23-7988

IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

OSVALDO HODGE,

Petitioner-Appellant,

– v. –

THOMAS BROPHY, in his official capacity as acting field office director, Buffalo Field Office, U.S. Immigration And Customs Enforcement, MERRICK B. GARLAND, United States Attorney General, in his official capacity as attorney general, U.S. Department Of Justice, ALEJANDRO MAYORKAS, United States Secretary Of Homeland Security, in his official capacity as secretary, U.S. Department Of Homeland Security, and MICHAEL BALL, in his official capacity as officer-in-charge, Buffalo Federal Detention Facility,

Respondents-Appellees.

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

BRIEF OF *AMICUS CURIAE* THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER-APPELLANT

Dated: April 23, 2024
New York, N.Y.

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION

By: Amy Belsher
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the New York Civil Liberties Union is a non-profit member corporation. It has no stock and no parent corporations, and no corporation directly or indirectly owns more than 10 percent of its stock.

/s/ *Amy Belsher*
Amy Belsher

Dated: April 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ..... *Page(s)*

Statutes, Rules, and Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, the New York Civil Liberties Union Foundation (the "NYCLU"), has a longstanding interest in enforcing the constitutional limits on the federal government's power to incarcerate noncitizens. The NYCLU is a nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The NYCLU is the New York affiliate of the American Civil Liberties Union.

The NYCLU has litigated key cases on immigration detention before this Court. *See, e.g.*, *Onosamba-Ohindo v. Garland*, No. 23-6804 (2d Cir. 2023) (counsel); *Black v. Decker*, No. 20-3224 (2d Cir. 2020) (amicus); *Keisy G.M. v. Decker*, 22-0070 (2d Cir. 2022) (amicus); *Gutierrez v. Garland*, No. 20-2781 (2d Cir. 2020) (counsel). The NYCLU also served as amicus the last time this Court addressed the constitutionality of prolonged mandatory immigration detention without a bond hearing. *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) (holding 8 U.S.C. § 1226(c) must be construed to require bond hearings at six months of detention to avoid serious constitutional concerns), *vacated*, 138 S. Ct. 1260 (2018).

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amici Curiae* authored this brief in full. No person contributed money intended to fund it. Counsel for the petitioner-appellant has consented to the filing of this brief. Counsel for the respondent-appellee has indicted it has no position.

INTRODUCTION

Amicus submits this brief in support of the Petitioner-Appellant, Osvaldo Hodge. For well-over two and a half years, Mr. Hodge has been incarcerated pending the resolution of his immigration proceedings without an impartial hearing to determine if his imprisonment is justified. *Amicus* agrees with Mr. Hodge that due process requires that he be provided with a custody hearing before an impartial adjudicator, whether under a bright-line rule like the one this Court has previously adopted, *see Lora*, at 606 (requiring a bond hearing after six months of mandatory detention) or an individualized analysis of the facts of Mr. Hodge's case.

In finding otherwise, the district court made several errors of law, including discounting the petitioner's indisputably weighty liberty interest and finding sufficient the virtually non-existent process available to people in mandatory detention. ECF 18 at 26. The district court arrived at this conclusion after noting two types of "process" available to people subject to mandatory detention under Section 1226(c). *Id.* at 17. First, the court observed that people subject to mandatory detention have convictions "obtained following the full procedural protections the criminal justice system offers." *Id.* Second, the court noted people subject to mandatory detention may seek a hearing before an immigration judge—known as a *Joseph* hearing— to determine whether they meet the statutory criteria for mandatory detention. *Id*. However, for the reasons explained below, neither

sufficiently safeguards the risk that noncitizens will be erroneously deprived of their freedom.

