UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
Columbus Division

A.O.A.

Petitioner,

v.

TERRENCE DICKERSON, Warden, Stewart Detention Center, *in his official capacity*;

Respondent.

No. 4:25-cv-93-CDL-AGH

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

For years, courts in the Eleventh Circuit—including this Court—have applied a nonexhaustive five-factor test to determine whether prolonged detention under 8 U.S.C. § 1226(c) violates the Due Process Clause. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1217-19 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018); *J.N.C.G. v. Warden, Stewart Det. Ctr.*, No. 4:20-cv-62, 2020 WL 5046870, *6-7 (M.D. Ga. Aug. 26, 2020). Despite this well-established line of case law, Respondent asks this Court to find that Petitioner's 28-month detention does not implicate due process. Respondent instead asks this Court to adopt a test that would place people like Petitioner into a "black hole," *J.N.C.G.*, 2020 WL 5046870 at *4, until the conclusion of their removal proceedings, regardless of how prolonged those proceedings become.

The Court has directed the parties to "address the appropriate test that should be used to determine when the length and nature of the detention under 8 U.S.C. § 1226(c) rises to the level of a constitutional violation." Am. Order, Doc. 4. This Court should continue applying the well-established multi-factor test set forth in *Sopo*, 825 F.3d at 1217-19, an approach aligned with two circuit courts and dozens of district courts throughout the country. In the alternative, the Court should apply the test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which the Supreme Court has consistently applied to civil detention. Under either test, Petitioner's prolonged detention violates the Due Process Clause, and this Court should order a bond hearing with the burden on the government by clear and convincing evidence.

FACTS AND PROCEDURAL HISTORY

Petitioner's I-130, Petition for Alien Relative, has been pending before United States Citizenship and Immigration Services ("USCIS") for the last seven years—well in excess of

USCIS's own estimated processing times.[1] The agency's glacial pace in processing Petitioner's I-130 (or rather, its failure to do so) has been the chief reason for why Petitioner A.O.A. has spent so much time in detention, despite Respondent's attempt to place the blame on Petitioner for seeking continuances.

Petitioner has been detained by Immigration and Customs Enforcement ("ICE") since December 13, 2022: over 28 months without his freedom and away from his U.S. citizen wife and children. Petitioner has spent much of his time detained seeking counsel who could assist him in procuring immigration relief, including the adjudication of his long-pending I-130. At no point has Petitioner been able to present the merits of his case or seek release, in large part due to his pending I-130, which the Government has not provided any indication it intends to process. Petitioner A.O.A. therefore faces continued detention that could go on indefinitely.

ARGUMENT

I. The Fifth Amendment Requires Limits on Civil Detention, Even Where Detention is Mandated by Statute.

Courts across the country agree that detention may not be indefinite and that excessively prolonged detention under § 1226(c) requires a bond hearing once that detention becomes unreasonable. This approach is supported by decades of bedrock due process precedent establishing that the government must provide people with an individualized hearing to justify the deprivation of their liberty. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*,

[1] *See Check Case Processing Times*, U.S. Citizenship & Immigr. Servs., https://egov.uscis.gov/processing-times/ (select "I-130 | Petition for Alien Relative" in "Form" field; "U.S. citizen filing for a spouse…" in "Form Category;" and "National Benefits Center" in "Field Office or Service Center") (showing 80% of cases as completed within 52.5 months, or less than five years).

441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972). Civil detention requires a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356).

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). *See also Black v. Decker*, 103 F.4th 133, 151 (2d Cir. 2024) (quoting *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020)). Civil detention "for *any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425 (emphasis added). *See also Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356); *Foucha*, 504 U.S. at 79; *Sopo*, 825 F.3d at 1210.

At a minimum, due process requires that detention be "reasonabl[y] relat[ed]" to a valid governmental purpose. *Jackson*, 406 U.S. at 738; *Foucha*, 504 U.S. at 79. Courts have long acknowledged the dual purposes of civil immigration detention: the government may only subject individuals to civil immigration detention to prevent flight and danger to the community, and for no other reason. *Zadvydas*, 533 U.S. at 690; *Sopo*, 825 F.3d at 1217. And the longer that detention continues, the more additional protections are necessary to ensure that detention continues to bear a reasonable relation to its purpose. *See Zadvydas*, 533 U.S. at 691; *Jackson*, 406 U.S. at 738; *Hendricks*, 521 U.S. at 363-64.

In seeking habeas relief, Petitioner does not ask for a radical departure from well-settled case law. Rather, his request relies on decades of Supreme Court precedent clearly establishing that the Fifth Amendment requires an individualized hearing before a neutral arbiter to determine whether detention serves a valid governmental purpose. *See Zadvydas*, 533 U.S. at 690-91. While 8 U.S.C. § 1226(c) mandates detention, a statute mandating detention is not the end of the

inquiry regarding persons' due process rights in detention. The Due Process Clause demands more of the government when it deprives individuals of their liberty.

II. *Demore* is Not Dispositive of This Case.

Respondent asks the Court to follow *Demore v. Kim*, 538 U.S. 510 (2003), as the start and end point of its analysis on § 1226(c) detention. Doc. 8 at 11. But *Demore* does not resolve this case because *Demore* was cabined to a facial challenge of § 1226(c). It did not contemplate an as-applied challenge to § 1226(c) detention, which Petitioner has brought here.

