PRACTICE ADVISORY
PROLONGED DETENTION CHALLENGES AFTER *JENNINGS V. RODRIGUEZ*

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Contents

INTRODUCTION

This practice advisory discusses the U.S. Supreme Court's decision in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). In *Jennings*, the Supreme Court held that the Immigration and Nationality Act ("INA") authorizes the prolonged detention of certain noncitizens without a custody hearing during their removal cases. The Court reversed a decision by the Ninth Circuit Court of Appeals construing 8 U.S.C. §§ 1225(b) and 1226(c) to authorize detention for only six months, at which point the detainee must receive a custody hearing before an immigration judge. The Court remanded for the Ninth Circuit to address whether the Fifth Amendment's Due Process Clause entitles immigrants to a hearing over prolonged detention.

Jennings abrogates decisions by several courts of appeals that, like the Ninth Circuit, construed Section 1226(c) to require custody hearings over prolonged detention. However, these detainees may still challenge their prolonged detention on constitutional grounds. Moreover, the circuit court decisions recognizing that prolonged mandatory detention raises serious due process concerns remain strong persuasive authority for the argument that the Constitution requires hearings over prolonged detention.

Attached to this advisory is a sample habeas petition setting forth these arguments. The ACLU is available to provide support and technical assistance in habeas actions seeking prolonged detention hearings on constitutional grounds. If you are filing new litigation, please contact us at ProlongedDetention@aclu.org. ***Please contact the ACLU immediately if you have a prolonged detention case pending before a court of appeals***. This advisory will be updated as new developments occur.[1]

I. *JENNINGS V. RODRIGUEZ*

Jennings v. Rodriguez is a class action lawsuit, filed originally in the Central District of California, challenging the federal government's practice of jailing immigrants for months or years without a custody hearing while they fight their deportation cases. Specifically, *Jennings* addressed the detention beyond six months of three classes of immigrants:

(1) Immigrants subject to mandatory detention under 8 U.S.C. § 1226(c), who are charged with removal based on a criminal offense;

(2) Immigrants detained under 8 U.S.C. § 1225(b)—i.e., arriving asylum seekers who are determined to have a credible fear of persecution and referred for removal proceedings, and certain others (primarily returning lawful permanent residents) who present facially valid documents but are found not clearly and beyond a doubt entitled to admission;

[1] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

(3) Immigrants detained under 8 U.S.C. § 1226(a). Although these immigrants receive a custody hearing at the outset of their detention, many are subject to prolonged detention if the immigration judge denies release on bond or sets a bond the immigrant cannot afford to post.

Plaintiffs in *Jennings* challenged their prolonged detention without hearings on both constitutional and statutory grounds. They won a class-wide permanent injunction in the district court requiring custody hearings after six months of detention.[2]

In the decision below, the Ninth Circuit held that prolonged detention without a hearing under Sections 1225(b), 1226(a), and 1226(c) raised serious due process concerns and concluded that none of the detention provisions at issue clearly authorized such detention.[3]Applying the canon of constitutional avoidance,[4] the court thus construed the statutes to require an automatic bond hearing before the immigration judge at six months of detention.[5] Applying established Ninth Circuit precedent, the court held that due process requires the government to bear the burden of justifying continued detention by clear and convincing evidence. The court further required that the immigration judge consider releasing individuals on reasonable conditions of supervision and the length of the individual's detention in making the custody decision. Finally, the court ordered periodic bond hearings, every six months, for detainees who are not released after their first hearing.[6]

Critically, the Ninth Circuit did *not* reach Plaintiffs' claim that *due process* requires a custody hearing over prolonged detention, but instead ordered the government to provide custody hearings on statutory grounds.

What did the Supreme Court hold in *Jennings v. Rodriguez*?

In a 5-3 decision,[7] the Supreme Court reversed the judgment of the Ninth Circuit and remanded for further proceedings. The Court rejected the lower court's "implausible constructions" of the three detention statutes, holding that the plain language of Sections 1226(c) and 1225(b) authorized detention without custody hearings until the conclusion of removal proceedings.[8] Moreover, the Court held that Section 1226(a) could not be read to require periodic custody hearings and the hearing procedures ordered by the Ninth Circuit.[9] However, the Court

[2] *See Rodriguez v. Holder*, No. CV 07-3239, 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013) (order granting permanent injunction).
[3] *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-77 (9th Cir. 2015).
[4] *Zadvydas v. Davis*, 533 U.S. 678, 689 (courts should construe statutes to avoid serious constitutional concerns when it is "fairly possible" to do so).
[5] *Rodriguez*, 804 F.3d at 1078-85.
[6] *Id*. at 1087-89.
[7] After two rounds of briefing and two oral arguments, Justice Kagan recused herself from the case.
[8] *Jennings*, 138 S.Ct. at 836, 842-47.
[9] *Id*. at 847-48.

remanded for the Ninth Circuit to decide in the first instance whether due process requires a hearing in cases of prolonged detention.[10]

II. CHALLENGING PROLONGED DETENTION WITHOUT A HEARING AFTER *JENNINGS*—NINTH CIRCUIT

A. Central District of California

The government has agreed that the class-wide permanent injunction entered by the district court in *Jennings* for detainees held in the Central District of California "remains in place in the Central District of California until it is vacated by some further action by [the district court] or the Ninth Circuit."[11] Until such time, class members are still entitled to the custody hearings required by the injunction.

Specifically, the injunction applies to the following class of immigrants:

> All noncitizens within the Central District of California who: (1) Are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review; (2) Are not and have not been detained pursuant to a national security detention statute; and (3) Have not been afforded a hearing to determine whether their detention is justified. [12]

The district court also approved subclasses, which correspond to the four general immigration detention statutes under which the class members are detained: 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a).[13] The district court clarified that the injunction requires hearings for all noncitizens detained more than six months with pending cases, including noncitizens with reinstated removal orders and those in withholding-only proceedings.[14]

The permanent injunction requires an automatic bond hearing before the immigration judge at six months of detention, where the government bears the burden of justifying continued detention by clear and convincing evidence.[15] The court further required that the immigration

