at 529). As we have previously observed, "[c]ase after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). True, in *Velasco Lopez*, we contrasted section 1226(a) detention with section 1226(c) detention, observing that "[t]he deprivation that Velasco Lopez experienced was not the result of a criminal adjudication." *Id.* And Petitioners' detentions in some sense were "the result of a criminal adjudication," since a conviction was the premise for applying section 1226(c). But each had served his entire sentence. And their detentions did not arise from new or unpunished conduct.

Moreover, much like someone detained under section 1226(a), Black and G.M. had "no administrative mechanism by which [they] could have challenged [their] detention on the ground that it reached an unreasonable length." *Id.* at 852. In approving detention for the pendency of removal proceedings, *Demore* was careful to emphasize the relatively short duration of section 1226(c) detention, stressing data showing that detention under section 1226(c) lasts roughly a month and a half in 85% of cases, and four months where the noncitizen chooses to appeal. *See Demore*, 538 U.S. at 529. Both Petitioners here were detained for far longer, and their liberty interests more seriously infringed.

In addition, the private interests of both Petitioners were seriously affected by their prolonged detention. Black's seven-month-long detention led unsurprisingly to serious financial difficulties for his family. He was the sole income provider before his detention; he helped keep up their mortgage payments; and he cared for his wife as she experienced ongoing health issues. Similarly, G.M.'s family relied on him for financial support, and his mother counted on him for help in managing her medical conditions. G.M. is a father to three young children, two of whom were at his home when he was arrested by ICE. His third child was born while he was in ICE custody; when he filed his habeas petition, he had yet to meet her. G.M. also experienced his own health difficulties (in part leading to his *Fraihat* release), and his legal preparations were significantly delayed by COVID-19 restrictions at his detention facility. Many of these difficulties persisted throughout G.M.'s twenty-one-month detention—a detention that outstripped by two months his nineteen-month incarceration for the underlying assault.

For these reasons, we conclude that the first *Mathews* factor weighs heavily in favor of Black and G.M.

B. The Risk of an Erroneous Deprivation of Their Interests and the Probable Value of Additional Procedural Safeguards

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. It, too, weighs heavily in favor of Black and G.M. The only interest to be considered at this part of the *Mathews* analysis is that of the detained individuals—not the government. *See Hamdi*, 542 U.S. at 530. Here, the almost nonexistent procedural protections in place for section 1226(c) detainees markedly increased the risk of an erroneous deprivation of Petitioners' private liberty interests.

At the threshold, two general observations are in order with respect to section 1226(c) detention. First, the "procedures used" for section 1226(c) detainees are very few. *Mathews*, 424 U.S. at 355. They include no mechanism for a detainee's release, nor for individualized review of the need for detention. The only procedural protection in place is the *Joseph* hearing, at which noncitizens can contest whether they in fact committed a crime that makes them subject to mandatory detention. *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Even in the context of Velasco Lopez's section 1226(a) detention, where he received two bond hearings at which he bore the burden of proof, we concluded that "the procedures underpinning [his] lengthy incarceration markedly increased the risk of error." *Velasco Lopez*, 978 F.3d at 852. Section 1226(c) detainees receive even less procedural protection, and the risk of erroneous deprivation is correspondingly greater.

Further, as we remarked with concern in *Lora*, section 1226(c)'s broad reach means that many noncitizens are detained "who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation at such time as they are able to present them." 804 F.3d at 605. Section 1226(c) sweeps in people convicted of many nonviolent offenses, *see id.* at 616, and does not take into account when the prior crime was committed, suggesting that the prior conviction may well be a poor proxy for a finding of dangerousness.[24]

These concerns were vindicated in the years after we decided *Lora*: Before *Jennings* vacated *Lora* in 2018, data showed that 62% of section 1226(c) detainees given bond hearings under *Lora* were released, confirming the absence in many cases of a sound justification for detention.[25] Similarly, in the First Circuit, where the district court in *Reid v. Donelan* had ordered bond hearings for a class of section 1226(c) detainees, almost half

---

[24] As Justice Breyer once observed, section 1226(c) detainees "may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of 'moral turpitude' such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person." *Nielsen v. Preap*, 586 U.S. 392, 430 (2019) (Breyer, *J.*, dissenting).

[25] *See* Vera Inst. of Just., *Analysis of* Lora *Bond Data: New York Immigrant Family Unity Project (NYIFUP) October 28, 2015-July 31, 2016*, at 1 (2016), available at https://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf [https://perma.cc/7FEW-BBYR].

of those who had bond hearings were ordered released, having been found not to pose a danger or a flight risk. *See Reid*, 17 F.4th at 18 (Lipez, *J.*, dissenting).

It is in this context that we consider Black's and G.M.'s respective circumstances under the second *Mathews* factor.

In Black's case, no doubt remains that these minimal procedures led to an unwarranted detention. For the almost twenty years since his criminal conviction in March 2000, he led a peaceful life, helping to support his family. When he ultimately had the bond hearing ordered by the district court, he was released because the government could not justify his continued detention. As to Black, therefore, rather than worrying of a "risk" of erroneous deprivation, we can be virtually certain that his prolonged detention was unjustified.

In G.M.'s case, the record appears to show that for the four years after he completed his sentence (and while on bail pending the criminal proceedings), he led a lawful life. When, in 2014, G.M.'s roommate was murdered in front of G.M. and his family, G.M. assisted law enforcement with the investigation and eventually testified at the trial of the murderer. During his four post-release years of freedom, he maintained steady employment and helped to provide for his family. And since his *Fraihat* release, no further criminal issues involving him have been brought to this Court's attention. Taken together with the general concerns noted above, G.M.'s circumstances similarly suggest a high likelihood that he was subject to an erroneous deprivation of liberty as his section 1226(c) detention was prolonged.

In the absence of any meaningful initial procedural safeguards, it appears to us that almost *any* additional procedural safeguards at some point in the detention would add value. The most obvious of these—and that sought by Petitioners—would be an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight. As borne out by the bond hearings held under our decision in *Lora*, we expect that many detained noncitizens would be released after a bond hearing conducted to satisfy their due process protections.

We therefore conclude that the second *Mathews* factor, too, weighs heavily in favor of Black and G.M.

C. The Government's Interest

The third *Mathews* factor considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The government has identified two primary interests in support of unlimited mandatory detention: (1) ensuring the noncitizen's appearance at proceedings, and (2) protecting the community from noncitizens who have been involved in crimes that Congress has determined differentiate them from others. These interests are legitimate and their importance well-established. *See Demore*, 538 U.S. at 518-21, 527-28 (noting that section 1226(c) detention serves these dual purposes).

The government contends that these concerns persist unaltered until the noncitizen's removal proceedings are complete. But the additional procedural safeguards we would allow here under *Mathews* do nothing to undercut those interests. At any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger to the community, as IJs routinely do for other noncitizen detainees. *See, e.g.*, 8 U.S.C. § 1226(a). And while the government's legitimate interests justify a relatively short-term deprivation of liberty, *Demore*, 538 U.S. at 513, the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need.

Just as in *Velasco Lopez*, here, too, "the Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight." 978 F.3d at 854. To require that the Government justify continued detention "promotes the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.* Where the noncitizen poses no danger and is not a flight risk, all the government does in requiring detention is "separate[] families and remove[] from the community breadwinners, caregivers, parents, siblings and employees." *Id.* at 855; *see also Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (observing that "any amount of actual jail time . . . has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration" (internal quotation marks and alterations omitted)); *Mathews*, 424 U.S. at 347 (instructing that "the public interest" drives analysis of the third factor).

Both cases here illustrate this effect. Black was separated from his family, who relied on him as the sole income provider. G.M. lived peacefully with his mother, assisting with her medical needs while helping care for his two sons. By detaining them for many months without an individualized assessment, the government eliminated vital support for Petitioners' families and, potentially, served no public interest.

The government also argues that the "fiscal and administrative burdens" of additional bond hearings would strain the immigration adjudication system yet provide little additional value. But just as the "burdens" argument failed to convince us in *Velasco Lopez*, we are not convinced here. Certainly, having to do something instead of nothing imposes an administrative and fiscal burden of some kind. But the Department of Justice reported an average cost of detaining noncitizens, in 2019, of $88.19 per prisoner per day.[26] Other estimates have placed the cost as high as $134 per day. *See Velasco Lopez*, 978 F.3d at 854 n.11 (citing Dep't of Homeland Security, U.S. Immigration and Customs Enforcement Budget Overview 14 (2018)). So, retaining and housing detainees imposes substantial costs as well. And, as far as we can tell, ICE may readily access the records of other law enforcement agencies for information bearing on its case for detention where necessary. *See* 8 U.S.C. § 1229a(c)(3)(B) (listing the various types of records that the government may reference in proving a criminal conviction for removal proceedings); *Velasco Lopez*, 978 F.3d at 853, 855 (observing that the government has "computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities," and, for information not already at its

[26] Off. of Pub. Affairs, Dep't of Just., *Departments of Justice and Homeland Security Release Data on Incarcerated Aliens* (Oct. 16, 2020), available at https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-release-data-incarcerated-aliens [https://perma.cc/68NY-GDLM].

fingertips, "broad regulatory authority to obtain it"). We expect that the additional resources that the government will need to expend to justify continued detention at bond hearings will be minimal—and will likely be outweighed by costs saved by reducing unnecessary detention. The government has therefore not substantiated its administrative burden argument sufficiently for it to weigh much against Petitioners' liberty interests.

For these reasons, we conclude that this third factor, too, favors Petitioners.

* * *

Thus, applying the *Mathews* factors, we conclude that due process entitled Black and G.M. to individualized bond hearings by an IJ once their detentions became unreasonably prolonged.

IV. In the hearing it required for Black, the district court properly placed the burden on the government to justify Black's continued detention by clear and convincing evidence and directed the IJ to consider Black's ability to pay and alternatives to detention.

In Black's case, in addition to ordering a bond hearing, the district court held that "[t]he burden at the bond hearing is on the Government to justify by clear and convincing evidence that Petitioner poses a risk of flight or a danger to the community," and that "the IJ must . . . consider Petitioner's ability to pay and the availability of alternative means of assuring his appearance." *Black*, 2020 WL 4260994, at *9. The government challenges each of these rulings, and we now address them.[27]

---

[27] G.M., too, asks this Court to "clarify" on remand to the district court that the government bears the burden of justifying G.M.'s

In this, the *Mathews* factors again serve as our guide. Our analysis above of the first and third factors applies with equal force to these questions. We elaborate briefly on the second *Mathews* factor—the risk of erroneous deprivation and the probable value of additional procedural safeguards—in evaluating the specific procedures that will be required at Black's bond hearing, should one again be needed. *Mathews*, 424 U.S. at 335. We conclude that the district court properly directed the government to justify Black's continued detention by clear and convincing evidence and the IJ to consider both Black's ability to pay and any alternatives to detention.

A. <u>The district court properly determined that the government had to justify Black's continued detention by clear and convincing evidence.</u>

Where the government seeks to continue depriving a person of their liberty—especially when a district court has already found that deprivation to be unconstitutionally prolonged—we must require the government to bear the burden of proving the need for continued detention. Otherwise, "the risk of an erroneous deprivation" of a detainee's liberty interest would remain unac-

---

continued detention by clear and convincing evidence, and that the IJ must consider his ability to pay and alternatives to detention. G.M. Br. at 56-59. As the government correctly points out, however, because the district court in G.M.'s case denied him a bond hearing, it never reached the issue of what procedural requirements would follow. *See G.M.*, 2021 WL 5567670, at *13; G.M. Gov't Br. at 36-37. The district court should consider these issues in accordance with the principles outlined in this opinion.

ceptably high. *See Mathews*, 424 U.S. at 335.[28] In so concluding, we find persuasive the First Circuit's reasoning in the context of section 1226(a). *See Hernandez-Lara*, 10 F.4th at 30-32.

First, noncitizens—detained or not—are not entitled to counsel in removal proceedings. *See* 8 U.S.C. § 1362 (outlining the noncitizen's "privilege of being represented (at no expense to the Government)" in removal proceedings). According to a 2016 study by the American Immigration Council, only 14% of detained noncitizens are represented by counsel in their removal proceedings.[29] A significant factor in this alarmingly low rate is that noncitizens in such proceedings can be transferred to any ICE detention center, even one not located in the district of the alleged offense—take, for instance, G.M.'s overnight transfer, without notice, from HCCF (in New Jersey) to a county jail in Alabama.[30] Unsurprisingly, then, detained noncitizens often find themselves far from any community support that might help them to find representation. Similarly unsurprising is the finding that noncitizens represented at their bond

---

[28] A standard of proof "serves to allocate the risk of error between the litigants" and must reflect the "relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423.

[29] Ingrid Eagly & Steven Shafer, Am. Immig. Council, Access to Counsel in Immigration Court at 5 (Sept. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/AN9B-FMX9].

[30] *See* Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States, Hum. Rts. Watch (Dec. 2, 2009), available at https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states [https://perma.cc/4U7Z-NZ2A].

hearings are about four times more likely to be released on bond than those who are unrepresented.[31]

Second, as demonstrated by G.M.'s case, detained noncitizens may have a much harder time preparing their cases because of difficulties in communicating with counsel and gathering evidence. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting that detained noncitizens have difficulty locating witnesses and collecting evidence); *Velasco Lopez*, 978 F.3d at 852-53 (describing how Velasco Lopez was prevented from appearing in criminal proceedings while detained by ICE). Further, like G.M., most noncitizens appearing in immigration proceedings lack English proficiency and require an interpreter, making preparation of their cases more difficult while in detention—with or without a lawyer.[32]

Finally, as the First Circuit observed, "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern." *Hernandez-Lara*, 10 F.4th at 31 (citing *Elkins v. United States*, 364 U.S. 206, 218 (1960)). Requiring that detainees like Black prove that they are *not* a danger and *not* a flight risk—after the government has enjoyed a presumption that detention is necessary—presents too great a risk of

---

[31] Eagly & Shafer, *supra* note 29.

[32] Laura Abel, Brennan Ctr. for Just., Language Access in Immigration Courts 3 (2011), available at https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/SQJ6-KALL] ("[M]ore than 85% of people appearing before the Immigration Courts are [limited English proficiency]."); Dep't of Just., Language Access in Immigration Court, DM 23-02, at 1-2 (noting that "most noncitizens who appear in immigration courts require . . . interpretation").

an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged.

The government raises two arguments in opposition. First, it points to the provision in section 1226(c) allowing release of a detailed noncitizen for witness protection purposes only if the *noncitizen* "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). The government contends that, where the statute's text requires the noncitizen to bear the burden of persuasion in one circumstance, this Court cannot conclude in another that due process requires the government to bear the burden.

We read section 1226(c)(2), however, as having "nothing to do with bail." *Jennings*, 583 U.S. at 351 (Breyer, *J.*, dissenting). Rather, it concerns "a special program, the Witness Protection Program, set forth in 18 U.S.C. § 3521," in which the government would usually be required to detain the noncitizen based on a presumption of dangerousness and flight risk. Section 1226(c)(2) allows the Attorney General to "release" the noncitizen in this limited circumstance, potentially doing "far more" than granting bail: instead, it would be "freeing the witness from a host of obligations and restraints, including those many obligations and restraints that accompany bail." *Id.* Section 1226(c)(2) says nothing about who should bear the burden of proof at a bond hearing once detention has been deemed unconstitutionally prolonged. We will not assume that procedures governing "far more" than *discretionary* release for protected witnesses will meet the requirements for a *constitutionally required* bail proceeding.

The government's second argument is that, under BIA precedent, even those noncitizens discretionarily detained under section 1226(a) must demonstrate that they are not flight risks or dangers to the community before release. Black Gov't Br. at 36 (citing *Matter of Guerra*, 24 I. & N. Dec. at 40). The government suggests that our decision in *Velasco Lopez* means that the noncitizen, even when not subject to mandatory detention, has been allowed to shift the burden to the government only at second or third bond hearings—and not at the initial bond hearing. Accordingly, the government asserts, the noncitizen subject to mandatory detention must bear the burden at the first hearing.

We find this argument unpersuasive. It is rooted neither in the text of section 1226 nor in our reasoning in *Velasco Lopez*. Both sections 1226(a) and (c) aim to prevent flight and danger to the community. Once those detentions have been unconstitutionally prolonged, the due process analysis adopted in *Velasco Lopez* applies with equal force to both situations. Accepting the government's argument would lead to an asymmetrical, puzzling result: section 1226(a) detainees like Velasco Lopez, who had already received (and did not prevail at) an initial bond hearing, would at future bond hearings be entitled to shift the burden to the government to prove the need for continued detention; section 1226(c) detainees like Black, who never had a similar opportunity to show at an initial hearing that he should be released, would bear the burden of proof. Accordingly, we conclude that once detention under section 1226(c) has become so prolonged that due process warrants a bond hearing, as in Black's case, the government must justify continued detention at such a hearing.

As for what that justification could be, we again view *Velasco Lopez* as instructive, and we require only that the government justify continued detention by clear and convincing evidence. *See* 978 F.3d at 855-57. Where an individual's liberty is at stake, the Supreme Court has consistently used this evidentiary standard for continued detention. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126, 129-31 (2010) (instructing that under a federal statute permitting continued confinement of "mentally ill, sexually dangerous federal prisoner[s] beyond the date the prisoner would otherwise be released," the government must prove its claims by clear and convincing evidence); *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992) (requiring proof by clear and convincing evidence for involuntary civil commitment); *Salerno*, 481 U.S. at 751 (observing that pretrial detention is permitted when the government can justify its need by clear and convincing evidence). We see no reason here to deviate from this approach.

B. <u>The district court properly required the IJ to consider Black's ability to pay and alternatives to detention in setting a bond amount.</u>

The district court in Black's case also properly required the IJ to consider Black's ability to pay and alternatives to detention when setting any bond amount. Once again, we are guided principally by our *Mathews* analysis. The "risk of an erroneous deprivation" of the noncitizen's liberty if alternatives to detention and ability to pay are not considered at the ordered bond hearing is the focus of our concern. *See Mathews*, 424 U.S. at 335. Our analysis is informed by the government's legitimate interests in protecting the public and in ensuring that noncitizens appear for their removal proceedings, and by the caution that any detention incidental to such interests must "bear[] [a] reasonable relation to" those interests. *Zadvydas*, 533 U.S. at 690 (internal quotation marks omitted) (second alteration by *Zadvydas* Court) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

As an initial matter, a bond amount would be at issue only once the IJ has determined that the noncitizen does not pose a danger to the community. *See Carlson v. Landon*, 342 U.S. 524, 539-42 (1952) (finding no due process violation where there is cause to believe noncitizen's release would pose a safety risk); *Matter of Guerra*, 24 I. & N. Dec. at 38 ("An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings."). At that point, refusing to consider ability to pay and alternative means of assuring appearance creates a serious risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons. *Cf. Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that revocation of probation for failure to pay fines, without first considering ability to pay or alternatives to imprisonment, "would be contrary to the fundamental fairness required by the Fourteenth Amendment").[33]

The government resists, arguing that "the district court's unqualified requirement that the immigration judge consider alternatives to detention and Black's

---

[33] Like the Ninth Circuit, "we cannot understand why [the government] would ever refuse to consider financial circumstances . . . [n]or can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances." *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017).

ability to pay a bond improperly obligated the immigration judge to consider those factors notwithstanding a potential finding that Black . . . posed a danger to the community." Black Gov't Br. at 38-39. We do not read the district court's order in that way: it required only that "the IJ . . . consider Petitioner's ability to pay and the availability of alternative means of *assuring his appearance*." *Black*, 2020 WL 4260994, at *9 (emphasis added). The district court said nothing about considering ability to pay and alternative means of assuring appearance *despite* a finding that the noncitizen is a danger to the community. But to the extent the district court's order might be read as the government suggests, we stress that a showing of dangerousness by clear and convincing evidence would foreclose any possibility of bond. The IJ would then have no reason to consider financial circumstances or alternatives to detention.

The government next submits that ordering consideration of these factors interferes with the "'broad discretion'" to be afforded an IJ in determining a noncitizen's eligibility for release on bond. Black Gov't Br. at 39 (quoting *Matter of Guerra*, 24 I. & N. Dec. at 40). An IJ, it says, may consider financial circumstances and alternatives to detention, but has discretion to consider many different factors and "may choose to give greater weight to one factor over others, as long as the decision is reasonable." *Id.* (quoting *Matter of Guerra*, 24 I. & N. Dec. at 40). We agree, and we do not read the district court's order as saying otherwise. The IJ does indeed have broad discretion in setting terms and can exercise that discretion by considering a multitude of relevant factors. Requiring that two of those factors be alternatives to detention and the noncitizen's ability to pay does nothing to constrain its discretion: the IJ is free to give as much or as little weight to these factors as appropriate, as long as *some* weight is given, and "as long as the decision is reasonable." *Matter of Guerra*, 24 I. & N. Dec. at 40.

CONCLUSION

For the foregoing reasons, we conclude that the Fifth Amendment's guarantee of due process precludes a noncitizen's unreasonably prolonged detention under section 1226(c) without a bond hearing. We further decide that the *Mathews* framework applies when determining when and what additional procedural protections are due. In Black's case, the district court properly granted Black's petition, required a bond hearing be conducted, and further required the government to show at such a bond hearing, by clear and convincing evidence, the need for Black's continued detention. And it correctly directed the IJ conducting Black's bond hearing to consider his ability to pay and alternative means of assuring his appearance. In G.M.'s case, the district court erred by concluding that his prolonged detention comported with due process, denying his petition, and failing to order a hearing.

We therefore **AFFIRM** the judgment of the district court in No. 20-3224, and we **REVERSE** the judgment of the district court in No. 22-70.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

21 Civ. 4440 (JPC)

KEISY G.M.,
Petitioner,

-v-

THOMAS DECKER *et al.*,
Respondents.

Filed: Nov. 29, 2021

AMENDED[1] OPINION AND ORDER

JOHN P. CRONAN, United States District Judge:

Petitioner Keisy G.M.,[2] a native and citizen of the Dominican Republic who is in removal proceedings, has

---

[1] The Court filed the original Opinion and Order under seal on November 18, 2021 to permit the parties to file any proposed redactions. Dkt. 36. Petitioner requested redaction of one sentence of the original Opinion and Order, and the Government took no position on that request. Dkt. 37 at 1-2. Upon applying the principles set forth in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), the Court grants Petitioner's request. This Amended Opinion and Order reflects that redaction.

[2] Petitioner filed a request that the Court identify Petitioner only by his first name and last initials in its decision in accordance with

been detained by U.S. Immigration and Customs Enforcement ("ICE") since October 5, 2020. He brings this petition for a writ of habeas corpus against Respondents (the "Government") challenging his continued detention without a bond hearing and seeking his release unless the Government affords him a constitutionally adequate bond hearing.[3]

Petitioner's detention is statutorily mandated by 8 U.S.C. § 1226(c) on account of his prior commission of an aggravated felony. The compulsory detention language of section 1226(c), however, does not end the inquiry as to whether Petitioner should be afforded a bond hearing. Noncitizens in removal proceedings are entitled to constitutional due process protections. The question before this Court, thus, is whether Petitioner's detention without a bond hearing has amounted to a due process violation.

Initially, the Court rejects Petitioner's request for a bright line rule requiring a bond hearing after six months

---

the guidance on privacy concerns in immigration cases by the Committee on Court Administration and Case Management of the Judicial Conference of the United States. Dkt. 37 at 2, Exh. B. The Government also took no position on this request. *Id.* at 2. The Court grants Petitioner's request and has amended its original Opinion and Order accordingly.

[3] Respondent Thomas Decker is the Director of ICE's New York City Field Office. Respondent Alejandro Mayorkas is the Secretary of Homeland Security. Respondent Jean King is the former Acting Director of the Executive Office for Immigration Review ("EOIR"). And Respondent Merrick Garland is the Attorney General of the United States. Since the commencement of this action, David L. Neal replaced King as the Director of EOIR. Pursuant to Federal Rule of Civil Procedure 25(d), Neal is automatically substituted for King. The Clerk of the Court is respectfully directed to update the caption accordingly.

of immigration detention, and instead joins many other courts to hold that an individualized inquiry must be conducted into the specific circumstances of the detention. Without question, Petitioner has been detained without a bond hearing for a lengthy period, and under conditions tantamount to criminal incarceration. But the fact-specific inquiry that this Court must undertake requires it to look beyond the length and conditions of Petitioner's detention, and ask whether the Government has unreasonably delayed Petitioner's detention such that it no longer serves a valid purpose. Under the facts presented here, the Government has not.

As discussed more fully below, the first approximately five-and-one-half months of Petitioner's detention occurred during proceedings before the immigration judge ("IJ"), with most of the delay attributable to adjournments sought by Petitioner himself. At a March 18, 2021 merits hearing on Petitioner's application for relief from removal, the IJ denied that relief and ordered Petitioner removed to the Dominican Republic, a decision that remains the lone adjudication on Petitioner's status. Four weeks after that adverse decision, Petitioner appealed to the Board of Immigration Appeals ("BIA"), and, after the BIA set a briefing schedule, Petitioner requested and obtained a briefing extension. That appeal is now fully briefed, pending before the BIA, and, as of the date of this Opinion and Order, moving at an appropriate pace. In sum, at all points, ICE or the immigration court has acted swiftly to move Petitioner's case along, and a decision from the BIA appears to be forthcoming.

To be sure, there may be circumstances where the continued detention of a noncitizen, even one previously convicted of an offense requiring detention under section 1226(c), may run afoul of due process. This case is not one of them, at least not at this point. The Petition is therefore denied.

I. Background

A. Factual Background

Petitioner has resided in the United States since his arrival from the Dominican Republic in 2011 as a lawful permanent resident. Dkt. 10 ("Petition") ¶ 15. Several of Petitioner's family members also live in the United States, including his mother, two sisters, and his three U.S. citizen children. *Id.* ¶¶ 16, 18. According to Petitioner, prior to his arrest by ICE, he worked full-time for a medical linens company and lived with and cared for his mother, who suffers from "diabetes, hypertension, and vertigo." *Id.* ¶¶ 18-19.

On June 6, 2012, Petitioner was arrested in the Bronx for stealing a phone and attacking someone with a belt. Dkt. 23 ("Gov't Return"), Exh. 3; Dkt. 15 ("Barrett Declaration")[4] ¶ 5. Following that arrest, Petitioner and his two co-defendants were charged in a twelve-count indictment with robbery in the first, second, and third degrees; assault in the second and third degrees; grand larceny in the fourth degree; menacing in the second degree; criminal possession of a weapon in the fourth degree; criminal possession of stolen property in the fifth degree; and petit larceny. Gov't Return, Exh. 3; Dkt.

---

[4] The Barrett Declaration was submitted by Morganne Barrett, a staff attorney for the New York Immigrant Family Unity Project of The Legal Aid Society who has been lead counsel for Petitioner in his removal proceedings. Barrett Declaration ¶ 1.

24 ("Crow Declaration")[5] ¶ 6. Petitioner later pleaded guilty on May 6, 2015 in New York Supreme Court, Bronx County, to one count of second degree assault. Gov't Return, Exh. 4; Crow Declaration ¶ 7. On February 17, 2016, Petitioner was sentenced to two years of imprisonment, followed by three years of post-release parole supervision.[6] Gov't Return, Exh. 4. Petitioner was released five months early due to good behavior after serving one year and seven months in prison. Gov't Return, Exh. 2 at 7; Barrett Declaration ¶ 7. He completed his sentence upon his discharge from parole on December 20, 2019. Gov't Return, Exh. 2 at 7; Barrett Declaration, Exh. E.

In 2014, while on bail following his June 2012 arrest, Petitioner contends that he witnessed his roommate's murder and that the killer then attempted to target Petitioner, his pregnant partner, and his partner's three-year-old son. Petition ¶ 21; Barrett Declaration ¶ 6. Petitioner maintains that he cooperated with law enforcement by providing testimony against the culprit. *Id.* According to Petitioner, witnessing the murder caused him to suffer from post-traumatic stress disorder, including "intrusive memories and persistent nightmares about his family, including his young children, being killed at their home." Petition ¶ 20. **[REDACTED]**

---

[5] The Crow Declaration was submitted by Sean P. Crow, a Deportation Officer at ICE who reviewed Petitioner's administrative file and ICE records. Crow Declaration ¶¶ 1-2.

[6] The Appellate Division, First Department, affirmed Petitioner's conviction on October 24, 2019. *See People v. Keisy G.M.*, 108 N.Y.S.3d 855 (App. Div. 2019). On December 24, 2019, the New York Court of Appeals denied leave to appeal. *See People v. Keisy G.M.*, 34 N.Y.3d 1078 (2019).

On October 5, 2020, ICE officers arrested Petitioner. Petition ¶ 27. ICE then initiated removal proceedings, charging Petitioner in a Notice to Appear as removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), based on his conviction of an "aggravated felony," *i.e.*, his February 17, 2016 conviction for second degree assault. Gov't Return, Exh. 6 at 1; Petition ¶ 28; Crow Declaration ¶ 11. Based on ICE's determination that Petitioner was subject to mandatory detention under 8 U.S.C. § 1226(c), he was detained pending a final administrative determination of his case. Gov't Return, Exh. 7.[7] Petitioner first appeared in immigration court on October 13, 2020, eight days after his arrest. Crow Declaration ¶ 14. What followed in immigration court was a series of adjournments, all at the request of Petitioner or his counsel, ultimately culminating in the IJ's denial of relief from removal approximately five months later.

At the first hearing on October 13, 2020, the IJ granted Petitioner's adjournment request to allow him the opportunity to retain counsel and scheduled the next hearing for November 2, 2020. *Id.* Petitioner appeared for the November 2, 2020 hearing with *pro bono* counsel

---

[7] The "Notice of Custody Determination" form advising Petitioner of this detention determination indicates that he refused to sign the form. Gov't Return, Exh. 7. Petitioner therefore did not indicate on the form whether he requested a hearing to review ICE's custody determination pursuant to *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999). *Id.* at 2. "At [a *Joseph*] hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that [ICE] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore v. Kim*, 538 U.S. 510, 514 n.3 (citing 8 C.F.R. § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 1999 WL 339053).

from The Legal Aid Society, who requested an adjournment to prepare Petitioner's case. Barrett Declaration ¶ 14; Crow Declaration ¶ 15. The IJ granted that request and set Petitioner's next hearing for November 24, 2020. Crow Declaration ¶ 15. At the November 24, 2020 hearing, Petitioner's counsel requested another adjournment, this time to allow her to file a motion to terminate Petitioner's removal proceedings. *Id.* ¶ 16. Petitioner's counsel explained that the anticipated motion would argue that ICE had not met its burden of establishing, by clear and convincing evidence, that Petitioner was an admitted alien subject to removal. *Id.* ICE's counsel argued ICE's opposition to that motion at the November 24, 2020 hearing. *Id.* ¶ 17. The IJ directed Petitioner's counsel to file any motion to terminate by November 30, 2020, and scheduled Petitioner's next hearing for December 15, 2020. *Id.* ¶ 16.

On November 30, 2020, Petitioner's counsel filed that motion to terminate, which the IJ denied in a seven-page written decision ten days later on December 10, 2020. *Id.* ¶ 17; Gov't Return, Exh. 8. At the next scheduled hearing on December 15, 2020, the IJ granted Petitioner's request for an adjournment to review the IJ's decision denying termination and scheduled another hearing for a week later. Barrett Declaration ¶ 14; Crow Declaration ¶ 18. On December 22, 2020, the IJ sustained the charges in the Notice to Appear and adjourned the case to allow Petitioner's counsel to file an application for deferral of removal under the Convention Against Torture ("CAT"). Barrett Declaration ¶ 14; Crow Declaration ¶ 19. The IJ scheduled Petitioner's next hearing for January 12, 2021. Crow Declaration ¶ 19.

On January 11, 2021, Petitioner filed an Application for Asylum and for Withholding of Removal, including protection under CAT. *Id.* ¶ 20; Petition ¶ 29. At the January 12, 2021 hearing, Petitioner's counsel asked for a four-to-five-week adjournment to prepare the case, which ICE opposed. Crow Declaration ¶ 20. Instead of granting the full adjournment sought by Petitioner's counsel, the IJ adjourned the hearing for three weeks and set the next hearing for February 4, 2021. *Id.* On February 4, 2021, the IJ designated the Dominican Republic as Petitioner's country of removal, in the event removal was ordered, and scheduled a merits hearing on Petitioner's application for relief from removal for March 5, 2021. *Id.* ¶ 21.

On February 25, 2021, however, Petitioner's counsel requested an adjournment of the March 5, 2021 merits hearing, citing COVID-related restrictions at the Hudson County Correctional Facility that complicated her ability to finalize Petitioner's submissions and adequately prepare Petitioner for his testimony. *Id.* ¶ 23; Petition ¶¶ 30-31. The IJ granted Petitioner's request for a continuance and rescheduled the merits hearing for March 18, 2021. Crow Declaration ¶ 23. At the March 18, 2021 hearing, the IJ considered the evidence submitted by Petitioner, including testimony from his mother and two experts, and issued an oral decision denying Petitioner relief and ordering his removal to the Dominican Republic. *Id.* ¶ 24.[8]

---

[8] In addition, at various points, ICE has conducted custody determination reviews for Petitioner that examined COVID-19 risk factors. On February 19, 2021, Petitioner requested such a review, which ICE conducted the same day and determined that he would remain in ICE custody. Crow Declaration ¶ 22; Barrett Declara-

Petitioner appealed the IJ's decision to the BIA on April 15, 2021 and opening briefs were due on June 11, 2021. *Id.* Petitioner's counsel, however, requested an adjournment of that deadline, which the BIA granted and set a new briefing deadline of July 2, 2021. *Id.* At oral argument in this case on November 2, 2021, the Government reported that Petitioner's BIA appeal is now fully briefed and that the Government expects a decision shortly. Nov. 2, 2021 Tr. at 19. In addition, Petitioner's counsel advised that, on August 27, 2021, Petitioner filed a motion to remand before the BIA, which the Government opposed on September 2, 2021. *Id.* at 4. That motion to remand also is pending before the BIA. *Id.*

On April 8, 2021, one week before filing his appeal to the BIA, Petitioner filed a petition for U nonimmigrant status ("U Visa") based on being a victim of attempted murder and his subsequent cooperation with law en-

---

tion ¶ 21. Petitioner again requested that ICE review his custody in light of COVID-19 on or about March 31, 2021, which ICE once again did on the same day and determined that Petitioner would remain in ICE custody. Crow Declaration ¶ 25. And then, on April 26, 2021, Petitioner asked for ICE to again review his custody in light of COVID-19, and yet again ICE conducted that review on the same day and determined that he would remain in ICE custody. *Id.* ¶ 27. Furthermore, on or about March 30, 2021, Petitioner's counsel requested that ICE review Petitioner's custody under ICE's interim guidance regarding civil immigration and removal enforcement. *Id.* ¶ 26. Petitioner's counsel received notice from ICE on April 2, 2021 that ICE had reviewed Petitioner's custody under that interim guidance and determined that he would remain in ICE custody. Barrett Declaration ¶ 25. On April 8, 2021, Petitioner's counsel submitted another request to ICE for Petitioner's release under that interim guidance. *Id.* ¶ 26. In a letter sent via email on or about April 12, 2021, ICE informed Petitioner's counsel that ICE had reviewed Petitioner's custody under the interim guidance and determined that he would remain in ICE custody. *Id*; Crow Declaration ¶ 26.

forcement. Petition ¶ 35; Barrett Decl. ¶ 15. A noncitizen is eligible for a U Visa if he or she (1) "has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity," (2) "possesses credible and reliable information" regarding the criminal activity upon which the petition is based, and (3) "has been helpful, is being helpful, or is likely to be helpful" to law enforcement in investigating or prosecuting the criminal activity. 8 C.F.R. § 214.14(b). The United States Citizenship and Immigration Services ("USCIS") has exclusive jurisdiction over all petitions for U Visas, *id.* § 214.14(c), and the U Visa program has a statutory cap of 10,000 principal visas, known as "U-1 Visas," per year, *id.* § 214.14(d).

In 2020, the median processing time for a U Visa application was 54.3 months—roughly 4.5 years. *Historical National Median Processing Time (in Months) for all USCIS Offices for Select Forms by Fiscal Year*, egov.uscis.gov/processing-times/historic-pt (last visited Nov. 29, 2021). If the cap is reached before USCIS has adjudicated all of the U Visa petitions for a given year, USCIS creates a waiting list for eligible petitioners. 8 C.F.R. § 214.14(d)(2). In the following year, USCIS will issue a number of visas to eligible petitioners on the waiting list, giving priority to the oldest petitions. *Id.* Although ICE may, in its discretion, move to terminate or stay removal proceedings with an immigration judge or the BIA while USCIS adjudicates an individual's U Visa, *see id.* § 214.14(c)(1)(i), a pending U Visa petition does not constitute a defense to removal, *see Revision of Stay of Removal Request Reviews for U Visa Petitioners*, ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners (last visited Nov. 29, 2021) ("The U visa regulations do not prevent pending U visa petitioners from being removed."). However, "[i]f removed, USCIS will continue to adjudicate the U visa petition." *Id.*; *see* Nov. 2, 2021 Tr. at 23 (Government confirming that USCIS would continue to review Petitioner's U Visa application if he were removed).

B. Procedural History

On May 18, 2021, Petitioner petitioned for a writ of habeas corpus challenging his ongoing detention without a bond hearing under section 1226(c). *See* Dkt. 1.[9] On June 3, 2021, Petitioner filed an amended petition, *i.e.*, the Petition. Petitioner seeks a writ ordering his release unless the Government provides him with a constitutionally sufficient bond hearing at which the Government must justify his continued detention by clear and convincing evidence and at which the immigration judge considers alternatives to detention. On June 22, 2021, the Government opposed the Petition on the grounds that Petitioner's detention during his ongoing removal proceedings does not violate his due process rights and that, in the event Petitioner is granted a bond hearing, Petitioner is not entitled to additional procedural safeguards. *See* Dkt. 25.

---

[9] On May 18, 2020, ICE transported Petitioner from the Hudson County Correctional Facility in Kearny, New Jersey to ICE's New York Field Office at 26 Federal Plaza in Manhattan, where he was detained for approximately six hours before being transported to the Lasalle ICE Processing Center in Jean, Louisiana. Barrett Declaration ¶¶ 40-42; Crow Declaration ¶ 28. Petitioner initiated this habeas proceeding while he was physically detained at ICE's New York Field Office and therefore while he was in this District. Petition ¶ 13; Barrett Declaration ¶¶ 36, 41. Venue is thus proper. *See Singh v. Decker*, No. 20 Civ. 9089 (JPC), 2021 WL 23328, at *3 (S.D.N.Y. Jan. 4, 2021).

II. Discussion

A. Jurisdiction over Habeas Petitions

Federal district courts may "grant a writ of habeas corpus whenever a petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003) (quoting 28 U.S.C. § 2241(c)(3)); *see also Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (holding that section 2241 grants federal courts the authority to answer "whether the detention in question exceeds a period reasonably necessary to secure removal"). "[T]he Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful, temporary, or permanent." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (citing *Zadvydas*, 533 U.S. at 693). Habeas review thus extends to "claims by non-citizens challenging the constitutionality of their detention." *Hernandez v. Decker*, No. 18 Civ. 5026 (ALC), 2018 WL 3579108, at *3 (S.D.N.Y. July 25, 2018) (citing *Demore*, 538 U.S. at 516-17); *see Demore*, 538 U.S. at 517 ("Section 1226(e) contains no explicit provision barring habeas review.").

B. Mandatory Detention Pursuant to Section 1226(c)

The Immigration and Nationality Act provides for the apprehension and detention of noncitizens pending removal proceedings. Section 1226(a) affords the Attorney General discretion to detain noncitizens or release them with conditions pending a removal decision, "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(a). Section 1226(c), in turn, "carves out a statutory category of aliens who may *not* be released under § 1226(a)," including those deportable for having committed an aggravated felony. *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018); *see* 8 U.S.C. § 1226(c)(1)(B). The parties do not dispute that Petitioner's February 17, 2016 conviction for second degree assault is an "aggravated felony" for purposes of the INA. *See* Nov. 2, 2021 Tr. at 6.[10]

In its 2003 decision in *Demore*, the Supreme Court upheld the facial constitutionality of mandatory detention under section 1226(c), holding that the Government may detain a noncitizen for the brief period necessary for removal proceedings. 538 U.S. at 513 ("Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."). Justice Kennedy, concurring, agreed that a bond hearing was not required under the circumstances presented in *Demore*, but wrote that a lawful permanent resident in removal proceedings "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532-33 (Kennedy, J., concurring); *see Zadvydas*, 533 U.S. at 690 (observing that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Fifth Amendment's Due Process Clause).

Until a few years ago, the law in this Circuit was that "an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention" to avoid con-

[10] Section 1226(c)(2) provides for a narrow exception to mandatory detention for witness protection purposes and if "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2).

stitutional concerns raised by indefinite detention. *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). The Second Circuit in *Lora* followed the Supreme Court's decisions in *Demore* and *Zadvydas* to hold that "in order to avoid significant constitutional concerns surrounding the application of section 1226(c), it must be read to contain an implicit temporal limitation." *Id.* at 606.

In 2018, the Supreme Court in *Jennings* rejected this statutory construction, holding that section 1226(c) "does not on its face limit the length of the detention it authorizes" and, to the contrary, "the statute expressly and unequivocally imposes an affirmative *prohibition* on releasing detained aliens under any other conditions." 138 S. Ct. at 846-47. The majority's opinion in *Jennings* addressed the limitations of detention as a statutory matter but declined to reach the constitutional issues. *See id.* at 851 ("Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. . . . Instead, we remand the case to the Court of Appeals to consider them in the first instance."); *see also Cabral v. Decker*, 331 F. Supp. 3d 255, 260 (S.D.N.Y. 2018) ("The *Jennings* decision left open the possibility that individual detentions without bond hearings might be so lengthy as to violate due process."). The Supreme Court vacated and remanded *Lora* in light of its decision in *Jennings*.[11]

[11] The Second Circuit did not have an opportunity to consider the issues raised by the Supreme Court on the *Lora* remand because, during the pendency of the appeal, the petitioner received cancellation of removal, rendering the case moot. *Lora v. Shanahan*, 719 F. App'x 79, 80 (2d Cir. 2018).

