No. 22-2252

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NYYNKPAO BANYEE,

Petitioner-Appellee,

v.

MERRICK B. GARLAND,
Attorney General of the United States, et al.,

Respondents-Appellants.

On Appeal from the United States District Court for the District of Minnesota
Case No. 0:21-cv-01817-WMW-BRT

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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INTRODUCTION

As explained in the government's opening brief, the district court erred in holding that Petitioner-Appellee Nyynkpao Banyee's detention pursuant to 8 U.S.C. § 1226(c) pending his removal proceedings had become unconstitutional largely based on the length of his detention. Banyee concedes that he falls within a class of noncitizens specified in section 1226(c) as being subject to mandatory detention and that the Supreme Court upheld the facial constitutionality of section 1226(c) detention in *Demore v. Kim*, 538 U.S. 510 (2003). But contrary to Banyee's primary argument, *Demore* does not limit section 1226(c) detention to any specific time period. And Banyee does not allege that the government unreasonably delayed his removal proceedings, nor has he identified any other extraordinary circumstances that would support a ruling that his detention violated due process.

Moreover, even if a bond hearing had been warranted, Banyee cites no binding authority from the Supreme Court or this Court to support the district court's requirement that the government justify his mandatory detention under section 1226(c), let alone by clear and convincing evidence. The standard bond-hearing procedures that apply to noncitizens detained under section 1226(a) are more than sufficient to satisfy due process.

For these reasons, and those set forth in the government's opening brief, this Court should reverse the district court's judgment.[1]

ARGUMENT

I. Banyee's Detention Pending Removal Proceedings, as Required by Section 1226(c), was Constitutionally Permissible.

A. Banyee's detention without a bond hearing comported with due process under controlling Supreme Court precedent.

As the government explained, Banyee's detention pursuant to 8 U.S.C. § 1226(c) during his removal proceedings was constitutionally permissible. Gov't Br. 18–21. At the outset, Banyee does not dispute that his prior convictions make him removable under 8 U.S.C. § 1227(a)(2)(A)(ii), which places him within a category of noncitizens subject to mandatory detention under section 1226(c).[2] Under the statute,

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[1] In Banyee's "Statement of the Case," he repeatedly references allegations contained in documents that were not before the district court and thus are not part of the record in this appeal. *See* Pet. Br. 3–4, 7–9, 15–16. These documents are not subject to judicial notice for the reasons set out in the government's opposition to Banyee's "Motion for Leave to File a Supplemental Appendix." In any event, Banyee does not cite those documents in his "Argument," *see* Pet. Br. 21–54, apparently conceding their irrelevance to the legal questions presented in this appeal.

[2] Banyee insists that he is "*not* conceding deportability" because he believes a "final removal order is *not* inevitable." Pet. Br. 29 n.12. But he simultaneously "concede[s] that his crimes rendered him deportable as a threshold matter." *Id.*; *see* 8 C.F.R. § 1240.8(a) ("A [noncitizen] charged with deportability shall be found to be removable if [the Department of Homeland Security] proves by clear and convincing evidence that the [noncitizen] is deportable as charged."). And that threshold assessment is the relevant one for determining whether Banyee is subject to section 1226(c) detention, which governs only "pending a decision on whether the alien is to be removed" and only where someone "is inadmissible" or "is deportable" under certain provisions. 8 U.S.C. § 1226(a), (c). At the end of Banyee's removal

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"that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes," *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018), and Banyee has never alleged that he qualifies for that limited exception.

Contrary to Banyee's suggestion that the governmental purpose of detention must always be tested in an individualized hearing, Pet. 21–24, in *Demore*, the Supreme Court upheld against a facial challenge the constitutionality of mandatory detention of certain criminal and terrorist noncitizens during their removal proceedings, Gov't Br. 18–21. The Court rejected the arguments the noncitizen made there that as a categorical matter, mandatory detention is unconstitutional absent an "individualized screening," *Demore*, 538 U.S. at 520, or "individualized findings of dangerousness" or "flight risk," *id.* at 524. As the Court explained, Congress had found that, before it enacted section 1226(c) mandating detention for certain criminal and terrorist noncitizens—when individual bond hearings had been provided those categories of noncitizens—many individuals absconded or committed additional crimes at unacceptably high rates. *Id.* at 518–20. Congress thus decided that mandatory detention of these individuals as a class was necessary to meet the goals of the statute, i.e., ensuring public safety and appearance at removal hearings and at removal. *Id.* at 520–21. Accordingly, the Court held that Congress may require that removable