[10] *Id*. at 851.
[11] Joint Status Report, *Rodriguez v. Marin*, No. CV 07-3239, at *2 (C.D. Cal. Mar. 5, 2018) (ECF No. 478).
[12] *Rodriguez v. Holder*, No. CV 07-3239, 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013) (order granting permanent injunction).
[13] *Id.* On appeal, the Ninth Circuit had reversed the injunction as to Section 1231(a) subclass after concluding that "the § 1231(a) subclass does not exist." *Rodriguez*, 804 F.3d at 1086. For this reason, Section 1231(a) detainees' right to a prolonged detention hearing was not before the Court in *Jennings*.
[14] *Rodriguez*, 2013 WL 5229795, at *1.
[15] *Id*. at *1-2.

judge consider releasing individuals on reasonable conditions of supervision in making its custody decision.[16]

B. Outside the Central District of California

Jennings abrogates the prior rulings of the Ninth Circuit requiring bond hearings at six months for individuals detained under Sections 1225(b), 1226(a), and 1226(c). However, individuals may file habeas petitions in federal district court seeking custody hearings at six months on constitutional grounds. In particular, the Ninth Circuit's prior rulings continue to provide strong persuasive authority for arguing that due process limits prolonged mandatory detention under Section 1226(c) to a reasonable period of time.[17] We address prolonged detention under Section 1225(b) in more detail below.

C. Ninth Circuit Precedent That Remains Good Law Post-*Jennings*

Jennings did *not* abrogate all of the Ninth Circuit's case law imposing limits on prolonged detention without a hearing. The following categories of immigrants likely still remain entitled to prolonged detention hearings under two Ninth Circuit cases: *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), and *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

Notably, a district court is bound by circuit court law unless the circuit decision is "clearly irreconcilable" with an intervening higher authority. *United States v. Robertson*, 875 F.3d at 1281, 1291 (9th Cir. 2017) (citing *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). "The clearly irreconcilable requirement is a high standard." *Id*. (internal quotation marks omitted). "So long as the court can apply our prior precedent without running afoul of the intervening authority, it must do so." *Id*. (internal quotation marks omitted). Thus, a district court hearing a habeas petition by an immigration detainee seeking to vindicate his or her rights under *Diouf II* or *Casas-Castrillon* must apply those circuit precedents unless the court deems them "clearly irreconcilable" with the Supreme Court's ruling in *Jennings*.[18]

Diouf v. Napolitano – Detainees Held Under Section 1231(a)(6)

In *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit held that prolonged detention under **8 U.S.C. § 1231(a)(6)** is prohibited without an individualized hearing to determine whether the person is a flight risk or a danger to the community. Because prolonged

[16] *Id*. at *2.
[17] *See, e.g.*, *Rodriguez v. Robbins*, 804 F.3d 1060, 1072-78 (9th Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127, 1134-36 (9th Cir. 2013); *Casas–Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 949-51 (9th Cir. 2008).
[18] *See Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018) (applying *Robertson* to affirm the continued validity of *Diouf II*).

detention without a hearing presents serious due process concerns, and the statute did not plainly authorize such detention, the Court construed Section 1231(a)(6) to require a custody hearing before an immigration judge where detention has lasted six months. *Diouf II*, 634 F.3d at 1086.[19]

Jennings did *not* abrogate the Ninth Circuit's ruling in *Diouf II*.[20] The question of whether Section 1231(a)(6) can be construed to require a custody hearing over prolonged detention was not before the Court in *Jennings*. Moreover, citing its prior decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court underlined that, in contrast to the other general immigration detention statutes, Section 1231(a)(6) may be construed to limit prolonged detention, as the Ninth Circuit did in *Diouf II*.[21] Thus, individuals subject to prolonged detention under Section 1231(a)(6) in the Ninth Circuit should continue to receive custody hearings.

Diouf II requires a bond hearing for the following groups of detained immigrants if they have been detained for six months, or if it is otherwise clear that they will face prolonged detention:

1. *Individuals detained pending withholding-only proceedings before the immigration judge or Board of Immigration Appeals ("BIA").*[22]

NB: The government's failure to provide *Diouf II* hearings to individuals in withholding-only proceedings is the subject of ongoing litigation. *See Baños v. Asher*, 2:16-cv-01454-JLR, 2017

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[19] *Diouf II* clarified that "[a]s a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Id.* at 1092 n.13. The court also made clear that the government should not presumptively detain individuals for six months without a hearing. Rather, the government "should be encouraged to afford an alien a hearing before an immigration judge before the 180-day threshold has been reached if it is practical to do so and it has already become clear that the alien is facing prolonged detention." *Id*.

[20] *See Ramos*, 2018 WL 1317276, at *3 ("*Jennings* . . . left untouched the Ninth Circuit's requirement of such hearings for immigrants detained under section 1231(a)(6).").

[21] As the Court explained, discussing its analysis of Section 1231(a)(6) in *Zadvydas*:

> [T]he Court detected ambiguity in the statutory phrase "may be detained." "'[M]ay,'" the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous." The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal.

Jennings, 138 S.Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 697). As a result, unlike the other general detention statutes, Section 1231(a)(6) can be read to contain an "implicit time limit on detention." *Id*. at 844. *See also Ramos*, 2018 WL 1317276, at *3 (*Jennings* concluded that the text of Section 1231(a)(6) "left space for constitutional avoidance" and "negative space for an implied limitation").

[22] There is a circuit split on what statute governs detention pending withholding-only proceedings. *Compare Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-32 (9th Cir. 2017) (holding that Section 1231 authorizes detention pending withholding-only proceedings) *with Guerra v. Shanahan*, 831 F.3d 59, 61-64 (2d Cir. 2016) (holding that Section 1226(a) applies). However, the Ninth Circuit has found that Section 1231 applies.

WL 3479451 (W.D. Wa. Jan. 23, 2018) (R&R) (ordering government to provide *Diouf* hearings to class of immigrants detained six months or longer pending "withholding-only" proceedings)

2. *Individuals seeking review of a reinstated order, as well as people seeking review of a negative reasonable fear determination.*

3. *Individuals petitioning for review of a denied motion to reopen, regardless of whether they have a stay of removal.*

4. *Individuals who have a final order of removal and remain detained pending administrative adjudication of a motion to reopen, whether before the immigration judge or BIA, and regardless of whether they have obtained an administrative stay of removal.*

5. *Individuals petitioning for direct review of a removal order and for whom no stay of removal has been issued.*

6. *Other individuals with final orders of removal who have no pending challenges to removal and no stay of removal.*

For more information on *Diouf II*, please see this ACLU practice advisory.