ARGUMENT

This Court assesses the procedural due process question presented here—whether the petitioners' prolonged detention without a custody hearing is constitutional—under the balancing test established in *Mathews v. Eldrige*, 424 U.S. 319, 335 (1976). *See Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020) (applying *Mathews* to the question of whether prolonged immigration detention without a custody hearing violates due process). Pursuant to that test, the Court balances: (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." *Mathews,* 424 U.S. at 335. As explained below, the limited procedures available to people subject to mandatory immigration detention result in an unacceptable risk of erroneous deprivation.

People like Mr. Hodge who are subject to mandatory detention under Section 1226(c) of Chapter 8 of the U.S. Code are provided with *no* process before a neutral decision-maker to assess whether their detention is necessary to prevent flight and danger to the community. In finding otherwise, the district court claimed that the Supreme Court's decision in "*Demore* highlighted the 'process' that has

been built into the mandatory detention provision in Section 1226(c)." ECF 18 at 17. This fundamentally misunderstands the question that was before the Supreme Court in *Demore* as well as the question before this Court now.

In *Demore*, the Supreme Court considered a facial, substantive due process challenge to Section 1226(c), *see Demore v. Kim*, 538 U.S. 510, 515 (2003), not the as-applied procedural due process challenge presented here. Accordingly, the *Demore* Court did not consider whether the limited procedures available to people subject to prolonged detention under Section 1226(c) adequately safeguard the petitioner's liberty interest as required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). As Justice Kennedy's concurrence noted, the *Demore* Court "had no occasion to determine the[] adequacy" of the limited procedures available to people in mandatory detention. *Id.* at 530; *cf. id.* at 514 n.3 (noting that the Court had no occasion to review the actual adequacy of *Joseph* hearings in "screening out those who are improperly detained")[2]; *see also Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 330 (3d Cir. 2021) (noting the Supreme Court did not address the constitutionality of *Joseph* hearings in *Demore*).

[2] In explaining that it had no occasion to consider the adequacy of *Joseph* hearings, the *Demore* Court noted that the petitioner had conceded he was removable and had not sought one. *See* 538 U.S. at 514 n.3. Mr. Hodge also has not sought a *Joseph* hearing, which, for reasons explained below would be futile. However, that fact is irrelevant to this Court's procedural due process analysis which considers the process available in the "generality of cases." *Mathews*, 424 U.S. at 344.

In any event, the two types of "process" noted by the Court in *Demore* and by the district court are inadequate safeguards of the noncitizen's weighty liberty interest. These procedures concern only the limited question of whether a noncitizen meets the categorical statutory requirements for mandatory detention under Section 1226(c), an issue not in dispute in this case. *See* Pet'r Br. at 7 (ECF 31.1). Neither concerns the core constitutional question—whether Mr. Hodge's prolonged detention is in fact justified—that would be addressed by the custody hearing Mr. Hodge seeks here.

A. The Process Received in Criminal Legal System Proceedings is Irrelevant to the Process Required in Civil Immigration Detention Proceedings.

First, the district court suggests that the risk of erroneous deprivation for people mandatorily detained is lessened by virtue of the due process they may have received in prior criminal proceedings. ECF 18 at 17. As an initial matter, Section 1226(c) captures people who have *no* criminal convictions,[3] and thus never receive the "full procedural protections the criminal justice system offers." *Id*. (quoting

[3] The sweeping mandatory detention statute captures alleged criminal acts absent any type of conviction or judgement from a court; *see, e.g.*, 8 U.S.C. §§ 1182(a)(2); the criminal conduct of a relative, *see* 8 U.S.C. §§1182(a)(2)(C)(ii) and (a)(3)(B)(i)(IX); and dispositions that do not qualify as convictions under state law, *see, e.g.*, *Wong v. Garland*, 95 F.4th 82, 91-92 (2d Cir. 2024); *Centurion v. Holder*, 755 F.3d 115, 119 (2d Cir. 2014); *see also Saleh v. Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007) ("Over the last 20 years, there has been a consistent broadening of the meaning of 'conviction' in the INA.").