In *Demore v. Kim*, the non-citizen respondent brought a facial challenge to § 1226(c)'s requirement of mandatory detention. *Id.* at 516-17. The Court was very clear that the respondent had mounted a facial challenge to the statute itself. *Id.* ("[R]espondent does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release. Rather, **respondent challenges the statutory framework** that permits his detention without bail.") (emphasis added); *id.* at 517 ("respondent's constitutional **challenge to the legislation** authorizing his detention without bail . . .") (emphasis added); *id.* at 526 ("respondent argues that the narrow **detention policy** reflected in 8 U.S.C. § 1226(c) violates due process") (emphasis added). The Court rejected respondent's argument, finding that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 531.

The Court's analysis in *Demore* was limited to whether the government can detain someone *at all* pending removal. *Demore* said nothing about whether due process requires the government to provide a bond hearing when detention becomes prolonged. *See Black*, 103 F.4th at 149. This Court noted in *J.N.C.G.* that the non-citizen respondent in *Demore* "did not challenge whether *prolonged* detention under § 1226(c) was constitutional but, instead, whether *any* period of mandatory detention was constitutional." 2020 WL 5046870, at *3 (emphasis in

original). Insofar as *Demore* sets a constitutional baseline, "*Demore*, obviously, is the starting point, but the Court must go further to determine whether . . . detention without an individualized bond hearing comports with due process." *Id.* at *6.

To illustrate how little utility *Demore* provides to resolving the question before the Court, it is worth highlighting the context within which *Demore* was decided. Critical to *Demore*'s holding that § 1226(c) was facially constitutional was the apparent brevity of detentions pending removal at the time. The Court found that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked." 538 U.S. at 530. In *Sopo*, the court recognized that the length of detention in 2016 far exceeded the length of detention when *Demore* was decided a decade earlier. 825 F.3d at 1213 (discussing how the estimated average amount of time spent in removal proceedings, and likely detention, in 2012 was 455 days, and thus was likely longer by 2016). Here, Petitioner has been detained for 28 months; *Demore*'s holding about the facial constitutionality of the § 1226(c) statute does not say anything about an as-applied challenge to detention that has lasted 28 months. *Demore* does not resolve this case.

III. This Court Should Apply a Factors-Based Test That This Court and At Least 36 Others Throughout the Country Have Applied.

The overwhelming weight of legal authority indicates that a factors-based reasonableness test is the constitutionally appropriate standard to analyze challenges to § 1226(c) detention.[2]

[2] *See, e.g., Doe v. Becerra*, 704 F. Supp. 3d 1006 (N.D. Cal. 2023); *Alphonse v. Moniz*, 635 F. Supp. 3d 28 (D. Mass. 2022); *Rocha-Sanchez v. Kolitwenzew*, 551 F. Supp. 3d 870 (C.D. Ill. 2021); *Pedro O. v. Garland*, 543 F. Supp. 3d 733 (D. Minn. 2021); *Smith v. Barr*, 444 F. Supp. 3d 1289 (N.D. Okla. 2020); *Vargas v. Beth*, 378 F. Supp. 3d 716 (E.D. Wis. 2019); *Chairez-Castrejon v. Bible*, 188 F. Supp. 3d 1221 (D. Utah 2016); *Anyanwu v. ICE*, No. 2:24-cv-00964-TSZ, 2024 WL 4627343 (W.D. Wash. Sept. 17, 2024); *Arido-Sorro v. Garland*, No. 2:23-cv-00842-JAT, 2024 WL 4393264 (D. Ariz. Sept. 5, 2024); *M.T.B. v. Byers*, No. 2:24-cv-00028-

Courts throughout the country look at a number of factors and balancing tests in their analysis of whether detention is unreasonable. Common to all of these holdings, however, is a consensus that there is a point at which continued detention can become constitutionally suspect, and that due process requires a flexible, circumstance-dependent approach to assessing prolonged detention. *Compare Black*, 103 F.4th at 147-51 (applying *Mathews* balancing to § 1226(c) procedural due process challenges) *with German Santos*, 965 F.3d at 210-11 (applying multi-factor reasonableness test to § 1226(c) detention).