Casas-Castrillon v. Department of Homeland Security

In *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit held that immigrants who were previously ineligible for a custody hearing under Section 1226(c), but who are detained pending a petition for review of their removal order and have a stay of removal, are eligible for a custody hearing before the immigration judge under Section 1226(a). Citing *Demore v. Kim*, 538 U.S. 510 (2003), the Ninth Circuit explained that Section 1226(c) "'was intended only to 'govern[ ] detention of deportable criminal aliens *pending their removal proceedings*.'" *Casas-Castrillon*, 535 F.3d at 948 (quoting *Demore*, 538 U.S. at 527-28). Likewise, the regulations implementing Section 1226(c) interpret the statute as applying only "during removal proceedings." 8 C.F.R. § 1236.1(c)(l)(i). In contrast, Section 1226(a) governs detention "pending a decision on whether the alien is to be removed from the United States"—a period which includes not only the administrative removal process but also the process of judicial review. Thus, the Ninth Circuit concluded that Section 1226(a) governs the detention of noncitizens whose removal is stayed pending judicial review of their removal orders. *See Casas-Castrillon*, 535 F.3d at 948.[23]

[23] The Ninth Circuit in *Casas* also construed Section 1226(c) to impose mandatory detention only where removal proceedings are "expeditious." *Casas-Castrillon*, 535 F.3d at 951 (citing *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)). That aspect of *Casas-Castrillon* has been abrogated by the Supreme Court's holding in *Jennings* that Section 1226(c) authorizes mandatory detention until the conclusion of removal proceedings. *See Jennings*, 138 S. Ct. at 846-47.

Reasoning in *Jennings* reaffirms the Ninth Circuit's construction of Section 1226(c). As the Court in *Jennings* explained:

> In *Demore v. Kim*, 538 U.S., at 529, we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has "a definite termination point": *the conclusion of removal proceedings*. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).

Jennings, 138 S. Ct. at 846 (emphasis added). However, the Court in *Jennings* also suggested that Section 1226(c) "mandates detention 'pending a decision on whether the alien is to be removed from the United States . . . .'" *Id*. (quoting Section 1226(a)). The government may cite this language to argue that *Jennings* construes Section 1226(c) to authorize mandatory detention beyond removal proceedings before the immigration judge and BIA. However, because the Court in *Jennings* did not squarely address the issue presented in *Casas-Castrillon*—i.e., detention pending judicial review of the removal order—and because the discussion on page 846 of the opinion suggests that the Court did not consider that a final "decision on whether the alien is to be removed" may not occur until well after "the conclusion of removal proceedings," *Casas-Castrillon* remains the circuit precedent unless and until revisited by the Ninth Circuit. *See Robertson*, 875 F.3d at 1291.

Notably, *Jennings* supports a similar construction of Section 1225(b)—i.e., that the statute authorizes detention only pending proceedings before the immigration judge and BIA, and not pending judicial review of a removal order. As the Supreme Court explained:

> Section 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and §1225(b)(2) aliens are in turn detained for "[removal] proceeding[s]. *Once those proceedings end, detention under §1225(b) must end as well*.
>
> [. . . .]
>
> [Sections] 1225(b)(1) and (b)(2) . . . provide for detention for a specified period of time. Section 1225(b)(1) mandates detention "for further consideration of the application for asylum," § 1225(b)(1)(B)(ii), and § 1225(b)(2) requires detention "for a [removal] proceeding," § 1225(b)(2)(A). The plain meaning of those phrases is that detention must continue *until immigration officers have finished "consider[ing]" the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A).*

Id. at 842, 844 (emphasis added). Thus, arriving aliens who were initially detained under Section 1225(b) pending removal proceedings, but are now detained pending judicial review of a removal order that has been stayed by the court of appeals, should argue that their detention is governed by Section 1226(a) under the reasoning of *Casas-Castrillon*, and they are entitled to a custody hearing before an immigration judge.

D. Procedural Requirements at a Prolonged Detention Hearing (including *Diouf* and *Casas* hearings)

In *V. Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), the Ninth Circuit held that *due process* requires that the government (1) bear the burden of justifying continued detention by clear and convincing evidence at a prolonged detention hearing and (2) provide a contemporaneous recording of that hearing so there is an adequate record for appeal. *Id*. at 1203-09 (citing, *inter alia*, *Addington v. Texas*, 441 U.S. 418, 427 (1979), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). *V. Singh* remains good law after *Jennings*.

Although *V. Singh* specifically required these procedural safeguards at *Casas* hearings, the Ninth Circuit has recognized that individuals detained under Section 1231 have the same liberty interest against prolonged detention. Thus, the same procedures apply at *Diouf* hearings as well, as numerous district courts have concluded.[24] In addition, the court in *Diouf II* specifically held that the post-order custody regulations for Section 1231 detainees "do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge."[25]

III. OUTSIDE THE NINTH CIRCUIT—CHALLENGING PROLONGED MANDATORY DETENTION UNDER SECTION 1226(c)

As noted above, several circuits had held prior to *Jennings* that prolonged detention mandatory detention under Section 1226(c) raises serious due process concerns. These decisions provide strong persuasive authority for arguing that due process requires a hearing over prolonged

[24] *See Diouf II*, 634 F.3d at 1086 (finding "no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under § 1226(a)"); *see also, e.g.*, *Villalta v. Sessions*, No. 17-cv-05390-LHK, 2017 WL 4355182, *6-7 (N.D. Cal. Oct. 2, 2017) (requiring that the government justify continued detention by clear and convincing evidence at a *Diouf* hearing); *accord Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 905922 at *4-6 (N.D. Cal. Feb. 15, 2018); *Sales v. Johnson*, No. 16-cv-01745-EDL, 2017 WL 6855827, at *5 (N.D. Cal. Sept. 20, 2017); *Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073 at *1, *4-5 (W.D. Wa. Feb. 16, 2016) (R&R), 2016 WL 865351 (W.D. Wa. Mar. 7, 2016) (order adopting R&R); *Mansoor v. Figueroa*, No. 3:17-cv-01695-GPC (NLS), 2018 WL 840253, at *3 (S.D. Cal. Feb. 13, 2018); *Castaneda v. Aitken*, No. 15–cv–01635–MEJ, 2015 WL 3882755 at *6 (N.D. Cal. June 23, 2015).

[25] *Diouf II*, 634 F.3d at 1091.

detention. Moreover, the Third Circuit *already* has held that mandatory detention under Section 1226(c) for an unreasonable period of time violates the Due Process Clause. Thus, *Jennings* does not affect the Third Circuit's case law limiting prolonged mandatory detention.

