No. 23-7988

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OSVALDO HODGE,

Petitioner-Appellant,

v.

ALEJANDRO MAYORKAS,
United States Secretary of Homeland Security, *et al.*

Respondents-Appellees

On Appeal from the United States District Court
for the Western District of New York

PETITIONER-APPELLANT'S OPENING BRIEF

Tiffany J. Lieu
Julio Q. Colby, *Supervised Law Student*
Shiv P. Pandya, *Supervised Law Student*
Crimmigration Clinic
Harvard Law School
6 Everett Street, Suite 3106
Cambridge, MA 02138
Phone: (617) 496-5497
Email: tlieu@law.harvard.edu

John H. Peng
Prisoners' Legal Services of New York
Karen Murtagh, Exec. Dir.
41 State St., Ste. M112
Albany, NY 12207
Phone: (518) 859-0060
Email: jpeng@plsny.org

Sarah T. Gillman, Esq.
Sarah E. Decker, Esq.
Robert F. Kennedy Human Rights
88 Pine Street, Suite 801
New York, NY 10005
Phone: (646) 289-5593
Email: gilman@rfkhumanrights.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), counsel for the Petitioner-Appellant, Osvaldo Hodge, attests that he is an individual. As such, he has no corporate parents, affiliates, and/or publicly held companies that own 10% or more of its stock.

/s/ Tiffany J. Lieu
Tiffany J. Lieu
Harvard Law School Crimmigration Clinic
Dated: April 16, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

"'In our society liberty is the norm,' and detention without trial 'is the carefully limited exception.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court recognized one such carefully limited exception: *brief* immigration detention without a bond hearing under 8 U.S.C. § 1226(c). This case presents a constitutional question that the *Demore* Court left open: whether prolonged detention without an individualized bond hearing under § 1226(c) falls outside of that carefully limited exception and affronts due process. It does, and the district court's denial of Petitioner-Appellant Osvaldo Hodge's petition for habeas corpus, which hinges on unprecedented and unjustifiable grounds, should be reversed.

Section 1226(c) requires the government to take into custody noncitizens with certain convictions for the duration of their removal proceedings based on the presumption that they pose a flight or danger risk, without any process to determine whether an individual actually poses those risks. While *Demore* determined that this presumption is constitutionally sufficient to justify brief detention without an individualized bond hearing, there comes a tipping point when the individual's core liberty interest in being free from imprisonment outweighs the convenience of that presumption. At that point, an individualized

hearing is needed to justify continued detention.

Mr. Hodge's case demonstrates why limits to § 1226(c)'s presumptions are constitutionally necessary. Mr. Hodge, an immigrant who has lived in the United States for over thirty years, has been mandatorily detained under § 1226(c) at the Buffalo Federal Detention Center ("BFDF") in Batavia, New York, for over thirty months. Though Mr. Hodge's immigration detention is civil in nature, he suffers conditions identical to criminal incarceration. In these two-and-a-half years, he has received no process whatsoever to justify his detention in these conditions—the government has never once had to show that he poses either a flight risk or danger. Moreover, Mr. Hodge's detention has become prolonged because of repeated errors by the government itself. He has appealed the immigration judge's ("IJ") denials of relief twice—and the Board of Immigration Appeals ("BIA") has remanded his case twice—first because the IJ failed to give him a competency hearing and second because the IJ failed to properly adjudicate his claim for relief under the U.N. Convention Against Torture ("CAT"). As long as he continues pursuing his meritorious claim, Mr. Hodge will continue being imprisoned without process.

While recognizing, as it must, the "significant" length of Mr. Hodge's detention, the district court denied relief based on indefensible propositions. The district court concluded that, as a threshold matter, there is no government deprivation triggering due process protections because removal proceedings have a

definite end point and mandatory detention is "quasi-voluntary." On the district court's draconian view, a noncitizen "holds the keys to release" because the noncitizen "may elect to regain his or her liberty—or freedom from detention—by agreeing to return to his or her native country"—even if that return could mean torture or death for people like Mr. Hodge. Relatedly, the district court acknowledged, as it must, that an individual has the right to "avail himself of all 'process' available to him in his removal proceedings." The district court nonetheless concluded that vindicating such statutory and constitutional rights—like seeking humanitarian relief and appealing erroneous decisions—are petitioner-caused delay that cannot bolster a due process claim in habeas proceedings. Based on these erroneous views, the district court refused to apply the *Mathews v. Eldridge* test that unquestionably applies to procedural due process assessments, and, in the alternative, summarily concluded that there was no due process violation even if the framework applied.

This conjured vision of due process rests on no decision of the Supreme Court or this Court, and it should be rejected out of hand. Instead, precedent and firm constitutional principles dictate that Mr. Hodge's continued detention without an individualized bond hearing violates due process under three separate, alternative bases. First, *Mathews* as applied to the generality of cases requires that noncitizens subject to mandatory detention be afforded an individualized bond

hearing after six months to accord with procedural due process. Second, *Mathews* as applied to the circumstances of Mr. Hodge's over-thirty-month detention without any process dictates that he must be provided an individualized bond hearing. Third, Mr. Hodge's prolonged mandatory detention without an individualized bond hearing has become unreasonable and violates due process.

Accordingly, Mr. Hodge must be afforded an individualized bond hearing at which the government must prove by clear and convincing evidence that he is a flight risk or danger.

STATEMENT OF JURISDICTION AND VENUE

Mr. Hodge challenges the district court's October 18, 2023, ruling denying his Petition for Writ of Habeas Corpus. ECF 18 at 27.[1] Mr. Hodge filed a timely notice of appeal on December 11, 2023. ECF 21. The district court had jurisdiction over Mr. Hodge's habeas petition under 28 U.S.C. §§ 2241 and 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Venue is proper under 28 U.S.C. § 1391(e) because Mr. Hodge is detained at BFDF in Batavia, New York, within the jurisdiction of the Western District of New York, over which this Court has jurisdiction. *See* 28 U.S.C. § 41.

---

[1] Pursuant to Local R. 30.1(e)(1), all citations, including to the district court's decision, will be to the original record without an appendix because Mr. Hodge was permitted to proceed *in forma pauperis*. ECF 25. All citations will be annotated as "ECF _."

STATEMENT OF THE ISSUES

1. Whether Mr. Hodge is entitled to an individualized bond hearing under procedural due process because (1) *Mathews v. Eldridge*, as applied to the generality of cases, requires a bond hearing within six months of detention, and/or (2) *Mathews v. Eldridge*, as applied to Mr. Hodge's prolonged mandatory detention, necessitates a bond hearing.

2. Whether Mr. Hodge's prolonged mandatory detention under 8 U.S.C. § 1226(c) without an individualized bond hearing is unreasonable and thus violative of due process.

3. At an individualized bond hearing, whether DHS bears the burden of demonstrating by clear and convincing evidence that detention is warranted, and whether an adjudicator must consider ability to pay and alternatives to detention.

STATEMENT OF THE CASE

I. Mr. Hodge's Background and Removal Proceedings

Mr. Hodge is a 48-year-old native of the Dominican Republic who has lived in the United States for over three decades since he was admitted as a legal permanent resident in 1990 at fifteen years old. ECF 8-1; ECF 8 ¶ 25. During that time, Mr. Hodge developed substantial ties to the United States. Mr. Hodge is the father of three U.S. citizen daughters, and has four siblings that live in the United States. ECF 12-2 at 29–30.

Mr. Hodge has a history of mental health conditions, including bipolar disorder, major depressive disorder, and psychosis, ECF 8 ¶ 27, and he has struggled with drug and alcohol abuse, ECF 8-2 at 3–4. He has been prescribed medication and treatment for these conditions, ECF 8 ¶ 27. These conditions

contributed to a series of criminal convictions in February 2001, December 2006, September 2007, December 2011, May 2012, and October 2020. *See* ECF 12-2 at 4, 57–60, 31–32; ECF 11-2 at 8. Mr. Hodge received suspended sentences with either conditional discharge or probation for all but the December 2011 conviction, for which he paid a $150 fine, and the October 2020 conviction, for which he served fewer than twelve months. ECF 12-2 at 4, 57–60; ECF 13-1 ¶ 2.

In February 2004, DHS initiated removal proceedings against Mr. Hodge based on the February 2001 conviction. ECF 12-2 at 6. The government eventually released Mr. Hodge from immigration detention in March 2004. ECF 12-4 at 2. In 2015, DHS again charged him as removable based on the September 2007 and May 2012 convictions. ECF 12-2 ¶¶ 22–23. Mr. Hodge applied for cancellation of removal, which the IJ initially denied. ECF 12-1 ¶ 20. Mr. Hodge successfully appealed the denial to the BIA, which remanded to the IJ to reconsider the application. ECF 12-2 at 49–50. On remand, the IJ granted Mr. Hodge's cancellation application in 2018. ECF 12-2 at 51–52.

As relevant to the instant proceedings, in October 2020, Mr. Hodge was convicted for conspiracy to distribute and possess with intent to distribute heroin and cocaine. ECF 12-2 at 54. He was sentenced to twelve months and one day but did not serve his full sentence. ECF 8 ¶ 28; ECF 12-2 at 57–60, 65–68. Based on this conviction, DHS again placed Mr. Hodge in removal proceedings. ECF 12-2 at

65–68. On September 10, 2021, ICE began detaining Mr. Hodge, and shortly thereafter an IJ determined that Mr. Hodge's detention was mandatory pursuant to § 1226(c). ECF 8 ¶ 30; ECF 12-2 at 70. Mr. Hodge has been held in mandatory immigration detention ever since. ECF 8 ¶ 2. To date, he has suffered over thirty months of detention, which is over twice the length of time that he served for the criminal conviction that triggered mandatory detention. *See* ECF 12-2 at 70; ECF 8 ¶¶ 28–29, 39.

In November 2021, as relevant here, Mr. Hodge applied for CAT protection because he fears persecution if forced to return to the Dominican Republic, including being imprisoned by the police due to his mental illness. ECF 8 ¶ 31; ECF 13-1 at 1–2. Mr. Hodge was originally scheduled for an individual hearing for his CAT claim in December 2021; however, he then tested positive for COVID-19 and was unable to attend. ECF 8 ¶ 32. After two continuances due to COVID-19 restrictions at BFDF, the hearing was adjourned until January 2022. *Id.* ¶ 33. At the hearing, Mr. Hodge's attorney had to request another continuance because ICE had held Mr. Hodge in COVID-19 isolation, which prevented him from meeting with his attorney to prepare his case. *Id.* ¶ 34. The IJ denied this continuance request and, on the merits, denied Mr. Hodge's CAT application. *Id.*; ECF 12-2 at 83–84.

Mr. Hodge timely appealed the denial to the BIA. ECF 8 ¶ 35. In September 2022, the BIA held that the IJ erred by denying Mr. Hodge the opportunity to meet

with his attorney and introduce additional evidence or testimony. ECF 8-2 at 4. The BIA remanded with specific instructions for the IJ to assess whether Mr. Hodge was mentally competent to proceed with his immigration proceedings and determine if any safeguards were necessary under *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011). ECF 8-2 at 4–5. On remand in December 2022, the IJ concluded at a *M-A-M-* hearing that Mr. Hodge was competent to proceed with his removal proceedings. ECF 8 ¶ 36. At that point, Mr. Hodge had been detained in civil immigration detention without a bond hearing for longer than he was incarcerated for the conviction that triggered mandatory detention. *See* ECF 8 ¶ 28.

At the second merits hearing, the IJ again denied Mr. Hodge's CAT application and on February 2, 2023, ordered him removed. ECF 8 ¶ 37; ECF 12-2 at 88; ECF 13-1 at 1. The IJ's denial was based largely on the IJ's sua sponte decision before the merits hearing that Mr. Hodge had waived his right to submit additional evidence. *See* ECF 8 ¶ 37. The IJ denied Mr. Hodge's request that the record be held open so that he could submit evidence necessary to his case, including a medical evaluation and report. *Id.* Mr. Hodge appealed the IJ's denial to the BIA on the basis that the IJ violated Mr. Hodge's due process rights by preventing him from submitting evidence, failed to properly apply *M-A-M-*, and erred in denying relief under CAT. *Id.*; *see also* ECF 8-3.

On July 27, 2023, the BIA again remanded the case for the IJ to properly

assess Mr. Hodge's CAT application, considering the record as a whole, and for further factfinding. ECF 13-1 at 2. The BIA also ruled that because mental competency is not a static condition, the IJ may reassess competency if there is new, relevant evidence. *Id.* at 3.

On remand, the IJ again denied Mr. Hodge's CAT application, and the case is again pending before the BIA. Mr. Hodge has remained detained in penal conditions throughout these proceedings.

II. The Habeas Proceedings Below

While his removal proceedings remained pending and without any way to seek independent review of his ongoing detention, Mr. Hodge filed the instant petition for a writ of habeas corpus in the Western District of New York on May 19, 2023, which he subsequently amended in June 2023. *See* ECF 1; ECF 8. Mr. Hodge argued that his prolonged mandatory detention violated due process and requested either release from detention or an individualized custody determination. ECF 8 ¶ 7.

In his habeas petition and accompanying documents, Mr. Hodge, who has never been subject to a disciplinary proceeding during his lengthy detention, ECF 8 ¶ 5, described the harmful, penal conditions that he suffers at BFDF. Mr. Hodge has been made to decide between "working" for $1 a day or being confined to his cell for long periods every day in effective solitary confinement pursuant to

BFDF's "lock-in" policy. ECF 13-2 ¶¶ 5–9. Moreover, despite his mental health conditions, Mr. Hodge has only been able to meet with a mental health professional at BFDF three times, for a maximum of fifteen minutes. ECF 8 ¶ 38. And BFDF has consistently failed to provide him necessary medication despite repeated requests. ECF 8 ¶ 38. As a result, Mr. Hodge's mental health has deteriorated and he filed a complaint with the Office of Civil Rights and Civil Liberties ("CRCL"), which remains pending. ECF 1 ¶ 37; ECF 13-2 ¶ 3; ECF 11-2 at 9.

On October 18, 2023, twenty-three months after Mr. Hodge was initially detained, District Judge John L. Sinatra denied the habeas petition. ECF 18 at 2. Mr. Hodge timely filed the instant appeal. To date, Mr. Hodge has been detained without process for over thirty months. *See* ECF 12-2 at 70.

SUMMARY OF THE ARGUMENT

"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." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Mr. Hodge has been detained under penal conditions pursuant to § 1226(c) for over thirty months without an individualized bond hearing or any procedural safeguards. His prolonged detention violates procedural due process and is unreasonable, and the Court should grant him an individualized bond hearing.

