No. 22-2252

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nyynkpao BANYEE,

Petitioner-Appellee,

v.

Merrick B. GARLAND, United States Attorney General, et al.,

Respondents-Appellants.

On Appeal from a Final Judgment of the United States District Court for the District of Minnesota
Case No. 21-1817 (WMW/BRT)

BRIEF FOR APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is an as-applied constitutional challenge to 8 U.S.C. § 1226(c) that concerns a question left open in *Demore v. Kim*, 538 U.S. 510 (2003) and *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018): when does the prolonged mandatory detention of a lawful permanent resident, who is in removal proceedings but has no access to a bond hearing, become unreasonable and violate due process? The district court below assessed Mr. Banyee's as-applied challenge through a fact-specific framework and correctly concluded that his continued mandatory detention—over a full year, with no end in sight—violated due process. It thus ordered the government to provide him a hearing at which, under the conventional *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test, the government bore the burden of proving danger or flight risk by clear and convincing evidence to justify any further detention.

This Court should affirm. As held by the only circuit court to have addressed both issues, due process prohibits unreasonably prolonged detention under § 1226(c) and, where courts determine through a fact-specific inquiry that detention has become unreasonable, due process requires the government to justify detention by clear and convincing evidence. *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020). *Demore* is not to the contrary, as that case only upheld § 1226(c) as facially constitutional and on the understanding that § 1226(c) detention was "brief." 538 U.S. at 513. Mr. Banyee requests 20 minutes of oral argument.

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   Most apposite authorities:

   - *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020)
   - *Muse v. Sessions*, 409 F. Supp. 3d 707 (D. Minn. 2018)
   - *Zadvydas v. Davis*, 533 U.S. 678 (2001)
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2. Whether the district court correctly concluded that, where mandatory detention under 8 U.S.C. § 1226(c) has become unreasonably prolonged and a bond hearing has been ordered, due process requires the government to bear the burden by clear and convincing evidence at that hearing.

   Most apposite authorities:

   - *Mathews v. Eldridge*, 424 U.S. 319 (1976)

- *Addington v. Texas*, 441 U.S. 418 (1979)
- *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020)
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STATEMENT OF THE CASE

I. Banyee Comes to America as a Child Refugee but Struggles as a Teenager, Resulting in Entanglement in Criminal Legal System.

Nynnkpao Banyee ("Mr. Banyee") is a 25-year-old long-time lawful permanent resident of the United States. A5.[1] He immigrated to the U.S. in January 2004, as a six-year-old child refugee from the Ivory Coast. A5. Mr. Banyee adjusted to lawful permanent resident status a year later, in November 2005. A5. He has never left the U.S. since arriving over 19 years ago. S.App.17.

Mr. Banyee grew up in Pennsylvania from 2004 to 2015 until his family moved to North Dakota. S.App.17. As a Black refugee who experienced considerable trauma and instability in his short life, Mr. Banyee had trouble integrating into the U.S.; consequently, Mr. Banyee got entangled in the criminal legal system through a series of primarily non-violent offenses. S.App.16-17. Between 2016 and 2017, Mr. Banyee was convicted of theft after taking $30 out of a cash register, false report to law enforcement after being pulled over on his bicycle and giving a false name, possession of drug paraphernalia for a cannabis grinder and a pipe, and possession of marijuana. S.App.19-20. Mr. Banyee served less than 30

[1] A. refers to the December 19, 2022 Addendum submitted by Appellants-Respondents. S.App. refers to the Supplemental Appendix, which Mr. Banyee requested leave to file on April 13, 2023, containing two documents related to his ongoing removal proceedings. As the motion explains, this Court can take judicial notice of the contents of the Supplemental Appendix documents—including that the IJ found certain facts or made certain legal conclusions. Fed. R. Evid. 201.

days in jail for these offenses. App.38-39; R.Doc.1-4 at 4-5. In October 2017, at the age of 19, Mr. Banyee was arrested after he stole a tablet. S.App.20. He was accused of brandishing a gun, though no weapon was ever found. S.App.20. In June 2018, he was convicted of aggravated robbery under N.D. Cent. Code § 12.1-22-01 and sentenced to four years of imprisonment and one year of probation. App.116; R.Doc.8-2 at 1.

Confronted with extended time in prison, Mr. Banyee committed to turning a new leaf. S.App.23. During his incarceration, he earned his GED and became a certified one-on-one mentor to provide peer support for other incarcerated individuals. S.App.18. He voluntarily participated in "a significant amount of programming" through the North Dakota Corrections Department, including on substance abuse and crisis intervention. S.App.18, 23-24. He converted to Islam and became dedicated to his religion. S.App.16. Mr. Banyee was a model inmate and maintained a clean record throughout his sentence. S.App.24, 40.

II. DHS Initiates Removal Proceedings and Places Banyee in Mandatory Detention Pursuant to 8 U.S.C. § 1226(c).

On March 31, 2021, at the end of his criminal sentence, the Department of Homeland Security ("DHS") arrested Mr. Banyee, detained him at the Kandiyohi

County Jail in Willmar, Minnesota,[2] and filed a Notice to Appear with the immigration court to initiate removal proceedings against him. App.159; R.Doc.9 at 3. DHS charged Mr. Banyee as removable from the U.S. under 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance offense) for the 2016 and 2017 marijuana offenses, 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony crime of violence) for the 2018 robbery offense, and 8 U.S.C. § 1227(a)(2)(A)(ii) (two or more crimes involving moral turpitude) for the 2016 theft and 2018 robbery offenses. App.33; R.Doc.1-2 at 4.

DHS held Mr. Banyee under the mandatory immigration detention statute, 8 U.S.C. § 1226(c). App.159; R.Doc.9 at 3. Generally speaking, § 1226 governs the arrest, detention, and release of noncitizens "pending a decision on whether [they are] to be removed from the United States." 8 U.S.C. § 1226(a). Section 1226(a) grants the Attorney General authority to release arrested noncitizens on bond or conditional parole. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(c), 1236.1(c). The

[2] In addition to housing criminal detainees, the Kandiyohi County Jail serves as a contract detention facility for U.S. Immigration and Customs Enforcement ("ICE"). *See Kandiyohi County Jail*, Kandiyohi Cnty., Minn., https://www.kcmn.us/departments/sheriff/departments/jail/index.php (last visited Apr. 18, 2023); *Kandiyohi County Jail*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/detain/detention-facilities/kandiyohi-county-jail (last visited Apr. 18, 2023). For civil immigration detainees, life "in a county jail alongside inmates who are serving criminal sentences" is "indistinguishable from penal confinement." *Muse v. Sessions*, 409 F. Supp. 3d 707, 717 (D. Minn. 2018).

regulations provide for bond hearings to be conducted before an immigration judge. 8 C.F.R. §§ 1003.19, 1236.1(d). Section 1226(c), however, dictates that noncitizens in removal proceedings who are charged with being removable on certain criminal grounds[3] be placed in detention without the opportunity to seek an individualized hearing on whether they should be released on bond or parole. *See* 8 U.S.C. § 1226(c); *see also Nielsen v. Preap*, 139 S. Ct. 954, 964-65 (2019).

III. DHS Keeps Banyee in a County Jail for Over 12 Months, Without Access to a Bond Hearing, as His Complex Removal Proceedings Stretch On.

DHS incarcerated Mr. Banyee for over a year while his case, through no fault of his own, grew extremely complex. Although he was originally deemed ineligible for most forms of relief, over two months into his immigration detention, a decision by the Supreme Court prompted the Immigration Judge ("IJ") to find that his criminal convictions did not, in fact, render him ineligible for cancellation of removal under 8 U.S.C. § 1229b(a)—a discretionary form of relief available to certain lawful permanent residents who have continuously resided in the U.S. for at

[3] Contrary to the government's claims that § 1226(c) is "limited to a narrow class of noncitizens," Br. 5, mandatory detention is quite expansive, extending to individuals convicted of nonviolent and minor offenses, including simple drug possession, turnstile jumping, and shoplifting. *See Demore v. Kim*, 538 U.S. 510, 558 (2003) (Souter, J., concurring in part and dissenting in part) ("Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor."). Elsewhere, the government itself has recognized that § 1226(c) extends to those who pose no danger or flight risk. *See* Pet'rs' Br. at 29, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022), 2022 WL 4278395.

least seven years and have not been convicted of an aggravated felony. After closely analyzing the equities in Mr. Banyee's case, the IJ found Mr. Banyee deserving of cancellation, thereby allowing him to retain his lawful status. DHS appealed that decision. Six months later—at which point Mr. Banyee had been mandatorily detained for ten months—the Board of Immigration Appeals ("BIA" or "Board") affirmed the IJ's decision that Mr. Banyee warranted a favorable exercise of discretion but remanded to the immigration court for further consideration of whether his robbery conviction rendered him ineligible for cancellation relief.