A. District of Massachusetts

Individuals detained six months under Section 1226(c) in **Massachusetts** are currently still entitled to custody hearings pursuant to the class-wide permanent injunction entered in *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014). The government has agreed that the injunction must remain in effect until it is vacated by the First Circuit or the district court.

B. Third Circuit

Prior to *Jennings*, the Third Circuit held as a *constitutional* matter that due process prohibits mandatory detention for an unreasonable period of time. As the court explained in *Diop v. ICE/Homeland Security*,

> Under the Supreme Court's holding [in *Demore v. Kim*, 538 U.S. 510 (2003)], Congress did not violate the Constitution when it authorized mandatory detention without a bond hearing for certain criminal aliens under § 1226(c). This means that the Executive Branch must detain an alien at the beginning of removal proceedings, without a bond hearing—and may do so consistent with the Due Process Clause—so long as the alien is given some sort of hearing when initially detained at which he may challenge the basis of his detention. *However, the constitutionality of this practice is a function of the length of the detention*. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) *becomes unconstitutional* unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community . . . . *In short, when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute*.

656 F.3d 221, 232-33 (3d Cir. 2011) (emphasis added) (citing *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring). *Accord Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 470, 473-75 (3d Cir. 2015). The court in *Diop* also construed Section 1226(c) to include an implicit time limit and authorize mandatory detention for only a "reasonable" period.[26] Although

[26] *Diop*, 656 F.3d at 235.

that holding has been abrogated by *Jennings*, the Third Circuit's conclusion that unreasonable periods of mandatory detention violate due process remains good law.[27]

The Third Circuit held that the analysis of whether mandatory detention violates due process is "necessarily a fact-dependent inquiry that will vary depending on individual circumstances." *Diop*, 656 F.3d at 233, and clarified this framework in *Chavez-Alvarez*. Please see this ACLU practice advisory for more information on prolonged detention challenges in the Third Circuit.

C. Other Circuits

Jennings abrogates holdings in the First, Second, Sixth, and Eleventh Circuits construing Section 1226(c) to authorize mandatory detention for only a reasonable period of time. However, those rulings were primarily decided based on the serious due process problems presented by prolonged mandatory detention. Thus, they all remain strong persuasive authority for the argument that due process requires a custody hearing over prolonged detention.

- **First Circuit**: *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)

- **Second Circuit:** *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)

  NB: Several district courts in the Second Circuit have found prolonged mandatory detention to violate the Due Process Clause.

  - *See also Faure v. Decker*, No. 15 Civ. 5128 (JGK), 2015 WL 6143801, at *2-4 (S.D.N.Y. Oct. 19, 2015)
  - *Minto v. Decker*, 108 F. Supp. 3d 189, 195-96 (S.D.N.Y. 2015)
  - *Gordon v. Shanahan*, No. 15 Cv. 261, 2015 WL 1176706, at *3-5 (S.D.N.Y. Mar. 13, 2015)
  - *Bugianishvili v. McConnell*, No. 1:15-CV-3360 (ALC), 2015 WL 3903460, at *9 (S.D.N.Y. June 24, 2015)
  - *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 544-50 (S.D.N.Y. 2014)
  - *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010)
  - *Fuller v. Gonzales*, No. Civ.A.3:04CV2039SRU, 2005 WL 818614, at *6 (D. Conn. Apr. 8, 2005)

- **Sixth Circuit:** *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time)

  - *See also Hamama v. Adducci*, --- F. Supp. 3d ----, 2018 WL 263037 (E.D. Mich. 2018) (ordering custody hearings for a nationwide class Iraqi Christians subject to

[27] *See, e.g., Wilkins v. Doll*, No. 1:17-cv-2354 (M.D. Pa. Feb. 22, 2018) (ECF No. 9) (R&R) & (ECF No. 11) (M.D. Pa. Mar. 19, 2018) (post-*Jennings* order granting habeas relief and ordering bond hearing under *Chavez-Alvarez*)

detention under Sections 1226(c) and 1231(a)(6) for six months, unless the government presents evidence that the class member has extended their detention through bad faith or frivolous litigation tactics or other factors for why that detainee should not receive a bond hearing)

NB: Several district courts in the Sixth Circuit have found prolonged mandatory detention to violate the Due Process Clause.

- *Diomande v. Wrona*, No. 05-73290, 2005 WL 3369498, at *1 (E.D. Mich. Dec. 12, 2005)
- *Parlak v. Baker*, 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005), *order vacated on other grounds, appeal dismissed sub nom. Parlak v. U.S. Immigration & Customs Enf't*, No. 05-2003, 2006 WL 3634385 (6th Cir. Apr. 27, 2006)
- *Uritsky v. Ridge*, 286 F. Supp. 2d 842, 847 (E.D. Mich. 2003)

- **Eleventh Circuit**: *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016)

Similarly, prior to *Jennings*, district courts in the Fourth, Fifth, and Eighth Circuits applied the canon of constitutional avoidance to limit prolonged mandatory detention under Section 1226(c).

Fourth Circuit

- *Mauricio-Vasquez v. Crawford*, No. 1:16-cv-01422 (AJT), 2017 WL 1476349 (E.D. Va. Apr. 24, 2017)
- *Haughton v. Crawford*, No. 1:16-cv-634 (LMB), 2016 WL 5899285 (E.D. Va. Oct. 7, 2016)
- *Jarpa v. Mumford*, 211 F. Supp. 3d 706 (D. Md. Sept. 30, 2016)
- *Bracamontes v. Desanti*, No. 2:09-cv-480, 2010 WL 2942760 (E.D. Va. June 16, 2010) (R&R), 2010 WL 2942757 (E.D. Va. July 26, 2010) (order adopting R&R).

Fifth Circuit

- *Ramirez v. Watkins*, No. 10-cv-126, 2010 WL 6269226 (S.D. Tex. Nov 03, 2010).

Eighth Circuit

- *Tindi v. Sec'y, Dep't of Homeland Sec.*, No. 17-cv-3663, 2018 WL 704314 (D. Minn. Feb. 5, 2018) (granting release)
- *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007) (granting release)
- *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006) (granting release)

Prior to *Jennings*, the lower courts had split on how to determine when mandatory detention has become unreasonably prolonged. Several courts had required custody hearings after six months

of mandatory detention.[28] Other courts determined whether mandatory detention had become unreasonable on a case-by-case basis.[29] Until the circuits have decided this issue, advocates should argue that due process entitles their client to a custody hearing under both approaches.