Contrary to the district court's determination, *Demore v. Kim*, which authorized *brief* mandatory detention, does not govern the instant case challenging Mr. Hodge's *prolonged* mandatory detention without a bond hearing. In *Demore*, the Supreme Court considered a facial, substantive due process challenge to § 1226(c) rather than, as here, an as-applied challenge. In that context, *Demore* concluded that Congress's established presumption that certain noncitizens are a flight risk and dangerous was constitutionally sufficient to justify their detention without a bond hearing—but only for the "brief period necessary for their removal proceedings." 538 U.S. at 513. *Demore* recognized that there may come a tipping point at which the presumption no longer holds and an individualized bond hearing is needed to justify the detention. Mr. Hodge's prolonged detention has reached the constitutional tipping point on at least three alternative bases.

First, applying the familiar *Mathews v. Eldridge* test, which properly governs procedural due process challenges, prolonged detention without a bond hearing after six months violates procedural due process. Without a bond hearing, the sweeping, over-inclusive nature of § 1226(c) creates a high risk of erroneous deprivation of both liberty and the right to be meaningfully heard in immigration court. In contrast, the government's interests are undermined by the growing use and efficacy of alternatives to detention ("ATDs") and are not served by prolonged detention of noncitizens who do not present any risk. *Mathews*, considered in the

generality of cases, mandates that noncitizens cannot be detained without process in perpetuity, and this Court can and should remedy the due process violation by adopting the six-month bright-line rule it previously established in *Lora*.

Second, regardless of whether the Court adopts a categorical rule, an individual application of *Mathews* to Mr. Hodge's over thirty months of detention in penal conditions compels the conclusion that his continued detention violates his procedural due process rights and that an individualized bond hearing is warranted.

Third, in the alternative, Mr. Hodge is entitled to a bond hearing because his prolonged detention has become unreasonable in violation of due process. As the Supreme Court has recognized, when continued detention becomes unreasonable or unjustified, a noncitizen may be entitled to an individualized bond hearing. Here, Mr. Hodge's over-thirty-month detention without any process under penal conditions, which is nearly three times the length of his criminal sentence and largely a product of errors by the IJ, has become unreasonable, entitling him to an individualized determination as to his risk of flight and dangerousness.

Finally, if Mr. Hodge is granted a bond hearing, the hearing should include the proper procedures required by due process. Given that detention represents a serious deprivation of liberty, the government must bear the burden of justifying Mr. Hodge's continued detention by clear and convincing evidence. An adjudicator must also consider ATDs and Mr. Hodge's ability to pay in determining bond.

STANDARD OF REVIEW

The denial of a petition for a writ of habeas corpus raises questions of law that this Court reviews de novo. *Hechavarria v. Sessions*, 891 F.3d 49, 53 (2d Cir. 2018), *as amended* (May 22, 2018); *see also Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020).

ARGUMENT

I. *Demore v. Kim* Does Not Authorize Prolonged Mandatory Detention Without an Individualized Bond Hearing.

The Supreme Court has long held that civil detention violates the Due Process Clause except in "certain special and 'narrow' nonpunitive 'circumstances,'" where the government has a "special justification" that outweighs the individual's core liberty interest in being free from detention. *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80). While the Supreme Court in *Demore* recognized one such narrow circumstance—*brief* immigration detention without a bond hearing under § 1226(c)—*Demore* did not, as the district court would have it, authorize prolonged § 1226(c) civil detention without an individualized bond hearing. *Demore*'s holding was fundamentally circumscribed to the temporal limits and the detention realities at issue in the decision, both of which have changed considerably.

To begin, while *Demore* held that § 1226(c) is not facially unconstitutional, "there must be some procedural safeguard in place," moored to the brevity of

detention. *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015), *cert. granted*, *judgment vacated*, 583 U.S. 1165 (2018). Such expected brevity was central to the Court's holding: "We hold that Congress . . . may require that persons such as respondent be detained for the *brief period necessary for their removal proceedings*." *Demore*, 538 U.S. at 513 (emphasis added); *id.* at 529 n.12 (referencing the "very limited time of the detention at stake"); *see also Lora*, 804 F.3d at 614 (explaining that *Demore* provides that, "for detention under the statute to be reasonable, it must be for a brief period of time"); *Velasco Lopez*, 978 F.3d at 852 (noting that *Demore* was "careful to emphasize the importance of the relatively short duration of detention"). Tellingly, the decision in *Demore* was grounded in the Supreme Court's expectation and belief—based on statistics the government submitted—that "the detention at stake under § 1226(c)" was brief, "last[ing] roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the [noncitizen] chooses to appeal." *Demore*, 538 U.S. at 529–30.

Justice Kennedy's concurrence further illuminates the temporal limitations of *Demore*'s holding. As Justice Kennedy made clear, a noncitizen "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 (Kennedy, J., concurring). In other words, as this Court has recognized,

"[t]he Supreme Court has indicated that," at a certain point, "the Due Process Clause may entitle even those mandatorily detained under § 1226(c) 'to an individualized determination as to his risk of flight and dangerousness.'" *Velasco Lopez*, 978 F.3d at 853 (quoting *Demore*, 538 U.S. at 532 (Kennedy, J., concurring)).[2] Thus, while *Demore* may permit brief mandatory detention, it decidedly did not authorize prolonged mandatory detention like that at issue here.

Every circuit court, including this Court, to consider *Demore* in the context of prolonged mandatory detention affirmed the temporal limits of its constitutional holding. *See, e.g.*, *Lora*, 804 F.3d at 614. This Court in *Lora* held that *Demore* and *Zadvydas* "clearly establish that mandatory detention under section 1226(c) is permissible, but that there must be some procedural safeguard in place for immigrants detained for months without a hearing." *Id.* Applying constitutional avoidance principles, the Court held that, "in order to avoid serious constitutional concerns, section 1226(c) must be read as including an implicit temporal limitation." *Id.* Every other circuit to have reached the issue similarly concluded that *Demore* did not authorize prolonged detention and applied constitutional

---

[2] The district court suggests that *Demore* does not require brevity and that because mandatory detention has a "definite termination point," such detention does not violate an individual's due process rights. ECF 18 at 14, 26. But that notion contravenes this Court's precedent. In *Velasco Lopez*, this Court held that detention under 8 U.S.C. § 1226(a) without a bond hearing violated due process despite the fact that the proceedings had a definite termination point. *Velasco Lopez*, 978 F.3d at 846, 852.

avoidance to require an individualized bond hearing once detention became unreasonable. *See, e.g.*, *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474–75 (3d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060, 1079 (9th Cir. 2015), *rev'd sub nom. Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1213 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016), *opinion withdrawn on reconsideration*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018).

While the Supreme Court in *Jennings*, 583 U.S. at 286, subsequently vacated or abrogated these decisions, circuit courts' overwhelming views on the constitutional question are untouched by *Jennings* and remain persuasive authority. *See Brown v. Kelly*, 609 F.3d 467, 476–77 (2d Cir. 2010) (explaining that decisions vacated by the Supreme Court remain "persuasive authority" even if they are "not technically binding"). In *Jennings*, the Supreme Court rejected the Ninth Circuit's construction of § 1226(c) as imposing a time limit on detention, but its holding was strictly based on statutory interpretation. *See Jennings*, 583 U.S. at 286, 296–97. The Supreme Court concluded that the statute was unambiguous and that employing the canon of constitutional avoidance was therefore improper. *See id.* The Court, however, explicitly left open the constitutional question of whether

prolonged detention under § 1226(c) violates due process. *See id.* at 296–97, 312. *Jennings* thus reaffirms that *Demore* does not fully address the constitutionality of *prolonged* mandatory detention, and the constitutional analyses underpinning those prior circuit court decisions remain relevant. *See id.* at 312; *id.* at 343 (Breyer, J., dissenting) ("We deal here with prolonged detention, not the short-term detention at issue in *Demore*."). Indeed, the Third Circuit—the only circuit to have decided the constitutional question post-*Jennings*—held that it was bound by the constitutional reasoning from two of its prior cases, which *Jennings* had partially abrogated, and thus concluded that prolonged mandatory detention without a bond hearing violates due process. *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020).

Second, the Court in *Demore* did not explicitly address any time constraints to detention because the Court was considering a facial, substantive due process challenge to § 1226(c). *See Demore*, 538 U.S. at 514–15. Notably, the respondent in *Demore* argued that *any* detention under § 1226(c), rather than detention exceeding a certain length without a bond hearing, was unconstitutional. *See id.* at 522–23 (explaining that the respondent argued even "brief" detention was unconstitutional). *Demore*'s facial, substantive due process challenge to § 1226(c)'s general mandatory detention regime stands in contrast to the case at hand, which raises an as-applied due process challenge to Mr. Hodge's prolonged detention

without a bond hearing. *See German Santos*, 965 F.3d at 209 (explaining that Justice Kennedy, who provided the fifth vote for the majority, concurred because he "read the majority's discussion of the facial challenge as consistent" with the possibility that continued detention might be unconstitutional as applied).

Finally, *Demore*'s determination that mandatory detention was permissible for the "brief period" necessary for noncitizens' removal proceedings could not account for the substantially different state of immigration detention today. To begin, there has been a "'dramatic increase' in the average length of detention." *Hernandez v. Decker*, No. 18-CV-5026 (ALC), 2018 WL 3579108, at *11 (S.D.N.Y. July 25, 2018) (citation omitted); *see also Lora*, 804 F.3d at 604–05 (noting that since *Demore*, the average length of § 1226(c) detention "has worsened considerably"). Indeed, subsequent information revealed that the very detention statistics that the government provided, which the *Demore* Court relied upon, were incorrect, and that detention in fact lasted significantly longer on average. *See Jennings*, 583 U.S. at 343, 352 (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. . . . [T]housands of people here are held for considerably longer than six months without an opportunity to seek bail.").

This increase in detention length has occurred against a backdrop of advancements relating to ATDs that mitigate the risks that justify detention. *See*

Hernandez v. Sessions, 872 F.3d 976, 991 (9th Cir. 2017) (explaining that ATDs "resulted in a 99% attendance rate at all [immigration] hearings and a 95% attendance rate at final hearings"). ATDs, which ICE began piloting after *Demore*, include telephonic reporting that verifies identity through voiceprint technology, GPS monitoring, and the SmartLINK application that incorporates facial matching. *Alternatives to Detention*, U.S. Immigr. & Customs Enf't [hereinafter ICE ATDs], https://www.ice.gov/features/atd (last visited Apr. 16, 2024). Given this reality, the government's interest in unfettered detention as expressed in *Demore* is greatly diminished.

Ultimately, Mr. Hodge's over thirty months of detention without an individualized bond hearing far exceeds the brief period of detention *Demore* authorized, thus "warranting additional procedural safeguards," *Hernandez v. Decker*, 2018 WL 3579108, at *11 (citation omitted).

II. Mr. Hodge Is Entitled to an Individualized Bond Hearing Because His Prolonged Mandatory Detention Without Any Process Violates Procedural Due Process.

It is axiomatic that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests," and that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (quoting *Armstrong v. Manzo*,

380 U.S. 545, 552 (1965)). At issue is whether Mr. Hodge's over-thirty-month deprivation of liberty without an individualized bond hearing—or any process at all—violates these procedural due process commands. It plainly does.

The district court's determination to the contrary erred, first, by failing to apply the canonical *Mathews* framework for evaluating procedural due process claims and, second, by concluding without any meaningful analysis of the *Mathews* factors that "the amount of corresponding process that would be due to Hodge . . . is the amount provided for by Congress." ECF 18 at 26. Longstanding jurisprudence makes clear that the *Mathews* framework applies to procedural due process challenges like Mr. Hodge's. *Cf. Velasco Lopez*, 978 F.3d at 851. Proper application of *Mathews* establishes that noncitizens like Mr. Hodge who are subject to § 1226(c) detention are categorically entitled to a bond hearing when detention becomes prolonged, after six months. Alternatively, as applied to Mr. Hodge's individual case, *Mathews* requires that Mr. Hodge's over-thirty-month detention without a bond hearing violates his procedural due process rights. Under either a categorical or individual application of *Mathews*, Mr. Hodge's prolonged detention violates due process.

A. The *Mathews* Test Applies to Mr. Hodge's Procedural Due Process Claim.

In *Mathews*, the Supreme Court set forth the authoritative test to evaluate whether "administrative procedures . . . are constitutionally sufficient," balancing

the individual's private interest, the risk of erroneous deprivation of that interest and the value of additional safeguards, and the government's interest. *Mathews*, 424 U.S. at 334. The Supreme Court has repeatedly confirmed that the *Mathews* test is the "ordinary mechanism" for evaluating procedural due process challenges to immigration and other detention. *Hamdi*, 542 U.S. at 528 (applying *Mathews* to determine whether a detained enemy combatant was entitled to an evidentiary hearing before a neutral decisionmaker to contest his detention); *Landon v. Plasencia*, 459 U.S. 21, 34–37 (1982) (applying *Mathews* to determine whether a noncitizen was denied due process at her exclusion hearing); *Addington v. Texas*, 441 U.S. 418, 425–33 (1979) (applying *Mathews* to determine the adequacy of procedural safeguards for individuals subject to civil commitment).[3]

This Court's recent decision in *Velasco Lopez* illustrates how the *Mathews* three-factor framework applies to compel a finding that prolonged immigration detention violates procedural due process. *See Velasco Lopez*, 978 F.3d at 851–55. In that case, Mr. Velasco Lopez was subject to the government's discretionary

[3] Courts regularly apply *Mathews* to assess the constitutionality of prolonged immigration detention. *See, e.g.*, *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27–28 (1st Cir. 2021) (applying *Mathews* to conclude that DHS bears the burden of proof at bond hearings under § 1226(a)); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 225 (3d Cir. 2018) (applying *Mathews* to determine whether noncitizens ordered removed are entitled to bond hearings after six months of detention); *Diouf v. Napolitano*, 634 F.3d 1081, 1090–91 (9th Cir. 2011) (same); *Reid v. Donelan*, 17 F.4th 1, 15–22 (1st Cir. 2021) (Lipez, J., dissenting) (concluding that, under *Mathews*, § 1226(c) detainees are entitled to a bond hearing within six months).

authority to detain noncitizens under 8 U.S.C. § 1226(a) for fifteen months. *Id.* at 851. He had two custody hearings in his first eight months in detention and was denied bond in both instances because he could not meet his burden of demonstrating that he was neither a flight risk nor a danger. *Id.* at 847. After six additional months of detention, Mr. Velasco Lopez filed a habeas petition arguing that his continued detention without a bond hearing at which the government bore the burden of proving he is not a flight risk or danger violated procedural due process. *See id.* at 847–48. Applying *Mathews*, the Court found that Mr. Velasco Lopez's deprivation of liberty was "substantial," his inability to prove he posed no risks at a bond hearing "markedly increased the risk of error," and the government has no "interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight." *Id.* at 851–52, 854. Balancing the factors, the Court concluded "that Velasco Lopez's prolonged incarceration . . . violated due process" and affirmed the district court's grant of a bond hearing at which the government bore the burden of proof by clear and convincing evidence. *Id.* at 855.