Mr. Banyee's removal proceedings raise a complicated legal question of first impression involving the categorical approach. Throughout the time he litigated this issue, he remained mandatorily detained but diligently pursued his right to cancellation—leading to over a year at Kandiyohi Jail.

A. March 31-July 15, 2021: Banyee Prevails in His Initial Proceedings Before the IJ.

Mr. Banyee initially appeared pro se at his hearings before the IJ. App.11; R.Doc.1 at 8. DHS charged him with removability on three grounds: (1) commission of a controlled substance offense; (2) conviction of an aggravated felony crime of violence; and (3) conviction of two or more crimes involving moral turpitude. S.App.1-2. At his preliminary "master calendar" hearing on May 20, 2021, the IJ sustained only the latter two charges. S.App.2. Because the IJ held that Mr. Banyee had been convicted of an aggravated felony, he was barred from applying for asylum,

withholding of removal, and cancellation of removal for lawful permanent residents. App.11; R.Doc.1 at 8. Mr. Banyee was then scheduled a merits hearing on June 22, 2021 for his application for deferral of removal under the Convention Against Torture ("CAT"). App.11; R.Doc.1 at 8.

On June 10, 2021, the Supreme Court issued *Borden v. United States*, 141 S. Ct. 1817 (2021), holding that a criminal offense requiring only a *mens rea* of recklessness is not categorically a "violent felony" under the Armed Career Criminal Act. The IJ sua sponte asked the parties for briefing on whether Mr. Banyee's North Dakota robbery conviction remained an aggravated felony after *Borden*; the IJ also asked Mr. Banyee to submit an application for cancellation of removal. S.App.2-3.[4]

On June 22, 2021, in light of the IJ's request, DHS changed its theory of removability; it voluntarily withdrew its aggravated felony crime of violence charge, but lodged a new charge of deportability for an aggravated felony theft offense as defined in 8 U.S.C. § 1101(a)(43)(G). S.App.3. Mr. Banyee disputed this charge as well, and the IJ then held merits hearings on July 14 and 15, 2021, to consider Mr. Banyee's applications for relief. S.App.3-4.

On July 15, 2021, in an oral decision, the IJ held that she would not sustain the government's new aggravated felony charge because the government had not

[4] Mr. Banyee had already submitted an I-589 application form for asylum, withholding of removal, and CAT relief. S.App.3.

met its burden to demonstrate that the North Dakota robbery conviction constitutes an aggravated felony theft offense. S.App.10-15. Applying the "categorical approach," the IJ held that the text of the North Dakota robbery statute, N.D. Cent. Code § 12.1-22-01, encompasses offenses exceeding the generic definitions of theft incorporated by the aggravated felony theft statute, including a wide array of conduct like theft by deception, embezzlement, and misappropriation of public funds. S.App.12-15 (citing *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021); *Lopez-Aguilar v. Barr*, 948 F.3d 1143 (9th Cir. 2020)). The statute was therefore overbroad because it criminalized theft where the use of force or threat could be employed for purposes other than the taking or obtaining of property itself. S.App.14-15.

Having found that the conviction did not bar Mr. Banyee from cancellation of removal, the IJ then closely examined Mr. Banyee's criminal history, extensive evidence of rehabilitation, and family circumstances, and decided to grant him cancellation in the exercise of discretion. S.App.20-24. The IJ denied his other requests for asylum, withholding and CAT relief, which he did not appeal. App.208; R.Doc.14-1 at 1.

B. July 15, 2021-January 31, 2022: The BIA Affirms Favorable Exercise of Discretion but Remands for Consideration of Eligibility.

On July 20, 2021, DHS appealed the IJ's decision to the BIA, challenging both the IJ's dismissal of the aggravated felony charge as well as the grant of

cancellation. App.57-59; R.Doc.1-6 at 1-3. Following briefing over several months, the BIA issued its decision on January 31, 2022—at that point, ten months into Mr. Banyee's detention. App.208; R.Doc.14-1 at 1.

On de novo review, the Board affirmed the IJ's decision that Mr. Banyee warranted a favorable exercise of discretion. App.209; R.Doc.14-1 at 2. However, it remanded to the IJ for a new determination of whether Mr. Banyee was eligible for cancellation relief. App.211; R.Doc.14-1 at 4. Notably, the Board did not address the IJ's ruling dismissing the aggravated felony theft charge. Instead, it held that Mr. Banyee bore the burden to establish his eligibility for cancellation relief, and that he had failed to do so. App.209-11; R.Doc.14-1 at 2-4 (citing *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)). Specifically, the Board disagreed with the IJ's textual analysis for why the North Dakota statute was overbroad and therefore not an aggravated felony theft offense. App.210-11; R.Doc.14-1 at 3-4. It ordered the IJ to revisit this issue using the "realistic probability" standard, under which Mr. Banyee needed to demonstrate a "realistic probability" that the government would apply the statute to conduct beyond the generic definition of the aggravated felony theft offense. App.211; R.Doc.14-1 at 4.

C. Banyee's Second Proceedings Before the IJ and Pending BIA Appeal.

On remand, the IJ promptly ordered briefing on the issue of whether Mr. Banyee's North Dakota robbery conviction disqualified him from cancellation of

removal. App.215; R.Doc.15-1 at 2. Now represented by counsel, Mr. Banyee submitted briefing on N.D. Cent. Code § 12.1-22-01, including the statute's plain language, history, *mens rea* requirements, its meaning of the word "another," and North Dakota case law. App.215; R.Doc.15-1 at 2.

On March 28, 2022, the IJ issued a decision. Reiterating her position that the North Dakota statute is overbroad (based on the statute's plain language), she also acknowledged the persuasiveness of Mr. Banyee's brief. App.215; R.Doc.15-1 at 2. The IJ noted the Board had recently, in a different one of her cases, found that the same North Dakota statute did *not* constitute an aggravated felony theft offense. App.215; R.Doc.15-1 at 2. However, the IJ stated that the BIA's decision required her to apply the realistic probability test in Mr. Banyee's case and he could not meet his burden under this test. App.215; R.Doc.15-1 at 2. She therefore found him ineligible for cancellation and ordered his removal. App.215-18; R.Doc.15-1 at 2-5.

Mr. Banyee filed a timely appeal of the IJ's decision, which is still pending before the BIA. A21-22.

IV. Banyee Challenges His Detention and District Court Grants His Habeas Petition After A Year in Detention, Ordering A Bond Hearing with Burden on the Government.

Meanwhile, on August 9, 2021, Mr. Banyee filed a habeas petition under 28 U.S.C. § 2241. App.4; R.Doc.1 at 1. On December 2, 2021—at which point Mr. Banyee had been mandatorily detained by ICE for more than eight months—the

magistrate judge issued a report and recommendation that the habeas petition be granted. A14. On April 14, 2022, over a year into Mr. Banyee's detention, the district court adopted the report and recommendation. A16. The court agreed that his continued mandatory detention without a bond hearing violated the Fifth Amendment. A18-23. The court thus ordered a bond hearing in immigration court and, applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), held that the government had to prove flight risk or danger by clear and convincing evidence. A24-28.

The district court discussed how the Supreme Court has not addressed the constitutionality of prolonged detention under § 1226(c), and underscored that "due process rights are implicated when the period of detention under § 1226(c) is no longer 'brief.'" A18-19 (citing *Demore v. Kim*, 538 U.S. 510, 513, 526-31 (2003), and *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001)). The district court then adopted the prevalent framework among district courts in the Eighth Circuit for assessing as-applied challenges to the constitutionality of prolonged § 1226(c) detention. A19-20 (citing *Muse v. Sessions*, 409 F. Supp. 3d 707, 715 (D. Minn. 2018)).

In *Muse*, U.S. District Judge Patrick J. Schiltz "follow[ed] the lead of virtually every court that has addressed the issue" after the Supreme Court left it unresolved in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), and "h[eld] that a due-process challenge to § 1226(c) detention must be resolved by closely examining the facts of

a particular case to determine whether detention is reasonable." 409 F. Supp. 3d at 715. Judge Schiltz highlighted six factors that have "guide[d] [courts] in identifying the point at which 'continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a [bond] hearing.'" *Id*. (citation omitted). These "*Muse* factors" are: "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the [petitioner]; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Id*.[5]

Applying the *Muse* framework, the district court below concluded that Mr. Banyee's particular circumstances rendered his continued mandatory detention unreasonable. A23. First, the court held that the prolonged length of Mr. Banyee's detention without a hearing—for over a year—favored granting habeas relief. A21. Similarly, the court found that the second factor—how long mandatory detention was likely to continue in the absence of a writ—also weighed in Mr. Banyee's favor. A21-22. The district court also concluded that his detention in a county jail in

[5] Courts in the District of Minnesota have consistently adopted the multi-factor test from the "persuasive *Muse* opinion." *Pedro O. v. Garland*, 543 F. Supp. 3d 733, 738 (D. Minn. 2021); *Abdirizak Mohamed A. v. Brott*, No. 18-cv-3063, 2020 WL 1062913, at *3 (D. Minn. Mar. 5, 2020) (collecting cases).

conditions that "resemble penal confinement" also served to render his continued detention unreasonable. A22.

The court next found that neither party engaged in dilatory tactics, since each party had advanced substantive arguments throughout the administrative and judicial process, so the fourth and fifth factors were on balance neutral. A22-23. Finally, the court decided that, because it was not in a position to predict the outcome of the removal proceedings or to weigh the merits of either party's arguments, the sixth factor was neutral as well. A23. Accordingly, based on the particular circumstances of Mr. Banyee's case, the district court held that his continued mandatory detention was unconstitutional and ordered a bond hearing. A23.

Finally, to determine the procedural protections at this hearing, the district court applied the conventional test from *Mathews*, 424 U.S. at 335, weighing the private interest at stake, the risk of an erroneous deprivation of that interest, and the government's interest, including any possible fiscal and administrative burdens that would be imposed. A24. The court underscored the significant private interest involved in civil commitment and deprivation of liberty. A24 (citing, *inter alia*, *Addington v. Texas*, 441 U.S. 418, 425 (1979)). As to the second factor, the court noted that the government generally must bear a heightened burden in cases that involve the deprivation of physical liberty, because the injury to the individual is significantly greater than any possible harm to the state. A24. As to the last factor,

the court noted that the government and immigration courts are familiar with the clear-and-convincing evidence standard, and that "the government undoubtedly 'has access to information that is likely to bear on the question whether [petitioner] poses a risk of flight risk or danger.'" A24-25 (citation omitted). Taking these factors together on balance, the court concluded in line with other courts in the Eighth Circuit and beyond that due process required the government to bear the burden of proof by clear and convincing evidence. A25-28.

The district court therefore granted Mr. Banyee's habeas petition, although it ordered a bond hearing within 30 days instead of 14 days as originally requested. A27.

V. At the Bond Hearing, the IJ Finds Banyee Is Neither a Flight Risk Nor a Danger.

On April 21, 2022, the government produced Mr. Banyee for a bond hearing before the IJ. S.App.36. After careful consideration of voluminous evidence presented by both Mr. Banyee and DHS, the IJ issued an oral decision concluding that Mr. Banyee was neither a danger to the community nor a flight risk. S.App.40. The IJ did not minimize Mr. Banyee's criminal history. S.App.37-40. However, the IJ emphasized the significant evidence of Mr. Banyee's rehabilitation since committing these crimes as a young adult, noting "concerted efforts he has made that go above and beyond those efforts . . . seen with most other individuals in a similar situation." S.App.40. Among the evidence cited by the IJ were Mr. Banyee's

"voluntary participation in programming, not just court-ordered programming" and "[t]he abundance of support that he has received from not just members of his community but also other fellow inmates." S.App.40. The IJ concluded that Mr. Banyee's "effort to really reflect on what he has done in his past as a young man and the programming that he is engaged in, demonstrates over the past five years significant rehabilitation" and his ability to "[think] critically about how to stop offending, violating the law and reduce his chances of recidivism in the future." S.App.40. The IJ also mentioned his significant family ties and other positive factors noted in her earlier decision to favorably exercise discretion in his application for cancellation of removal. S.App.40.

The IJ ordered that Mr. Banyee be released on $7,500 bond. S.App.40. DHS appealed but did not seek a stay of the IJ's bond order. S.App.40-41.

The government filed its instant appeal of the district court's decision on June 10, 2022. App.242; R.Doc.18 at 1.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Mr. Banyee's prolonged mandatory detention under § 1226(c) had become unreasonable, such that due process required a bond hearing where the government bore the burden to justify his detention on either flight risk or danger by clear and convincing evidence.

While the issue is one of first impression for this circuit, the district court's decision follows from decades of Supreme Court precedent holding that an individualized hearing before a neutral arbiter on whether imprisonment serves a valid governmental purpose is the most basic procedural protection required by the Fifth Amendment—especially when detention becomes prolonged. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992); *Zadvydas*, 533 U.S. at 690. In *Demore*, the Supreme Court carved out a limited exception to this requirement, upholding the facial constitutionality of mandatory detention under 8 U.S.C. § 1226(c). 538 U.S. at 531. However, in doing so, the Court repeatedly emphasized the "brief" and "limited" period of detention at stake. *Id*. at 513, 531. Thus, it did not address the question presented here: at what point *prolonged* mandatory detention becomes unconstitutional. Likewise, in *Jennings*, the Supreme Court rejected the argument that § 1226(c) should be construed, based on the canon of constitutional avoidance, to require a bond hearing at six months, the Court explicitly left open the constitutional question presented here. 138 S. Ct. at 851.

In the aftermath of *Jennings*, "courts in this [circuit] and around the country have consistently recognized that 'prolonged mandatory detention under § 1226(c) . . . may violate the Due Process Clause.'" *Pedro O.*, 543 F. Supp. 3d at 738 (citations omitted). Nearly every district court in this circuit, and the only other circuit court to have addressed this question post-*Jennings*, have adopted a "highly fact-specific"

multi-factor framework—including looking at the length of detention to date and the anticipated future length of detention—to determine whether due process requires a bond hearing. *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020) (quoting *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d. Cir. 2015)); *Muse*, 409 F. Supp. 3d at 715.[6] In line with these decisions, the district court below correctly analyzed the specific circumstances of Mr. Banyee's as-applied challenge and held that his mandatory detention in a county jail—by then totaling over a year, all while pursuing legitimate defenses to removal, with no discernible end in sight—violated his due process rights.

The government's argument to the contrary fails on two fundamental fronts: first, it assumes that *Demore* resolves the case; and second, it argues that the district court was wrong to put such weight on the length of Mr. Banyee's detention. The government essentially posits that mandatory detention—regardless of its duration—is constitutional so long as removal proceedings are ongoing and the government has not engaged in dilatory tactics. Br. 17. But this position completely ignores *Demore*'s repeated emphasis on the "brief period" of detention. 538 U.S. at 513. And notably, the government also ignores its own prior concessions—made in

[6] *See also supra* at n.5. District courts that have not applied the *Muse* framework nevertheless agree that there is a point at which detention becomes unreasonable. *See, e.g.*, *Thok v. Berg*, No. 20-cv-478, 2020 WL 7632138, at *3 (D. Neb. Dec. 22, 2020) ("The Court is concerned with the length of time ICE has held petitioner without a bond hearing.").

briefing and oral argument in both *Demore* and *Jennings*—that detention under § 1226(c) could become so prolonged as to violate due process. *See, e.g.*, Pet'rs' Br. at 48, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560 [hereinafter Gov't *Demore* Br.] ("*Zadvydas* illustrates that the duration of detention in aid of removal is another factor bearing upon its constitutionality, because prolonged detention imposes a greater burden upon the alien[.]").[7]

Indeed, by insisting that the length of mandatory detention has no bearing on the constitutional question, the government now embraces a view of *Demore* that has been rejected by every court of appeals to consider it. Not only would its acceptance create a circuit split with the Third Circuit, it would also contravene foundational due process principles, derived from decades of Supreme Court precedent limiting the permissibility of civil detention without a bond hearing. The Supreme Court has never upheld the kind of expansive detention authority the government seeks, and this Court should not do so now.

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[7] *See also* Pet'rs' Br. at 47, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 5404637 [hereinafter Gov't *Jennings* Br.] ("[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely[.]" (citing *Zadvydas*, 533 U.S. at 690, 701)); Transcript of Oral Argument at 56, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) ("if there's some question about an aberrational lengthy detention, that should be brought to this Court or the courts below in an as-applied challenge"); Transcript of Oral Argument at 67, *Jennings v. Rodriguez*, 138 S Ct. 830 (2018) (No. 15-1204) (argued Nov. 30, 2016) (same).

Lastly, the district court correctly held that at the bond hearing, the government bears the burden by clear and convincing evidence of demonstrating that flight risk or danger requires further detention. The conclusion was consistent with bedrock Supreme Court precedent establishing the standard governing civil detention, and with the decisions of every court of appeals to address what burden should govern when detention under § 1226(c) grows unconstitutionally prolonged. *See German Santos*, 965 F.3d at 213; *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011). As the district court correctly reasoned, application of the *Mathews* test should yield the same result in this context. The liberty interests presented by the prolonged length of Mr. Banyee's detention are of the utmost importance. The government's interest in ensuring presence at removal and community safety is served by focusing detention resources on those who are demonstrably a flight risk or danger. And the risk of error from placing the burden on the detainee to demonstrate the negative is extremely high. The government undoubtedly is better positioned to develop a full and accurate record than noncitizens, who are detained and often unrepresented.

The government argues that the procedures under § 1226(a) that govern the bond hearings provided at the outset of discretionary detention are constitutionally sufficient here. *See* Br. 27 (citing *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), and *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)). But those cases did

not address the constitutionality of the burden where an individual was detained for over a year without *any* opportunity for release. According to the government, mandatory detention under § 1226(c) provides for no contested bond hearing before a neutral adjudicator and not even any consideration by the arresting officer. Thus, the gravity of the deprivation, the imbalance between the parties' respective abilities to gather and present evidence of flight risk and danger, and the complete lack of any mechanism by which the government may consider flight risk or danger, all justify the conclusion the district court reached, a conclusion reached by multiple other district courts in this circuit. *See Chuol P.M. v. Garland*, No. 21-cv-1746, 2022 WL 2302635, at *1 (D. Minn. June 27, 2022) (collecting cases).

ARGUMENT

I. Standard of Review.

When reviewing a district court's habeas decision, this Court "review[s] the district court's findings of fact for clear error, and its conclusions of law de novo." *Finch v. Payne*, 983 F.3d 973, 978 (8th Cir. 2020) (citations omitted).

II. The District Court Correctly Ordered a Bond Hearing When Banyee's Mandatory Detention Became Unreasonably Prolonged.

The district court correctly concluded that, although *Demore* permits mandatory detention under § 1226(c) for a "brief" or "limited" period, 538 U.S. at 513, 531, over time, an individual's detention without a hearing can violate due process. Decades of Supreme Court precedent unequivocally holds that an

individualized hearing before a neutral arbiter on whether imprisonment serves a valid governmental purpose is the most basic procedural protection required by the Fifth Amendment. This is particularly so when detention becomes unreasonably prolonged, as in Mr. Banyee's case.

A. Due Process Requires a Bond Hearing When Prolonged § 1226(c) Detention Becomes Unreasonable.

1. Bedrock Due Process Principles Require an Individualized Hearing to Justify Deprivation of Liberty.

"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*, 533 U.S. at 690. In the civil context, due process prohibits the government from detaining any person unless there is a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). The Fifth Amendment accordingly requires—"[a]t the least"—that detention be "reasonabl[y] relat[ed]" to a valid governmental purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see, e.g.*, *Foucha*, 504 U.S. at 79 (same); *Hendricks*, 521 U.S. at 357 (same).

Due process also requires "adequate procedural protections" to ensure that detention serves a valid governmental purpose. *Zadvydas*, 533 U.S. at 690-91; *Hendricks*, 521 U.S. at 357; *see also Addington*, 441 U.S. at 425-27. Accordingly,

even when the government has a valid goal, it generally may not deprive someone of liberty unless a neutral decisionmaker finds at an *individualized hearing* that detention in fact furthers the asserted justification for confinement. *Compare Hendricks*, 521 U.S. at 353, 357 (upholding civil detention scheme that unambiguously require[d]"—in a full-blown trial—"a finding of dangerousness . . . as a prerequisite to involuntary confinement"), *with Foucha*, 504 U.S. at 78-79 (holding that detention scheme violated due process in part because it did not require a "determination" that the individual sought to be committed possessed the requisite characteristics that would justify detention: "current mental illness and dangerousness").[8]

The dictates of due process become even more critical when detention is prolonged. *See Zadvydas*, 533 U.S. at 690; *Hendricks*, 521 U.S. at 363-64. In *Jackson*, for example, the Supreme Court emphasized that "due process requires that . . . [the] *duration* of commitment bear some reasonable relation to the purpose" of commitment, and it accordingly held that as the length of detention grows, additional protections are necessary to ensure that detention still bears a reasonable relation to its intended purpose. 406 U.S. at 738 (emphasis added); *see also McNeil*

[8] *See also United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (upholding a statute that authorized pre-trial detention which required "a full-blown adversary hearing, [where] the Government must convince a neutral decisionmaker" that individual was sufficiently dangerous).

v. Dir., Patuxent Inst., 407 U.S. 245, 249-50 (1972) (explaining that once detention becomes prolonged, more stringent procedural protections are required to satisfy due process).

In the immigration context, the Supreme Court has applied these precedents to conclude that "[a] statute permitting indefinite detention would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. The Court emphasized that preventive detention, especially the longer it lasts, must be justified by "sufficiently strong special justification[s]" and "subject to strong procedural protections." *Id.* at 690-91 (first citing *Jackson*, 406 U.S. at 738; then *Hendricks*, 521 U.S. at 368; *Salerno*, 481 U.S. at 747, 750-52; *Foucha*, 504 U.S. 81-83).

2. Demore *Carved Out a Limited Exception for "Brief" Periods of Detention and Concessions of Deportability.*

The government bases its entire argument on the Supreme Court decision in *Demore*. *E.g.*, Br. 1, 19-21, 23-25. But *Demore* considered only a *facial* challenge to the constitutionality of the mandatory detention statute, § 1226(c), not an *as-applied* challenge as here. In addition, *Demore* based its decision on government data showing that detention under § 1226(c) was "brief," 538 U.S. at 513, not over-12-months of mandatory detention Mr. Banyee was subjected to, which was by no means "brief." For these reasons, virtually every court to consider as-applied challenges to prolonged § 1226(c) detention has rejected the government's reading of *Demore*. *See infra* at 26. This Court should do the same.

The petitioner in *Demore* argued that he was entitled, at the outset of his detention, to an individualized determination of flight risk and dangerousness. *Demore*, 538 U.S. at 514 & n.2. The government, in turn, argued that the statute was constitutional in part because prolonged detention was not implicated. Gov't *Demore* Br. at 48. Citing *Zadvydas,* the government conceded that "the duration of detention in aid of removal is another factor bearing upon its constitutionality, because prolonged detention imposes a greater burden upon the alien and (depending upon the circumstances) may at some point not serve the underlying governmental purpose." *Id*. It argued, however, that "detention under Section 1226(c) generally lasts approximately one month or less, which distinguishes *Zadvydas* and strongly supports the statute's constitutionality." *Id*.

The Supreme Court's decision in *Demore* upholding § 1226(c) as facially constitutional was a narrow one, limited in two critical respects. First, *Demore* sanctioned detention without a bond hearing only for a "very limited time of detention." 538 U.S. at 529 n.12. Based on data the government provided, the Supreme Court understood that § 1226(c) detention "last[ed] roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal." *Id*. at 530. The Supreme Court therefore held that during this "limited period," due process does not require an inquiry into each individual detainee's circumstances. *Id*. at 531. *Demore* reasoned that Congress

could lawfully authorize detention for this "limited period" based on the mere presumption that noncitizens subject to § 1226(c) are a flight risk or danger because of their criminal histories. *Id*. at 523-26. Thus, the Supreme Court's expectation that detentions under § 1226(c) would be brief "was key to [its] conclusion that the law complied with due process." *Chavez-Alvarez*, 783 F.3d at 474. Indeed, every circuit court to address *Demore* has recognized that its holding is limited in this respect. *See German Santos*, 965 F.3d at 209; *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1211-12 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 493 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601, 613-14 (2d Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013); *Ly v. Hansen*, 351 F.3d 263, 275 (6th Cir. 2003).

In fact, in upholding the statute as facially constitutional, *Demore* expressly relied on cases that themselves permitted only brief periods of confinement. 538 U.S. at 531 (stating that *Wong Wing v. United States*, 163 U.S. 228 (1896), *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993), "governed" respondent's facial challenge). *Wong Wing* decided that "temporary confinement" is permissible during deportation proceedings, 163 U.S. at 235, but that such confinement cannot function as punishment without judicial process. *Id*. at 237; *cf. Salerno*, 481 U.S. at 747 n.4 (explaining that civil detention would become punitive if it is excessively prolonged). *Carlson* upheld the Attorney General's discretionary denial of bail to certain members of the Communist Party pending a decision on their

deportability. 342 U.S. at 543.[9] But *Carlson* also presumed that detention would be brief, specifically "not[ing] that the problem of habeas corpus after unusual delay in deportation hearings [was] not involved in th[e] case." *Id*. at 546 (citing *U.S. ex rel. Potash v. Dist. Dir.*, 169 F.2d 747, 751 (2d Cir. 1948) (collecting cases that suggested prolonged or unreasonable immigration detention is impermissible)). *Flores*, for its part, addressed a regulation that allowed detained minors to be released to close relatives and legal guardians on the "'blanket' presumption" that other adults would be unsuitable custodians. 507 U.S. at 313. But like *Carlson*, *Flores* avoided addressing whether prolonged detention was permissible based only on that presumption: The Supreme Court "w[ould] not assume, on [a] facial challenge, that an excessive delay will invariably ensue[.]" *Id*. at 309. The government cites *Demore*, *Reno*, *Carlson* and *Wong Wing* to argue that the Supreme Court has upheld detention during removal in all of its previous cases, Br. 20, but as explained above, this overlooks the essential premise that the detention in all of these cases were presumed to be brief.

The centrality of the brevity of detention to *Demore*'s holding is further reflected in Justice Kennedy's concurrence. Casting the crucial fifth vote, Justice Kennedy explained that, as a matter of due process, "a lawful permanent resident

[9] *Carlson* did not involve a mandatory detention scheme like § 1226(c) that prohibited the Attorney General from granting bail. To the contrary, evidence "show[ed] allowance of bail in the large majority of cases." 342 U.S. at 542.

such as [Mr. Banyee] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention becomes unreasonable or unjustified," and he joined the majority's opinion because it was "consistent with [that] premise[]." *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring).[10] The government suggests that Justice Kennedy's concurrence sanctions "continued detention under § 1226(c)" so long as it "continued to 'serve its purported immigration purpose' . . . of ensuring [] appearance and protecting the community." Br. 20, 24. But this fails to resolve the core issues: how to determine whether detention is serving this purpose and at what point such a determination is required.[11] Because *Demore* sanctioned brief detention and reasoned that the "purposes [of § 1226(c) detention] would be fulfilled in the vast majority of cases within a month and a half, and five months at the maximum, the constitutional case for continued detention *without inquiry into its necessity* becomes more and more suspect as

[10] The government argues that Justice Kennedy's concurrence cannot be read as limiting or qualifying *Demore*. Br. 20. But, here too, courts have repeatedly rejected that contention, which is foreclosed by Justice Kennedy's own words. *E.g.*, *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring); *Diop*, 656 F.3d at 232 (noting that Justice Kennedy's concurrence "highlighted an important limitation on the scope of [*Demore*'s] holding").

[11] In addition, it conflates a due process challenge to *continued detention* with a challenge to continued detention *without a hearing*. The ultimate question of whether due process requires release from detention is entirely separate from the question of whether a bond hearing is required in the first place. In Mr. Banyee's case, until he filed his habeas petition, *no one* ever had the chance to consider whether his continued detention served any valid purpose.

detention continues past those thresholds." *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011) (emphasis added) (internal citation omitted); *cf. McNeil*, 407 U.S. at 249 ("A confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation."). Importantly, as discussed below, federal courts universally recognize Justice Kennedy's concurrence as laying the foundation for as-applied challenges to § 1226(c). *E.g.*, *German Santos*, 965 F.3d at 209.[12]

[12] *Demore*'s holding is limited in a second respect: The Court expressly based its constitutional analysis on the petitioner's "concession" that he was, in fact, deportable, 538 U.S. at 522 n.6, and thereafter repeatedly limited its holding to "deportable criminal aliens." *Id*. at 513; *cf. Reid*, 819 F.3d at 499-500 ("As Justice Kennedy noted . . . the government's categorical denial of bond hearings is premised upon the alien's *presumed* deportability."); *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004) ("[*Demore*] left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable."). The Court, however, expressly avoided deciding whether it would be constitutionally permissible to categorically detain noncitizens, like Mr. Banyee, who are *not* conceding deportability and for whom entry of a final removal order is *not* inevitable. Although Mr. Banyee conceded that his crimes rendered him deportable as a threshold matter, he maintains that he is eligible for the relief of cancellation of removal, which if granted—a real possibility as explained below, *infra* Section II.B.5—would not only defeat a removal order, but also allow him to retain his lawful permanent resident status. By contrast, in *Demore*, the only relief that the noncitizen was eligible for at the time was withholding of removal from South Korea, which would not have prevented the entry of an order of removal against him nor the loss of his permanent resident status nor the possibility of his being removed to any other country that would accept him. 538 U.S. at 522 n.6.

3. Courts Post-*Jennings* Apply a Fact-Specific Inquiry to Determine When Prolonged § 1226(c) Detention Becomes Unreasonable.

After *Demore* was decided, *every* circuit to consider the issue held that prolonged, categorical detention based on mere presumptions of dangerousness and flight risk raises serious due process concerns. *Sopo*, 825 F.3d at 1213-14; *Reid*, 819 F.3d at 494; *Lora*, 804 F.3d at 606; *Rodriguez*, 715 F.3d at 1138; *Ly*, 351 F.3d at 267-68; *see also Diop*, 656 F.3d at 232-33. Rather than decide the issue squarely on constitutional grounds, most of these courts applied the canon of constitutional avoidance to read an implicit reasonableness limitation into the statute. *E.g.*, *Sopo*, 825 F.3d at 1213-14. They held that once prolonged § 1226(c) detention becomes unreasonable, the statute itself mandated a bond hearing. *Id*. at 1221. In doing so, these circuits effectively rejected the government's arguments—which it again advances here, Br. 24—that due process sanctions "the detention of criminal aliens *during their entire removal proceedings*, no matter how long they last." *Sopo*, 825 F.3d at 1212 (explaining uniform rejection of the government's position).

In *Jennings*, the Supreme Court held that the text of § 1226(c) cannot be read to provide for bond hearings after six months of detention, but it expressly did not address, and thus left open, whether and when due process might require such a hearing. 138 S. Ct. at 850-51. The government argues that the district court was wrong to rely on post-*Demore* cases because their "misguided framework" and

"flawed constitutional avoidance analysis" was "abrogated" by *Jennings*. Br. 7, 14. But while *Jennings* rejected these courts' *statutory* holdings—i.e., that § 1226(c) could be read to provide bond hearings, 138 S. Ct. at 846—it did not disturb the *constitutional* underpinnings of these courts' decisions. *Id*. at 851 (expressly declining to rule on the constitutional question). And even the government in *Jennings* expressly conceded the due process concerns with prolonged detention to the Supreme Court. Gov't *Jennings* Br. at 47 ("[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely.").

Separately, the Third Circuit has squarely held that unreasonably prolonged mandatory detention under § 1226(c) violates the Due Process Clause and that determining the point at which detention becomes unreasonable involves a careful analysis of the particular facts of the case. *Diop*, 656 F.3d at 232-33; *see also Chavez-Alvarez*, 783 F.3d at 472-78. In the only circuit decision addressing prolonged § 1226(c) detention since *Jennings*, the Third Circuit held that as-applied challenges to § 1226(c) require analyzing multiple factors, such as the duration of detention to date, whether detention is likely to continue, the reasons for the delays, and "whether the alien's conditions of confinement are 'meaningfully different[ ]' from criminal punishment." *German Santos*, 965 F.3d at 211 (alteration in original) (quoting *Chavez-Alvarez*, 783 F.3d at 478). As noted above, every district court in

this circuit has recognized that prolonged mandatory detention can raise due process concerns, and the vast majority apply the *Muse* multi-factor test, similar to the Third Circuit's in *German Santos*. *See supra* at 17-18 & n.5-6.

To analyze the reasonableness—and thus the constitutionality—of prolonged detention without a bond hearing, courts therefore have considered the factual circumstances that bear on whether the presumptions animating § 1226(c)'s categorical detention remain valid. *See, e.g.*, *German Santos*, 965 F.3d at 211; *Reid*, 819 F.3d at 500-01. These circumstances include: "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays of the removal proceedings caused by the detainee; (5) delays of the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Muse*, 409 F. Supp. 3d at 715. As discussed below, these factors are all relevant to the due process analysis and the district court correctly applied them in Mr. Banyee's case.

B. The District Court Correctly Applied the Fact-Specific Inquiry to Conclude that Banyee's Detention Had Become Unreasonable.

1. Length of Detention

The starting point and "most important factor" in evaluating an as-applied constitutional challenge to prolonged mandatory detention is the length of the particular noncitizen's detention to date. *German Santos*, 965 F.3d at 211; *see* Muse,

409 F. Supp. 3d at 716. This is because when the Supreme Court rejected a facial challenge to § 1226(c) in *Demore*, it did so based on its understanding that the detention at stake would last for a "brief period." 538 U.S. at 513, 530; *German Santos*, 965 F.3d at 211. Due process concerns arise when a noncitizen's detention ceases to be brief, dragging on beyond the timeframe contemplated in *Demore*. *Diop*, 656 F.3d at 233-34. In such cases, the burden to the noncitizen's liberty interest begins to outweigh the prior reliance on a mere presumption of flight risk and dangerousness. *Chavez-Alvarez*, 783 F.3d at 474-75.

Applying these principles, the district court correctly determined that the length of Mr. Banyee's detention during his removal proceedings at that point—"for more than 12 months"—weighed in favor of a finding of unreasonableness. A21. Concluding that *Demore* did not control because the Court there looked a "'brief' several-month period of detention," the district court explained that Mr. Banyee's civil detention without any individualized inquiry for "well beyond" that brief period—in fact, more than twice the time contemplated in *Demore*—made it difficult for the government to justify continued detention without a bond hearing. A21.

The government argues that the length of detention cannot be dispositive to render a noncitizen's continued detention unconstitutional. Br. 21. But the district court held nothing of the sort; rather, it considered the duration of Mr. Banyee's detention in its holistic due process analysis along with all the other relevant facts

and circumstances. A21-23; *see also German Santos*, 965 F.3d at 211 ("[W]e evaluate duration along with all the other circumstances[.]"); *Muse*, 409 F. Supp. 3d at 715 (courts "have used several factors to guide them" including "the total length of detention to date").

More importantly, the government's related contention that there is no "implicit time limit on how long that period [for § 1226(c) detention] may last," Br. 19, ignores the fundamental principle that a lengthier period of detention imposes a greater deprivation on an individual's liberty and therefore requires additional procedural protections to ensure that detention remains reasonable in relation to its purpose. *See Jackson*, 406 U.S. at 738-39; *McNeil*, 407 U.S. at 249; *Zadvydas*, 533 U.S. at 690-91, 701. Indeed, as noted above, in both *Demore* and *Jennings*, the government *expressly* conceded this very point and argued that the length of detention is a critical fact bearing on the constitutionality of § 1226(c). *See* Gov't *Demore* Br. at 48; Gov't *Jennings* Br. at 47. At no point does the government attempt to explain its about-face here.

The government also repeatedly and mistakenly claims that the length of Mr. Banyee's detention is not unreasonable because it "reflected the reasonable pace of his removal proceedings." Br. 22. As discussed below, *infra* Section II.B.4, the government essentially argues that a noncitizen can be held under mandatory detention for *any* length of time—with no limit—so long as they are in removal

proceedings and the government has not caused any unreasonable delay. But neither *Demore* nor any other circuit court has accepted the government's claim that a noncitizen's detention remains constitutional while "removal proceedings ran their course," no matter how long such proceedings might last. *See* Br. 24. Adopting that reasoning would mean that the government is authorized to detain lawful permanent residents like Mr. Banyee for *years*, without any review by a neutral arbiter whatsoever, so long as removal proceedings were still pending against them, even where they raise "complex" issues, as the government acknowledges is the case here. Br. 12. And this is not a hypothetical fear. Beyond Mr. Banyee's case, the government's position routinely results in mandatory detentions that last years. *See, e.g.*, *Leslie v. Att'y Gen. of U.S.*, 678 F.3d 265, 270 (3d Cir. 2012) ("nearly four full years"); *Sopo*, 825 F.3d at 1220 ("at least three-and-a-half" years); *Diop*, 656 F.3d at 223 ("two years, eleven months, and five days").

Contrary to the government's assertions, the Supreme Court has consistently recognized that due process requires the duration of civil detention to "bear some reasonable relation" to its purpose, *Jackson*, 406 U.S. at 738, and the federal courts have readily held that the constitutionality of detention under § 1226(c) "is a function of the length of the detention," *Diop*, 656 F.3d at 232. The district court was therefore correct in both its consideration of the length of Mr. Banyee's detention as a factor in its due process analysis and in its determination that his over 12-month detention

favored relief in this case. A21 (collecting cases); *see also Chavez-Alvarez*, 783 F.3d at 478 (stating that a lawful permanent resident's detention likely became unreasonable sometime after six months "and certainly by the time [he] had been detained for one year"); *Sopo*, 825 F.3d at 1217 (suggesting that an "alien's detention without a bond hearing may often become unreasonable by the one-year mark").

2. Likelihood of Future Detention

The next consideration is the likely duration of future detention. *See German Santos*, 965 F.3d at 211-12; *Muse*, 409 F. Supp. 3d at 716-17. Because the mandatory detention authorized by § 1226(c) is premised upon the government's ability to complete removal proceedings and secure a removal order within a brief period of time, the justification for categorically denying a bond hearing diminishes if a noncitizen's "removal proceedings are unlikely to end soon." *See German Santos*, 965 F.3d at 211. Thus, where a noncitizen faces the prospect of lengthy future detention because a final resolution of their removal case is not "reasonably within reach," continued detention without a bond hearing is more likely unreasonable. *See Chavez-Alvarez*, 783 F.3d at 477-78.

As with the first factor, the government appears to place no weight on the "theoretical length of any future detention," because the timeline merely "reflects a typical progression and careful assessment of Banyee's contested removability and eligibility for relief." Br. 21, 23. The government further claims that *Demore*

contemplated that removal proceedings can take longer than average without violating due process and that "due process is not violated simply because the noncitizen's litigation choices—such as requesting continuances, filing applications for relief, or filing an appeal, as Banyee did here—require that additional time be spent in removal proceedings." Br. 23. But the government is wrong on multiple counts. First, the government again overlooks that *Demore* did not address the constitutionality of *prolonged* § 1226(c) detention and that its holding on the facial validity of the statute was instead based on an understanding that removal proceedings "would be resolved within a matter of months, *including* any time taken for appeal by the detainee." *Reid*, 819 F.3d at 499. Second, courts have resoundingly held that a noncitizen's good-faith challenges to removal will not be held against him, "even if his appeals or applications for relief have drawn out the proceedings." *German Santos*, 965 F.3d at 211. To do so would be punishing the noncitizen for exercising her statutory and due process rights in removal proceedings.

Thus, courts consistently factor the time required to resolve a noncitizen's appeal within their evaluation of the likely duration of future detention. *E.g.*, *Chavez-Alvarez*, 783 F.3d at 477-78 (stating that the "complexity of [petitioner]'s case" allowed for the reasonable prediction that his "appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *Reid*, 819 F.3d at 501 (finding that the likely duration of future detention weighed in favor

of relief where the noncitizen's appeal was pending at the BIA, "making final resolution certainly far enough out to implicate due process concerns" (quotation omitted)).

Indeed, Mr. Banyee's case demonstrates how removal proceedings can become protracted, even after detention has already become prolonged. Shortly after the magistrate judge's report and recommendation, and over ten months after Mr. Banyee was first detained, the BIA affirmed the IJ's exercise of discretion to grant cancellation but remanded to the IJ to consider whether Mr. Banyee could demonstrate his eligibility for cancellation. At the time of the district court's decision, over a year into his detention, Mr. Banyee was in the early stages of his second appeal before the Board. The district court suggested that the administrative and judicial process, should there be an adverse decision appealed to the Eighth Circuit, could result in another 18 months or more of detention. A21-22.

As each of these developments make clear, there is no "credibl[e] claim[] that a final resolution" of Mr. Banyee's removal proceedings "was reasonably within reach" at the time of the district court's decision. *See Chavez-Alvarez*, 783 F.3d at 478. The district court therefore correctly concluded that the likely duration of Mr. Banyee's future detention favored a finding of unreasonableness.

3. Delays Caused by the Noncitizen

Courts analyzing the reasonableness of continued mandatory detention also

consider the reasons why a noncitizen's removal proceedings have become prolonged, considering which party, if any, is responsible for unnecessary delays. *German Santos*, 965 F.3d at 211; *Muse*, 409 F. Supp. 3d at 717-18. Actions taken by the noncitizen in bad faith and solely for the purpose of delay—such as seeking "repeated or unnecessary continuances, or fil[ing] frivolous claims and appeals"—cut against a finding that detention has become unreasonable. *Sopo*, 825 F.3d at 1218. As courts have explained, "aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get." *Chavez-Alvarez*, 783 F.3d at 476.

However, as noted above, courts have uniformly recognized that a noncitizen's good-faith challenges to removal do not count against them or otherwise undermine their ability to claim that detention has become unreasonable, even if those challenges by necessity lengthened their removal proceedings. *E.g.*, *German Santos*, 965 F.3d at 211; *Muse*, 409 F. Supp. 3d at 717. Asserting defenses to removal and pursuing applications for relief are a natural part of removal proceedings, and noncitizens are "not responsible for the amount of time that such [claims] may take" to resolve. *Leslie*, 678 F.3d at 271 (quotation omitted). If a noncitizen's pursuit of a legitimate challenge to removal "render[ed] the corresponding increase in time of detention reasonable," it "would 'effectively punish [them] for pursuing applicable legal remedies,'" and courts have therefore

"decline[d] the government's invitation to adopt such a position." *Id.* (quoting *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004)).

Applying this analysis, the district court correctly determined—and the parties agreed—that there were no delays on Mr. Banyee's part. A22. Yet in its opening brief, the government appears to fault Mr. Banyee for the length of his detention because of his "litigation choices" to contest removability and file an appeal. Br. 23. Given the fundamental rights at stake in removal proceedings, *see, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (describing the "severity of deportation" as "the equivalent of banishment or exile" (quotation omitted)), courts unsurprisingly have rejected the government's position and concluded that good faith challenges to removal do not constitute delay or undermine a claim that their detention has become unreasonable. *E.g.*, *Ly*, 351 F.3d at 272.

4. Delays Caused by the Government

Courts likewise consider the nature and extent of any delays in the removal case caused by the government. *German Santos*, 965 F.3d at 211; *Muse*, 409 F. Supp. 3d at 717-18. Where the government has "made careless or bad-faith" errors that have prolonged proceedings or otherwise failed to actively prosecute the noncitizen's removal case, this factor will favor relief. *German Santos*, 965 F.3d at 211. A noncitizen's mandatory detention will also appear more unreasonable if their case has slipped through the cracks, lingering on the immigration court's or

BIA's docket for an extended period of time. *See Muse*, 409 F. Supp. 3d at 718; *cf. Lora*, 804 F.3d at 616 (noting that "endless months of detention" under § 1226(c) are "often caused by nothing more than bureaucratic backlog").

The district court found this factor here was "neutral" and the parties agreed below that neither party has engaged in dilatory tactics. A22-23. The government now asserts, however, that there can be no extraordinary circumstances to warrant habeas relief if the government has not engaged in any dilatory tactics. Br. 2, 24. But mandatory detention can be unreasonable after a prolonged period even if removal proceedings are moving forward at a reasonable pace and even if the government has handled the removal case in a reasonable way. *German Santos*, 965 F.3d at 211. This is because "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of . . . [an] alien for an unreasonable, and ultimately unconstitutional, period of time." *Diop*, 656 F.3d at 223.

Courts have thus repeatedly rejected the government's argument that a noncitizen *must* show dilatory tactics by the government to show an unreasonably prolonged detention. *Compare* Br. 23-24, *with*, *e.g.*, *Reid*, 819 F.3d at 499 ("Total duration matters to a person held in civil confinement, and due process demands a better answer than 'we haven't gotten around to it yet.'"). And the reason for that is logical: *Demore* was premised on "[t]he very limited time of the detention at stake,"

538 U.S. at 529 n.12; the due process concerns inherent in prolonged detention arise regardless of whether the government or noncitizen are acting diligently or whether delays are attributable to third parties or the immigration system itself. *E.g.*, *Diop*, 656 F.3d at 228, 235 (acknowledging "[t]he Government doggedly pursued [the petitioner]'s detention and removal for three years" but concluding nevertheless that his detention had become unreasonable).

Therefore, Mr. Banyee need not establish government delay in order for this Court to uphold the district court's decision.

5. Likelihood of a Final Order of Removal

Courts additionally consider the likelihood that proceedings will culminate in the noncitizen's actual removal from the U.S. *Muse*, 409 F. Supp. 3d at 718; *see Reid*, 819 F.3d at 499-500; *Sopo*, 825 F.3d at 1218. The ultimate purpose behind § 1226(c)'s categorical denial of bond hearings is the noncitizen's presumed deportability. *Demore*, 538 U.S. at 531 (Kennedy, J., concurring). Therefore, "[a]s the likelihood of an imminent *removal* order diminishes, so too does the government's interest in detention *without a bond hearing*." *Reid*, 819 F.3d at 500. Put differently, where a noncitizen's presumed deportability is "draw[n] into question" over the course of removal proceedings, or it appears that she may ultimately prevail, that weighs toward a finding that continued detention without a bond hearing is unreasonable. *Id.* at 501; *see also Zadvydas*, 533 U.S. at 690

("[W]here detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." (cleaned up)).

The district court found this factor neutral, stating "[t]ypically, a court is not in a position to predict the outcome of removal proceedings or to weigh the merits of either the government's grounds for removal or a detainee's grounds for cancellation of removal." A23. This is consistent with the practice of other courts in the District of Minnesota, which "are disinclined to conduct an in-depth analysis of this factor, as doing so would require the [c]ourt to weigh the merits of IJ decisions and the parties' appeals." *Abshir H.A. v. Barr*, No. 19-cv-1033, 2019 WL 3719414, at *2 (D. Minn. Aug. 7, 2019) (citations omitted).

While ultimately unnecessary to affirm the decision below, there is ample evidence that Mr. Banyee's removal proceedings will not end in a final removal order. The IJ already granted Mr. Banyee's application for cancellation for removal, and the BIA affirmed that positive exercise of discretion. The only remaining issue in Mr. Banyee's case is a purely legal one: whether the North Dakota robbery statute is categorically an aggravated felony theft offense that would render him ineligible for cancellation. As the IJ already found (and the BIA affirmed in a separate appeal), the statute is on its face overbroad because it criminalizes conduct that falls outside the generic definition of theft. App.215; R.Doc.15-1 at 2. The Eighth Circuit has

already recognized that petitioners need not show "realistic probability" where laws are unambiguously overbroad. *See Gonzalez v. Wilkinson*, 990 F.3d 654, 660-61 (8th Cir. 2021) ("Here, the plain language of the Florida statute makes clear that it applies to conduct not covered by the federal statute . . . This is all that [the petitioner] was required to show under the categorical approach."). Although the IJ felt constrained by the first BIA decision to apply the "realistic probability" test to this claim, the Board could revisit the issue on appeal based on Mr. Banyee's new, fully briefed arguments regarding how overbroad the plain language of the statute is. Alternatively, the issue can be reviewed de novo on a petition for review. If Mr. Banyee prevails on appeal, he would automatically be granted cancellation of removal. Therefore, although Mr. Banyee need not establish likelihood of ultimate success in his removal proceedings, there are grounds to find that this factor weighs in favor of unreasonableness.

6. Conditions of Confinement

Finally, courts consider whether—and to what degree—the conditions under which a noncitizen is held resemble penal confinement. *German Santos*, 965 F.3d at 211; *Sopo*, 825 F.3d at 1218. Removal proceedings are civil, not criminal, and detention under § 1226(c) therefore must be nonpunitive in both purpose and effect. *Zadvydas*, 533 U.S. at 690; *see Wong Wing*, 163 U.S. at 238 (holding that punitive confinement cannot be imposed on noncitizens absent

judicial process). The reality remains, however, that "merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures." *Chavez-Alvarez*, 783 F.3d at 478. Due process concerns thus arise where a civil detention resembles criminal punishment, "tilt[ing] the scales toward finding the detention unreasonable." *German Santos*, 965 F.3d at 211.

As the district court found, Mr. Banyee was held in a county jail, which the government conceded to be a criminal correctional facility, and therefore subjected him to conditions of confinement that were "indistinguishable from criminal incarceration." A22. The district court correctly concluded that his prolonged detention in conditions that "resemble penal confinement" strengthened his entitlement to a bond hearing. A22 (citing *Muse*, 409 F. Supp. 3d at 717, and *Chavez-Alvarez*, 783 F.3d at 478).

The government claims conditions of confinement have no relevance aside from the length of detention, because they cannot form an independent basis for habeas relief. Br. 21. Courts analyzing this factor have made clear that the weight it receives increases as the length of detention grows. *German Santos*, 965 F.3d at 211; *Muse*, 409 F. Supp. 3d at 717. But the government never addresses the common-sense principle that confinement in conditions designed to punish—on its own and apart from length of time in detention—constitutes a greater deprivation of an individual's liberty. Courts have thus refused to "ignore the conditions of [a

noncitizen's] confinement." *German Santos*, 965 F.3d at 212; *Sopo*, 825 F.3d at 1221; *see also, e.g.*, *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020) (stressing that while immigration detention is "not the result of a criminal adjudication," noncitizens are nevertheless "locked up in jail" where they "[can]not maintain employment or see . . . family or friends or others outside normal visiting hours"). While length of time in these penal conditions are relevant, the *nature* of the conditions of confinement is independently important to the due process analysis because it impacts the extent of the deprivation of liberty involved.

* * *

The district court thus undertook a careful, individualized analysis of Mr. Banyee's case to conclude, correctly, that his prolonged mandatory detention had become unreasonable. This Court should reject the government's attempts to minimize the fundamental liberty interests at stake and affirm the order for a bond hearing.

III. The Government Must Justify Banyee's Unreasonably Prolonged Mandatory Detention by Clear and Convincing Evidence.

A standard of proof "serves to allocate the risk of error between the litigants" and reflects the "relative importance attached to the ultimate decision." *Addington,* 441 U.S. at 423. The district court correctly balanced the disparity between the private and governmental interests when detention becomes prolonged to conclude that liberty was paramount and the government must justify its deprivation by a clear

and convincing standard—the same standard that the Supreme Court has held to govern across civil detention contexts.

A. Supreme Court Precedent Places the "Clear and Convincing Evidence" Burden on the Government When Detention Becomes Prolonged.

The Supreme Court has long made clear that, where the government seeks to deprive an individual of a "particularly important individual interest[]," it bears the burden of proof by clear and convincing evidence. *Addington*, 441 U.S. at 424 (addressing civil commitment); *see Santosky v. Kramer*, 455 U.S. 745 (1982) (parental termination); *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 285-86 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation proceedings); *Chaunt v. United States*, 364 U.S. 350, 354-55 (1960) (same, for denaturalization). Where the Court has upheld civil detention, it has relied on the fact that the government bore the burden of proof by at least clear and convincing evidence. *See, e.g., Salerno*, 481 U.S. at 750, 752 (noting "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Hendricks*, 521 U.S. at 352-53 (jury trial and proof beyond reasonable doubt). Conversely, the Court has struck down civil detention schemes that place the burden on the detainee. *See Foucha*, 504 U.S. at 81-83; *see also Zadvydas*, 533 U.S. at 692 (finding post-final order custody review procedures deficient because, *inter alia*, they placed burden on noncitizen).

These principles apply even more forcefully to prolonged confinement, which requires stronger procedural safeguards. *See* Section II.A.1 (recognizing the need for greater government justification as length of detention increases). Consequently, the two circuits to squarely consider the constitutionality of prolonged mandatory detention under § 1226(c) have held that the government bears the burden of justifying prolonged immigration detention by clear and convincing evidence. *See German Santos*, 965 F.3d at 213; *Singh*, 638 F.3d at 1205.[13]

The government argues that bedrock principles governing civil detention should not apply to the burden here, and instead the same procedures accompanying discretionary detention under 8 U.S.C. § 1226(a) should apply to require non-citizens detained for prolonged periods without any custody review to prove a negative—that they are *not* a flight risk or danger. Br. 15-17. But the bond procedures pursuant to § 1226(a) were not designed for this context. Under § 1226(a), an individual receives a bond hearing before an IJ when detention begins, and has the opportunity for further review by an IJ upon a showing of changed circumstances. Moreover, ICE officers have discretion to release an individual *at any time* if presented with evidence mitigating flight risk or danger.

[13] As *Singh* provided a constitutional grounding for its rule, its reasoning remains valid even after the Supreme Court's statutory holding in *Jennings*. 638 F.3d at 1203-04.

Here, however, detention is mandatory. Mr. Banyee—and others detained pursuant to § 1226(c)—will go years without either a formal bond hearing or *any* opportunity to persuade their arresting officers to release them. Indeed, even those circuits that have affirmed the burden placed on noncitizens detained under § 1226(a) for prolonged periods of time have *also* reached the same result as the district court below to place the burden on the government in prolonged § 1226(c) detention. *Compare Borbot v. Warden*, 906 F.3d 274, 278-79 (3d Cir. 2018) (rejecting challenge to burden under prolonged § 1226(a) detention), *with German Santos*, 965 F.3d at 213-14 (placing burden on government by clear and convincing evidence after § 1226(c) becomes prolonged), *and Rodriguez-Diaz*, 53 F.4th at 1193-94 (§ 1226(a)), *with Singh*, 638 F.3d at 1205 (§ 1226(c)).[14]

Moreover, although district courts in this circuit initially left burden as an open question, the growing consensus among courts is that the government should bear the burden in these prolonged § 1226(c) bond hearings. *Compare Pedro O.*, 543 F. Supp. 3d at 740 (acknowledging "[s]everal courts in this District have decided to leave all questions concerning the appropriate procedure for a bond hearing under § 1226(c) to the [IJ] in the first instance"), *with id*. at 742 ("When asked to balance these [*Mathews*] factors, an overwhelming majority of courts have held that the

[14] *Ali v. Brott*, 770 F. App'x 298 (8th Cir. 2019), held only that the text of § 1226(a) could not be interpreted to shift the burden in bond hearings under that statute; it left open the question of the constitutionality of that burden. *Id*. at 302.

Government must justify the continued confinement of an alien under § 1226(c) by clear and convincing evidence." (citations omitted)); *see also Chuol P.M.*, 2022 WL 2302635, at *1 ("[T]his Court agrees with the reasoning and analysis of other Courts within this District that have concluded that at such a bond hearing, due process requires the government to bear the burden of proof by clear and convincing evidence to justify [petitioner]'s continued detention." (collecting cases)).

It is simply untrue, as the government contends, that the rule applied here treats "criminals" more leniently than those detained under § 1226(a). Though the government may eventually have to meet a higher burden to detain under the district court's rule, the government need not meet *any* evidentiary burden whatsoever until detention grows prolonged. A26; *see also Pedro O.*, 543 F. Supp. 3d at 743-44 ("Non-criminal aliens subject to discretionary detention under § 1226(a) enjoy a crucial procedural protection that criminal aliens do not."). Moreover, as the individuals subject to § 1226(c) are so categorized by dint of their criminal records, the government will have access to necessary records so as to attempt to meet their burden.

B. *Mathews v. Eldridge* Requires a Standard of Clear and Convincing Evidence.

As the district court correctly concluded, each prong of the *Mathews* test supports placement of the burden on the government by clear and convincing evidence. First, prolonged detention undoubtedly deprives noncitizens of a

"particularly important" interest. *Addington*, 441 U.S. at 424; *see also Zadvydas*, 533 U.S. at 689; *German Santos*, 965 F.3d 213-14 ("[W]hen someone stands to lose an interest more substantial than money, we protect that interest by holding the Government to a higher standard of proof.") The longer the duration of detention, the greater the deprivation, particularly in the civil context. *Pedro O.*, 543 F. Supp. 3d at 742. Here, because Mr. Banyee had been deprived of his physical liberty for a prolonged period of over 12 months at the time of the district court's ruling, the first *Mathews* factor weighed heavily in favor of granting him relief.

The government agrees that "noncitizens in removal proceedings are entitled to due process" but argues that "they are not necessarily entitled to the same procedures as U.S. citizens" developed in the Supreme Court's civil detention case law. Br. 27. The Supreme Court, however, has made clear that noncitizens and citizens alike have a fundamental interest in "[f]reedom from . . . physical restraint." *Zadvydas*, 533 U.S. at 690; *see also id*. at 693 (by "appl[ying] to all '*persons*' within the United States," the Due Process Clause necessarily "include[es] aliens, whether their presence here is unlawful, temporary, or permanent"); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying *Mathews* to noncitizen's challenge to deportation procedures). The Supreme Court's case law governing the application of due process to civil detention draws no distinction based on citizenship. *See, e.g.*, *Addington*, 441 U.S. at 425, 427 (discussing the due process rights of "individuals"). And the

Supreme Court has relied on civil detention cases to determine the limits on arbitrary immigration detention. *See Zadvydas*, 533 U.S. at 690 (citing, *inter alia*, *Foucha*, *Salerno*, and *Hendricks*).

Second, unless the government bears the burden by clear and convincing evidence, the risk of erroneous deprivation of that liberty interest in bond hearings is impermissibly high. As demonstrated in this case, individuals who are *not* a flight risk or a danger are held without the possibility of release.

The asymmetry between the parties at bond hearings means that the government is best positioned to provide accurate and complete information going to flight risk and danger—thus ensuring a complete record for decisionmaking. The government is represented by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained, often unrepresented, and frequently lacks English proficiency. *Cf. Santosky*, 455 U.S. at 762-63 (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"). Government attorneys are far more able to produce documents and other evidence to meet their burden than are detained noncitizens, who would otherwise be tasked with obtaining records—including court documents, marriage and birth

certificates, or police reports—after having spent months if not years in detention, where they have limited access to counsel, the Internet, mail, phone, and a reduced ability to pay for and store vital records. *See Velasco Lopez*, 978 F.3d at 853 (noting that for immigration bond proceedings, "the Government had substantial resources to deploy . . . includ[ing] computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities. Moreover, to the extent the Government did not have the necessary information at its fingertips, it had broad regulatory authority to obtain it." (internal citations omitted)).

Indeed, the government identifies no *practical* difficulties with the district court's decision, instead stating generally that "control over matters of immigration is . . . largely within the control of the executive and legislature." Br. 28 (citing *Plasencia*). But that case concerned decisions over who is to be *removed* from the U.S., not detention pending those proceedings. And, as explained *supra* at 26-27, the Supreme Court has established that while the government may have broad powers to establish who is allowed to enter and remain in the U.S., its treatment of persons while making removal decisions—even after establishing that someone is to be removed—is subject to Constitutional limitations. *See, e.g.*, *Wong Wing*, 163. U.S. at 238; *Zadvydas*, 533 U.S. at 690.

Finally, the government's interest in detaining people like Mr. Banyee—who are not a flight risk or danger—for months or years is minimal to nonexistent. As discussed above, the government has substantial resources to present its case for continued detention between the information already in its files and its authority to procure more information from contacts in the criminal legal system. The government, moreover, already holds bond hearings for those detained under § 1226(a). Only those under § 1226(c) whose detention grows unconstitutionally prolonged will require a bond hearing under the constitutionally-required standard. Not only will the commitment of additional resources be minimal, any burden to the government would be more than offset by the reduced cost to the government and society at large with fewer unnecessary detentions of people like Mr. Banyee.

CONCLUSION

This Court should affirm the district court's holding that the government's mandatory detention of Mr. Banyee under § 1226(c) had become unreasonable, violated due process, and required a bond hearing where the government must prove by clear and convincing evidence that continued detention was justified.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,990 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Rome 14-point font.

Pursuant to 8th Cir. R. 25, I certify that the brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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