IV. CHALLENGING PROLONGED DETENTION UNDER SECTION 1225(b)

Two main groups of arriving noncitizens[30] are subject to prolonged detention under Section 1225(b): (1) certain returning lawful permanent residents and (2) arriving asylum seekers who have passed a credible fear screening and been referred for removal proceedings on their asylum claims.

A. Returning Lawful Permanent Residents

It is clear that returning lawful permanent residents detained under Section 1225(b) have due process rights against arbitrary detention. Section 1225(b) applies to several categories of lawful permanent residents who may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C).[31] "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the

[28] *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015).
[29] *See Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016).
[30] *See* 8 C.F.R. § 1.2 (defining an "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport").
[31] Section 1101(a)(13)(C) provides that:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
> (i) has abandoned or relinquished that status,
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
> (iii) has engaged in illegal activity after having departed the United States,
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

Fifth Amendment." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). Moreover, a lawful permanent resident who returns from a brief trip abroad is assimilated to that same constitutional status. *Id*. The Supreme Court specifically has held that a lawful permanent arrested for alien smuggling upon return from a brief trip abroad is entitled to due process. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).[32]

Several district courts have recognized that the prolonged detention without a hearing of returning lawful permanent residents raises serious due process concerns or violates the Due Process Clause.

Second Circuit

- *Arias v. Aviles*, No. 15-cv-9249, 2016 WL 3906738, at *8 (S.D.N.Y. July 14, 2016), *appeal filed*, No. 16–3186 (2d Cir. Sept. 12, 2016) (ordering custody hearing on statutory grounds)
- *Galo-Espinal v. Decker*, No. 17-cv-3492, 2017 WL 4334004, at *4-5 (S.D.N.Y. June 30, 2017) (same)
- *Morris v. Decker*, No. 17-cv-02224 (VEC), 2017 WL 1968314, at *3 (S.D.N.Y. May 11, 2017), *appeal filed*, No. 17-cv-2121 (2d Cir. July 7, 2017) (same)
- *Heredia v. Shanahan*, 245 F. Supp. 3d 521, 526 (S.D.N.Y. 2017), *appeal filed sub nom. Heredia v. Decker*, No. 17–1720 (2d Cir. May 26, 2017) (same)
- *Ricketts v. Simonse*, No. 15-cv-6662, 2016 WL 7335675, at *4 (S.D.N.Y. Dec. 16, 2016) (same)

Third Circuit

- *Cruz-Nails v. Castro*, No. 16-cv-1587, 2017 WL 6698709, at *5-6 (D.N.J. Sept. 19, 2017) (ordering hearing on due process grounds)
- *Swarray v. Lowe*, No. 1:17-cv-0970, 2017 WL 3585868, at *7-10 (M.D. Pa. June 27, 2017) (R&R), 2017 WL 3581710, at *1-2 (M.D. Pa. Aug. 18, 2017) (order adopting R&R) (same)
- *Bautista v. Sabol*, 862 F. Supp. 2d 375, 379-82 (M.D. Pa. 2012) (same)

Ninth Circuit

- *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1016-19 (N.D. Cal. 2013) (ordering hearing on statutory grounds)

[32] *See Plasencia*, 459 U.S. at 34 (holding that *Mezei* "did not suggest that no returning resident alien has a right to due process," and that "it does not govern this case, for *Plasencia* was absent from the country only a few days").

For further discussion of the due process rights of returning lawful permanent residents, *see* the Brief of *Amici Curiae* Detained Legal Service Providers, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Oct. 24, 2016).

B. Arriving Asylum Seekers with a Credible Fear of Persecution

In contrast, there is a dispute about whether arriving asylum seekers with a credible fear of persecution have constitutional rights against arbitrary detention. In *Jennings*, the government maintained that, pursuant to the "entry fiction," such asylum seekers lack due process rights against arbitrary imprisonment.[33] Notably, the majority in *Jennings* did *not* endorse this view. Justice Breyer, in a dissent joined by Justices Ginsburg and Sotomayor, rejected the government's argument. *See Jennings*, 138 S.Ct. at 862-63 (Breyer, J., dissenting) (declining to apply the entry fiction because "the Constitution does not authorize arbitrary detention."). Moreover, in his dissent in *Zadvydas*, Justice Kennedy previously wrote that "inadmissible aliens" who are "stopped at the border" are "entitled to be free from detention that is arbitrary or capricious."[34]

The Third and Sixth have held that excludable noncitizens have due process rights against indefinite detention after the entry of a removal order. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 408-15 (6th Cir. 2003) (en banc); *Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999). [35] These cases provide support to the argument that arriving noncitizens have a due process right to custody hearings over their prolonged detention.

Several district courts have required prolonged detention hearings for arriving asylum seekers on due process grounds:

- *Shire v. Decker*, No. 1:17-cv-01984, 2018 WL 509740, at *3-4 (M.D. Pa. Jan. 23, 2018)
- *Martinez-Paredes v. Lowe*, No. 1:17-cv-00353, 2017 WL 4883197, at *3-4 (M.D. Pa. Oct. 30, 2017)
- *Mancia-Salazar v. Green*, No. 17-cv-147, 2017 WL 2985392, at *3-5 (D.N.J. July 13, 2017) (same), *vacated as moot* 2017 WL 4159138 (D.N.J. July 20, 2017)
- *Singh v. Sabol*, No. 1:16-cv-2246, 2017 WL 1659029, at *4-5 (M.D. Pa. Apr. 6, 2017) (R&R), 2017 WL 1541847 (M.D. Pa. Apr. 28, 2017) (order adopting R&R) (same), *appeal filed* No. 17-2383 (3d Cir. June 27, 2017)
- *Ahmed v. Lowe*, No. 3:16-cv-2082, 2017 WL 2374078, at *3-5 (M.D. Pa. May 31, 2017), *appeal filed* No. 17-2653 (3d Cir. Aug. 3, 2017)
- *Singh v. Lowe*, No. 3:17-cv-0119, 2017 WL 1157899, at *7-10 (M.D. Pa. Mar. 7, 2017) (R&R), 2017 WL 1134413 (M.D. Pa. Mar. 27, 2017) (order adopting R&R)

[33] *See* Petitioners' Supplemental Brief at 21-24, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Jan. 31, 2017).
[34] *Zadvydas*, 533 U.S. at 720-21.
[35] The Ninth Circuit did not squarely address this issue in *Rodriguez III*, and it remains an open issue in the circuit. *See Rodriguez III*, 804 F.3d at 1082.