Demore, 538 U.S. at 513). Moreover, that Mr. Hodge may have received due process in his criminal proceedings—a fact the district court appears to assume—is irrelevant to whether he is entitled to due process in his immigration proceedings. At most, the fairness of his criminal proceedings suggests only that Mr. Hodge was, at one point in time, constitutionally convicted of a criminal offense. It does not follow that that conviction qualifies him for mandatory detention under Section 1226(c). But, even if it did, the process he received in his criminal proceedings in no way suggests his *current* civil immigration detention, nearly 4 years after his last criminal conviction, is justified.

Due process is not transferrable; to be relevant to the *Mathews* inquiry, the process must bear on the risk of an erroneous deprivation of the liberty interest at issue. And Mr. Hodge has already served the sentence the criminal legal system thought necessary to address any perceived dangerousness. *See* ECF 18 at 6; *see also Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) ("[T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes"). Thus, the process Mr. Hodge was afforded in his criminal proceedings has little bearing on whether he is currently a flight risk or danger, necessitating the deprivation of his liberty. To the extent Mr. Hodge's criminal proceedings are relevant to this analysis, it is the fact that Mr. Hodge has now been detained—in

conditions that are virtually indistinguishable from criminal incarceration[4]—over twice the length of time he served for that criminal conviction. *See* ECF 12-2 at 70; ECF 8 ¶¶ 28–29, 39.

B. Joseph Hearings Inadequately Safeguard Against Arbitrary Deprivations of Liberty.

The second type of "process" identified by the district court—*Joseph* hearings—is also inadequate. *Joseph* hearings determine "whether the [ICE] has properly included [the noncitizen] within a category that is subject to mandatory detention" under Section 1226(c). *See In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999); *see also* 8 C.F.R. § 1003.19 (h)(2)(ii). Once placed in mandatory immigration detention, this hearing is the *only* process available to people seeking to challenge their detention.

This Court has not yet had occasion to rule on whether *Joseph* hearings sufficiently safeguard against arbitrary detention. However, the only two Circuit Courts to squarely consider this question have found they do not. In *Tijani v. Willis*, the Ninth Circuit found "the *Joseph* standard is not just unconstitutional, it is egregiously so." 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring). Similarly, in *Gayle*, the Third Circuit found the burden allocation and standard of

[4] *See Velasco Lopez*, 978 F.3d at 850 (recognizing that noncitizens in ICE custody are not merely "detained" but in many instances "incarcerated under conditions indistinguishable from those imposed on criminal defendants sent to prison following convictions").

proof at *Joseph* hearings unconstitutional, 12 F.4th 321 at 330-331.

Joseph hearings insufficiently safeguard against arbitrary detention for four reasons. First, these hearings do not assess whether someone is in fact a danger or a flight risk—the only two constitutional justifications for immigration detention. *See Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (noting the government's interests in immigration detention are preventing flight and danger); *Hernandez v. Decker*, No. 18-CV-5026, 2018 WL 3579108, at *8 n.7 (S.D.N.Y. July 25, 2018) ("[A] *Joseph* inquiry does not involve an analysis of risk of flight or dangerousness, which Justice Kennedy's *Demore* concurrence itself suggests is the appropriate inquiry." (citing *Demore*, 538 U.S. at 578 (Breyer, J., dissenting))). In other words, "*Joseph* hearing[s] have no relation to the government's purported regulatory interests in detaining [Mr. Hodge]." *Hechavarria v. Sessions*, No. 15-CV-1058, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018). Instead, this hearing assesses only whether someone meets the statutory criteria under Section 1226(c). And just because the statutory requirements are met, does not mean the Constitution is satisfied.[5]

Second, given the limited question *Joseph* hearings address, this procedure only potentially benefits a *very* limited number of people who in fact been

[5] While detention would also be arbitrary if someone were to be erroneously categorized under Section 1226(c), that is not the only basis on which it could be so.