While the instant case concerns a different detention authority, *Mathews* similarly governs Mr. Hodge's procedural due process claims and compels the conclusion that his prolonged detention pursuant to § 1226(c) without a bond hearing violates his procedural due process rights. *See infra* Sections II.B, II.C. As in *Velasco Lopez*, Mr. Hodge's challenge is "not to his initial detention but to the

procedures"—or lack thereof—that have resulted in his prolonged detention. 978 F.3d at 850. And "'as the period of . . . confinement grows,' so do the required procedural protections" under the Due Process Cause. *Id.* at 853 (quoting *Zadvydas*, 533 U.S. at 701). Mr. Hodge must similarly be provided an individualized bond hearing for his detention to comport with due process.

The district court correctly acknowledged that *Mathews* provides the appropriate test "[t]o determine the safeguards necessary to ensure that a petitioner receives 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" ECF 18 at 12 (quoting *Mathews*, 424 U.S. at 333). Notwithstanding, the district court erroneously ignored the *Mathews* framework, relying instead on the untenable determination that, as a threshold matter, noncitizens detained by the government are not deprived of their liberty. *Id.* at 25. The district court then summarily opined, without explanation, that "even if some governmental deprivation" existed, the "corresponding process . . . is the amount provided for by Congress." *Id.* at 26.

These two conjured claims have no basis in Supreme Court or this Court's precedent. First, the notion that no government deprivation exists directly contravenes Supreme Court precedent, which clearly establishes that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," *Jones v. United States*, 463 U.S. 354, 361 (1983), and that at

some point, the Due Process Clause entitles a noncitizen in "continued detention" to "an individualized determination," *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). It also contradicts this Court's recognition that immigration detention implicates "the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851. By being imprisoned without any process, Mr. Hodge has certainly suffered government deprivation.

Second, as discussed below, proper application of the *Mathews* factors dictates that Mr. Hodge must be provided a bond hearing for his continued detention to comport with due process either as a categorical matter after six months, *see infra* Section II.B, or as applied to Mr. Hodge's individual circumstances, *see infra* Section II.C.

B. Procedural Due Process Requires that Noncitizens in Prolonged Mandatory Detention Receive an Individualized Bond Hearing after Six Months.

To determine what procedural safeguards are required, the *Mathews* test requires courts to balance: 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. As the Supreme

Court has explained, the *Mathews* test properly considers the demands of due process "as applied to the generality of cases." *Id.* at 344.

Applied to the generality of cases, each *Mathews* factor tips in favor of noncitizens, and thus prolonged mandatory detention without an individualized bond hearing after six months violates procedural due process.

1. The Private Interest in Liberty from Imprisonment Weighs Heavily in Favor of Noncitizens in Prolonged Detention.

The private interests at issue in prolonged mandatory detention include "the most elemental of liberty interests—the interest in being free from physical detention," *Hamdi*, 542 U.S. at 529 (citing *Foucha*, 504 U.S. at 80), and the right to be meaningfully heard in immigration court. These private interests weigh heavily in favor of the noncitizen.

The Supreme Court has repeatedly emphasized that "[f]reedom from imprisonment . . . lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citation omitted). As such, the length of that imprisonment weighs heavily on the private interest, and only brief periods of immigration detention comport with due process. *See Velasco Lopez*, 978 F.3d at 852 ("The longer the duration of incarceration, the greater the deprivation. Where the Supreme Court has upheld detention . . . it has been careful to emphasize the importance of the relatively short duration of detention."); *cf. Salerno*, 481 U.S. at 747 (finding that pretrial detention comports with due process because individuals

are "entitled to a prompt detention hearing . . . and the maximum length of pretrial detention is limited by . . . stringent time limitations" (citation omitted)). Detention that exceeds that brief constitutional period inflicts significant harm on noncitizens, impedes their ability to pursue immigration relief, and effectively punishes individuals with meritorious claims for relief.

The conditions of imprisonment in immigration detention exacerbate the liberty deprivation. Although the Supreme Court has noted that immigration detention is civil and non-punitive in nature, *Zadvydas*, 533 U.S. at 690, this Court and others have noted that noncitizens are "incarcerated under conditions indistinguishable from those imposed on criminal defendants," *Velasco Lopez*, 978 F.3d at 850. Many noncitizens are in fact detained in criminal jails or suffer conditions akin to criminal incarceration. *See Vazquez Perez v. Decker*, 18-cv-10683 (AJN), 2020 WL 7028637, at *10 (S.D.N.Y. 2020). For example, BFDF, where Mr. Hodge has been detained for over thirty months, has a documented history of abuse, denying individuals necessary medical treatment and verbally abusing individuals with marginalized identities. *See* Physicians for Hum. Rts. ("PHR"), *"Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention* 26, 31 (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf. At some point, subjecting a noncitizen to prolonged detention in those conditions

without any process ceases being "nonpunitive in purpose and effect." *Zadvydas*, 533 U.S. at 690.

Prolonged detention in such conditions inflicts profound physical, psychological, and economic harms on individuals. *See Lora*, 804 F.3d at 614, 616 n.23 (noting examples of "the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous"). Prolonged detention has "severe and chronic . . . consequences for detainee psychological and physical health." PHR, *Punishment Before Justice: Indefinite Detention in the U.S.* 10 (2011), https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf. The consequences of detention are even more severe given ICE's rampant use of solitary confinement. Between 2018 and 2023, ICE subjected more than 14,000 immigrants to solitary confinement for an average length of one month to over two years in some cases. *See* PHR, *"Endless Nightmare," supra*, at 5. Many of these individuals had preexisting mental health conditions and other vulnerabilities, which solitary confinement exacerbated. *Id.* Detention also impacts the families of those detained, who may depend on the detained individual and struggle to afford food and housing in their absence. *See* Caitlin Patler, UCLA Inst. for Rsch. on Lab. and Emp., *The Economic Impacts of Long-Term Immigration Detention in Southern California* 3–4 (2015), https://irle.ucla.edu/old/publications/documents/CaitlinPatlerReport_Full.pdf.

Prolonged detention further deprives a noncitizen of their right to be meaningfully heard in their underlying removal proceedings. They are significantly less likely to obtain representation than those who are not detained. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 16, 32 (2015) (finding that 37% of noncitizens, and only 14% of detained noncitizens, were represented by counsel). Without representation, the chances of securing immigration relief are exceedingly slim. *See id.* at 50 fig. 14 (noting that only 2% of detained immigrants granted relief in immigration court from 2007 to 2012 were unrepresented); *Hernandez-Lara*, 10 F.4th at 30; Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 Law & Soc'y Rev. 117, 119 (2016) (finding that represented individuals are 3.5 times more likely to be granted bond than pro se individuals). Even where an individual is represented, detention impedes meaningful access to their counsel and their ability to gather evidence on their own behalf. *See Hernandez Lara v. Barr*, 962 F.3d 45, 55 (1st Cir. 2020) ("Detainees' access to phone calls and visits is generally limited."); *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (explaining that detained noncitizens "have little ability to collect evidence" in their own defense).

As a result of these conditions of confinement, prolonged mandatory detention effectively punishes noncitizens with meritorious claims for exercising their legal rights and may cause them to abandon those claims altogether. *See* Nat'l

Immigr. Law Ctr., *Blazing A Trail: The Fight for Right to Counsel in Detention and Beyond* 3–7 (2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf (detailing numerous barriers that restrict detained people's access to legal representation and resources, forcing many to abandon potentially meritorious claims for relief). Noncitizens may be discouraged from appealing errors by immigration adjudicators, which, as Mr. Hodge's case demonstrates, are not uncommon. Indeed, in some cases the BIA and circuit courts remand multiple times due to repeated immigration adjudicator error—all the while, the individual remains detained. *See, e.g.*, *Rad v. Att'y Gen. U.S.*, 983 F.3d 651, 669–70 (3d Cir. 2020) (emphasizing that it had already remanded to the BIA twice before and was loathe to "give it a third bite at th[e] apple"). This punishment is especially cruel in the case of a noncitizen who, like Mr. Hodge, has a claim for asylum, withholding of removal, or CAT protection, where deportation risks physical harm, torture, or death. *See* ECF 8 ¶ 31.

The district court would have no problem imposing such draconian measures. According to the court, detained noncitizens "exercise control over the length of detention, by retaining the ability to consent to release to their native countries pending removal proceedings—thereby holding the 'keys' to their own release." ECF 18 at 19. But "[t]his argument is a bit like telling detainees that they can help themselves by jumping from the frying pan into the fire." *Hernandez-*

Lara, 10 F.4th at 29. "Deportation is a 'drastic measure'" with especially serious consequences for noncitizens seeking persecution-based relief. *Id.* (quoting *Sessions v. Dimaya*, 584 U.S. 148, 157 (2018)). For these individuals, any so-called "escape from detention" may well "be death." *Id.* The district court's approach would effectively vitiate noncitizens' right to be meaningfully heard and apply for immigration relief that they are "statutorily permitted" to seek. *Hechavarria*, 891 F.3d at 56 n.6. It further contravenes the "strong presumption in favor of judicial review of administrative action" that the Supreme Court has long recognized. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Such an approach is an impermissible "departure from historical practice in immigration law." *Id.* at 305.

Because prolonged detention without a bond hearing imposes a "substantial" deprivation of a noncitizen's liberty, physical and psychological well-being, and legal rights, *Velasco Lopez*, 978 F.3d at 851, the first *Mathews* factor cuts sharply in the noncitizen's favor.

2. The Risk of Erroneous Deprivation of Liberty Is Severe and the Value of a Bond Hearing Is High When Detention Becomes Prolonged.

The second *Mathews* factor considers "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." 424 U.S. at 335. "At this stage in the *Mathews* calculus, the primary interest is not that of the Government

but the interest of the detained individual." *Velasco Lopez*, 978 F.3d at 852 (citing *Hamdi*, 542 U.S. at 530). Here, the risk that individuals subject to prolonged mandatory detention without *any* process are erroneously deprived of liberty is high: § 1226(c)'s presumption ensnares individuals who have lesser convictions or no convictions at all, as well as those who have meritorious claims for relief. An individualized hearing would effectively mitigate that risk.

Through § 1226(c), Congress required the government to detain individuals it presumed to be a danger to the community. But by operation of how convictions are defined and characterized under immigration law—which is often at odds with criminal law—§ 1226(c) deprives the liberty of individuals who are not dangerous by any stretch. Indeed, given the breadth of the conviction definition set forth at 8 U.S.C. § 1101(a)(48)(A), individuals who do not have *any* convictions for criminal law purposes may trigger mandatory detention. For example, an individual who receives certain deferred adjudications—which are not convictions for criminal law purposes—would still be deemed to be convicted for immigration purposes and thus subject to mandatory detention. *See Centurion v. Holder*, 755 F.3d 115, 119 (2d Cir. 2014). Similarly, a noncitizen who is not convicted of any crime but merely *admits* to having committed a crime, such as possessing over thirty grams of marijuana, may be deemed convicted for immigration purposes. 8 U.S.C. § 1182(a)(2)(A). The same is true for someone who has never been convicted of

any crime but whom the government determines is or has been "a drug abuser or addict." 8 U.S.C. § 1227(a)(2)(B)(ii). Even a conviction that has been vacated may still constitute a conviction for immigration purposes and thus trigger mandatory detention. *See, e.g.*, *Saleh v. Gonzales*, 495 F.3d 17, 25 (2d Cir. 2007). Thus, a noncitizen with no criminal convictions may nonetheless be subjected to mandatory detention.

Similar unintended consequences arise from the analysis adjudicators use to determine the immigration consequences of a conviction: individuals convicted of lesser crimes, including misdemeanors, may be subjected to mandatory detention.[4] For example, an individual sentenced to one year for a misdemeanor shoplifting offense may be deemed to be convicted of an aggravated felony and thus subject to mandatory detention. *See United States v. Pacheco*, 225 F.3d 148, 150, 155 (2d Cir. 2000). A noncitizen convicted of twice jumping a New York City subway turnstile may be subject to mandatory detention for committing two crimes of moral turpitude. *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997), *aff'd in part, dismissed in part sub nom. Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998). And someone who was never criminally incarcerated may be subject to mandatory

[4] Courts apply the so-called categorical approach to determine whether a conviction constitutes a category of crime—for example, an aggravated felony or a crime involving moral turpitude—that triggers mandatory detention. *See Moncrieffe*, 569 U.S. at 190. This approach involves comparing the elements of the offenses without looking to the facts or nature of the offense. *Id.*

detention. *See, e.g.*, *Jackson C. v. Dept. of ICE*, No. 22-CV-116-JFH-GLJ, 2023 WL 4108178, at *1–3 (E.D. Okla. June 21, 2023).

The Supreme Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 691. Although § 1226(c)'s presumption of dangerousness may be sufficient to justify *brief* initial detention without a bond hearing, the risk of erroneous deprivation is far too great to justify *prolonged* detention after six months. *Cf. Salerno*, 481 U.S. at 747 (upholding brief pretrial detention without a bond hearing in part because it "carefully limits the circumstances under which detention may be sought to the most serious of crimes").

The risk of erroneous deprivation is further elevated because many noncitizens detained after six months do not pose a flight risk. Many noncitizens in prolonged immigration detention are precisely those pursuing meritorious claims. *See, e.g.*, *Lora*, 804 F.3d at 616 (emphasizing that "Lora is an excellent candidate for cancellation of removal"). For Mr. Hodge and others, proceedings are prolonged as the result of successful appeals in meritorious claims for relief, making them less likely to abscond. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 544 (2021) ("[Noncitizens] who have not been ordered removed are less likely to abscond because they have a chance of being found admissible."); ECF 13-1 at 1,

3. Moreover, many noncitizens, like Mr. Hodge, have family and community ties to the United States they have no interest in abandoning. *See Lora*, 804 F.3d at 616 n.23 (noting many individuals in mandatory detention "are parents and primary caregivers of U.S. citizen children"); ECF 12-2 at 30.