See Shanahan v. Lora, 138 S. Ct. 1260 (2018). Accordingly, the six-month bright line established in *Lora* no longer controls.

Since *Jennings*, neither the Supreme Court nor the Second Circuit has resolved whether a noncitizen detained pursuant to section 1226(c) may be entitled to a bond hearing under the Constitution. But several lower court decisions in this District post-*Jennings* have addressed this issue and concluded that noncitizens subject to mandatory detention under section 1226(c) are entitled to an individualized determination as to their risk of flight and dangerousness when their continued detention becomes unreasonable and unjustified such that it violates due process. *See, e.g.*, *Sajous v. Decker*, No. 18 Civ. 2447 (AJN), 2018 WL 2357266, at *8-11 (S.D.N.Y. May 23, 2018); *id.* at *10 ("[W]hether mandatory detention under § 1226(c) has become unreasonable, and thus a due process violation, must be decided using an as-applied, fact-based analysis." (internal quotation marks and citations omitted)).

C. The Court Declines to Impose a Bright Line Six-Month Rule

The Court begins with, and rejects, Petitioner's urging that the Court adopt a "bright line rule," whereby a due process violation automatically occurs if a noncitizen is detained in ICE custody for six months without a bond hearing. Petition ¶¶ 82-83. In *Demore*, the Supreme Court recognized that due process does not require a bond hearing solely because detention under section 1226(c) lasts beyond six months. There, the Court upheld the constitutionality of the noncitizen's mandatory detention even though the noncitizen already had spent six months in immigration custody, holding that "[d]etention during removal proceedings is a constitutionally permissible part of that process." 538 U.S. at 531. And while not reaching the constitutional issue, the *Jennings* Court explained that "due process is flexible" and "calls for such procedural protections as the particular situation demands." 138 S. Ct. at 852.

Several circuit and district courts have similarly concluded that the determination of whether detention pursuant to section 1226(c) violates due process is not amenable to a bright line rule. *See, e.g.*, *Reid v. Donelan*, Nos. 19-1787, 19-1900, 2021 WL 4958251, at *5 (1st Cir. Oct. 6, 2021) (affirming the district court's decision that "six months of detention did not on its own necessarily trigger a constitutional right to a reasonableness hearing or bond hearing for a person already convicted of a crime that triggers detention under section 1226(c), and that any such relief must be adjudicated on an individual basis"); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020) (declining "to adopt a presumption of reasonableness or unreasonableness of any duration" because "[r]easonableness is a 'highly fact-specific' inquiry"); *Vazquez Perez v. Decker*, No. 18 Civ. 10683 (AJN), 2020 WL 7028637, at *16 (S.D.N.Y. Nov. 30, 2020) ("There is no bright-line rule to determine at what point detention has become sufficiently prolonged as to violate substantive due process principles" because "[r]easonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case."); *Cabral*, 331 F. Supp. 3d at 260 (refusing to adopt a six-month rule, explaining that "it would be inconsistent with the discussion of due process in *Jennings* to find a due process requirement of an automatic bond hearing after a detention of six months"); *Sajous*, 2018 WL

2357266, at *9 ("[T]he Court cannot conclude . . . that the Constitution would deem any detention beyond six months per se unconstitutional.").

D. The Circumstances of Petitioner's Detention Have Not Violated Due Process

Having rejected a bright line rule, the Court turns to an individualized assessment of whether Petitioner's immigration detention has violated due process. In conducting such fact-based analyses, courts have considered factors to include: (1) the length of detention; (2) the party responsible for the delay; (3) whether the noncitizen has asserted defenses to removal; (4) the nature of the noncitizen's crimes; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; and (6) whether the noncitizen's detention is near conclusion. *See, e.g.*, *Gabrae Hylton v. Decker*, 502 F. Supp. 3d 848, 854 (S.D.N.Y. 2020); *Nikolic v. Decker*, No. 19 Civ. 6047 (LTS), 2019 WL 5887500, at *4-5 (S.D.N.Y. Nov. 12, 2019); *Sajous*, 2018 WL 2357266, at *10-11; *Cabral*, 331 F. Supp. 3d at 261; *Vallejo v. Decker*, No. 18 Civ. 5649 (JMF), 2018 WL 3738947, at *3 (S.D.N.Y. Aug. 7, 2018). As in any fact-based analysis, different factors take on different weight depending on the circumstances of the case. The questions of whether the Government has engaged in unreasonable delay and whether Petitioner's detention is serving a valid purpose are particularly significant here, and demonstrate that his ongoing detention has not run afoul of due process.

But certain factors weigh in Petitioner's favor. The entirety of Petitioner's immigration detention—first at the Hudson County Correctional Facility and now at the Etowah County Detention Center in Gadsden, Alabama

—has occurred under conditions that are not meaningfully different from penal incarceration. *See* Barrett Declaration ¶¶ 27, 49-51; Nov. 2, 2021 Tr. at 20 (the Government acknowledging that the conditions at Etowah "sound as if they're similar to criminal detention"). Petitioner also has been detained for nearly fourteen months, which exceeds the "brief period" that the Supreme Court deemed reasonable in *Demore*, 538 U.S. at 530. The analysis, however, does not end there. "[T]he sheer length of the proceedings is not alone determinative of reasonableness. Rather, the principal factor considered in constitutional review of detention pending removal proceedings is the degree to which the proceedings have been prolonged by unreasonable government action." *Debel v. Dubois*, No. 13 Civ. 6028 (LTS) (JLC), 2014 WL 1689042, at *5 (S.D.N.Y. Apr. 24, 2014).

It is therefore necessary to examine the circumstances that resulted in Petitioner's past nearly fourteen months of detention. The first part of this period occurred during immigration court proceedings before the IJ. Petitioner was arrested on October 5, 2020, and the IJ denied his request for relief from removal pursuant to CAT and ordered his removal to the Dominican Republic on March 18, 2021. Throughout this five-and-one-half-month period, ICE and the IJ expeditiously progressed Petitioner's case, ensuring a determination on his removal without unreasonable delay. Petitioner's first hearing took place on October 13, 2020, only eight days after his arrest. When Petitioner moved to terminate his removal proceedings on November 30, 2020, the IJ resolved that motion in a seven-page written decision issued ten days later on December 10, 2020. The IJ conducted a merits hearing on Petitioner's request for relief from removal on March 18, 2021, and resolved that application at the hearing, finding that Petitioner had not met his burden of showing that he warranted protection under CAT.

Meanwhile, it is evident that Petitioner's immigration court proceedings spanned over five months largely on account of adjournments requested by Petitioner himself. *See Demore*, 538 U.S. at 530-31 (observing that although the noncitizen who had spent six months in immigration custody under section 1226(c) "was detained for somewhat longer than the average," he was responsible for the delay by "request[ing] a continuance of his removal hearing"); *Nikolic*, 2019 WL 5887500, at *5 (concluding that the petitioner was "primarily responsible for the delay in his proceedings" because he adjourned the immigration court hearing to retain counsel and the petitioner's competency hearing was adjourned twice at the petitioner's request); *cf. Sajous*, 2018 WL 2357266, at *10 ("If the alien has requested several continuances or otherwise delayed immigration proceedings, it is less likely that the length of his detention could be deemed unreasonable because 'aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute.'" (quoting *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015)). The IJ granted adjournments sought by Petitioner on October 13, 2020, November 2, 2020, November 24, 2020, December 15, 2020, January 12, 2021, and February 25, 2021. Barrett Declaration ¶¶ 14, 19; Crow Declaration ¶¶ 14-16, 18, 20. And for one of these adjournment requests—his January 12, 2021 request for a four-to-five-week continuance—the IJ did not even grant the full adjournment sought by Petitioner. Crow Declaration ¶ 20.

Nor has there been any unreasonable delay in Petitioner's pending appeal before the BIA, at least thus far. And here too, the length of the BIA process has been extended, at least in part, by Petitioner's own conduct. After the IJ denied Petitioner relief from removal on March 18, 2021, Petitioner did not appeal to the BIA until four weeks later on April 15, 2021. The BIA issued a briefing schedule, pursuant to which Petitioner's opening brief was due June 11, 2021. Yet Petitioner sought an adjournment of that deadline, which the BIA granted until July 2, 2021.

ICE also expeditiously addressed Petitioner's multiple requests that the agency revisit its determination that he should remain in custody. Petitioner requested that ICE review its custody determination by examining COVID-19 risk factors on February 19, 2021, March 31, 2021, and April 26, 2021, and on each occasion, ICE conducted the review and affirmed its custody determination on the very same day. Crow Declaration ¶¶ 22, 25, 27. Similarly, when Petitioner requested reviews of his custody in light of ICE's interim guidance regarding civil immigration and removal enforcement[12] on or about March 30, 2021 and April 8, 2021, ICE informed Petitioner of the results of those reviews mere days later on

[12] Ms. Barrett explains that Petitioner sought a custody review on the ground that he was not an enforcement priority under (1) the January 20, 2021 Department of Homeland Security ("DHS") memorandum entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," issued by then-Acting DHS Secretary David Pekoske, and (2) the February 18, 2021 "Interim Guidance for Civil Immigration Enforcement and Removal Priorities," issued by Acting ICE Director Tae D. Johnson. Barrett Declaration ¶ 22.

April 2, 2021 and April 12, 2021, respectively. *Id.* ¶ 26; Barrett Declaration ¶¶ 25-26.

The circumstances here—with the IJ and ICE moving swiftly as Petitioner sought adjournments and appealed—are markedly different from those in many of the cases cited by Petitioner where judges in this District have found unreasonable delay on the part of the Government. Take *Cabral*, for example. *See* Petition ¶¶ 64, 69 (citing *Cabral*). There, the immigration judge adjourned the noncitizen's case several times because of ICE's filing of an amended notice to appear and in order to rule on the petitioner's motion to terminate, in the process continuing the merits hearing three months out without a decision on the petitioner's request for relief. *Cabral*, 331 F. Supp. 3d at 257-58; *see id.* at 261 ("The most recent adjournment of the hearing from August 7, 2018, to November 14, 2018—over three months—was occasioned because the IJ did not have sufficient time to hear all of the evidence on August 7."). Thus, unlike the situation here, where the IJ promptly moved Petitioner's case forward with any delay resulting from Petitioner's multiple adjournment requests, the lengthy adjournments in *Cabral* were caused by the immigration judge or ICE. Indeed, in finding that the petitioner in *Cabral* did not unreasonably delay the proceedings, the district court observed that "it does not appear that [the petitioner] ever requested a continuance or an adjournment." *Id.* at 261.

Hernandez also is distinguishable. *See* Petition ¶ 64 (citing *Hernandez*). In that case, the petitioner's first immigration court hearing occurred over one month after his arrest, and the immigration judge adjourned the merits hearing for approximately one-and-one-half months without issuing a decision because the immigration judge "did not have sufficient time to complete the case." 2018 WL 3579108, at *2-3. The district court there observed that the petitioner's proceedings "have just begun" and his detention "could continue for a significant additional period of time." *Id.* at *8. The court further noted that the petitioner's "next hearing quite possibly won't be the last one before the IJ . . . due to backlogs and the new videoconferencing procedures at the [immigration] court" as well as "the extensive evidence and argument that [the petitioner] has every right to present." *Id.* The court also expressed concern that "the IJ's first adjournment for a lack of readiness indicates future adjournments may be forthcoming." *Id.*

Similarly, in *Vallejo*, the petitioner had his first appearance before the immigration judge nearly two months after he was transferred into ICE custody. 2018 WL 3738947, at *1-2; *see* Petition ¶ 66 (citing *Vallejo*). Following his initial bond hearing, at which the immigration judge found that the petitioner was a flight risk, the immigration judge adjourned the petitioner's case eight times. *Vallejo*, 2018 WL 3738947, at *2. Although the petitioner was responsible for some of the adjournments, including due to an unavailable witness and a scheduling conflict on the part of the petitioner's counsel, the majority of the adjournments were attributable to the immigration judge. *Id.* at *4 ("In the Court's view, at least five of the eight delays in [the petitioner]'s proceedings—namely, the first, fourth, fifth, seventh, and eighth adjournments or continuances—are attributable to the Government."). The district court also expected that the petitioner's proceedings in immigration court, and therefore his detention, were likely to continue for "several more months, if not more." *Id.* *5 (internal quotation marks omitted). The court additionally found the petitioner's application for withholding of removal to be "plainly colorable . . . as a DHS asylum officer already concluded that [the petitioner] has a 'reasonable fear of persecution or torture' if he is removed to Honduras." *Id.* at *4. In contrast, here, the IJ has found that Petitioner failed to meet his burden to warrant protection under CAT and ordered him removed.

This case also is distinguishable from *Sajous*, where the petitioner appeared for his first hearing before an immigration judge approximately two months after he was taken into ICE custody. 2018 WL 2357266, at *3; *see* Petition ¶¶ 64-66, 69 (citing *Sajous*). While the petitioner in *Sajous* did request adjournments prior to seeking relief from removal, those continuances were "*because* of a prolonged, uncorrected failure by the relevant immigration agencies" to process and send the petitioner's A-file to his counsel. *Sajous*, 2018 WL 2357266, at *11. While Petitioner here generally contends that COVID-related restrictions at the Hudson County Correctional Facility contributed to Petitioner's delay, any such COVID-related delay appears to have been the basis for only one of the six adjournments that Petitioner sought from the IJ and Petitioner has not pointed to any other evidence that the IJ or ICE unreasonably prolonged the proceedings, despite the challenges posed by the pandemic.

The contrast between these cases and the instant case is stark. Petitioner's first appearance before the IJ occurred merely eight days after his arrest by ICE officers, significantly faster than the approximately two-month delay between the petitioner's arrest and his first hearing in *Sajous*, 2018 WL 2357266, at *3, the nearly two-month delay in *Vallejo*, 2018 WL 3738947, at *1-2, and the over one-month delay in *Hernandez*, 2018 WL 3579108, at *2. And all adjournments of Petitioner's hearings in immigration court were at Petitioner's request, with none requested by ICE or *sua sponte* ordered by the IJ, which is quite different from the immigration judge in *Cabral* who ordered months of adjournments, apparently none at the petitioner's request, because she did not have enough time to consider the evidence, *Cabral*, 331 F. Supp. 3d at 257-58, 261, or the at least five adjournments in *Vallejo* that were "clearly attributable to the Government," resulting in "more than eleven months[] of detention," 2018 WL 3738947, at *4. *See also Lett v. Decker*, 346 F. Supp. 3d 379, 388 (S.D.N.Y. 2018) (finding that a three-month delay was attributable to the immigration court which had adjourned the petitioner's case on several occasions, including because "the decision was not yet ready" and because "the case was inadvertently not assigned to a clerk"); *Dukuray v. Decker*, No. 18 Civ. 2898 (VB), 2018 WL 5292130, at *4 (S.D.N.Y. Oct. 25, 2018) (finding that a three-month delay caused by the immigration judge rescheduling the petitioner's merits hearing "for administrative reasons" constituted the majority of the delay in the case).

The reasonings of judges in this District who have found no due process violation, despite lengthy immigration detention without a bond hearing, also are instructive when viewed in the context of circumstances presented here. In *Nikolic*, for instance, the petitioner appeared for his first hearing in immigration court approximately one month after he was taken into ICE custody. 2019 WL 5887500, at *1-2. The petitioner sought four adjournments, including to obtain counsel, to request a competency hearing, and to undergo psychological testing in advance of the competency hearing. *Id.* at *2. Thereafter, the petitioner's counsel filed two applications for relief from removal; the immigration judge denied those applications and ordered him removed to Serbia. *Id.* The petitioner then appealed the immigration judge's decision to the BIA. *Id.* At the time of the district court's decision, the petitioner had been detained for over eleven months. *Id.* at *5. The district court concluded that the petitioner "failed to carry his burden of demonstrating that his continued detention has become 'unreasonable and unjustified,' such that it violates due process," explaining, *inter alia*, that the petitioner "is primarily responsible for the delay in his proceedings" and he failed to identify "any delay caused by Respondents." *Id.* at *4-5; *see also Antoine Hylton v. Shanahan*, No. 15 Civ. 1243 (LTS), 2015 WL 3604328, at *5 (S.D.N.Y. June 9, 2015) (declining to find the petitioner's nearly two-year detention without a bond hearing unreasonable because the petitioner's "detention has been prolonged in large part due to the granting of [the petitioner]'s requests for time to seek representation, to prepare adequately for each conference before the immigration judge, to prepare his case in opposition to removal, and to seek relief from the removal order, and by his appeal of the order of removal against him").

Likewise, in *Debel*, the hearing on the petitioner's removability did not occur until approximately six months after his first appearance in immigration court "[d]ue to three requests for continuances made by [the petitioner] and one Government error, which led to a continuance." 2014 WL 1689042, at *2. At that hearing, the immigration judge found the petitioner removable as charged in the notice to appear. *Id.* The hearing was then "continued three more times"—for a total of seven continuances —"in order to accommodate [the petitioner]'s preparation of an application for relief from removal." *Id.* Over eight months later (*i.e.*, over fourteen months after the petitioner's first appearance in immigration court), the immigration judge denied the petitioner's application for relief from removal and entered an order of removal. *Id.* The district court found that the petitioner's ongoing detention was not unreasonable. Although the petitioner was likely to be detained over two years without a bond hearing, the court explained that "the length of [the petitioner]'s detention has been augmented in large part due to the granting of his requests for numerous continuances to allow him time to seek representation, to prepare his case in opposition to removal, to seek relief from the removal order, and by his appeal of the order of removal against him." *Id.* at *6. Such continuances and the appeals process, the court noted, "have thus far extended the proceedings by approximately one year." *Id.* In contrast, the court found "no evidence that the immigration authorities have unreasonably prolonged [the petitioner]'s removal proceedings and consequent detention." *Id.*

Here, Petitioner requested six adjournments during his immigration court proceedings. Like in *Nikolic*, *Antoine Hylton*, and *Debel*, these adjournments were sought to allow Petitioner time to seek representation, to prepare adequately for each conference before the IJ, to prepare his case in opposition to removal, and to seek relief from the removal order. Petitioner has further prolonged his detention by appealing the IJ's order of removal, which has resulted in expected delay to allow for the adjudication of his appeal. *See Debel*, 2014 WL 1689042, at *6. While the Court does not find Petitioner's requests for adjournments or his appeal to the BIA to be frivolous, Petitioner's ongoing detention at this point is the result of his decision to appeal the IJ's decision, and further delays caused by that choice "does not make continued detention unreasonable or unjustified." *Baker v. Johnson*, 109 F. Supp. 3d 571, 586 (S.D.N.Y. 2015) (internal quotation marks omitted); *see id.* ("To the extent the proceedings are extended by appeals or by motion practice initiated by Petitioner, 'the Court properly takes into account the fact that [Petitioner's] continued detention' may be at least in part 'a result of [his] choice to appeal' and otherwise prolong the proceedings with motion practice." (quoting *Johnson v. Orsino*, 942 F. Supp. 2d 396, 410 (S.D.N.Y. 2013)) (alterations in original)). Petitioner of course had every right to appeal to the BIA, but his pursuit of that appeal after an adverse decision should not permit him to secure release from custody when Congress otherwise mandated it, absent a delay in the BIA process that runs afoul of the due process clause. *Id.* ("Although [Petitioner] indisputably 'has every right to seek relief from deportation for which he may be eligible, delay caused by his actions does not make continued detention unreasonable or unjustified.'" (quoting *Johnson*, 942 F. Supp. 2d at 409)); *Debel*, 2014 WL 1689042, at *6 ("Delays attributable to normal considerations of an alien's appeal of adverse decisions do not render unreasonable the consequent delay of his ability to gain release into his home country."); *Antoine Hylton*, 2015 WL 3604328, at *6 (same). This is especially true given the IJ's denial of relief and removal order, which strongly suggest that his detention is serving a valid purpose. *See Nikolic*, 2019 WL 5887500, at *5 (explaining that, where the immigration judge had rejected the petitioner's defenses to removal, the petitioner's "detention at least marginally serves the ultimate purpose behind the detention" (internal quotation marks and alterations omitted)); *see also Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring) (explaining that the relevant question is "whether the detention is not to facilitate deportation . . . but to incarcerate for other reasons").

In assessing the length of detention, courts also "consider 'the likely duration of continued detention,' [and] not just the duration of past detention." *Nikolic*, 2019 WL 5887500, at *5. In *Cabral*, for instance, the court found it significant that, by the time of his next hearing, the petitioner would have been detained for over nine months without any decision from the immigration judge as to his request for relief from removal and "without any assurance that [his detention] will end at that time." *Cabral*, 331 F. Supp. 3d at 261. In this respect as well, Petitioner's case stands in stark contrast. Unlike a situation where a decision from the immigration judge did not appear to be forthcoming, *see id.*, or where the proceedings "have just begun," *Hernandez*, 2018 WL 3579108, at *8, Petitioner's removal proceedings before the IJ have concluded: the IJ denied Petitioner's motion to terminate those proceedings, has denied Petitioner's request for relief under CAT, and has ordered Petitioner removed to the Dominican Republic. Petitioner's appeal to the BIA is fully briefed, and a decision is expected in the near future. Therefore, unless Petitioner loses before the BIA and he opts to petition for review before the Second Circuit, his detention is unlikely to continue much longer.

And as suggested above, there has been no unreasonable delay in the BIA appellate process, at least thus far.

The appeal has been fully briefed for approximately five months. While the Government understandably is unable to provide a specific timeline for a BIA decision, the Government stated at oral argument that it expects a decision soon, which would be consistent with the applicable federal regulations. *See* 8 C.F.R. § 1003.1(e)(8)(i) ("Except in exigent circumstances as determined by the Chairman, subject to concurrence by the Director, or as provided in paragraph (d)(6) of this section or as provided in §§ 1003.6(c) and 1003.19(i), the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days of completion of the record for all cases assigned to a three-member panel (including any additional opinion by a member of the panel).").

And for many of the same reasons discussed above, the question of Petitioner's eligibility for any relief from removal weighs against finding unreasonable delay. In ruling against Petitioner on his claim for relief under CAT, the IJ found that Petitioner failed to demonstrate that he suffered torture in the past and that "it is not more likely than not that [Petitioner] would be tortured" if removed to the Dominican Republic. Gov't Return, Exh. 10 at 6-8. Thus, Petitioner's case is different from those in which no ruling on removability had been issued, *see, e.g.*, *Cabral*, 331 F. Supp. 3d at 261-62; *Hernandez*, 2018 WL 3579108, at *8, or where a DHS asylum officer already had found a reasonable fear of persecution or torture, *see Vallejo*, 2018 WL 3738974, at *4.

Indeed, the IJ's decision finding him not entitled to CAT relief and ordering him removed remains the only adjudication as to Petitioner's request for relief from removal. *See Nikolic*, 2019 WL 5887500, at *5 (finding that the petitioner's detention had not been unreasonably delayed because, *inter alia*, "while [the petitioner] has asserted defenses to removal, they were all rejected by the immigration judge"). Petitioner's continued detention, in light of that adverse ruling, is "more reasonable" than a noncitizen who has not yet received an adverse decision by an immigration judge ordering removal. *Id.* (internal quotation marks and alterations omitted). Nor does Petitioner's pending U Visa petition weigh in his favor. USCIS—and not ICE—adjudicates U Visa petitions. Although a favorable determination by USCIS on Petitioner's eligibility for a U Visa would provide an independent basis for Petitioner to remain in the United States, his pending U Visa petition does not constitute a defense to removal.

Finally, the seriousness of Petitioner's crime also cuts against Petitioner. Petitioner was arrested for stealing a phone and attacking a person with a belt. In connection with his arrest, Petitioner pled guilty to one count of second degree assault. The seriousness of this offense is reflected not only by the resulting penal sentence, but also by Congress's decision to put this offense among the special category of crimes that requires mandatory detention under section 1226(c).[13]

---

[13] Other courts in this District also have considered a petitioner's prior criminal sentence length in comparison to the length of civil detention. *See, e.g.*, *Sajous*, 2018 WL 2357266, at *11; *Cabral*, 331 F. Supp. 3d at 262. The Court finds this factor to be less persuasive for purposes of the due process analysis here, since Petitioner's prior criminal incarceration and his current immigration detention serve different purposes. It also is a less compelling consideration where, as here, the immigration detention is delayed due to the noncitizen seeking adjournments and then appealing an adverse decision. In any event, this factor would cut slightly

In sum, as Justice Kennedy observed in his concurrence in *Demore*, "[w]ere there to be an unreasonable delay by the [Government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." 538 U.S. at 532-33. At this point, there has been no unreasonable delay by the Government in completing Petitioner's deportation proceeding, nor any reason to think that his continued detention is for any purpose other than to facilitate his deportation. Rather, the Government has at all turns moved at an appropriate pace during Petitioner's removal proceedings, with the overwhelming majority of the delay resulting from adjournments sought by Petitioner and his decision to appeal a ruling denying him relief from removal.

III. Conclusion

For the reasons stated, the Petition is denied in its entirety.[14] The Clerk of Court is respectfully directed to amend the caption to substitute David L. Neil for Jean King as a Defendant, enter judgment in the Government's favor, and close this case.

SO ORDERED.

---

against Petitioner because he was sentenced to two years of imprisonment for his criminal conviction and served one year and seven months, which exceeds the nearly fourteen months that he has been in immigration custody.

[14] Having determined that Petitioner's ongoing detention does not violate his due process rights at this time, the Court does not reach Petitioner's argument regarding the appropriate procedures at any bond hearing.

Dated: November 29, 2021
New York, New York

[/s/ JOHN P. CRONAN]
JOHN P. CRONAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

21 Civ. 3055 (LGS)

CAROL BLACK,
Petitioner,

-against-

THOMAS DECKER, et al.,
Respondents.

Filed: July 23, 2020

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Petitioner Carol Black, a native and citizen of Jamaica, is a lawful permanent resident of the United States being detained by U.S. Immigration and Customs Enforcement ("ICE") pursuant to 8 U.S.C. § 1226(c) during the pendency of his immigration proceedings. He filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and the All Writs Act, 28 U.S.C. § 1651, seeking (1) an injunction prohibiting Respondents from moving Petitioner outside the New York City area while the habeas proceedings are pending; (2) an order directing Respondents to release Petitioner immediately for violation of substantive due process or, in the alternative, provide him with an individualized bond hearing; and (3) in the event of release, an order enjoining Respondents from re-detaining Petitioner pending the culmination of removal proceedings against him, including all administrative or judicial appeals, barring a violation of standard immigration bond terms. For the reasons stated below, the Petition is granted to the extent that the Court finds that Petitioner is entitled to an individualized bond hearing, in which the Government bears the burden of proving by clear and convincing evidence that Petitioner poses a risk of flight or a danger to the community. The Petition is denied in all other respects.

I. BACKGROUND

A. Petitioner Carol Black

Petitioner is a 57-year-old man from Jamaica who has lived in the United States as a lawful permanent residence since 1983. He is married and lives with his wife and step-daughter.

On March 23, 2000, Petitioner was convicted of sexual abuse in the first degree in violation of New York Penal Law ("NYPL") § 130.65(3), for sexual contact with a minor less than eleven years old, and of endangering the welfare of a child in violation of NYPL § 260.10, for acting in a manner to injure a child less than 17 years-old. Petitioner was sentenced to five years probation for each conviction.

On December 4, 2019, ICE arrested Petitioner. Respondents assert that Petitioner's convictions render him removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1227(a)(2)(E)(i), and subject to mandatory detention under INA § 236(c), 8 U.S.C. § 1226(c). Petitioner is currently detained at the Orange County Jail (the "OCJ").

B. Immigration Court Proceedings

Petitioner was taken into custody on December 4, 2019, and served with a Notice to Appear ("NTA"). The NTA was served on the Varick Street Immigration Court on December 6, 2019. Petitioner and/or his counsel have attended seven master calendar hearings, but Petitioner has not received a bond hearing.

The first master calendar hearing occurred on December 27, 2019. At that hearing Petitioner requested an adjournment because his counsel was on vacation and unaware of the hearing due to its "abrupt[] schedul[ing]." The hearing was adjourned to January 13, 2020.

The second master calendar hearing occurred on January 13, 2010. Prior to that hearing, Petitioner's counsel filed motions for bond and challenging the NTA charge that Petitioner was removable based on 8 U.S.C. § 1227(a)(2)(A)(iii), arguing that he was not convicted of an aggravated felony as is required for removal under that statute. ICE informed the immigration court that ICE had not received the motions, and the case was adjourned to February 3, 2020, to permit ICE time to respond. The case was then adjourned an additional week at the request of ICE and over Petitioner's opposition, and then *sua sponte* adjourned by the Immigration Judge ("IJ") to February 24, 2020.

At the third master calendar hearing, held on February 24, 2020, the IJ sustained the charges in the NTA, but adjourned the case for further review of the briefing. According to Petitioner, the IJ incorrectly indicated in his initial ruling that the Government's brief was unopposed, and agreed to further review the briefing upon being reminded by Petitioner's counsel of the previously filed brief. Respondents do not dispute this assertion. Petitioner also submitted an application for cancellation of removal at the time of the third hearing.

At the fourth master calendar hearing, held on March 16, 2020,[1] the IJ affirmed the prior ruling, and issued a written order denying Petitioner's request for bond and finding Petitioner to be ineligible for his previously filed application for cancelation of removal because he is detained pursuant to INA § 236(c) and therefore subject to mandatory detention. Petitioner's appeal of this decision is still pending. The IJ further adjourned the case, and directed Petitioner to move for any additional relief by April 20, 2020.

At the fifth master calendar hearing, held on April 20, 2020, Petitioner was directed to file a motion to redetermine by April 27, 2020. Petitioner asserts that his counsel argued that a redetermination was unnecessary, as he sought only to ensure that the arguments and briefs were incorporated into both the bond and removal record. Respondents do not directly address the issue, but assert that Petitioner's counsel argued that the determination was wrongly decided.

At the sixth master calendar hearing, held on May 11, 2020, the IJ gave ICE additional time to respond to Petitioner's motion, as ICE stated it had not received the filing. The IJ also directed Petitioner to email Petitioner's Form I-589 application for asylum to the court, as it had not previously been successfully filed. The IJ adjourned the case to June 8, 2020. On May 22, 2020, Petitioner's request for redetermination was denied.

[1] This hearing was originally scheduled for March 23, 2020, but was moved up at the request of Petitioner.

On June 8, 2020, the IJ adjourned the case until June 29, 2020, to allow time for Petitioner and his counsel to prepare prior to a master calendar hearing to address Petitioner's I-589 application.

Petitioner filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on April 16, 2020. Petitioner filed an Amended Petition on June 5, 2020, seeking immediate release. On June 22, 2020, the Government filed an opposition and on July 2, 2020, Petitioner filed a reply.

C. Petitioner's Medical Condition and Treatment

The following facts are from Petitioner's OCJ medical records and the sworn declaration of Marsha Dixon (the "Dixon Declaration"), a Registered Nurse and the on-site Health Service Administrator of Wellpath Correctional Medical Services, which administers health care services for detainees at OCJ.

Petitioner was detained on December 4, 2019. Upon arrival at the facility, Petitioner underwent a medical intake screening interview, during which Petitioner was asked, *inter alia*, if he had been treated for a heart condition, and whether he had past hospitalizations. Petitioner does not dispute that he answered both questions in the negative. At that time, Petitioner's heart rate was documented as normal. At an initial physical assessment on December 5, 2019, Petitioner's heart rate was also documented as normal.

On December 7, 2019, Petitioner complained of chest pain and was seen by a nurse. His heart rate, respiratory rate and oxygen levels were normal, and an EKG[2] yielded normal results. He was seen again later that day for chest pain and told the treating physician that a previous consultation with a cardiologist did not reveal a cardiac pathology. The second examination showed normal heart rate, heart rhythm, oxygen levels and clear lungs.

Two months later, on February 7, 2020, Petitioner complained of heartburn. On February 9, 2020, Petitioner was examined by a nurse, who found that his heart rate, respiratory rate and oxygen levels were normal, and he was given Tums.

On February 15, 2020, Petitioner complained of chest pain. On February 16 and 17, 2020, Petitioner was examined by a nurse and a physician, who found that his heart rate, respiratory rate and oxygen levels were normal. The physician "assessed musculoskeletal chest pain." An EKG performed on February 17, 2020, "demonstrated borderline intra-atrial conduction delay and was otherwise normal."

On February 27, 2020, Petitioner complained of heartburn and headaches. On February 28, 2020, Petitioner was examined by medical personnel, who found that his heart rate and oxygen levels were normal, and he was given Tums and Motrin.

---

[2] According to the Dixon Declaration, an EKG or electrocardiogram "records the heart's electrical impulses to provide information about the sinus rhythm" and "can show that a person is currently having a heart attack and can demonstrate abnormalities including past heart attack(s), abnormal heart rhythm, enlarged heart, inadequate supply of blood or oxygen to the heart, and excessive thickening of the heart's walls."

A month later, on March 31, 2020, Petitioner complained of chest pain and dizziness. A nurse examined Petitioner the same day and found high blood pressure and a normal heart rate. Petitioner denied lightheadedness, shortness of breath or a family history of cardiac issues. A physician also examined Petitioner the same day and prescribed an antacid and medication to prevent dizziness. An EKG performed the same day found no abnormalities. The physician ordered further blood pressure checks over the next week, leading to further examinations on April 1, 2020 and April 3, 2020. On April 1, 2020, Petitioner was prescribed a medication to treat high blood pressure. By April 3, 2020, Petitioner's blood pressure was stabilized. On April 3, 2020, a physician ordered a chest x-ray, which was conducted on April 6, 2020, revealing no abnormalities.

Petitioner complained of dizziness and chest pain on the following dates: April 11, 12, 16, 17, 20, 23, 24, 25, 27 and 29, 2020. Petitioner was examined by medical practitioners on the following dates: April 12, 17, 18, 20, 21, 25, 27 and 30, 2020. The examinations found normal heart rate and oxygen levels. On April 27, 2020, Petitioner was also given an abdominal ultrasound which yielded normal results.

On May 7, 2020, Petitioner complained of chest pain and dizziness, and on May 8, 2020, was seen by a nurse practitioner. Petitioner reported left-sided chest pain for multiple years that was becoming more frequent with time, dizziness for the past two months, and daily heart palpitations. He denied shortness of breath. An examination revealed normal heart rate, respiratory rate and oxygen levels. A second examination later that day had the same findings. Medical personnel placed an order for a Holter heart monitor, defined as a "small, wearable device that records the electrical activity of a patient's heart, similar to an EKG" that, "[b]ecause [it] is worn over an extended period . . . may provide more information about the patient's heart rhythm than an EKG." The Holter heart monitor had not yet arrived at the time this Petition was briefed.

On May 17 and 26, Petitioner complained of chest pain and dizziness. Examinations conducted on May 18 and 26 found that his heart rate, respiratory rate and oxygen levels were normal. An EKG was also conducted on May 26, 2020, and showed normal results.

On May 29, 2020, Petitioner complained of dizziness, loss of hearing in his left ear, weakness in his left arm and pain in his groin. An examination by medical personnel found mild weakness in his left hand grasp, no facial droop, and normal vital signs and neurological functions. Medical personnel monitored Petitioner's vital signs and neurological functions for the next three days, checking twice daily, and found normal results. An EKG performed on June 1, 2020 also yielded normal results, and no changes from the EKG performed on May 26, 2020. Petitioner's antacid medication was renewed on June 4, 2020.

On June 9, 2020, Petitioner complained of severe stomach cramps and dizziness. He was examined the next day and was found to have a normal heart rate, respiratory rate and oxygen levels. Petitioner reported that he had been experiencing dizziness for the past two months and neck pain for a month, and denied worsening or new symptoms.

On June 20, 2020, Petitioner complained of severe headaches, dizziness, blurriness in his left eye and chest pain. The same day, he was examined by medical staff, and stated he was not experiencing blurred vision, headache or chest pain at that time. His heart rate and respiratory rate were normal.

D. COVID-19

The Secretary of Health and Human Services declared a public health emergency on January 31, 2020, as a result of the confirmed cases of COVID-19 in the United States. U.S. Dep't of Health & Human Servs., *Determination that a Public Health Emergency Exists*, Pub. Health Emergency (Jan. 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx. On March 13, 2020, the President of the United States declared a national emergency due to the spread of the COVID-19 virus. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, White House (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. The first COVID-19 case in the State of New York was confirmed on February 29, 2020. *See* Joseph Goldstein & Jesse McKinley, *Coronavirus in N.Y.: Manhattan Woman is First Confirmed Case in State*, N.Y. Times (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/nyregion/new-york-coronvirus-confirmed.html. As of July 21, 2020, there were 412, 889 confirmed cases in New York State. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last viewed July 21, 2020). Over 32,000 persons have died in New York of the virus and over 141,000 have died nationwide. *Id.*

As of July 21, 2020, there were 10,908 confirmed cases in Orange County, New York and 483 confirmed cases in Goshen, New York (the location of OCJ). *See Orange County NY COVID-19 Cases by Town*, Orange County N.Y. GIS, https://ocnygis.maps.arcgis.com/apps/opsdashboard/index.html#/21de1fb5ce0c480f95dc0cf2b8b83b71 (last viewed July 21, 2020). Per the Dixon Declaration, signed on June 22, 2020, there were no confirmed cases at the OCJ, and no ICE detainees or county inmates at the OCJ who were symptomatic. The OCJ has previously had eight staff members diagnosed with COVID-19; all have since recovered and returned to work after a minimum fourteen-day quarantine.

As of June 17, 2020, the OCJ was at approximately forty-seven percent of its maximum capacity. According to the declaration executed on June 17, 2020 by Colonel Anthony Mele (the "Mele Declaration"), the Correctional Administrator of the Orange County Sheriff's Office who is assigned to the OCJ, the OCJ had implemented, *inter alia*, the following procedures to address the COVID-19 virus: housing each ICE detainee in his own cell; providing meals in detainee cells; screening of incoming detainees and, if necessary, isolation or monitoring; screening of staff members and vendors prior to entrance to the facility; mandatory wearing of masks by all staff and inmates (who have been issued two reusable face masks each); maintenance of an active list of high risk detainees, who are closely monitored; sanitizing the facility and housing units no less than three times per shift, including phones and headsets, and the provision of disinfectant spray, bleach, hand sanitizer, hot water and soap[3] in every housing unit; daily access to sick call, and the placement of posters and educational materials throughout the facility to advise detainees and staff on hygiene protocol and social distancing.

II. STANDARD

A. Writ of Habeas Corpus

Congress has authorized federal district courts "to grant a writ of habeas corpus whenever a petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States,'" *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003) (quoting 28 U.S.C. § 2241(c)(3)), including claims by non-citizens challenging their detention without bail. *Demore v. Kim*, 538 U.S. 510, 516-17 (2003).

B. Mandatory Detention Under 8 U.S.C. § 1226(c)

Under federal immigration law, "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Certain classes of aliens are subject to mandatory detention under § 1226(c) and may not, under the text of the statute, be released until the removal proceedings conclude. *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018). Aliens subject to mandatory detention include those who have committed certain "crimes involving moral turpitude" as defined by statute, controlled substance offenses, aggravated felonies, firearm offenses, or terrorist activities. *See* 8 U.S.C. §§ 1226(c)(1)(A)-(D).

---

[3] Petitioner disputes the availability of soap, asserting that he "regularly does not have access to soap without his own purchase at the commissary."

Here, Petitioner is detained under § 1226(c) for having committed an aggravated felony in his violation of NYPL § 130.65(3), for sexual contact with a minor less than eleven years old.

III. UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT

A. Standard

"In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Charles v. Orange Cty.*, 925 F.3d 73, 85-86 (2d Cir. 2019) (quotation marks and citations omitted) (holding that civil immigration detainees plausibly alleged a Fourteenth Amendment substantive due process claim based on deliberate indifference to medical needs). For a civil detainee to establish such a violation based on deprivation of medical care while in state custody, a claim "must meet two requirements: (1) that Plaintiffs had a serious medical need for discharge planning, and (2) that the Defendants acted with deliberate indifference to such needs." *Id.* at 86.

The first requirement—a serious medical need—"contemplates a condition of urgency such as one that may produce death, degeneration, or extreme pain." *Id.*

> In determining whether a medical need is sufficiently serious to be cognizable as a basis for a constitutional claim for deprivation of medical care, we consider factors such as whether a reasonable doctor or patient would find the injury important and worthy of treatment, whether the medical condition significantly af-

> fects an individual's daily activities, and whether the illness or injury inflicts chronic and substantial pain. In most cases, the actual medical consequences that flow from the denial of care are highly relevant in determining whether the denial of treatment subjected the detainee to a significant risk of serious harm.

Id. (citation omitted).

The second requirement, deliberate indifference, requires a plaintiff to show "something more than mere negligence" or "mere medical malpractice," *id.* at 87, but "does not require proof of a malicious or callous state of mind." *Id.* at 86. Rather, "[d]eliberate indifference . . . can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff's health or safety." *Id.* at 87 (quotation marks and alteration omitted). Conduct "may rise to the level of deliberate indifference when it involves culpable recklessness, i.e., an act or a failure to act . . . that evinces a conscious disregard of a substantial risk of serious harm." *Id.* (alteration in original). "Whether the state knew or should have known of the substantial risk of harm to the detainee is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* (quotation marks and citations omitted).