DCR, 2024 WL 3881843 (E.D. Ky. Aug. 20, 2024); *Durand v. Allen*, No. 3:23-cv-00279-RBM-BGS, 2024 WL 711607 (S.D. Cal. Feb. 21, 2024); *Abioye v. Oddo*, No. 3:23-cv-0251, 2023 WL 8254368 (W.D. Pa. Nov. 29, 2023); *Singh v. Pitman*, No. 2:23-cv-20366-SDW, 2023 WL 7530328 (D.N.J. Nov. 13, 2023); *Singh v. Garland*, No. 1:23-cv-01043-EPG-HC, 2023 WL 5836048 (E.D. Cal. Sept. 8, 2023); *Lewis v. Garland*, No. 5:22-cv-00296-JGB-AGR, 2023 WL 8898601 (C.D. Cal. Jul. 31, 2023); *Jackson C. v. ICE*, No. 22-cv-116-JFH-GLJ, 2023 WL 4108178 (E.D. Okla. June 21, 2023); *Smith v. Ogle*, No. 3:21-cv-1129, 2023 WL 3362597 (M.D. Pa. May 10, 2023); *Dorley v. Normand*, No. 5:22-cv-62, 2023 WL 3620760 (S.D. Ga. April 3, 2023); *Jalloh v. Garland*, No. 5:22-cv-00908-R, 2023 WL 3021514 (W.D. Okla. March 9, 2023); *Santos Garcia v. Garland*, No. 1:21-cv-742, 2022 WL 989019 (E.D. Va. March 31, 2022); *Stephens v. Ripa*, No. 1:22-cv-20110-JEM, 2022 WL 621596 (S.D. Fla. Mar. 3, 2022); *Maya v. Acuff*, No. 21-cv-755-NJR, 2021 WL 4903166 (S.D. Ill. Oct. 21, 2021); *Mansaray v. Perry*, No. 8:21-cv-01044-ELH, 2021 WL 2315415 (D. Md. June 7, 2021); *Lopez Santos v. Clesceri*, No. 3:20-cv-50349, 2021 WL 663180 (N.D. Ill. Feb. 19, 2021); *M.D.F. v. Johnson*, No. 3:20-cv-00829-G-BK, 2020 WL 7090125 (N.D. Tex. Dec. 3, 2020); *Diaz-Calderon v. Barr*, No. 2:20-cv-11235-TGB, 2020 WL 5645191 (E.D. Mich. Sept. 22, 2020); *J.N.C.G.*, 2020 WL 5046870; *Zagal-Alcaraz v. ICE*, No. 3:19-cv-01358-SB, 2020 WL 1862254 (D. Or. March 25, 2020); *Singh v. Barr*, No. 1:19-cv-01096, 2020 WL 1064848 (W.D.N.Y. March 2, 2020); *Moore v. Nielsen*, No. 4:18-cv-01722-LSC-HNJ, 2019 WL 2152582 (N.D. Ala. May 3, 2019); *Alexis v. Sessions*, No. 4:18-cv-1923, 2018 WL 5921017 (S.D. Tex. Nov. 13, 2018); *Perez v. Decker*, No. 1:18-cv-05279-VEC, 2018 WL 3991497 (S.D.N.Y. Aug. 20, 2018); *Maniar v. Warden*, No. 6:18-cv-00544, 2018 WL 11544220 (W.D. La. July 11, 2018); *Khan v. Whiddon*, No. 2:13-cv-00638-JES-M_M, 2016 WL 4666513 (M.D. Fla. Sept. 7, 2016); *Lacroix v. Lynch*, No. 4:15-cv-140, 2016 WL 1165804 (N.D. Fla. Jan. 7, 2016); *Hyppolite v. Enzer*, No. 3:07-cv-729, 2007 WL 1794096 (D. Conn. June 19, 2007).

This Court should not deviate from its precedent applying *Sopo*'s multi-factor test. 825 F.3d at 1217-19; *J.N.C.G.*, 2020 WL 5046870 at *6-7; *Hanna v. Lynch*, No. 4:16-cv-375, 2018 WL 547232, *2-3 (M.D. Ga. Jan. 24, 2018). *See also O.D. v. Warden, Stewart Det. Ctr.*, No. 4:20-cv-222, 2021 WL 5413968, *4 (M.D. Ga. Jan. 14, 2021) (dismissing petition for lack of jurisdiction, but referencing *Sopo* as the otherwise applicable standard for analysis). *But cf. S.C. v. Warden,* Case No. 4:23-cv-00064-CDL-MSH, Doc. 26 at 3-4 n.2 (M.D. Ga. Dec. 15, 2023) (deviating from *Sopo*, but "acknowledg[ing] that prolonged indefinite detention without evidence of reasonable efforts to facilitate deportation may give rise to a requirement that a bond hearing be provided.")

A. *Jennings* Did Not Disturb Courts' Core Constitutional Analysis of As-Applied Challenges to Prolonged Detention Under § 1226(c).

In *Jennings v. Rodriguez*, 583 U.S. 281, 296-97 (2018), the Supreme Court issued a statutory holding about § 1226(c), ruling that the statute does not have an implicit time limit. The Court left open the availability of as-applied constitutional challenges to § 1226(c) prolonged detention. *Id.* at 312.

Before *Jennings*, all Courts of Appeals that had considered the constitutionality of prolonged detention under § 1226(c) recognized *Demore*'s limits. *See Sopo*, 825 F.3d at 1210-13; *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) (acknowledging "the limited nature of the holding in *Demore*" and "recogniz[ing] that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention..."); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015) ("[T]he Court in *Demore* expected the detentions under section 1226(c) to be brief, and that this expectation was key to their conclusion that the law complied with due process."); *Rodriguez v. Robbins*, 715 F.3d 1127, 1137-38 (9th Cir. 2013) ("We have consistently held that *Demore*'s holding is limited to detentions of brief duration.");

Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) (emphasizing that the reasoning undergirding *Demore* related to the likelihood of proceedings being completed within a short period of time, or ending in release); *Lora v. Shanahan*, 804 F.3d 601, 613-14 (2d Cir. 2015) ("[W]hen the court upheld the constitutionality of section 1226(c) in *Demore v. Kim*, it emphasized that, for detention under the statute to be reasonable, it must be for a brief period of time."). While there was a split among circuits pre-*Jennings* as to whether a bright-line rule or factors-based test applied, that split did not question whether there was a due process right to a bond hearing past a certain threshold. Those courts merely disagreed on the means rather than the end, as the end was quite clear: due process requires a bond hearing when detention becomes unreasonable. *See Sopo*, 825 F.3d at 1214-15 (comparing bright-line and case-by-case approaches).

While the pre-*Jennings* cases' statutory holdings are no longer good law, their core constitutional analyses of the issues underlying prolonged mandatory detention continue to guide analysis of due process claims for as-applied challenges to § 1226(c) detention. *See, e.g.*, *German Santos*, 965 F.3d at 210-11 (acknowledging that even though *Jennings* abrogated constitutional avoidance analysis, the "constitutional analyses in *Diop* and *Chavez-Alvarez* are still good law, [and] those cases govern as-applied challenges under § 1226(c))") (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011), *Chavez-Alvarez*, 783 F.3d at 474-75).

B. The Eleventh Circuit's Analysis in *Sopo* on As-Applied Challenges to § 1226(c) Detention Still Stands Post-*Jennings*.

The *Sopo* court considered both a statutory question and a constitutional question: does § 1226(c) have an implicit temporal limitation? If so, what is the "trigger point" at which "removal proceedings and concomitant mandatory detention become unreasonably prolonged, triggering the need for an individualized bond hearing"? *Sopo*, 825 F.3d at 1214.

Sopo joined circuit courts that had considered this question by applying the canon of constitutional avoidance to read an implicit reasonableness requirement into § 1226(c). *Id.* at 1213-14. The *Sopo* court rejected the government's position that § 1226(c) mandates detention during the entire removal proceedings regardless of duration, stressing that the government "ignore[d] that this is a civil detention case and the profound liberty interest at stake." *Id.* at 1212. Like other circuit courts, the *Sopo* court derived a narrow lesson from *Demore*, acknowledging its "strong constitutional caveat about due process concerns as to continued mandatory detention where the duration of the removal proceedings is unreasonably long or delayed." *Id.*

Sopo based its holding on constitutional avoidance, construing § 1226(c) to contain a reasonableness threshold to "avoid[] 'serious doubt[s]' about the constitutionality of indefinite detention." *Id.* at 1213 (citing *Zadvydas*, 533 U.S. at 689). This reasoning does not survive *Jennings*, which held that the lower court misapplied the canon of constitutional avoidance to read a six-month implicit reasonableness limitation into § 1226(c). 583 U.S. at 296-97. But *Sopo*'s underlying reasoning hinged on well-settled law about due process and civil detention, emphasizing that "[u]nder the Due Process Clause, *civil detention* is permissible only when there is a 'special justification' that 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" 825 F.3d at 1209 (quoting *Zadvydas*, 533 U.S. at 690) (emphasis in original). *Jennings* did not disturb those core principles by ruling that the canon of constitutional avoidance was misapplied.

The Eleventh Circuit emphasized that reasonableness under § 1226(c) hinges on "whether it is necessary to fulfill the purpose of the statute," *id.* at 1217 (quoting *Diop*, 656 F.3d at 234), and adopted a non-exhaustive factors-based test to determine when detention becomes

unreasonable. *Id.; see* section IV *infra*. Despite *Sopo*'s later vacatur for mootness after *Jennings* was decided, 890 F.3d 952 (11th Cir. 2018), courts in the Eleventh Circuit continue to apply *Sopo*'s multi-factor test as highly persuasive authority. *J.N.C.G.*, 2020 WL 5046870 at *6-7; *O.D.*, 2021 WL 5413968 at *4; *Hanna*, 2018 WL 547232 at *2-3; *Clue v. Greenwalt*, No. 5:21-cv-80, 2022 WL 17490505, *2-4 (S.D. Ga. Oct. 24, 2022); *Stephens v. Ripa*, No. 1:22-cv-20110-JEM, 2022 WL 621596, *1-2 (S.D. Fla. Mar. 3, 2022); *Moore v. Nielsen*, No. 4:16-cv-01722-LSC-HNJ, 2019 WL 2152582, *9-13 (N.D. Ala. May 3, 2019).

C. Post-*Jennings*, Courts Continue to Hold That Prolonged Detention Under § 1226(c) is Unconstitutional.

Since *Jennings* was decided, courts nationwide, including two circuit courts, have rejected the suggestion that *Demore* alone governs cases involving as-applied constitutional challenges to prolonged § 1226(c) detention. *See Black*, 103 F.4th at 143-44; *German Santos*, 965 F.3d at 208-13. Respondent runs against the majority of courts by asking this Court to adopt an approach squarely rejected by two circuit courts and heavily questioned by at least three dozen district courts, including the Middle District of Georgia. *See supra* n.2. Petitioner is not asking for a novel departure from settled law; he is asking for an application of the law that this Court has applied to § 1226(c) detention for most of the last decade.

The weight of authority shows that habeas relief is available to individuals facing prolonged detention. *Id.* Because as-applied challenges to prolonged detention are inherently fact-intensive, the Second and Third Circuits apply factors-based tests to determine whether detention violates the Due Process Clause. *See Black*, 103 F.4th at 147-51; *German Santos*, 965 F.3d at 210-13. A circumstance-specific analysis acknowledges that "due process is flexible… and calls for such procedural protections as the particular situation demands." *Jennings*, 583 U.S. at 314 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In *German Santos*, the Third Circuit held that a factors-based test, similar to *Sopo*, applies when a person has been subjected to prolonged detention under § 1226(c). 965 F.3d at 210-13 (looking at (1) the likelihood of continued detention; (2) the reasons for delay; and (3) whether the conditions of confinement differ from criminal confinement). Rather than holding that *Demore* forecloses all challenges to prolonged detention under § 1226(c), the court "distilled the following rule from *Demore*: Though the Government must detain [noncitizens] convicted of certain crimes at the start of their removal proceedings, 'the constitutionality of this practice is a function of the length of the detention.'" *Id.* at 219 (quoting *Diop*, 656 F.3d at 232). In *Black*, the Second Circuit applied the *Mathews v. Eldridge* procedural due process balancing test, considering such factors as the private interest affected by the deprivation of liberty; the risk of erroneous deprivations of that interest; and the countervailing government interests at stake. 104 F.4th at 147-51. There, the court similarly rejected a rigid and expansive reading of *Demore* that foreclosed as-applied due process analysis to prolonged detention cases. *Id.* at 149.

The Second and Third Circuits stress that "when detention becomes unreasonable, the Due Process Clause demands a hearing." *German Santos*, 965 F.3d at 210 (quoting *Diop*, 656 F.3d at 233); *accord Black*, 103 F.4th at 145 ("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."). Neither court, however, adopted a reading of *Demore* as expansive and inflexible as Respondent seeks here.

Since *Jennings*, two other Circuits have at least implied that prolonged § 1226(c) detention implicates due process concerns without having made a definitive holding as to the matter. *See Reid v. Donelan*, 17 F.4th 1, 7-8 (1st Cir. 2021) (rejecting a six-month bright-line

rule, but acknowledging that unreasonably prolonged mandatory detention without a bond hearing may violate the Due Process Clause); *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) ("We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so.").

Banyee v. Garland, 115 F.4th 928, 931-33 (8th Cir. 2024), which Respondent would have this Court adopt, was misguided by limiting its analysis to *Demore* and ignoring longstanding Supreme Court precedent on civil detention. With both the Third Circuit in *German Santos v. Warden*, 965 F.3d 203 (3d Cir. 2020), and the Second Circuit in *Black*, 103 F.4th at 149, having adopted a multi-factor reasonableness test, the Eighth Circuit has cast itself as an outlier among other circuit courts to limit its analysis on § 1226(c) prolonged detention to *Demore*.

In the time since *Banyee* was decided in September 2024, courts have continued to apply a multi-factor test to determine when § 1226(c) prolonged detention violates the Fifth Amendment. In *Martinez v. Ceja*, which was decided three months after *Banyee*, the District of Colorado applied a multi-factor reasonableness test, expressly declining to follow the Eighth Circuit's analysis in *Banyee*. No. 1:24-cv-03056-PAB, 2024 WL 5168143, at *4 (D. Colo. Dec. 19, 2024). The *Martinez* court stated, "In *Banyee*, the Eighth Circuit concluded that the holding in *Demore* is clear and 'leave[s] no room for a multi-factor "reasonableness" test.' . . . However, in this district and among other courts of appeal, the weight of authority endorses the approach the Court applies here." *Id.* at n.4. To support its decision, the court cited the Third Circuit's opinion in *German Santos* as well as four cases from the District of Colorado. *Id.* It is worth noting that there was no case law from the Tenth Circuit addressing § 1226(c) detention, but here in the Eleventh Circuit, there is. And there are significant portions of *Sopo*'s analysis that survive

Jennings, as discussed in section III(B), *supra*—specifically, the portions recognizing that *Demore* was cabined to a facial challenge and that there are constitutional due process issues when detention has lasted much longer than what *Demore* contemplated.

This Court has explicitly declined to rely on *Demore* as the operative framework for § 1226(c) cases, instead looking to *Sopo* to guide its analysis. *J.N.C.G.*, 2020 WL 5046870 at *4. In *J.N.C.G.*, the Court emphasized that *Demore* never addressed prolonged detention and reflected an outdated knowledge of the average length of immigration detention. *Id.* at *3-5. Permitting limitless detention until the conclusion of removal proceedings would thus otherwise place detained individuals "in a black hole." *Id.* at *4. This continued acknowledgement that detention violates the Due Process Clause past a certain reasonableness threshold accords with other district courts throughout the country. *See supra* n.2.

IV. Under the Multi-Factor Test Applied by Courts Around the Country, Petitioner is Entitled to a Bond Hearing.

The *Sopo* court identified five non-exhaustive factors to "guide a district court in determining whether a particular [noncitizen]'s continued detention, as required by § 1226(c), is necessary to fulfilling Congress' aims of removing [noncitizens with relevant criminal histories] while preventing flight and recidivism." *Sopo*, 825 F.3d at 1217. These factors include: (1) the length of detention without a bond hearing; (2) the reason removal proceedings are protracted; (3) whether removal would be possible once a removal order is final; (4) whether the period of civil detention exceeds the time the petitioner spent incarcerated for the crime triggering immigration consequences; and (5) whether the facility where the petitioner is detained meaningfully differs from a penal institution. *Id.* at 1217-1218. The court emphasized the importance of individual circumstances in every case. *Id.* at 1218.

Petitioner's detention has become unconstitutionally prolonged under the *Sopo* factors. First, the "critical" factor is "the amount of time that the [noncitizen] has been in detention without a bond hearing." *Id.* at 1217. The *Sopo* court suggested that "there is little chance that a [noncitizen]'s detention is unreasonable until at least the six-month mark" and that "detention without a bond hearing may often become unreasonable by the one-year mark." *Id.* Petitioner's detention exceeds two years. He has been detained for over 28 months, more than double the threshold for presumptive unreasonableness. Thus, this "critical" factor weighs heavily against Petitioner's continued detention without a bond hearing. *See J.N.C.G.*, 2020 WL 5046870, at *6-7 (granting relief for petitioner detained over 16 months); *Mansaray*, 2021 WL 2315415, at *6, *11 (same, where petitioner was detained for 13 months); *Perez*, 2018 WL 3991497, at *5-6 (same, where petitioner was detained for over nine months).

Second, courts should evaluate "why the removal proceedings have become protracted." The court should consider whether the noncitizen "failed to participate actively in the removal proceedings or sought continuances and filing extensions." *Id.* at 1218. The Eleventh Circuit specifically noted that it is "not saying that [noncitizens] should be punished for pursuing avenues of relief and appeals." *Id.* The inquiry is, rather, whether the proceedings involved "repeated or unnecessary continuances." *Id.* Courts have granted relief to petitioners who have sought numerous continuances throughout proceedings so long as there is no evidence of bad faith or any indication that requests for continuances were made for the purpose of delay. *See, e.g.*, *Carlos L. C. v. Green*, No. 2:18-cv-08670-KM, 2019 WL 1110388, at *3 (D.N.J. Mar. 11, 2019) (ordering bond hearing when petitioner had requested continuances but there was no indication requests were "in bad faith or for the purposes of delay"); *Oscar C. L. v. Green*, No. 2:18-cv-09330-KM, 2019 WL 1056032, at *3 (D.N.J. Mar. 6, 2019) (same).

District courts around the country have similarly held that good-faith litigation of claims for relief from removal are not the sort of protraction that would excuse prolonged detention without a bond hearing. *See, e.g.*, *Alexis v. Sessions*, No. 4:18-cv-01923, 2018 WL 5921017, at *8 (S.D. Tex. Nov. 13, 2018); *Oscar C. L.*, 2019 WL 1056032, at *3; *Carlos L. C.*, 2019 WL 1110388, at *3; *Liban M.J. v. Sec'y of Dep't of Homeland Sec.*, No. 0:18-cv-01843-NEB-ECW 2018 WL 8495827, at *7 (D. Minn. Dec. 10, 2018). Petitioner's removal proceedings have been protracted because of the government's failure to timely adjudicate his I-130 petition, which has been pending for over six years. Any continuances Petitioner requested were necessary to pursue legitimate relief from removal, chiefly, to seek administrative closure or find an immigration attorney. Thus, the second *Sopo* factor weighs in favor of granting Petitioner a bond hearing.

Third, courts should evaluate "whether it will be possible to remove the [noncitizen] after there is a final order of removal." *Sopo*, 825 F.3d at 1218. Respondent points out that the Government has effectuated at least 44 removals to Nigeria in FY2025 thus far. Doc. 8 at 25. This does not alter the totality of Petitioner's circumstances weighing in favor of granting him a bond hearing. In *J.N.C.G.*, this Court ordered a bond hearing for a petitioner where there was no apparent impediment to their removal once a removal order became final, but four *Sopo* factors otherwise weighed in the petitioner's favor. 2020 WL 5046870, at *6-7.

Fourth, courts should evaluate "whether the [noncitizen]'s civil immigration detention exceeds the time the [noncitizen] spent in prison for the crime that rendered him removable." *Sopo*, 825 F.3d at 1218. Petitioner's current time in immigration detention is almost equivalent to the amount of time he spent incarcerated for his single, non-violent predicating criminal offense, for which he spent 30 months in federal criminal custody. For comparison, he has spent over 28 months in immigration custody. This factor weighs in favor of ordering Petitioner a bond

hearing. *See Hanna*, 2018 WL 547232, at *2-3 (ordering a bond hearing where petitioner's immigration detention was 29 months compared to 60 months' criminal incarceration).

Fifth, courts should evaluate "whether the facility or the civil immigration detention is meaningfully different from a penal institution or criminal detention." *Sopo*, 825 F.3d at 1218. Petitioner is detained at the Stewart Detention Center, which is not meaningfully distinguishable from a prison and was, in fact, the same facility at issue in *Sopo*. *Id.* at 1221 (describing Stewart Detention Center as "a prison-like facility"); *J.N.C.G.*, 2020 WL 5046870 at *7 ("Stewart Detention Center[] is not meaningfully different from a prison.") This factor also weighs in favor of ordering a bond hearing.

As at least four of the five *Sopo* factors favor Petitioner, the Court should grant him an individualized bond hearing. The court in *Sopo* found the petitioner should be afforded a bond hearing with only three factors in his favor: the length of his detention, the reason for protracted proceedings, and detention conditions similar to prison. 825 F.3d at 1220-21; *see also German Santos*, 965 F.3d at 210-13 (looking at (1) the likelihood of continued detention; (2) the reasons for delay; and (3) whether the conditions of confinement differ from criminal confinement). As Petitioner has at least four *Sopo* factors (and all three *German Santos* factors) in his favor, the totality of the circumstances demonstrates that his continued detention without an individualized bond hearing would be unreasonable and unjust.

V. In the Alternative, This Court Should Apply *Mathews v. Eldridge*.

If the Court decides not to apply the multi-factor test from *Sopo* and *German Santos*, it should apply the test from *Mathews v. Eldridge*, 424 U.S. at 335, which the Supreme Court has applied to examine the adequacy of procedures provided to individuals in custody. *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*, 441 U.S. at 425-33 (observing that *Mathews* applies to assess adequacy of procedural safeguards for people subject to civil commitment).

In *Mathews v. Eldridge*, the Court identified three factors bearing on the need for procedural protections: (1) "the private interest that will be affected by the official action"; (2) "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"; 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.

Several circuit courts have applied the *Mathews* framework to analyze immigration detention. *See, e.g.*, *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27-28, 41 (1st Cir. 2021) (applying *Mathews* and concluding that government must prove that § 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 § 1226(c) detainee should stay detained); *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 225 (3d Cir. 2018) (applying *Mathews* to identify due process requirements for noncitizen detained pursuant to ICE's § 1231 authority); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203-07 (9th Cir. 2022) (collecting cases that applied *Mathews* to determine process due to § 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 § 1226(a) detainee).

In *Black*, the Second Circuit relied on the above cases to support its finding that *Mathews* governed petitioner's § 1226(c) detention. 103 F.4th at 147-50. In so doing, the court joined the First and Third Circuits in rejecting a bright-line rule at the six-month mark or at any other point, noting that "*Jennings*, while also decided on statutory grounds, similarly suggests that a bright-line rule would be inappropriate in the constitutional context." *Id.* at 150. If this Court declines to apply the factors outlined in *Sopo*, it should adopt the *Mathews* test that so many other courts have applied in analyzing immigration detention.[3]

Turning to Petitioner's due process claim, an analysis under the *Mathews* test dictates that Petitioner is entitled to an individualized bond hearing to determine whether his continued detention is justified.

1. A.O.A.'s Private Interest

The first *Mathews* factor weighs heavily in favor of Petitioner. Here, his private interest affected by the Government's 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). Petitioner has had no administrative mechanism by which he could have challenged his detention on the ground that it reached an unreasonable length. 103 F.4th at 151. Just as the petitioner in *Black*, here Petitioner A.O.A. has served his entire criminal sentence, and his 28-month-long detention "did not arise from new or unpunished conduct." *Id.* Because of his lengthy detention, Petitioner has missed critical moments in his eight-year-old daughter's life. He

[3] In addition to the Second and Third Circuits applying *Mathews* to analyze § 1226(c) detention, the following district courts have adopted the *Mathews* framework to these cases as well: *Doe*, 704 F. Supp. 3d at 1016-17; *M.T.B.*, 2024 WL 3881843, at *1-4; *Singh*, 2023 WL 5836048, at *5-7; *Lewis*, 2023 WL 8898601, at *3-4; *Santos Garcia*, 2022 WL 989019, at *8-9.

has not only been deprived of his freedom, but his ability to be a present father and family member. The impact of his prolonged detention on his life cannot be overstated.

2. The Risk of an Erroneous Deprivation of His Private Interest and Probable Value of Additional Procedural Safeguards

The second *Mathews* factor also weighs heavily in favor of Petitioner. "The only interest to be considered at this part of the *Mathews* analysis is that of the detained individuals—not the government." *Id.* at 152 (citing *Hamdi*, 542 U.S. at 530).

The risk of an erroneous deprivation of Petitioner's right to be free from imprisonment is high. As an initial matter, the procedural protections afforded to people detained under § 1226(c) are "almost nonexistent." *Id.* Section 1226(c) detention "include[s] no mechanism for a detainee's release, nor for individualized review of the need for detention," as *Black* observed. *Id.* The *Black* court considered that the § 1226(a) petitioner in *Velasco Lopez* received two bond hearings during which he bore the burden of proof, and there the court held that the procedures underpinning the petitioner's detention "markedly increased the risk of error." *Id.* (discussing *Velasco Lopez*, 978 F.3d at 852). The *Black* court observed that "Section 1226(c) detainees receive even less procedural protection [than people detained under § 1226(a)], and the risk of erroneous deprivation is correspondingly greater." *Id.* at 152. Furthermore, § 1226(c)'s broad reach sweeps in people who have strong ties to the community, as well as people convicted of many nonviolent offenses, such as Petitioner A.O.A., suggesting that "the prior conviction may well be a poor proxy for a finding of dangerousness." *Id.* Here, Petitioner's only conviction was for a nonviolent offense for which he was sentenced to time served. Petitioner has strong ties to the community through his family and friends. Before being detained, Petitioner A.O.A. worked as a rideshare and food delivery driver in Atlanta, Georgia, where he resided with his wife and

three young adult stepchildren. Petitioner further has close ties in Dallas, Texas, where his ex-wife and eight-year-old daughter live.

As for the probable value of additional procedural safeguards, the court in *Black* held, "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." *Id.* at 153.

3. The Government's Interest

The third *Mathews* factor also weighs heavily in favor of Petitioner. The only legitimate interests the government has in detaining immigrants—(1) ensuring noncitizen's appearance at proceedings and (2) protecting the community from violence—would not be undermined by providing Petitioner with a bond hearing. At any ordered bond hearing, the immigration judge would make an individualized assessment of whether Petitioner A.O.A. presents a flight risk or a danger to the community, as the immigration judge routinely does for other people in ICE detention. Furthermore, the fiscal and administrative burden to the government that providing a bond hearing would impose would be nominal. "Certainly, having to do something instead of nothing imposes an administrative and fiscal burden of some kind." *Id.* at 154. But "retaining and housing detainees imposes substantial costs as well." *Id.* (discussing the monetary costs of immigration detention). Weighing the unobtrusive burden to the government of providing a bond hearing to Petitioner against the importance of Petitioner's liberty interest results in a finding that Petitioner is entitled to a bond hearing.