To the extent the district court relies on the criminal justice system and *Matter of Joseph* hearings to provide sufficient "process" to satisfy due process, ECF 18 at 17, such claimed safeguards "are, in fact, illusory," *Vazquez Perez*, 2020 WL 7028637, at *12. To begin, the criminal justice system does not provide sufficient process to safeguard the risk of erroneous deprivation. Indeed, as discussed *supra*, even individuals who do not have a criminal conviction or have been exonerated may still be subject to mandatory detention.

Moreover, while *Joseph* hearings permit noncitizens detained pursuant to § 1226(c) to challenge whether they are properly subject to mandatory detention, such hearings are "no response to this deficiency." *Demore*, 538 U.S. at 556 n.12 (Souter, J., dissenting). *Joseph* hearings do not consider whether an individual is a danger or flight risk, the only two justifications for immigration detention. Rather, they consider only whether the noncitizen has a conviction that triggers mandatory detention. *See* 8 C.F.R. § 3.19(h)(2)(i) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999). Moreover, as courts have opined, the noncitizen's burden in a *Joseph* hearing "is a heavy one" and creates an effectively "irrebuttable"

presumption that they are subject to mandatory detention. *Gayle v. Warden Monmouth Cnty. Correctional Instn.*, 12 F.4th 321, 330, 333 (3d Cir. 2021). To succeed, the IJ must "be convinced that the [government] is substantially unlikely to prevail on its charge." *Joseph*, 22 I. & N. Dec. at 807. In practice, a noncitizen will only succeed if they present "precedent caselaw directly on point that mandates a finding that the charge of removability will not be sustained." *Gayle*, 12 F.4th at 330. Thus, *Joseph* hearings fail to provide noncitizens the necessary opportunity to contest whether they are a flight risk or danger, and in any event establish such a high burden that they are, in effect, hearings in name only.[5]

Given that individuals subject to prolonged mandatory detention are afforded no procedural rights, the "probable value" of a "procedural safeguard[]" in the form of an individualized bond hearing where the government bears the burden of proof by clear and convincing evidence is high. *Mathews*, 424 U.S. at 335; *see infra* Part IV. This Court's decision in *Lora* amply demonstrates the value of such bond hearings to prevent erroneous deprivations of liberty. In the year following *Lora*, 158 immigrants subjected to § 1226(c) detention received a bond

[5] Habeas petitions are also an insufficient remedy as courts have interpreted 8 U.S.C. § 1252(b)(9) as barring federal courts from reviewing whether a conviction properly triggers mandatory detention. *See, e.g.*, *Alphonse v. Moniz*, No. CV 21-11844-FDS, 2022 WL 279638, at *5 (D. Mass. Jan. 31, 2022); *Aguayo v. Martinez*, No. 1:20-cv-00825-DDD-KMT, 2020 WL 2395638, at *4–5 (D. Colo. May 12, 2020).

hearing after six months as required under *Lora*. *See* Vera Inst. Of Just., *Analysis of Lora Bond Data: New York Immigrant Family Unity Project* 1 (2016), https://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf. Those immigrants were detained for an average of 320 days. *Id.* Of those individuals, 62% were released—in other words, in one year, 98 immigrants erroneously suffered prolonged detention in this Circuit where the government had no justifiable basis for their detention. *Id.*

In short, § 1226(c) authorizes detention of noncitizens who are "neither a flight risk nor a danger to the community but [are] unable to prove that [is] the case." *Velasco Lopez*, 978 F.3d at 853. When mandatory detention becomes prolonged, an individualized bond hearing is a necessary safeguard against this erroneous deprivation of liberty.

3. The Government's Interests Are Not Served by Prolonged Detention Without a Bond Hearing.

"In striking the appropriate due process balance the final factor to be assessed is the public interest," including "the administrative burden and other societal costs that would be associated with" providing process. *Mathews*, 424 U.S. at 347. The Supreme Court has recognized two legitimate government interests served by detention: preventing flight risk and danger to the community. *See Zadvydas*, 533 U.S. at 690. Only in these "special and 'narrow' nonpunitive 'circumstances'" may the government hold noncitizens in immigration detention.

Id. (quoting *Foucha*, 504 U.S. at 80).

When detention becomes prolonged, neither of the government's interests in detaining noncitizens are served by continued detention without a bond hearing. As to flight risk, Mr. Hodge's case demonstrates that many who are subject to prolonged detention are precisely those who have meritorious claims to relief and thus are unlikely to abscond. *See* Section II.B.2; *Hernandez-Lara*, 10 F.4th at 34 (noting "the strength of a removal defense as a factor in evaluating flight risk"). Moreover, § 1226(c)'s broad reach undermines the government's interest in preventing danger to the community. Section 1226(c) requires detention without a bond hearing of a large class of noncitizens, including those convicted of lesser nonviolent offenses, those who have spent little to no time in jail, and those who have not been convicted of anything at all.[6] *See supra* Section II.B.2. Moreover, the growing use and efficacy of ATDs further undermine the government's interests. ICE reports that through the end of July 2022, "more than 350,000 participated in the ATD program with absconder rates dropping dramatically." *See* ICE ATDs, *supra*. ICE reported that in Fiscal Year 2023, the use of ATDs resulted in an attendance rate of 99.1% and 93.6% for total hearings and all final hearings,

[6] The government's interest in preventing danger is further undermined by its ability to prevent recidivism risk through the criminal system, "the normal means of dealing with persistent criminal conduct." *Foucha*, 504 U.S. at 82.

respectively.[7] Thus, as this Court previously opined, mandatory detention sweeps broadly to "include[] non-citizens 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." *Lora*, 804 F.3d at 605. Their continued, prolonged detention serves no government interest.

Further, the "administrative burden" of providing § 1226(c) bond hearings is low. *Mathews*, 424 U.S. at 347. While providing such hearings may carry some administrative costs, IJs are more than capable of scheduling and administering bond hearings—they do so regularly in the § 1226(a) context. And because bond hearings help move people who should not be detained or are eligible for ATDs out of detention, they would *reduce* the government's overall burden by avoiding costly and unnecessary detention. *See* ICE ATDs, *supra* ("The daily cost per ATD participant is less than $8 per day—a stark contrast from the cost of detention, which is around $150 per day.")

By contrast, the social costs of incarcerating individuals who should not be detained are "substantial." *Hernandez-Lara*, 10 F.4th at 33. Prolonged mandatory detention "separates families and removes from the community breadwinners,

---

[7] U.S. Immigr. & Customs Enf't, *ICE Detention Statistics*, https://www.ice.gov/doclib/detention/FY23_detentionStats.xlsx (last visited Apr. 16, 2024) (follow "ATD EOFY23" sheet; then see tables titled "FY23 Year End Court Appearance: Total Hearings*" and "FY23 Year End Court Appearance: Final Hearings*").

caregivers, parents, siblings and employees." *Velasco Lopez*, 978 F.3d at 855; *see also Hernandez-Lara*, 10 F.4th at 33 ("[N]oncitizens subject to immigration detention include spouses, children, and parents of U.S. citizens, caretakers of children and elderly relatives, and leaders in religious, cultural, and social groups.'"). Such "unnecessary" separation harms the social order in ways that are both "intangible"—by "rupture[ing] . . . the fabric of communal life"—and tangible—causing states to lose revenue because detained individuals cannot work or pay taxes and increasing state social welfare expenses for the families of those detained. *Hernandez-Lara*, 10 F.4th at 33.

Thus, the public interest is harmed, not served, by prolonged detention without a bond hearing.

4. Balancing the *Mathews* Factors Dictates that Noncitizens in Mandatory Detention Must Be Provided a Bond Hearing Within Six Months.

Balancing the *Mathews* factors, the private interest in liberty from imprisonment and a meaningful opportunity to be heard in immigration court is "commanding," the risk of erroneous prolonged detention without a bond hearing is high, and any countervailing governmental interests are "slight." *See Hernandez-Lara*, 10 F.4th at 35 (quoting *Santosky v. Kramer*, 455 U.S. 745, 758 (1982)). Thus, additional process is needed for prolonged mandatory detention to comport with due process. Where, as here, the private interest in liberty weighs heavily once

detention is prolonged, this Court can and should, as it did in *Lora*, remedy the due process violation by adopting a bright-line rule applying the same procedural protection in every case: an individualized bond hearing within six months.

Mathews compels that this Court establish a bright-line rule for § 1226(c) detention. While *Mathews* recognized that due process is "flexible," the Supreme Court made clear that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases." *Mathews*, 424 U.S. at 334, 344 (citation omitted). Because every instance of prolonged detention without a bond hearing implicates serious liberty interests, a grave risk of erroneous deprivation resulting from no procedural protections, and a slight government burden, the Court should adopt a general rule crafted to ensure the procedural demands of the Due Process Clause are followed in all cases.[8] Indeed, courts have applied *Mathews* to craft temporal limits in other immigration detention contexts. *See, e.g.*, *Saravia v. Sessions*, 905 F.3d 1137, 1143–44 (9th Cir. 2018) (applying *Mathews* to establish noncitizen minors' due process right to a hearing within seven days of re-detention); *Vazquez Perez*, 2020 WL 7028637, at *15 (applying *Mathews* and finding noncitizens must receive custody hearing

[8] Moreover, a bright-line rule is more administrable and just than the alternative case-by-case approach. A case-by-case approach where each individual must file a habeas petition may foreclose many pro se individuals from vindicating their procedural due process rights. *See* Eagly & Shafer, *supra*, at 30 (reporting that only 14% of individual who sought relief did so without counsel).

within ten days of detention).

As this Court in *Lora* recognized, the temporal limit to mandatory detention without a bond hearing lies at six months. 804 F.3d at 606.[9] In arriving at this constitutional boundary, this Court looked to *Zadvydas*, where the Supreme Court found a presumptive limit of constitutionality to post-removal detention at six months. *Id.* Most recently, in *Velasco Lopez*, this Court noted that *Demore* understood the brief detention that it authorized to be "roughly a month and a half in 85% of cases, and an average of four months in the minority of cases." *Velasco Lopez*, 978 F.3d at 852.

Other courts and Congress have recognized six months as a constitutional boundary in the immigration context and beyond. *See supra* Part I (listing cases interpreting § 1226(c) to include a temporal limit at six months that remain persuasive despite *Jennings*); 8 U.S.C. § 1226a(a)(7) (requiring automatic review every six months of security threat certifications to justify continued detention); 8 U.S.C. § 1537(b)(2)(C) (requiring the Attorney General to provide a written report

[9] Although *Lora* was based on constitutional avoidance principles, this Court arguably reached the constitutional question: "Lora also . . . argues to this Court that his indefinite detention without being afforded a bond hearing would violate his right to due process. We agree." *Lora*, 804 F.3d at 613. Thus, the Court may arguably be bound by *Lora*'s constitutional holding. *See, e.g.*, *German Santos*, 965 F.3d at 210 (holding that "*Jennings* . . . did not touch the constitutional analysis that led *Diop* and *Chavez-Alvarez* to their reading," and thus the court was bound by the constitutional analysis in those cases).

of his efforts to remove detained noncitizen every six months); *see also Muniz v. Hoffman*, 422 U.S. 454, 475 (1975) (collecting cases); *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970) (requiring jury trial for sentences in excess of six months); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (limiting court-imposed sentences for contempt without jury trial to six months).

Accordingly, the Court should reaffirm its holding that "mandatory detention for longer than six months without a bond hearing affronts due process." *Lora*, 804 F.3d at 606. Because Mr. Hodge has been detained for over thirty months without an individualized hearing, the government must provide him a bond hearing to continue his detention.

C. As Applied to Mr. Hodge's Thirty-Month Detention, Procedural Due Process Requires that He Receive an Individualized Bond Hearing.

Even if the Court declines to adopt a categorical rule as it did in *Lora*, Mr. Hodge's over-thirty-month detention without a bond hearing violates his procedural due process rights "[o]n any calculus." *Velasco Lopez*, 978 F.3d at 855 n.13. On balance, the *Mathews* factors as applied to Mr. Hodge's prolonged detention weigh heavily in favor of providing him an individualized bond hearing.

As to the first *Mathews* factor, the extreme length, poor conditions, and harmful effects of Mr. Hodge's over thirty months of detention weigh heavily in favor of his liberty interest. At the time of the district court's denial, Mr. Hodge had

been detained for twenty-three months since October 2021—a length even the district court acknowledged as "significant." ECF 18 at 25; *see* ECF 8 ¶ 2. At thirty months to date, Mr. Hodge's detention is five times longer than the six months that was considered "somewhat longer than the average" in *Demore* and nearly twenty times longer than the month-and-a-half period central to the *Demore* holding, *Demore*, 538 U.S. at 530–31; double the fifteen months that this Court found to be a "substantial" deprivation of liberty in *Velasco Lopez*, 978 F.3d at 851; and, critically, nearly three times longer than the length of time he spent in criminal incarceration, ECF 8 ¶ 39. "The longer the duration of incarceration, the greater the deprivation"—and here, the deprivation is severe. *Velasco Lopez*, 978 F.3d at 852.

The conditions of Mr. Hodge immigration detention are "indistinguishable from"—and indeed worse than—what he experienced in criminal custody. *Id.* at 850; ECF 13-2 ¶ 10. Mr. Hodge is subjected to BFDF's lock-in policy, during which individuals are confined to their cells for long periods of time without access to external bathrooms, showers, television, the commissary, or tablets which detainees use to file grievance requests, send requests to ICE officers, and speak with their family and attorneys. ECF 13-2 ¶¶ 6–8; ECF 8 ¶ 39. To avoid being held in this effective-solitary confinement, Mr. Hodge must work in detention, but he is only paid $1 per day—which is not even enough for a fifteen-minute video call with his family, which costs $3.50. ECF 13-2 ¶ 8. Even when Mr. Hodge is out of

his cell, he still has only limited communications access as he must share fourteen tablets with the seventy-five to eighty people in his unit. *Id.* ¶ 7. Thus, like Mr. Velasco Lopez, Mr. Hodge is "locked up in jail," "[can]not maintain employment or see his family or friends or others outside normal visiting hours," and his access to communications mediums are restricted. *Velasco Lopez*, 978 F.3d at 851–52.

