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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

EARLIN ORANDE AHINSHA RICHARDS,

***Petitioner*,**

v.

JOHNNY CHOATE,
in his official capacity as warden of the Aurora Contract Detention Facility owned and operated by GEO Group, Inc.;

JAMISON MATUSZEWSKI,
In his official capacity as Interim Field Office D Director, Denver, U.S. Immigration & Customs Enforcement;

KRISTI NOEM,
in her official capacity as Secretary, U.S. Department of Homeland Security;

TODD M. LYONS,
in his official capacity as Acting Director of Immigration & Customs Enforcement (ICE); and

PAMELA BONDI,
in her official capacity as Attorney General, U.S. Department of Justice.

Respondents.

Case No. 25-cv-3134-DDD-STV

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

ARGUMENT

I. Mr. Richards's Ongoing Prolonged Detention Violates Due Process Because His Detention Has No Foreseeable Endpoint and His Custody Status Has Not Received Individualized Review.

Mr. Richards has now been detained by ICE for approaching eight months. This is exponentially longer then the time he spent in jail for the single, low-level possession of marijuana offense from approximately twenty years ago which made him "inadmissible" to the United States. Mr. Richards is not asking this Court to order his release from detention, or for this Court to determine a bond amount. Mr. Richards, instead, is asking this Court to find that his indefinite detention without the opportunity for a bond hearing before an Immigration Judge violates due process and to order a bond hearing as a result. Respondents' Response to Motion for Temporary Restraining Order, ECF No. 13 ("Response"), does its best to avoid the great weight of authority from within this District utilizing a balancing test that supports this logical conclusion.

A. Mr. Richards's Detention is Prolonged Because DHS Detained Him Eight Months Ago and There is No Endpoint to His Incarceration.

Mr. Richards's continued imprisonment without access to procedural due process is unlawful and Respondents' actions are not justified. Respondents' reading of *Demore v. Kim* is inaccurate as it relates to the Supreme Court's holding. *See* 538 U.S. 510 (2003). *Demore* found mandatory detention under 8 U.S.C. § 1226(c) for a "brief period" constitutional. *Id.* at 530. The analysis in *Demore* hinged on the Court's misunderstanding—due to inaccurate statistics provided by the government—that detention under 8 U.S.C. § 1226(c) has "a definite termination point." *See id.* at 529. *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong.").

After *Demore*, Courts in this District have consistently found detention without individualized review beyond the brief period authorized in *Demore* unconstitutional. *See, e.g.,*

Martinez v. Ceja, 760 F. Supp. 3d 1188, 1193 (D. Colo. 2024); *Juarez v. Choate*, No. 1:24-cv-00419-CNS, 2024 WL 1012912, at *7-*8 (D. Colo. March 8, 2024); *de Zarate v. Choate* No. 23-cv-00571 (PAB), 2023 WL 2574370, at *3-*5 (D. Colo. Mar. 20, 2023); *Viruel Arias v. Choate*, No. 1:22-CV-02238 (CNS), 2022 WL 4467245, at *2 (D. Colo. Sept. 26, 2022); *Sheikh v. Choate*, No. 1:22-CV-01627 (RMR), 2022 WL 17075894, at *4 (D. Colo. July 27, 2022); *Singh v. Garland*, No. 21-cv-00715 (CMA), 2021 WL 2290712, at *4 (D. Colo June 4, 2021); *Villaescusa-Rios v. Choate*, No 20-cv-03187 (CMA), 2021 WL 269766, at *2 (D. Colo. Aug. 21, 2019). Mr. Richards merits the same procedural protections.

Respondents have detained Mr. Richards for approximately *five times* longer than the brief period of detention that the Supreme Court contemplated when deciding the constitutionality of 8 U.S.C. §1226(c). *Compare Demore*, 538 U.S. at 529–530 (concluding that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases…"). *Demore* therefore does not save Respondents from its continued unlawful imprisonment of Mr. Richards.

Mr. Richards's imprisonment is not "brief" nor is there a "definite termination point." *See Demore*, 538 U.S. at 513, 529. Mr. Richards's detention raises "serious constitutional concerns" because it has an indeterminate endpoint. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

B. Mr. Richards Has Not Received a Constitutionally Adequate Custody Hearing.

Due process requires "adequate procedural protections" to ensure that the government's justification for physical confinement "outweighs the [incarcerated] individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (internal citation omitted). The process afforded Mr. Richards is constitutionally inadequate. Because his detention is prolonged, he seeks an individualized review of his custody status. Section 1226(c) strips IJs of jurisdiction over custody determinations and there is no circumstance when they can order release. 8 C.F.R. §§ 1003.19, 1236.1. Because a neutral arbiter has *never* considered whether Mr.

Richards's confinement serves a legitimate government purpose, the process afforded to date does not meet constitutional muster.

C. Mr. Richards Merits a Constitutionally Adequate Custody Hearing.

Due process requires at a minimum a bond hearing where the question of whether Mr. Richards is a flight risk or danger can be addressed. Respondents' position in opposition directly conflicts with extensive, established caselaw from this District applying a balancing test when determining what process is due when detention becomes unconstitutionally prolonged. *See, e.g., Martinez*, 760 F. Supp. 3d at 1193; *Viruel Arias*, 2022 WL 4467245, at *2; *Sheikh*, 2022 WL 17075894, at *4; *Singh*, 2021 WL 2290712, at *4; *Villaescusa-Rios*, 2021 WL 269766, at *2.[1] The balancing test has been likewise employed by Chief Judge Brimer in factually similar situations. *See de Zarate,* 2023 WL 2574370, at *3-*5. And just last year, Judge Moore rejected Respondents' argument that a detained non-citizen subject to mandatory detention was not entitled to a bond hearing and ordered the payment of EAJA fees after finding that "the clear legal trend within this District should have made Respondents aware—even in the absence of binding Supreme Court or Tenth Circuit precedent—that their position was not substantially justified." *See Daley v. Choate*, No. 22-cv-03043 (RM), 2023 WL 2336052, at *2-*3 (D. Colo. Jan. 6, 2023), *aff'd Daley v. Ceja,* --- F.4th ---, 2025 WL 3058588 (10th Cir. Nov. 3, 2025).[2] The Court should therefore adhere to the

[1] Respondents' statement that "[t]his Court properly has declined to employ this [balancing] test in the context of mandatory detention during removal proceedings," Response at 9, is plainly inaccurate. Numerous District Courts from this Court have employed the aforementioned balancing test to non-citizens detained subject to "mandatory" detention. *See, e.g., Sheikh*, 2022 WL 17075894, at *4; *Singh*, 2021 WL 2290712, at *4; *Villaescusa-Rios v. Choate*, 2021 WL 269766, at *2; *Singh v. Choate*, No. 19-cv-00909 (KML), 2019 WL 3943960, at *6 (D. Colo. Aug. 21, 2019).

[2] Respondents did not appeal Judge Moore's application of the balancing factors, or his finding that the EAJA award was "substantially justified." *See Daley*, --- F.4th ---, 2025 WL 3058588 at *1 n.1. Respondents instead litigated whether the EAJA authorizes the award of fees in habeas actions challenging immigration detention (which the Tenth Circuit answered in the affirmative). *See*

overwhelming number of decisions within this District finding, after applying a balancing test, that due process requires a bond hearing where Respondents bear the clear and convincing evidence burden of proof.[3]

II. Mr. Richards's Detention is Unreasonably Prolonged and Violates the Constitution.

As noted above, Courts in this district apply a six-factor test to determine whether a noncitizen's incarceration is unconstitutionally prolonged. Each factor in this test favors Mr. Richards.

The total length of detention is the first factor considered in this District. "The pertinent consideration is whether '[t]he length of detention has surpassed the rough six-month threshold at which detentions become less and less reasonable.'" *Arostegui-Maldonado v. Baltazar*, --- F.3d ---, 2025 WL 2280357, at *6 (D. Colo. Aug. 8, 2025) (*quoting Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497 at *6 (S.D.N.Y. Aug. 20, 2018)). Petitioner's nearly eight months of detention therefore weighs strongly in his favor. *See id.* ("[E]ven if the Court were to only consider the period of time that Maldonado has been consecutively detained—roughly eight months—it would still be sufficient to trigger scrutiny."). *See also Perez*, 2018 WL 3991497, at

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Daley, --- F.4th ---, 2025 WL 3058588, at *10.

[3] Respondents point to two decisions from within this district that declined to apply a balancing test, but these cases are fundamentally distinguishable. The detainee in *Basri v. Barr* had *already received two bond hearings* before filing his habeas petition, and was presenting argument to the District Court as to why those hearings did not satisfy due process. *See* 469 F. Supp. 3d 1063, 1066, 1066 (D. Colo. 2020). And while the Court in *Aguayo v. Martinez* did find that it need not apply a multi-factor balancing test, the Court also relied heavily on the fact that "Mr. Aguayo's prolonged detention is largely of his own making. *He has requested—and been granted—eight continuances* of his removal proceedings to permit his parallel application for an adjustment of status to be resolved before any final order of removal is entered. . . . [I]t appears that much of the delay is due to Mr. Aguayo's own actions . . . ." *See* No. 1:20-cv-00825-DDD-KMT, 2020 WL 2395638, at *3-*4 (D. Colo. May 12, 2020) (emphasis added). Mr. Richards has not behaved in any similar, dilatory manner.

*6 (ordering individualized bond hearing where detention lasted 9 months); *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *11 (S.D.N.Y. May 23, 2018) (ordering individualized bond hearing where detention lasted 8 months).[4]

The second factor similarly tips in Mr. Richards's favor, as his prolonged period of confinement has no foreseeable end. "Courts examine the anticipated duration of all removal proceedings--including administrative and judicial appeals--when estimating how long detention will last." *Villaescusa-Rios*, 2021 WL 269766, at *2 (internal citations and quotations omitted). Here, it is unknown when Mr. Richards's immigration case will reach a final resolution: he has filed a non-frivolous appeal, and it is anyone's guess when a decision will be issued by the BIA. He likewise may litigate his case before the Court of Appeals for the Third Circuit. And Respondents intend to hold him in custody without a bond hearing through all of these steps—indefinitely. "All this amounts to the fact that his detention will definitely terminate at some point, but that point is likely to be many months or even years from now. Therefore, this factor weighs in Petitioner's favor." *See Singh*, 2019 WL 3943960, at *6.

The third factor considered by this Court—the conditions of Mr. Richards's imprisonment— supports his position. The Court must consider "whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention." *Villaescusa-Rios*, 2021 WL 269766, at *4 (citation omitted and internal quotations omitted); *Singh*, 2021 WL 2290712, at *3–4 (same). "The more the conditions under which the [noncitizen] is being

[4] Respondents reply, without citation to any caselaw, that "the length of Petitioner's detention—approximately seven months—has not become unreasonable or unjustified, as his removal proceedings have proceeded at a reasonable pace." Response at 10 n.4. Respondents' description of a "reasonable" pace is surprising given the Supreme Court in *Demore* 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, and about five months in the minority of cases in which the alien chooses to appeal." *See* 538 U.S. at 30.

held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing." *Villaescusa-Rios*, 2021 WL 269766, at *4 (citation omitted). The Aurora Contract Detention Facility, where Mr. Richards is incarcerated, is akin to a penal institution. *See e.g.*, *Viruel Arias*, 2022 WL 4467245, at *2; *Sheikh*, 2022 WL 17075894, at *4; *Singh*, 2021 WL 2290712, at *3–4; *Villaescusa-Rios*, 2021 WL 269766, at *4. This factor therefore weighs heavily in Mr. Richards's favor.[5]

Fourth, Mr. Richards cannot be prejudiced by exercising his right to non-frivolously litigate his case. *See Villaescusa-Rios*, 2021 WL 269766, at *4. Although the pursuit of bona fide legal remedies does not equate to dilatory tactics, Respondents appear to suggest otherwise. *See* Response at 10 n.4 ("[M]ost of the time spent in detention has been due to Petitioner's appeal."). Whatever their intention, Respondents misrepresent Mr. Richards's zealous pursuit of legal relief. Caselaw is clear that Mr. Richards cannot be penalized for his efforts to pursue justice in his immigration proceedings. *See Arostegui-Maldonado,* --- F.3d ---, 2025 WL 2280357, at *8 ("[C]ourts have refused to hold [petitioners'] efforts to seek relief through the available legal channels against [them].") (internal quotations and citation omitted); *Juarez,* 2024 WL 1012912, at *7 ("Although Ms. Rodriguez Juarez did extend the length of her removal proceedings, there is nothing to show she engaged in improper dilatory tactics—instead, she engaged in good-faith efforts to obtain counsel and to allow counsel adequate time to prepare her merits briefing before the IJ."). The fourth factor therefore weighs in Mr. Richards's favor.

The sixth factor similarly favors Mr. Richards. The Court in *Demore* held that mandatory

[5] Respondents answer that "Petitioner does not explain why the Court should consider conditions-of-confinement, which must be challenged through civil rights lawsuits, not habeas petitions." Response at 10 n.4. The simple answer is that conditions-of-confinement should be considered because that is one of the factors analyzed by Courts in this District in conducting a due process analysis.

detention of an individual who *conceded removal* was constitutional for the brief period necessary to deport him. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Due process concerns therefore arise when DHS mandatorily detains noncitizens who have substantial claims against removal. *See Singh*, 2019 WL 3943960, at *6 ("The continued detention of a [noncitizen] who asserts no defenses will be more reasonable than if the [noncitizen] had at least some possibility of remaining in the country.") (citing *Demore*, 538 U.S. at 531) (Kennedy, J., *concurring*)). Here, Mr. Richards presents substantial defenses against removal, *see* ECF 1-2, but Respondents erroneously craft an added burden for Respondent to demonstrate that is it "substantially likely" he will win his appeal. *See* Response at 10 n.4 ("Petitioner does not sufficiently show that overturning the order of removal is substantially likely."). The purpose of removal proceedings is to determine whether a person has a legal basis for remaining in the United States, *see* 8 C.F.R. § 1240.1(a)(1). Mr. Richards is actively pursuing an appeal, and it is not for this Court to conduct a "mini-trial" concerning Petitioner's eligibility and the likelihood of his success. It is enough that the Petitioner has legitimate, non-frivolous defenses that are being pursued.[6]

[6] To the extent an analysis of Respondent's claims on appeal is warranted, the Court should be aware that the Immigration Judge did not find this case a close call. *See* ECF 1-2, at 15-16 ("The record is pretty clear that the respondent has been continuously residing in the United States for the last seven years, he's not been convicted of an aggravated felony and had been lawfully admitted for not less than five years. The court finds that the respondent has met his burden to establish those requirements for 42A. The only remaining matter is whether he has shown that he merits a favorable exercise of discretion. . . . .The court finds respondent has very strong ties to the United States. He has lived in the United States since he was 7 years old. He has extensive family ties to the country. His parents are U.S. citizens and they're here. His children are here. The arrests he has, or convictions do not necessarily disqualify him in the court's opinion from a favorable exercise of discretion. . . . However, the issue here is twofold. One, that's right bears the burden of demonstrating rehabilitation, and the court finds that the respondent's evidence and lack of candor to this court about his criminal record shows that lack of rehabilitation. Further, this lack of candor puts into question the veracity of his overall testimony. . . . In assessing the totality of the circumstances, the court simply cannot find that these other equities outweigh the lack of showing the rehabilitation due to his lack of candor with the court. If not for that, it's possible the court would have reached a different conclusion. But the court can't.").

DHS is acting as jailer and judge and intends to keep Mr. Richards imprisoned indefinitely. Applying the six-factor test, the record demonstrates Respondents' actions violate the Constitution. Mr. Richards merits a constitutionally adequate bond hearing.

III. DHS that Bears the Burden of Proof at a Future Bond Hearing

"At any such individualized bond hearing, the majority of the Courts in this District have allocated the burden of proof to the government, to show by clear and convincing evidence that the non-citizen poses a flight risk or is a danger to the community." *See Daley*, 2023 WL 2336052, at *3 (collecting authority) (internal citation omitted). *See also Diaz-Ceja v. McAleenan*, 19-cv-00824 (NYW), 2019 WL 2774211, at *10 (D. Colo. July 2, 2019) (allocating burden of proof to the government in 1226(a) bond context; "[t]he balance of these interests supports placing the risk of error on the Government by allocating it the burden of proof. . . . This allocation of burden is consistent with other civil detention contexts, where a person who is not subject to a final adjudication may not be deprived of their right to personal liberty without imposing the burden on the government to justify such detention."). Respondents offer no new arguments to the contrary, and this Court should similarly rule.[7]

CONCLUSION

Based on the foregoing, Mr. Richards respectfully requests that this Court order Respondents to provide Petitioner a bond hearing where Respondents bear the burden of proof.

Dated: November 3, 2024

Respectfully submitted,

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[7] Respondents' citation to *Basri v. Barr* is distinguishable, as it involved a detainee that had already received two bond hearings. *See* 469 F. Supp. 3d at 1073-74.

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CERTIFICATE OF SERVICE

I, Michael Z. Goldman, hereby certify that on November 3, 2025, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

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