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proceedings, he will either meet his burden to establish eligibility for relief, *see* 8 C.F.R. § 1240.8(d), or he will receive a final order of removal and thus any detention would be governed by a different statute, 8 U.S.C. § 1231(a).

criminal noncitizens (such as Banyee) "be detained for the brief period necessary for their removal proceedings." *Id.* at 513.

Banyee also invokes Supreme Court caselaw involving potentially indefinite civil commitment or pretrial criminal detention to argue that civil detention generally requires a "special justification" to outweigh individual liberty interests and sufficient procedural protections to ensure that the detention serves its intended purposes. Pet. Br. 22–24 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *United States v. Salerno*, 481 U.S. 739 (1987)). But the Supreme Court has never applied the reasoning from those cases to immigration detention incident to removal proceedings. Again, similar arguments were raised and rejected in *Demore*, where these lines of cases were addressed only in dissent. *See Demore*, 538 U.S. at 548-51 (Souter, J., dissenting in part) (discussing *Hendricks*, *Jackson*, *Foucha*, *Addington*, and *Salerno*). The majority, in contrast, emphasized that it had "firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522; *see also* Gov't Br. 20 n.10 (collecting similar cases upholding the categorical detention of certain noncitizens during removal proceedings).

Similarly, *Demore* forecloses Banyee's reliance on *Zadvydas v. Davis*, 533 U.S. 678 (2001)—a case involving potentially indefinite detention pursuant to a final order of removal under 8 U.S.C. § 1231(a)(6)—for the broad proposition that "preventive

detention, especially the longer it lasts, must be justified by 'sufficiently strong special justification[s]' and 'subject to strong procedural protections.'" Pet. Br. 24; *see id.* at 34. In *Zadvydas*, as a statutory matter, the Court concluded that six months was a "presumptively reasonable" time during which detention after entry of a final order of removal continued to serve the purpose of effectuating the final order of removal. 533 U.S. at 701. Even after that point, a noncitizen's detention could continue (without a bond hearing) "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*[3] The Court highlighted that, unlike detention under section 1226(c), which applies only to certain criminal or terrorist noncitizens "pending a determination of removability," section 1231(a)(6) applies to anyone with a final removal order and "has no obvious termination point." *Id.* at 697.

Two years later, in *Demore*, the Supreme Court further emphasized that the post-removal-order detention at issue in *Zadvydas* was "materially different" from pre-order detention under section 1226(c) because the former may be "indefinite" and "potentially permanent," while the latter has an "obvious termination point." *Id.* at 529. The Court specifically overturned circuit courts' decisions that had relied on *Zadvydas* to hold that the government "had not provided a justification for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest"

[3] The Supreme Court recently confirmed that noncitizens detained under 8 U.S.C. § 1231(a)(6) have no statutory right to a bond hearing at the six-month mark. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1833 (2022).

with respect to section 1226(c). *Id.* at 515; *see also Jennings*, 138 S. Ct. at 846 ("As we made clear [in *Demore*], that 'definite termination point' [(*i.e.*, the conclusion of removal proceedings)]—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).").

Accordingly, particularly for a criminal noncitizen who has conceded removability—like Banyee—"[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore*, 533 U.S. at 697; *see also Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (upholding constitutionality of section 1226(c) detention and noting "the sweeping powers Congress possesses to prescribe the treatment of aliens").