The impact of these prolonged and severe conditions of confinement on Mr. Hodge have been pronounced. A medical expert concluded that Mr. Hodge's "mental status has worsened during" his detention. ECF 11-2 at 9. Mr. Hodge suffers from mental health conditions and struggles with substance use, for which he requires medication and a treatment plan. ECF 8 ¶ 27; ECF 13-1 at 2. But, despite repeated requests, Mr. Hodge has not received the medication that he needs at BFDF, and he has only been able to meet with a mental health professional three times for a total of forty-five minutes. ECF 8 ¶ 38; ECF 13-2 ¶ 3. As a result, Mr. Hodge has filed a complaint with CRCL, which remains pending. ECF 13-2 ¶ 3.[10]

Mr. Hodge's detention has been prolonged as a result of the COVID-19 pandemic and two meritorious appeals to the BIA to remedy the IJ's repeated errors—facts which the government does not dispute and which the district court

[10] BFDF has been the subject of at least five recent complaint investigations by CRCL. Summary of CRCL's Recommendations and ICE's Response: BFDF, Office for C.R. & C.L., U.S. Dep't of Homeland Sec., (Feb. 8, 2024), https://www.dhs.gov/sites/default/files/2024-03/24_0208_crcl_buffalo-close-summary-508-final.pdf.

glossed over. ECF 8 ¶ 32–41; ECF 18 at 8–9. In his removal proceedings, Mr. Hodge seeks CAT protection because he fears persecution and imprisonment as a criminal deportee and due to his mental health if he were returned to the Dominican Republic. ECF 13-1 at 2; *see Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *11 (S.D.N.Y. May 23, 2018) (noting "it may be pertinent [to a reasonableness analysis] whether the [noncitizen] has asserted defenses to removal"); *Cabral v. Decker*, 331 F. Supp. 3d 255, 261–62 (S.D.N.Y. 2018) (holding any asserted defenses weigh in the petitioner's favor). Initially, Mr. Hodge's proceedings were delayed around two months because of COVID-19 restrictions at BFDF. ECF 8 ¶ 34. Even though the COVID-19 restrictions prevented Mr. Hodge from meeting with counsel, the IJ proceeded with his merits hearing and denied all applications for immigration relief. *Id.* On appeal, the BIA held that the IJ had impermissibly denied Mr. Hodge a meaningful opportunity to meet with his attorney to prepare his case and erred by failing to provide a competency hearing to determine whether safeguards were necessary in his case. ECF 8-2 at 4–5. The IJ again erroneously denied relief on remand. ECF 13-1 at 1. In Mr. Hodge's second appeal, the BIA found that the IJ erred by failing to consider the record as a whole and conduct necessary fact finding and legal analysis as to the likelihood that Mr. Hodge would be tortured if forced to return to the Dominican Republic. *Id.* at 3. Mr. Hodge remains detained as he awaits

adjudication of his case.

There is "no end in sight" to Mr. Hodge's detention. *Velasco Lopez*, 978 F.3d at 846; *see* ECF 18 at 25 (acknowledging that Mr. Hodge's removal proceedings "may continue for several more months"). Mr. Hodge intends to appeal any future errors if necessary, ECF 8 ¶ 40, which as previously seen can take months to adjudicate, *see* ECF 13-1 at 1. It is unconscionable to force Mr. Hodge to face unending detention in order to pursue his right to judicial review, especially when each successful appeal adds credibility to his claim for immigration relief. Without a mandated bond hearing, "it is impossible to say how long [Mr. Hodge's] incarceration [will] last[]." *Velasco Lopez*, 978 F.3d at 852.

Under the second *Mathews* factor, the risk that Mr. Hodge is being erroneously deprived of his liberty is high. Mr. Hodge has never had an individualized bond hearing to determine if he is, in fact, a flight risk or a danger to the community. In other words, in the over thirty months that Mr. Hodge has been detained, the government has never once had to justify his continued detention. Here, Mr. Hodge has lived in the United States for thirty-four years since 1990 when he arrived as an LPR and has three U.S. citizen daughters. ECF 8 ¶¶ 25–26. Mr. Hodge fears persecution if he were to return to the Dominican Republic and has demonstrated, through two successful appeals, that he has a meritorious claim to CAT protection, making him less likely to abscond. *See* ECF 13-1; *supra*

Section II.B.2. Moreover, Mr. Hodge has no history of violence; his past convictions have been nonviolent and drug offenses. *See* ECF 12-2 at 4, 31–32. He has never been subjected to any disciplinary proceeding during his over thirty months in detention. ECF 8 ¶ 5.

Finally, although brief detention without a hearing may be justified in furtherance of the government's interest in preventing flight risk and danger to the community, it strains credulity that the government would oppose a simple request: a bond hearing after over thirty months without one. *See Velasco Lopez*, 978 F.3d at 854 (explaining that government has no "interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight"). To date, however, the government has never provided any evidence to justify Mr. Hodge's prolonged detention, despite his significant ties to the United States, meritorious claim for relief, and lack of history of violence. Due process requires, at a minimum, that Mr. Hodge be provided an individualized bond hearing at which the government justifies his continued detention.

III. Alternatively, Mr. Hodge Is Entitled to a Bond Hearing Because His Prolonged Detention Has Become Unreasonable in Violation of Due Process.

While *Mathews* provides the proper framework for determining that Mr. Hodge's over-thirty-month detention without an individualized bond hearing violates due process, this Court may, in the alternative, reach the same conclusion

because his prolonged detention absent any justification from the government has become "unreasonable." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

Whether prolonged immigration detention has become unreasonable, and thus violative of due process, flows from the foundational premise that the government may not deprive any person of "liberty . . . without due process of law." U.S. Const. amend. V. It is a bedrock principle, in turn, that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80. In *Demore*, the Supreme Court held that Congress permissibly created a presumption through § 1226(c) that individuals with certain convictions are a flight risk and dangerous and thus their detention could be so justified for a *brief* period. *Demore*, 538 U.S. at 513. But that presumption cannot stand in perpetuity: as Justice Kennedy recognized, at a certain point, continued detention may become "unreasonable or unjustified." *Id.* at 532 (Kennedy, J., concurring); *see also Zadvydas*, 533 U.S. at 699 ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable."). At this constitutional tipping point, a noncitizen "could be entitled to an individualized determination as to his risk of flight and dangerousness." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

Courts since *Demore* have repeatedly affirmed this constitutional tipping point and consider a variety of factors to determine when detention becomes

unreasonable. *See, e.g.*, *German Santos*, 965 F.3d at 211. These factors include, inter alia, the length of detention, whether it exceeds the time spent in prison for the crime triggering removability, whether the detention is near conclusion, the party responsible for the delay, whether the petitioner has asserted defenses to removal, and whether the detention facility is meaningfully different from criminal incarceration. *Sajous*, 2018 WL 2357266, at *10–11. While courts differ in the factors they consider case-by-case,[11] courts generally agree that the "most important . . . factor that must be considered is the length of time the [noncitizen] has already been detained." *Id.* at *10.

Notwithstanding, the district court below adopted an unprecedented approach—which this Court should reject—that delays in proceedings cannot support a grant of habeas relief unless they are caused by the government. ECF 18 at 19–24. On the district court's view, an individual like Mr. Hodge who "avail[s] himself of all the 'process' available to him"—by exercising his right to appeal successfully such that the Board remanded his case due to the IJ's errors twice—causes delay in proceedings that cannot "bolster his due process claim." *Id.* at 25. But the district court's interpretation of due process is unsupportable and would

[11] *See, e.g.*, *Sajous v. Decker*, 2018 WL 2357266, at *10–11 (S.D.N.Y. May 23, 2018) (discussing five factors); *Hemans v. Searls*, No. 18-CV-1154, 2019 WL 955353, at *6 (W.D.N.Y. Feb. 27, 2019) (considering four factors); *German Santos*, 965 F.3d at 211 (considering four factors); *Ranchinskiy v. Barr*, 422 F. Supp. 3d 789, 797 (W.D.N.Y. 2019) (considering seven factors).

penalize noncitizens for pursuing the very "process" that Congress made available to them. *Id.* at 25. Courts, including this one, have repeatedly rejected such a penalty. *See, e.g.*, *Hechavarria*, 891 F.3d at 56 n.6 (noting that delay in immigration proceedings may not be held against a noncitizen who has "simply made use of the statutorily permitted appeals process"); *German Santos*, 965 F.3d at 212 (declining to hold the petitioner's appeals and applications for relief against him, as doing so "would 'effectively punish [the noncitizen] for pursuing applicable legal remedies'" (citing *Chavez-Alvarez*, 783 F.3d at 475)); *Ly*, 351 F.3d at 272 (explaining that a noncitizen "who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him"). Moreover, as courts have recognized, "detention under § 1226(c) can still grow unreasonable even if the Government handles the removal proceedings reasonably." *German Santos*, 965 F.3d at 211; *see Diop*, 656 F. 3rd at 223 ("[I]ndividual actions by various actors in the immigration system . . . can nevertheless result in the detention of a removable [noncitizen] for an unreasonable . . . period of time.").

Furthermore, the district court's reliance on *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) to support its conjured view is inapposite. ECF 18 at 19. In that case, Mr. Doherty had already received a bond hearing and argued that his mandatory detention violated substantive due process and entitled him to release—

not a bond hearing—despite findings that he was almost certain to abscond and had engaged in tactical delay. *Doherty*, 943 F.2d at 205–06, 208–11. Moreover, *Doherty* was decided well before the Supreme Court established limits to immigration detention in *Zadvydas* and *Demore*.[12]

Here, under any measure, Mr. Hodge's over-thirty-month detention under penal conditions without an individualized bond hearing has become unreasonable. The prolonged duration of his detention—which the district court below acknowledged, as it must, is "significant," ECF 18 at 25—"[s]train[s] any common-sense definition of a limited or brief civil detention," *Chavez-Alvarez*, 783 F.3d at 477. To date, Mr. Hodge has been detained in immigration custody for nearly three times the length that he served for his criminal sentence which formed the basis of his detention, *see* ECF 8 ¶ 28–29, and has suffered conditions that are indistinguishable from or worse than what he experienced in criminal custody, ECF 13-2 ¶ 10. Mr. Hodge is faced with what effectively amounts to solitary confinement through BFDF's lock-in policy for long periods at a time, during

[12] To the extent the district court concluded that Mr. "Hodge's due process claim also fails under the test proposed in Justice Kennedy's *Demore* concurrence" because the facts "do not support an inference that his detention was not arbitrary, unreasonable, or unjustified," the court fundamentally misunderstands Justice Kennedy's concurrence. ECF 18 at 26 n.16. Justice Kennedy did not create a distinct "test" for reasonableness, but rather identified that mandatory detention is subject to reasonableness limitations—a limit the district court itself acknowledged. *See id.* at 18 & n.12.

which he is prohibited from accessing important needs like calls to his family and attorney. *See supra* Section II.C. Moreover, Mr. Hodge suffers from mental health conditions, which have deteriorated during his detention. ECF 11-2 at 9. In over thirty months at BFDF, he has only had access to a mental health professional for a total of forty-five minutes, and the facility repeatedly fails to provide him the medication he needs. ECF 8 ¶ 38.

The prolonged length of detention in such penal conditions is largely a consequence of the IJ's repeated errors, including depriving him a meaningful opportunity to meet with his attorney, failing to evaluate his mental competency, and failing to conduct the requisite factual findings and legal analysis for CAT protection. *See supra* Section II.C. Mr. Hodge has twice had to appeal the IJ's erroneous denials, and the BIA has twice remanded the case—a process that has taken twenty-six months and counting from the IJ's first erroneous decision. *See* ECF 13-1; ECF 8 ¶ 34. In contrast, Mr. Hodge has requested minimal continuances—based on the unprecedented COVID-19 pandemic that was out of his control—that comprise only two of the over thirty months that he has been detained. ECF 8 ¶¶ 32–33; ECF 12-2 at 83–84. Moreover, it is almost certain that Mr. Hodge's detention will only grow longer as his case is again before the BIA. Mr. Hodge's good faith, successful efforts to challenge aspects of his removal process should not be used against him. *German Santos*, 965 F.3d at 211.

The facts of Mr. Hodge's case thus compel the conclusion that his detention has become unreasonable, and due process demands that he be provided an individualized bond hearing in order to justify his continued detention.

IV. The Bond Hearing Must Incorporate a Clear and Convincing Standard of Proof and Consider Alternatives to Detention and Mr. Hodge's Ability to Pay.

At Mr. Hodge's bond hearing, the government should bear the burden of proving by clear and convincing evidence that his continued detention is necessary because he is a flight risk or danger to the community. The adjudicator must also consider ATDs and Mr. Hodge's ability to pay in determining a monetary bond.

A. The Government Should Bear the Burden of Justifying Mr. Hodge's Continued Detention by Clear and Convincing Evidence.

"The function of a standard of proof," the Supreme Court has explained, "is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness" of the decision, so the standard "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423 (citation omitted). Given detention represents a serious deprivation of liberty to Mr. Hodge, the government must bear the burden of justifying Mr. Hodge's continued detention by clear and convincing evidence.

Longstanding Supreme Court precedent has held that when the government is seeking to deprive an individual of liberty, the government must bear the burden

of proof by clear and convincing evidence. *See id.* at 427, 433 (requiring a clear and convincing standard for civil commitment for mental illness); *Foucha*, 504 U.S. at 75–76 (affirming the same standard); *Salerno*, 481 U.S. at 751 (noting the same standard for pretrial detention).

Affirming this principle, this Court and others have held that the government bears the burden of justifying immigration detention by clear and convincing evidence. *See, e.g.*, *Velasco Lopez*, 978 F.3d at 856 (holding that the government bears the burden by clear and convincing evidence in § 1226(a) detention); *Lora*, 804 F.3d at 616 (holding the same for § 1226(c) detention); *German Santos*, 965 F.3d at 213 (same); *Hylton v. Decker*, 502 F. Supp. 3d 848, 855–56 (S.D.N.Y. 2020) (same); *Balogun v. Wolf*, No. 20-CV-6574-FPG, 2020 WL 13553495, at *7 (W.D.N.Y. Dec. 3, 2020) (same); *Rosario v. Decker*, No. 21 CIV. 4815 (AT), 2021 WL 3115749, at *5 (S.D.N.Y. July 20, 2021) (same); *Garcia v. Decker*, No. 22 CIV. 6273 (PGG), 2023 WL 3818464, at *7 (S.D.N.Y. June 5, 2023) (same); *Diaz v. Genalo*, No. 22CV3063VSBBCM, 2023 WL 5322180, at *10 (S.D.N.Y. July 6, 2023) (same); *Hernandez v. Decker*, 2018 WL 3579108, at *11 (same). In *Velasco Lopez*, this Court found that an immigrant detained for fifteen months pursuant to § 1226(a) was entitled to a bond hearing where the government bore the burden of proof by clear and convincing evidence. *Velasco Lopez*, 978 F.3d at 846. In so holding, the Court in *Velasco Lopez* explicitly rejected a preponderance of the

evidence standard, which would improperly "allocate the risk of error evenly between the individual and the Government," creating an increased risk of erroneously depriving individuals of liberty without clearly furthering the state's interests. *Id.* at 856.