incorrectly classified or charged. Thousands of people are detained under the statute at any given moment[6] and *Joseph* hearings provide no process at all for the significant percentage of this group, including Mr. Hodge, whose contact with the criminal legal system meets the statute's requirements. Section 1226(c) captures a broad range of criminal conduct including people with *no* criminal convictions and de minimis offenses.[7] The futility of *Joseph* hearings is exemplified by the fact that very few people pursue them; the Board of Immigration Appeals ("BIA") has published virtually no decisions about *Joseph* hearing determinations since 2013.[8]

Third, even for those noncitizens who have been misclassified under the mandatory detention statute, the burden allocation and standard of proof at *Joseph* hearings makes it nearly impossible for them to prevail. The *Joseph* hearing's burden allocation creates a system of "detention by default," in which the burden of proof is upon the respondent to establish that he "is not properly included"

---

[6] The government provides no clear statistics on the number of people subject to detention under Section 1226(c). As of the first quarter of 2024, there were 16,895 immigration cases pending for people in immigration detention, a significant percentage of whom are likely detained under Section 1226(c). Transactional Records Access Clearinghouse, Immigration Court Backlog Tool, Syracuse Univ., https://trac.syr.edu/phptools/immigration/backlog/ (last visited April 23, 2024).

[7] Given this broad reach, Section 1226(c) classifications are a poor proxy for dangerousness.

[8] A search on Westlaw reveals that the most recent published BIA decision was issued in 2013. *See In re Hans Liberal*, 2013 WL 416277 (BIA Jan. 7, 2013) (finding it could not address the petitioner's arguments that he was not a danger or flight risk because "[s]uch considerations are not pertinent to custody redeterminations under [8 U.S.C. § 1226(c)]").

within Section 1226(c). *Tijani*, 430 F.3d at 1244. However, the Supreme Court's well-established civil confinement precedent—which this Court has applied to immigration detention[9]— makes clear that "the risk of erroneous deprivation of a fundamental right may not be placed on the individual." *Id.* at 1245; *see also Gayle*, 12 F.4th at 331.[10] Thus, in addition to the irrelevance of the question it answers and the limited number of people to which it applies, the burden allocation and standard of proof at *Joseph* hearings alone renders it unconstitutional.

At the *Joseph* hearing, the government bears an initial, nearly nonexistent, burden to show "there is reason to believe" a noncitizen is properly categorized under Section 1226(c). *In re Joseph*, 22 I. & N. Dec. at 799. While the BIA has determined that the "reason to believe" standard is akin to a "probable cause" standard, *In re U-H-*, 23 I. & N. Dec. 355, 356 (BIA 2002), in application, the standard remains "virtually undefined" and inconsistently applied, *Gayle*, 12 F.4th at 331 n.7 ("In practice, the 'reason to believe' standard has produced significant

---

[9] *See Velasco Lopez*, 978 F.3d at 856 ("[W]here liberty is at stake," as in "civil detention," the "Supreme Court has consistently held the Government to . . . the clear and convincing standard").

[10] In *Gayle,* the Third Circuit addressed the narrower question of whether *Joseph* hearings adequately safeguarded the liberty interests of noncitizens with substantial defenses to removal—*i.e.* those likely to prevail at *Joseph* hearings. 12 F.4th at *326. The Third Circuit has separately held that once mandatory detention becomes prolonged, as is the case here, detention may be unconstitutional absent a custody hearing. *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020).

confusion."). In short, "the *Joseph* standard places little to no risk on the broad shoulders of the government." *Tijani*, 430 F.3d at 1246.