B. The length of Banyee's detention alone does not signal a lack of due process.

As the government explained, although there may be cases in which continued detention without a bond hearing under section 1226(c) may be unconstitutional, Banyee has not pointed to any extraordinary circumstances that would warrant such a conclusion here. Gov't Br. 20–25.[4] Banyee principally argues that *Demore*'s holding—

[4] Purportedly relying on the government's briefs and oral arguments in *Demore* and *Jennings*, Banyee falsely accuses the government of "completely ignor[ing] its own prior concessions" that "detention under § 1226(c) could become so prolonged as to violate due process." Pet. Br. 18–19, *see id.* at 25, 34. But the government explicitly acknowledged here that section 1226(c) detention "*might cease to be constitutional in extraordinary circumstances*." Gov't Br. 21 (emphasis added); *see also id.* at 20 ("The Supreme Court has not yet decided whether due process might prohibit the continued application of section 1226(c) in individual extraordinary circumstances."). That is

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permitting mandatory detention of certain criminal noncitizens during their removal proceedings—applies only where the detention is "brief." Pet. Br. 24–29.[5] Although Banyee does not explicitly define "brief" in this context, he appears to believe that any period of detention beyond the six months that the noncitizen in *Demore* had experienced would not qualify. *E.g.*, Pet. Br. 33 ("Due process concerns arise when a noncitizen's detention ceases to be brief, dragging on beyond the timeframe contemplated in *Demore*."); *id.* at 24 (asserting that Banyee's 12 months of detention "was by no means 'brief'").

But the Supreme Court in *Demore* never suggested that the constitutionality of section 1226(c) detention is limited to a specific length of time. Gov't Br. 23–25. Rather, the Court contrasted the period of detention with that in *Zadvydas*, which

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entirely consistent with the government's position in *Demore*—which Banyee ignores—that "exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis." Gov't Br. 48–49, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. Banyee's actual dispute, then, is with the government's argument that just because an as-applied challenge is *available* to a noncitizen like Banyee, that does not mean he necessarily will *succeed* in that challenge.

[5] In a footnote, Banyee also attempts to limit *Demore*'s "constitutional analysis" as "expressly based" on "the petitioner's 'concession' that he was, in fact, deportable." Pet. Br. 29 n.12. First, as described above, Banyee has conceded that he is removable as charged under 8 U.S.C. § 1227(a)(2)(A)(ii). The noncitizen in *Demore*, just like Banyee, had "conceded that he is deportable for purposes of his habeas corpus challenge to § 1226(c)" even though he "did not concede that he will ultimately be deported." 538 U.S. at 522 & n.6. Further, in *Demore*, the noncitizen "intend[ed] to argue" in his removal proceedings that his convictions did not qualify as "an aggravated felony or a crime involving moral turpitude" and thus "he might not be subject to detention under § 1226(c) after all," *id.*—an argument that Banyee has never suggested.

involved potentially indefinite or permanent detention, 538 U.S. at 528, that, as described above, would be inconsistent with the purpose of section 1231(a)(6). The Court thus explained that section 1226(c) involves detention of a "shorter duration" than the potentially indefinite detention at issue in *Zadvydas* because it has "definite termination point" at the end of the removal proceedings. *Demore*, 538 U.S. at 529. Accordingly, the Court did not hold that detention under section 1226(c) is constitutional only for a "brief period" of a few months but that it is constitutional for the "brief period *necessary for their removal proceedings*." *Id.* at 513 (emphasis added); *see also id.* at 526 (explaining "this Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period *necessary for their removal proceedings*") (emphasis added); *id.* at 531 (upholding as constitutional the government's detention of Kim, "a criminal alien who has conceded that he is deportable, for the limited period *of his removal proceedings*") (emphasis added).

Here, as the government explained, the length of Banyee's detention alone does not signal a lack of due process because his detention reflected a reasonable and typical pace of contested removal proceedings. Gov't Br. 21–25; *see also* Br. of *Amici Curiae* Retired Immigration Judges and Board of Immigration Appeal Members at 8 ("[T]he threshold removability determination here . . . is typical of the complex removability analysis immigration judges frequently make."); *id.* at 10 ("[T]he complex contested proceedings before the immigration court and the BIA here are typical."). The facts of *Demore* itself are illustrative. There, the Supreme Court noted that the

noncitizen's removal proceedings (and thus the corresponding detention) had taken longer than the average where a party appeals. *Demore*, 538 U.S. at 530–31. Still, the Court ruled that he could be returned to custody until his removal proceedings concluded and did not limit its holding to proceedings of average length. *Id.* at 531; *see also Reid v. Donelan*, 17 F.4th 1, 9 (1st Cir. 2021) (explaining that *Demore* forecloses any argument that six months of section 1226(c) detention triggers a right to a bond hearing).

Moreover, Banyee's contention that Justice Kennedy's concurrence in *Demore* reflects the "centrality of the brevity of detention to *Demore*'s holding," Pet. Br. 27, is wrong. Like the majority opinion, Justice Kennedy's concurrence does not suggest that section 1226(c) detention must be limited to some particular time period but rather that the detention must serve its purposes of "facilitat[ing] deportation" and "protect[ing] against risk of flight or dangerousness." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Banyee says that "fails to solve the core issues: how to determine whether detention is serving this purpose and at what point such a determination is required." Pet. Br. 28. But the government did explain how to resolve those issues here—by assessing the reasonable pace of (and reasonable government actions during) Banyee's ongoing removal proceedings. Gov't Br. 22–24; *see Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("Were there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary to inquire whether the detention is not to

facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.").[6]

Banyee erroneously asserts that "virtually every court to consider as-applied challenges to prolonged § 1226(c) detention has rejected the government's reading of *Demore*." Pet. Br. 24. First, several courts have denied habeas relief to petitioners like Banyee who brought as-applied challenges to section 1226(c) detention. *See, e.g.*, *Oladipupo v. Schmidt*, No. 23-CV-294, 2023 WL 3568498, at *4 (E.D. Wis. May 18, 2023) (denying habeas petition challenging section 1226(c) detention and explaining that "more important than the mere length of detention is the reason for the delay and, specifically, whether the government caused an unreasonable delay"); *Castro-Almonte v. Searls*, No. 22-CV-861 (JLS), 2023 WL 1931853, at *6 (W.D.N.Y. Feb. 9, 2023) (denying habeas petition challenging section 1226(c) detention and collecting cases where district courts generally had denied relief "unless the government caused extreme delay or engaged in dilatory conduct"); *Edison C. F. v. Decker*, No. CV 20-

[6] Further, because "the ultimate purpose behind the [section 1226(c)] detention is premised upon the alien's deportability," Justice Kennedy suggested that "due process requires individualized procedures to ensure there is at least some merit to" the removal charge and "therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing." *Demore*, 538 U.S. at 531 (Kennedy, J., concurring). A noncitizen like Banyee may seek a "*Joseph* hearing" to challenge whether his conviction falls within a section 1226(c) category. Gov't Br. 6–7. Banyee does not claim that he ever sought a *Joseph* hearing, possibly because the immigration judge found him removable under 8 U.S.C. § 1227(a)(2)(A)(ii) within two months of the initiation of his removal proceedings, Gov't Br. 9–10, and Banyee has conceded that ground of removability since that time.

15455 (SRC), 2021 WL 1997386, at *3 (D.N.J. May 19, 2021) ("Petitioner has been detained for approximately eleven months, a length of time which, standing on its own, is not so prolonged as to amount to a denial of Due Process.").

Moreover, Banyee fails to recognize that nearly every circuit decision he cites has been directly overruled or otherwise abrogated by the Supreme Court's decision in *Jennings*. Pet. Br. 26 (citing *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469 (3d Cir. 2015), *overruling recognized by German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 209–10 (3d Cir. 2020) (explaining that *Jennings* held that section 1226(c) does not "limit the length of the detention it authorizes," and "[i]n so holding, *Jennings* abrogated" earlier decisions reading "§ 1226(c) as providing a right to a bond hearing" as a matter of "constitutional-avoidance"); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016), *opinion withdrawn on reconsideration*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (upholding grant of preliminary injunction; permanent injunction later granted in same case overturned on grant of *certiorari* by *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), *overruling recognized by Hamama v.*

Adducci, 946 F.3d 875, 879–80 (6th Cir. 2020) (explaining that "*Ly* did not survive *Jennings*," and overturning injunction requiring release after six months of detention)).[7]

In another part of his brief, Banyee admits that *Jennings* invalidated the statutory holdings of these circuit decisions but argues that their "constitutional underpinnings" survived *Jennings*. Pet. Br. 30–31. That is incorrect. In *Jennings*, the Supreme Court categorically rejected the statutory construction based on constitutional avoidance that the Ninth Circuit had adopted to impose a temporal limitation on section 1226(c) detention. *Jennings*, 138 S. Ct. at 846–47. With that rejection, the Court certainly did not endorse any nebulous "underpinnings" that Banyee believes are contained in the Ninth Circuit's decision or the other circuits' similar decisions. Instead, after *Demore* and *Jennings*, any constitutional analysis of section 1226(c) must acknowledge that the plain text of the statute unambiguously requires detention pending completion of administrative removal proceedings, *see Jennings*, 138 S. Ct. at 847, and must presume that such detention is constitutional, *see United States v. Morrison*, 529 U.S. 598, 607

[7] This is a pervasive issue in Banyee's brief. *See, e.g.*, Pet. Br. 28–33, 35, 41–42 (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011), *statutory ruling abrogated as recognized by German Santos*, 965 F.3d at 208; Pet. Br. 18, 31, 33, 36–39, 45 (citing *Chavez-Alvarez*); Pet. Br. 35, 39 (citing *Leslie v. Att'y Gen. of U.S.*, 678 F.3d 265 (3d Cir. 2012), *abrogated in part by Jennings*, 138 S. Ct. at 847); Pet. Br. 30, 41 (citing *Lora*); Pet. Br. 30, 40 (citing *Ly*); Pet. Br. 29, 30, 32, 37, 41–42 (citing the First Circuit's 2016 withdrawn *Reid* opinion); Pet. Br. 30 (citing *Rodriguez*); Pet. Br. 30, 35–36, 39, 42, 44, 46 (citing *Sopo*). To the extent Banyee's arguments are supported by the Third Circuit's decision in *German Santos*—which remains good law in that circuit—this Court of course is not bound by that decision, which the government respectfully contends is not a correct application of *Demore*.

(2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Banyee would prefer to invert that standard, such that detention, which is mandated by statute, is deemed unconstitutional after some arbitrary time period has passed without considering the purpose of the statute. The Supreme Court's decisions do not support such a rule.

Finally, *McNeil* v. *Director*, 407 U.S. 245 (1972), Pet. Br. 23–24, 29, 34, does not support Banyee's arguments regarding the length of detention. That case involved a freestanding regime for the indefinite commitment of mentally ill individuals, and the Supreme Court identified six months as "a useful benchmark" because the underlying statute "limit[ed] the observation period to a maximum of six months," subject to renewal, suggesting an "initial legislative judgment" about an appropriate period. 407 U.S. at 250. In section 1226(c), by contrast, Congress made a different legislative judgment: "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers," Congress mandated detention of covered criminal noncitizens during removal proceedings. *Demore*, 538 U.S. at 513. And detention in this context is not "indeterminate" because it has an "obvious termination point": the end of removal proceedings. *Zadvydas*, 533 U.S. at 697.

Accordingly, Banyee's section 1226(c) detention was constitutionally permissible and did not stop being so simply because of its length. Even under the

analysis set forth by Justice Kennedy, the reasonable pace of Banyee's removal proceedings reflected the reasonableness of the government's actions and thus was consistent with due process.

C. Banyee did not identify any other extraordinary circumstances that would demonstrate a due process violation.

Rather than apply *Demore*, the district court improperly relied on a flawed framework set forth by *Muse v. Sessions*, 409 F. Supp. 3d 707 (D. Minn. 2018), which resulted in the length of Banyee's detention being the dispositive factor in granting habeas relief. Gov't Br. 21–25. Banyee insists that the district court did not solely consider the length of detention but rather undertook a "holistic due process analysis" and considered "all the other relevant facts and circumstances." Pet. Br. 33–34. But aside from the "conditions of confinement" factor—which is neither relevant to the constitutionality of section 1226(c) detention nor an appropriate consideration in any habeas context, Gov't Br. 21 n.12—the district court found only that the length of detention to date and the theoretical length of future detention weighed in Banyee's favor. A21–22. The district court deemed the other "*Muse* factors" "neutral" and specifically found that the government had not caused any unjustified delays. A22–23. In any event, Banyee has not identified circumstances in his case that justified the grant of relief.

Banyee first asserts that length of detention is the "most important factor" in evaluating an as-applied constitutional challenge to section 1226(c) detention. Pet. Br.

32–36. He again incorrectly maintains that *Demore*'s holding applies strictly to detention that he believes is "brief" without regard for the progress of removal proceedings. *Id.* at 33. And to support his argument, Banyee relies on outlier cases which—in addition to most of them no longer being good law—involved periods of mandatory detention at least two-and-a-half times longer than Banyee's. *Id.* at 34–35. Moreover, as explained above, Banyee's period of detention cannot be viewed in a vacuum. Rather, to assess whether section 1226(c) detention remains reasonable, a court must consider the progress of the noncitizen's removal proceedings to determine if the corresponding detention is continuing to serve its immigration purpose of preventing additional risk of flight or danger to the community. *See supra* Point I.B. Here, although Banyee's detention lasted a few months longer than that of the petitioner in *Demore*, his ongoing detention reflected the reasonable pace of his contested removal proceedings and thus continued to serve its purpose. Gov't Br. 22–23.

Next, as the government explained, the district court's supposition about the potential future length of Banyee's detention does not bear on whether his detention up to that point was serving the purpose of the statute. Gov't Br. 23–24. In response, Banyee recycles his argument that *Demore* controls only where detention is "brief," Pet. Br. 36–37, which is misguided for the reasons described above. Moreover, there is nothing in the record to support the district court's speculation that Banyee's detention "could [have] result[ed] in another 18 months or more of detention." Pet.

Br. 38. Because the government generally expedites resolution of removal proceedings for detained individuals, Banyee's proceedings would have advanced much more quickly absent the district court's order that resulted in his release and the transfer of his removal proceedings to the non-detained docket. *See* Executive Office for Immigration Review ("EOIR") Policy Memorandum 20-07, Case Management and Docketing Practices 2 (Jan. 31, 2020), https://www.justice.gov/eoir/reference-materials/OOD2007/download (stating that "EOIR continues to maintain its longstanding policy of prioritizing the timely completion of cases involving detained aliens" and that completion of such cases "shall be the highest priority relative to the calendaring of all other types of cases").

Regarding which party is "responsible" for any delays in proceedings, Banyee takes issue with the government pointing out 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." Pet. Br. 37 (quoting Gov't Br. 23). Banyee asserts that his "good-faith challenges to removal [may] not be held against him," lest he be "punish[ed]" for exercising his rights. Pet. Br. 37, 39–40. But allowing Banyee—a noncitizen who has conceded removability—multiple opportunities to contest his removal and file appeals is not "punish[ment]." Rather, "affording [him] each procedural protection to which he is entitled takes time." *Oladipupo*, No. 23-CV-294, 2023 WL 3568498, at *5. "That [Banyee] employed these remedies counts against him

no more than the fact that [the] government has afforded him these remedies should count against it." *Id.* Moreover, Banyee admitted in district court that the government also "ha[d] exercised its right to appeal," and the district court agreed, ruling that the government did not "engage[] in dilatory tactics" but rather had "advanced substantive arguments" supporting its position. Gov't Br. 24.

Banyee now argues that "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." Pet. Br. 41. But Banyee makes no attempt to explain how, if the government has acted *reasonably* during the removal proceedings, the corresponding section 1226(c) detention incident to those removal proceedings could become so *un*reasonable that it amounts to a due process violation. In any case, even if Banyee were not required to show that the government acted unreasonably to succeed in his challenge, he does not point to any facts relevant to a "delay" factor that would suggest the impropriety of his detention. Instead, he again maintains that *Demore* applies only where the detention period is "limited." Pet. Br. 41–42. The main case on which Banyee relies to support his argument that he need not demonstrate improper government action, *Diop*, in addition to being abrogated, does not apply. In *Diop*, the petitioner had been detained for nearly three years (three times as long as Banyee), and the Third Circuit specifically found that the government had caused "unreasonable delay" due to "the immigration judge's numerous errors" and the government's "failure to secure, at the earliest

possible time, evidence that bore directly on the issue of whether [the petitioner] was properly detained." *Diop*, 656 F.3d at 234.

Next, Banyee argues that courts properly assess whether the removal proceedings will "culminate in the noncitizen's actual removal" from the United States. Pet. Br. 42. Banyee admits that the district court here found this factor "neutral" but suggests that "there is ample evidence that Mr. Banyee's removal proceedings will not end in a final removal order." Pet. Br. 43. But Congress mandated detention of a noncitizen like Banyee during his removal proceedings to resolve this precise question. *See Jennings*, 138 S. Ct. at 846. Banyee continues to argue that his conviction for robbery with a firearm does not constitute an aggravated felony, Pet. Br. 43–44, but currently, an immigration judge has rejected that argument and ordered his removal, Gov't Br. 12–13.[8] Even if he might ultimately be successful on appeal before the Board, section 1226(c) continues to apply pending that final decision. *Cf. Parra*, 172 F.3d at 958 (holding that "once deportation proceedings have begun an alien's detention is constitutional" even where, under an earlier version of the Immigration and Nationality Act, "discretionary relief from deportation" might have been available that might "thus render the imprisonment gratuitous").

[8] To the extent Banyee suggests that the immigration judge or the Board misapplied the "realistic probability" standard when analyzing whether his conviction for robbery with a firearm qualifies as an aggravated felony, Pet. Br. 43–44, he cannot raise that argument in this habeas appeal, *see* 8 U.S.C. § 1252(a)(5), (b)(9).

Finally, Banyee argues that the district court properly weighed the conditions of confinement—in a county jail—in favor of finding his detention unconstitutional. Pet. Br. 44–46. But as the government explained, such a consideration is not appropriate in a habeas action. Gov't Br. 21 n.12. Indeed, the Supreme Court has never considered the conditions of confinement when analyzing constitutional or statutory challenges to immigration detention. Moreover, the conditions of confinement do not necessarily change over time and thus are irrelevant to whether the detention is serving the statutory purpose. Banyee's reliance on *Velasco Lopez v. Decker*, 978 F.3d 842, 851–52 (2d Cir. 2020), which he says "stress[ed] that while immigration detention is 'not the result of a criminal adjudication,' noncitizens are nevertheless 'locked up in jail'…" Pet. Br. 46. But in that passage from *Velasco Lopez*, the Second Circuit was emphasizing that the petitioner there was not detained because of a "criminal adjudication" because he was detained under section 1226(a), which applies more broadly, rather than section 1226(c), which applies only to certain criminal and terrorist noncitizens like Banyee. *See Velasco Lopez*, 978 F.3d at 851–52.

Accordingly, neither the district court nor Banyee identified any extraordinary circumstances that demonstrated a due process violation. The district court erred in holding otherwise.

II. Even if a Bond Hearing Were Required, the District Court Further Erred in Requiring the Government to Bear the Burden of Proof by Clear and Convincing Evidence.

There is no support in the Constitution, Supreme Court precedent, or this Court's precedent for the district court's requirement that the government bear the burden of proof, let alone by a heightened standard, to justify the continued detention of a noncitizen like Banyee who concedes that he is subject to mandatory detention under 8 U.S.C. § 1226(c). Gov't Br. 25–28. Accordingly, even if this Court were to hold that Banyee's section 1226(c) detention violated due process, the appropriate remedy would be a bond hearing applying the general procedures applicable to noncitizens detained under section 1226(a). Gov't Br. 26–27.

First, Banyee ignores that, even in the limited scenario where section 1226(c) allows for release, the noncitizen must establish his eligibility for release. Gov't Br. 25.

Moreover, Banyee's assertion that the Supreme Court has required a "clear and convincing standard" to "govern across civil detention contexts," Pet. Br. 46–47, is wrong. Banyee cannot cite any Supreme Court case concerning *immigration detention incident to removal proceedings* that supports his argument. As the government explained above and in its opening brief, the Supreme Court has never held immigration detention incident to removal proceedings to the same standard it has applied to the indefinite (and potentially permanent) civil detention of individuals (generally U.S. citizens) in *Addington*, *Foucha*, *Hendricks*, or to the pretrial criminal detention of individuals in *Salerno*. Gov't Br. 25–26. Instead, the Supreme Court repeatedly has

affirmed the constitutionality of detention incident to removal proceedings, and it has never suggested that the government is constitutionally compelled to bear the burden of justifying detention, let alone by clear and convincing evidence. Gov't Br. 26.