"The allegations of a return to the writ of habeas corpus or of an answer . . . if not traversed, shall be accepted as true except to the extent that the judge finds from evidence that they are not true." 28 U.S.C. § 2248. "On a petition for a writ of federal habeas corpus, the petitioner bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated." *Jones v. Vacco*, 126 F.3d 408, 415 (2d Cir. 1997); *accord Grant v. Decker*, No. 20 Civ. 2946, 2020 WL 3402445, at *6 (S.D.N.Y. June 19, 2020). "[I]ssuance of the writ is an extraordinary remedy, granted only in the exercise of a sound judicial discretion." *Pinkney v. Keane*, 920 F.2d 1090, 1094 (2d Cir. 1990) (quotation marks and citation omitted); *accord Dzhabrailov v. Decker*, No. 20 Civ. 3118, 2020 WL 2731966, at *3 (S.D.N.Y. May 26, 2020).

B. Discussion

Petitioner asserts in his Amended Petition (the "Petition") that he "has been diagnosed with Congenital Heart Disease" because doctors "found a hole in his heart, following multiple heart attacks," and that, "[j]ust prior to his arrest by immigration, he was admitted to the Jacobi Medical Center and the New Rochelle Hospital for a hear[t] murmur following severe chest pains and breathing trouble."[4] Petitioner does not dispute that he did not tell medical staff at the OCJ that he

---

[4] Petitioner submits no medical records in support of these claim because "[t]hese hospitals are overrun with COVID-19 cases and are reasonably unable to respond to our requests for information." Petitioner also states that he suffers from "borderline diabetes," but does not explain what this means.

suffered from this condition.[5] The Court need not reach the question of whether Petitioner has demonstrated a serious medical need, because Petitioner cannot demonstrate deliberate indifference. Petitioner's request for immediate release is denied on that basis.

Petitioner argues that he has received "inadequate care" and faces "near certain death or serious debilitating complications in a jail environment." Petitioner specifically points to the fact that the OCJ medical team has been "unable to locate [Petitioner's] medical issue," has not performed other types of examinations, "including an echocardiogram or consistent heart monitoring," and has not provided Petitioner with "off-site treatment" or "hospitalization" as is required by ICE guidelines.

But nothing in the record shows that the OCJ medical staff "knew, or should have known," *Charles*, 925 F.3d at 87, of Petitioner's purported congenital heart condition. The OCJ medical records demonstrate that the facility medical staff has consistently and quickly responded to Petitioner's complaints with examinations and that those examinations—including five EKGs and one chest x-ray—revealed minor or no abnormalities. Although Petitioner asserts that he "currently believe[s] he may have suffered a small heart attack" while detained, Petitioner's medical records do not support

[5] Petitioner states in his reply that "Petitioner mentioned his medical history merely three days after OCJ allegedly brought him through their intake process," but cites to the Declaration of Martha Dixon ("Dixon Declaration") in support, wherein she states that, on December 7, 2019, Petitioner "told the physician [at the OJC] that he had experienced similar [chest] pain in the past two years, approximately 2-3 times per year, that he had consulted with a cardiologist, and that the cardiologist had found no cardiac pathology."

this claim. The records are insufficient to find deliberate indifference on the part of OCJ staff in their treatment of Petitioner where repeated examinations have consistently revealed no abnormalities, and Petitioner does not dispute that he did not tell medical staff at the OCJ about the asserted heart condition. Petitioner's opinion that OCJ medical personnel should have conducted different or additional diagnostic tests or referred him to outside medical specialists does not warrant a contrary conclusion. *See id.* ("A plaintiff must show something more than mere negligence to establish deliberate indifference in the Fourteenth Amendment context. . . . [M]ere medical malpractice is not tantamount to deliberate indifference . . . ." (citation and quotation marks omitted)); *Gutierrez v. Dubois*, No. 20 Civ. 2079, 2020 WL 3072242, at *7 (S.D.N.Y. June 10, 2020) ("While Petitioner has many complaints about the medical care he has received at the Orange County Jail, he has not demonstrated that Jail personnel are deliberately indifferent to his medical needs. Aside from his request for back surgery, Petitioner has not identified any health issue that has gone entirely unaddressed.").

Petitioner argues that the risk caused by the COVID-19 pandemic, in conjunction with his heart condition and "pre-diabetes", "subject him to a heightened risk of harm [which] cannot be adequately addressed if or when he becomes ill." But Petitioner's complaints of chest pain and dizziness alone, where all examinations show no abnormalities, does not mandate the conclusion that Petitioner is at higher risk of death or severe illness from COVID-19. *See People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (last visited July 22, 2020) (listing, among other medical diagnoses, "people who have serious heart conditions" and "diabetes" as conditions that trigger higher risk of severe illness from COVID-19). But for Petitioner's assertion that he needs to buy his soap from the commissary, Petitioner does not dispute the COVID-19 protocols that OCJ has implemented. Other courts in this District have found these protocols sufficient to show that the facility is not acting with deliberate indifference in its response to the COVID-19 pandemic, and this Court agrees. *See, e.g., Bernal Gutierrez v. Decker*, No. 20 Civ. 4046, 2020 WL 3396283, at *2 (S.D.N.Y. June 10, 2020) (listing the precautions described herein, and finding the OCJ "has taken constitutionally adequate precautions to address the risks Petitioner faces from COVID-19" and that the OCJ "has not been 'deliberately indifferent' to [Petitioner's] medical needs" where Petitioner suffered from Type 2 diabetes); *Gutierrez*, 2020 WL 3072242, at *6 (same); *Dzhabrailov*, 2020 WL 2731966, at *8 (same). Petitioner's single assertion that he needs to buy his soap from the commissary does not mandate a contrary conclusion, nor does Petitioner's speculation that there may be cases of infection that have not been confirmed by testing because "[i]t's hard to imagine that none of [the symptoms of COVID-19] were present throughout the winter/flu season of the past six months." To the extent that Petitioner's habeas application seeks immediate release due to unconstitutional conditions of confinement, the Petition is denied.

Petitioner's request for a bail hearing pursuant to *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001) is also denied. The Second Circuit held in *Mapp* that a Court may grant bail to habeas petitioners when (1) "the habeas petition raises substantial claims" and (2) "extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 226 (alterations omitted). As discussed above, the Petition does not raise substantial claims, and no extraordinary conditions associated with this Petition make the grant of bail necessary for the habeas remedy to be effective.

IV. UNCONSTITUTIONALLY PROLONGED DETENTION

A. Standard

"[T]here must be some procedural safeguard in place for immigrants detained for months without a hearing." *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018); *see also Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at *6 (S.D.N.Y. May 23, 2018) ("[U]nder the Second Circuit's case law, the opinion in *Lora* is no longer binding but carries significant persuasive weight."); *Demore*, 538 U.S. at 513 (holding Congress "may require that [noncitizens held under § 1226(c)] be detained for the *brief period necessary* for their removal proceedings" (emphasis added)). "Numerous courts in this Circuit have concluded that aliens subject to mandatory detention under 8 U.S.C. § 1226(c) are entitled to individualized determinations as to their risk of flight and dangerousness when their continued detention becomes unreasonable and unjustified." *Sophia v. Decker*, No. 19 Civ. 9599, 2020 WL 764279, at *3 (S.D.N.Y. Feb. 14, 2020) (quotation marks omitted) (citing cases).

Courts in this District consider a number of factors in determining whether detention is unreasonable and thus a violation of due process. These factors include:

> (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) whether the petitioner has asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner's detention is near conclusion.

Cabral v. Decker, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018) (drawing factors from various cases in this District); *accord Graham v. Decker*, No. 20 Civ. 3168, 2020 WL 3317728, at *5 (S.D.N.Y. June 18, 2020) (noting that courts in this District have "overwhelmingly adopted" this analysis).

B. Discussion

Petitioner argues that the length of his detention without a bond hearing, which has exceeded seven months, is unconstitutional as applied to him and violates his right to due process. Applying the aforementioned factors, Petitioner's detention without a bond hearing is unreasonable. On that basis, the Petition for a bond hearing is granted.[6]

---

[6] Petitioner requests that the Court conduct the bond hearing, but cites *Celestin v. Decker*, Case No. 17 Civ. 2419, filed in the Southern District of New York on April 17, 2017, where the Court granted the petitioner's writ of habeas corpus and directed that a bond hearing be held before an IJ. Only after the bond hearing did the District Court conduct another hearing at which the issue of bond was discussed.

First, Petitioner has been detained for over seven months without an individualized bond hearing. "As a rule of thumb, courts applying the multi-factor analysis have regarded detentions exceeding six months without a bond hearing as favoring the finding of a due process violation." *Graham*, 2020 WL 3317728, at *5. Specifically, courts in this District have found a seven-month detention sufficient to show a due process violation. *See, e.g.*, *Sophia*, 2020 WL 764279, at *4 (seven months); *Cabral*, 331 F. Supp. 3d at 261 (same); *Alberto v. Decker*, No. 17 Civ. 2604, 2017 WL 6210785, at *7 (S.D.N.Y. Nov. 21, 2017) (same); *Morris v. Decker*, No. 17 Civ. 2224, 2017 WL 1968314, at *5 (S.D.N.Y. May 11, 2017) (same). This factor weighs in favor of Petitioner.

Second, Petitioner has not unreasonably delayed the proceeding. Respondents point to the first hearing, which was adjourned two weeks to permit attendance by Petitioner's counsel, but Respondents do not dispute Petitioner's assertion that the first hearing, scheduled for December 27, 2019, was scheduled "abruptly," weeks after Petitioner's detention on December 4, 2019, after Petitioner's counsel had already left for a holiday vacation. Otherwise, to the extent that Petitioner's actions have caused any delay, it is only as a result of his efforts to obtain relief from removal. *See Hernandez v. Decker*, No. 18 Civ. 5026, 2018 WL 3579108, at *9 (S.D.N.Y. July 25, 2018) ("[P]ursuit of relief from removal does not, in itself, undermine a claim that detention is unreasonably prolonged."); *Sophia*, 2020 WL 764279, at *4 (finding this factor to weigh in favor of petitioner where "[t]he record indicates that the length of his detention is primarily due to his efforts to ensure that he could proceed with legal counsel, his compliance with the Immigration Judge's schedule, and his decision to appeal the final decision concluding that the DHS had established removability."). Respondents' argument that there is no evidence that the immigration court or immigration officials were responsible for undue delay is unpersuasive; "detention can be unconstitutionally unreasonable even when the Government did not intentionally cause the length and conditions of detention to reach an untenable limit." *Sophia*, 2020 WL 764279, at *4. This second factor also weighs in favor of Petitioner.[7]

The third, fourth and fifth factors also weigh in favor of Petitioner: Petitioner is asserting defenses to his removal. *Sajous*, 2018 WL 2357266, at *11 ("The Court need not inquire into the strength of these defenses—it is sufficient to note their existence and the resulting possibility that the [p]etitioner will ultimately not be removed, which diminishes the ultimate purpose of detaining the [p]etitioner pending a final determination as to whether he is removable."). Petitioner was also sentenced to probation for the crimes that ICE asserts renders Petitioner removable, and Petitioner is detained at a penal institution—the Orange County Correctional Facility. *See Graham*, 2020 WL 3317728, at *7 (S.D.N.Y. June 18, 2020) (finding the fourth and fifth factors to weigh in favor of petitioner where petitioner's current detention had lasted twice as long as the sentence he received for his past crimes, and he was being detained in Orange County Jail).

---

[7] *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) does not mandate a different holding, as the petitioner there had already received a bond hearing, had been found to be "an exceptionally poor bail risk", *id.*, and to be purposefully slowing the removal process, which is not the case here.

The sixth factor—the nature of the underlying crime—weighs in favor of Respondents.

Finally, the seventh factor weighs in favor of Petitioner because it is unclear when Petitioner's detention will conclude.

In light of these factors, Petitioner's continued detention without an individualized bond hearing violates his due process rights. Petitioner is entitled to an individualized bond hearing before an IJ to determine whether he is a flight risk or poses a danger to the community such that continued detention is warranted. *See Graham*, 2020 WL 3317728, at *7 ("At bottom, the minimal burden that a bond hearing would place on the Government is far outweighed by [Petitioner's] interest in ensur[ing] that his continued detention is justified." (quotation marks omitted)).[8]

C. Procedural Requirements of Bond Hearing

The burden at the bond hearing is on the Government to justify by clear and convincing evidence that Petitioner poses a risk of flight or a danger to the community. *See Graham*, 2020 WL 3317728, at *8 ("The overwhelming majority of courts have concluded, post-*Jennings*, that when unreviewed detention has become unreasonable, the government must bear the burden of proof at a bond hearing by clear and convincing evi-

[8] Respondents also argue that detention is beneficial because it ensures aliens appear at hearings and protects the community from aliens who have already committed serious crimes. This argument is more appropriate at the bond hearing itself. *See Sophia*, 2020 WL 764279, at *4 (observing, in response to the same argument, that "[t]he Government will have an opportunity to argue at the bond hearing that these interests, when applied to Petitioner, warrant denying his release.").

dence, to ensure the preservation of the detainees' fundamental liberty interests." (quotation marks omitted)). "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). This includes mandatory detention under § 1226(c). *See Hernandez*, 2018 WL 3579108, at *11 (finding, in the context of detention under § 1226(c), that "pursuant to *Lora*, [] imposing a clear and convincing standard would be most consistent with due process"). In considering the issue, the IJ must also consider Petitioner's ability to pay and the availability of alternative means of assuring his appearance. *See id.* at *12; *Graham*, 2020 WL 3317728, at *8. "These two procedural safeguards—a clear and convincing standard of proof, and consideration of the ability to pay and conditions of release—are the two conditions most often ordered as constitutionally necessary." *Sophia*, 2020 WL 764279, at *5 (citing *Sanchez v. Decker*, 18 Civ. 8798, 2019 WL 7047328, at *5-6 (S.D.N.Y. Dec. 23, 2019) (collecting cases)).

V. CONCLUSION

For the foregoing reasons, Petitioner's request for a Writ of Habeas Corpus is GRANTED in part. By **August 6, 2020**, Respondents shall provide an individualized bond hearing to Petitioner to determine whether his detention is justified. Should they fail to provide such a hearing, Respondents shall release Petitioner from detention. The Government shall file a status letter to update the Court about Petitioner's status by **August 7, 2020**.

The Clerk of Court is respectfully requested to close this case.

SO ORDERED.

Dated: July 23, 2020
New York, New York

[/s/ LORNA G. SCHOFIELD]
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX D

Present:

Debra Ann Livingston,
Chief Judge,
Raymond J. Lohier, Jr.,
Richard J. Sullivan,
Joseph F. Bianco,
Michael H. Park,
William J. Nardini,
Steven J. Menashi,
Eunice C. Lee,
Beth Robinson,
Myrna Pérez,
Alison J. Nathan,
Sarah A. L. Merriam,
Maria Araújo Kahn,
Circuit Judges.*

---

* Judge Bianco took no part in the consideration of 22-70.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-3224

CAROL WILLIAMS BLACK,
Petitioner-Appellee,

v.

JUDITH ALMODOVAR, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, KRISTI NOEM, IN HER OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, PAUL ARTETA, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ORANGE COUNTY, NEW YORK,
Respondents-Appellants.

No. 22-70

KEISY G.M.,
Petitioner-Appellant,

v.

JUDITH ALMODOVAR, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PAMELA J. BONDI, IN HER OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL, KRISTI NOEM, IN HER OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents-Appellees,

DAVID L. NEIL,
Defendant-Appellee.[†]

[†] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Judith Almodovar—the current Acting Director of the New York

---

Filed: Oct. 24, 2025

Following disposition of this appeal on May 31, 2024, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

Raymond J. Lohier, Jr., *Circuit Judge*, joined by Eunice C. Lee, Beth Robinson, Myrna Pérez, Alison J. Nathan, Sarah A. L. Merriam, and Maria Araújo Kahn, *Circuit Judges*, concurs by opinion in the denial of rehearing *en banc*.

William J. Nardini, *Circuit Judge*, joined by Debra Ann Livingston, *Chief Judge*, Richard J. Sullivan, Michael H. Park, and Steven J. Menashi, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Steven J. Menashi, *Circuit Judge*, joined by Debra Ann Livingston, *Chief Judge*, Richard J. Sullivan, and Michael H. Park, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Field Office of U.S. Customs and Immigration Enforcement—and Kristi Noem—the current Secretary of the U.S. Department of Homeland Security—are automatically substituted in the caption for their predecessors in office as respondents in No. 20-3224 and No. 22-70. Pamela J. Bondi—the current United States Attorney General—is automatically substituted in the caption for her predecessor in that office as a respondent in No. 22-70. The Clerk of Court is directed to amend the case caption to conform to the above.

Denny Chin and Susan L. Carney, *Circuit Judges*, filed a statement with respect to the denial of rehearing *en banc*.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

LOHIER, *Circuit Judge*, joined by LEE, ROBINSON, PÉREZ, NATHAN, MERRIAM, and KAHN, *Circuit Judges*, concurring in the denial of rehearing en banc:

For the reasons set forth in the excellent joint statement of my colleagues, Senior Judges Chin and Carney, and in the panel opinion, *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), I concur fully in the decision to deny in banc rehearing in this case.

NARDINI, *Circuit Judge*, joined by LIVINGSTON, *Chief Judge*, SULLIVAN, PARK, MENASHI, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

The petition for rehearing in this case raises two principal issues: (i) whether and under what circumstances a noncitizen's Fifth Amendment right to due process limits the period of his immigration detention without a bond hearing under 8 U.S.C. § 1226(c) (which requires the detention of certain noncitizens on statutorily defined criminal or national security grounds during their removal proceedings); and (ii) if such a hearing is required, which party bears the burden of proof and under what standard. The panel first held that due process precludes "unreasonably prolonged detention under section 1226(c) without a bond hearing." *Black v. Decker*, 103 F.4th 133, 138 (2d Cir. 2024). Then, applying the three-factor test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the panel held that at such a hearing, the government must justify continued detention by clear and convincing evidence.[1] *Black*, 103 F.4th at 138.

The panel wrestled with these difficult questions with characteristic thoughtfulness. But the panel's holding on the second issue—concerning the burden allocation

---

[1] 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." 424 U.S. at 335.

and evidentiary standard if a hearing does occur—causes me concern for two principal reasons.

First, in concluding that due process requires the same remedy for prolonged detention under § 1226(c) as under § 1226(a), *see Velasco Lopez v. Decker*, 978 F.3d 842, 854-56 (2d Cir. 2020), the panel opinion does not account for key differences between the two statutory provisions and how those differences impact the due process analysis. Section 1226(a) provides that in general, the Attorney General *may*, in her discretion, order the detention of any noncitizen pending a removal decision, with regulations guaranteeing the noncitizen an initial bond hearing in the event of his detention. In contrast, § 1226(c) *mandates* the detention of a group of criminal noncitizens whom Congress has deemed to be especially troubling, and it does not, by its terms, authorize a bond hearing. Congress made this distinction based on significant evidence that criminal noncitizens posed unacceptably high risks of flight and recidivism, and with the purpose of eliminating those risks during the pendency of removal proceedings. The panel's decision to treat the two categories of detainees the same strikes me as being fundamentally at odds with that legislative choice.

But more to the point—the remedy it prescribes is not required by the Constitution. In announcing that the Due Process Clause *requires* that the burden of proof fall on the government, and that the burden can be met only by clear and convincing evidence, the panel opinion has effectively decreed that Congress has no power to set a standard that demands more of a noncitizen who has been convicted of a qualifying crime, or who poses a national security risk. Because the panel opinion establishes a constitutional floor, it implicitly bars Congress from amending § 1226(c) to require, say, that the noncitizen bear the burden of proving by a preponderance of the evidence that he does not pose a danger to the community or a risk of flight. Nor would Congress even have leeway to place the burden on the government, but only by a preponderance of the evidence. I cannot see how the Constitution dictates such a result.

Second, and relatedly, a disjointed body of case law analyzing § 1226(a) and § 1226(c) has bubbled up through the circuits. Five Circuits have considered various due process challenges to these statutes, and their decisions diverge widely. Our Court has now decided—through the combination of the present case and *Velasco Lopez*—that under *both* statutes, prolonged detention must trigger a bond hearing in which (i) the government bears the burden, (ii) by clear and convincing evidence. As to § 1226(a), the First Circuit agrees with our Court *in part* (requiring proof of dangerousness by clear and convincing evidence, but flight risk only by a preponderance), but the Fourth and Ninth Circuits go the other way entirely; they have held that due process allows the burden to remain with the noncitizen.[2] And the Third Circuit has gone with the Fourth and Ninth Circuit with respect to § 1226(a) (leaving the burden on the noncitizen) but with our Court on § 1226(c) (placing the burden on the government by clear

---

[2] *Compare Hernandez-Lara v. Lyons*, 10 F.4th 19, 39-40 (1st Cir. 2021), *with Miranda v. Garland*, 34 F.4th 338, 365-66 (4th Cir. 2022), *and Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1213 (9th Cir. 2022).

and convincing evidence).[3] These all-over-the-map holdings present more than the usual circuit split. Put together, they're a circuit splat.

As discussed below, the Supreme Court left these constitutional questions open in *Jennings v. Rodriguez*, 583 U.S. 281, 312 (2018). I would have granted the government's petition for rehearing *en banc*. At this point, only the Supreme Court can clean up this inter-circuit incoherence.

I.

8 U.S.C. § 1226 governs the procedures for detaining noncitizens during the pendency of their removal proceedings. Section 1226(a) establishes the default rule, providing that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Following the arrest of a noncitizen under this subsection, the government may continue to detain the noncitizen or instead release him on bond or conditional parole. 8 U.S.C. § 1226(a)(2). If the Immigration and Customs Enforcement officer who makes the initial custody determination decides that continued detention is appropriate, the noncitizen may seek review of that decision at a bond hearing before an immigration judge ("IJ"), and in the event of an adverse decision by the IJ, may appeal such decision to the Board of Immigration Appeals. 8 C.F.R. § 236.1(c)(8), (d)(1), (d)(3). To obtain release on bond under § 1226(a),

---

3 *Compare Borbot v. Warden, Hudson Cnty. Corr. Facility*, 906 F.3d 274, 279-80 (3d Cir. 2018) (§ 1226(a)), *with German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 214 (3d Cir. 2020) (§ 1226(c)).

"the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). If a § 1226(a) detainee is denied bond at the initial hearing stage, he may later request a second hearing, but such a request will "be considered only upon a showing that the alien's circumstances have changed materially." *Id.* § 1003.19(e).

In contrast to § 1226(a)'s discretionary detention framework, § 1226(c) *requires* the detention of certain noncitizens who are inadmissible or deportable for having committed certain crimes or having engaged in terrorist activities, because Congress determined that they pose a heightened bail risk as a class.[4] This subsection provides that "[t]he Attorney General *shall* take into custody any alien who" is removable on any of various enumerated criminal or national security grounds during the pendency of removal proceedings. 8 U.S.C. § 1226(c)(1) (emphasis added). The government "*may* release" such a noncitizen only if (1) such release is necessary for witness protection and (2) the noncitizen "satisfies the Attorney General that [he] will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id.* § 1226(c)(4) (emphasis added). Unlike § 1226(a) de-

---

[4] As noted below, after the panel's opinion was filed, § 1226(c) was amended to cover even noncitizens who have merely been charged with or arrested for, or admitted to having committed, certain crimes. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). Because the petitioners here were detained under the prior version of § 1226(c), my analysis focuses on the statute as it existed then.

tainees, noncitizens detained under § 1226(c) have no right by statute or regulation to an initial bond hearing.

Despite the differences between these statutory schemes, the panel opinion determined that our holding in *Velasco Lopez*, 978 F.3d 842—that when a bond hearing occurs after unreasonably prolonged detention under § 1226(a), the government must justify continued detention by clear and convincing evidence—"applies with equal force" in the § 1226(c) context. *Black*, 103 F.4th at 157. I disagree.

Congressional authority is at its peak in the realm of immigration, and we therefore owe Congress's decisions over such matters considerable deference. Indeed, the Supreme Court has consistently recognized that "[o]ver no conceivable subject is the legislative power of Congress more complete" than immigration. *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), which in turn was quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). And in recognition of that "broad power," the Court has approvingly acknowledged that "Congress regularly makes rules [for noncitizens] that would be unacceptable if applied to citizens." *Id.* at 305-06 (internal quotation marks omitted). Accordingly, when a court evaluates what due process requires in a matter relating to immigration, "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Of course, Congress does not have carte blanche, but our task is to ascertain "the minimum procedures required by the Constitution," *Washington v. Harper*, 494 U.S. 210, 220 (1990) (internal quotation marks omitted), not to imagine what a different Congress might have done or to decide what, in *our* view, the ideal procedures would be, *see Landon*, 459 U.S. at 34-35 ("The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.").

By applying the same burden allocation and evidentiary standard for unreasonably prolonged detention under both § 1226(a) and § 1226(c), the panel failed to accord adequate weight to Congress's deliberate choice to treat detainees under each statutory provision differently. Section 1226(c) reflects Congress's "justifiabl[e] concern[] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore v. Kim*, 538 U.S. 510, 513 (2003). "Congress adopted this provision against a backdrop of wholesale failure by the [Immigration and Naturalization Service (the "INS")] to deal with increasing rates of criminal activity by aliens," and in light of "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings."[5] *Id.* at 518-19. To address those failures, Congress *mandated* the detention of a specified group of criminal noncitizens, whom it deemed to be especially troubling, during the pendency

[5] For many years, the INS was the principal federal agency for immigration and border security matters. The Homeland Security Act of 2002 disbanded the INS, effective March 1, 2003, and created three new agencies to replace its functions: Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services.

of their removal proceedings. *See id.* at 521. So strong was Congress's desire to ensure the successful removal of that subset of criminal noncitizens that it did not authorize a bond hearing at any point. Under § 1226(a), on the other hand, Congress merely authorized the *discretionary* detention of any noncitizen pending a removal decision, and the implementing regulations guarantee detainees an initial bond hearing (with the possibility of additional hearings). 8 U.S.C. § 1226(a)(1)-(2); 8 C.F.R. § 236.1. The reason for the discrepancy is straightforward: Congress made "no similar findings regarding dangerousness or flight risk . . . as to the class of noncitizens detained under section 1226(a)." *Hernandez-Lara v. Lyons*, 10 F.4th 19, 36 (1st Cir. 2021). Put simply, "§§ 1226(a) and (c) apply to discrete categories of noncitizens," *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1201 (9th Cir. 2022) (internal quotation marks omitted), and Congress deliberately created distinct detention frameworks for each category.

Given the differences between § 1226(a) and § 1226(c), I disagree with the panel's conclusion that the same burden allocation and evidentiary standard ought to apply in both contexts. It is axiomatic that "[t]he constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances." *Landon*, 459 U.S. at 34. "The circumstances [of detention under the two provisions at issue here] are quite different." *Hernandez-Lara*, 10 F.4th at 36. "Unlike those mandatorily detained under § 1226(c), persons subject to detention under § 1226(a) . . . include individuals with no criminal record . . . ." *Velasco Lopez*, 978 F.3d at 854; *see also Hernandez-Lara*, 10 F.4th at 36 (underscoring the same distinction). In *Velasco Lopez*, we considered this distinction to be significant to our determination "that individuals subject to prolonged detention under § 1226(a) must be afforded process in addition to that provided by the ordinary bail hearing," including by "shifting the burden of proof to the Government." 978 F.3d at 854. This distinction is equally relevant to the constitutional analysis here, and it supports reaching a different conclusion as to the process required to remedy prolonged detention under § 1226(c).

Congress's finding that § 1226(c) detainees "pose a heightened bail risk as a class," *id.* at 848, supports keeping the burden of proof on the detainee. In this scenario, detainees who have been subject to unreasonably prolonged detention without a hearing would get their day in immigration court, but they would need to overcome the presumption, which underlies the statutory scheme, that "releasing [them] on bond would lead to an unacceptable rate of flight" and recidivism. *Demore*, 538 U.S. at 518-20. The panel reasoned that requiring such detainees to "prove that they are *not* a danger and *not* a flight risk—after the government has enjoyed a presumption that detention is necessary—presents too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged." *Black*, 103 F.4th at 156; *see id.* at 155-56 (concluding that the second *Mathews* factor is dispositive of the burden allocation). But the panel fails to explain why the presumption of detention changes with the mere passage of time, which in the panel's view could be as little as six months. *See id.* at 150 ("[A]ny immigration detention exceeding six months without a bond hearing raises serious due process concerns.").

As the Supreme Court observed in *Demore*, the "detention of deportable criminal aliens *pending their* *removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-28. "[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.* at 528. And it certainly does not need to employ the least burdensome means when addressing the detention of noncitizens whose criminal records implicate national security risks and other concerns. *See id.* (stating that the "evidence [regarding flight risk and recidivism among criminal noncitizens that] Congress had before it certainly supports the approach it selected"—that is, mandating detention for the class of criminal noncitizens covered by § 1226(c)).[6]

Consider the Bail Reform Act. In support of its conclusion that the government must justify continued detention by clear and convincing evidence, the panel points to the Supreme Court's observation in *United States v. Salerno*, 481 U.S. 739 (1987)—which rejected a constitutional challenge to the Bail Reform Act—that "pretrial detention is permitted when the government can justify its need by clear and convincing evidence." *Black*, 103 F.4th at 158 (citing *Salerno*, 481 U.S. at 751). But that observation pertained to the Bail Reform Act's

---

[6] The Supreme Court has recognized that "reasonable presumptions and generic rules . . . are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens," *Demore*, 538 U.S. at 526 (internal quotation marks omitted), particularly when, as here, the presumption is based on a record of criminal activity or activity that is deemed to present a national security threat.

discretionary detention provision, which, like § 1226(a), applies to a broad class—any arrestee. *See* 18 U.S.C. § 3142(f)(2). Notably, the statute also singles out a subgroup of persons, not unlike § 1226(c), by creating "a rebuttable presumption" for certain arrestees (regardless of their citizenship status) that "no condition or combination of conditions will reasonably assure the safety of any other person and the community," *id.* § 3142(e)(2), or "reasonably assure the appearance of the person as required and the safety of the community," *id.* § 3142(e)(3). Arrestees face this presumption in certain circumstances if they have previously been convicted of an offense listed in 18 U.S.C. § 3142(f)(1), such as a crime of violence, or if the judge "finds that there is probable cause to believe" that they have committed an offense listed in § 3142(e)(3), such as a specified drug crime carrying a maximum term of imprisonment of ten years or more. *Id.* § 3142(e)(2), (e)(3), (f)(1). In these cases, the presumption shifts from releasing the arrestee on bail, as in the typical case, to detaining him, even before the arrestee is convicted. When the presumption applies, the defendant must "introduce some evidence . . . to rebut the presumption," and even when the "defendant introduces rebuttal evidence, the presumption, rather than disappearing altogether, continues to be weighed along with other factors to be considered when deciding whether to release a defendant." *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991). So even in *Salerno*, where the Court considered a statute that allows for detention for risk of flight based on a preponderance of the evidence, and danger to the community based on clear and convincing evidence, due process permitted for the introduction of a presumption that significantly altered the detention calculus. And although the *Salerno* Court had no occasion to consider it, 18 U.S.C. § 3143—which governs detention of a convicted defendant pending sentence or appeal—flips the burden: Detention is mandatory unless the judge finds by clear and convincing evidence *both* that the person is not likely a flight risk or danger to the community.

The Supreme Court's approval of Congress's decision to single out a certain category of persons (citizens included) for presumptive detention under the Bail Reform Act reinforces the validity of Congress's choice to do so under § 1226(c). In addressing a challenge to detention under § 1226(a), the Fourth Circuit, relying on *Salerno*, stated: "If, in the criminal context, requiring citizens to bear the burden to show that they are not a danger to the community and a flight risk is not unconstitutional, it cannot be unconstitutional for the government to place a similar burden on an alien facing removal proceedings, especially considering the detention lasts only until removal." *Miranda v. Garland*, 34 F.4th 338, 363 (4th Cir. 2022). This well-founded proposition applies with even greater force to the removable noncitizens detained under § 1226(c), who have been convicted of a crime, even when their detention has become unreasonably prolonged. The remedy for § 1226(c) detainees who have been subject to such detention is the bond hearing that they would otherwise be denied entirely. *See Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotation marks omitted)). There is no constitutional basis for requiring, in addition, that the government bear the burden of proof at that hearing. The presumption of detention need not disappear entirely.

In summary, the panel's prescribed remedy for prolonged detention under § 1226(c) exceeds what the Constitution requires.

II.

In *Demore*, the Supreme Court rejected a facial challenge to the constitutionality of 8 U.S.C. § 1226(c). 538 U.S. 510. More recently, in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), the Court considered a challenge asserting that §§ 1226(a) and 1226(c) do not authorize prolonged detention absent a bond hearing at which the government must prove by clear and convincing evidence that continued detention is justified.[7] The Court resolved the case solely on statutory grounds, declining to consider the respondents' constitutional argument that prolonged detention under these provisions without a bond hearing violated their due process rights. *Id.* at 312. Thus, the question whether unreasonably prolonged detention under § 1226(c) may violate due process, and if so, what remedy is required, has been left to percolate through the lower courts.

The panel and several other members of this Court voted to deny rehearing in part because the only other circuit that has addressed this narrow question, regarding § 1226(c), reached the same conclusion as the panel, including with respect to the burden allocation and evidentiary standard. That observation is correct as far as it goes. In *German Santos v. Warden Pike County Correctional Facility*, 965 F.3d 203, 206 (3d Cir. 2020),

---

[7] *Jennings* also involved a challenge to § 1225(b), but that provision is not at issue here.

the Third Circuit, like the panel here, held that when detention under § 1226(c) becomes unreasonably prolonged, the detainee is entitled to a bond hearing at which "the Government must justify his continued detention by clear and convincing evidence." But courts, including the panel here, have consistently analyzed § 1226(c) in relation to § 1226(a), and vice versa. *See, e.g.*, *Black*, 103 F.4th at 149 ("That *Velasco Lopez* dealt with section 1226(a) detention means only that the case is not directly binding here, not that its reasoning is irrelevant."); *id.* at 157 ("Once those detentions [under §§ 1226(a) and (c)] have been unconstitutionally prolonged, the due process analysis adopted in *Velasco Lopez* applies with equal force to both situations."). It is therefore critical to consider the broader state of the case law regarding constitutional claims arising under either provision.

Since *Jennings*, four circuits other than ours have considered whether due process requires the government to bear the burden of proof at bond hearings for noncitizens detained under § 1226(a) or § 1226(c). In the § 1226(a) context, the First Circuit has held that even at the initial bond hearing, due process requires the government to bear the burden of proving dangerousness by clear and convincing evidence or flight risk by a preponderance of the evidence. *See Hernandez-Lara*, 10 F.4th at 39-40. The Third, Fourth, and Ninth Circuits, on the other hand, have held that due process does not require shifting the burden from the noncitizen to the government in a § 1226(a) bond hearing. *See Borbot v. Warden, Hudson Cnty. Corr. Facility*, 906 F.3d 274, 279 (3d Cir. 2018); *Miranda*, 34 F.4th at 366; *Rodriguez Diaz*, 53 F.4th at 1213. And as noted above, in the § 1226(c) context, the Third Circuit has held—in contrast to its holding in the § 1226(a) context—that the burden of proof belongs to the government. *See German Santos*, 965 F.3d at 214.

One might argue that the § 1226(a) cases in the Third and Fourth Circuits addressed due process requirements only for the *initial* bond hearing, not for a hearing once the detention has become unreasonably prolonged. But neither circuit cabined its opinion that narrowly. In *Borbot*, which involved a habeas petitioner's request for a second bond hearing, the Third Circuit noted that the petitioner was "correct to point out that *Diop* [*v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011),] places the burden of proof on the government in § 1226(c)" bond hearings offered as a remedy for "unreasonably long" detention, "whereas under § 1226(a) the burden remains on the detainee *at all times*." 906 F.3d at 277, 279 (emphasis added). The court "perceive[d] no problem with this distinction." *Id.* at 279. In other words, the Third Circuit expressly contrasted the procedures for § 1226(c) bond hearings *in the context of unreasonably prolonged detention* with the unchanging procedures for § 1226(a) hearings. Thus, any attempt to cabin *Borbot* to initial § 1226(a) hearings would be unpersuasive.[8]

---

[8] Moreover, the Third Circuit stated that because Borbot failed to demonstrate that his detention was unreasonably prolonged, the court "need not decide when, if ever, the Due Process Clause might entitle an alien detained under § 1226(a) to a new bond hearing in order to conclude that [his] due process rights were not violated." *Borbot*, 906 F.3d at 280. Notably, the court limited that hypothetical to whether *a new hearing* would be required, making no mention of whether *the burden of proof would need to shift to the government* at such a hearing, despite Borbot's argument on that point. This further supports reading "at all times," *id.* at 279, to

Nor does anything in *Miranda* limit its analysis to initial § 1226(a) hearings. To the contrary, the Fourth Circuit emphasized that "aliens are due less process when facing removal hearings than an ordinary citizen would have," and that "it cannot be unconstitutional" to require "an alien facing removal proceedings" to "bear the burden to show that [he is] not a danger to the community and a flight risk." *Miranda*, 34 F.4th at 361, 363. Moreover, the court "agree[d] with the Third Circuit's view of the burden of proof procedures in § 1226(a)," namely, that "the alien bear[s] the burden of proof." *Id.* at 366 (citing *Borbot*, 906 F.3d at 279).

In any event, the panel places its emphasis in the wrong place. As discussed above, it is the *category of noncitizens* at issue that principally matters for our due process analysis, not the timing of the hearing along the detention continuum. *See Rodriguez Diaz*, 53 F.4th at 1201 (recognizing "that under the Supreme Court's . . . decision in *Jennings*, §§ 1226(a) and (c) apply to discrete categories of noncitizens—and *not* to different stages of a noncitizen's legal proceedings" (internal quotation marks omitted)).

This misplaced emphasis skewed the outcome of the panel's *Mathews* analysis. Congress placed its thumb on the scale in favor of detention for noncitizens covered by § 1226(c), going so far as to mandate it. Thus, in this context, as compared with the discretionary detention regime under § 1226(a), the government's interest is relatively stronger, and the detainee's relatively weaker, while the risk of error is effectively the same. One would expect that plugging these different inputs into

include subsequent bond hearings, even when the detention has become unreasonably prolonged.

the *Mathews* test in the § 1226(c) context would yield a different output than in the § 1226(a) context. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[N]ot all situations calling for procedural safeguards call for the same kind of procedure."). Yet the panel's reasoning produced the same outcome. Even assuming that when the *Mathews* factors are properly weighted in the § 1226(c) context, due process may eventually require that a detainee receive a bond hearing, it certainly does not require shifting the burden of proof from the detainee to the government, much less requiring the government to justify continued detention by the heightened standard of clear and convincing evidence.

* * *

In my view, the varying approaches taken by several courts of appeals underscore why we should have granted the government's petition for rehearing *en banc* here. Consider the Third Circuit's contrasting decisions in *Borbot* and *German Santos*. Under *Borbot*, § 1226(a) detainees bear the burden of proof even though many of them have no criminal history, much less the type of criminal record that Congress deemed to warrant mandatory detention under § 1226(c), as the First Circuit and this Court have recognized. *See Hernandez-Lara*, 10 F.4th at 36 ("Unlike section 1226(c), section 1226(a) applies to a wide swath of noncitizens, many of whom . . . have no criminal record at all."); *Velasco Lopez*, 978 F.3d at 854 (noting that "[u]nlike those mandatorily detained under § 1226(c), persons subject to detention under § 1226(a) . . . include individuals with no criminal record"). Yet under *German Santos*, § 1226(c) detainees, who by definition were convicted of particularly serious crimes such as murder or robbery or engaged in terrorist activities, face no such burden as soon as they become entitled to a hearing; instead, the government must justify their continued detention by clear and convincing evidence. This is a peculiar result, and it runs counter to the entire statutory scheme. Congress enacted § 1226(c) precisely because it wanted to ensure that the covered noncitizens would be detained pending their removal proceedings, absent the narrowest of circumstances, on the ground that they presented a heightened risk of danger to the community, or risk of flight, in contrast to the detainees under § 1226(a), whom Congress permitted to be released on bond at the discretion of the Attorney General. Given this statutory framework, it strikes me as profoundly wrong to make it no more difficult to obtain release at a bond hearing for § 1226(c) detainees than for § 1226(a) detainees, when detention for either has become unreasonably prolonged in the same measure.

I believe that the rule with respect to § 1226(c) hearings should be what multiple other circuits have said about § 1226(a) hearings: namely, that it is consistent with due process to require the detainee to bear the burden of proving, by a preponderance of the evidence, that he presents neither a danger to the community nor a risk of flight. *See Miranda*, 34 F.4th at 365-66; *Rodriguez Diaz*, 53 F.4th at 1213; *see also Borbot*, 906 F.3d at 279 ("[U]nder § 1226(a) the burden remains on the detainee at all times."). Although some judges might perhaps have drawn the line between the panel's and mine (say, placing the burden on the government, but only by a preponderance of the evidence), rehearing this case *en banc* would have given us an opportunity to grapple collectively with where to draw it.

Moreover, this case has the potential to affect a substantial number of immigration proceedings within our jurisdiction and nationwide. In New York alone, U.S. Immigration and Customs Enforcement ("ICE") detained 4,770 noncitizens with criminal convictions during the period between October of 2020 and January of 2025; nationwide, there were over 236,000 ICE detainees with criminal convictions during that period. [9] While the available data do not identify the number of noncitizens detained pursuant to § 1226(c), these figures nonetheless suggest that this decision will likely affect many cases and carry wide-ranging implications.

It is worth noting that after the government filed its petition, Congress amended § 1226(c) to expand the category of covered crimes, and to require the detention not only of those who have been convicted of any of the newly added crimes but also of anyone who has been accused of one. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). But it seems to me that the panel holding regarding the burden of proof at a bond hearing remains binding as to petitioners who fall within the scope of the pre-amendment version of the statute; the only open question for a future panel would be whether this holding also applies to petitioners falling within the expanded scope. While other considerations might apply to the amendments (say, to petitioners who have been arrested but not yet convicted), our *en banc* Court would not have been called upon to express a view on the revised statute because the two petitioners in this case were convicted of crimes covered by the prior version.

---

[9] *See ICE Enforcement and Removal Operations Statistics*, U.S. Immigr. & Customs Enf't (May 30, 2025), https://www.ice.gov/spotlight/statistics [https://perma.cc/SE2V-GBBC].

Accordingly, I do not believe that the amendments provide support for the Court's decision to abstain from rehearing.

For all these reasons, I respectfully dissent from the denial of rehearing *en banc*.

MENASHI, *Circuit Judge*, joined by LIVINGSTON, *Chief Judge*, and SULLIVAN and PARK, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

The panel in these cases held that the requirement of mandatory detention pending removal proceedings that Congress adopted in 8 U.S.C. § 1226(c) is unconstitutional. According to the panel, the Due Process Clause instead requires a court to determine whether the detention has become "unreasonably prolonged" and to conduct individualized bond hearings based on *Mathews* balancing. *Black v. Decker*, 103 F.4th 133, 138 (2d Cir. 2024).

"Invalidating an act of Congress is 'the gravest and most delicate duty that a federal court is called on to perform.'" *Fuld v. PLO*, 101 F.4th 190, 204 (2d Cir. 2024) (Menashi, J., dissenting from the denial of rehearing en banc) (alteration omitted) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). It is especially delicate given "the need for special judicial deference to congressional policy choices in the immigration context." *Fiallo v. Bell*, 430 U.S. 787, 793 (1977). I would reconsider these cases not only because of the improper assignment of the burden of proof, *see ante* at 1 (Nardini, J., dissenting from the denial of rehearing en banc), but also because the panel opinion provided no persuasive justification for invalidating the congressional policy reflected in § 1226(c) in the first place.

According to the panel opinion, *Mathews* "provides the proper framework to assess Black's and G.M.'s respective due process challenges" because an alien has a "significant liberty interest" to be free from "unreasonably prolonged" detention in the United States while removal proceedings are pending. *Black*, 103 F.4th at 148-51. That holding entrenches a split with the

Eighth Circuit, which has squarely held that *Mathews* balancing does not apply to a challenge to detention under § 1226(c). The Eighth Circuit explained that the decisions of the Supreme Court in *Zadvydas* and *Demore* "leave no room for a multi-factor 'reasonableness' test" in evaluating a § 1226(c) detention because the Supreme Court has "already done whatever balancing is necessary" and has "opted for a bright-line rule" that "the government can detain an alien for as long as deportation proceedings are still pending." *Banyee v. Garland*, 115 F.4th 928, 933 (8th Cir. 2024) (internal quotation marks and emphasis omitted).

The Eighth Circuit has the better reading of the case law, which means that the panel opinion conflicts not only with that circuit but also with controlling decisions of the Supreme Court. Those decisions establish that (1) a detention under § 1226(c) has a definite termination point, so it does not implicate the due process concerns associated with indefinite detention, and (2) a removable alien does not have a "significant liberty interest" to be released into the United States while removal proceedings are pending. As a result, there is no legal basis for invalidating a statute that requires detention without a bond hearing while removal proceedings are pending.

I would rehear these cases *en banc* because "the panel decision conflicts with a decision of the United States Supreme Court," Fed. R. App. P. 40(b)(2)(B), "the panel decision conflicts with an authoritative decision of another United States court of appeals," *id.* 40(b)(2)(C), and "the proceeding involves one or more questions of exceptional importance" given that the panel invalidated an act of Congress in the immigration context, *id.* 40(b)(2)(D).[1] I dissent from the denial of the petition for rehearing *en banc*.

I

The panel opinion concluded that *Zadvydas* and *Demore* "imply . . . that any immigration detention exceeding six months without a bond hearing"—including detention pursuant to § 1226(c)—"raises serious due process concerns." *Black*, 103 F.4th at 150. But the Supreme Court has distinguished detention under § 1226(c) from the sort of indefinite detention that raises such concerns:

> In *Demore v. Kim*, we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has "a definite termination point": the conclusion of removal proceedings. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).

Jennings v. Rodriguez, 583 U.S. 281, 304 (2018) (citation omitted) (quoting *Demore v. Kim*, 538 U.S. 510, 529 (2003)). In *Demore*, the Court acknowledged that an indefinite detention may raise due process concerns, but it held that the detention in that case was permissible precisely because a detention under § 1226(c) is neither "indefinite" nor "potentially permanent." *Demore*, 538 U.S. at 528. The fact that a § 1226(c) detention has "a definite

---

[1] "The invalidation of a federal statute is a primary reason for the Supreme Court to grant a petition for certiorari," *Fuld*, 101 F.4th at 205 n.3 (Menashi, J., dissenting from the denial of rehearing en banc), alongside conflicts with the Supreme Court and with another court of appeals, *see* Sup. Ct. R. 10(a), (c).

termination point" makes it "materially different" from the detention considered in *Zadvydas*. *Id.* at 528-29.

Indeed, *Zadvydas* itself recognized the same distinction. The Court distinguished the provision at issue in that case from § 1226(c) based on the indefiniteness of the detention: "importantly," said the Court, "post-removal-period detention, *unlike detention pending a determination of removability* or during the subsequent 90-day removal period, has no obvious termination point." *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (emphasis added); *see also Demore*, 538 U.S. at 529 ("*Zadvydas* distinguished the statutory provision it was there considering from § 1226 on these very grounds."). The indefiniteness of the detention—not its mere length—implicated the Due Process Clause.

The *Zadvydas* Court held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. In other words, only "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Due process considerations arise once removal is no longer foreseeable because "where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Id.* at 690 (internal quotation marks and alterations omitted). In *Zadvydas*, the purpose was "ensuring the appearance of aliens at future immigration proceedings." *Id.* Under the circumstances of *Zadvydas*—in which removal proceedings had ended, a final order of removal had issued, the statutory removal period had expired, and there still was no likelihood of effectuating the removal—the detention no longer appeared to serve the purpose of facilitating ongoing removal proceedings.[2] The government therefore needed to justify the continued detention.

Those circumstances bear no resemblance to a § 1226(c) detention. Detention under § 1226(c) is authorized—and required—until the conclusion of removal proceedings. The statute authorizes release during that period "*only* if . . . release . . . is necessary to provide protection to a witness . . . and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(4) (emphasis added). The Supreme Court has recognized that the "detention of deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 527-28 (emphasis in original). The detention "necessarily" continues to serve that purpose as long as the removal proceedings remain pending. Thus, the Supreme Court has already explained that the key principle of *Zadvydas*—"*[c]essante ratione legis cessat ipse lex*," requiring that a detention which no longer serves its purpose receive an additional justification—does not ap-

[2] *See Demore*, 538 U.S. at 527 ("[I]n *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was 'no longer practically attainable.' The Court thus held that the detention there did not serve its purported immigration purpose.") (citation omitted).

ply to a detention pursuant to § 1226(c). *Zadvydas*, 533 U.S. at 699 (quoting 1 Edward Coke, Institutes *70b).[3]

A

There is no suggestion in these cases that the government will be unable to remove either G.M. or Black at the conclusion of the removal proceedings such that "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. To the contrary, the detentions here have been prolonged not because of the government's inability to

[3] The statement respecting the denial of rehearing *en banc* nonsensically insists that my position is that "no individual could *ever* challenge his or her detention . . . even if the detention became indefinite or, worse, permanent." *Post* at 3. But I have just explained that the lack of a definite termination point is what justifies such a challenge. The statement tendentiously focuses on the *Demore* Court's characterization of "the brief period necessary for [an alien's] removal proceedings," *Demore*, 538 U.S. at 513, as if the length of the detention rather than the definite termination point were the ground of the decision. *See post* at 7. "But 'judicial opinions are not statutes, and we don't dissect them word-by-word as if they were'" because "we rely on the principles the Court articulated" to guide future cases. *United States v. Chastain*, 145 F.4th 282, 294 n.4 (2d Cir. 2025) (quoting *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting)). Those principles did not turn on the length of the detention but on the foreseeability of its termination. In any event, the Supreme Court understood the respondent in *Demore* to have been "detained for somewhat longer than the average" but that was because the "respondent himself had requested a continuance of his removal hearing." 538 U.S. at 530-31. The petitioners in these cases also sought continuances and other delays of their removal proceedings, but the panel opinion wrongly discounted the relevance of their litigation conduct. *See infra* Part I.A.

effectuate the removals but because of the petitioners' own litigation conduct.

G.M. was a lawful permanent resident when he was convicted of assault based on his stealing a phone and attacking someone with a belt. *See* G.M. App'x 161-65, 217. The government charged him with removability based on his commission of an aggravated felony. He was ordered removed within five and a half months of his arrest. *See id.* at 218-21 (¶¶ 11, 24). During that time, he received several adjournments and continuances to file applications for immigration relief despite his being removable based on his criminal conduct. *See id.* at 201-10, 218-22 (¶¶ 12-24). G.M. applied for relief including deferral of removal under the Convention Against Torture ("CAT"). *See id.* at 220 (¶ 20).[4] G.M. then appealed the IJ's denial of CAT relief to the BIA. *See* G.M. App'x 73 (¶ 20).

Black was a lawful permanent resident when he was convicted of sexual abuse of a minor and of endangering the welfare of a child. The government charged him with removability based on his commission of an aggravated felony and a crime of child abuse. *See* Black App'x 110. He was detained for seven months before the district court granted habeas relief. *See id.* at 177. During that time, he conceded that he was removable for having been convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment. *See* 8 U.S.C. § 1227(a)(2)(E)(i). The IJ repeat-

---

[4] The immigration judge granted most of G.M.'s requests to delay the proceedings. But when G.M.'s counsel requested a sixth adjournment of an additional four to five weeks "to prepare the case," the IJ granted only a three-week adjournment. *See* G.M. App'x 220 (¶ 20).

edly rejected his challenge that he was not removable for having been convicted of an aggravated felony. *See id.* § 1227(a)(2)(A)(iii); Black App'x 147, 149-52, 157-58 (¶¶ 17-18).[5] Throughout his detention, he repeatedly sought release pending the removal proceedings, which the IJ denied, and sought adjournments and continuances to file applications for asylum and withholding of removal; the IJ granted those requests to delay the proceedings. *See* Black App'x 149-52, 157-61.

This litigation conduct might have involved "dilatory and obstructive tactics," or it might have involved difficult choices taken in good faith to seek immigration relief and thereby to extend the corresponding detention. *Demore*, 538 U.S. at 530 n.14. Either way, "the legal system is replete with situations requiring the making of difficult judgments as to which course to follow, and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Id.* (internal quotation marks and alteration omitted). The district court in the *G.M.* case correctly explained that "Petitioner of course had every right to appeal to the BIA, but his pursuit of that appeal after an

---

[5] That was not a close question. As the IJ explained, Black "was convicted, after a jury trial, of *inter alia* Sexual Abuse in the First Degree, in violation of NYPL § 130.65(3)," which criminalizes "subjecting a person under eleven years old to sexual contact." Black App'x 150. "While not disputing the fact of his conviction," Black argued that his offense was not "categorically an aggravated felony." *Id.* But the BIA had already "held that the lesser offense of Sexual Abuse in the Second Degree, in violation of NYPL § 130.60(2), constitutes an aggravated felony sexual abuse of a minor" under 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.* at 151 (citing *Matter of Small*, 23 I. & N. Dec. 448 (B.I.A. 2002)). And the language of each statute is "identical except for the age of the victim." *Id.*

adverse decision should not permit him to secure release from custody when Congress otherwise mandated it, absent a delay in the BIA process that runs afoul of the due process clause." *G.M. v. Decker*, No. 21-CV-4440, 2021 WL 5567670, at *11 (S.D.N.Y. Nov. 29, 2021).[6] Our own court has previously held that "[a]lthough this litigation strategy is perfectly permissible," an alien "may not rely on the extra time resulting therefrom to claim that his prolonged detention violates substantive due process." *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991).[7]

---

[6] The district courts have long recognized this straightforward principle. *See, e.g.*, *Baker v. Johnson*, 109 F. Supp. 3d 571, 586 (S.D.N.Y. 2015) ("To the extent the proceedings are extended by appeals or by motion practice initiated by Petitioner, the Court properly takes into account the fact that Petitioner's continued detention may be at least in part a result of his choice to appeal and otherwise prolong the proceedings with motion practice.") (internal quotation marks and alterations omitted); *Debel v. Dubois*, No. 13-CV-6028, 2014 WL 1689042, at *6 (S.D.N.Y. Apr. 24, 2014) ("Delays attributable to normal consideration of an alien's appeal of adverse decisions do not render unreasonable the consequent delay of his ability to gain release into his home country."); *Johnson v. Orsino*, 942 F. Supp. 2d 396, 409 (S.D.N.Y. 2013) ("Although Johnson indisputably 'has every right to seek any relief from deportation for which he may be eligible, delay caused by his actions does not make continued detention unreasonable or unjustified.' ") (quoting *Andreenko v. Holder*, No. 09-CV-8535, 2010 WL 2900363, at *4 (S.D.N.Y. June 25, 2010)); *Adler v. DHS*, No. 09-CV-4093, 2009 WL 3029328, at *2 (S.D.N.Y. Sept. 22, 2009) ("Although it is Adler's right to seek relief from deportation, the delays caused by his motions should not be attributed to the government.").

[7] *See also Thevarajah v. McElroy*, No. 01-CV-3009, 2002 WL 923914, at *5 (E.D.N.Y. Apr. 30, 2002) ("This Circuit does not . . . permit an alien to rely on the lengthening of detention caused by his litigation strategy to claim that his prolonged detention violates

I would adhere to that precedent. The fact is that "an alien detained under § 1226(c) 'has the keys in his pocket' and can 'end his detention immediately' by 'withdrawing his defense and returning to his native land.'" *Banyee*, 115 F.4th at 933 (alterations omitted) (quoting *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999)). It is a perverse interpretation of the Due Process Clause under which Congress, by affording a criminal alien *more* process to contest his removal and to seek immigration relief, thereby invalidates its own authority to detain the alien until the process concludes.

B

The Supreme Court was emphatic in *Jennings* that courts must respect the requirement of mandatory detention that Congress adopted in § 1226(c). The Court explained that "§ 1226(c) is *not* 'silent' as to the length of detention. It mandates detention 'pending a decision on whether the alien is to be removed from the United States,' and it expressly prohibits release from that detention except for narrow, witness-protection purposes." *Jennings*, 583 U.S. at 304 (emphasis in original) (citation omitted). That express language leaves no room for interpreting the statute, pursuant to the constitutional avoidance canon, to contain an implicit limit on the length of an authorized detention: "Even if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not trans-

---

substantive due process. This conclusion is consistent with *Zadvydas*, which focused on the constitutionality of indefinite detention in the case of aliens placed in deportation limbo because their countries of origin had refused to allow them entrance, not on aliens whose detention is lengthened largely because of their own actions.") (internal quotation marks, citations, and alteration omitted).

mute existing statutory language into its polar opposite. The constitutional-avoidance canon does not countenance such textual alchemy." *Id.*

The panel opinion dismissed *Jennings* as "a statutory decision" that "did not answer the question whether due process places any limits on the government's detention authority under section 1226(c)." *Black*, 103 F.4th at 142-44 (emphasis omitted). It is true that in *Jennings*, the Ninth Circuit had "erroneously concluded that periodic bond hearings are required under the immigration provisions," so the Ninth Circuit "had no occasion to consider respondents' constitutional arguments on their merits." *Jennings*, 583 U.S. at 312. As a result, the Supreme Court also did "not reach those arguments." *Id.*

But because the Supreme Court has foreclosed the constitutional avoidance approach it followed in *Zadvydas* with respect to § 1226(c), our court has now gone beyond *Zadvydas* to declare § 1226(c) unconstitutional to the extent that it "mandates detention pending a decision on whether the alien is to be removed from the United States" and "prohibits release from that detention except for narrow [specified] purposes." *Jennings*, 583 U.S. at 304 (internal quotation marks omitted). According to the panel opinion, "[t]he Constitution does not permit the Executive to detain a noncitizen for an unreasonably prolonged period under section 1226(c) without a bond hearing," so Congress violated the Constitution when it directed the executive branch to detain criminal aliens throughout the removal proceedings and prohibited release through bond hearings. *Black*, 103 F.4th at 145.

The statement protests that the panel opinion did not *facially* invalidate § 1226(c) but instead authorized a series of *as-applied* challenges by each individual detainee. *See post* at 2-3. The statement pretends that this position is consistent with what the government argued in *Demore*. *See id.* at 11. But that is not true. The government argued that "[t]he mandatory detention provisions of Section 1226(c) are constitutional in the ordinary case," and only those "*exceptional circumstances* that present special due process concerns" would be "addressed on a case-by-case basis."[8] These cases are ordinary. No one has argued that the government brought sham removal proceedings or engaged in abusive conduct that created "a delay in the BIA process." *G.M.*, 2021 WL 5567670, at *11. Instead, Black and G.M. were long-ago adjudicated to be removable,[9] and their detentions continued only because of the "normal consideration of an alien's appeal of adverse decisions." *Debel*, 2014 WL 1689042, at *6. Black and G.M. each continued to litigate but always had "the keys [to release] in his pocket." *Banyee*, 115 F.4th at 933 (quoting *Parra*, 172 F.3d at 958).

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Here, Congress provided for mandatory detention with-

---

[8] Brief for the Petitioners at 48-49, *Demore v. Kim*, No. 01-1491 (U.S. Aug. 29, 2002), 2002 WL 31016560, at *48-49 (emphasis added). Similarly, the Solicitor General said at oral argument that an as-applied challenge would be appropriate "if there's some question about an *aberrational* lengthy detention" in an individual case. Transcript of Oral Argument at 56, *Demore v. Kim*, No. 01-1491 (U.S. Jan. 15, 2003) (emphasis added).

[9] *See* Black App'x 98 ("At a master calendar hearing on February 24, 2020, the Court sustained both charges of removability."); G.M. App'x 184 ("[A] previous Immigration Judge sustained the charges of removability under the INA.").

out the possibility of a bond hearing or of release except for statutorily specified reasons. The panel opinion has instead directed district courts to entertain as-applied challenges by detainees in the form of bond hearings based on *Mathews* balancing. That means the congressional policy of mandatory detention has been replaced with the judicial policy of individualized bond hearings. That amounts to the invalidation of § 1226(c).

The statement even admits that the panel rewrote the statute to depart from the text that Congress adopted. The statement notes that "*other* types of civil detention generally require a bond hearing near the outset of detention." *Post* at 6 (emphasis added). In other words, Congress knows how to write a civil detention statute that provides for bond hearings. But it decided not to include such a provision in § 1226(c). We have a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). With respect to § 1226(c), the Supreme Court has expressly held that there is no way to read the text of the statute to include a time limit on the length of the detention or to authorize release from detention for any reason other than "narrow, witness-protection purposes." *Jennings*, 583 U.S. at 304. The panel opinion invalidated the scheme of mandatory detention that Congress adopted and replaced it with a scheme of individualized bond hearings of the panel's own making.

That invalidation has no support in the applicable precedents. The statute at issue in these cases does not contain the "ambiguous" language that the Supreme Court could construe in *Zadvydas*. And even in *Zadvydas*, the application of the constitutional avoidance canon was not justified *until* removal was no longer reasonably foreseeable and the detention became indefinite. In *Demore*, meanwhile, the application of the constitutional avoidance canon was not justified for a reason that applies equally to this case: during the pendency of the removal proceedings, removal remains reasonably foreseeable and the detention has a definite termination point. Despite these clear standards from the Supreme Court, our court has held § 1226(c) to be invalid even when the removal proceedings remain pending, removal is reasonably foreseeable, and the detention has a definite termination point. That decision conflicts with controlling precedent and ignores "the limited scope of judicial inquiry into immigration legislation." *Fiallo*, 430 U.S. at 792.[10]

I would join the Eighth Circuit in holding that the Due Process Clause does not invalidate the mandatory detention provision of § 1226(c) as long as "deportation remains a possibility." *Banyee*, 115 F.4th at 933. In doing so, I would adhere to the Supreme Court's instruction that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."

---

[10] *See Fiallo*, 430 U.S. at 792 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' ") (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (citations omitted).

Zadvydas, 533 U.S. at 701. Because "detention under § 1226(c) has a definite termination point" at "the conclusion of removal proceedings," removal remains a possibility throughout a § 1226(c) detention. *Jennings*, 583 U.S. at 304 (internal quotation marks omitted). The applicable precedents therefore yield "a bright-line rule" that "the government can detain an alien for as long as deportation proceedings are still '*pending*.'" *Banyee*, 115 F.4th at 933 (quoting *Demore*, 538 U.S. at 527).

In these cases, the removal proceedings remain pending; there is no indication that those proceedings are a sham or that the government is otherwise unlikely to effectuate the removals at the reasonably foreseeable conclusion of those proceedings. Under these circumstances, the Constitution requires no exception to the requirement of mandatory detention that Congress enacted.

II

The panel opinion justified its invalidation of § 1226(c) with its conclusion that a criminal alien—who is concededly removable based on his criminal history—has a "significant liberty interest . . . in being free from imprisonment" while the alien seeks relief from removal in immigration proceedings. *Black*, 103 F.4th at 151. Unlike *Zadvydas*—in which removal was improbable and the detention was indefinite—the general interest in being free from imprisonment is not implicated in these cases. "[A]n alien detained under § 1226(c) 'has the keys in his pocket' and can 'end his detention immediately' by 'withdrawing his defense and returning to his native land.'" *Banyee*, 115 F.4th at 933 (alterations omitted) (quoting *Parra*, 172 F.3d at 958). In fact, "the Government is happy to release him—provided the release occurs in the cabin of a plane bound" for his home country. *DHS v. Thuraissigiam*, 591 U.S. 103, 119 (2020).

The due process analysis "must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). When we engage in interest balancing, the "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of *the precise nature* of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (emphasis added) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

To be precise about these cases, "[t]he private interest here is not liberty in the abstract, but liberty *in the United States* by someone no longer entitled to remain in this country but eligible to live at liberty in his native land." *Parra*, 172 F.3d at 958 (emphasis in original). Under what law can the aliens in these cases make a "substantive claim of entitlement" to release into the United States? *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). Both Black and G.M. are removable based on their criminal conduct. From the start of his removal proceedings, Black has conceded that he is removable pursuant to § 1227(a)(2)(E)(i) because he was convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment. *See* Black App'x 157 (¶ 17). And there is no question that he is also removable pursuant to § 1227(a)(2)(A)(iii) because he committed an aggravated felony. *See id.* at 155 (¶ 11). At one time, G.M. made a frivolous argument that the government could not prove he was removable because the records of his conviction for an aggravated felony were "unreliable" and contained "formatting and spelling errors." G.M. App'x 177-79. An IJ rejected that argument in 2020, *see id*. at 177, and the BIA agreed that the government had proven removability in a decision it issued on December 15, 2021, *see* Motion to Supplement the Record on Appeal, Exhibit A at 2, *G.M. v. Decker*, No. 22-70 (2d Cir. Apr. 25, 2022), ECF No. 33-3. There is no question that G.M is removable pursuant to § 1227(a)(2)(A)(iii) because he was convicted of an aggravated felony.

"When an alien is removable, he or she has no right under the basic immigration laws to remain in this country." *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting). Black and G.M. continue to pursue forms of relief from removal, meaning they hope to convince the government to decline to exercise its legal right to remove them from the United States. Those sorts of claims cannot establish an entitlement to be released into the United States.

Black, for example, has applied for asylum. But even assuming that he is eligible for asylum—which he does not appear to be, *see* 8 U.S.C. § 1158(b)(2)(A)(ii)—asylum is always "a discretionary form of relief" that the government may choose to deny, *Hong Fei Gao v. Sessions*, 891 F.3d 67, 75 (2d Cir. 2018) (quoting *Delgado v. Mukasey*, 508 F.3d 702, 705 (2d Cir. 2007)); *see* 8 U.S.C. § 1158(b)(1). Every asylum applicant "has the burden of proof to establish" that he or she "merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A)(ii). An alien "does not have a liberty or property interest in a discretionary grant of asylum." *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008). The Due Process Clause does not protect such an interest because "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

The only relief that G.M. continues to seek is deferral of removal under the CAT. *See* G.M. Supp. App'x 2-3. We have previously explained that neither the CAT nor the United Nations Protocol Relating to the Status of Refugees creates a private entitlement. Because these are not "self-executing treaties," the CAT and the Protocol "do not create private rights that petitioners can enforce in this court beyond those contained in their implementing statutes and regulations (i.e., the INA)." *Yuen Jin*, 538 F.3d at 159. The CAT certainly cannot serve as a basis for *invalidating* a statute that Congress has enacted. Moreover, "even if the treaties were self-executing, 'there is a strong presumption against inferring individual rights from international treaties.'" *Id.* (quoting *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001)). "[I]nternational agreements, even those directly benefiting private persons, generally do not create private rights." *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008) (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (1986)).

Black has additionally sought withholding of removal pursuant to 8 U.S.C. § 1231(b)(3)(A). With respect to this statutory provision, "we have suggested in dicta that an alien's interest 'in not being returned to a country where he fears persecution may well enjoy some due process protection not available to an alien claiming only admission.'" *Yuen Jin*, 538 F.3d at 157 (alteration omitted) (quoting *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983)). But even if Black had a protectable interest in statutory withholding relief, that interest has not been affected by his detention. We must identify "the precise nature" of "the private interest that has been affected by governmental action." *Goldberg*, 397 U.S. at 263. If the private interest is Black's purported statutory entitlement to avoid being returned to Jamaica, then no governmental action has affected that interest because Black has not been returned to Jamaica. That private interest certainly has not been denied without due process. The whole reason for this appeal is that the government has afforded Black so much process to contest his return to Jamaica that his removal proceedings have continued for a lengthy amount of time. In his habeas case, Black is not contesting his return to Jamaica but "claiming only admission" to the United States, and he has no entitlement to such admission. *Yuen Jin*, 538 F.3d at 157.

A right not to be removed to a particular country—whether the right is asserted under § 1231(b)(3)(A) or under the CAT—does not establish an entitlement to be released into the United States. In their habeas cases, Black and G.M. assert an entitlement to be released into the United States pending their removal proceedings. In their removal proceedings, however, Black and G.M. are pursuing possible entitlements only to avoid removal to particular foreign countries. Thus, to the extent that Black and G.M. have a possible entitlement, it has not been denied. To the extent that Black and G.M. have been denied release into the United States, they have identified no entitlement to such release.

Even if we defined the interest in release at so high a level of abstraction as to obscure the distinction between domestic and foreign release, that interest still would not entitle aliens such as Black and G.M.—who are concededly removable—to additional procedures under the *Mathews* factors. As Judge Easterbrook has explained:

> [T]he probability of error is zero when the alien *concedes* all elements that require removal (as [the aliens here have] done); and the public interest is substantial given the high flight rate of those released on bail. The Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1987), that pretrial detention in criminal prosecutions (a parallel to pre-removal detention) comports with the Constitution even though the private interest is greater, the likelihood of error must be deemed significant given the prosecutor's high burden at a criminal trial, and the public interest is less (for the skip rate on bond in criminal prosecutions is well under 90%). Given the sweeping powers Congress possesses to prescribe the treatment of aliens, *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977), the constitutionality of § 1226(c) is ordained.

Parra, 172 F.3d at 958. I would hold that removable aliens lack a protected liberty interest in being released into the United States and that, for the reasons Judge Easterbrook identified, the *Mathews* factors would in any event deny such aliens the right to a bond hearing when Congress has prescribed their mandatory detention.

* * *

The panel opinion conflicts with the decisions of the Supreme Court in *Jennings*, *Demore*, and *Zadvydas*; entrenches a direct circuit split with the Eighth Circuit; and unjustifiably renders an act of Congress—which continues to apply to immigration proceedings in Minnesota and other states—invalid in New York, Connecticut, and Vermont. Our court should rehear these cases *en banc*. *See* Fed. R. App. P. 40(b)(2). I dissent from the order of the court declining to do so.

CHIN and CARNEY, *Senior Circuit Judges*, in support of the denial of rehearing en banc:

As members of the two-judge panel that decided the case, we fully support the Court's denial of the petition for rehearing en banc.[1] The panel decision was correct, *see Black v. Decker*, 103 F.4th 133 (2d Cir. 2024) ("*Black*"), and the criteria for en banc rehearing have not been met. Fed. R. App. P. 40(b)(2). We write to address the arguments made by our two colleagues who have filed dissents from the Court's denial of en banc review.

The panel concluded that the detentions of two noncitizens under 8 U.S.C. § 1226(c) for a prolonged period without any bond hearing violated the noncitizens' Fifth Amendment due process rights.[2] In so holding, we affirmed the ruling of one district court and reversed the ruling of another. A district court granted habeas relief to Black, ordering that a bond hearing be conducted after he had been detained for almost 8 months. Black prevailed at that bond hearing, posted bond, and was released. The government appealed. Another district court denied habeas relief to G.M., who by then had been detained without a bond hearing for almost 14 months, and G.M. appealed. (He was later released, af-

---

[1] As senior judges, we have no vote on whether to rehear a case en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 40(c). Pursuant to this Court's protocols, however, senior judges who were members of the panel deciding the case that is subject to the en banc petition may file a statement expressing their views where, as here, an active judge has filed a dissent from the denial of a petition for rehearing en banc.

[2] Judge Rosemary Pooler was a member of the panel and joined Judges Chin and Carney in voting for the result reflected in the published opinion. She died, however, before the opinion was issued.

ter 21 months' detention, in circumstances related to the Covid pandemic. He never received a bond hearing.)

On appeal, we applied the three-factor balancing test provided by *Mathews v. Eldridge*, 424 U.S. 319 (1976), to examine Black's and G.M.'s individual circumstances. Based on that exercise, we held in each case that detention had become unreasonably prolonged and that due process therefore entitled each to a bond hearing.[3] We further concluded, again guided by *Mathews*, that at such a bond hearing, due process demanded that the government bear the burden to justify, by clear and convincing evidence, their continued detentions. In so holding, we joined the Third Circuit, the only other Circuit to address what bond hearing procedures are constitutionally required to remedy unreasonably prolonged detention under § 1226(c). *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020).

We write separately to respond in more detail to several arguments raised now by our dissenting colleagues.

First, we address Judge Menashi's accusation that the panel "invalidated" § 1226(c). Menashi Dissent at 2. He is incorrect. Far from "invalidating" § 1226(c), *id.*, and upending its "policy of mandatory detention," *id.* at 12, the *Black* panel held that, as a remedy for an as-applied challenge to unreasonably prolonged detention, a

[3] The three *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." *Mathews*, 424 U.S. at 335.

district court properly ordered the government to justify an individual petitioner's *continued § 1226(c) detention* at a bond hearing. Judge Menashi's misreading of what the panel held unfortunately pervades the whole of his dissent. Further, and importantly, under Judge Menashi's interpretation of the law, no individual could *ever* challenge his or her detention under § 1226(c), even if the detention became indefinite or, worse, permanent. Absent a court's imposition of a life sentence for a criminal conviction, due process does not permit such a result.

Next, Judge Nardini takes issue with our conclusion, which was guided by *Mathews*, that at such a bond hearing, due process demands that the government bear the burden to justify by clear and convincing evidence detainees' continued detentions.[4] Judge Nardini urges that, where detention under § 1226(c) is "unreasonably prolonged" such that due process entitles a detainee to a remedial bond hearing, the detainee must bear the burden of proof to justify release by a preponderance of the evidence. Yet, his arguments rely primarily on caselaw analyzing a *different* provision—8 U.S.C. § 1226(a)—which, as we explain further below, creates a different detention regime. Judge Nardini has identified no case (and we are aware of none) in which any Circuit has determined that a bond hearing using the burden allocation he proposes was deemed an adequate remedy for unreasonably prolonged detention under either § 1226(a) or § 1226(c). And meanwhile, the Third Circuit's holding in *German Santos* is wholly in accord with our ruling. On our reading, rehearing this case en

[4] As we explained in *Black*, the panel reached the issue of the burden allocation at the hearing ordered for Black only. *See Black*, 103 F.4th at 155 & n.27.

banc and deciding as Judge Nardini suggests would not help to resolve any Circuit split; rather, to adopt his position would be to create a Circuit split.

To address the dissents' arguments, we discuss below the statutory scheme governing immigration detention under § 1226; the Supreme Court's guidance on these topics; our Court's approach to resolving the questions left open by the Supreme Court; and Judge Menashi's misinterpretation of Supreme Court precedent and of our panel's holding. We further discuss other Circuits' caselaw concerning § 1226(a) and § 1226(c), and explain why, contrary to Judge Nardini's misapprehensions, there is no Circuit split that reconsidering *Black* would help resolve.

I. Applicable law

A. Statutory background

Section 1226 contains two relevant subsections, (a) and (c), which establish different regimes for the government's detention of noncitizens whom it charges with removability. Section 1226(a) authorizes the government to detain a noncitizen "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). As the Supreme Court explained in *Jennings v. Rodriguez*, "Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien" pending a removal decision, and "'may release' an alien detained under § 1226(a) 'on . . . bond' or 'conditional parole.'" 5 83 U.S. 281, 288 (2018) (quoting 8 U.S.C. § 1226(a)). As discussed further in Section IV.A. below, § 1226(a) detainees are afforded multiple opportunities to challenge their detention: at the point of arrest, at multiple bond hearings, and on appeal. Notably,

§ 1226(a) detainees receive an initial bond hearing when first detained, and, under BIA precedent, they bear the burden of justifying their release at that initial hearing.

In contrast, § 1226(c) provides that the government "shall take into custody" noncitizens whom it charges with removability based on certain specific prior criminal convictions and makes no provision at all for a bond hearing, at any point.[5] Section 1226(c) detainees have no express statutory or regulatory rights at all to a bond hearing at any point in their detention. They have only the hearing that we have now ordered in *Black*, and that is available to them only after a judge has found, based on their individual circumstances, that their detention has become unreasonably prolonged.

B. The Supreme Court's guidance

It is well settled that "the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). As the Supreme Court has re-

[5] Following a January 2025 amendment, § 1226(c) mandatory detention covers any noncitizen who, *inter alia*, "is *charged* with, is *arrested* for, is convicted of, *admits having committed*, or *admits committing acts* which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person." 8 U.S.C. § 1226(c)(1)(E)(ii) (emphasis added). The amended § 1226(c) also subjects to mandatory detention those who are charged with inadmissibility on the ground that they are present in the United States "without being admitted or paroled," "misrepresent[ed] a material fact" as part of an application for admission or for a visa or benefit, or lack the necessary documentation at the time they apply for admission. 8 U.S.C. § 1182(a)(6)(A), (6)(C), (7); *id.* § 1226(c)(1)(E)(i).

cently reiterated, "'the Fifth Amendment entitles aliens to due process of law' in the context of removal proceedings." *Trump v. J. G. G.*, 604 U.S. 670, 673 (2025) (per curiam) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). The Supreme Court has also made clear that "[f]reedom 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*, 533 U.S. at 690.

Immigration detention, like all forms of civil detention, must be "nonpunitive in purpose and effect." *Id.* It also must be necessary to prevent against a risk of flight or danger to the community. *See id.* Due process thus requires "adequate procedural protections" to ensure that a noncitizen's immigration detention remains necessary to serve a permissible government purpose. *Id.* And in the context of preventive civil detention, the most fundamental due process protection is an individualized hearing, before a neutral decisionmaker, to justify government detention. *See, e.g.*, *Schall v. Martin*, 467 U.S. 253, 270 (1984); *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997).

Section 1226(c) is an outlier among comparable civil detention regimes. While other types of civil detention generally require a bond hearing near the outset of detention, *see, e.g.*, *Salerno*, 481 U.S. at 750, § 1226(c) makes no express provision for a bond hearing.

The Supreme Court has never directly addressed whether prolonged detention without a bond hearing will *at some point* violate a detainee's due process rights, nor what bond procedures would be constitutionally required to remedy unreasonably prolonged detention under § 1226(a) or § 1226(c). The groundwork, however, was laid in 2001, in *Zadvydas v. Davis*, 533 U.S. 678 (2001). There, the Supreme Court addressed whether a different detention statute—8 U.S.C. § 1231(a)(6)—authorized indefinite detention.[6] Resolving only the statutory challenge, the *Zadvydas* Court determined that the statute would raise "serious constitutional concerns" if it did permit indefinite detention. 533 U.S. at 682. The Court also held that the government's existing custody-review processes were deficient because they placed on the detainee "the burden of proving he is not dangerous." *Id.* at 692. Accordingly, the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation" of six months, when, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must either rebut that showing or release the noncitizen. *Id.* at 682, 701.

Two years later, in *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld the constitutionality of § 1226(c) against a facial challenge, resting on the purportedly "*brief* period necessary for [§ 1226(c) detainees'] removal proceedings." *Id.* at 513 (emphasis added). This was a facial challenge because the petitioner was not challenging the statute based on his individual circumstances, but instead, based on the statute's lack of provision for an initial bond hearing. *See id.* at 516-17 ("But respondent does not challenge a 'discretionary judgment' by the Attorney General or a 'deci-

---

[6] Section 1231(a)(6) provides that certain noncitizens who are ordered removed "may be detained beyond the [90-day] removal period and, if released, shall be subject to [certain] terms of supervision." 8 U.S.C. § 1231(a)(6).

sion' that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail."). Relying on statistics provided by the government, the Court wrote that the "detention at stake . . . lasts roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. The Supreme Court assumed that the circumstances of the habeas petitioner, Hyung Joon Kim, who had been detained for six months, were not typical. *See id.* at 530-31.[7]

In 2018, the Supreme Court in *Jennings v. Rodriguez* decided that, as a matter of statutory interpretation, neither § 1226(a) nor § 1226(c) contains implicit six-month limitations on detention absent a bond hearing. 583 U.S. 281, 296, 303-04 (2018). *Jennings* also ruled that § 1226(a), by its own terms, does not mandate that a clear and convincing evidence burden be placed on the

---

[7] As we explain in the panel opinion, *see Black*, 103 F.4th at 144 n.14, the government later disclosed that the statistics on which the Supreme Court relied in *Demore* contained several significant errors. Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, Supreme Ct. of the U.S. at 2 (Aug. 26, 2016), *available at* https://on.wsj.com/2sUWIGk [https://perma.cc/U3KR-C56W]. Contrary to the *Demore* Court's understanding that § 1226(c) detention averaged 5 months when detainees appealed to the BIA, the government clarified that the actual average was over 12 months. Gershengorn Letter at 3. Kim's 6-month detention was not, therefore, an outlier, but rather fell within the 80% of cases in which § 1226(c) detainees who appealed to the BIA were detained for at least 6 months. And even the updated data in the Gershengorn Letter contained acknowledged weaknesses growing from its inadequate definition of case "completions." *See id.* at 2-3.

government in bond hearings. The *Jennings* majority took no position on whether the Due Process Clause places any procedural limit on detention, reserving the constitutional claims for remand. *See id.* at 312.

In sum, *Zadvydas*, *Demore*, and *Jennings* left open the question whether prolonged detention without a bond hearing will *at some point* violate a detainee's due process rights.

C. Our Court's approach

In *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), we addressed the government's discretionary detention authority under § 1226(a). Three and one-half months after Velasco Lopez was first detained under § 1226(a), he had an initial bond hearing. There, he failed to carry his burden of proving that he was neither a flight risk nor dangerous. *See id.* at 847, 849. He had another bond hearing five months after the first, again failing to meet the burden of proof. *See id.* at 847. After fourteen months in detention, Velasco Lopez filed a habeas petition alleging a violation of due process. The district court granted his petition and ordered a new hearing at which the government was required to justify his continued incarceration by presenting clear and convincing evidence that he was either a flight risk or a danger to the community. *See id.* at 847-48. At the hearing, the immigration judge ("IJ") concluded that the government failed to carry its burden, and ordered Velasco Lopez released on a $10,000 bond, which he posted.

On appeal, this Court held that "Velasco Lopez's prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process."

Id. at 855. We went on to rule that, to address this due process violation, the district court properly ordered a new hearing at which the government bore the burden to show dangerousness and flight risk by clear and convincing evidence. *Id.* at 855-57. In so ruling, we did not take issue with the burden allocation at the *initial*, statutorily required § 1226(a) bond hearings—where noncitizens bear the burden of proof—but explained that "'as the period of . . . confinement grows,' so do the required procedural protections no matter what level of due process may have been sufficient at the moment of initial detention." *Id.* at 853 (quoting *Zadvydas*, 533 U.S. at 701). "While the Government's interest may have initially outweighed short-term deprivation of Velasco Lopez's liberty interests, that balance shifted once his imprisonment became unduly prolonged." *Id.* at 855. Our Court concluded that the clear and convincing standard was appropriate to apply, reasoning that "[t]he Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake, and has reaffirmed the clear and convincing standard for various types of civil detention." *Id.* at 856 (footnote omitted).[8]

II. The *Black* Panel decision

In *Black*, we evaluated petitioners Black and G.M.'s due process challenges under the three *Mathews* factors and found that all three weighed in favor of allowing each petitioner a bond hearing. *First*, they had a weighty

---

[8] In *Velasco Lopez*, we cited, *inter alia*, *United States v. Comstock*, 560 U.S. 126 (2010), *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *United States v. Salerno*, 481 U.S. 739 (1987). *See* 978 F.3d at 856. We relied on these same authorities in *Black*. *See* 103 F.4th at 157-58.

"private interest" in being free from imprisonment. *Black*, 103 F.4th at 151-52. *Second*, it was not a "risk," but a virtual certainty, that the minimal procedures under § 1226(c) had led to "unwarranted detention" for Black. *Id.* at 153. Black had led a peaceful life since his criminal conviction in March 2000, 19 years before his arrest under § 1226(c), and at the bond hearing ordered by the district court, the government could not justify his continued detention. *Id.* G.M.'s circumstances similarly "suggest[ed] a high likelihood that he was subject to an erroneous deprivation of liberty." *Id.* *Third*, while the government's legitimate interests in detaining certain individuals justify a relatively short-term deprivation of liberty, *see Demore*, 538 U.S. at 513, "the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need," *Black*, 103 F.4th at 154. Accordingly, due process entitled Black and G.M. to individualized bond hearings once their detentions became unreasonably prolonged.

We also concluded that the district court correctly determined that, at Black's bond hearing, due process required the government to bear the burden of proof by clear and convincing evidence. We observed that "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern. Requiring detainees like Black to prove that they are *not* a danger and *not* a flight risk—after the government has enjoyed a presumption that detention is necessary —presents too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged." *Id.* at 156 (internal quotation marks and citations omitted). As in *Velasco Lopez*, the clear and convincing standard was appropriate in light of the liberty interests at stake.

III. Judge Menashi's dissent

Judge Menashi urges a far different interpretation of the Supreme Court's precedents, relying on the Eighth Circuit's recent, post-*Black* decision in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024). But *Banyee* is under-reasoned and deeply flawed, and it is an outlier among the relevant decisions of our Sister Circuits.

Petitioner Banyee, a lawful permanent resident, had been detained under § 1226(c) for over twelve months when a district court granted his habeas petition challenging his prolonged detention. *Nyynkpao B. v. Garland*, No. 21-CV12-1817, 2022 WL 1115452, at *3, *6 (D. Minn. Apr. 14, 2022). The district court carefully considered the factors outlined in *Muse v. Sessions*, 409 F. Supp. 3d 707 (D. Minn. 2018), and ordered relief in the form of a bond hearing at which the government would bear the burden to justify continued detention. *Nyynkpao B.*, 2022 WL 1115452, at *6. At that bond hearing, the immigration judge held that the government had not met its burden and thus ordered Banyee released on bond.

The Eighth Circuit reversed, holding that "[t]he rule has been clear for decades" (since *Demore* in 2003) that due process placed no time limit on detention under § 1226(c) without a bond hearing. *Banyee*, 115 F.4th at 931. According to the *Banyee* panel, the Supreme Court definitively foreclosed individual as-applied challenges to prolonged detention under § 1226(c), and established a "bright-line rule" that "the government can detain an alien for as long as deportation proceedings are still pending." *Id.* at 933 (internal quotation marks omitted). The *Banyee* panel further concluded that *Zadvydas* and *Demore* "leave no room for a multi-factor 'reasonableness' test" in evaluating a § 1226(c) detention because the Supreme Court has "already done whatever balancing is necessary" in opting for its purported "bright-line rule." *Id.*[9]

Banyee's claimed "bright-line rule" runs headlong, however, into the Supreme Court's actual rulings as well as the government's consistent representations to the Court in the decades since *Demore*. As discussed, *Demore* rejected a facial challenge to mandatory detention under § 1226(c). Yet, according to *Banyee* and Judge Menashi, the Supreme Court went far beyond rejecting that facial challenge to establish its "bright-line rule" and left no room for *as-applied* challenges to prolonged detention. Menashi Dissent at 2 (quoting *Banyee*, 115 F.4th at 933). But the government did not take that position in *Demore*. It urged instead that, although Kim's facial challenge failed (in its view), as-applied due process challenges to prolonged detention under § 1226(c) are proper and viable.[10]

---

[9] Banyee petitioned for rehearing en banc, which was denied by a 6-5 vote of the Eighth Circuit's active judges. *Banyee v. Bondi*, 131 F.4th 823 (8th Cir. 2025). As the dissent from the denial of rehearing en banc in that case argues, the *Banyee* panel "attributes to the Supreme Court a much broader decision that it has not rendered." *Id.* at 831 (Colloton, *J.*, dissenting from denial of rehearing en banc).

[10] Petitioners' Br., *Demore v. Kim*, 2002 WL 31016560, at *48-*49 ("The mandatory detention provisions of Section 1226(c) are constitutional in the ordinary case, and exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis."); Transcript of Oral Argument at 56, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) (The solicitor general, in rebuttal, stating, "[I]f there's some question about an aberrational lengthy detention, that should be brought to this Court or the courts below in an as-applied challenge."). This position comports

Nor has the government adopted Judge Menashi's reading of the Supreme Court's precedents in the decades since *Demore*. In its brief to the Supreme Court in *Jennings*, the government explained that "[t]he proper avenue for presenting a claim that detention under Section 1226(c) has become impermissibly prolonged is therefore through an as-applied constitutional challenge in an individual habeas corpus proceeding." Petitioners' Br., *Jennings v. Rodriguez*, 2016 WL 5404637, at *46-47 (citation omitted); Transcript of Oral Argument at 67, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204) ("[T]he position of the government is that that individual [detained for years without a bond hearing] would have an individualized as-applied challenge in a habeas proceeding[.]"). In fact, the government argued that "*Demore* provides guideposts for evaluating such [as-applied] challenge[s]," Petitioners' Br., *Jennings v. Rodriguez*, 2016 WL 5404637, at *47, because *Demore* focused on the "*brief* period" that, as the gov-

with the long-established differences between facial and as-applied challenges: "a statute, even if not void on its face, may be challenged because invalid as applied," *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, *J*., concurring), and "[a] statute may be invalid as applied to one state of facts and yet valid as applied to another," *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921). *See also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 n.6, 102 (1982) (approving district court's analysis that because application of law requiring financial disclosure was invalid as applied, court need not address alleged facial invalidity of the statute); *Rice v. Norman Williams Co*., 458 U.S. 654, 662 n.7 (1982) (mere fact that statute "might have an anticompetitive effect when applied in concrete factual situations" does not render it void on its face). "It should be elementary that a decision rejecting a facial challenge means only that the statute is constitutional in at least some of its applications." *Banyee*, 131 F.4th at 831 (Colloton, *J*., dissenting from denial of rehearing en banc).

ernment represented at the time, was necessary for removal proceedings, *Demore*, 538 U.S. at 513 (emphasis added). As the government explained, *Demore* counsels that the length of a detention can bear on the constitutionality of even a mandatory detention: "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely." Petitioners' Br., *Jennings v. Rodriguez*, 2016 WL 5404637, at *47.[11]

For the same reasons, the government in *Banyee* specifically declined to urge the rule adopted by the *Banyee* panel. As the government there recognized, "The Supreme Court has not yet decided whether due process might prohibit the continued application of section 1226(c) in individual extraordinary circumstances," Appellants' Br. at 20, *Banyee*, No. 22-2252 (8th Cir. Dec. 19, 2022), and "there may be cases in which continued detention without a bond hearing under section 1226(c) may be unconstitutional," Appellants' Reply Br. at 6, *Banyee*, No. 22-2252 (8th Cir. June 14, 2022). The government contended, however, that Banyee's claim failed simply because he "has not pointed to any extraordinary circumstances that would warrant such a conclusion here." *Id.*[12]

---

[11] Likewise, the government conceded in *Demore* that "the duration of detention . . . is another factor bearing upon its constitutionality, because prolonged detention imposes a greater burden upon the [noncitizen.]" Petitioners' Br., *Demore v. Kim*, 2002 WL 31016560, at *48 (citing *Zadvydas*, 533 U.S. at 688-701).

[12] That *Banyee* was wrongly decided—and that Judge Menashi's reliance on *Banyee* is therefore misguided—is further clarified by the government's subsequent efforts to cabin *Banyee*'s analysis.

In addition to misapprehending *Demore*'s rejection of a facial challenge as foreclosing as-applied challenges, Judge Menashi makes the reverse mistake regarding the *Black* panel opinion, claiming that *Black* "invalidated" § 1226(c) altogether by inviting as-applied challenges in the form of bond hearings. Menashi Dissent at 2, 12. One need only review the panel opinion to see that it did not "invalidate" § 1226(c)'s mandatory detention scheme.[13] To the contrary, it held that § 1226(c) had been used unconstitutionally in two, individual cases of excessively prolonged detention, leaving untouched the vast majority of § 1226(c)'s lawful applications. Nothing about this limited holding constitutes an "invalidation" of anything.

Moreover, the Supreme Court has long applied the balancing test in *Mathews*, 424 U.S. at 335, as a framework for determining whether individuals—including

---

In its opposition to the petition for rehearing en banc in *Banyee*, the government argued that *Banyee* "should not be read as ruling out as-applied challenges to section 1226(c) detention or suggesting that due process imposes no constraints on prolonged mandatory detention." Opp. to Petition for Rehearing En Banc at 10, *Banyee*, No. 22-2252 (8th Cir. Jan. 23, 2025). And in its petition for rehearing en banc here, the government reiterated that *Demore* and *Jennings* recognized the need for individualized, case-by-case consideration of whether a person's prolonged detention is necessary. *See* Petition for Rehearing En Banc at 11, *Black*, No. 20-3224 (2d Cir. Nov. 20, 2024).

[13] No party appears to be under the same misapprehension as Judge Menashi that *Black* could be read as invalidating § 1226(c). The government did not make any such argument in its request for en banc review. *See* Petition for Rehearing En Banc, *Black*, No. 20-3224 (2d Cir. Nov. 20, 2024). Nor does Judge Nardini, in his dissent from rehearing en banc, challenge the panel's opinion as a wholesale invalidation of the statute.

noncitizens—in government custody have received constitutionally-adequate process. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (observing that *Mathews* governs evaluation of noncitizen's claim that she was denied due process at exclusion hearing); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (applying *Mathews* to assess whether due process entitled enemy combatant to evidentiary hearing). Neither *Zadvydas* nor *Demore* precludes the balancing of interests that was recognized as necessary in *Black*.

Judge Menashi further contends that *Zadvydas* supports his view that prolonged detention without a bond hearing poses no due process concerns as long as "removal is reasonably foreseeable, and the detention has a definite termination point." Menashi Dissent at 13. But *Zadvydas*'s focus on the foreseeability of removal—and its limiting construction of § 1231(a)(6) as authorizing detention only when removal is reasonably foreseeable—does not address or settle the due process concerns raised by prolonged detention under § 1226(c) of noncitizens who are awaiting determinations on their claims for relief, which may take years to resolve. Indeed, whether removal is foreseeable and whether detention has a definite termination point are issues that could be explored at a due process hearing.

Even more troubling is the fact that Judge Menashi's view would strip the judiciary of all power to verify that detention does in fact have a valid rationale and a "definite termination point." While § 1226(c) mandates detention, it is still a civil statute and therefore can only do so to prevent flight or protect the community. *See Zadvydas*, 533 U.S. at 690. Statutory authorization or not, the Constitution demands that there be a point when detention has gone on so long that courts can no longer blindly trust that it remains justified. Judge Menashi's conviction that no such point exists should worry all who recognize, as the Supreme Court long has, that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80.

Furthermore, if Judge Menashi were correct that the pendency of removal proceedings and the prospect of a future deportation alone were enough to legitimize indefinitely prolonged detention without a hearing, that interpretation would make nonsensical the Supreme Court's focus on "the brief period" for which it approved the extraordinary measure of mandatory preventative detention under § 1226(c). *Demore*, 538 U.S. at 513. Similarly, if the Supreme Court had already decided that mandatory detention under § 1226(c) is always constitutional regardless of duration or circumstances, "the *Jennings* Court would have had no reason to remand to the Ninth Circuit 'to consider . . . in the first instance' the detainees' argument that '[a]bsent . . . a bond-hearing requirement, . . . [section 1226(c)] would violate the Due Process Clause,'" *Black*, 103 F.4th at 149 (quoting *Jennings*, 583 U.S. at 291, 312).

Although we agree with Judge Menashi that individuals have no "liberty or property interest in a discretionary grant of asylum," *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008), they do have a due process interest in the procedures by which their asylum claims are adjudicated. *See Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008) (protected interest in procedural fairness for asylum claims); *Burger v. Gonzales*, 498 F.3d 131, 134

(2d Cir. 2007) (same); *Yuen Jin*, 538 F.3d at 161 n.1 (Sack, *J.*, concurring in part) ("Although asylum is a discretionary form of relief, and the Due Process Clause does not protect benefits that government officials may grant or deny in their discretion, every asylum applicant is nonetheless entitled to due process in establishing her eligibility for that form of relief." (internal quotation marks and citations omitted)). Withholding of removal may not entitle a petitioner to admission to the United States, but the Constitution entitles all individuals to freedom from arbitrary bodily restraint while they exercise their legal rights in this country. Thus, while the Government may be "happy to release [a detainee] . . . in the cabin of a plane bound for his home country," Menashi Dissent at 15 (internal quotation marks omitted), the Government cannot use prolonged detention to force a detainee to relinquish rights that he might otherwise exercise.

Judge Menashi further faults the *Black* panel for "entrench[ing] a split with the Eighth Circuit." Menashi Dissent at 1. But our decision in *Black* was issued *before Banyee*. It brought our Court into alignment with the only other post-*Jennings* decision to address what procedures due process demands following unreasonably prolonged detention without a bond hearing under § 1226(c)—the Third Circuit's decision in *German Santos*—a decision that Judge Menashi does not mention. Meanwhile, *Banyee* failed to meaningfully address its split with our Court and others, dismissing our constitutional holding in *Black* without analysis, in a footnote.

Finally, it is error to conclude, as Judge Menashi does, that prolonged detention under § 1226(c) does not implicate the petitioners' "general interest" in freedom from imprisonment. Menashi Dissent at 15. In *Zadvydas*, the Supreme Court affirmed that, *even after the conclusion of removal proceedings*, removable noncitizens in the United States have due-process rights and possess a liberty interest in freedom from imprisonment. *See* 533 U.S. at 690-96. In fact, rejecting an argument similar to that raised by Judge Menashi, the Court declined to characterize that liberty interest at issue as the "right to release" into the United States. *Id.* at 696 (internal quotation marks omitted). And although Judge Menashi does not at all engage with *Velasco Lopez*, that precedent clearly recognizes that prolonged detention pending removal proceedings without a bond hearing implicates noncitizens' liberty interest in being free from imprisonment. *See* 978 F.3d at 850-52.

IV. Judge Nardini's dissent

Judge Nardini's dissent does not speak to our fundamental holdings that the *Mathews* framework applies to § 1226(c) length-of-detention challenges and that due process may entitle a § 1226(c) detainee to a bond hearing once his or her particular detention becomes "unreasonably prolonged." Rather, his dissent focuses on our conclusion about the burden allocation and evidentiary standard to apply at such a bond hearing. He urges that, where detention under § 1226(c) is "unreasonably prolonged" such that due process entitles a detainee to a remedial bond hearing, the detainee must bear the burden of proof to justify release by a preponderance of the evidence. Yet, Judge Nardini's arguments rely primarily on inapt caselaw analyzing § 1226(a).

At bottom, Judge Nardini fails to acknowledge the significance of differences between the two detention regimes set out separately in § 1226(a) and § 1226(c); he misinterprets *Velasco Lopez*; and he misconstrues other Circuits' opinions to find a Circuit split where there is none.

A. Individuals detained under § 1226(a) and § 1226(c) face markedly different barriers to release.

Judge Nardini argues that, in his view, it is "profoundly wrong to make it no more difficult to obtain release at a bond hearing for § 1226(c) detainees than for § 1226(a) detainees." Nardini Dissent at 29. In our view, there is at best limited equivalence between the respective barriers faced by § 1226(a) and § 1226(c) detainees.

***1.* § 1226(a)**

The opportunities available for § 1226(a) detainees to challenge their detention and seek release are several:

- When a person is apprehended under the authority of § 1226(a), an Immigration and Customs Enforcement ("ICE") officer makes an initial determination about whether to retain that person in custody. *See* 8 C.F.R. § 236.1(c)(8).
- If the officer chooses to continue the person's detention, the person may seek review of that decision at a bond hearing before an IJ. *See id.* § 236.1(d)(1).
- If the IJ decides to continue detention, the person may appeal to the BIA. *See id.* § 236.1(d)(3).
- If the person stays in detention, he may also request additional bond hearings whenever he experiences a material change in circumstances. *See id.* § 1003.19(e).

- He may also appeal the outcome of any of those bond hearings to the BIA. *See id.* § 1003.19(f).

Section 1226(a) and its accompanying regulations are silent as to what burden of proof applies at a bond hearing before an immigration judge and who bears that burden. For many decades, the BIA interpreted that silence as creating a presumption in favor of a noncitizen's liberty pending removal proceedings. *See Matter of Patel*, 15 I. & N. Dec. 666 (B.I.A. 1976). In the late 1990s, however, the INS adopted regulations establishing a presumption of detention in the arresting officer's initial custody determination for § 1226(a) detainees. *See* 8 C.F.R. § 236.1(c)(2)-(8). Under those regulations, a noncitizen held under § 1226(a) and seeking release bears the burden of "demonstrat[ing] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." *Id.* § 236.1(c)(8).

Although by its terms that regulation applies only to the initial custody determination by the arresting officer, the BIA soon adopted that standard for § 1226(a) *bond hearings before an IJ* as well, reversing the *Patel* rule. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112 (B.I.A. 1999); *see also Matter of Guerra*, 24 I. & N. Dec. 38, 40 (B.I.A. 2006). Accordingly, the BIA now holds that a noncitizen detained under § 1226(a) must demonstrate "to the satisfaction of the Immigration Judge that he or she merits release on bond," *Matter of Guerra*, 24 I. & N. Dec. at 40, "even though section [1226(a)] does not explicitly contain such a requirement," *Matter of Adeniji*, 22 I. & N. Dec. at 1113. To meet that standard, the noncitizen must show that he or she is neither a danger to the community nor a flight risk. *See, e.g.*, *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 (B.I.A. 2020).

As we held in *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), however, once a § 1226(a) detainee's period of detention after the initial or most recent bond hearing becomes unreasonably prolonged, due process demands an *additional* bond hearing. And at that hearing, we held, the *government* bears the burden of justifying, by clear and convincing evidence, the detainee's continued detention. Accordingly, regulation, statute, and case law have produced tailored burden-allocation protocols for § 1226(a) detainees that depend on whether the bond hearing is provided (i) *as a matter of course* (in which case the noncitizen bears the burden), or (ii) *as a remedy* for unreasonably prolonged detention (in which case the government bears the burden).

***2.* § 1226(c)**

Section 1226(c), on the other hand, carves out a class of noncitizens for whom detention is mandatory. 8 U.S.C. § 1226(c). As Judge Nardini stresses, these individuals include those who have been convicted of certain serious crimes or engaged in certain terrorist activities.[14] But, as Justice Breyer observed, § 1226(c) detainees also include those who "may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of 'moral turpitude' such as illegally

---

[14] For instance, § 1226(c) provides for detention of noncitizens who have "engaged in a terrorist activity," who are "representative[s]" of a "terrorist organization" or "a political, social, or other group that endorses or espouses terrorist activity," and those whom the government "has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." 8 U.S.C. §§ 1226(c)(1)(D), 1182(a)(3)(B).

downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person." *Nielsen v. Preap*, 586 U.S. 392, 430 (2019) (Breyer, *J.*, dissenting). The statute also makes no mention of the recency of a qualifying conviction or offense or of the date of a person's completion of a sentence for the qualifying crime.

In stark contrast to § 1226(a), and the five bond-related opportunities listed above, § 1226(c) by its terms establishes no express entitlement to a bond hearing *at any point*.[15] Section 1226(c) detainees have only the hearing that we have now ordered in *Black*, and that is available to them only after a judge has found that their detention has become unreasonably prolonged.[16] And, after our panel decision, § 1226(c) was amended to cover additional categories of noncitizens, including those who have no criminal convictions but have been arrested or charged with certain offenses, including shoplifting, further placing individuals at risk. Within the *Mathews* balancing framework, then, § 1226(c) comes with a sig-

---

[15] The only procedural protection in place is the BIA-established *Joseph* hearing, at which noncitizens can contest whether they in fact committed an offense that meets the statutory criteria for § 1226(c) detention. *See Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

[16] In addition, ICE may "release" a person detained pursuant to § 1226(c) if necessary for witness protection purposes. 8 U.S.C. § 1226(c)(2). As we explained in *Black*, "We read section 1226(c)(2) . . . as having 'nothing to do with bail.'" *Black*, 103 F.4th at 157 (quoting *Jennings*, 583 U.S. at 351 (Breyer, *J.*, dissenting)). "Rather, it concerns 'a special program, the Witness Protection Program, set forth in 18 U.S.C. § 3521,' in which the government would usually be required to detain the noncitizen based on a presumption of dangerousness and flight risk." *Id.* (quoting *Jennings*, 583 U.S. at 351 (Breyer, *J.*, dissenting)).

nificantly higher risk of an erroneous deprivation of rights than § 1226(a).

Glossing over these differences, Judge Nardini would have us hold that the proper burden allocation for a § 1226(c) bond hearing ordered as a *remedy* for unreasonably prolonged detention is the same as that for a detainee at an *initial* § 1226(a) bond hearing: that the noncitizen must demonstrate entitlement to release by a preponderance of the evidence. In support of his position, Judge Nardini points to Third, Fourth, and Ninth Circuit decisions analyzing due process challenges to § 1226(a)—not § 1226(c)—detentions. *See* Nardini Dissent at 23.[17] Moreover, in those § 1226(a) cases, the noncitizens had not shown any underlying constitutional violation in their detentions. So it should come as no surprise that those courts declined to shift the burden of proof to the government as a remedy for due process violations that were not present.

Judge Nardini cites to no case in which any Circuit has found that detention under either § 1226(a) or § 1226(c) was unreasonably prolonged and then *declined* to provide the precise bond hearing and burden allocation remedy ordered in *Velasco Lopez* and *Black*. He has identified no case (and we are aware of none) in which any Circuit has determined that a bond hearing using the burden allocation he proposes was deemed an adequate remedy for unreasonably prolonged detention under *either* § 1226(a) or § 1226(c). And meanwhile, the

---

[17] Judge Nardini relies principally on *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274 (3d Cir. 2018), *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), and *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022). We discuss these cases in greater depth below.

Third Circuit's holding in *German Santos* is wholly in accord with the panel's ruling. On our reading, rehearing this case en banc and deciding as Judge Nardini suggests would not help to resolve any Circuit split; rather, to adopt his position would be to create a Circuit split.

B. *Black* and *Velasco Lopez* refute Judge Nardini's arguments.

In the panel decision, we considered arguments akin to those now raised by Judge Nardini and rejected them. The government highlighted that *Velasco Lopez* required the government to bear the burden of proof at Velasco Lopez's *third* bond hearing under § 1226(a), not his *initial* bond hearing. Therefore, the government argued, § 1226(c) detainees should have to bear the burden of proof at their *first* bond hearing as well.

We rejected this argument as "rooted neither in the text of § 1226 nor in our reasoning in *Velasco Lopez*." 103 F.4th at 157. We explained:

> Both sections 1226(a) and (c) aim to prevent flight and danger to the community. Once those detentions have been unconstitutionally prolonged, the due process analysis adopted in *Velasco Lopez* applies with equal force to both situations. Accepting the government's argument would lead to an asymmetrical, puzzling result: section 1226(a) detainees like Velasco Lopez, who had already received (and did not prevail at) an initial bond hearing, would at future bond hearings be entitled to shift the burden to the government to prove the need for continued detention; section 1226(c) detainees like Black, who never had a similar opportunity to show at an initial hearing that he should be released, would bear the burden of proof.

Id. Accordingly, once detention under *either* § 1226(a) or § 1226(c) has become unreasonably prolonged in violation of the Fifth Amendment, due process requires an individualized bond hearing by an IJ at which the government bears the burden to justify continued detention by clear and convincing evidence.

Judge Nardini claims that *Velasco Lopez* placed significant weight on the fact that, unlike § 1226(c) detainees, those detained under "§ 1226(a) . . . include individuals with no criminal record."[18] Nardini Dissent at 13 (quoting *Velasco Lopez*, 978 F.3d at 854). He argues that, based on that distinction between § 1226(a) and § 1226(c) detainees, *Velasco Lopez* concluded that § 1226(a) detainees "must be afforded process in addition to that provided by the ordinary bail hearing." *Id.* at 13-14 (quoting *Velasco Lopez*, 978 F.3d at 854). But Judge Nardini's quotation from *Velasco Lopez* is incomplete, as the Court made clear in *Velasco Lopez* that § 1226(a) detainees "must be afforded process in addition to that provided by the ordinary bail hearing, *just as the Supreme Court in Demore has suggested criminals subjected to prolonged detention under § 1226(c) may be entitled to further process*." *Velasco Lopez*, 978 F.3d at 854 (emphasis added).

In Judge Nardini's view, the *Black* panel fundamentally erred by extending the *Velasco Lopez* remedy to § 1226(c) detainees, because "it is the *category of noncitizens* at issue that principally matters for our due process analysis, not the timing of the hearing along the detention continuum." Nardini Dissent at 26. As his

[18] As discussed above, even under the pre-amendment version of § 1226(c), § 1226(c) detainees included individuals without any criminal conviction. *Preap*, 586 U.S. at 430 (Breyer, *J.*, dissenting).

only support, he cites an observation made by a Ninth Circuit panel in *Rodriguez Diaz*, which noted that, under a now-overruled Ninth Circuit decision, "aliens who [were] detained under § 1226(c) bec[a]me detained under § 1226(a) once the BIA issue[d] a final order of removal and the alien file[d] a petition for review in federal court." *Rodriguez Diaz*, 53 F.4th at 1201. *Rodriguez Diaz* recounted that *Jennings* overruled that scheme by holding that "§§ 1226(a) and (c) apply to discrete categories of noncitizens—and *not* to different stages of a noncitizen's legal proceedings." *Id.* (internal quotation marks omitted). Judge Nardini mistakes this proposition as support for his assertion that § 1226(c) detainees whose due process rights have been violated deserve a lesser remedy than § 1226(a) detainees whose due process rights have been violated. Additionally, the *Mathews* test accounts for multiple factors, not just one. While the "category of noncitizens" may affect the government's interest in detention, the fact that § 1226(c) affords those noncitizens none of the procedural protections available under § 1226(a) substantially increases the risk of error.[19] The approach the panel adopted—guaranteeing a bond hearing at which the government bears the burden of proof, but only once detention has already become unduly prolonged—strikes the right balance between these competing interests.

Judge Nardini further posits that "the panel opinion has effectively decreed that Congress has no power to

[19] One might also argue that the "category of noncitizens" affects the risk of error, since those convicted of serious crimes might be deemed more likely to flee or pose a danger to the community. Since § 1226(c) has now been extended to those convicted of or even simply charged with petty crimes, including shoplifting, this argument carries substantially less weight. *See supra* note 5.

set a standard that demands more of a noncitizen who has been convicted of a qualifying crime, or who poses a national security risk." Nardini Dissent at 3-4. Our response is that of the Supreme Court: "[i]n the enforcement of [immigration] policies," still "the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). "It is axiomatic, moreover, that when Congress enacts a statut[e] . . . , basic procedural due process protections attach." *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2162 (2025) (Sotomayor, *J.*, dissenting) (citing *Mathews*, 424 U.S. at 332). As the Supreme Court has recently reaffirmed, courts' recognition of "the significance of the Government's national security interests" neither eliminates nor reduces "the necessity that such interests be pursued in a manner consistent with the Constitution." *A.A.R.P. v. Trump*, 605 U.S. 91, 96 (2025).

Judge Nardini provides no rationale for how a properly conducted *Mathews* analysis could result in a burden allocation requiring § 1226(c) detainees whose due process rights have been violated by unreasonably prolonged detention to bear the burden of justifying their release.[20] That Congress singled out people with certain criminal histories for detention under § 1226(c) does not change the fact that the government cannot articu-

---

[20] Judge Nardini claims incorrectly that *Black*'s holding as to the burden allocation treated "the second *Mathews* factor [a]s dispositive." Nardini Dissent at 15. In fact, the relevant section of the *Black* opinion states that: "Our analysis above of the first and third factors applies with equal force to these questions [concerning the burden allocation and the district court's order that the IJ consider Black's ability to pay and alternatives to detention]," and we proceeded to "elaborate briefly on the second *Mathews* factor." *Black*, 103 F.4th at 155.

late any interest in prolonged detention of individuals whom it cannot show, on an *individualized* basis, are dangerous or flight risks.

C. There is no relevant Circuit split on *Black*'s burden allocation holding.

Judge Nardini claims that our Sister Circuits' treatment of the procedural protections owed to those detained under §§ 1226(a) and (c) have resulted in "inter-circuit incoherence" and "all-over-the-map holdings [that] present more than the usual circuit split." Nardini Dissent at 5-6. He reaches that flawed conclusion by failing to recognize important differences among cases, including what claims were raised and what issues the courts reached. First, there is no Circuit split regarding *Black*'s burden allocation. Second, the § 1226(a) cases on which Judge Nardini relies are easily distinguishable from *Velasco Lopez* and *Black* and provide no reason to reconsider our § 1226(c) ruling. Here, we aim to clarify those important differences, which Judge Nardini overlooks.

1. *Black* is consistent with the decision of the only other Circuit to reach the burden-allocation issue.

After *Jennings*, only one other Circuit has addressed what due process requires to address unreasonably prolonged detention under § 1226(c). In *German Santos*, the Third Circuit held—just as we did in *Black*—that, once detention under § 1226(c) becomes unconstitutionally prolonged, due process requires a bond hearing at which "the [g]overnment must justify [a detainee's] continued detention by clear and convincing evidence." 965 F.3d at 206; *see also Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (same), *vacated in part* *by Jennings*, 583 U.S. 281 (see *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 278 (3d Cir. 2018)).

2. The § 1226(a) decisions of other Circuits did not address the question presented in *Black* and on which Judge Nardini sought en banc review.

Judge Nardini asserts that the "Third, Fourth, and Ninth Circuits . . . have held that due process does not require shifting the burden from the noncitizen to the government in a § 1226(a) bond hearing." Nardini Dissent at 23 (citing *Borbot*, 906 F.3d 274, *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), and *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)). But the noncitizens in those cases failed to show any underlying constitutional violation in their detentions. So it is no surprise that those courts declined to shift the burden of proof to the government as a remedy for due process violations that were not present.

Moreover, none of the out-of-Circuit § 1226(a) decisions that Judge Nardini cites squarely confronted the issue on which he sought rehearing en banc in *Black*: what remedy does due process demand upon a finding of unreasonably prolonged detention?[21] Indeed, none of

[21] The decisions that Judge Nardini cites agree on a key underlying principle: where a noncitizen detainee demonstrates a due process violation, the *Mathews* factors apply to determine what process is due. *See Rodriguez Diaz*, 53 F.4th at 1203-07 (collecting cases applying *Mathews* and assuming without deciding that *Mathews* applied to petitioner); *Miranda*, 34 F.4th at 358 (applying *Mathews*); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27-28, 41 (1st Cir. 2021) (same); *German Santos*, 965 F.3d at 213 (same). *Borbot* did not discuss *Mathews*, but, as discussed below, the petitioner there failed to demonstrate a due process violation. 906 F.3d at 280.

those cases held anything about what procedures would be required to remedy unreasonably prolonged detention under § 1226(a). The Third Circuit left for another day the question "when, if ever, the Due Process Clause might entitle an alien detained under § 1226(a) to a new bond hearing." *Borbot*, 906 F.3d at 280. The Fourth Circuit was not presented with any claim of unreasonably prolonged detention. *Miranda*, 34 F.4th at 346. And the Ninth Circuit had "no occasion to consider the constitutional limits of prolonged immigration detention because [petitioner] ha[d] not demonstrated a due process violation." *Rodriguez Diaz*, 53 F.4th at 1214. *See also Hernandez-Lara v. Lyons*, 10 F.4th 19, 25 n.2, 30 n.4 (1st Cir. 2021) (declining to reach petitioner's claim that her unreasonably prolonged detention entitled her to a new bond hearing at which the government bore the burden of proof).

Judge Nardini's analysis of § 1226(a) caselaw fails to distinguish between those courts' assessments of challenges to the procedures at *statutorily required* bond hearings under § 1226(a) and claims of *unreasonably prolonged detention* warranting a *new* bond hearing with a shifted burden. In any event, we unpack those issues here.

a. Several Circuits have addressed the burden of proof at statutorily required § 1226(a) bond hearings, and none conflicts with *Black*.

As discussed, the texts of § 1226(a) and its accompanying regulations are silent as to who bears the burden of proof at a bond hearing before an IJ. BIA precedent, however, places the burden on the noncitizen. *Matter of Guerra*, 24 I. & N. Dec. at 40; 8 C.F.R.

§ 236.1(c)(8). Neither *Black* nor *Velasco Lopez* casts doubt on that procedure.

The Fourth Circuit in *Miranda* and the Ninth Circuit in *Rodriguez Diaz* upheld existing BIA precedent placing the burden on detainees at ordinary § 1226(a) bond hearings that are convened as a matter of course under § 1226(a)'s related regulation. *Miranda*, 34 F.4th at 346 (rejecting due process challenge to the burden allocation at § 1226(a) bond hearings governed by BIA precedent, finding that the noncitizens "are unable to establish a likelihood of success on their due process claims"); *Rodriguez Diaz*, 53 F.4th at 1210, 1212 (rejecting challenge that § 1226(a) detainee "should not have borne the burden of proof at his initial bond hearing," concluding that "[n]othing in this record suggests that placing the burden of proof on the government was constitutionally necessary to minimize the risk of error").

The First Circuit's holding in *Hernandez-Lara*, 10 F.4th 19, *does* conflict with the Fourth and Ninth Circuit decisions, but not in any way that implicates our holding in *Black*. In *Hernandez-Lara*, after the petitioner failed to meet her burden at an initial bond hearing under § 1226(a), she filed a habeas petition arguing that (i) her initial bond hearing was constitutionally inadequate because she was made to bear the burden of proof, and (ii) her prolonged detention violated due process and thus an additional bond hearing was warranted, at which the government must bear the burden of proof. The First Circuit addressed the first argument and declined to address the second. *Id.* at 25 n.2, 30 n.4. As to the *initial* § 1226(a) bond hearing, the First Circuit took the position that "due process requires the government to either (1) prove by clear and convincing evidence that she poses a danger to the community or (2) prove by a preponderance of the evidence that she poses a flight risk." *Id.* at 41.

Nothing about this conflict warrants reconsidering our holding in *Black* on unreasonably prolonged detention under § 1226(c) without a bond hearing. The First Circuit's split with other Circuits on the proper burden allocations for statutorily required § 1226(a) bond hearings would exist regardless of *Black* and *Velasco Lopez*.

b. Other Circuits have not squarely addressed the burden of proof at bond hearings required as a remedy for unreasonably prolonged detention under § 1226(a).

The decisions on which Judge Nardini relies say very little about unreasonably prolonged detention, at issue in *Black* and *Velasco Lopez*: Prolonged detention was not before the Fourth Circuit in *Miranda*. The First Circuit declined to address Hernandez-Lara's prolonged detention claim. *Hernandez-Lara*, 10 F.4th at 25 n.2, 30 n.4.[22] And the Ninth Circuit in *Rodriguez Diaz* had "no occasion to consider the constitutional limits of prolonged immigration detention because Rodri-

[22] The Ninth Circuit in *Rodriguez Diaz* incorrectly characterized *Hernandez-Lara* as addressing the bond allocation procedures required upon "prolonged" detention under § 1226(a). *Rodriguez Diaz*, 53 F.4th at 1204. The *Hernandez-Lara* Court did "find the potential length of detention under section 1226(a) relevant to the weight of the liberty interest at stake" when determining what *initial* procedures were required, but declined to reach the argument that, once detention became unreasonably prolonged, Hernandez-Lara was entitled to a new bond hearing at which the government would bear the burden of proof. 10 F.4th at 30 n.4.

guez Diaz ha[d] not demonstrated a due process violation." 53 F.4th at 1214.

Judge Nardini contends that the differing outcomes in the Third Circuit's decisions in *Borbot* and *German Santos* warrant rehearing in *Black*. Nardini Dissent at 27-29. But he overlooks fundamental differences that demonstrate the consistency between these two cases. *German Santos* involved detention under § 1226(c) that became unreasonably prolonged in violation of the Fifth Amendment; *Borbot*, in contrast, involved detention under § 1226(a) that the Third Circuit expressly determined had *not* become unreasonably prolonged. *See Borbot*, 906 F.3d at 279-80. The sole basis of Borbot's due process challenge was the duration of that detention after his initial hearing was conducted.[23] Having found it was not overlong, the Third Circuit had little difficulty rejecting Borbot's argument that the burden must shift to the government in such a second hypothetical bond hearing under § 1226(a). Indeed, Borbot was not entitled to a new bond hearing at all. That § 1226(c) detainees were entitled under Third Circuit precedent to shift the burden at bond hearings following unreasonably prolonged detention, *id.* at 279, was of no moment in

[23] Judge Nardini contends that "[o]ne might argue that [*Borbot*] addressed due process requirements only for the *initial* bond hearing, not for a hearing once the detention has become unreasonably prolonged," and "any attempt to cabin *Borbot* to initial § 1226(a) hearings would be unpersuasive." Nardini Dissent at 24-25. But Borbot did not advance any argument that he was denied due process in his initial § 1226(a) hearing. *See Borbot*, 906 F.3d at 279 ("Borbot's habeas petition seeks to compel a *second* bond hearing *despite alleging no constitutional defect in the one he received*." (emphasis added)). The Third Circuit thus issued no holding on that question.

the context of Borbot's claims: as the *Borbot* Court explained, habeas petitioners detained under § 1226(c) are "not situated similarly" to § 1226(a) detainees. *See id.*

Accordingly, aside from *German Santos*, none of the cases Judge Nardini cites answers the question posed by *Velasco Lopez* and *Black*: when detention under either § 1226(a) or § 1226(c) has become unreasonably prolonged, what process does the Constitution require? Meanwhile, Judge Nardini overlooks case law that guides us to view an individual's liberty interest in freedom from detention on a continuum, with the amount of process necessary to protect that liberty interest increasing over time. And indeed, a standard of proof "serves to allocate the risk of error between the litigants" and reflects the "relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The Supreme Court has repeatedly reaffirmed the principle that "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (internal quotation marks omitted). And the Supreme Court has recognized that when confinement becomes prolonged, due process requires enhanced protections to ensure detention remains reasonable in relation to its purpose. *See Zadvydas*, 533 U.S. at 701 ("[F]or detention to remain reasonable," greater justification is needed "as the period of . . . confinement grows."). *Black* does no more than implement these principles.

V. CONCLUSION

In sum, *Black* was correctly decided and the Court appropriately denied the petition for rehearing en banc.

Judge Menashi's dissent relies on misconceptions about the panel's holding and misapprehensions about the Supreme Court's rulings, none of which are shared by any party to this case. Rehearing en banc is also correctly denied because arguments advanced now by Judge Menashi were not raised or developed by any party, either in the initial appeal or in the petition for rehearing. Even if this Court were to adopt his ill-formed views, that would not cure the split created by the Eighth Circuit's deeply flawed reasoning in *Banyee*. *Black* is wholly in accord with the only other Circuit to address what bond hearing procedures are constitutionally required to remedy unreasonably prolonged detention under § 1226(c). *See German Santos*, 965 F.3d 203.

Judge Nardini's dissent likewise misapprehends the significance of the differences between the detention regimes set out in § 1226(a) and § 1226(c), the reasoning of *Velasco Lopez*, and the import of other Circuits' treatment of challenges to § 1226(a) detention. His dissent also fails to distinguish between challenges to the procedures governing § 1226(a) bond hearings that are provided as a matter of course and challenges to unreasonably prolonged detention that seek a *new* bond hearing with a shifted burden.

The burden allocation in *Black* was the product of a careful *Mathews* analysis and was designed to remedy the due process violation resulting from unreasonably prolonged detention under § 1226(c). Without meaningfully engaging with that *Mathews* analysis, Judge Nardini asserts that he would prefer that the remedial bond hearing burden allocation ordered in *Black* be the same as the burden allocation for § 1226(a) hearings convened as a matter of course. But the different burden allocations in these two situations, as *Velasco Lopez* and *Black* explained, is warranted precisely because the balance of interests under the *Mathews* framework shifts once detention becomes unreasonably prolonged. What may be adequate at the outset of detention becomes inadequate when detention has become unreasonably prolonged.

We emphasize that § 1226(c) has been amended since our decision in *Black*. Under the new law, additional categories of noncitizens without any criminal conviction are now subject to mandatory detention as "criminal aliens." Now, for instance, a noncitizen who "is charged with" or "arrested for" "any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense" "shall" be detained under § 1226(c). 8 U.S.C. § 1226(c)(1)(E)(ii). Judge Nardini states that he does not "believe that the amendments provide support for the Court's decision to abstain from rehearing," and that "our *en banc* Court would not have been called upon to express a view on the revised statute because these two petitioners [in *Black*] were convicted of crimes covered by the prior version." Nardini Dissent at 32. We are not persuaded. The new breadth of § 1226(c) may call for new considerations better left to a future panel, and convening en banc here might well confuse the issues.

For all of these reasons, a majority of the active judges of this Court correctly concluded that this case did not warrant en banc review.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NO. _________

Keisy G[redacted] M[redacted],
Petitioner,

v.

Thomas DECKER, New York Field Office Director of for U.S. Immigration and Customs Enforcement; Alejandro MAYORKAS, Secretary of Homeland Security; Jean KING, Acting Director of the Executive Office for Immigration Review; Merrick GARLAND, Attorney General of the United States,
Respondents.

[Filed: June 3, 2021]

VERIFIED AMENDED PETITION FOR WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

1. This action challenges the federal government's unlawful practice of incarcerating immigrants for months or years on end without due process. Petitioner Keisy G[redacted] M[redacted] is a 32-year-old lawful permanent resident who has lived in this country for ten years and is the father of three children, all of whom are U.S. citi-

zens. U.S. Immigration and Customs Enforcement ("ICE") has imprisoned Mr. G[redacted] M[redacted] for nearly eight months under the mandatory immigration detention statute, 8 U.S.C. § 1226(c). ICE has denied him any opportunity to seek release at a bond hearing, and ICE has never justified Mr. G[redacted] M[redacted]'s prolonged detention to any neutral adjudicator.

2. Due to his detention, Mr. G[redacted] M[redacted] has not been able to support his medically vulnerable mother; nor has he met his youngest child, who was born while he was detained. His prolonged detention has severely exacerbated his post-traumatic stress disorder (PTSD), which worsened following his recent transfer to a detention facility more than 900 miles away from his family and counsel without prior notice.

3. Mr. G[redacted] M[redacted]'s mandatory detention was triggered by his sole conviction—a 2015 conviction based on an assault that occurred in 2012. In the nine years that followed the 2012 assault, Mr. G[redacted] M[redacted] worked with law enforcement on a separate case to put a murderer behind bars, served his own criminal sentence, and reintegrated into his community without further arrests. Prior to his detention by ICE, he supported his mother and his children while employed as an essential worker supplying medical linens to health care workers.

4. The government's conduct is unlawful because it violates Mr. G[redacted] M[redacted]'s constitutional rights against arbitrary detention. Courts in this Circuit have repeatedly and unambiguously held that due process prohibits the federal government from imprisoning individuals for unreasonably prolonged periods without providing adequate procedural safeguards, namely a

bond hearing before a neutral adjudicator where the government bears a high burden of justifying continued detention.

5. Despite the clear case law, the government has failed to provide Mr. G[redacted] M[redacted] the basic procedural protection of a bond hearing, resulting in a violation of his constitutional rights. Mr. G[redacted] M[redacted] therefore seeks this Court's intervention in ordering his release unless the government promptly provides him a constitutionally sufficient bond hearing.

PARTIES

6. Mr. G[redacted] M[redacted] is a lawful permanent resident of the United States. From October 5, 2020 until May 18, 2021, Mr. G[redacted] M[redacted] was detained by the New York Field Office for ICE at the Hudson County Jail in Kearny, New Jersey. On May 18, 2021, ICE initiated his transfer to Etowah County Detention Center in Gadsden, Alabama, where he remains detained. His removal proceedings were pending before the New York Immigration Court at 201 Varick Street, New York, New York. His case is now pending appeal before the Board of Immigration Appeals ("the Board").

7. Thomas Decker is named in his official capacity as the Field Office Director for the New York Field Office of ICE. He is responsible for the administration of immigration laws and the execution of detention and removal determinations. He was Mr. G[redacted] M[redacted]s immediate custodian at the time of filing.

8. Merrick Garland is named in his official capacity as the Attorney General of the United States. He is responsible for the policies and operations of the U.S. Department of Justice, including the Executive Office for

Immigration Review ("EOIR"), which houses the immigration courts and the Board.

9. Alejandro Mayorkas is named in his official capacity as the Secretary of the Department of Homeland Security ("DHS"). He directs each of the component agencies within DHS, including ICE. As a result, he is responsible for the administration of the immigration laws.

10. Jean King is named in her official capacity as the Acting Director of EOIR, a component of the U.S. Department of Justice. She is responsible for the policies and operations of the immigration courts.

JURISDICTION

11. The Court has jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question); Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause); 28 U.S.C. § 165 (All Writs Act); the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; and 28 U.S.C. § 2201 (Declaratory Judgment).

VENUE

12. Venue is proper in the Southern District of New York under 28 U.S.C. § 2241 and 28 U.S.C. § 1391. At the time this proceeding was initiated, Mr. G[redacted] M[redacted] was detained at the immediate direction of Mr. Decker, and a substantial part of the events giving rise to the claims and relevant facts occurred within this District.

13. Furthermore, Mr. G[redacted] M[redacted] was physically present within this District at the time of the filing of this Petition at 6:07 a.m. on May 18, 2021. At or about 5 a.m. that day, ICE transported Mr. G[redacted] M[redacted] from the Hudson County Jail in Kearny, New Jersey to ICE's New York Field Office located at 26 Federal

Plaza, New York, New York. Mr. G[redacted] M[redacted] remained at 26 Federal Plaza for approximately six hours before being transported by plane to Etowah County Detention Center in Alabama.

14. The government has stated that Mr. G[redacted] M[redacted] was checked into 26 Federal Plaza at or about 6:10 a.m. on May 18, 2021. This is consistent with Mr. G[redacted] M[redacted]'s understanding that he was physically located within the Southern District at the time this proceeding was initiated. As such, Mr. G[redacted] M[redacted] submits that venue is proper within this District, and the government does not oppose venue in this case. *See Singh v. Decker*, 20 Civ. 9089 (JPC), 2021 WL 23328 at *4-5 (S.D.N.Y. Jan. 4, 2021); *see also* ECF No. 6, Petitioner's May 24, 2021 Letter to the Court.

STATEMENT OF FACTS

Background

15. Mr. G[redacted]o M[redacted] was born on [redacted], 1988 in Santo Domingo, Dominican Republic. Declaration of Morganne Barrett ¶ 2 ("Barrett Decl."). He entered the United States in 2011 as a lawful permanent resident and has continuously resided here since that time. *Id.* ¶ 3.

16. Mr. G[redacted] M[redacted] has two sons, ages five and seven, and an infant daughter. *Id.* ¶ 9. All three children are U.S. citizens who reside in the United States. *Id.* Prior to his detention, he maintained a relationship with both of his sons, who often visited him and were staying with him the morning that ICE came to his home and arrested him. *Id.* He has never met his daughter, who was born while he was in detention. *Id.*

17. For several months prior to his arrival in the United States, Mr. G[redacted] M[redacted] faced threats of arson,

murder, and false imprisonment in the Dominican Republic. Barrett Decl., Exh. A, Petitioner's I-589 Declaration ¶¶ 4-34 ("Pet'r I-589 Decl."). When Mr. G[redacted] M[redacted] received notice that his visa allowing him to enter the United States as a lawful permanent resident had been approved in 2011, he left the Dominican Republican as quickly as possible, only telling immediate family because he feared reprisals from the individuals threatening him. *Id.* ¶ 3.[1]

18. Since his arrival in the United States ten years ago, Mr. G[redacted] M[redacted] has developed an extensive network of familial support, including his mother and his two sisters. Barrett Decl. ¶ 9. Prior to his detention, Mr. G[redacted] M[redacted] lived with his mother, caring for her medical conditions—diabetes, hypertension, and vertigo—and providing for her financially. *Id.* ¶ 10. He helped her pay for her medication, called her at lunch and dinner time to remind her to maintain her blood sugar levels, and helped her when her low blood sugar caused her to faint. *Id.*

19. Until his arrest by immigration authorities, Mr. G[redacted] M[redacted] lived and worked in the Bronx, New York. *Id.* ¶ 8. He was employed full-time for Unitex, a medical linens supply and distribution company, as an essential worker during the COVID-19 pandemic. *Id.; see* Barrett Decl., Exh. I, Form W-2, Wage and Tax

---

[1] These events are the basis for his claim under the Convention Against Torture, which protects noncitizens from being removed to countries where they face likely torture or death. Barrett Decl. ¶ 14. Mr. G[redacted] M[redacted] provided credible testimony about these threats at his merits hearing (the hearing at which evidence is presented in support of a claim for immigration relief) in March 2021. *Id.* ¶ 20.

Statement and Employee Certificate of Recognition from Unitex ("Employment Documents").

20. Since 2014, Mr. G[redacted] M[redacted] has suffered from PTSD and was formally diagnosed in January 2021. Barrett Decl., Exh. B, Psychological Evaluation by Dr. Andrew Rasmussen ("Rasmussen Evaluation"). His PTSD causes him intrusive memories and persistent nightmares about his family, including his young children, being killed at their home. *Id.* at 13. He is triggered by external stimuli, which causes periods of psychological distress during which he fixates on death. *Id.* at 12. He also suffers from a persistent negative emotional state, an inability to experience positive emotions, exaggerated startle response to loud sounds, and difficulty sleeping and concentrating. *Id.* at 12-14.[2]

21. The onset of Mr. G[redacted] M[redacted]'s PTSD resulted from a traumatic event in 2014 where he witnessed the murder of his roommate in their shared apartment. *Id.* at 14. The murderer then attempted to kill Mr. G[redacted] M[redacted], his pregnant partner, and his partner's three-year-old son. *Id.* at 14. Following those events, Mr. G[redacted] M[redacted] immediately provided a statement to police, and he later testified in the prosecution of his roommate's murderer. Barrett Decl., Exh. C, G[redacted] M[redacted] U-Visa Declaration ¶ 14 ("U-Visa Decl.").

22. Medical records from Hudson County Jail reveal that he has met with a mental health professional, though

---

[2] Petitioner has filed under separate cover a motion to seal certain supporting documents that contain sensitive details about his mental health and the events that gave rise to his PTSD, as well as medical documents relating to his mother.

infrequently. Barrett Decl., Exh. D, Hudson County Jail Medical Records ("HCJ Medical Records"). His PTSD has persisted throughout his detention, and his symptoms have become more severe. Barrett Decl., Exh. B, Rasmussen Evaluation at 14. Members of the social work team at The Legal Aid Society have assessed that his mental health has steadily declined since he was first arrested by immigration authorities. Barrett Decl., Exh. G, Letter of Raisa Rodriguez-Torres ("Rodriguez-Torres Letter") ¶ 7. Mr. G[redacted] M[redacted]'s social worker, Raisa Rodriguez-Torres, reported that since being detained, Mr. G[redacted] M[redacted] has experienced ongoing symptoms of trauma, depression, anxiety, insomnia, intrusive thoughts, ruminating, and nightmares. *Id.* ¶ 3.

Mr. G[redacted] M[redacted]'s Contacts with the Criminal Justice System

23. Mr. G[redacted] M[redacted]'s criminal history consists of only one conviction for second-degree assault under New York Penal Law § 120.05(2), stemming from a fight that occurred at a restaurant in June 2012. Mr. Barrett Decl., Exh. E, Certificate of Disposition, No. 02140-2012 ("Cert. of Disposition") and Parole Completion Letter ("Parole Letter"); Barrett Decl. ¶ 5. G[redacted] M[redacted]'s criminal defense attorney advised him to plead guilty to second-degree assault, which he did on May 6, 2015. Barrett Decl. ¶ 5. Morganne Barrett, Mr. G[redacted] M[redacted]'s removal defense attorney, is working to secure counsel to assist him in petitioning for vacatur of this conviction on constitutional grounds. *Id.* ¶ 7.

24. On February 17, 2016, Mr. G[redacted] M[redacted] was sentenced to a term of imprisonment of two years, and three years of post-release supervision. Barrett Decl.,

Exh. E, Cert. of Disposition. As a result of good behavior, he was released five months early, successfully completing his sentence on December 20, 2016. Barrett Decl. ¶ 7; *id.*, Exh. E, Parole Completion letter. He also complied with the conditions of his release and completed his probation term on December 20, 2019. Barrett Decl. ¶ 7. Mr. G[redacted] M[redacted] has had no other contact with the criminal justice system as a defendant. *Id.* ¶ 5.

25. Following his release, Mr. G[redacted] M[redacted] continued to assist the Bronx District Attorney in the prosecution of his roommate's murder. *See* Barrett Decl., Exh. C, Form I-918 Supplement B Law Enforcement Certification ("Law Enforcement Certification"). Mr. G[redacted] M[redacted] testified as one of the prosecution's witnesses throughout the criminal proceedings, which resulted in the conviction of his roommate's murderer. *Id.*

26. In December 2020, an appellate court vacated the conviction and ordered a new trial because of a procedural error by the trial judge. *Id.* The District Attorney has stated that Mr. G[redacted] M[redacted]'s continued cooperation "may very well be needed in any future retrial." *Id.*

ICE Arrest and Immigration Proceedings

27. Around 5:00 a.m. on October 5, 2020, ICE officers knocked on the front door of the apartment Mr. G[redacted] M[redacted] shared with his mother. His two young sons were visiting at the time and asleep inside. Barrett Decl. ¶ 12. The officers identified themselves to Mr. G[redacted] M[redacted]'s mother as "the police" and told her they were investigating a crime. *Id.* When she told Mr. G[redacted] M[redacted] that the police wanted to speak with him, Mr. G[redacted] M[redacted] invited them in-

side. *Id.* Once inside, the ICE officers arrested Mr. G[redacted] M[redacted]. *Id.* They have imprisoned him ever since. *Id.*

28. ICE initiated removal proceedings against Mr. G[redacted] M[redacted], charging him as removable pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), on the basis that his conviction for second degree assault qualifies as an aggravated felony. *Id.* ¶ 14.

29. On October 13, 2020, Mr. G[redacted] M[redacted] appeared unrepresented for his first hearing in immigration court. *Id.* The immigration judge ("IJ") adjourned the case to allow him to speak with an attorney from the New York Immigrant Family Unity Project ("NYIFUP"), which provides *pro bono* representation to detained individuals in removal proceedings. *Id.* On November 2, 2020, Mr. G[redacted] M[redacted] retained Morganne Barrett, a NYIFUP attorney with The Legal Aid Society, as *pro bono* counsel in his immigration proceedings. *Id.* On January 11, 2021, Mr. G[redacted] M[redacted] filed an application for deferral of removal under the Convention Against Torture. *Id.* His merits hearing was scheduled for March 5, 2021. *Id.*

30. Because of COVID-related restrictions, Mr. G[redacted] M[redacted] and Ms. Barrett communicated primarily through Hudson County Jail's video teleconferencing. *Id.* ¶ 17. In the weeks leading up to his merits hearing, the audio quality was so poor, and at times nonexistent, that it was impossible for Mr. G[redacted] M[redacted] and Ms. Barrett to hear one another or use a Spanish-language interpreter. *Id.* ¶ 18.

31. These communication issues made it impossible to finalize Mr. G[redacted] M[redacted]'s declaration, provide a

finalized copy to his expert witness to allow him to finalize his report, or adequately prepare Mr. G[redacted] M[redacted] for testimony. *Id.* ¶ 19. On February 25, 2021, Ms. Barrett filed a motion to continue the merits hearing due to the lack of adequate communication with Mr. G[redacted] M[redacted]. *Id.* On March 4, 2021, the immigration judge granted his counsel's motion to continue and the merits hearing was rescheduled for March 18, 2021. *Id.*

32. By March 18, 2021, officials at the Hudson County Jail had still not resolved the communication issues. *Id.* ¶ 20. With no foreseeable resolution to the communication issues, Mr. G[redacted] M[redacted]'s merits hearing went forward on March 18, 2021. *Id.* The IJ ultimately found that Mr. G[redacted] M[redacted] had not met his burden of showing that he warranted protection under the CAT and denied his claim for relief from removal. *Id.* Mr. G[redacted] M[redacted] filed a timely appeal of the IJ's decision on April 15, 2021 and intends to submit a brief with supporting arguments at the Board of Immigration Appeals. *Id.*

33. Based on the experience of The Legal Aid Society, the Board usually issues a decision on merits appeals for detained noncitizens between four and thirteen months after an appeal is filed.[3] *Id.* If the Board remands the case to the IJ, the case will continue for several additional months before the agency. *Id.* If the Board

[3] This period includes the time it takes for the record of proceedings to be transferred from the Varick Street Immigration Court to the Board of Immigration Appeals; for a transcript of all the hearings to be created; for the Board to set a briefing schedule; for the parties to file their respective briefs; and for the Board to review the briefing and adjudicate the appeal.

dismisses the appeal, Mr. G[redacted] M[redacted] will likely petition for review in the U.S. Court of Appeals for the Second Circuit, and proceedings on the petition usually last for several years.[4] *Id.*

34. Following his merits hearing, Ms. Barrett filed three requests for Mr. G[redacted] M[redacted]'s release with ICE pursuant to the Preliminary Injunction and Order on Plaintiff's Motion to Enforce issued in *Fraihat v. ICE*. No. 19-cv-01546 (JBG-SHK) (C. Dist. Cal. Oct. 7, 2020), ECF 240. Barrett Decl. ¶¶ 21-26. She requested his release on the basis of his PTSD diagnosis, which makes him vulnerable to complications if he contracted COVID-19, and because he is not an enforcement priority pursuant to recent DHS and ICE guidance. *Id.* All requests were denied on the basis that Mr. G[redacted] M[redacted] is a threat to public safety. *Id.*

35. On April 8, 2021, Mr. G[redacted] M[redacted] filed a petition for U nonimmigrant status on the basis of being the victim of attempted murder, assisting law enforcement in its investigation and prosecution as a witness to his roommate's murder, and suffering PTSD as a result of that incident. Barrett Decl. ¶ 15. A petition for U nonimmigrant status is adjudicated by the U.S. Citizenship and Immigration Service ("USCIS"), which is a separate entity from the immigration court. *Id.* However, approval of the petition would constitute a complete defense to removability. *Id.*

---

[4] The median processing time for agency appeals in the Second Circuit, from docketing to final order, was 20.2 months for the 12-month period ending on September 30, 2019. *See U.S. Courts of Appeal—Median Time Intervals in Months for Administrative Appeals*, Appeals Table B-4-C (Sep. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4c_0930.2019.pdf.

36. On May 17, 2021, Ms. Barrett and Ms. Rodriguez-Torres received automated email notifications informing them that they were being removed as "approved visitors" for Mr. G[redacted] M[redacted] on the jail's video-conferencing platform and that he could no longer be scheduled for professional video visitation. *Id.* ¶ 30. In the experience of Legal Aid Society staff, this notification is generally sent when an immigration detainee is being released or transferred from the facility. *Id.*

37. ICE provides information about the location of immigration detainees through its Online Detainee Locator System.[5] *Id.* ¶ 31. Throughout the day on May 17, 2021, Ms. Barrett checked the status of Mr. G[redacted] M[redacted]'s location using the Online Detainee Locator System. *Id.* The query for Mr. G[redacted] M[redacted]'s location "returned zero (0) matching records," and the website instructed the searcher to contact the local ICE field office. *Id.*

38. That same day, Ms. Barrett contacted his last known ICE deportation officer ("DO"), Jose M. Hernandez, requesting information on his whereabouts and any intention of moving Mr. G[redacted] M[redacted] to another facility. *Id.* ¶ 32. DO Hernandez informed Ms. Barrett that he would no longer be the DO on this case and that DO Joseph Pujol would take his place. *Id.* Ms. Barrett contacted DO Pujol, requesting information on Mr. G[redacted] M[redacted]'s location. *Id.* DO Pujol responded, "I am inquiring on the status of your client and will get back to your shortly once I have the information. He is not being removed at this time." *Id.* Having received no update from DO Pujol several hours later, Ms.

---

[5] *Available at* https://locator.ice.gov/odls/#/index.

Barrett contacted DO Pujol once more, requesting an update on Mr. G[redacted] M[redacted]'s location. *Id.* DO Pujol responded, "I will provide an update shortly, as I am awaiting this information." *Id.* Mr. G[redacted] M[redacted]'s family was also unaware of his location, believing him to still be at Hudson County Jail. *Id.* ¶ 33.

39. At 9:50 p.m. that evening, Ms. Barrett received a call from Mr. G[redacted] M[redacted] informing her that he was still at Hudson County Jail. *Id.* ¶ 35. He had received no notice of a possible transfer and erroneously believed he was being released, having observed others being transported from the facility. *Id.*

40. At 6:07 a.m. on the morning of May 18, 2020, counsel for Mr. M[redacted] G[redacted] filed a Petition for Writ of Habeas Corpus, thus initiating this habeas proceeding. *Id.* ¶ 36.

41. Later that day, and after further inquiry, ICE officers informed Ms. Barrett that Mr. G[redacted] M[redacted] was en route to Etowah County Detention Center in Alabama. *Id.* ¶ 37. The following day, Ms. Barrett was provided with a Notice of Transfer. *Id.* ¶ 38.

42. On May 21, 2021, after several attempts, Ms. Barrett was finally able to speak with Mr. G[redacted] M[redacted] on the phone, though the call was not confidential due to the presence of a detention center employee. *Id.* ¶ 40. Mr. G[redacted] M[redacted] described his transfer to Ms. Barrett, explaining that at about 5 a.m. on May 18, 2021, he was transported to ICE's New York Field Office at 26 Federal Plaza. *Id.* ¶ 41. He was handcuffed by his hands and feet and placed in a cell for six hours with no blanket. *Id.* He was provided two pain pills to treat his headache, but was otherwise not provided any of the

other medication he is prescribed during the entirety of his transfer. *Id.*

43. Mr. G[redacted] M[redacted] was then transported to an airport where he was boarded onto a plane, flying for approximately four hours, eventually arriving in Louisiana. *Id.* ¶ 42. *Id.* Only one of the officers aboard the flight wore a face mask. *Id.* From the plane, he was transferred to a van and driven nine hours before arriving at another small detention facility where they remained for ten hours. *Id.* ¶ 43. The following day, they drove several more hours, finally arriving at Etowah County Detention Center. *Id.* ¶ 44. During the entire transport, he remained handcuffed by his hands and feet. *Id.* ¶¶ 40-44.

Prolonged detention is severely harming Mr. G[redacted] M[redacted]

44. Mr. G[redacted] M[redacted], who has been incarcerated for nearly eight months, is severely harmed by his prolonged detention.

45. Prior to his transfer, ICE's New York Field Office detained Mr. G[redacted] M[redacted] at the Hudson County Jail in conditions indistinguishable from criminal custody. Barrett Decl. ¶ 27. The Hudson County Jail is a county jail that detains criminal inmates and pretrial detainees as well as civil immigration detainees. *Id.* While there, Mr. G[redacted] M[redacted] had limited access to outdoor recreation, was subject to daily inmate "counts," and had limited phone access, visitation, and correspondence. *Id.*; *see also* Barrett Decl., Exh. J, U.S. Immigration and Customs Enforcement, National

Detainee Handbook: Custody Management (2016).[6] The restrictiveness of these jail conditions has intensified as the jail has made efforts to respond to the public health concerns posed by the COVID-19 pandemic. Barrett Decl. ¶ 27.

46. Ms. Rodriguez-Torres, Mr. G[redacted] M[redacted]'s social worker, stated that the conditions of his confinement at both Hudson County Jail and Etowah County Detention Center have exacerbated his mental health symptoms and, in particular, are aggravating his PTSD. Barrett Decl., Exh. G, Rodriguez-Torres Letter ¶ 4. After his arrival at Etowah County Detention Center, Ms. Rodriguez Torres conducted a Beck Depression Inventory evaluation, screening tool designed to measure symptoms of depression. *Id.* ¶ 5. The evaluation revealed that depression in the moderate range. *Id.* Mr. G[redacted] M[redacted] also reports that psychotropic treatment has not helped mitigate most of his symptoms.

47. At Hudson County Jail, Mr. G[redacted] M[redacted] was unable to access necessary mental health services. Barrett Decl. ¶ 29. He reported that, while at Hudson County Jail, when he submitted a sick call, he usually had to wait at least three days before receiving medical attention. *Id.* Medical records from Hudson County Jail indicated that he was prescribed Remeron, which has tripled in dosage since he was first prescribed the medication in February 2021. *Id.*, Exh. D, HCJ Medical Records at 2-4. This medication is most commonly used to treat depression. *Id.*, Exh. G, Rodriguez-Torres Letter ¶ 3. However, Mr. G[redacted] M[redacted] reports that psychotropic treatment has not helped mit-

---

[6] *Available at* https://www.ice.gov/sites/default/files/documents/Document/2017/detaineehandbook.PDF.

igate most of his symptoms. *Id.* Records also indicate that while Mr. G[redacted] M[redacted] was at Hudson County Jail, he infrequently met with a mental health professional and that these sessions were often conducted through an interpreter. *Id.* Ex. D, HCJ Medical Records at 15. Mr. G[redacted] M[redacted]'s depressed mood has persisted throughout his detention. *Id.* He has also been suffering from severe headaches and trouble sleeping while detained. *Id.*

48. Mr. G[redacted] M[redacted] also worries constantly about the hardships his family members are experiencing while he is detained. Barrett Decl. ¶ 55. Prior to his incarceration by ICE, he provided for his mother financially and cared for her due to her medical conditions. *Id.* His mother suffers from hypertension, diabetes, and vertigo and takes medication for each. *Id;* Barrett Decl., Exh. H, Elida M[redacted] Medical Records ("Elida Medical Records"). Medical records also reveal she is being evaluated for dementia. Barrett Decl. ¶ 52. Recently, she was hospitalized for a nosebleed that eventually had to be cauterized to stop the bleeding. *Id.* Mr. G[redacted] M[redacted]'s mother reports that since Mr. G[redacted] M[redacted] has been detained, she has struggled to make ends meet in the absence of her son's assistance. *Id.* ¶ 55.

49. Prior to his transfer, Mr. G[redacted] M[redacted] spoke to his mother frequently to check on her well-being. *Id.* However, since his transfer to Etowah County Detention Center, his communication with her has been much less frequent, because calls there cost 21 cents per minute, making them prohibitively expensive for Mr. G[redacted] M[redacted] who is indigent. *Id.* ¶ 47. He re-

mains very worried that she is suffering because he is not there to take care of her. *Id.* ¶ 55.

50. Since he was detained, Mr. G[redacted] M[redacted]'s two sons have not been able to visit him and can only speak with their father over the phone for a few minutes at a time. *Id.* ¶ 53. Those calls have become even more limited due to the price of calls at Etowah County Detention Center. *Id.* ¶ 52. Prior to his detention, his sons made frequent visits to his home in New York, sometimes staying over for several days at a time. *Id.* ¶ 56. Mr. G[redacted] M[redacted] has not been able to meet his infant daughter who was born while he was detained. *Id.* ¶ 9.

51. Mr. G[redacted] M[redacted]'s transfer from Hudson County Jail to Etowah County Detention Center is another deeply traumatic and frightening experience that has deteriorated his mental state. *Id.* ¶¶ 42-45. Throughout the two-day journey, officers never informed Mr. G[redacted] M[redacted] where he was being taken, the stress of which caused him severe stress-induced headaches. *Id.* ¶ 45. Fearing imminent deportation, he explained to the officers that he could not return to the Dominican Republic because of the danger that awaits him there. *Id.* ¶ 41.

52. According to Mr. G[redacted] M[redacted], being continuously handcuffed over the course of two days without knowing where he was going is the worst experience he has ever endured in his life. *Id.* ¶ 45. At one point during his transfer, the uncertainty and fear became so great that Mr. G[redacted] M[redacted] questioned his will to live. *Id.*

53. Since arriving at Etowah County Detention Center, Mr. G[redacted] M[redacted] has been depressed and experi-

encing heightened PTSD symptoms, including insomnia, intrusive and uncontrollable thoughts, and anxieties regarding his family, who is now 900 miles away. *Id.; see also id.*, Exh. G, Rodriguez-Torres Letter ¶¶ 3-5. Despite the exacerbation of his mental health issues, Mr. G[redacted] M[redacted] has not had access to any mental health services at Etowah County Detention Center, including counseling, group therapy, or other mental health programming. *Id.* ¶ 48. Although he requested to speak with a mental health professional upon arrival and was told he could do so during the week of May 24, he has still not been able to meet with anyone. *Id.* He is being given Remeron, but the dosage is inexplicably lower than it was at Hudson County Jail despite his increased symptoms. *Id.* ¶ 46. Ms. Rodriguez-Torres is very concerned that the lack of mental health services as well as the ineffectiveness of Mr. G[redacted] M[redacted]'s current prescription will result in re-traumatization and a worsening of his current symptoms. *Id.* Exh. G, Rodriguez Torres Letter ¶ 7.

54. Communication between Mr. G[redacted] M[redacted] and Ms. Barrett has also been limited as a result of his transfer. *Id.* ¶ 52. Since his arrival at Etowah County Detention Center on May 19, Ms. Barrett has only been able to speak with him twice for approximately ninety minutes in total. *Id.* It appears communication with Mr. G[redacted] M[redacted] is subject to the availability of the coordinating officer's schedule, and there is no other means by which to schedule calls with him. *Id.* Since May 28, 2021, the officer in charge of scheduling calls with Mr. G[redacted] M[redacted] has been non-responsive to Ms. Barrett's requests to speak with Mr. G[redacted] M[redacted]. *Id.*

55. Due to communication issues with the facility, Ms. Rodriguez-Torres was not been able to speak with Mr. G[redacted] M[redacted] to provide mental health support until May 28, 2021. *Id.* Mr. G[redacted] M[redacted] is currently scheduled for a psychological evaluation by Dr. Joseph Giardino, a psychologist retained by Ms. Barrett. *Id.* ¶ 48.

LEGAL ANALYSIS

56. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause "applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). "Freedom from imprisonment —from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty the [Due Process] Clause protects." *Id.* at 690.

57. The substantive component of the Due Process Clause prohibits the government from infringing upon an individual's fundamental interests, such as the freedom from arbitrary detention, unless the infringement is carefully tailored to serve a sufficiently important state interest. U.S. Const. amend. V; *see Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention: to mitigate the risks of danger to the community and to prevent flight. *Demore v. Kim*, 538 U.S. 510, 528 (2003).

58. Due process also requires "adequate procedural protections" to ensure that the government's asserted

justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas,* 533 U.S. at 690 (internal quotation marks omitted). In almost every civil confinement context, the Supreme Court has found that the hallmark of due process is an individualized custody hearing before a neutral adjudicator. *See*, *e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (citing *United States v. Salerno*, 481 U.S. 739, 751 (1987)); *Addington v. Texas*, 441 U.S. 418, 433 (1979); *Zadvydas*, 533 U.S. at 690-92, 699-700. The Second Circuit recently affirmed that these civil commitment precedents apply with equal force to immigration detention. *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020) ("The Government's claim that these precedents are inapplicable in an immigration context is unpersuasive.").

59. The INA governs the detention of noncitizens and states that a noncitizen "may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a). That provision grants the Attorney General discretion whether to detain a noncitizen during removal proceedings "[e]xcept as provided in subsection (c)." *Id.* Section 1226(c) sets out several bases by which a noncitizen is subject to mandatory detention. Section 1226(c)(1)(B) requires the Attorney General to take into custody any noncitizen who "is deportable by reason of having committed any offense covered in section . . . 1227(a)(2)(A)(iii)." 8 U.S.C. § 1226(c)(1)(B). Section 1227(a)(2)(A)(iii) renders "[a]ny alien who is convicted of an aggravated felony at any time after admission" as deportable. 8 U.S.C. 1227(a)(2)(A)(iii). *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) ("[T]he statute expressly and unequivocally imposes an affirm-

ative prohibition on releasing detained aliens under any other conditions.").

60. In *Demore v. Kim,* the Supreme Court upheld the constitutionality of Section 1226(c) in the context of a facial challenge, reversing a lower court ruling that the statute violated the substantive due process rights of lawful permanent residents. 538 U.S. at 523. However, the Court's holding was a narrow one for at least three reasons.

61. First, *Demore* involved a *facial* challenge to the constitutionality of Section 1226(c) in all of its applications to lawful permanent residents. *See* 538 U.S. at 522-23 (explaining that the petitioner challenged even "brief" detention without a bond hearing). The Court has never considered whether procedural protections are sufficient to pass muster where mandatory detention continues for a significant length of time. In his concurrence, Justice Kennedy expressly noted that, despite the Court's holding, "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532. He also acknowledged that the Court did not consider the constitutionality of the mandatory detention statute when there is "an unreasonable delay . . . in pursuing and completing deportation proceedings." *Id.* He suggested that, in that case, "it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 533. As such, the Court expressly left open the possibility of other legitimate constitutional challenges to the manda-

tory detention statute that are outside the scope of the *Demore* holding.[7]

62. Second, *Demore* was premised on the presumption that detention under this statute is "for a brief period," lasting "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore*, 538 U.S. at 523, 528-30. The statistics upon which the Court relied in arriving at this conclusion, however, were erroneous. *See Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (noting the government's concession "that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.").

63. Third, *Demore* did not involve a detainee who had long been at liberty. *See Kim v. Schilten*, No. C 99-2257 SI, 1999 WL 33944060, at *1 (N.D. Cal. Aug, 11, 1999) ("His estimated release date was February 1, 1999 . . . The notice to appear was served on Kim on February 2, 1999"), *aff'd sub nom, Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev'd sub nom. Demore v. Kim*, 538 U.S. 510 (2003). Mr. Kim was detained when released from criminal custody, and the Court did not address whether the statute was constitutional as applied to individuals who had reintegrated into the community subsequent to their criminal release. The Supreme Court explicitly recognized in *Preap v. Nielsen* that there could be an as-applied constitutional challenge to deten-

---

[7] Over a decade later, in *Jennings*, the Supreme Court held as a matter of statutory interpretation that Section 1226(c) applies even where detention grew prolonged, but expressly left open the question of when such detention would be constitutionally impermissible. 138 S. Ct. at 850.

tion under § 1226(c) where a noncitizen has reintegrated into the community during the interval between his release from criminal custody and detention. 139 S. Ct. 954, 972 (2019).

<u>Using an As-Applied, Fact-Based Test, Mr. G[redacted] M[redacted]'s Mandatory Detention Under § 1226(c) Is Unreasonably Prolonged and Therefore Violates His Substantive Due Process Rights</u>

64. Courts within and outside of this Circuit have consistently held that when mandatory detention under Section 1226(c) becomes unreasonably prolonged, it violates an noncitizen's right to due process, and the government is required to provide detainees with bond hearings to remedy this constitutional violation. *See*, *e.g.*, *Hylton v. Decker,* Civil Action No. 20-5994 (JGK), 2020 WL 6879067 (S.D.N.Y. Nov. 24, 2020); *Arana v. Barr*, 451 F. Supp. 3d 271 (S.D.N.Y. 2020)*; Doe v. Decker*, Civil Action No. 20-4232 (KPF), 2020 WL 4937395, at *7 (S.D.N.Y. Aug. 21, 2020); *Black v. Decker,* Civil Action No. 20-3055 (LGS), 2020 WL 4260994, at *1 (S.D.N.Y. July 23, 2020); *Graham v. Decker*, Civil Action No. 20-3168 (PAE), 2020 WL 3317728, at *5 (S.D.N.Y. June 18, 2020); *Gutierrez v. Barr*, Civil Action No. 20-6078 (FPG), 2020 WL 2059845, at *2 (W.D.N.Y. Apr. 29, 2020); *Rosemond v. Decker*, Civil Action No. 19-9657 (NSR) (LMS), 2020 WL 1876318, at *1 (S.D.N.Y. Apr. 14, 2020); *Hernandez v. Decker*, 18-CV-5026 (ALC), 2018 WL 3579108, at *1 (Jul. 25, 2018); *Sajous v. Decker*, 18-CV-2447 (AJN), 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018); *Cabral v. Decker*, 331 F. Supp. 3d 255 (S.D.N.Y. 2018); *see also German Santos v. Warden Pike Cty. Corr. Fac.*, 965 F.3d 203, 210 (3d Cir. 2020) ("when detention [under § 1226(c)]

becomes unreasonable, the Due Process Clause demands a hearing") (internal quotation marks omitted).

65. To determine when mandatory detention under Section 1226(c) has become unreasonably prolonged in violation of due process, the vast majority of judges in this District employ the type of "as-applied, fact-based analysis" undertaken in *Sajous v. Decker*, 2018 WL 2357266, at *10. *See Hernandez*, 2018 WL 3579108, at *6-11 (applying *Sajous* factors); *Arana*, 451 F. Supp. 3d 271, 274-75 (S.D.N.Y. 2020) (same); *Hylton,* 2020 WL 6879067, at *3 (applying *Sajous* factors supplemented by two additional factors); *see also Vazquez Perez v. Decker*, No. 18-CV-10683, 2020 WL 7028637 (S.D.N.Y. Nov. 30, 2020) (describing *Sajous*, the leading case in this District, as setting forth a standard for determining when lengthy mandatory detention becomes so unreasonable as to violate substantive due process).

66. In *Sajous*, Judge Nathan employed five factors for consideration: (1) the length of time the alien has been detained; (2) whether the alien is responsible for the delay; (3) whether the alien has asserted defenses to removal; (4) whether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable; and (5) whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention. 2018 WL 2357266, at *10. This list of factors is not exhaustive and courts may consider other factors that are relevant. *Sajous,* No. 18-CV-2447 (AJN), 2018 WL 2357266, at *11; *see, e.g.*, *Hylton v. Decker*, 2020 WL 6879067, at *4 (considering two additional factors: the nature of the crimes committed by the petitioner, and whether the petitioner's detention is near conclusion);

Vellejo v. Decker, Civil Action No. 18-5649 (JMF), 2018 WL 3738947, at *3 (S.D.N.Y. Aug. 7, 2018) (considering whether detention is near conclusion, and the interests served by the continued detention).

67. Applying the fact-dependent inquiry outlined in *Sajous*, Mr. G[redacted] M[redacted] is entitled to a bond hearing, as all of the relevant factors indicate that his detention has become unreasonably prolonged.

68. **First**, Mr. M[redacted] G[redacted] has been detained for nearly eight months, which exceeds the six-month line twice recognized by the Second Circuit as marking the outer limits of reasonable detention. *See Velasco Lopez*, 978 F.3d at 855 n.15 (noting that "a presumptively constitutional period of detention does not exceed six months") (citing *Zadvydas*, 533 U.S. at 701); *Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015) (same), *vacated and remanded on statutory grounds*, 138 S. Ct. 1260, *dismissed as moot*, 719 F. App'x 79 (2018).

69. Indeed, several judges in this District have found that six to eight months of immigration detention without a bond hearing is unreasonably prolonged. *Sajous*, 2018 WL 2357266, at *10 (granting petition after eight months' detention); *Black*, 2020 WL 4260994, at *1 (collecting cases and finding seven-month detention unreasonably prolonged); *Sophia v. Decker*, Civil Action No. 19-9599 (LGS), 2020 WL 764279, at *3 (S.D.N.Y. Feb. 14, 2020) (finding seven-month detention unreasonably prolonged); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 548-49 (S.D.N.Y. 2014) (granting petition after six months' detention); *Cabral,* 331 F. Supp. 3d at 261 (seven months); *Gomes Herbert*, Civil Action No. 19-760 (JPO), 2019 WL 1434272, at *2 (S.D.N.Y. Apr. 1, 2019) (eight months); *Gordon v. Shanahan*, Civil Action No. 15-261

(JGK), 2015 WL 1176706 (S.D.N.Y. Mar. 13, 2015) (seven months). Moreover, Mr. G[redacted] M[redacted]'s detention will likely last many more months, as briefing has not been completed for his merits appeal, and proceedings are likely to continue even after a Board decision.

70. **Second**, Mr. G[redacted] M[redacted] cannot be accused of causing unreasonable delays in his removal case. Beyond requesting time for attorney preparation at the first hearing in which Ms. Barrett entered an appearance, the only other continuance requested was due to access-to-counsel issues during a pandemic. *See* Barrett Decl. ¶¶ 14, 19. These issues were caused by Hudson County Jail's inadequate and malfunctioning video teleconferencing system, which made it impossible for Mr. G[redacted] M[redacted] and Ms. Barrett to communicate or prepare for his merits hearing. *Id.* ¶ 17-19. This delay is more attributable to the government than Mr. G[redacted] M[redacted], because Ms. Barrett made diligent and repeated efforts to establish communication with Mr. G[redacted] M[redacted] despite the system malfunctions. *Id.*[8]

71. **Third**, Mr. G[redacted] M[redacted] has asserted a defense to removal by filing an application for deferral under the Convention Against Torture. At his merits hearing, the IJ found his testimony, including his fear, to be credible. Barrett Decl. ¶ 14. The narrow legal questions

---

[8] Although Mr. G[redacted] M[redacted] filed a motion to terminate alleging that ICE had failed to meet its burden, *see id.* ¶ 14, contesting removability does not undermine a finding of unreasonably prolonged detention, especially where, as here, the issues raised are not frivolous. *See Hernandez,* 2018 WL 3579108 at *9. However, the fact that the IJ was not prepared to issue either a written or oral decision at the following hearing, causing a delay in the proceedings, is attributable to the government. Barrett Decl. ¶ 14.

that remain pending on appeal relate to the severity of the harm Mr. G[redacted] M[redacted] has suffered as well as the likelihood of torture if he is returned to the Dominican Republic. *Id.* ¶ 20.

72. Mr. G[redacted] M[redacted] has also filed a petition for U nonimmigrant status as the victim of attempted murder who assisted law enforcement in its prosecution of his roommate's murderer. *See* Barrett Decl., Exh. C, U-Visa Certification and Declaration. Mr. G[redacted] M[redacted] made an initial report to the police and assisted the District Attorney by testifying against his roommate's murderer at trial. *Id.* The trauma of this incident resulted in the onset of Mr. G[redacted] M[redacted]'s PTSD, which continues to plague him. *See id.* Exh. B, Rasmussen Evaluation. Mr. G[redacted] M[redacted]'s pending petition for U nonimmigrant status provides a basis for a stay of removal pursuant to ICE's policy. *See* Barrett Decl., Exh. K, ICE Fact Sheet, Revision of Stay of Removal Request Reviews for U Visa Petitioners, August 2, 2019.[9] Success on the petition would allow him to remain in the United States. Barrett Decl. ¶ 15. As such, Mr. G[redacted] M[redacted] has two independent bases for relief, one pending before the Board and another pending before USCIS.

73. **Fourth**, Mr. G[redacted] M[redacted] is imprisoned in harsh and punitive conditions of confinement. For the majority of the last eight months, he was detained at Hudson County Jail, the same jail at issue in *Sajous*. Barrett Decl. ¶ 13; *see Sajous*, 2018 WL 2357266, at *11("Petitioner is now being detained in an actual jail."). On several occasions, several judges in this District have

[9] *Available at* https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners

noted that Hudson County Jail subjects civil immigration detainees to conditions that do not meaningfully differ from those of a penal institution. *See Joseph v Decker*, Civil Action No. 18-2640 (RA), 2018 WL 6075067, at *11 (S.D.N.Y. 2018); *Reid v. Decker*, Civil Action No. 19-8393 (KPF), 2020 WL 996604, at *11 (S.D.N.Y. 2020) ("The Hudson County Correctional Facility is not meaningfully different from a penal institution, as it is in fact a penal institution."); *Cruz v. Decker*, Civil Action No. 18-9948 (GBD) (OTW), 2019 WL 7572975, at *7 (S.D.N.Y. Aug. 27, 2019) ("Lastly, Mr. Cruz has been detained in a state penal institution, Hudson County Correctional Facility, in conditions similar to those detained for criminal offenses."); *Hernandez*, 2018 WL 3579108, at *10 (". . . a penal institution in New Jersey, where he is subject to 'identical' conditions as individuals held in criminal custody.").

74. The punitive conditions of his confinement continue at Etowah County Detention Center. *See* Barrett Decl. ¶¶ 46-53. Indeed, the U.S. District Court for the Northern District of Alabama, the District where Etowah County Detention Center is located, has observed that this facility is "essentially the jail facility for the Etowah County Sheriff's Office as well as for Gadsden, Alabama municipal detainees," and is therefore "not meaningfully different from a penal institution." *Moore v. Nielsen*, Civil Action No. 4:18-01722 (LSC) (HNJ), 2019 WL 2152582, at *12 (N.D. Ala. May 3, 2019).

75. Additionally, Mr. G[redacted] M[redacted]'s mental health issues coupled with the lack of access to adequate medical care at Hudson County Jail and at Etowah County Detention Center make his continued detention in these penal institutions even punitive. This factor clearly

weighs in favor of a finding that Mr. G[redacted] M[redacted]'s detention has become unreasonably prolonged.

76. **Finally**, Mr. G[redacted] M[redacted] received his sole criminal sentence in 2015—approximately six years ago —for an offense that occurred in 2012. *See* Barrett Decl., Exh. E, Certification of Disposition and Parole Letter. Although he received a two-year criminal sentence, he completed this sentence in 2016 and was released back into the community, where he satisfied his parole term and lived without incident for several years until his detention by ICE. *Id.* While the length of the sentence may cut against Mr. G[redacted] M[redacted], the fact that this crime occurred nine years ago "with no subsequent criminal history weighs in favor of a bond hearing." *Hylton*, 2020 WL 6879067, at *4 (noting that the length of time since the crime weighed in favor of a bond hearing).

77. Under the *Sajous* test, Mr. G[redacted] M[redacted]'s mandatory detention has become unreasonably prolonged and violates his substantive due process rights. Mr. G[redacted] M[redacted] therefore is entitled to release or a constitutionally adequate hearing to determine whether continued detention is warranted.

Mr. G[redacted] M[redacted] Is Entitled to a Bond Hearing, As Procedural Due Process Principles Mandate that a Bond Hearing Is Provided at the Six Month-Mark

78. Even if Mr. G[redacted] M[redacted]'s lengthy detention did not run afoul of substantive due process guarantees, his continued detention without any bond hearing cannot be reconciled with the Supreme Court's three-part balancing test for assessing procedural due process in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under that test, a court must consider three factors:

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

Mathews, 424 U.S. at 335. Upon application of the *Mathews* balancing test here, it is clear that Mr. G[redacted] M[redacted]'s lengthy detention without a bond hearing violates his procedural due process rights.

79. First, the core liberty interest at stake here—an individual's freedom from detention—is indisputably "particularly important." *Addington*, 441 U.S. at 424; *see Zadvydas*, 533 U.S. at 690. Indeed, the Second Circuit recently observed that "the private interest affected by the official action [of immigration detention] is the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851. Moreover, prolonged and indefinite detention implicates other fundamental constitutional concerns. The Constitution recognizes the importance of liberty interests such as the ability to care for one's children, which is disrupted by abrupt mandatory detention. *See*, *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.) (describing the liberty interest "of parents in the care, custody, and control of their child . . . perhaps the oldest of the fundamental liberty interests recognized by this Court."). These interests are strongly implicated in Mr. G[redacted] M[redacted]'s case because he has been unable to partici-

pate in his children's lives or even meet his infant daughter. Barrett Decl. ¶¶ 9, 58.

80. Second, the risk of erroneous deprivation is especially high when the government detains noncitizens like Mr. G[redacted] M[redacted] years after their release from criminal custody without ever justifying the need for continued detention under any standard before any judge. *Cf. Saysana v. Gillen*, 590 F.3d 7, 17-18 (1st Cir. 2009) ("[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 the community, the lower his bail risk is likely to be."). Individuals whose criminal conduct occurred long ago may very well be good candidates for bond, if they are only permitted a hearing. *See Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006) (instructing that the "recency of [criminal] activity" is relevant to determining whether release on bond is appropriate); *Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) (explaining that a "denial of bond on the basis of criminal history alone" is unwarranted if a noncitizen's "convictions . . . occurred years ago, and the alien . . . led an entirely law-abiding life since then.").[10]

[10] In *Velasco Lopez,* the Second Circuit disapproved of bond hearings where the noncitizen bears the burden of proof by a preponderance of the evidence, noting that "it is improper to allocate the risk of error evenly between the individual and the Government when the potential injury is as significant as the individual's liberty." 978 F.3d at 856. This reasoning underscores the impermissibility of a system where the noncitizen bears the entire risk of error because there is *no* bond hearing at all, even when detention is lengthy.

81. Finally, the government's interest in continuing to detain noncitizens such as Mr. G[redacted] M[redacted] without providing a bond hearing is weak, especially compared to the disastrous impact his detention has had on his mental health, his mother's health and well-being, and his family and community. Barrett Decl. ¶ 55. This is especially true because Mr. G[redacted] M[redacted] is not seeking direct release from this court, but simply a bond hearing before a neutral adjudicator. Mr. G[redacted] M[redacted] has suffered substantially while unreasonably detained at the government's expense. The government would not be unduly burdened by the provision of a bond hearing.

82. A court may adopt a bright-line rule when a system currently does not provide adequate safeguards. *See, e.g., Saravia v. Sessions*, 905 F.3d 1137, 1143-44 (9th Cir. 2018) (applying *Mathews* to hold class of noncitizen minors has a due process right to a hearing within seven days of their re-detention); *Vazquez Perez*, 2020 WL 7028637, at *15 (applying *Mathews* to hold that while due process is flexible, it nevertheless requires immigrants receive a hearing before immigration court within 10 days of detention); *see also Mathews*, 424 U.S. at 344 (noting that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions"). Although the court in *Lora* did not expressly employ a *Mathews* analysis, the court similarly balanced "the interests of the detainees and the district courts, as well as the government," in concluding that those interests were "best served" by a six-month, bright-line rule. 804 F.3d at 616.

83. Mr. G[redacted] M[redacted]'s case highlights why a six-month bright-line rule is a preferable remedy for the due process violation caused by prolonged detention without adequate process. Based on the Supreme Court's decisions in *Zadvydas* and *Demore*, the Second Circuit in *Lora* concluded that "mandatory detention for longer than six months without a bond hearing affronts due process." *Lora*, 804 F.3d at 606. Following *Lora,* a bright-line six-month rule existed in this Circuit for several years. *Id.* at 616; *see also Hernandez*, 2018 WL 3579108 at *6 (recognizing that *Lora* remains "strong persuasive authority"). Under it, Mr. G[redacted] M[redacted] would have already been automatically eligible for a bond hearing at the six-month mark without first having to undertake the time-consuming and onerous process of seeking habeas relief. Indeed, the Second Circuit in *Lora* adopted a bright-line six-month rule precisely to forestall "random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not." 804 F.3d at 615-16.

Application of 8 U.S.C. § 1226(c) to Mr. G[redacted] M[redacted], following his reintegration into society, violates due process

84. As noted above, Mr. G[redacted] M[redacted] received his sole criminal sentence in 2015—six years ago. He completed it without incident and was released early back into the community. Barrett Decl., Exh. C Parole Letter. He satisfied his parole term and lived without incident for several years until his detention by ICE. *Id.* These facts directly undermine the government's assertion that Mr. G[redacted] M[redacted] is a danger to the com-

munity. It also presents constitutional concerns regarding the application of the mandatory detention statute to his case.

85. As Judge Scheindlin noted in *Martinez-Done v. McConnell*, endorsing the government's practice of waiting several years before exercising its authority under Section 1226(c) "would confer limitless authority on the Attorney General to pluck immigrants from their families and communities with no hope of release pending removal," years after release from criminal custody and after reintegration into their communities. 56 F. Supp. 3d 535, 548 (S.D.N.Y. 2014). The ongoing threat of mandatory immigration detention years after release from criminal custody creates anxiety to noncitizens and their families rising to the level of "constitutional harm." *Martinez-Done*, 56 F. Supp. 3d at 547 (describing how "[l]iving in the shadow of mandatory detention that could begin at any moment invariably takes its toll.").

86. The Supreme Court considered this practice in *Preap* and concluded that, as a matter of statutory construction, Section 1226(c) applies even to noncitizens whose immigration detention did not begin immediately upon their release from criminal custody. 139 S. Ct. at 972, 203. However, the Court was careful to emphasize that its decision did not "foreclose as-applied challenges —that is, constitutional challenges to applications of the statute." *Preap*, 139 S. Ct. at 972.

87. In Mr. G[redacted] M[redacted]'s case, the conduct underlying his sole conviction occurred in 2012—nine years ago—when he was 23 years old. Barrett Decl. ¶ 5. From 2012 to 2015, he was released on bail; during that time, he continued to appear for court proceedings and had no problems with law enforcement. *Id.* He then

served his time and was released from criminal custody in 2016—five years ago. *Id.* ICE did not detain Mr. G[redacted] M[redacted] until October 2020, nearly four years after his release from criminal custody. *Id.* ¶ 12.

88. In those four years, he successfully completed his term of parole supervision, maintained steady employment, cared for his ailing mother, and became a father to his two young sons. *Id.* ¶¶ 9-10. He has had no further contact with the criminal justice system as a defendant. Rather, he served a critical role when testifying as a witness against a murderer. *See* Barrett Decl., Exh. C, Law Enforcement Certification. By working to ensure that his roommate's murderer would not be released into the community, Mr. G[redacted] M[redacted] made his community safer. Indeed, law enforcement officials have indicated that they may also need him as a future witness in a retrial. *Id.* Additionally, by working as an essential worker providing medical supplies to frontline workers during the COVD-19 pandemic, he contributed positively to the safety and well-being of his community. *See id.* Exh. I, Employment Documents.

89. In light of these facts, there is no reasonable basis to believe that detaining Mr. G[redacted] M[redacted] is necessary to prevent him from "engag[ing] in crime" or "fail[ing] to appear" for court. *Preap*, 139 S. Ct. at 956 (quoting *Demore*, 583 U.S. at 513). Therefore, the relation between Mr. G[redacted] M[redacted]'s continued detention under § 1226(c) and Congress's purpose in enacting that provision is even weaker and more attenuated. As such, his continued detention is an arbitrary and unconstitutional deprivation of liberty that necessitates a bond hearing.

The government must justify continued detention by a clear-and-convincing standard and the IJ must consider alternatives to detention.

90. Regardless of which test the Court applies to determine that the government must provide him a bond hearing, Mr. G[redacted] M[redacted] is also entitled to certain procedural safeguards at a prolonged-detention bond hearing. First, the government must bear the burden of justifying continued detention and do so by a clear-and-convincing standard. *See Velasco Lopez,* 978 F.3d at 856 & n.14 ("conclud[ing] that a clear and convincing evidence standard of proof provides the appropriate level of procedural protection" at a discretionary immigration bond hearing and relying in part on precedents from the Section 1226(c) context); *German Santos*, 965 F.3d at 213 (same, in the context of a noncitizens detained under Section 1226(c)). And second, the IJ conducting the bond hearing must consider less restrictive alternatives to detention and Mr. G[redacted] M[redacted]'s ability to pay in determining whether detention or release (under conditions or on recognizance) is appropriate. *See Joseph*, 2019 WL 3842359 at *9; *Rosado Valerio*, 2019 WL 3017412 at *7; *Arce-Ipanaque*, 2019 WL 2136727 at *3; *Campbell*, 2019 WL 2106387 at *9; *Gomes Herbert*, 2019 WL 1434272 at *4; *Hechavarria*, 2018 WL 5776421, at *9; *Vallejo*, 2018 WL 3738947 at *6; *Hernandez*, 2018 WL 3579108 at *11; *Sajous*, 2018 WL 2357266 at *12. If the government cannot meet its burden, the IJ must order Mr. G[redacted] M[redacted]'s release.

CLAIM FOR RELIEF

COUNT ONE: VIOLATION OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

91. The government's prolonged mandatory detention of Mr. G[redacted] M[redacted] violates his right to due process under the Fifth Amendment.

92. The government's mandatory detention of Mr. G[redacted] M[redacted] violates his right to due process because of his reintegration into the community in the years between his release from criminal custody and his detention by federal immigration authorities.

PRAYER FOR RELIEF

WHEREFORE, Mr. G[redacted] M[redacted] respectfully requests that this Court:

1) Assume jurisdiction over this matter;

2) Grant this habeas petition and order the government to release him unless it provides him with a constitutionally sufficient bond hearing;

3) Order ICE to provide Mr. G[redacted] M[redacted] with two hours of confidential access to his counsel to prepare for a bond hearing;

4) Enter declaratory relief corresponding to the Order set forth in paragraph 2;

5) Award Mr. G[redacted] M[redacted] costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412; and

6) Grant such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Julie Dona
Julie Dona
Johanna Zacarias*
THE LEGAL AID SOCIETY
Immigration Law Unit
199 Water Street, 3rd Floor
New York, NY 10038
(646) 988-1425
jdona@legal-aid.org

Counsel for Petitioner

*application for admission *pro hac vice* forthcoming

Dated: June 3, 2021
Brooklyn, New York

APPENDIX F

DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION

Alien's Name: G[redacted] M[redacted], KEISY

A-File Number: [redacted] Date: 10/05/2020

Event ID: NYC2110000018 Subject ID: 369039990

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

☒ Detained by the Department of Homeland Security.

☐ Released (check all that apply):

- ☐ Under bond in the amount of $ ______
- ☐ On your own recognizance.
- ☐ Under other conditions.
  [Additional document(s) will be provided.]

MCGINNITY, MICHAEL [/s/ MICHAEL MCGINNITY]
Name and Signature of Authorized Officer

SDDO
Title

10/05/2020 09:49 AM
Date and Time of Custody Determination

ICE ERO New York Field Office 26 FEDERAL PLAZA 9TH FLOOR NEW YORK, NY US 10278
Office Location/Address

You may request a review of this custody determination by an immigration judge.

- ☐ I acknowledge receipt of this notification, and
  - ☐ I **do** request an immigration judge review of this custody determination.
  - ☐ I **do not** request an Immigration judge review of this custody determination.

[Refused to sign] [10/5/2020]
Signature of Alien Date

The contents of this notice were read to

G[redacted] M[redacted], KEISY in the
(Name of Alien)

SPANISH language.
(Name of language)

VANDERHOST, PROSPERO
[/s/ PROSPERO VANDERHOST]
Name and Signature of Officer

Deportation Officer
Title

[N/A]
Name or Number of Interpreter (if applicable)

DHS Form 1-286 (1/14) Page 1 of 1

ADDENDUM TO NOTICE OF CUSTODY DETERMINATION

Gayle v. Johnson, --- F. Supp.3d ---, 2015 WL 351669 (D.NJ. Jan. 28, 2015)

This addendum to the Department of Homeland Security, Notice of Custody Determination (DHS Form I-286 (1/14)) is provided to inform you of the basis for your detention under the Federal immigration laws and your right to seek review of your custody determination.

On January 28, 2015, the U.S. District Court for the District of New Jersey held that the Notice of Custody Determination (DHS Form 1-286 (1/14)) fails to provide aliens subject to detention with adequate notice of their detention status, *i.e.,* whether the aliens are being detained under discretionary detention (Section 236(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(a)) or mandatory detention (INA § 236(c), 8 U.S.C. § 1226(c)) grounds. As a result, the Court ruled that the U.S. Department of Homeland Security must inform all aliens detained in the State of New Jersey of the specific detention authority used to detain them and the type of custody redetermination hearing to which they are entitled. *Gayle v. Johnson,* --- F. Supp.3d ---, 2015 WL 351669, at *10, *25 (D.N.J. Jan. 28, 2015). This Addendum serves to inform you of the detention authority holding you and the type of hearing you may request. Enclosed please notice that U.S. Immigration and Customs Enforcement (ICE) has determined that you are being detained under either discretionary or mandatory detention authority based on the box checked for that specific authority. You then may request a particular hearing corresponding to that detention authority. In other words, you may request an individualized bond determination hearing if you are being held under INA § 236(a) (discretionary detention). Likewise, you may request a custody redetermination, *i.e.*, a *Matter of Joseph* (*Joseph*), 22 I. & N. Dec. 799 (BIA 1999), hearing if you are being held under INA § 236(c) (mandatory detention).

If you would like to request a bond hearing or *Joseph* hearing before an Immigration Judge, please check the appropriate box and sign the form enclosed. A hearing then will be scheduled to determine your custody status.

Name: G[redacted]-M[redacted], Keisy [redacted]

☐ ICE has determined that you are subject to discretionary detention under INA § 236(a).

- ☐ Yes, I do want a bond hearing to review this custody determination.
- ☐ No, I do not want a bond hearing to review this custody determination.
- ☐ I decline to make an election at this time.

☒ ICE has determined that you are subject to mandatory detention under INA§ 236(c).

- ☐ Yes, I do want a *Joseph* hearing to review this custody determination.
- ☐ No, I do not want a *Joseph* hearing to review this custody determination.
- ☐ I decline to make an election at this time.

Signature of Alien: [Refused to sign]

Date: 10/05/2020

Name and Signature of Authorized Officer:

McGinnity M [/s/ MICHAEL MCGINNITY]

Title: Supervisory Detention and Deportation Officer

Name of Interpreter (if applicable): ______________

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No.: 1:20-cv-03055

CAROL WILLIAMS BLACK
Petitioner,

vs.

THOMAS DECKER, in his official capacity as Director of New York Field Office of U.S. Immigrations and Customs Enforcement; CHAD WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; and CARL E. DUBOIS, in his official capacity as Sheriff of Orange County, New York.
Respondents.

[Filed: June 5, 2020]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner, Carol Black, by and through his attorney, Laird Law, petitions this Court for a writ of mandate and complaining of Respondents, alleging the following upon information and belief:

PRELIMINARY STATEMENT

1. Mr. Black is a husband, loving step-father, and longtime permanent resident of the United States. Over nineteen years ago Mr. Black's was convicted of Sexual Abuse in the first degree under New York Penal Law ("NYPL") §130.65(03) and Engangering the Welfare of a Child under NYPL §260.10(01). *See* Transcript of Jury Deliberation and Virdict from Mr. Black's Criminal Trial dated March 23, 2000 ("Jury Tr.") pg. 12, lines 5-11 (attached hereto as Exhibit 1). Mr. Black disputed the facts of this case, believing unrelated domestic issues with his ex-wife's family had instigated the claim. He was tried by a jury and found guilty. However, all of the other related charges including rape and molestation were dismissed. *See* Id.

2. While, his judge was extremely merciful in his decision, the conviction destroyed Mr. Black's marriage and relationship with his daughter and step-child. *See* Transcript of Sentencing from Mr. Black's Criminal trial dated May 18, 2000 ("Sentencing Tr.") (attached hereto as Exhibit 2).

3. He eventually reconstructed his life, remarried and made a new family. Mr. Black made a living off repairing diesel engines for first responders, repairing boat engines at various marinas, and finally opening his own business. *See* Sample of Affidavits from Mr. Black's Bond Motion ("Black Aff.") (attached hereto as Exhibit 3).

4. Mr. Black has since remarried and brought his new wife and teenage step-daughter into his home. He raised his step-daughter and sup-

ported his new family without any issues. *See* Black Aff. at pages 1-3, Affidavits from his wife and step-daughter.

5. Through his wife's encouragement he joined Jehovah's witnessed and eventually became a faithful member of their congregation, giving his time and skills to various charitable causes.
6. DHS detained petitioner on December 4, 2019. The length of Mr. Black's detention has become unreasonable and its nature and causes have exceeded the limits that previous courts found constitutionally concerning.
7. Attorney General William Barr has even sounded the alarm bells stating, "jails are petri dishes" for the virus.[1]
8. Mr. Black, a husband, loving step-father, and longtime resident of the United States; is at imminent risk in immigration detention, where he cannot be adequately protected from contracting COVID-19 due to the nature of the jail environment and because his medical conditions of congenital heart disease and pre-diabetes subject him to a heightened risk of harm and cannot be adequately addressed if or when he becomes ill.
9. In fact Mr. Black has regularly suffered severe chest pains, shortness of breath, and dizziness during his detention. Just prior to his arrest by immigration, he was admitted to the Jacobi Med-

---

[1] 'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars, The New York Times (March 31, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html

ical Center and the New Rochelle Hospital for a hear murmur following severe chest pains and breathing trouble. These hospitals are overrun with COVID-19 cases and are reasonably unable to respond to our requests for information

10. Mr. Black and prison's medical staff currently believe he may have suffered a small heart attack. Unfortunately they refuse to release the records until some time in May or June. Mr. Black's health may not last that long.

11. This is an action brought pursuant to 28 U.S.C. § 2241 and the All Writs Act, 28 U.S.C. § 1651, compelling the Respondents to release Petitioner from this dangerous situation. In support of this complaint, Petitioner states as follows:

12. Despite their clear inability to protect Mr. Black from near certain death or serious debilitating complications in a jail environment, and a clear path to release him, ICE obstinately disregards the only course of action that will provide Mr. Black with reasonable safety: to release Mr. Black to his loving family and supportive community who can provide a safe haven for him during this pandemic.

13. Under these circumstances, Respondents cannot provide Mr. Black with safe conditions or adequate due process. His continued detention will likely lead to death or serious medical repercussions without action by this Court. Accordingly, Mr. Black respectfully requests that this Court issue a writ of habeas corpus, ordering Respondents to promptly release him.

14. ICE has not claimed in any correspondence or Immigration Hearing that Mr. Black is a danger to society, a flight risk, or a fugitive from the law. They just believe they don't have to release him.

15. Mr. Black runs his own business servicing boat engines for the City of Stamford, the Stamford Police, and a large number of private citizens. Mr. Black began this business after building a strong reputation for honest and reliable service with his prior employer.

16. He also developed his skills by servicing first responder vehicles across Westchester County and Southern Connecticut.

17. These jobs allowed him to support his wife and step-daughter. His wife suffers from chronic asthma which places her in the hospital several times per year. Mr. Black was her sole financial support.

JURISDICTION

18. This action arises under the Fifth and Fourteenth Amendments to the U.S. Constitution.

19. The Court has subject matter jurisdiction over this Petition pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause); the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus). In addition, the Court has jurisdiction to grant injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

20. The district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness of their detention. Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Demore v. Kim, 538 U.S. 510, 516-17 (2003); Zadvydas v. Davis, 533 U.S. 678, 687 (2001).

VENUE

21. Venue lies in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 2241(d) and 28 U.S.C. § 1391(b)(2).

22. Venue is proper in this District under 28 U.S.C. § 2241(d) because Mr. Black is detained in this District by Respondent Decker, whose office is located in this District. See, e.g., Rodriguez Sanchez v. Decker, No. 18-CV-8798 (AJN), 2019 WL 3840977, at *2 (S.D.N.Y. Aug. 15, 2019); Cruz v. Decker, No. 18 Civ. 9948 (GBD) (OTW), 2019 WL 6318627, at *6 (S.D.N.Y. Nov. 26, 2019).

23. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial portion of the events or omissions giving rise to this action occurred in this District. The removal proceedings against Mr. Black are held in this District, and Mr. Black lives in this District, and his arrest, prolonged detention, and inadequate medical care are the results of actions by Respondents in this District.

PARTIES

24. Mr. Black, also known as "Brother Black" or "Junior", is a 57-year-old Lawful Permanent Resident of the United States who has been diagnosed with Congenital Heart Disease, after doctor's found a hole in his heart, following multiple

heart attacks. He has been a Lawful Permanent since 1983. He lives in Mount Vernon, NY but has been detained by Respondents at the Orange County Jail ("OCJ") since December 4, 2019 in conjunction with removal proceedings at the Varick Street Immigration Court.

25. Respondent Thomas Decker is named in his official capacity as Director of the New York Field Office for ICE. He is responsible for administration and management of ICE Enforcement Removal Operations in New York City and has jurisdiction over the decision to keep Mr. Black in detention. Respondent Decker's address is 26 Federal Plaza, 9th Floor, Suite 9-110, New York, NY 10278.

26. Respondent Chad Wolf is named in his official capacity as Acting Secretary of DHS. He is responsible for the enforcement of the immigration laws and routinely transacts business in the Southern District of New York. Respondent Wolf supervises Respondent Decker and is legally responsible for the pursuit of Petitioner's detention. Respondent Wolf's address is U.S. Department of Homeland Security, 800 K Street, N.W. #1000, Washington, D.C. 20528.

27. Respondent Carl E. DuBois is the Sheriff of Orange County, New York. As Sheriff, he is responsible for overseeing the administration and management of the Jail in Goshen, New York. He is sued in his official capacity. Respondent DuBois address is Orange County Sheriff's Office, Goshen, NY, 10924.

EXHAUSTION OF REMEDIES

28. Petitioner has no available administrative remedies for his release. Petitioner has exhausted all other available remedies. Petitioner is mandatorily detained under INA §236(c).

29. Mr. Black has no administrative remedies to exhaust through ICE or the Orange County Jail because no process exists to challenge the unconstitutional conditions of his detention or the inadequate medical care he is provided. The only process available to Mr. Black is to pursue defenses to removal—a process governed by separate laws, see 8 U.S.C. § 1229a, controlled by the Department of Justice rather than DHS, see id., and one that will take months, if not years, to complete —particularly in light of the current pandemic that is the basis for in this action—while Mr. Black continues to suffer severe and irreparable harm exacerbated by that pandemic.

30. Even if meaningful administrative remedies were promptly available, Mr. Black, as a noncitizen challenging the lawfulness of his ongoing immigration detention, is not required to exhaust them under 8 U.S.C. § 2241. See Louisaire v. Muller, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010); Garcia v. Shanahan, 615 F. Supp. 2d 175, 180 (S.D.N.Y. 2009).

31. Moreover, the immigration agencies do not have jurisdiction to adjudicate the due process claims that Mr. Black raises here. See, e.g., Araujo-Cortes v. Shanahan, 35 F. Supp. 3d 533, 538-39 (S.D.N.Y. 2014) (holding that an administrative appeal challenging classification under the man-

datory detention statute would be futile because the BIA "'does not have jurisdiction to adjudicate constitutional issues'") (quoting United States v. Gonzalez-Roque, 301 F.3d 39, 48 (2d Cir. 2002)).

STATEMENT OF FACTS

32. On March 11, 2020, the World Health Organization ("WHO") declared COVID-19 a "global pandemic."

33. At the time, there were more than 118,000 cases in 114 countries, and 4,291 people had died.[2]

34. Experts estimate that as many as 214 million people in the United States could be become infected, and as many as 1.7 million people could die.[3]

35. Currently over 614,283 have been confirmed to have the virus resulting in 27,760 deaths. New York City accounts for more than of those 25% numbers with 7,905 deaths.[4]

36. In Response multiple states are actively releasing their inmates. This includes Ohio, New Jersey, and even New York.[5] Recently prisons have

---

[2] Coronavirus disease 2019 (COVID-19) Situation Report – 58, March 18, 2020, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing- on-covid-19---11-march-2020.

[3] Sheri Fink, *The Worst-Case Estimate for U.S. Coronavirus Deaths*, The New York Times (Mar. 13, 2020), https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html.

[4] John Hopkins University of Medicine, CoronaVirus Resource Center, https://coronavirus.jhu.edu/map.html

[5] Advocates: Inmates Released Early Due To Pandemic Need Help To Safely Shelter, NPR, (April 9, 2020), https://www.npr.org/ 2020 /04/09/830394249/advocates-inmates-released-early-due-to-pandemic -need-help-to-safelyshelter; US starts to release inmates due to

confirmed an increased spread due to improper care standards and close quarters.[6]

37. COVID-19 has already started to spread inside U.S. prisons and jails, and experts predict mass contagion is only a matter of time. See, e.g., Rich Shapiro, Coronavirus Could "Wreak Havoc" on U.S. Jails, Experts Warn, NBC News (Mar. 12, 2020) ("An outbreak of the deadly virus inside the walls of a U.S. prison or jail is now a question of when, not if, according to health experts.")[7]; Dr. Anne C. Spaulding, MD MPH, Coronavirus and the Correctional Facility: for Correctional Staff Leadership at 16, Mar. 9, 2020 ("A prison or jail is a self-contained environment, both those incarcerated and those who watch over them are at risk for airborne infections. Some make an analogy with a cruise ship. Cautionary tale #1: think of the spread of COVID-19 on the Diamond Princess Cruise Ship, January 2020. Cautionary tale #2: Hundreds of cases diagnosed in Chinese prisons.").[8] Even this morning, officials

coronavirus outbreak, FoxNews (March 20, 2020) https://www.foxnews.com/health/us-starts-release-inmates-coronavirus; 1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk, New York Times (March 23, 2020), https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html

[6] Coronavirus cases in California prisons multiplied in days and inmates fear further spread, CNN (April 9, 2020) https://www.cnn.com/2020/04/09/us/california-prisons-coronavirus/index.html

[7] https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn- n1156586.

[8] https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf; *see also*, Dr. Homer Venters, *Four Ways to Protect Our Jails and Prisons from Coronavirus*, The Hill, (Feb. 29, 2020),

announced that a corrections officer at Bergen County Jail—where other ICE detainees are held—was diagnosed with COVID-19.

38. Despite these widespread warnings, ICE and the Orange County Jail, where Mr. Black is detained, remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody, including Mr. Black, against a life-threatening illness.

39. Indeed, the primary recommended way to avoid the spread of the virus—social isolation—is effectively impossible in a jail setting.

40. ICE's failure to recognize this inevitability and take adequate precautions, including releasing people, demonstrates a total disregard for the constitutional rights, well-being, and humanity of immigrant detainees, including Mr. Black.

41. As a person living with significant heart trouble and borderline diabetes, Mr. Black already has significant health risk. In fact Mr. Black has suffered regular chest pain and shortness of

---

https://thehill.com/opinion/criminal-justice/485236-4-waysto-protect-our-jails-and-prisons-from- coronavirus?rnd=1582932792 ("When COVID-19 arrives in a community, it will show up in jails and prisons. This has already happened in China, which has a lower rate of incarceration than the U.S."); *see also NBC, US Prisons, Jails on Alert for Spread of Coronavirus* (Mar. 7, 2020), https:// www.nbcboston.com/news/coronavirus/us-prisons-jails-spread-of-coronavirus/2087202/ ("Coronavirus suddenly exploded in China's prisons last week, with reports of more than 500 cases spreading across five facilities in three provinces. . . . Jail operators in the U.S. are coming to the growing realization that it's only a matter of time before it strikes here.").

breath, resulting in four cardiograms while in detention. The medical staff have been unable to help him with their limited resources. Mr. Black is particularly unsafe in the jail environment, and ICE's inability to protect him and failure to release him amount to a life-threatening violation of his constitutional right to due process.

42. New York and its surrounding areas, including Westchester County, which neighbors Orange County, have become the epicenter of the outbreak. New York currently reports 2600 number of cases, including 500 hospitalizations and 21 deaths.

43. In Orange County, New York, the government has already confirmed that over 33 people have been infected with COVID-19,[9] and the Orange County Health Commissioner has advised that the best way to prevent the spread of COVID-19 is "commonsense personal hygiene, including washing your hands frequently and thoroughly . . . and avoiding unnecessary contact with others."[10]

44. Detention facilities have a long history of failing to protect its occupants. In 2019, a mumps outbreak across 57 immigration detention facilities throughout the country caused almost 900 cases of mumps overwhelmingly contracted inside the

---

[9] Orange County Health Department, https://www.orangecountygov.com/1936/COVID-19Coronavirus.

[10] Daily Freeman, Orange County Confirms three more COVID-19 Cases, Bringing Total to Six (March 14, 2020), https://www.dailyfreeman.com/news/local-news/orange-county-confirms-three-more-covid-- cases-bringing-total/article_35f49df8-6624-11ea-9d62-63dc07ff9a21.html.

facilities15 before the outbreak spread to surrounding communities.[11]

45. The nature of detention facilities themselves, including Orange County Jail, make exposure and spread of the virus particularly harmful. Dr. Jaimie Meyer, an expert on infectious diseases in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in detention centers like Orange County Jail "is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected."[12]

46. It will be nearly impossible to prevent widespread infections inside the Orange County Jail once one person contracts the virus because detainees live, sleep, and use the bathroom in close proximity with others, and because "[b]ehind bars, some of

---

[11] *See* Terrence McDonald, Bergen County Won't Say if Mumps Outbreak Affects Only Immigrant Detainees, Northjersey.com (June 13, 2019), https://www.northjersey.com/story/news/bergen/2019/06/13/bergen-county-nj-wont-say-if-jail-mumps-outbreak-hit-only-ice-inmates/1448708001. In addition, in 2019, thousands of individuals in 39 immigration detention centers across the country were exposed to chickenpox. *See* Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox,* Vice News (June 14, 2020), https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

[12] *See* Declaration of Dr. Jaimie Meyer, Velesaca v. Wolf, 20-cv-1803, ¶ 7 (AKH) (S.D.N.Y. Feb. 28, 2020), ECF 42 ("Meyer Decl.").

the most basic disease prevention measures are against the rules or simply impossible."[13] [14] [15]

47. Overcrowding and deficient medical care,[16] including immigrant detainees being given incorrect medication or even dying because of an inadequately treated illness,[17] at the Orange County Jail are well documented even before the crisis.[18]

---

13 Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, the Marshall Project (Mar. 6, 2020), https://www.themarshallproject.org/2020/03/06/when-purell-is- contraband-how-do-you-contain-coronavirus (describing, for example, limited access to hand sanitizer & measures).

14 Nicole Wetsman, *Prisons and Jails Are Vulnerable to COVID-19 Outbreaks,* The Verge (Mar. 7, 2020), https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19- flu-soap.

15 Johnathan Hogan, *As Coronavirus Spreads, Jails And Prisons Are Particularly Vulnerable*, Post Register (Mar. 9, 2020), https://www.postregister.com/news/crime_courts/as-coronavirus-spreads-jails- and-prisons-are-particularly-vulnerable/article_cf7c22ef-cb93-5a21-908f-644d7ae6c682.html.

16 *See Compliance Inspection for the Orange County Jail Goshen, New York*, U.S. Dept. of Homeland Security Office of Detention Oversight, 2 (Mar. 2017), https://www.ice.gov/doclib/foia/odo-compliance-inspections/2017-Orange%20County-Jail-Goshen-NY-Mar-21-23-2017.pdf.

17 *See Systemic Indifference: Dangerous & Substandard Care in US Immigration Detention*, Human Rights Watch (May 8, 2017), https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous- substandard-medical-care-us-immigration-detention.

18 *See* Abigayle Erickson, et al., *Behind Bars in the Empire State: An Assessment of the Immigration Detention of New Yorkers*, Immigrant Advocates Response Collaborative, 18 (Mar. 2019), https://www.immigrationadvocates.org/nonprofit/alerts/attachment.3409 46.

48. The Office of the Inspector General ("OIG") of the Department of Homeland Security ("DHS") even concluded in a 2019 report that ICE "does not adequately hold detention facility contractors accountable for not meeting performance standards," "issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards," and "does not adequately share information about ICE detention contracts with key officials."[19]

49. Moreover, ICE has routinely failed to remedy inhumane conditions because, according to the OIG, "ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them, which further diminishes the usefulness of inspections."[20]

50. NY-area immigration detention centers specifically are "dangerously under-equipped and ill-prepared to prevent and manage a COVID-19 outbreak, which would result in severe harm to detained individuals, jail and prison staff, and the broader community." Decl. At ¶¶ 26-27. These facilities' past record on addressing individuals both with serious health needs and in need of emergency care shows that the facilities are not

[19] *See* OIG, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf.

[20] *See ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, Office of the Inspector General, 1 (June 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/20//18-06/OIG-18-67-Jun18.pdf.

prepared to "identify, monitor, and treat a COVID-19 epidemic" and that will be compounded as a great number of people need care simultaneously. Id. at ¶¶ 33-34. Reducing the number of people in detention is critical to mitigating risk for those people both inside detention and in the surrounding communities. Id. At ¶ 37.

51. Now, conditions inside the Orange County Jail have already deteriorated significantly, as detainees do not have access to hand sanitizer or gloves and limited access to soap, there is rarely soap in the visitors' bathroom, and the facility does not have adequate cleaning supplies.

52. Further, the jail has accepted new pre-trial detainees from Westchester, the epicenter of the outbreak in New York, and placed them in the immigration unit.

53. Simultaneously, as of March 16, 2020, Mr. Black and other people detained at the Orange County Jail have lost the ability to communicate with the outside world, as the Jail has canceled all[21] contact and non-contact visits, including for attor-

[21] The Jail says that visitation is limited to "extreme need" consisting of "any event that is life concerning and would require direct communication such as birth, death, serious illness or injury." The Jail goes on to specify that "Attorneys . . . and any other outside entity wishing to contact a prisoner must do so through video conferencing." New Update on Orange County Sheriff Jail Visitation, March 15, 2020, https://twitter.com/OCSheriffNY/status/1239347616481247232/photo/1.

neys, and the video teleconferencing system often malfunctions and is unreliable at best.[22]

54. Those released are low-risk to the public, especially during a movement restricting epidemic.

Mr. Black's Ongoing Detention During the COVID-19 Pandemic is Particularly Egregious

55. Mr. Black, is a devout Christian, husband, and stepfather. He has been a Lawful Permanent Resident living in the United States for the majority of his adult life. He has been detained by ICE since December, 2019[23] despite serious threats to his health and well-being and numerous requests for his release.

56. Prior to his detention, Mr. Black and his wife lived in lived in Mount Vernon, NY. He and his wife had just took their loyal clientele and started

---

[22] The Jail says that visitation is limited to "extreme need" consisting of "any event that is life concerning and would require direct communication such as birth, death, serious illness or injury." The Jail goes on to specify that "Attorneys . . . and any other outside entity wishing to contact a prisoner must do so through video conferencing." New Update on Orange County Sheriff Jail Visitation, March 15, 2020, https://twitter.com/OCSheriffNY/status/1239347616481247232/photo/1.

[23] Mr. Black was detained by ICE after he received a speeding ticket with his wife in NY. ICE officer's held him due to a conviction from May 18, 2000. Mr. Black and his partner were accused of abuse by their daughter. His partner's case was quickly dropped. Mr. Black's Judge warned him to take a bench trial for a similar outcome. Mr. Black did not take this advice and suffered a guilty verdict after a nearly hung jury. Due to the surrounding unfortunate circumstances and his daughter's eventual conviction for perjury, Mr. Black has always been open about his prior convictions with his friends and family.

their own business servicing boat engines. Their regular customers included the City and Police of Stamford and yacht clubs. All of his clients call him Junior. They were surprised by his ICE detention and came out in droves to support him.

57. In addition to providing for his family, Mr. Black, or "Brother Black", is a devout member of the Jehovah's Witness. He was converted after meeting his wife and now donates his time and money to those in the Kingdom Hall. Mr. Black informed all of his church fellows of his prior convictions. Mr. Black's openness and honesty has made him an endeared member. According to the detention center's logs, various church fellows have visited him almost every week leading up to the lock-down.

58. Mr. Black has been diagnosed Congenital Heart Disease. He regularly suffered from chest pain, but his recent breathing trouble and heart attacks led his doctor's to discover that the hole in his heart had aggravated his symptoms.

59. Despite this, Mr. Black had managed to stabilize his health, with a strict diet and other activities aided by his concerned wife. Since being detained by ICE, Mr. Black's conditioned has worsened. He has suffered multiple potential heart attacks with chest pain, shortness of breath, and dizziness. Each episode has resulted in inadequate care and a lack of medical records for his regular doctor's to review. The prison will not bring him to a hospital.

ICE'S Failure to Release Mr. Black During the COVID-19 Pandemic Violates His Constitutional Rights

60. ICE often releases individuals with significant medical or humanitarian needs pursuant to this authority, regardless of the detention statute under which the individuals are held.

61. ICE also releases individuals on various alternatives to detention ("ATDs"), such as check-in appointments or electronic monitoring, which can result in nearly perfect compliance rates. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that one of ICE's ATD programs, the Intensive Supervision Appearance Program, "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings").

62. Mr. Black has repeatedly requested his release, asking that ICE exercise either its discretion or parole authority under 8 C.F.R § 215.5(b) to immediately release him on recognizance, bond, or reasonable conditions of release because of the urgent risks to his wife's health and those posed to him by COVID-19.

63. To date, ICE has not provided an answer to Mr. Black's release request. Their officer's repeatedly gave his Counsel non-working numbers and unchecked e-mail addresses. Further the ICE officers still present at his facility have explicitly stated that they have no knowledge of the release process and weren't apart of it.

64. Nonetheless, despite these repeated requests and the heightened risk to Mr. Black's health and well-being, ICE has continued to detain him.

Mr. Black's Case History

65. A Notice to Appear ("NTA") was issued for Mr. Black On October 2, 2019 after he received a speeding ticket while driving through upstate New York with his wife. *See* Mr. Black's Notice to Appear dated October 2, 2019 ("Pet. NTA") (attached hereto as Exhibit 4).

66. Mr. Black and his wife continued to live their lives unaware the notice was drafted. It wasn't till two months later that he was served with the official notice on December 4, 2019. At that time he was arrested and placed in detention. *See* Id.

67. Shortly after his detention, Mr. Black and Undersigned Counsel, immediately attempted to contact Mr. Black's Deportation Officer and prepared for hist first appearance before an Immigration Judge.

68. Weeks later Mr. Black was abruptly scheduled for a hearing date two days after Christmas, December 27, 2019. Unfortunately, Undersigned Counsel was not informed of the date until after he and his office had closed for a holiday break.

69. The hearing was adjourned to January 13, 2020, as Petitioner was not represented by counsel. Petitioner subsequently filed his Motion for Bond and Memorandum of Law opposing his aggravated felony determination in early January 2020.

70. On January 13, DHS requested time to respond and received a deadline of January 27, 2020. The next hearing was scheduled for February 3, 2020 for final arguments and a potential decision on both motions. *See* Mr. Black's Hearing Notice dated January 13, 2020 (attached hereto as Exhibit 5).

71. At the January 13th hearing, the Immigration Judge indicated that he had read the Memorandum and appreciated it. He also informed Counsel to prepare a Cancellation of Removal application if that's what Petitioner sought as a form of relief.

72. An application for Cancellation of Removal was filed shortly afterward. USCIS confirmed receipt on January 22, 2020. *See* Mr. Black's Form E-42A Receipt Notice dated January 22, 2020 (attached hereto as Exhibit 6).

73. On January 23, 2020, DHS requested a one-week extension on their deadline. DHS left the standard motion line regarding the reason for lack of undue hardship on the opposing party incomplete. *See* DHS Motion to Extend the Briefing Schedule dated January 23, 2020 (attached hereto as Exhibit 7).

74. On January 28, 2020 the court granted DHS' motion and further adjourned the hearing to February 10, 2020. *See* Mr. Black's Adjournment Notice and Hearing Notice dated January 28, 2020 (attached hereto as Exhibit 8).

75. Carol Black and Undersigned Counsel received the motion and subsequent decision several days

after each was issued. As a result Mr. Black's motion opposing the decision was filed on January 30, 2020 out of sync with the Court's decision.

76. That was motion was denied on February 5, 2020 and seemingly caused the Immigration Judge to further adjourn the hearing to February 24, 2020. *See* Immigration Judge's Order and Mr. Black's Hearing Notice dated February 5 and 10, 2020 (attached hereto as Exhibit 9). Respondent's counsel was notified by phone before the original hearing. No reason was given for this second adjournment.

77. On February 10, Petitioner's counsel went to court to personally file the completed Cancellation of Removal application for relief with the Judge's clerk and to investigate if DHS had made a second motion or if Counsel had accidentally offended the court. Counsel was told to return to his office and file the application on a different day.

78. The government ultimately submitted a three-page response brief relying heavily on a 2002 BIA decision, whose reasoning has now been overturned by the Supreme Court in *Moncrieffe v. Holder,* 569 US 184, 133 S. Ct. 1878 (2013).

79. On February 24, 2020, the Immigration Judge ruled against Petitioner, stating the government's brief had gone unopposed. The Court seemed to forget Petitioner's initial Memorandum and its arguments. This was particularly odd as he had specifically acknowledged it at the prior hearing.

80. After a quick oral argument reminding the Court of the brief and its contents, the Immigration

Judge adjourned Petitioner's case to review it again. The next hearing date was set for March 23, 2020. *See* Mr. Black's Hearing Notice dated February 24, 2020 (attached hereto as Exhibit 10).

81. Mr. Black and his family, who were present at every hearing, were reasonably distraught.

82. So, Undersigned Counsel personally went to the Immigration Court's staff and worked with them to find any new openings in the Judge's schedule. After filing an official request, the case was moved up to March 16, 2020. *See* Mr. Black's Hearing Notice scheduling his hearing for March 16, 2020 (attached hereto as Exhibit 11).

83. On or about March 16, 2020 the Immigration Judge denied Petitioner's position and found him ineligible for bond. The Judge declined to give an oral opinion for the denial believing a more articulate exposition should be made in writing. *See* Judge's Order on Bond dated March 16, 2020 (attached hereto as Exhibit 12).

84. Petitioner reserved and immediately filed an appeal of the Bond decision with the Board of Immigration Appeals ("BIA") on March 18, 2020. *See* Mr. Black's BIA Appeal package dated March 18, 2020 (attached hereto as Exhibit 13).

85. The BIA did not issue a receipt notice for this appeal until May 15, 2020, almost two months later. *See* BIA Receipt Notice Returning Filing Fee as Unnecessary, dated May 15, 2020 (attached hereto as Exhibit 14). The Immigration Judge did not issue a written decision for the Bond until

May 26, 2020. *See* Judge's written decision dated May 26, 2020 (attached hereto as Exhibit 15).

86. By the end of March the Immigration Courts were placed on lockdown. Non-detained cases were suspended and detained master calendars continued telephonically.[24] The Executive Office of Immigration Review ("EOIR") under the DOJ began posting rapidly changing court closings and evidence filing locations requirements solely via Twitter on sometimes a daily or hourly basis.[25] Eventually all evidence was set to be filed by e-mail and court notices were to be issued on EOIR's official DOJ website.[26]

87. On April 20, 2020, Petitioner's counsel appeared telephonically before a different Immigration Judge, temporarily assigned to the case. Petitioner's counsel noted it was unclear if the order was made on the "Bond Record" or the "Removal Record".[27] Petitioner's counsel argued that a redetermination was not necessary, but rather

---

[24] DOJ EOIR Twitter announcement dated March 17, 2020. https://twitter.com/DOJ_EOIR/status/1240124718298038273 (accessed June 4, 2020).

[25] DOJ EOIR Twitter Account, https://twitter.com/DOJ_EOIR (accessed June 4, 2020).

[26] EOIR Operational Status During Coronavirus Pandemic, EOIR/DOJ, https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic (accessed June 4, 2020).

[27] In Immgiration Proceedings, the Bond Hearing and Removal Hearings are seperate proceedings, even if they occur on the same day. As a result the Record of Proceedings are kept entirely seperate, requiring the incoporation of evidence from one proceeding to another for the sake of appeal. *See Immigration Court Practice Manual* § 9.3(a), *See also* 8C.F.R. §§ 1003.19 and 1236.1

sought to ensure that the arguments and briefs were incorporated in both records of proceedings.

88. The new Judge ordered a Motion to Redetermine be submitted by the following Monday, April 27. DHS' response Brief was due on May 4, 2020. The Judge ordered a "basic" asylum application be submitted at the next hearing on May 11, 2020, acknowledging that the pandemic would make the application's preparation difficult.

89. Petitioner timely submitted the motion with new case law his counsel mentioned at the hearing. Petitioner also submitted the Form I-589 application for asylum. DHS missed its deadline again, resulting in another adjournment from another temporary Immigration Judge on May 11.

90. At the May 11 hearing, DHS claimed they did not receive Petitioner's submission through their electronic filing system, despite the fact that the Immigration Court did. When Petitioner offered to submit proof, the Immigration Judge simply e-mailed DHS the submission on the record.

91. DHS finally filed a near identical brief almost two weeks later. Petitioner's next hearing was scheduled for June 8, 2020.

LEGAL BACKGROUND AND FRAMEWORK

92. At all times through out the proceedings, Mr. Black actively prosecuted his case. He and his family, friends, church, and counsel prepared applications, motions, memorandums, affidavits, and other evidence to support his case. They made every effort to ensure there was no undue delay, even to his own disadvantage.

93. At one point he actively worked to advance his own hearing date.

94. Despite all of their efforts, Mr. Black's case was repeatedly delayed due to DHS and DOJ inaction or error. DHS has missed nearly every deadline the court has given it. They have requested repeated adjournments. The Immigration Court itself has placed months of delays on his case. Further, the Board of Immigration Appeals has shown through its nearly two month delay to confirm it received Mr. Black's bond appeal that it will be unable to resolve the standing legal issues causing his detention and bar from Cancellation of Removal relief for quite some time.

95. These delays will no doubt be further exacerbated as the COVID-19 pandemic has wreaked havoc on the Immigration Court docket. This is easily evidenced by their ever changing Twitter and DOJ website announcements, as well as Mr. Black's case transfer between two different substitute Judges in strictly telephonic hearings.

96. The pandemic has also made case preparation near impossible. Mr. Black's communication with the outside world is further limited by the OCJ's shoddy teleconferencing system and expensive phone call network that both regularly fail to connect. In addition Mr. Black's support network of friends and family cannot freely travel within the US or Jamaica or coordinate their efforts in church. Due to mailing issues from the prison, Mr. Black was resigned to submit his asylum statement to his Counsel by holding it up to the teleconferencing camera to be captured.

See Screen Captures of Petitioner and his Asylum Statement (attached hereto as Exhibit 16).

97. Mr. Black's detention has decimated his family. Mr. Black is the main breadwinner without his labor there is no income stream. His wife works as the business' secretary and bookkeeper. Without any income stream, they have been unable to afford their new mortgage and his wife's current medical bills.

98. Meanwhile, his detention serves no purpose. Mr. Black has personal, moral and economic responsibilities to his family, church, and his customers. He is not a flight risk nor danger to the community. It is also hard to imagine how his continued detention furthers the public good in anyway.

99. Petitioner reasserts his allegations from his initial complaint regarding ICE's ability to release him under various restrictions and alternatives that would not cause such severe detriment to his health, humanity, and Constitutional rights.

100. Further they have refused to communicate with Mr. Black's counsel despite regularly telling his family otherwise.

101. The Supreme Court in sustaining the authority of Congress to mandate detention of criminal aliens during administrative removal proceedings, stressed that such detention would be "for the brief period necessary for their removal proceedings." *Demore v. Kim*, 538 U.S. 510, 513 (2004) (emphasis added). It is unmistakable that D*emore* contemplated "limited" and "brief" periods of "temporary confinement." *See Id.*

*a*t 513 ("Congress . . . may require that [criminal aliens] be detained for the brief period necessary for their removal proceedings."); *Id.* At 526 (noting the "Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings")' *Id.* At 529 n.12 (noting "the very limited time of the detention at stake").

102. Further the Court noted in *Zadvydas* that prolonged detention without a clear plan for removal is in fact unconstitutional. *Zadvydas v. Davis* 533 US 678 (2001)

103. In *Demore,* the Court specifically referred to statistics demonstrating the typically brief period that removal proceedings require.

104. Relying on statistics, The Court then noted immigration authorities were to improve their "operations in order to complete removal proceedings against all deportable criminal aliens before their release" *Id.* At 520 n. 13. For Mr. Black his removal proceedings has lasted over half a year through no fault of his own.

105. Following *Zadvydas* and *Demore*, every circuit court of appeals, including this circuit, to confront the issue has found either the immigration statutes or due process require a hearing for non-citizens subject to unreasonably prolonged detention pending removal proceedings. *See* Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016) (detention under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)

(8 U.S.C. § 1226(c)); (8 U.S.C. § 1226(c)); *Rodriguez v. Robbins* (Rodriguez III), 804 F.3d 1060 (9th Cir. 2015) (8 U.S.C. § 1226(c) and 8 U.S.C. § 1225(b)); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) (8 U.S.C. § 1226(c)); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (8 U.S.C. § 1226(c)) (requiring release when mandatory detention exceeds a reasonable period of time).

106. Recently the Supreme Court abrogated many of these decisions in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), requiring the 9th Circuit and subsequently the 2nd circuit to determine if the Constitution itself requires bond hearing in cases of prolonged detention. *See Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).

107. While Lora was vacated by *Jennings* "it still carries 'significant persuasive weight' as to the constitutional issue, which was not addressed in *Jennings".* Guerro v. Decker No. 19 Civ. 11644 (KPF) *(quoting Sajous* v. *Decker,* No. 18 Civ. 2447 (AJN), 2018 WL 2357266 at *6 (S.D.N.Y. May 23, 2018)). *See also Cabral v. Decker*, 331 F. Supp.3d 255, 260 (S.D.N.Y. 2018), *Hechavarria v. Sessions*, 891 F.3d 49, 58 (2d Cir. 2018),

108. The *Jennings* decision has resulted in District Courts taking a case-by case approach to petitions. *See Cabral,* 331 F.Supp at 260. *E.g. Hernandez,* No. 18cv5026, 2018 WL 3579108, at *8 (S.D.N.Y. July 25, 2018) (holding that, under "a fact-dependent inquiry, [the petitioner's] detention has become unreasonably prolonged").

109. Many pre-Lora or Jennings decisions used this approach citing J. Kennedy's concurrence in

Demore where he stated that the Due Process clause prohibits arbitrary deprivations off liberty and that "a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Demore, 538 U.S. 510, 532, 123 S.Ct. 1708 (Kennedy, J., concurring).

110. As a result courts currently consider several factors to determine if a bond hearing is warranted: (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) whether the petitioner has asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner's detention is near conclusion. See, e.g., *Sajous* 18cv2447, 2018 WL 2357266, at *10-11; *Vallejo v. Decker*, No. 18cv5649, 2018 WL 3738947, at *3 (S.D.N.Y. Aug. 7, 2018); *Hernandez v. Decker*, No. 18cv5026, 2018 WL 3579108, at *7 (S.D.N.Y. July 25, 2018).

111. *First* Petitioner has been detained since December 4, 2019. His detention has lasted more than six months. While not a bright line rule, it is a strong factor. *Id.*

112. *Second,* DHS and DOJ are primarily responsible for the delay in his case and therefore release. The only adjournment made on his be-

half was entirely out of Petitioner's control. He waited in detention almost a month before his first hearing was scheduled shortly after Christmas Day. This was unfortunately after his attorney had already left his office for a planned vacation. Every other adjournment since that time was made by other parties due to inaction, late filings, forgetfulness, or other internal issues. Despite Officer Flynn's assertions, Undersigned Counsel did not request a redetermination of the bond, but rather sought to ensure the same arguments were placed on both the "removal" and "bond" records for the sake of appeal. The substitute judge subsequently ordered a motion be submitted.

113. *Third*, Petitioner has asserted defenses to removal. He is claiming Asylum, Withholding, and protection under the Convention Against Torture. He is also concurrently filing for Cancellation of Removal pending a briefing schedule from the Board of Immigration Appeals regarding his eligibility for such relief.

114. *Fourth*, Petitioner's detention has not exceeded the time he previously spent in prison; however that prison sentence was completed over 20 years ago. Petitioner has established a successful life for himself and his family without any issue. Also that detention was held during the course of his trial and was officially terminated by his judge on the day of sentencing. That Judge also noted that Respondent was not a flight risk nor a danger to the community. *E.g. Cabral*, 331 F. Supp. 3d at 262

115. *Fifth*, Petitioner is held in the same facility as other state inmates. His separation from those inmates bares little weight as there is no indication that his portion of the facility was designed or treated any differently than the rest of the prison.

116. *Sixth*, The nature of Petitioner's crimes are severe. While "sexual contact" in New York has a historically flexible definition, the implications of the charge alone are serious. Petitioner nor Undersigned Counsel make light of that. Petitioner only asks the court consider that the accusation and trial against him is over 20 years old. At his sentencing, the judge noted that Mr. Black was always present and on time for his hearings. He further found that he was the lowest level risk threat. Mr. Black continued to assert his innocence but that he obviously had to accept the Jury's decision. Interestingly the Judge spoke respectfully of Mr. Black and his position and did not hold it against him, noting that it was a difficult case.

117. Since that time he has faced no other accusations or suspicions from anyone. He has raised his step-daughter without any issue or suspicion. His family and church are well aware of his conviction. Upon information and belief, his charge for failing to register as an offender was discharged and dismissed, because he and his wife did properly register his change of address with the local authorities in Mt. Vernon, NY but not with the main office in Albany.

118. *Seventh,* the Petitioner's detention is not near its conclusion. Despite limited access to family, friends, and counsel during the COVID-19 pandemic, Petitioner has managed to prepare and application for asylum with a statement. Unfortunately he is only at the beginning of the relief portion of his case. He will require witness testimony and evidence from the US and Jamaica with COVID-19 creating tough restrictions. Further the Board of Immigration Appeals will need to determine if NYPL § 130.65(3) is an aggravated felony under INA § 101(a)(43), 8 USC §1101(a)(43).[28] Under these circumstance the Court should consider the strong possibility that Mr. Black will be detained for many months. *See also Tijani v. Willis*, 430 F.3d 1241,1242 (9th Cir. 2005) (granting petitioner relief after reviewing his potential future length of detention).

119. Based upon these factors, Petitioner's continuing detention without a bond hearing is unreasonable and unconstitutional. *See E.g. Cabral*, 331 F. Supp. 3d at 262. (finding the factors weighed in favor of Petitioner despite the sixth factor presenting a long list of serious convictions).

---

[28] The 2nd Circuit has requested the Board make precedential decision on this particular statute *in James v. Mukasey,* 522 F.3d 250, 257-258 (2d Cir. 2008) and again in *Flores v. Holder,* 779 F.3d 159, 166-165 (2d Cir. 2015), and *Flores v. Barr* 2019 WL 5566316 (2d Cir. 2019).

Punitive Conditions of Confinement, Including Failure to Provide Adequate Medical Care, for Civil Detainees Violate the U.S. Constitution

120. The U.S. Constitution prohibits pretrial and civil detainees from being detained in punitive conditions of confinement because the purpose of such detention is allegedly not punitive. Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017). As a result, these detainees, including immigrant detainees, "may not be punished in any manner —neither cruelly and unusually nor otherwise." Id. (explaining that protections for pretrial detainees, who may not be punished at all, are broader than those for convicted prisoners, for whom the Eighth Amendment provides protection against cruel and unusual punishment).

121. As a result, due process rights of civil detainees such as immigrant detainees "are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); see also Darnell, 849 F.3d at 33 (noting that in the Second Circuit, due process conditions of confinement jurisprudence "generally mirrors" Eighth Amendment jurisprudence).

122. Because the rights of these detainees are broader than those guaranteed under the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments governs the claims of immigrant detainees who challenge punitive or otherwise unsafe or inhumane conditions. *Charles v. Orange County*, 925 F.3d 73, 82; Darnell, 849 F.3d 17, 29; see also

DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) ("[W]hen the State so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs —e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

123. Immigrant detainees establish a due process violation for unconstitutional conditions of confinement by showing that a government official "knew, or should have known" of a risk to a condition of confinement that "posed an excessive risk to health." *Darnell*, 849 at 35; *Charles*, 925 F.3d at 87 (noting that due process violations can be proven, in part, by showing that government officials either "knew that failing to provide the complained of medical treatment would pose a substantial risk to his health" or "should have known") (emphasis in original); *see also Darnell* at 29 (describing the elements of a due process conditions of confinement claim as a subjective prong—that an officer acted with "at least deliberate indifference" and an objective prong—towards conditions that "pose an unreasonable risk of serious damage to [one's] health"); *see also Charles*, 925 F.3d at 86 ("[T]hose in civil detention ... are also afforded a right to be free from deliberate indifference to their serious medical needs.").

124. Where a risk is obvious, such as during a contagious disease outbreak, it is fair for a fact finder

to assume that the government official was aware of the risk. *See, e.g., Charles*, 925 F.3d 73, 87 ("A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.") (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (expressing "great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems" where those authorities "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," such as "exposure of inmates to a serious, communicable disease").

125. When considering whether a condition amounts to a serious medical need or poses an excessive risk to health, one of the key identifiers for courts in the Second Circuit is "a condition of urgency such as one that may produce death, degeneration, or extreme pain." Charles, 925 F.3d at 86; *see also Id.* at 86 (listing factors that indicate a serious medical need to include "whether a reasonable doctor or patient would find the injury important and worthy of treatment, whether the medical condition significantly affects an individual's daily activities, and whether the illness or injury inflicts chronic and substantial pain).

126. An immigrant detainee need not demonstrate that "they actually suffered from serious injuries" to show a due process violation. *Darnell*, 849 F.3d at 31; *Helling*, 509 U.S. at 33. Rather

showing conditions that "pose an unreasonable risk of serious damage to [one's] future health" may be sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35).

127. Further, immigrant detainees may establish a constitutional violation through "mutually enforcing" aggregate conditions where the existence of one condition, such as unsanitary conditions or a communicable disease outbreak, exacerbates an "identifiable human need," such as food or medical care. See *Darnell*, 849 F.3d at 30-31.

Release is the Appropriate Remedy Where the Petitioner Raises Substantial Claims and Extraordinary Circumstances Exist.

128. Where a habeas petitioner is deprived of safe conditions and adequate care for his conditions, the Court must order the petitioner's immediate release.

129. This Court has "inherent authority to grant bail to habeas petitioners." *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001); *see also Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978) ("A district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody."); *Elkimya v. Dep't of Homeland Sec.*, 484 F.3d 151, 153-54 (2d Cir. 2007) (recognizing federal courts' "inherent authority to admit to bail petitioners in immigration cases") (quoting *Mapp*, 241 F.3d at 226); cf. *Vacchio v. Ashcroft*, 404 F.3d 663, 673 (2d Cir. 2005) (explaining that a prior panel released pe-

titioner on bail under *Mapp* during the pendency of the appeal of his habeas petition challenging mandatory detention); *cf., D'Alessandro v. Mukasey*, No. 08-cv-914 (RJA) (VEB), 2009 WL 799957, at *4 (W.D.N.Y. Mar. 25, 2009) (conducting a bail hearing under *Mapp* and ordering the petitioner's release under conditions of supervision in the context of prolonged detention under 8 U.S.C. § 1231).

130. Granting release under *Mapp* is appropriate where (1) "the habeas petition raise[s] substantial claims," and 2) "extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 229 (internal quotation marks and citations omitted).

131. When assessing whether substantial claims exist, the district court must assess whether "the [habeas] petition present merits that are more than slightly in petitioner's favor." *Richard v. Abrams*, 732 F. Supp. 24, 25 (S.D.N.Y. 1990) (citing *Rado v. Manson*, 435 F. Supp. 349, 350-51 (D. Conn. 1977)).

132. The "extraordinary circumstances" element is satisfied where the petitioner, like here, alleges serious medical concerns or irreparable harm. *See, e.g., Vacchio*, 404 F.3d at 673 (granting release under *Mapp* during the pendency of petitioner's appeal of his mandatory detention habeas petition because "extraordinary circumstances found in the instant case are analogous to a showing of irreparable harm"); *cf. United States v. Mett*, 41 F.3d 1281, 1282 n.4 (9th Cir.

1994) (in the criminal prisoner context, noting that extraordinary circumstances warranting bail for habeas petitioners "include a serious deterioration of health while incarcerated").

133. Applying this Circuit's *Mapp* framework in *D'Alessandro v. Mukasey*, the court found release under conditions of supervision the appropriate remedy in the 8 U.S.C. § 1231 context where the petitioner suffered with "a number of serious, potentially debilitating health problems," which continued to deteriorate in ICE detention. *No. 08-cv-914, 2009 WL 799957,* at *3 (W.D.N.Y. March 25, 2009). The court concluded that the petitioner's "chronic and debilitating health conditions, while not 'emergent,' . . . certainly constitute exceptional circumstances setting his case apart and making bail necessary to make the habeas remedy effective, and to prevent further deterioration of his health." Id. at *4; see also S.N.C. v. Sessions, No. 18-cv-7680 (LGS), 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (finding extraordinary circumstances and ordering release where the petitioner was suffering with Post Traumatic Stress Disorder, "a condition that the detention environment aggravates," as well as depression and physical pain in ICE custody); Kiaddii v. Sessions, 18-cv-1584, at *3 (Dkt. No. 9) (S.D.N.Y. Mar. 2, 2018) (finding extraordinary circumstances under Mapp and ordering release where the petitioner presented evidence that "her health has deteriorated while in ICE's custody").

134. The COVID-19 pandemic unquestionably presents exceptional circumstances warranting release. Many federal judges have released detainees in light of COVID-19. *See e.g., United States v. Stephens*, 1:15-cr- 00095 (AJN), Doc. No. 2798 (S.D.N.Y March 19, 2020) (explaining that "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent" and that "inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop").

CLAIM FOR RELIEF

135. The allegations set forth in paragraphs 1 to 88 above are repeated and realledged as though fully set forth herein.

136. The Due Process Clauses guarantees immigrant detainees the right to be detained in a safe situation, free from punitive conditions of confinement. See U.S. Const. Amend V, XIV. The government violates that guarantee where a widespread outbreak of a contagious disease subjects detainees to inhumane conditions without adequate protection.

137. Because of the conditions in the county jails that serve as immigration detention facilities, Mr. Black is not able to take steps to protect himself—such as social distancing, using hand sanitizer, or washing his hands regularly—and the government has not provided adequate protections. When COVID-19 reaches the immigrant detention facilities in a matter of days as experts predict, the already deplorable conditions in these facilities will be exacerbated, and

the ability to protect oneself will become even more impossible.

138. The government's failure to adequately protect Petitioners from these punitive conditions, or release them from the conditions altogether, constitutes an egregious violation of Petitioners' due process rights.

SECOND CAUSE OF ACTION: RESPONDENTS' FAILURE TO PROVIDE ADEQUATE MEDICAL CARE AND PROTECTION TO PEOPLE, SUCH AS MR. BLACK., AT HIGH RISK OF SERIOUS HARM FROM COVID-19 VIOLATES DUE PROCESS

139. Petitioner repeats and re-alleges paragraphs 1-88 of this petition.

140. The Due Process Clauses guarantees immigrant detainees the right to be provided with adequate medical care. See U.S. Const. Amend V, XIV. The government violates that guarantee where they are unable to address serious medical needs during an outbreak of a contagious disease, and that contagion exacerbates the existing medical condition.

141. Mr. Black's heart condition, diabetic risks, and resulting respiratory issues, place him at a heightened risk of contracting COVID-19 and suffering serious medical harm, or even death, as a result.

142. Because Respondents are aware that failing to adequately protect Mr. Black could have tragic results and yet have not taken necessary or appropriate precautions, Respondents have acted

with deliberate indifference to his serious medical needs in violation of the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

1) Assume jurisdiction over this matter;

2) Enjoin Respondents from moving the Petitioner from the New York City area while habeas proceedings are pending;

3) Under the Court's inherent powers as detailed in Mapp v. Reno, 241 F.3d 221 (2d Cir. 2001), order Respondents to immediately release Mr. Black, under any appropriate conditions, to end the violations of his due process rights and resulting harm he is suffering, including the risk of severe illness or death upon being infected by COVID-19 in a jail setting;[29]

---

[29] If the Court determines that immediate release pursuant to *Mapp* is not justified at this time, Mr. Black respectfully requests that the Court conduct a bail hearing where Respondents must prove, by clear and convincing evidence, that Mr. Black's ongoing detention is necessary and does not violate his due process because Respondents have not acted with deliberate indifference towards Mr. Black's serious medical needs and risk of severe illness or death if exposed to COVID-19. *See Celestin v. Decker*, 17- Civ.-2419, Tr. at 13-14 (S.D.N.Y. Apr. 17, 2017) (bench decision) (Abrams, J.) (district court holding bond hearing for immigration habeas petitioner, noting that "[t]he federal courts have inherent authorityto admit to bail individuals properly within their jurisdictions, including in the immigration context." (*quoting Mapp v. Reno*, 241 F.3d at 226)).

4) Order that Petitioner be released immediately from DHS custody either without bond or with bond in a reasonable amount and/or other appropriate conditions to be determined by this Court unless, Defendants schedule a hearing before an immigration judge where (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge order Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond.

5) Order Respondents not to re-detain Mr. Black pending the culmination of removal proceedings against him, including all administrative or judicial appeals, barring a violation of standard immigration bond terms;

6) Grant any other and further relief that this Court deems just and proper.

Respectfully submitted,

/s Mitchell Laird, Esq.

Laird Law, PLLC
Mitchell Laird [ML2016]
2 Mott Street, Suite 607
New York, New York 10013
(212) 233-2988

Dated: June 5, 2020
New York, NY

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NEW YORK

File No.: [redacted]

In the Matter of:

BLACK, Carol Williams

The Respondent.

[Date: May 22, 2020]

BOND PROCEEDINGS

CHARGES:

INA § 237(a)(2)(A)(iii) (Aggravated Felony – Murder, Rape, or Sexual Abuse of a Minor)

INA § 237(a)(2)(E)(i) (Crime of Child Abuse, Child Neglect, or Child Abandonment)

APPLICATION:

8 C.F.R. § 1003.19 Custody/bond

<u>ON BEHALF OF THE RESPONDENT</u>

Mitchell Laird, Esq.
Law Office of Mitchell Laird

2 Mott Street, Suite 607
New York, New York 10013

ON BEHALF OF DHS

Assistant Chief Counsel
Office of the Chief Counsel
201 Varick Street, Room 1130
New York, New York 10014

MEMORANDUM DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Carol Williams Black ("the Respondent"), a native and citizen of Jamaica, entered the United States ("U.S.") at or near New York, New York, on or about July 23, 1983. See Notice to Appear ("NTA"). On May 18, 2000, the Respondent was convicted in Bronx County, under case number 4069-98, of Sexual Abuse in the First Degree, in violation of New York Penal Law ("NYPL") § 130.65(3), and Endangering the Welfare of a Child, in violation of NYPL § 260.10(1). Id.

On December 4, 2019, the Respondent was served by the Department of Homeland Security ("DHS" or "the Department") with a NTA, charging him with removability pursuant to the Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), for having been convicted of an aggravated felony as defined in § 101(a)(43)(A), a law relating to Murder, Rape, or Sexual Abuse of a Minor; and, INA § 237(a)(2)(E)(i), for having been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. See id. The Respondent was thereafter detained by Immigration and Customs Enforcement ("ICE") at

Orange County Correctional Center pursuant to the mandatory detention provision under INA § 236(c). See Form I-830, Notice to EOIR; Form I-286, Notice of Custody Determination. At a master calendar hearing on February 24, 2020, the Court sustained both charges of removability.

On March 16, 2020, the Court conducted a custody determination hearing and it denied the Respondent's request for a change in custody status. In denying his request, the Court found that the Respondent is detained pursuant to INA § 236(c) and therefore it does not have jurisdiction to determine his custody status.

II. LEGAL STANDARDS & ANALYSIS

The Department may arrest and detain any alien pending a decision on whether he is to be removed from the United States. INA § 236(a). An alien is subject to mandatory detention, and not subject to release on bond or conditional parole, if he is described in INA §§ 236(c)(1)(A)-(D), which encompasses most criminal grounds of removability as well as national security grounds.

While an Immigration Judge does not have jurisdiction to release a person subject to mandatory detention, the judge retains jurisdiction to determine whether the person is "properly included" within the mandatory detention provisions. 8 C.F.R. § 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 799, 800 (BIA 1999). In a Joseph hearing, the court will uphold the application of INA § 236(c) unless the alien demonstrates that DHS is "substantially unlikely to prevail" in its charge that he is removable on one of the grounds designated in INA §§ 236(c)(1)(A)-(D). Id. A person need not be charged in the NTA with the crime that would subject him to mandatory detention. Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007). However, DHS must give an alien notice of the basis for mandatory detention and an opportunity to challenge detention in a Joseph hearing. Id. at 127.

In his custody proceedings, the Court addressed whether the Respondent is "properly included" in the mandatory detention category. See 8 C.F.R. § 1003.19(h)(2)(ii); Joseph, 22 I&N Dec. at 800. The Respondent was convicted, after a jury trial, of *inter alia* Sexual Abuse in the First Degree, in violation of NYPL § 130.65(3). See NTA; see also DHS' Proffered Evidence, Tabs B-C. While not disputing the fact of his conviction, the Respondent argues that NYPL § 130.65 is not categorically an aggravated felony within the meaning of INA § 101(a)(43)(A), such that he is not subject to mandatory detention pursuant to INA § 236(c). See The Respondent's Memorandum of Law on Aggravated Felony (filed January 9, 2020). The Court disagrees.

In Flores v. Holder, the Second Circuit held that NYPL § 130.65 is a divisible statute requiring use of the modified categorical approach. 779 F.3d 159, 165-166 (2nd Cir. 2015); see also Descamps v. United States, 133 S. Ct. 2276. The record of conviction, in this case, establishes that the Respondent was convicted under subsection three, for subjecting a person under eleven years old to sexual contact. The Court must next consider whether the minimum conduct necessary to violate NYPL § 130.65(3) is encompassed within 18 U.S.C. § 3509(a)'s definition of "sexual abuse." See Descamps, 133 S. Ct. at 2285; Moncrieffe v. Holder, 133 S.Ct. at 1684 ("[W]e must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." (alterations in original)).

Under BIA precedent, the Court is bound to find the Respondent's conviction under NYPL § 130.65(3) is an aggravated felony conviction for sexual abuse of a minor. In Matter of Small, 23 I&N Dec. 448 (BIA 2002), the BIA held that the lesser offense of Sexual Abuse in the Second Degree, in violation of NYPL § 130.60(2), constitutes an aggravated felony sexual abuse of a minor under INA § 237(a)(2)(A)(iii). NYPL § 130.60(2) states that "a person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is less than fourteen years old[.]" NYPL § 130.60(2)

Here, at the time of the Respondent's conviction of NYPL § 130.65(3) on May 18, 2000, the statute stated "a person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact when the other person is less than eleven years old[.]" See NYPL § 130.65(3) (McKinney 2000). The language of § 130.60(2) and § 130.65(3) are identical except for the age of the victim. Compare NYPL § 130.60(2), with NYPL § 130.65(3). Thus, the BIA's precedential holding that the lesser offense is categorically a crime involving sexual abuse of a minor logically applies to the virtually identical greater offense of § 130.65(3).

The Court notes that the Second Circuit, in dicta, and as referenced by the Respondent, seriously questioned whether the definition of "sexual contact" under the New York penal law is a categorical match to the federal definition of "sexual contact" contained in the federal definition of sexual abuse. See James v. Mukasey, 522

F.3d 250, 257-58 (2d Cir. 2008); see also Flores v. Holder, 779 F.3d at 166; The Respondent's Memorandum of Law on Aggravated Felony, p. 3 (filed January 9, 2020). The Second Circuit reasoned that because New York's definition of "sexual contact" includes "any touching" of "other intimate parts" it is far broader than the federal definition which limits the definition of "sexual contact" to contact with specific body parts. Id. This reasoning, however, is purely dicta and thus not binding precedent. Moreover, the federal statute is not as restrictive as the Second Circuit implied in James. Rather, the generic federal definition of "sexual abuse" —as defined in 18 U.S.C. § 3509(a)(8)—"includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." See Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 995 (BIA 1995) (adopting the definition of "sexual abuse" in 18 U.S.C. § 3509(a)(8) as the generic federal definition for immigration purposes). Specifically, the Second Circuit's focus on the incongruent definitions of "sexual conduct" distracts from the fact that "sexual conduct," as defined in 18 U.S.C. § 3509(a)(9)(A), is merely a subset of "sexually explicit conduct," which is in turn part of the broader definition of "sexual abuse" in 18 U.S.C. § 3509(a)(8). For instance, "molestation . . . of children" is also included in the definition of sexual abuse under 18 U.S.C. § 3509(a)(8), and Merriam-Webster Dictionary defines "molest" as "to harm (someone) through sexual contact: to touch (someone) in a sexual and improper way." Because the "touching of the sexual or other intimate parts of" someone less than eleven years of age for the purpose of gratifying sexual desire of either party under NYPL § 130.65(3), as further defined in NYPL § 130.00(3), readily falls under the definition of "molestation" of "children" in 18 U.S.C. § 3509, this also supports the conclusion that NYPL § 130.65(3) is an aggravated felony as defined in INA § 101(a)(43)(A).

Therefore, the Court finds the Respondent's conviction for Sexual Abuse in the First Degree, in violation of NYPL § 130.65(3), is an aggravated felony conviction for sexual abuse of a minor under INA § 237(a)(2)(A)(iii), as defined in INA § 101(a)(43)(A), thus subjecting him to mandatory detention pursuant to INA § 236(c). The Court does not need to address whether the Respondent poses a danger to the community or if there is a risk of flight because it does not have jurisdiction to adjudicate the custody issue since he is mandatorily detained under INA § 236(c). See Jennings v. Rodriguez, 138 S.Ct. 830 (2018) (INA provision, carving out narrow conditions under which Attorney General may release on bond aliens detained pending their removal based on criminal offenses or terrorist activities, could not be plausibly interpreted as implicitly placing six-month limit on detention or requiring periodic bond hearings); Shanahan v. Lora, 138 S.Ct. 1260 (2018).

Accordingly, after a careful review of the record, the following Order is entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's request for redetermination of his custody status is **DENIED**.

[May 22, 2020]		[/s/ ILLEGIBLE]
Date	[for]	Thomas J. Mulligan Immigration Judge

APPENDIX I

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NY

FILE: [redacted]

IN THE MATTER OF:

BLACK, CAROL WILLIAMS,

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of respondent pursuant to 8 CFR 236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

[X] ORDERED that the request for a change in custody status be denied.

___ ORDERED that the request be granted and that respondent be:

___ released from custody on his own recognizance

___ released from custody under bond of $__________

___ OTHER ______________________________

Copy of this decision has been served on the respondent and the Department of Homeland Security.

APPEAL: waived -- reserved [4/15/20]

NEW YORK -- NEW YORK SERVICE PROCESSING CENTER (VARICK ST)

Date: Mar 16, 2020

[/s/ THOMAS J. MULLIGAN]
MULLIGAN, THOMAS J.
Immigration Judge

APPENDIX J

DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION

Alien's Name: CAROL WILLIAMS BLACK

A-File Number: [redacted] Date: 12/04/2019

Event ID: CPD2012000018 Subject ID: 367350215

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

☒ Detained by the Department of Homeland Security.

☐ Released (check all that apply):

- ☐ Under bond in the amount of $ ______
- ☐ On your own recognizance.
- ☐ Under other conditions. [Additional document(s) will be provided.]

FRANK D01078 FRANCO [/s/ FRANK FRANCO]
Name and Signature of Authorized Officer

SDDO
Title

12/04/2019 11:24
Date and Time of Custody Determination

ERO CASTLE POINT SUB OFFICE
15 Governor Drive
Newburgh NY 12250
Office Location/Address

You may request a review of this custody determination by an immigration judge.

☒ I acknowledge receipt of this notification, and

☒ I **do** request an immigration judge review of this custody determination.

☐ I **do not** request an Immigration judge review of this custody determination.

[/s/ CAROL WILLIAMS BLACK] [12/4/19]
Signature of Alien Date

The contents of this notice were read to

CAROL WILLIAMS BLACK in the
(Name of Alien)

ENGLISH language.
(Name of language)

A 4980 DELANO [/s/ DELANO]
Name and Signature of Officer

Deportation Officer
Title

____
Name or Number of Interpreter (if applicable)

DHS Form 1-286 (1/14) Page 1 of 1

ADDENDUM TO NOTICE OF CUSTODY DETERMINATION

Gayle v. Johnson,--- F. Supp.3d ---, 2015 WL 351669 (D.NJ. Jan. 28, 2015)

This addendum to the Department of Homeland Security, Notice of Custody Determination (DHS Form I-286 (1/14)) is provided to inform you of the basis for your detention under the Federal immigration laws and your right to seek review of your custody determination.

On January 28, 2015, the U.S. District Court for the District of New Jersey held that the Notice of Custody Determination (DHS Form 1-286 (1/14)) fails to provide aliens subject to detention with adequate notice of their detention status, *i.e.,* whether the aliens are being detained under discretionary detention (Section 236(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(a)) or mandatory detention (INA § 236(c), 8 U.S.C. § 1226(c)) grounds. As a result, the Court ruled that the U.S. Department of Homeland Security must inform all aliens detained in the State of New Jersey of the specific detention authority used to detain them and the type of custody redetermination hearing to which they are entitled. *Gayle v. Johnson,* --- F. Supp.3d ---, 2015 WL 351669, at *10, *25 (D.N.J. Jan. 28, 2015). This Addendum serves to inform you of the detention authority holding you and the type of hearing you may request.

Enclosed please notice that U.S. Immigration and Customs Enforcement (ICE) has determined that you are being detained under either discretionary or mandatory detention authority based on the box checked for that specific authority. You then may request a particular hearing corresponding to that detention authority. In other words, you may request an individualized bond determination hearing if you are being held under INA § 236(a) (discretionary detention). Likewise, you may request a custody redetermination, *i.e.*, a *Matter of Joseph* (*Joseph*), 22 I. & N. Dec. 799 (BIA 1999), hearing if you are being held under INA § 236(c) (mandatory detention).

If you would like to request a bond hearing or *Joseph* hearing before an Immigration Judge, please check the appropriate box and sign the form enclosed. A hearing then will be scheduled to determine your custody status.

Name: Carol Williams Black

Alien Number: [redacted]

☐ ICE has determined that you are subject to discretionary detention under INA § 236(a).

- ☐ Yes, I do want a bond hearing to review this custody determination.
- ☐ No, I do not want a bond hearing to review this custody determination.
- ☐ I decline to make an election at this time.

☒ ICE has determined that you are subject to mandatory detention under INA § 236(c).

- ☒ Yes, I do want a *Joseph* hearing to review this custody determination.
- ☐ No, I do not want a *Joseph* hearing to review this custody determination.
- ☐ I decline to make an election at this time.

Signature of Alien: [/s/ CAROL WILLIAMS BLACK]

Date: 12/3/2019

Name and Signature of Authorized Officer:

[/s/ Delano, Anthony]

Title: [DO]

Name of Interpreter (if applicable): [N/A]

APPENDIX K

8 U.S.C. 1226, as amended by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3, provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year,

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or

(E)(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and

(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or

---

[1] So in original. Probably should be "sentenced".

probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Definition

For purposes of paragraph (1)(E), the terms "burglary", "theft", "larceny", "shoplifting", "assault of a law enforcement officer", and "serious bodily injury" have the meanings given such terms in the jurisdiction in which the acts occurred.

(3) Detainer

The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien.

(4) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens un-

lawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

(f) Enforcement by attorney general of a State

The attorney general of a State, or other authorized State officer, alleging an action or decision by the Attorney General or Secretary of Homeland Security under this section to release any alien or grant bond or parole to any alien that harms such State or its residents shall have standing to bring an action against the Attorney General or Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable. For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.