If the government meets their minimal burden, the noncitizen must then show that the government is "substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention." *Joseph*, 22 I. & N. Dec. at 807. Courts have described this burden as a "heavy one,"[11] "all but insurmountable,"[12] and "extremely difficult."[13] If relying on factual arguments, the noncitizen must find a way to collect evidence from detention, the most relevant of which—evidence relating to criminal proceedings—will almost always be in the government's custody and control. *See Velasco Lopez,* 978 F.3d at 853-54. If relying on legal arguments, the detained noncitizen—who has no right to an attorney—must 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 (quoting *In re Garcia*, 2007 WL 4699861, at *1 (BIA Nov. 5, 2007)).[14]

---

[11] *Gayle*, 12 F.4th at 330.

[12] *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) ("The standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable."); *see also Hernandez v. Decker*, No. 18-CV-5026, 2018 WL 3579108, at *8 n.7 (S.D.N.Y. July 25, 2018) (finding the Joseph hearing standard is "all but insurmountable").

[13] *Arthur v. Gonzales*, No. 07-CV-6158, 2008 WL 4934065, at *11 (W.D.N.Y. Nov. 14, 2008).

[14] Unpublished BIA cases further demonstrate that even where the noncitizen raises "serious questions" based on analogous circuit precedent, it does not meet the "substantially unlikely" standard. *See Gayle*, 12 F.4th at 330 n.6.

Accordingly, "[i]t should come as no surprise that most *Joseph* hearings are resolved in favor of the Government." *Hernandez*, 2018 WL 3579108, at *8 (citing Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L. J. 65, 72 (2011) (concluding that ninety percent of *Joseph* hearing appeals result in continued detention)).[15]

Fourth, *Joseph* hearings do not result in release, even if the noncitizen prevails. At most, people who prevail at a *Joseph* hearing will be re-classified under the discretionary immigration detention statute located at Section 1225(a) of Chapter 8 of the U.S. Code. *Gayle*, 12 F.4th at 328 (citing *In re Joseph*, 22 I. & N. Dec. at 806). Once re-classified, the noncitizen will have the opportunity to seek bond before an immigration judge. *See* 8 U.S.C. § 1226(a)(2). But the immigration court's default custody hearing procedures are unconstitutional in two key respects. First, they impermissibly require the noncitizen to carry the burden of demonstrating "to the satisfaction of the Immigration Judge that he or she merits release on bond." *In Re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). As the petitioner correctly argues in his principal brief, this burden allocation cannot be reconciled with either Supreme Court precedent or this Court's recent decision in

[15] As noted above, *supra* n.8, it is not possible to update the empirical data analyzed in this report given the dearth of recently published BIA decisions.

Velasco Lopez. *See* Pet'r Br. at 53. Second, under the current custody procedures, the immigration court is not required to consider alternatives to detention and ability to pay when setting bond. *See* 8 U.S.C. § 1226(a); *In re Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009) (finding a noncitizen's "ability to pay the bond amount is not a relevant bond determination factor"). Without these key procedural protections, there remains an impermissibly high risk that someone will remain detained not because they are a flight risk or danger but simply because they cannot afford bond. *See* Pet'r Br. at 54.

For all these reasons, and "[g]iven the enormous individual liberty interests at stake, a holding that a *Joseph* hearing suffices in lieu of an individualized bond hearing would result in an unacceptably high risk of erroneous detention, even while giving due consideration to the Government's undoubtedly weighty interest in regulating immigration." *Hernandez*, 2018 WL 3579108, at *8 (citing *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring)). Accordingly, *Amicus* respectfully urges this Court to reverse the district court's decision and find that Mr. Hodge is entitled to a constitutional custody hearing.

Dated: April 23, 2024
New York, N.Y.

Respectfully Submitted,

/s/ Amy Belsher
AMY BELSHER
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300
abelsher@nyclu.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rules of Appellate Procedure 29(a) (5), the total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, and certificate of compliance, is 3,281. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Procedure 32(a)(6) because it has been prepared using 14-point Times New Roman proportionally spaced typeface, double-spaced.

.

Dated: April 23, 2024
New York, N.Y.

Respectfully Submitted,

By: */s/ Amy Belsher*
Amy Belsher

Counsel for Amicus Curiae