- *Ahad v. Lowe*, 235 F. Supp. 3d 676, 686-90 (M.D. Pa. 2017), *appeal filed* No. 17-1492 (3d Cir. filed Mar. 9, 2017)

- *See also Maldonado v. Macias*, 150 F. Supp. 3d 788, 798-808 (W.D. Tx. 2015) (holding that prolonged detention without hearing of arriving asylum seeker raised serious due process concerns and ordering custody hearing on statutory grounds)
- *Crespo v. Baker*, No. 11-cv-3019 (IEG), 2012 WL 1132961, at *8-9 (S.D. Cal. Apr. 3, 2012) (same)[36]

The government likely will argue—as it did in *Jennings*—that due process does not apply to arriving asylum seekers under the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). However, *Mezei* is distinguishable for three reasons:

First, even if arriving asylum seekers have limited due process rights with respect to the procedures for *admission*, they still have a right to freedom from prolonged *detention* that is not needed to serve its purpose. Indeed, *Zadvydas* makes clear that the government's power to exclude and its power to detain are distinct for due process purposes. The detainees there had lost all legal right to reside in the United States, but the Supreme Court nonetheless recognized their interest in "[f]reedom from . . . physical restraint," 533 U.S. at 690, which protects against arbitrary imprisonment. *See also Rosales-Garcia*, 322 F.3d at 412-13.

Although the Court in *Mezei* conflated the power to detain with the power to remove, that holding must be read in light of its peculiar circumstances: an exclusion resting on national security. *See Rosales-Garcia*, 322 F.3d at 413-14. As the Court in *Mezei* explained, "to admit an alien barred from entry on security grounds nullifies the very purpose" of the exclusion order because it could unleash the very threat that the order sought to avoid. 345 U.S. at 216. That rationale does not apply to asylum seekers who are in proceedings to determine whether they may live in the U.S. permanently.

Second, arriving asylum seekers have been determined to have a credible fear of persecution, and been referred for full adjudication of that claim in removal proceedings. Congress has afforded them a right to be in the U.S. while their asylum claim is pending. They therefore stand in a fundamentally different position from the detainee in *Mezei*, who had been ordered excluded from the U.S. Indeed, the record in *Jennings* established that *two-thirds* of arriving asylum seekers subject to prolonged detention (defined as six months or more) win asylum and thus the right to live permanently in the U.S. *See Jennings*, 138 S.Ct. at 860 (Breyer, J., dissenting).

[36] *See also Salazar v. Rodriguez*, No. 17-1099, 2017 WL 3718380, at *5-6 (D.N.J. Aug. 29, 2017) (due process required custody hearing for arriving alien granted deferred inspection); *Centeno-Ortiz v. Culley*, No. 11-cv-1970-IEG, 2012 WL 170123, at *8-9 (S.D. Cal. Jan. 19, 2012) (ordering custody hearing on statutory grounds for arriving alien detained under Section 1225(b)(2)); *Lakhani v. O'Leary*, No. 1:08-cv-2355, 2010 WL 3239013, at *4, *6-9 (N.D. Ohio Aug. 16, 2010) (due process required custody hearing for parolee), *vacated as moot* 2010 WL 3730157 (N.D. Ohio Sept. 17, 2010).

Third, asylum seekers with a credible fear of persecution cannot voluntarily end their detention by returning to the countries from which they fled. The liberty interests of such individuals, who have often suffered persecution and torture in their countries of origin, cannot be dismissed on the ground that they are somehow free to go home.

For more information, please see Respondents' Supplemental Brief, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Jan. 31, 2017).

Note: Arriving asylum seekers held in the Western District of New York are currently entitled to a custody hearing after six months pursuant to a class-wide preliminary injunction entered in *Abdi v. Duke*, --- F. Supp. 3d ---, 2017 WL 5599521 (W.D.N.Y. 2017).

V. THE REDETENTION OF INDIVIDUALS RELEASED AS A RESULT OF A PROLONGED DETENTION HEARING

Presently it is unclear whether the government intends to revoke the bonds and re-detain individuals who were released as a result of a prolonged detention hearing. The ACLU is monitoring the situation closely. **If you have clients or learn of cases where individuals are re-detained, please contact the ACLU immediately at ProlongedDetention@aclu.org.**

IN THE UNITED STATES DISTRICT COURT
FOR THE _____

_____, (A _____) Petitioner, v. Kirsten Nielsen, Secretary of the Department of Homeland Security; Jefferson Beauregard Sessions III, Attorney General of the United States; _____, Director of the _____ Field Office; _____, Warden of the _____, Respondents.	Case No. _____ **Petition for Writ of Habeas Corpus**

PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

Petitioner respectfully petitions this Honorable Court for a writ of habeas corpus to remedy Petitioner's unlawful detention by Respondents, as follows:

INTRODUCTION

1. Petitioner is currently detained by Immigration and Customs Enforcement ("ICE") at the _____ detention center pending removal proceedings.

2. Petitioner has been detained in immigration custody for over ___ months even though no neutral decisionmaker—whether a federal judge or an immigration judge—has conducted a hearing to determine whether this lengthy incarceration is warranted based on danger or flight

risk, the only two permissible bases for immigration detention prior to entry of an executable removal order.

3. Petitioner's prolonged detention without a hearing on danger and flight risk violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment's Excessive Bail Clause.

4. Petitioner therefore respectfully requests that this Court issue a writ of habeas corpus, determine that Petitioner's detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention, and order Petitioner's release, with appropriate conditions of supervision if necessary, taking into account Petitioner's ability to pay a bond.

5. In the alternative, Petitioner requests that this Court issue a writ of habeas corpus and order Petitioner's release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge orders Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond.

JURISDICTION AND VENUE

6. Petitioner is detained in the custody of Respondents at _____ detention center.

7. Jurisdiction is proper under 28 U.S.C. §§ 1331, 2241; the Suspension Clause, U.S. Const. art. I, § 2; and 5 U.S.C. § 702.

8. Congress has preserved judicial review of challenges to prolonged immigration detention. *See Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878 at *7-*9 (Feb. 27, 2018) (holding that 8 U.S.C. §§ 1226(e), 1252(b)(9) do not bar review of challenges to prolonged immigration detention); *see also id.* at *44 (Breyer, J., dissenting). ("8 U.S.C. § 1252(b)(9), . . . by its terms

applies only with respect to review of an order of removal") (internal quotation marks and brackets omitted).