Although *Velasco Lopez* involved discretionary detention, its reasoning for assigning the burden and standard to the government applies with equal force to mandatory detention. *See Hylton*, 502 F. Supp. 3d at 855 ("There is no reason to believe that the [*Velasco Lopez*] holding should be cabined to § 1226(a) . . . ."). This Court has previously squarely held as much. *See Lora*, 804 F.3d at 616. In *Lora*, the Court categorically held that in § 1226(c) detention bond hearings the government must establish that an immigrant poses a flight risk or danger to the community by clear and convincing evidence. *Id.* While *Jennings* vacated *Lora*, this Court's reasoning as to the government's burden of proof by clear and convincing evidence remains persuasive. *See Sajous*, 2018 WL 2357266, at *6–7 (citing *Brown*, 609 F.3d at 476–77, to find that *Lora* remains persuasive authority).

Indeed, due process norms direct the burden of proof to the government by clear and convincing evidence. *See, e.g.*, *German Santos*, 965 F.3d at 213 (applying *Mathews* to hold that the government bears the burden of proof); *Hernandez-Lara*, 10 F.4th at 27, 40 (same). On balance, the risk of losing one's "liberty, even temporarily," *German Santos*, 965 F.3d at 214, and the

"opportunities for prejudicial error [that] abound" in a bond proceeding, *Hernandez-Lara*, 10 F.4th at 31, outweigh any governmental interests. The *Mathews* scales decidedly weigh in favor of the government bearing the burden of proof by clear and convincing evidence.

Thus, Mr. Hodge is entitled to an individualized bond hearing at which the government must bear the burden of proof by clear and convincing evidence.

B. The Adjudicator Must Consider Alternatives to Detention and Mr. Hodge's Ability to Pay in Their Decision.

"[A]ny detention incidental to removal must 'bear[] [a] reasonable relation to [its] purpose.'" *Hernandez v. Sessions*, 872 F.3d at 990 (alterations in original) (quoting *Zadvydas*, 533 U.S. at 690). However, if the adjudicator in the bond hearing does not consider ATDs and Mr. Hodge's ability to pay, any continued detention will not reasonably relate to the government's legitimate interests in protecting the public and incentivizing respondents to appear at their next proceeding. *See id.* at 990–91.

The government's interests are not served by disregarding ability to pay or ATDs. *Id.* at 991; *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 334 (W.D.N.Y. 2018). Without considering an individual's financial resources, a monetary bond may likely deprive an individual of liberty solely based on their potential indigency. *Hernandez v. Sessions*, 872 F.3d at 992 (citing *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983)). Similarly, without considering ATDs, which are effective, *see id.*

at 991; *supra* Section II.B.3, "there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty," *Hernandez v. Sessions*, 872 F.3d at 993.

Within this Circuit, courts have repeatedly held that "[a] bond determination that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests."[13] *Hernandez v. Decker*, 2018 WL 3579108, at *12 (alteration in original) (quoting *Hernandez v. Sessions*, 872 F.3d at 991); *see, e.g.*, *Abdi*, 287 F. Supp. 3d at 338–39 (requiring consideration of ATDs and the ability to pay in an individualized bond hearing); *Rodriguez Sanchez v. Decker*, 431 F. Supp. 3d 310, 317 (S.D.N.Y. 2019) (same); *Doe v. Decker*, No. 21 Civ. 5257 (LGS), 2021 WL 5112624, at *4–5 (S.D.N.Y. Nov. 3, 2021) (same); *Villatoro v. Joyce*, No. 22 Civ. 6270 (AT), 2024 WL 68533, at *6 (S.D.N.Y. Jan. 5, 2024) (same).

Accordingly, in order to comport with the demands of the Due Process Clause, the adjudicator must consider ATDs and Mr. Hodge's ability to pay at his bond hearing.

---

[13] Courts have noted that "consideration of ability to pay and alternatives to detention appears to be compelled by BIA case law." *Hernandez v. Decker*, 2018 WL 3579108, at *12 (citing *Abdi*, 287 F. Supp. 3d at 338).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

Dated: April 16, 2024

/s/ Tiffany J. Lieu
Tiffany J. Lieu
Julio Q. Colby, *Supervised Law Student*
Shiv P. Pandya, *Supervised Law Student*
Crimmigration Clinic
Harvard Law School
6 Everett Street; Suite 3106
Cambridge, MA 02138
Phone: (617) 496-5497
Email: tlieu@law.harvard.edu

John H. Peng
Prisoners' Legal Services of New York
Karen Murtagh, Exec. Dir.
41 State St., Ste. M112
Albany, NY 12207
Phone: (518) 859-0060
Email: jpeng@plsny.org

Sarah T. Gillman, Esq.
Sarah E. Decker, Esq.
Robert F. Kennedy Human Rights
88 Pine Street, Suite 801
New York, NY 10005
Phone: (646) 289-5593
Email: gilman@rfkhumanrights.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules 32.1(a)(4)(A) because it contains 13,896 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f), which is fewer than the 14,000-word limit for principal briefs. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 16, 2024

/s/ Tiffany J. Lieu
Tiffany J. Lieu
Crimmigration Clinic
Harvard Law School
6 Everett Street; Suite 3106
Cambridge, MA 02138
Phone: (617) 496-5497
Email: tlieu@law.harvard.edu

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief and attached appendix with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system on April 16, 2024. I further certify that participants in the case are registered ACMS users will be served by the appellate ACMS system.

Dated: April 16, 2024

/s/ Tiffany J. Lieu
Tiffany J. Lieu
Crimmigration Clinic
Harvard Law School
6 Everett Street; Suite 3106
Cambridge, MA 02138
Phone: (617) 496-5497
Email: tlieu@law.harvard.edu

ADDENDUM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

OSVALDO HODGE,

Petitioner,

v. 23-CV-447 (JLS)

MERRICK GARLAND, in his official capacity as Attorney General, U.S. Department of Justice,

ALEJANDRO MAYORKAS, in his official capacity as Secretary, U.S. Department of Homeland Security,

THOMAS BROPHY, in his official capacity as Acting Field Office Director, Buffalo Field Office, U.S. Immigration and Customs Enforcement,

JEFFREY SEARLS, in his official capacity as Officer-in-Charge, Buffalo Federal Detention Facility,

Respondents.

DECISION AND ORDER

This case presents the question whether the Fifth Amendment's Due Process Clause is violated where the government, without any intentional delay, frivolous litigation, or arbitrary confinement, detains a criminal alien pursuant to the mandatory detention provision in 8 U.S.C. § 1226(c), for two years, while the alien actively litigates whether he may remain in the United States, thereby lengthening the duration of his detention—all while he retains the keys to his liberty if he were

to agree to removal to his native country. This issue goes to the core of congressional power over immigration issues and national sovereignty. Supreme Court and Second Circuit authority indicate no constitutional violation—and no right to a bond hearing—on these facts, where an alien seeks release into the United States for the duration of his removal proceedings.

For these reasons, and those that follow, the Court denies the relief requested and dismisses the petition.

BACKGROUND

I. Overview

Petitioner Osvaldo Hodge is a native and citizen of the Dominican Republic. He entered the United States in August 1990. Hodge has been detained at the Buffalo Federal Detention Facility pending removal proceedings for approximately twenty-five months. He petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Hodge currently is detained under 8 U.S.C. § 1226(c), which requires detention of aliens convicted of certain crimes pending removal proceedings and does not afford a hearing at which the alien may advocate for release. He argues that Section 1226(c), as applied to him, violates his Fifth Amendment procedural due process rights because it requires his continued detention, without a bond hearing, pending a final removal order.

Hodge seeks a conditional writ of habeas corpus "requiring Respondents to provide [him] with a constitutionally adequate, individualized hearing before an

impartial adjudicator at which Respondents bear the burden of establishing by clear and convincing evidence that [he] is a danger to the community or a flight risk" such that "no alternatives to detention could reasonably secure his future compliance with the orders of immigration officials." Dkt. 8, at 22 ¶ 2.[1] He also seeks an award of his costs and attorneys' fees pursuant to 28 U.S.C. § 2412. *Id.* at 22 ¶ 3.

II. Immigration History, Criminal History, and Detention[2]

In 1990, Hodge entered the United States in Puerto Rico as a lawful permanent resident. Dkt. 12, at 2 ¶ 3; Dkt. 12-1, at 2 ¶ 5. He has lived in the United States since that time, with the exception of one brief trip to the Dominican Republic in 1999 to visit family. Dkt. 8, at 6 ¶ 26.

A. First Set of Immigration Proceedings & Related Convictions

Hodge first was arrested in 1999 by the East Haven Police Department for selling a synthetic narcotic and was prosecuted in Connecticut Superior Court. Dkt. 12-1, at 2 ¶ 6; Dkt. 12-2, at 4. In February 2001, he was sentenced to six months in jail (execution suspended), with two years of probation, based on that arrest. Dkt. 12-2, at 4. On February 20, 2004, Hodge was issued a Notice to Appear for removal proceedings based on his 2001 controlled substances-related conviction, which made him removable under Section 212(a)(2)(C) of the Immigration and Nationality Act

[1] All page references are to the pagination automatically generated by CM/ECF, which appears in the header of each page.

[2] The parties' accounts of these events vary in detail but agree on the basic timeline set forth below.

("INA"). *Id.* at 6–8; Dkt. 12-1, at 2 ¶ 7. He was ordered detained pending removal proceedings and requested a redetermination of that decision by an immigration judge on the same date. Dkt. 12-2, at 9. In March 2004, the immigration judge concluded that the immigration court did not have jurisdiction over Hodge's custody redetermination request. *Id.* at 10; Dkt. 12-1, at 3 ¶ 9. Also in March 2004, Hodge additionally became removable under INA Section 212(a)(2)(A)(i)(II). Dkt. 12-1, at 3 ¶ 10; Dkt. 12-2, at 11.

Under circumstances that are unclear, at some point, Hodge was released from immigration detention. Dkt. 12, at 2 ¶ 7. In December 2004, he was arrested for criminal trespass, interference with an emergency call, and failure to appear, for which he was convicted and sentenced to one year of imprisonment (execution suspended), with a one-year conditional discharge. Dkt. 12-1, at 3 ¶ 11; Dkt. 12-2, at 4.

In May 2006, Hodge was arrested for cocaine possession. Dkt. 12-1, at 3 ¶ 12; Dkt. 12-2, at 2. He was convicted and sentenced to one year of imprisonment (execution suspended), with a one-year conditional discharge. Dkt. 12-1, at 3 ¶ 12; Dkt. 12-2, at 4, 12–13.

In January 2007, Hodge was arrested for burglary. Dkt. 12-1, at 3 ¶ 13; Dkt. 12-2, at 4, 14–15. In April 2007, he was arrested for failure to appear. Dkt. 12-1, at 3 ¶ 14; Dkt. 12-2, at 2, 4. He was convicted of both offenses and sentenced to three years of imprisonment (execution suspended), with three years of probation. Dkt. 12-2, at 4, 14.

Hodge then was arrested for heroin possession in April 2012. Dkt. 12-1, at 3 ¶ 15; Dkt. 12-2, at 4. He was sentenced to three years of imprisonment (execution suspended), with a two-year conditional discharge. Dkt. 12-1, at 3 ¶ 15; Dkt. 12-2, at 4, 17–18.

In September 2015, Hodge was encountered in Connecticut state court, identified, and informed that immigration authorities had a warrant to take him into immigration custody. Dkt. 12-1, at 4 ¶¶ 17, 18; Dkt. 12-2, at 20. He was taken to the Hartford Enforcement and Removal and Operations Office and received another Notice to Appear. Dkt. 12-1, at 4 ¶ 18. That Notice to Appear stated that Hodge was subject to removal under Section 237(a)(2)(B)(i) of the INA, based on his 2007 and 2012 convictions in Connecticut for possession of narcotics. Dkt. 12-2, at 23.[3] A September 14, 2015 Notice of Custody Determination stated that the Department of Homeland Security ("DHS") was detaining Hodge pending removal proceedings. *Id.* at 25. Hodge requested review of this custody determination by an immigration judge. *Id.*

On November 17, 2015, Immigration Judge Michael W. Straus denied Hodge's application for cancellation of removal for permanent residents and ordered him removed to the Dominican Republic. *Id.* at 38; *see also* Dkt. 12-1, at 4 ¶ 20. Hodge appealed both the September 2015 denial of bond and the November 2015 order of removal. Dkt. 12-1, at 4 ¶ 21; Dkt. 12-2, at 40–43. The appeal was

[3] These convictions appear to be based on Hodge's May 2006 arrest for cocaine possession and his April 2012 arrest for heroin possession. *See id.*

dismissed as untimely. Dkt. 12-1, at 5 ¶ 22. An immigration judge granted Hodge's request and released him on a $30,000 bond in February 2016.[4] Dkt. 12-2, at 45–46; *see also* Dkt. 12-1, at 5 ¶ 23.

The Board of Immigration Appeals ("BIA") set a briefing schedule on Hodge's appeal of his removal order. Dkt. 12-2, at 47. Hodge requested, and received, an extension of time to file his brief. *Id.* at 48. On December 23, 2016, the BIA remanded Hodge's record to the immigration judge for further proceedings, in part because DHS did not oppose the appeal or respond to Hodge's remand request and in part because of a claimed error in the immigration judge's conclusion regarding the nature of Hodge's burglary conviction. *Id.* at 49–50. On November 27, 2018, Immigration Judge Straus granted Hodge's application for cancellation of removal. *Id.* at 51–52; *see also* Dkt. 12-1, at 5 ¶ 27.