Furthermore, even in *Zadvydas*—which took place in the context of potentially indefinite detention following a noncitizen's final order of removal—the Supreme Court still placed the initial burden of proof on the noncitizen. Banyee is incorrect that in *Zadvydas* the Supreme Court found "post-final order custody review procedures deficient because, *inter alia*, they placed [the] burden on [the] noncitizen." Pet. Br. 47. To the contrary, the Supreme Court held that six months of post-removal-order detention under section 1231(a)(6) is presumptively reasonable, and only after that time may a noncitizen challenge his detention. *Zadvydas*, 533 U.S. at 699-702. Still, at that time, the noncitizen first bears the burden of "provid[ing] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Then and only then is the government required to "respond with evidence to rebut that showing." *Id.*

Banyee also ignores the Supreme Court's decision in *Jennings*. Although it involved a question of statutory interpretation, even the dissent in *Jennings* reasoned that any constitutionally required bond hearings should be conducted "in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed." *Jennings*, 138 S. Ct. at 876 (Breyer, J., dissenting). Those "customary rules of procedure" do not mandate the procedures the district

court required here. Furthermore, even the Bail Reform Act contains provisions requiring certain individuals (including U.S. citizens) to bear the burden to show they are not a danger to the community and a flight risk. *See Miranda v. Garland*, 34 F.4th 338, 363 (4th Cir. 2022). Accordingly, "it cannot be unconstitutional for the government to place a similar burden on an alien facing removal proceedings, especially considering the detention lasts only until removal." *Id.* at 363.

Finally, as the government explained, even if the balancing test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), applied when considering the proper procedures in a bond hearing for a criminal noncitizen who concedes he is subject to mandatory detention, the existing section 1226(a) bond-hearing procedures comport with due process. Gov't Br. 27–28. *Mathews* reaffirms that "due process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. at 334. Here, the constitutional concerns depend on whether Banyee's section 1226(c) detention continued to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527; *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.").

First, regarding the private interest at stake, Banyee erroneously argues that the "Supreme Court's case law governing the application of due process to civil detention draws no distinction based on citizenship." Pet. Br. 51. But as this Court has recently recognized, "the Supreme Court has 'firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to

citizens.'" *United States v. Sitladeen*, 64 F.4th 978, 989 (8th Cir. 2023) (quoting *Demore*, 538 U.S. at 522). Moreover, Banyee—a criminal noncitizen who has conceded removability—does not have a general right to liberty without restraint in the United States. *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) ("Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.").

Second, regarding the risk of erroneous deprivation of the private interest, Banyee argues that the risk is "impermissibly high" "unless the government bears the burden by clear and convincing evidence." Pet. Br. 52. In support, Banyee theorizes what evidence may be available to the government versus detained noncitizens. Pet. Br. 52–53. But Banyee does not cite to the record in this case, nor does he allege that, for example, he was unrepresented or unable to access relevant documents for his court-ordered bond hearing. Banyee also says "the government identifies no *practical* difficulties with the district court's decision." Pet. Br. 53. But the Supreme Court has repeatedly held that "the government need not use the 'least burdensome means to accomplish its goal' to comport with the Due Process Clause." *Demore*, 538 U.S. at 528. Banyee's preference for a certain burden on the government that he believes poses no "*practical* difficulties" does not mean that burden is constitutionally required. Gov't Br. 28.

Finally, Banyee argues without support that the government's interest in maintaining its current procedures is "minimal to nonexistent." Pet. Br. 54. Again,

Banyee theorizes purported practical considerations that are not relevant to the government's interest in defending its current procedures and allocations of burdens of proof. *See Plasencia*, 459 U.S. at 34 (courts "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature").

Accordingly, even if Banyee had been entitled to a bond hearing, there is no constitutional requirement that the government bear the burden of proof, let alone by clear and convincing evidence.

CONCLUSION

This Court should reverse the district court's judgment.

Dated: June 9, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,237 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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