9. Section 1252(f)(1) does not repeal this Court's authority to grant the relief Petitioner seeks because, *inter alia*, Petitioner is in removal proceedings. *See* 8 U.S.C. § 1252(f)(1) (exempting claims by "an individual alien against whom proceedings . . . have been initiated"); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (Section 1252(f) "does not extend to individual cases").

10. If Section 1252(f)(1) did bar the relief Petitioner seeks, it would violate the Suspension Clause.

11. Even if otherwise applicable, Section 1252(f)(1) does not bar declaratory relief.

VENUE

12. Venue is proper in this District under 28 U.S.C. § 1391 because at least one Defendant is in this District, the Petitioner is detained in this District, and a substantial part of the events giving rise to the claims in this action took place in this District.

PARTIES

13. Petitioner, _____, is a noncitizen currently detained by Respondents pending removal proceedings.

14. Respondent Kirsten Nielsen is the Secretary of the U.S. Department of Homeland Security ("DHS"), an agency of the United States. She is responsible for the administration of the immigration laws. 8 U.S.C. § 1103(a). Secretary Nielsen is a legal custodian of Petitioner. She is named in her official capacity.

15. Respondent Jefferson Beauregard Sessions III is the Attorney General of the United States and the most senior official in the U.S. Department of Justice ("DOJ"). He has the authority to interpret the immigration laws and adjudicate removal cases. The Attorney General delegates this responsibility to the Executive Office for Immigration Review ("EOIR"), which

administers the immigration courts and the Board of Immigration Appeals ("BIA"). He is named in his official capacity.

16. Respondent _____ is the Field Office Director responsible for the Field Office of ICE with administrative jurisdiction over Petitioner's case. She/he is a legal custodian of Petitioner and is named in his official capacity.

17. Respondent _____ is the warden of the facility where Petitioner is held. She/he is a legal custodian of Petitioner and is named in his official capacity.

STATEMENT OF FACTS

18. Petitioner is a noncitizen currently detained by Respondents pending immigration removal proceedings. Petitioner is pursuing the following claims in removal proceedings:

_____

_____

(include all claims presented, including any applications for asylum; withholding of removal; Convention Against Torture; cancellation of removal; adjustment of status; termination of proceedings; U visa; T visa; or any other applications.

19. Petitioner has been detained in DHS custody since _____.

20. Petitioner has been detained by ICE for more than ___ months, yet has not been provided a bond hearing before a neutral decisionmaker to determine whether his prolonged detention is justified based on danger or flight risk.

21. Additional facts that support Petititioner's entitlement to relief are:

_____

_____

_____

LEGAL BACKGROUND

22. "'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores,* 507 U.S. 292, 306 (1993)). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause

protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also id*. at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). This fundamental due process protection applies to all noncitizens, including both removable and inadmissible noncitizens. *See id.* at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious").

23. Due process therefore requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (internal quotation marks omitted). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id*.; *Demore*, 538 U.S. at 528.

24. Following *Zadvydas* and *Demore*, every circuit court of appeals to confront the issue has found either the immigration statutes or due process require a hearing for noncitizens subject to unreasonably prolonged detention pending removal proceedings. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016) (detention under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) (8 U.S.C. § 1226(c)); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) (8 U.S.C. § 1226(c)); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015) (8 U.S.C. § 1226(c) and 8 U.S.C. § 1225(b)); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) (8 U.S.C. § 1226(c)); *Diouf v. Holder (Diouf II)*, 634 F.3d 1081 (8 U.S.C. § 1231(a)); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (8 U.S.C. § 1226(c)) (requiring release when mandatory detention exceeds a reasonable period of time).

25. Recently, the Supreme Court held that the Ninth Circuit erred by interpreting Sections 1226(c) and 1225(b) to require bond hearings as a matter of statutory construction. *Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878 at *10 (Feb. 27, 2018). Because the Ninth Circuit had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court remanded for the Ninth Circuit to address the issue. *Id*. at *10. The majority

opinion did not express any views on the constitutional question, and left it to the lower courts to address the issue in the first instance.

26. Due process requires that the government provide bond hearings to noncitizens facing prolonged detention. "The Due Process Clause foresees eligibility for bail as part of due process" because "[b]ail is basic to our system of law." *Id.* at *28 (Breyer, J., dissenting) (internal quotations and citations omitted). While the Supreme Court upheld the mandatory detention of a noncitizen under Section 1226(c) in *Demore*, it did so based on the petitioner's concession of deportability and the Court's understanding that detentions under Section 1226(c) are typically "brief." *Demore*, 538 U.S. at 522 n.6, 528. Where a noncitizen has been detained for a prolonged period or is pursuing a substantial defense to removal or claim to relief, due process requires an individualized determination that such a significant deprivation of liberty is warranted. *Id.* at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"). *See also Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the "initial commitment" requires additional safeguards); *McNeil v. Dir., Patuxent Inst*., 407 U.S. 245, 249-50 (1972) ("lesser safeguards may be appropriate" for "shortterm confinement"); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (in Eighth Amendment context, "the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

27. Consistent with this view, the federal courts have made clear that prolonged detention pending removal proceedings without a bond hearing likely violates due process. *See supra*; *Jennings*, 2018 WL 1054878 at *37 (Breyer, J, dissenting) ("an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution"). In addition, numerous circuit and district courts have expressly found that the Constitution requires bond hearings in cases of prolonged detention. *See, e.g.*, *Diop*, 656 F.3d at 233; *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 544-50 (S.D.N.Y. 2014); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010).

28. Detention without a bond hearing is unconstitutional when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detentions under Section 1226(c), which last "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal"); *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months").

29. The recognition that six months is a substantial period of confinement—and is the time after which additional process is required to support continued incarceration—is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term . . . ." *Duncan v. State of La*., 391 U.S. 145, 161 & n.34 (1968). Consistent with this tradition, the Supreme Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose without the protection afforded by jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion). The Court has also looked to six months as a benchmark in other contexts involving civil detention. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972) (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment). The Court has likewise recognized the need for bright line constitutional rules in other areas of law. *See Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (14 days for re-interrogation following invocation of Miranda rights); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (48 hours for probable cause hearing).