B. Current Immigration Proceedings & Related Conviction

In May 2019, the Drug Enforcement Administration arrested Hodge for criminal conduct related to heroin and cocaine trafficking. Dkt. 12-2, at 54. Hodge pled guilty to, and was convicted of, conspiracy to possess with intent to distribute, and to distribute, heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. *Id.* at 57. On October 1, 2020, he was sentenced to twelve months and one day of imprisonment, plus three years of supervised release. *Id.* at 57–58; *see also* Dkt. 12-1, at 5 ¶ 29.

[4] The order releasing Hodge on bond is dated September 23, 2015, Dkt. 12-2, at 45, but the bond is dated February 17, 2016, *id.* at 46.

A Warrant for Arrest of Alien, dated November 12, 2020, concluded that probable cause existed to believe that Hodge was removable from the United States. Dkt. 12-2, at 61. As a result, DHS issued an immigration detainer. *Id.* at 62. On August 17, 2021, DHS cancelled Hodge's immigration bond. *Id.* at 63–64.

Hodge received another Notice to Appear on September 10, 2021. *Id.* at 65–66; *see also* Dkt. 12-1, at 6 ¶ 33. This notice stated that Hodge was removable from the United States under Sections 237(a)(2)(B)(i) and (a)(2)(A)(iii) of the INA as a result of his federal conviction for conspiracy to possess with intent to distribute, and to distribute, heroin and cocaine. Dkt. 12-1, at 6 ¶ 33; Dkt. 12-2, at 65–68. A Notice of Custody Determination dated September 10, 2021 ordered Hodge detained. Dkt. 12-2, at 69. Hodge was taken into immigration custody the same date. Dkt. 12-1, at 6 ¶ 32. He asked an immigration judge to review his custody determination. Dkt. 12-2, at 69. Immigration Judge Robert Driscoll denied Hodge's custody redetermination request on September 28, 2021, because detention was mandatory based on Hodge's aggravated felony and controlled substances conviction, as well as because he was a drug user or addict. *Id.* at 70; *see also* Dkt. 12-1, at 7 ¶ 35.

Hodge's removal hearing was adjourned twice to accommodate his attorney. Dkt. 12-1, at 7 ¶¶ 35, 36. He appeared with his attorney for a removal hearing on October 12, 2021, and the hearing was rescheduled to October 19, 2021. *Id.* ¶ 37. On October 19, 2021, Hodge's attorney stated that Hodge planned to apply for asylum and, as a result, his hearing was rescheduled to November 9, 2021. *Id.* ¶ 38.

Hodge applied for asylum on November 2, 2021, and his removal hearing was adjourned again—this time to December 15, 2021—to allow for adjudication of his asylum application and the issue of removal. *Id.* ¶ 39.

Hodge moved to adjourn the December 15, 2021 hearing because he was under quarantine for COVID-19. *Id.* ¶¶ 41, 42. Hodge moved to adjourn the hearing again—this time from January 21, 2022—because he was under quarantine for COVID-19. *Id.* ¶ 43. The hearing ultimately occurred on January 28, 2022, and Immigration Judge Driscoll denied Hodge's applications for (1) asylum, (2) withholding of removal, (3) withholding under the Convention Against Torture ("CAT"), and (4) deferral under the CAT. *Id.* ¶ 44; *see also* Dkt. 12-2, at 72–84. Hodge appealed to the BIA, which remanded the matter to the immigration judge on September 6, 2022, for further proceedings. Dkt. 12-1, at 8 ¶¶ 45, 46.

An appearance scheduled for November 8, 2022 was rescheduled to December 12, 2022, for a competency hearing. *Id.* at 8 ¶ 47. On December 12, 2022, an immigration judge found Hodge competent to appear in his removal proceedings and rescheduled the matter for a hearing on January 5, 2023. *Id.* ¶ 48. The removal hearing began on January 5, 2023, and was continued to January 26, 2023, for additional testimony. *Id.* ¶ 49.

On February 2, 2023, Immigration Judge Driscoll ordered Hodge removed. *Id.* ¶ 49; *see also* Dkt. 12-2, at 88–97. Hodge appealed his removal order to the BIA on March 2, 2023. Dkt. 12-1, at 8 ¶ 51; Dkt. 12-2, at 87. On July 27, 2023, the BIA remanded the matter to the immigration judge, instructing him to "reassess

[Hodge]'s claim for protection under the CAT considering the record as a whole," and to conduct further factfinding regarding Hodge's claims. Dkt. 12-2, at 100–02; *see also* Dkt. 12-1, at 8 ¶ 52.

III. Mental-Health & Substance-Abuse Conditions

Hodge lives with various diagnosed mental-health conditions. Dkt. 8, at 7 ¶ 27.[5] He also has abused alcohol and drugs. Dkt. 8, at 7 ¶ 27. He receives treatment for his mental-health and substance-abuse conditions and is prescribed medication. *Id.*

Hodge alleges that, while confined at the Buffalo Federal Detention Facility between October 2021 and June 2023, he met with a mental-health professional three times for no more than fifteen minutes per session. *Id.* at 9 ¶ 38. He also alleges that he repeatedly requested changes to his medication because his current regimen was not sufficient to manage his mental-health conditions. *Id.*[6]

IV. Procedural History

Hodge filed his initial petition on May 19, 2023. Dkt. 1. Before Respondents answered or responded, the parties agreed to a briefing schedule, which included time for Hodge to file an amended petition. Dkt. 4. Hodge filed his amended petition—the operative petition here—on June 16, 2023. Dkt. 8. He also submitted

---

[5] These mental-health conditions—and the treatment Hodge receives for them—form the general basis for his application under the CAT. *See* Dkt. 8-3, at 4–35; Dkt. 12-2, at 100–02.

[6] Hodge confirmed that he is not challenging the conditions of his confinement in this petition. *See* Dkt. 13, at 5.

a sealed document regarding his mental-health and substance-abuse history in support of the amended petition. Dkt. 11. On July 31, 2023, Respondents answered the amended petition and provided relevant supporting documents, including a memorandum of law and declarations with attached exhibits. Dkt. 12. Hodge replied on August 15, 2023. Dkt. 13. On September 14, 2023, the Court heard oral argument on the relief requested in the amended petition and reserved decision. Dkt. 17.

Hodge's Section 1226(c) detention, which began on September 10, 2021,[7] has lasted approximately twenty-five months to date. Dkt. 12, at 4 ¶ 24.

ANALYSIS

I. Jurisdiction

Jurisdiction over substantive challenges to final deportation, exclusion, and removal orders resides with the circuit courts; district courts lack jurisdiction over the merits of such orders. *See Gittens v. Menifee*, 428 F.3d 382, 384 (2d Cir. 2005) (holding that the REAL ID Act "eliminates habeas jurisdiction over final orders of deportation, exclusion, and removal, providing instead for petitions of review . . . , which circuit courts alone can consider"). But district courts can review claims that pre-removal detention is unconstitutional. *See Demore v. Kim*, 538 U.S. 510, 516–

[7] Respondents state that Hodge's immigration detention began on September 10, 2021. *See, e.g.*, Dkt. 12, at 4 ¶ 24. Hodge alleges that he entered immigration custody in October 2021. Dkt. 8, at 2 ¶ 2. The Court will use the earlier, September 10, 2021 date when analyzing Hodge's claims in the amended petition. Hodge currently is in custody at the Buffalo Federal Detention Facility in Batavia, New York, pending removal proceedings. Dkt. 12-1, at 9 ¶ 53.

17 (2003). In this way, habeas corpus review is available to persons "in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2241(c)(3).

Hodge claims that his detention is unconstitutional based on its duration. Specifically, he claims that his now twenty-five-month detention under Section 1226(c) without an individualized bond hearing, in which the government bears the burden of proof, violates his procedural due process rights under the Fifth Amendment. *See, e.g.*, Dkt. 8, at 3 ¶ 6; *id.* at 10 ¶¶ 42, 43; *id.* at 21–22 ¶¶ 70–76. Respondents do not dispute that the Court has jurisdiction over Hodge's "challenge to his continued detention." Dkt. 12, at 2 ¶ 1. The parties agree that Hodge is detained pursuant to Section 1226(c). *See, e.g.*, Dkt. 8, at 2 ¶ 3; *id.* at 5 ¶ 20; Dkt. 12, at 4 ¶ 26.

II. Constitutionality of Section 1226(c)

A. Governing Principles

The Fifth Amendment provides that no person shall be (1) "deprived of," (2) "liberty," (3) "without due process of law." U.S. Const. amend V. It is "well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore*, 538 U.S. at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)) (internal quotation marks omitted). But the Supreme Court has also recognized that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Id.* Indeed, "deportation proceedings 'would be in vain if those accused could not be held in custody pending

the inquiry into their true character.'" *Id.* (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)); *see also Zadvydas v. Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) ("Congress' power to detain aliens in connection with removal or exclusion . . . is part of the Legislature's considerable authority over immigration matters.").

Equally clear are the "constraints on governmental decisions [that] deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To determine the safeguards necessary to ensure that a petitioner receives "the opportunity to be heard at a meaningful time and in a meaningful manner," the Court considers: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of [that] interest through the procedures used, and the probable value, if any, of additional procedural safeguards;" and (3) the [g]overnment's interest, including the function involved and the . . . burdens that [any other] procedural requirement would impose." *Id.* at 333, 335 (internal quotation marks and citation omitted).

Hodge's detention is mandatory under 8 U.S.C. § 1226(c), which provides that the Attorney General "shall take into custody any alien who . . . is deportable by reason of having committed" certain criminal offenses[8] —including, as relevant

[8] By contrast, under Section 1226(a), the Attorney General "may continue to detain the arrested alien" and "may release the alien on . . . bond . . . or conditional parole" pending a "decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a).

here, (1) an aggravated felony at any time after admission, and (2) under federal controlled substances law other than an offense involving possession of a small amount of marijuana for personal use. *See* 8 U.S.C. § 1226(c)(1)(B);[9] 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i); *see also* Dkt. 12-2, at 70.

The Supreme Court rejected a constitutional challenge to Section 1226(c) in *Demore v. Kim*, where it held: "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 [such] persons . . . be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513. The Court alternatively used the phrase "limited period necessary for . . . removal proceedings," *id.* at 526, and contrasted the "shorter" Section 1226(c) period with the "indefinite" and "potentially permanent" type of detention addressed in *Zadvydas*, 533 U.S. at 690–91. *Demore*, 538 U.S. at 528. It concluded that no constitutional violation resulted from detention of the alien at issue "for the limited period of his removal proceedings." *Id.* at 531.

---

[9] If an alien meets these criteria, the Attorney General may order release "only if:" (1) release is necessary for certain witness-protection purposes; and (2) 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); *see also Jennings v. Rodriguez*, 538 U.S. — , 138 S. Ct. 830, 837–38 (2018) (explaining that "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)" and summarizing Section 1226(c)'s detention and release requirements (emphasis in original)). The Attorney General also must consider the severity of the criminal offense. *See* 8 U.S.C. § 1226(c)(2).

Nothing in *Demore* mandates any specific form of brevity; nor does *Demore* define that term. Instead, the *Demore* Court recognized that detention pending a determination of removability has a "definite termination point." *Id.* at 529. In particular, where a petitioner appeals the immigration judge's decision to the BIA, such detention ends with a BIA determination and, if applicable, a final order of removal. *See, e.g.*, *id.* Delays attributable to a petitioner may permissibly extend the termination point. *See id.* at 530 (identifying delay in petitioner's request for a continuance of his removal hearing); *id.* at 531 n.14 (where petitioner argued that "the length of detention required to appeal may deter aliens from exercising their right to do so," concluding that "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" (internal quotation marks and citations omitted)).

Demore also reiterated the "fundamental premise of immigration law" that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)) (internal quotation marks omitted).

As the *Demore* Court noted, "the statutory provision at issue govern[ed] detention of deportable criminal aliens *pending their removal proceedings*." *Id.* at 527–28 (emphasis in original). Detention in this circumstance "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, [they] will be successfully removed." *Id.* at 528.

Regardless of whether individualized bond hearings would be effective to achieve the aim of ensuring successful removal, when adopting Section 1226(c), Congress had before it "evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Id.*[10] And "when the [g]overnment deals with deportable aliens," that was enough because "the Due Process Clause does not require [the government] to employ the least burdensome means to accomplish its goal." *Id.* As a result, the *Demore* Court concluded that the "evidence Congress had before it . . . support[ed] the approach it selected even if other, hypothetical studies might have suggested different courses of action." *Id.* In sum, detention during removal proceedings "is a constitutionally permissible part of that process." *Id.* at 531.

The Court's holding in *Demore* aligns with its prior recognition that "the responsibility for regulating the relationship between the United States and [its] alien visitors [is] committed to the political branches of the Federal Government." *Diaz*, 426 U.S. at 81. Indeed, "[o]ver no conceivable subject is the legislative power of Congress more complete." *Flores*, 507 U.S. at 305 (internal quotation marks and citations omitted). Because decisions regarding immigration "may implicate [the

[10] In other words, when Congress enacted Section 1226, "individualized bail determinations had not been tested under optimal conditions, or tested in all their possible permutations." *Id.*

United States'] relations with foreign powers, and [because] a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently . . . more appropriate [for] either the Legislature or the Executive than [for] the Judiciary." *Diaz*, 426 U.S. at 81; *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (citing *Diaz*, 426 U.S. at 81) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.").

Indeed, imagine a scenario where the number of aliens surges, increasing the volume of removal proceedings involving criminal aliens and, thereby, slowing the pace at which those proceedings move. Lenient application of multi-factor tests (discussed below) results in bond hearings and, presumably, in some cases, released detainees. Such a scenario arrogates this very sovereignty issue to the judiciary—and to the aliens themselves by virtue of their chosen litigation strategy. The Constitution does not require that outcome, and the statute prohibits it.[11]

As a result of these broad concerns, the Supreme Court has "underscore[d] the limited scope of judicial inquiry" into issues related to immigration legislation. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The power over matters related to "aliens is of a political character and therefore subject only to narrow judicial review." *Id.* (citation omitted). In particular:

---

[11] To be sure, Congress retains the power to amend the statutory prohibition by amending Section 1226(c).

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Diaz, 426 U.S. at 81 n.17 (internal quotation marks and citations omitted).

Against this careful backdrop, courts must pay particular attention to the constitutional interests, governance concerns, and individual rights involved in these weighty questions. Indeed, courts must employ "a narrow standard of review of decisions made by the Congress or the President" regarding immigration and must exercise "the greatest caution" in evaluating constitutional claims that implicate those decisions. *See id.* at 81–82.

In addition, *Demore* highlighted the "process" that has been built into the mandatory detention provision in Section 1226(c). For example, Section 1226(c) applies to detainees whose convictions generally were "obtained following the full procedural protections [the] criminal justice system offers." *See Demore*, 538 U.S. at 513; *id.* at 525 n.9 (noting that "respondent became 'deportable' under [Section] 1226(c) only following criminal convictions that were secured following full procedural protections"); *Velasco Lopez v. Decker*, 978 F.3d 842, 850 & n.7 (2d Cir. 2020) (noting a "sharp contrast" between procedural protections afforded to criminal defendants later detained under Section 1226(c) and those afforded to Section 1226(a) detainees).

Finally, an expedited hearing—a *Joseph* hearing—is available to detainees who claim they are not subject to Section 1226(c). At a *Joseph* hearing, "the

detainee may avoid mandatory detention by demonstrating that he is not an alien, [that he] was not convicted of the predicate crime, or that the [agency] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3 (citing 8 C.F.R. § 3.19(h)(2)(ii) (2002), and *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999)).[12]

B. Section 1226(c) Detention in Lower Courts

Since *Jennings v. Rodriguez*, the Second Circuit "has not addressed . . . the standard to be utilized by courts in addressing procedural due process claims for aliens detained pursuant to [Section] 1226(c) in the immigrant habeas context." *Ranchinskiy v. Barr*, 422 F. Supp. 3d 789, 796–97 (W.D.N.Y. 2019). When determining whether the petitioner's "length of detention has become unreasonable or unjustified," district courts within the Second Circuit have considered factors such as:

> (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

---

[12] In his concurrence, Justice Kennedy suggested that, because the Due Process Clause prohibits "arbitrary" deprivations of liberty, a detainee "could be entitled to an individualized determination as to his [or her] risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). For instance, an "unreasonable delay by the [government] in pursuing and completing deportation proceedings" may suggest that detention is being used "not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532–33. That analysis would depend on "the circumstances of [the] case." *Id.* at 533.

> committed by the petitioner; and (7) whether the petitioner's detention is near conclusion.

Id. at 797 (citation omitted). If this analysis reveals that the detention is not unreasonably prolonged, district courts have concluded that no procedural due process violation exists and have ended the analysis. *See, e.g.*, *Kabba v. Barr*, 403 F. Supp. 3d 180, 185 (W.D.N.Y. 2019). But when district courts have concluded that an alien's detention is unreasonably prolonged, they next have considered what process petitioner is due—in other words, whether the government has "provided the procedural safeguards required by the Due Process Clause." *Id.*

The collection of resulting outcomes in these recent district court cases turns significantly on the duration of detention and much less on the petitioner's litigation regarding removal as the reason for the duration. The outcomes turn even less on the reality that petitioners exercise control over the length of detention, by retaining the ability to consent to release to their native countries pending removal proceedings—thereby holding the "keys" to their own release.

The factor-driven process used in recent district court decisions should be considered in light of the Second Circuit's decision in *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991), which parallels the principles the Supreme Court would later discuss in *Demore*. The *Doherty* court recognized that "an alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of national interest." *Id.* at 209. Control "over matters of immigration and naturalization is the 'inherent and unalienable right of every sovereign and independent nation,'" and the Constitution vests this control "in the

political branches of government." *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893)). The power of Congress in such matters "is plenary, subject to only limited judicial review." *Id.*

Detention of the petitioner in *Doherty* was "not an end in itself sought by the Attorney General; rather bail [was] denied . . . to preserve the government's ability to later carry out its broader responsibility over immigration matters." *Id.* at 211. Examining the causes for the length of detention, the court recognized that, over the course of years, the petitioner "exercised skillfully his rights under the deportation statute"—a "perfectly permissible" litigation strategy, but one that the petitioner could "not rely on the extra time resulting therefrom" to obtain habeas relief based on the duration of his detention. *Id.* *Doherty* does not foreclose the possibility that "lengthy detention largely the result of a government strategy intended to delay" might result in a substantive due process violation. *Id.*

Because the *Doherty* petitioner's detention resulted from his challenge to removal, "from the outset of his detention, [he had] possessed, in effect, the key that unlocks his prison cell."[13] *Id.* at 212. His choice to contest vigorously his deportation properly subjected him "to the countervailing measures Congress . . . enacted to ensure the protection of national interests." *Id.* The Fifth Amendment guaranteed the petitioner "adequate procedural safeguards during the course of the deportation proceedings," as well as liberty pending deportation "absent a proper

[13] It could not "be said that, by attributing to [the petitioner] primary responsibility for the delay in resolving his status, he [was] being 'punished' for the exercise of his constitutional rights." *Id.*

exercise of statutory discretion by the Attorney General." *Id.* But the Fifth Amendment did not confer a "substantive due process right not to be deported." *Id.* (internal quotation marks and citation omitted). Because the petitioner had "been afforded the full panoply of procedural due process" and had "not demonstrated the invidious purpose, bad faith[,] or arbitrariness necessary to make out a denial of substantive due process," his detention did not offend the Constitution. *Id.*

Other cases—from within and outside of this Circuit—are instructive. One such case, *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), illustrates the circuit split regarding the constitutionality of Section 1226(c), which led to *Demore*.[14] In *Parra*, the Seventh Circuit recognized that a petitioner subject to Section 1226(c) "can withdraw his [or her] defense of the removal proceeding and return to his [or her] native land," ending detention. *Parra*, 172 F.3d at 958. Such a petitioner "has the keys [to release] in his [or her] pocket." *Id.* A petitioner subject to Section 1226(c) "has no constitutional right to remain at large during the ensuing delay [in his or her removal proceedings], and the United States has a powerful interest in maintaining the detention . . . to ensure that removal actually occurs." *Id.*

The *Parra* court engaged in the "due process calculus under *Mathews v. Eldridge*" under the facts and circumstances presented and concluded that, in light of "the sweeping powers Congress possesses to prescribe the treatment of aliens," Section 1226(c) is constitutional. *Parra*, 172 F.3d at 958; *see also id.* ("Section 1226(c) plainly is within the power of Congress."). That court left open the

[14] *See Demore*, 538 U.S. at 516.

possibility that habeas relief "may be appropriate" in cases involving "claims by persons detained under [Section] 1226(c) who say that they are citizens rather than aliens, who contend they have not been convicted of one of the felonies that authorizes removal, or who are detained indefinitely because the nations of which they are citizens will not take them back." *Id.* at 957. But such facts were not presented to that court.

In *Yanez v. Holder*, 149 F. Supp. 2d 485 (N.D. Ill. 2001), the court considered challenges from Section 1226(c) petitioners who were challenging removal. *See id.* at 491, 492. The court "[w]eigh[ed] the[] factors" in *Mathews v. Eldridge*, noting: (1) the petitioners had a "strong liberty interest" to "be free from . . . possibly long-term detention," in light of their ongoing challenges to removal; (2) there was "little probability of error because the petitioners [did] not dispute their convictions;" and (3) the government had "a substantial interest in ensuring the presence of criminal aliens who have obvious motivation to flee during the removal process." *Id.* at 493–94. In light of those factors, and "given the broad powers Congress possesses to prescribe the treatment of aliens," the court concluded that "den[ying] . . . an individualized bond hearing to petitioners who have been found to be criminal aliens detained pursuant to [Section 1226(c)] is not a violation of procedural due process." *Id.* at 494.

Another court in this district determined that more than three years of detention pursuant to Section 1226(c) did not violate the Due Process Clause. *See Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 197 (W.D.N.Y. 2010). Citing *Demore*,

the court concluded that the petitioner did not show his continued detention was "unreasonable or unjustified." *Id.* For example, no delay in removal proceedings was attributable to the government. *See id.* at 199. Moreover, if the petitioner were unsuccessful in removal proceedings, there was "absolutely no impediment to [his] eventual deportation" and "nothing preventing him from being removed" to his native country. *Id.* at 197. Because the petitioner could "obtain his release to [his native country] at any time," he was "essentially remaining in custody voluntarily, rather than returning to [his native country] and awaiting the outcome of his [removal proceedings] there." *Id.* at 199. The court noted that the petitioner's preference to remain in custody in the United States instead of release to his native country suggested that the petitioner might be unwilling to comply with removal, if necessary. *Id.* at 200. Detention under those circumstances did not violate the Due Process Clause. *See id.* at 199–200.

Finally, this Court has determined that a twenty-seven-month period of detention pursuant to Section 1226(c) did not offend the Due Process Clause. *See Sosa Rodriguez v. Feeley*, 507 F. Supp. 3d 466, 479 (W.D.N.Y. 2020). The Court recognized that the length of detention was significant but, on the other hand, no barriers to removal existed aside from the petitioner's challenge to removal. *See id.* Some of delay in the removal proceedings was attributable to the petitioner's litigation strategy—which the petitioner was entitled to pursue, but which did not bolster his due process claim. *See id.* at 480. The petitioner's due process claim also "fail[ed] under the narrow test proposed in Justice Kennedy's *Demore* concurrence"

because the circumstances of his "detention [did] not support an inference that his detention [was] arbitrary, unreasonable, or unjustified." *Id.* (citing *Demore*, 538 U.S. at 532). In other words, there were "no facts suggesting that DHS [sought] to detain [the petitioner] for 'other reasons' beyond facilitating deportation or protecting against risk of flight or dangerousness." *Id.* (quoting *Demore*, 583 U.S. at 532–33 (Kennedy, J., concurring)). Under those circumstances, the petitioner's continued detention did not violate his procedural due process rights. *See id.* at 481.

C. Hodge's Detention Comports with the Fifth Amendment

Hodge challenges his continued detention on procedural due process grounds, arguing that his now twenty-five-month detention has become unreasonably prolonged, and that Respondents must provide an individualized bond hearing, in which the government bears the burden of proof. The Supreme Court's holding and rationale in *Demore*, supplemented by the authority discussed in detail above, provide the structure for this Court's analysis of Hodge's Section 1226(c) detention here. Based on this framework, Hodge's detention has not violated his due process rights.

The government is not seeking to retain custody of removable aliens under Section 1226(c). Rather, by following the statute's mandatory-detention provision, the government seeks to promote public safety within this country and to ensure a means of effecting potential eventual removal. During the pendency of removal proceedings, an alien subject to Section 1226(c) may elect to regain his or her liberty—or freedom from detention—by agreeing to return to his or her native

country. The quasi-voluntary nature of the detention undermines any due process claim. Because detention is quasi-voluntary and the alien holds the keys to release, there is no governmental deprivation. And as the Supreme Court in *Demore*—and other courts elsewhere—recognized, an alien has no statutory or constitutional right to release during the finite period of removal proceedings. The Court is aware of no Supreme Court or Second Circuit case requiring release—or a bond hearing—during the pendency of removal proceedings in the Section 1226(c) context.

The length of Hodge's detention is indeed significant. The Court acknowledges that Hodge's removal proceedings are ongoing—and, perhaps, may continue for several more months. Ultimately, the length of Hodge's detention is a product of his chosen course of litigation in his removal proceedings. Hodge, of course, may avail himself of all "process" available to him in his removal proceedings—including requesting extensions of time, adding claims or bases for relief from removal, and appealing all adverse decisions. But he cannot expect resulting delay in his removal proceedings to bolster his due process claim. If a petitioner could delay enough and thereby earn release, he could defeat the process. *See Demore*, 538 U.S. at 531 n.14 (concluding "there is no constitutional prohibition against requiring parties" to "mak[e]. . . difficult judgments," such as whether to risk a lengthier detention by exercising their right to appeal); *id.* at 531 n.15 (considering the delay resulting from the alien's request for a continuance of his removal hearing so he could obtain relevant documents); *Doherty*, 943 F.2d at 211 (concluding that the alien's "litigation strategy [was] perfectly permissible," but he

could "not rely on the extra time resulting therefrom to claim that his prolonged detention violates substantive due process").

Hodge's Section 1226(c) detention has a "definite termination point:" either a final removal order or success on his CAT claim. *See Demore*, 538 U.S. at 529. Until one of those outcomes occurs, Hodge may obtain relief from detention by agreeing to release to the Dominican Republic. The Constitution does not require his release into the United States while removal proceedings play out.

Finally, even if some governmental deprivation—and some relevant and context-specific liberty rights—existed here, the amount of corresponding process that would be due to Hodge under the three-factor, "flexible," and "situation[al]" approach outlined in *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotation marks and citation omitted),[15] and discussed above, is the amount provided for by Congress. It does not include an extra-statutory bond hearing.[16]

---

[15] *See Galvez v. Lewis*, 56 F. Supp. 2d 637, 648–49 (E.D. Va. 1999) (concluding that "the government's interest outweigh[ed] that of Petitioner" because (1) the petitioner's "right to freedom pending removal [was] not absolute, especially in light of his illegal alien status and drug conviction" and the fact that he did not dispute his alien status or conviction, and (2) the government's interest was "substantial," given the "administrative burden of conducting . . . individualized bond hearings for each and every detained alien" and the risk of a released alien absconding); *see also Yanez*, 149 F. Supp. 2d at 493–94.

[16] Hodge's due process claim also fails under the test proposed in Justice Kennedy's *Demore* concurrence. The circumstances of his detention do not support an inference that his detention is arbitrary, unreasonable, or unjustified. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring). There are no facts suggesting that the government seeks to detain Hodge for "other reasons" beyond facilitating deportation or protecting against risk of flight or dangerousness. *See id.* at 532–33 (Kennedy, J., concurring).

In sum, Hodge's continued detention comports with his procedural due process rights.[17] Moreover, there is no indication that his detention has become unjustified, unreasonable, or arbitrary—especially in light of his conviction, litigation regarding removal, and the absence of any apparent inaction or bad faith on the government's part. Neither the Constitution nor binding case law requires a contrary outcome.

CONCLUSION

For these reasons, the relief requested in Hodge's petition for a writ of habeas corpus is denied. Because the Court has dismissed Hodge's claim, it also denies his request for costs and attorney's fees pursuant to 28 U.S.C. § 2412. The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: October 18, 2023
Buffalo, New York

JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

[17] Hodge does not allege a substantive due process claim. *See* Dkt. 8, at 21–22. Aliens "have a substantive due process right to be free of arbitrary confinement pending deportation proceedings." *Doherty*, 943 F.2d at 209; *see also United States v. Salerno*, 481 U.S. 739, 746 (1987) (substantive due process "prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty") (internal quotation marks and citations omitted)). Under the circumstances here, Hodge's detention is not arbitrary and does not result from government conduct that shocks the conscience so as to render his continued confinement a substantive due process violation.