If the Court declines to follow the Eleventh Circuit's persuasive authority in *Sopo*, it should follow the Supreme Court's binding authority in applying *Mathews* to Petitioner's civil immigration detention. This Court could even apply a combination of tests, as other courts have done in analyzing § 1226(c) detention. *See Singh*, 2023 WL 5836048, at *5, *7 (applying both

Mathews and *Sopo*-like factors); *Santos Garcia*, 2022 WL 989019, at *4, *8 (applying *Sopo*-like factors and alternatively, *Mathews*). But what this Court should not do is confine its analysis to *Demore*, which in any event does not resolve this case.

VI. The Government Should Bear the Burden of Proof at a Bond Hearing.

Where the Court has found a person's prolonged detention to be unreasonable, the burden of proving that the detained noncitizen is a flight risk or a danger to society must fall on the government to prove with clear and convincing evidence. *See Black,* 103 F.4th at 155. Otherwise, it would unreasonably heighten "the risk of an erroneous deprivation" of a person's liberty interest. *Id.* at 156 (citing *Mathews*, 424 U.S. at 335).

Although the Eleventh Circuit has not yet addressed this issue, many courts that have place the burden on the government at bond hearings in situations of prolonged detention under § 1226(c). *See, e.g, German Santos*, 965 F.3d at 213 (holding that a clear and convincing standard of proof with the burden on the government in a § 1226(c) bond hearing is required based on balancing the noncitizen's "liberty interest, the risk of error to him, and the Government's interest in detaining [those subject to §1226(c)] until the end of their removal proceedings."); *Perera v. Jennings*, No. 5:21-cv-04136-BLF, 2021 WL 2400981, at *6 (N.D. Cal. June 11, 2021) (ordering a bond hearing where the government bears the burden by clear and convincing evidence); *Xiong v. Garland*, No. 0:20-cv-02678-NEB-BRT, 2021 WL 2482309, at *4 (D. Minn May 12, 2021) (same, explaining that the Constitution requires the burden be placed on the government).

In *Black*, the Second Circuit listed three justifications for shifting the burden to the government in § 1226(c) cases. 103 F.4th at 156-57. First, noncitizens are not entitled to government-appointed counsel in removal proceedings. *Id.* at 156. Second, constant transfers to and from different detention centers across the country, as well as language barriers, hamper a

noncitizen's opportunity to retain legal representation. With no representation, they find themselves at greater difficulty in preparing for their cases and gathering evidence—which cannot easily be accomplished while detained. *Id.* Third, requiring the detained noncitizens 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.* These three considerations present too great a risk of an erroneous deprivation of liberty. *Id.* In *Black*, the court relied on a 2016 study by the American Immigration Council which found that only 14% of detained noncitizens had legal representation in their removal proceedings. *Id.* at n.29 (citing Ingrid Eagly & Steven Shafer, Am. Immigr. Council, *Access to Counsel in Immigration Court* 5 (Sept. 2016), *available at* https://perma.cc/AN9B-FMX9). Though the numbers have marginally improved over the years, only 33% of detained noncitizens had representation in their removal proceedings at the end of 2024 according to a study conducted by the Congressional Research Service.[4] The same study also showed that 81% of detained individuals who did not have legal counsel lost their cases with all relief being denied. *Id.* at 2.

Imposing the burden of proof on detained people in such a context, where they have monumental odds stacked against them, does not stand to reason. Shifting that burden to the government by clear and convincing evidence aligns with the value which the Constitution places on one's personal liberty. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision…" *Addington*, 441 U.S. at 427. Borrowing this line of thinking, the Third Circuit in *German Santos* directed the government to bear the burden

[4] *See* Cong. Rsch. Serv., *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs* 1 (Aug. 6, 2024), *available at* https://tracreports.org/tracker/dynadata/2024_08/IF12158.pdf.

with clear and convincing evidence on the basis that "when someone stands to lose an interest more substantial than money, we protect that interest by holding the Government to a higher standard of proof." 965 F.3d at 213-14 (citing *Addington*, 441 U.S. at 424).

These decisions by the Second and Third Circuits are not isolated. Rather, they belong in the same category as previous Supreme Court decisions where the Court had time and again affirmed that civil detention must be carefully limited—particularly through placing a heightened burden of proof on the government to justify detention—to avoid due process concerns. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("[D]ue 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.") (citation and quotation marks omitted); *Foucha*, 504 U.S. at 80 (holding unconstitutional a state civil detention "statute that place[d] the burden on the detainee to prove that he is not dangerous" and explaining: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

Where, as here, the risk of erroneous deprivation is greater because there is no statutory basis for seeking release from detention for those detained pursuant to § 1226(c), due process requires the government to bear the burden under a clear and convincing standard that the petitioner presents a risk of flight and danger to the community so great that no conditions of release mitigate those risks.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court grant the relief sought by the Petition in all respects.

Respectfully submitted,

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