30. Even if a bond hearing is not required after six months in every case, at a minimum, due process requires a bond hearing after detention has become unreasonably prolonged. *See Diop*, 656 F.3d at 234. Courts that apply a reasonableness test have considered three main factors in determining whether detention is reasonableness. First, courts have evaluated whether the noncitizen has raised a "good faith" challenge to removal—that is, the challenge is "legitimately raised" and presents "real issues." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469,

476 (3d Cir. 2015).[37] Second, reasonableness is a "function of the length of the detention," with detention presumptively unreasonable if it lasts six months to a year. *Id*. at 477-78; *accord Sopo*, 825 F.3d at 1217-18. Third, courts have considered the likelihood that detention will continue pending future proceedings. *Chavez-Alvarez*, 783 F.3d at 478 (finding detention unreasonable after ninth months of detention, when the parties could "have reasonably predicted that Chavez–Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500..

31. At a bond hearing, due process requires certain minimal protections to ensure that a noncitizen's detention is warranted: the government must bear the burden of proof by clear and convincing evidence to justify continued detention, taking into consideration available alternatives to detention; and if the government cannot meet its burden, the noncitizen's ability to pay a bond must be considered in determining the appropriate conditions of release.

32. To justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that the noncitizen is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Where the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (upholding pre-trial detention where "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

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[37] Notably, "aliens should [not] be punished for pursuing avenues of relief and appeals." Sopo, 825 F.3d at 1218 (citing *Ly*, 351 F.3d at 272). Thus, courts should notcount a continuance against the noncitizen when he obtained it in good faith to prepare his removal case. Instead, only "[e]vidence that the alien acted in bad faith or sought to deliberately slow the proceedings"—for example, by "[seeking] repeated or unnecessary continuances, or [filing] frivolous claims and appeals"—"cuts against" providing a bond hearing. *Id*.; *see also Chavez–Alvarez*, 783 F.3d at 476; *Ly*, 351 F.3d at 272.

33. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, prolonged incarceration deprives noncitizens of a "profound" liberty interest. *See Diouf II*, 634 F.3d at 1091–92 (9th Cir. 2011). Second, the risk of error is great where the government is represented by trained attorneys and detained noncitizens are often unrepresented and frequently lack English proficiency. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested"). Moreoever, detainees are incarcerated in prison-like conditions that severely hamper their ability to obtain legal assistance, gather evidence, and prepare for a bond hearing. *See infra* ¶ 39. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to the noncitizen's immigration records and other information that it can use to make its case for continued detention.

34. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen's appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979). ICE's alternatives to detention program—the Intensive Supervision Appearance Program—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"). It follows that alternatives to detention must be considered in determing whether prolonged incarceration is warranted.

35. Due process likewise requires consideration of a noncitizen's ability to pay a bond. "Detention of an indigent 'for inability to post money bail' is impermissible if the individual's

'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Id.* at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). It follows that—in determining the appropriate conditions of release for immigration detainees—due process requires "consideration of financial circumstances and alternative conditions of release" to prevent against detention based on poverty. *Id*.

36. Evidence about immigration detention and the adjudication of removal cases provide further support for the due process right to a bond hearing in cases of prolonged detention.

37. Each year, thousands of noncitizens are incarcerated for lengthy periods pending the resolution of their removal proceedings. *See Jennings*, 2018 WL 1054878 at *27 (Breyer, J., dissenting). Among a class of immigration detainees in the Central District of California held for at least six months ("*Rodriguez* class"), the average length of detention was over a year, with many people held far longer. In numerous cases, noncitizens are incarcerated for years until winning their immigration cases. *Id*. (identifying cases of noncitizens detained for 813, 608, and 561 days until winning their cases). For noncitizens who have some criminal history, their immigration detention often dwarfs the time spent in criminal custody, if any. *Id.* ("between one-half and two-thirds of the class served sentences less than six months").

38. Noncitizens are detained for lengthy periods because they pursue meritorious claims. Among the *Rodriguez* class, 40 percent of noncitizens subject to Section 1226(c) won their cases, and two-thirds of asylum seekers subject to Section 1225 won asylum. *See id*. Detained noncitizens are able to succeed at these dramatically high rates despite the challenges of litigating in detention, particularly for the majority of detainees who lack counsel. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 (2015) (reporting government data showing that 86% of immigration detainees lack counsel).

39. Immigration detainees face severe hardships while incarcerated. Immigration detainees are held in lock-down facilities, with limited freedom of movement and access to their families: "the circumstances of their detention are similar, so far as we can tell, to those in many

prisons and jails." *Jennings*, 2018 WL 1054878 at *28 (Breyer, J., dissenting); *accord Chavez–Alvarez*, 783 F.3d at 478; *Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999); *Sopo*, 825 F.3d at 1218, 1221. "And in some cases the conditions of their confinement are inappropriately poor." *Jennings*, 2018 WL 1054878 at *28 (Breyer, J., dissenting) (citing Dept. of Homeland Security (DHS), Office of Inspector General (OIG), *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) (reporting in-stances of invasive procedures, substandard care, and mistreatment, e.g., indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee)).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

40. Petitioner re-alleges and incorporates by reference the paragraphs above.

41. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. Const. amend. V.

42. To justify Petitioner's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Petitioner's detention is justified by clear and convincing evidence of flight risk or danger, even after consideration whether alternatives to detention could sufficiently mitigate that risk.

43. For these reasons, Petitioner's ongoing prolonged detention without a hearing violates due process.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

44. Petitioner re-alleges and incorporates by reference the paragraphs above.

45. The Eighth Amendment prohibits "[e]xcessive bail." U.S. Const. amend. VIII.

46. The government's categorical denial of bail to certain noncitizens violates the right to bail encompassed by the Eighth Amendment. *See Jennings*, 2018 WL 1054878 at *29 (Breyer, J, dissenting).

47. For these reasons, Petitioner's ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1) Assume jurisdiction over this matter;
2) Issue a Writ of Habeas Corpus; hold a hearing before this Court if warranted; determine that Petitioner's detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention; and order Petitioner's release, with appropriate conditions of supervision if necessary, taking into account Petitioner's ability to pay a bond.
3) In the alternative, issue a Writ of Habeas Corpus and order Petitioner's release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge order Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond.
4) Issue a declaration that Petitioner's ongoing prolonged detention violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment;

5) Award Petitioner his costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, other statute; and
6) Grant such further relief as the Court deems just and proper.

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Dated: