

1 KARA HARTZLER
2 Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
3 San Diego, California 92101-5030
4 Telephone: (619) 234-8467
5 Facsimile: (619) 687-2666

6 Attorneys for Mr. BoukouBongue
7 

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 SAKIROU BOUKOUBONGUE,

12 Petitioner,

13 v.

14 MARKWAYNE MULLIN, Secretary
of the Department of Homeland
15 Security, TODD BLANCHE, Acting
Attorney General, TODD M. LYONS,
16 Acting Director, Immigration and
Customs Enforcement, JESUS
17 ROCHA, Acting Field Office Director,
San Diego Field Office, JEREMY
18 CASEY, Warden at Imperial Regional
Detention Facility,

19 Respondents.
20
21
22
23
24
25
26
27
28

CIVIL CASE NO.: 26-cv-2491-JO-VET

**Supplemental Briefing in Support of
Petition for a
Writ of Habeas Corpus**

1 INTRODUCTION

2 Sakirou BoukouBongue is an asylum seeker from Togo who has been
3 detained pending his immigration proceedings for over 16 months. On May 12,
4 2026, this Court conditionally appointed Federal Defenders of San Diego, Inc., to
5 represent Mr. BoukouBongue and ordered the parties to brief: “(1) whether his
6 prolonged detention without a bond hearing violates his procedural due process
7 rights; AND (2) whether such detention violates his substantive due process rights,
8 and if so, whether he is entitled to immediate release.” ECF 8.

9 Mr. BoukouBongue’s 16-month detention without a bond hearing violates
10 both his procedural and substantive due process rights. An Immigration Judge has
11 never found Mr. BoukouBongue to be a flight risk or a danger, and yet he has been
12 detained during the entirety of his asylum proceedings. This procedural due process
13 violation also led to a substantive due process violation because it deprived
14 Mr. BoukouBongue of his liberty for a prolonged period of time without
15 individualized consideration of whether he is a danger or a flight risk. Moreover,
16 immediate release is the appropriate remedy because any additional time in custody
17 will only further these due process violations. Accordingly, this Court should grant
18 immediate release.

19 STATEMENT OF FACTS

20 Mr. BoukouBongue entered the United States on January 9, 2025, to escape
21 persecution in Togo and seek asylum. Declaration of Sakirou BoukouBongue,
22 Exhibit A, at ¶¶ 1–2. He was immediately detained and has been in custody ever
23 since. *Id.* at ¶ 2. He passed his credible fear interview and was placed in removal
24 proceedings. *Id.* at ¶ 3. Since then, he has been continuously detained. *Id.* at ¶ 2.

25 An immigration judge ordered Mr. BoukouBongue removed on February 20,
26 2026. *Id.* at ¶ 3. His case is currently on appeal with the BIA, and if dismissed, he
27 plans to appeal to the Ninth Circuit. *Id.* Mr. BoukouBongue has been detained for
28

1 over sixteen months and will likely be detained for several more years pending his
2 appeal. *Id.* at ¶ 4.

3 Since his original detention, Mr. BoukouBongue has not had a bond hearing
4 or the opportunity to have an immigration judge make a substantive bond
5 determination. *Id.* Mr. BoukouBongue does not have an immigration attorney. *Id.*
6 at ¶ 4. He did not know he was eligible for a bond hearing, and an immigration
7 judge never told him that, either. *Id.* All the while, Mr. BoukouBongue remains
8 detained at Imperial Regional Detention Center.

9 **LEGAL BACKGROUND**

10 **I. Detaining Mr. BoukouBongue for 16 months without an individualized**
11 **determination violated procedural due process.**

12 By refusing to provide Mr. BoukouBongue a bond hearing—or tell him he
13 was eligible to have one—the immigration judge (“IJ”) deprived him of Due
14 Process.

15 **A. Mr. BoukouBongue’s 16-month detention without a bond hearing**
16 **violated procedural due process.**

17 Mr. BoukouBongue’s 16-month detention without an individualized
18 determination of flight risk or danger violated procedural due process. Mr.
19 BoukouBongue is detained under 8 U.S.C. § 1225(b), which “applies to ‘applicants
20 for admission’—noncitizens who ‘arrive[] in the United States,’ or are ‘present’ in
21 the United States but have ‘not been admitted.’” *Banda v. McAleenan*, 385 F. Supp.
22 3d 1099, 1111 (W.D. Wash. 2019). It “applies to, among others, noncitizens
23 initially determined to be inadmissible because of . . . lack of valid documentation.”
24 *Id.* That includes persons who, like Mr. BoukouBongue, come to the United States
25 to make asylum and other fear-based claims. *See id.* at 1109–11 (describing a
26 similar procedural history and finding that petitioner was detained under
27 § 1225(b)). Such immigrants are detained under § 1225(b) not only during their
28 initial proceedings, but also when they appeal to the BIA. *See id.* at 1111 (reaching
same conclusion for immigrant with pending BIA appeal).

1 This statutory scheme has left courts to grapple with the limits (if any) of that
2 detention power: Does this statute permit the government to detain immigrants
3 indefinitely, without ever having to prove at a bond hearing that they pose a risk of
4 danger or flight? Three Supreme Court cases are potentially relevant to answering
5 that question.

6 First, in *Zadvydas v. Davis*, the Supreme Court indicated that indefinite
7 immigration detention raises serious due process concerns. 533 U.S. 678 (2001).
8 *Zadvydas* involved a statute authorizing the government to detain immigrants after
9 they are ordered removed. *Id.* at 683. For immigrants who cannot be removed, that
10 statute had the potential to subject them to years, decades, or a lifetime in custody.
11 *See id.* at 690. The Supreme Court held that if the statute “permit[ed] indefinite
12 detention of an alien[,] [it] would raise a serious constitutional problem,” because

13 [t]he Fifth Amendment's Due Process Clause forbids the Government
14 to ‘depriv[e]’ any ‘person ... of ... liberty ... without due process of law.’
15 Freedom from imprisonment—from government custody, detention, or
16 other forms of physical restraint—lies at the heart of the liberty that
17 Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And
18 this Court has said that government detention violates that Clause unless
19 the detention is ordered in a *criminal* proceeding with adequate
20 procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746
21 (1987), or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’
Foucha, supra, at 80, where a special justification, such as harm-
threatening mental illness, outweighs the ‘individual's constitutionally
protected interest in avoiding physical restraint.’ *Kansas v. Hendricks*,
521 U.S. 346, 356 (1997).

22 *Id.* Ultimately, however, the Court declined to decide whether a statute permitting
23 indefinite detention would violate the Due Process Clause. Instead, the Court
24 employed the constitutional avoidance canon to read implicit limits into the statute,
25 requiring release after detention became sufficiently prolonged. *Id.* at 699.

26 Following *Zadvydas*, the Ninth Circuit applied similar reasoning to
27 § 1225(b). *Rodriguez v. Robbins*, 804 F.3d 1060, 1087–89 (9th Cir. 2015).
28 Employing the constitutional avoidance canon, the Ninth Circuit held that

1 § 1225(b) implicitly entitled detained immigrants to bond hearings every six
2 months. *Id.*

3 The Supreme Court overruled that precedent in *Jennings v. Rodriguez*,
4 holding that the statute does not entitle detainees to bond hearings or otherwise
5 impose “any limit on the length of detention.” 583 U.S. 281, 297 (2018). But though
6 *Jennings* held that § 1225(b) imposes no statutory limit on the length of detention,
7 it reserved the question of whether prolonged, mandatory detention without bond
8 hearings violates due process. *Id.* at 312.

9 Finally, the Supreme Court held in *Demore v. Kim* that at least some statutes
10 mandating detention during immigration proceedings do not automatically violate
11 the Due Process Clause. 538 U.S. 510, 513 (2003). *Demore* addressed 8 U.S.C.
12 § 1226(c), which mandates detention without a bond hearing for persons with
13 certain criminal convictions. *Id.* The Court upheld § 1226(c) in a 5-4 opinion based
14 on (1) the government interests justifying the detention of immigrants with certain,
15 aggravated criminal convictions, and (2) the relative brevity of detention in most
16 cases, with the vast majority taking only about five months. *Id.* at 517–31. Justice
17 Kennedy supplied a deciding vote. His concurrence left open the possibility that
18 individual immigrants could be “entitled to an individualized determination as to
19 his risk of flight and dangerousness if the continued detention became unreasonable
20 or unjustified.” *Id.* at 532–33.

21 “In the wake of *Jennings*,” *Zadvydas*, and *Demore*, “district courts have
22 grappled with how to address due process challenges to prolonged mandatory
23 detention under § 1225(b).” *Banda*, 385 F. Supp. 3d at 1116. But after a full
24 evaluation, “[n]early all district courts that have considered the issue agree that
25 prolonged mandatory detention pending removal proceedings, without a bond
26 hearing, will—at some point—violate the right to due process.” *Id.* (cleaned up)
27 (collecting cases).

28

1 These Courts have relied on the due process concerns recognized in
2 *Zadvydas*. See, e.g., *Kydyrali*, 499 F. Supp. 3d at 771; *Banda*, 385 F. Supp. 3d at
3 1113–17; *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at
4 *3 (S.D. Cal. Oct. 15, 2025). As the Ninth Circuit put it in *Jennings*’ wake, those
5 considerations raise “grave doubts that any statute that allows for arbitrary
6 prolonged detention without any process is constitutional or that those who founded
7 our democracy precisely to protect against the government’s arbitrary deprivation
8 of liberty would have thought so.” *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir.
9 2018).

10 Neither *Jennings* nor *Demore* undermines that conclusion. *Jennings* held
11 only that the statute itself did not impose any limits on detention. It “did not
12 foreclose as-applied constitutional challenges to detention under” mandatory-
13 detention statutes. *Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 209
14 (3d Cir. 2020). And *Demore* held only that conviction-based mandatory detention
15 during immigration proceedings does not necessarily or inherently violate the Due
16 Process Clause, particularly when the detention has an expected duration of only
17 about five months. *Id.* at 208–11. But many persons detained under § 1225(b)—
18 like Mr. BoukouBongue—do not have criminal convictions. And as Justice
19 Kennedy’s concurrence made clear, *Demore* does not prevent immigrants from
20 arguing that sufficiently prolonged detention violates due process in their individual
21 cases. See *id.*¹

22 Thus, this Court should hold that sufficiently prolonged detention violates
23 the Due Process Clause, as most courts have. See, e.g., *Gao v. LaRose*, No. 25-CV-
24

25 ¹ The Supreme Court’s later decision in *Dep’t of Homeland Sec. v. Thuraissigiam*,
26 591 U.S. 103 (2020), is also inapposite, because it addressed only immigrants’ due
27 process rights in deportation proceedings—i.e., the process due when noncitizens
28 seek to stay in the country instead of being removed. See *Lopez-Arevelo v. Ripa*,
No. EP-25-CV-337-KC, 2025 WL 2691828, at *7–9 (W.D. Tex. Sept. 22, 2025). It
does not purport to hold that immigrants have no constitutional right to due process
before the government holds them indefinitely in immigration detention. *Id.*

2084-RSH-SBC, 2025 WL 2770633, at *3 (S.D. Cal. Sept. 26, 2025); *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at *4 (S.D. Cal. Oct. 15, 2025); *Cong v. Noem*, No. 25-CV-3730-GPC-DEB, 2026 WL 76566, at *3 (S.D. Cal. Jan. 9, 2026); *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020) (Battaglia, J.); *Mardian v. Mayorkas*, 25-cv-3467-JLS; *Raeva v. Mayorkas*, 25-cv-3175-JO; *Abdul-Samed v. Warden of Golden State Annex Det. Facility*, No. 25-cv-98-SAB-HC, 2025 WL 2099343, at *6 (E.D. Cal. July 25, 2025); *Hernandez v. Wofford*, No. 25-cv-986-KES-CDB (HC), 2025 WL 2420390, at *3 (E.D. Cal. Aug. 21, 2025); *Padilla v. ICE*, 704 F. Supp. 3d 1163, 1171–72 (W.D. Wash. 2023).

B. Courts have reached different conclusions about when immigration detention becomes indefinitely prolonged, but Mr. BoukouBongue would prevail under any standard.

Though courts agree that due process procedurally mandates a bond hearing when detention grows unreasonably prolonged, they disagree about how to assess whether a particular migrant’s detention has reached that point. *Sanchez-Rivera v. Matuszewski*, No. 22-CV-1357-MMA (JLB), 2023 WL 139801, at *5–6 (S.D. Cal. Jan. 9, 2023) (Anello, J.) (surveying the various approaches). Some courts have “conclude[d] . . . that detention becomes prolonged after six months and entitles [a petitioner] to a bond hearing.” *Rodriguez v. Nielsen*, No. 18-CV-04187-TSH, 2019 WL 7491555, at *6 (N.D. Cal. Jan. 7, 2019). In that case, Mr. BoukouBongue would automatically qualify, as he has been detained for well over a year.

Other courts have adopted various factors tests. *See Sanchez-Rivera*, 2023 WL 139801, at *5–6 (surveying different approaches). Courts generally agree that relevant factors include:

- (1) “the total length of detention to date,”
- (2) “the likely duration of future detention,” and
- (3) “the delays in the removal proceedings caused by the petitioner and the government.”

Id. Some courts also consider:

(4) “the conditions of detention,” and

(5) “the likelihood that the removal proceedings will result in a different final order.”

Id. Other courts have rejected the fourth and fifth factors, holding that they are “not particularly suited to assisting the Court in determining whether detention has become unreasonable and due process requires a bond hearing.” *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022); *accord Sanchez-Rivera*, 2023 WL 139801, at *5–6.² Mr. BoukouBongue would prevail under any of these factors tests.

First, the “most important factor,” the length of detention, strongly favors Mr. BoukouBongue. *Banda*, 385 F. Supp. 3d at 1118. In assessing this factor, “[i]t is important to bear in mind the context: The detention that is being examined here is the detention of a human being who has never been found to pose a danger to the community or to be likely to flee if released.” *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Minn. 2019). With that context, courts have granted bond hearings for persons detained between nine and eleven months. *See Ashemuke v. ICE Field Off. Dir.*, No. C23-1592-RSL-MLP, 2024 WL 1683797, at *4 (W.D. Wash. Feb. 29, 2024), *report and recommendation adopted*, No. C23-1592-RSL, 2024 WL 1676681 (W.D. Wash. Apr. 18, 2024) (“approximately eleven months”); *Brissett v. Decker*, 324 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) (“over nine months”); *Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497, at *5 (S.D.N.Y. Aug. 20, 2018) (“more than nine months”); *Masood v. Barr*, No. 19-CV-07623-JD, 2020 WL 95633, at *2 (N.D. Cal. Jan. 8, 2020) (“nearly nine months”). Mr. BoukouBongue has been detained for even longer—over 16 months. Exh. A at ¶ 2. This factor therefore clearly favors a bond hearing.

² Courts also disagree about whether to account for any criminal convictions that have led to the deportation. *Sanchez-Rivera*, 2023 WL 139801, at *5–6. But such factors—if appropriate at all—are irrelevant where, as here, the person is not being removed as a result of criminal convictions.

1 Second, Mr. BoukouBongue has reason to anticipate significant future
2 detention. He was ordered removed in February 2026 and is currently appealing his
3 asylum claim to the BIA. Exh. A at ¶ 3. And if Mr. BoukouBongue loses, he plans
4 to appeal to the Ninth Circuit. *Id.* BIA appeals, on their own, can take months. *See*
5 *Banda*, 385 F. Supp. 3d at 1119. All told, “[t]his process may take up to two years
6 or longer.” *Id.* Because “Petitioner’s future detention can last several more months
7 or even years[,]” this factor favors Mr. BoukouBongue. *Abdul Kadir v. Larose*, No.
8 25CV1045-LL-MMP, 2025 WL 2932654, at *5 (S.D. Cal. Oct. 15, 2025).

9 Third, the delay factor is neutral. There is no indication that
10 Mr. BoukouBongue engaged in any unreasonable delay.

11 Fourth, Mr. BoukouBongue’s conditions of confinement weigh in his favor.
12 At Imperial Regional Detention Center (“IRDC”), his confinement is
13 indistinguishable from penal confinement and the conditions are challenging for
14 him. Reports from IMDC have indicated drinking water causes skin rashes and
15 must be boiled before drinking. Rob Bonta et al., *Immigration Detention in*
16 *California: A Review of Conditions of Confinement*, California Department of
17 Justice 96, 103, (2026), [https://oag.ca.gov/system/files/media/immigration-](https://oag.ca.gov/system/files/media/immigration-detention-2026.pdf)
18 [detention-2026.pdf](https://oag.ca.gov/system/files/media/immigration-detention-2026.pdf). Two detainee deaths have occurred at IRDC during the time
19 Mr. BoukouBongue has been in custody. *Id.* at 8.

20 Fifth, the chances that continued proceedings will result in a different final
21 order does not apply here. There is not yet any final order in Mr. BoukouBongue’s
22 case.

23 Under any test, then, Mr. BoukouBongue is entitled, at the very least, to a
24 bond hearing.

II. Mr. BoukouBongue’s continued, prolonged, and potentially indefinite immigration detention violates substantive due process.

In light of the failed (and, therefore, absent) procedures where no valid reason for such continued detention has been found, the length of Mr. BoukouBongue’s detention also violates his substantive due process rights.

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). “A due process violation occurs when detention becomes punitive rather than regulatory, meaning there is no regulatory purpose that can rationally be assigned to the detention or the detention appears excessive in relation to its regulatory purpose.” *United States v. Torres*, 995 F. 3d 695, 708 (9th Cir. 2021).

Courts have primarily addressed whether prolonged detention violates substantive due process in the context of detention under 8 U.S.C. § 1226(c). The same factors highlighted above from *Sanchez-Rivera*, see Section I.B *supra*, have been applied in the substantive due process context. See *Doe v. Becerra*, 732 F. Supp. 3d 1071, 1080 (N.D. Cal. 2024). It makes sense to extend those analyses to immigrants detained under Section 1225(b): both classes do not have a statutory right to a bond hearing, and both classes are routinely detained pre-final removal order for prolonged and often indefinite periods of time. See 8 U.S.C. §§ 1225(b), 1226(c).

Mr. BoukouBongue’s case demonstrates exactly how a violation of procedural due process can lead to a violation of substantive due process. Mr. BoukouBongue, as of the filing of this brief, has been continuously detained for one year, four months, and thirteen days. See Exh. A at ¶ 2. Had he been afforded a bond hearing during that time, it is possible he would have already been released, and his pro se petition for habeas corpus would have never been filed. Instead, Mr. BoukouBongue did not receive, and has yet to receive, a hearing. An immigration

1 judge has never found him to be a flight risk or a danger. And yet, he remains
2 detained. That detention has now extended to a length that violates his substantive
3 due process rights.

4 The “equitable and flexible nature of habeas relief” affords district courts
5 significant discretion over the appropriate remedies for violations of law and the
6 Constitution. *Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020); *see also*
7 *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“[H]abeas corpus is, at its core, an
8 equitable remedy”). This Court should order a remedy that fully addresses the
9 statutory and constitutional violations in this case and is efficient to administer.
10 *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (the habeas statute “does not limit
11 the relief that may be granted to discharge of the applicant from physical custody.
12 Its mandate is broad with respect to the relief that may be granted”). In this case,
13 that remedy is immediate release from custody.

14 CLAIM AND PRAYER FOR RELIEF

15 Here, because ordering a bond hearing before a randomly selected IJ would
16 not immediately redress the statutory and constitutional violations present in this
17 matter and only perpetrate them, Petitioner urges this Court to order his immediate
18 release unless and until Respondents can establish by clear and convincing evidence
19 that he poses a danger or a flight risk. “In recent months, courts across the country
20 have ordered the release of detainees in similar situations.” *Moctezuma v. Henkey*,
21 No. 1:25-CV-00741-BLW, 2026 WL 18809, at *5 (D. Idaho Jan. 2, 2026) (given
22 that the government’s repeated use of unlawful detention policies across the
23 country, causing petitioners to “sit in jail waiting for a judicial decision,” the court
24 would order immediate release instead of causing additional delay through a bond
25 hearing) (citing *Lepe v. Andrews*, 801 F. Supp. 3d 1104 (E.D. Cal. 2025); *J.U. v.*
26 *Maldonado*, No. 25-cv-4836, 2025 WL 2772765, at *10 (E.D.N.Y. Sept. 29, 2025);
27 *Rosado v. Figueroa*, No. 25-cv-2157, 2025 WL 2337099, at *19 (D. Ariz. Aug. 11,
28 2025); *Pinchi v. Noem*, No. 25-cv-05632, 2025 WL 1853763, at *4 (N.D. Cal. July

1 4, 2025). *Santiago v. Noem*, No. EP-25-CV-361, 2025 WL 2792588, at *13-14
2 (W.D. Tex. Oct. 2, 2025) (“Without a legitimate interest in her detention, immediate
3 release appropriately remedies Respondents’ violation of [Petitioner’s] due process
4 rights through her continued detention.”).

5 For these reasons, this Court should order Mr. BoukouBongue’s immediate
6 release unless and until Respondents can show by clear and convincing evidence
7 that he poses a danger or a flight risk.

8
9
10 Respectfully submitted,

11 Dated: May 21, 2026

s/ Kara Hartzler

KARA HARTZLER

Federal Defenders of San Diego, Inc.

Attorneys for Mr. BoukouBongue

Email: kara_hartzler@fd.org