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

BRIEF FOR RESPONDENTS-APPELLANTS

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INTRODUCTION

Petitioner-Appellee Nyynkpao Banyee petitions for rehearing en banc of the panel's decision rejecting his as-applied due process challenge to 8 U.S.C. § 1226(c), a provision that requires his detention for the duration of his removal proceedings. Petitioner argues that rehearing is warranted because the panel decision conflicts with Supreme Court precedent, creates an inter-circuit split on the appropriate due process analysis, and because the issue is one of exceptional importance. *See* Fed. R. App. P. 40(b)(2). Although the federal appellate courts are divided on the appropriate due process analysis, the Court should decline rehearing because the panel's decision is consistent with Supreme Court precedent and the panel correctly rejected Banyee's due process challenge. Accordingly, the Court should deny the petition for rehearing.

STATEMENT OF THE CASE

A. Detention of Criminal Noncitizens During Removal Proceedings and for Removal

Section 1226(c) provides that the Secretary of Homeland Security "shall take into custody any [noncitizen] who" is removable on specified criminal or national-security grounds during the pendency of removal proceedings, and "may release" the noncitizen "only" as part of a witness-protection program. 8 U.S.C. § 1226(c). In *Demore v. Kim*, the Supreme Court upheld the constitutionality of section 1226(c) against a facial due process challenge, finding that Congress was "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." 538 U.S. 510, 513 (2003). In *Jennings v. Rodriguez*, the Supreme Court held that individuals detained under section 1226(c) do not have a statutory right to a bond hearing for the limited period that it takes the government to secure a final order of removal.[1] 583 U.S. 281, 286 (2018).

After the government secures an administratively final order of removal, detention shifts from section 1226(c) to section 1231(a), the provision that applies while the government is working to effectuate the removal order. Under section 1231(a), the government may detain a noncitizen for removal for an additional, "presumptively-reasonable" period of six months. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). After that point, a noncitizen's detention may continue "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

B. Banyee's Immigration Proceedings

Petitioner Banyee is a native and citizen of the Ivory Coast who obtained lawful permanent resident status in 2005. Appendix (App.) 10, R. Doc. 1, at 7; App. 35–41; R. Doc. 1-4, at 1–7. Banyee amassed a lengthy criminal record since entering the United States. App. 10, R. Doc. 1, at 7. Following convictions for theft, making a false

[1] An immigration judge's order of removal becomes final when, *inter alia*, the time for administrative appeal to the Board of Immigration Appeals expires without an appeal or, if there is an appeal, the Board dismisses the administrative appeal. *See* 8 C.F.R. §§ 1003.39, 1241.1.

report to law enforcement officers, possessing drug paraphernalia, and unlawfully possessing marijuana, in June 2018, Banyee was convicted of robbery with a firearm, dangerous weapon, or destructive device, in violation of North Dakota Century Code § 12.1-22-01(1), a class B felony. App. 11, R. Doc. 1, at 8; App. 37–41, R. Doc. 1-4, at 3–7; App. 116–25, R. Doc. 8-2, at 1–10. *See also* App. 10, R. Doc. 1, at 7; App. 103–05, R. Doc. 8-1, at 1–3; App. 158, R. Doc. 9, at 2. Banyee was sentenced to five years' imprisonment. App. 11, R. Doc. 1, at 8; App. 116, R. Doc. 8-2, at 1; App. 121, R. Doc. 8-2, at 6. On March 31, 2021, upon his release from state prison, U.S. Immigration and Customs Enforcement (ICE) arrested Banyee and served him with a Notice to Appear for removal proceedings.

Nearly one year later, on March 25, 2022, the immigration judge sustained the removal charges, ruled that Banyee's robbery conviction qualifies as an aggravated-felony-attempted-theft offense, and denied his request for cancellation of removal on the basis that his aggravated felony conviction rendered him ineligible for relief from removal. *See* App. 155–56, R. Doc. 8-4, at 1–2; App. 208–11, R. Doc. 14-1, at 1–4; App. 214–19, R. Doc. 15-1, at 1–6.

On December 11, 2024, the Board of Immigration Appeals (Board) affirmed the immigration judge's order. *See Banyee v. Garland*, No. 24-3590 (8th Cir.), Petition for Review at 1. The Board's order concluded administrative removal proceedings and converted Banyee's detention status from "pre-final order" to "post-final order." As a result, Banyee is no longer covered by section 1226(c). Unless his removal order is

reopened or this court order a stay of his removal order, his detention will be governed by section 1231(a) until he is removed from the United States. *See* 8 U.S.C. § 1231(a)(1)(B)(i), (ii).

Banyee filed a timely petition for review and has requested a stay of his removal order. *Banyee v. Garland*, 24-3590 (8th Cir.). On January 23, the court denied his motion for a stay of removal. *See id.*

C. Banyee's Habeas Proceedings

On August 9, 2021, Banyee filed a habeas petition challenging his prolonged detention under the Fifth Amendment Due Process Clause and seeking a bond hearing before an immigration judge. App. 4–28, R. Doc. 1, at 1–25. The district court analyzed the claim using the "*Muse* factors," a multi-factor test courts in the District of Minnesota apply to determine whether immigration detention without a bond hearing under section 1226(c) has become unconstitutionally prolonged. The *Muse* factors 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 v. Sessions*, 409 F. Supp. 3d 707, 715 (D. Minn. 2018).

On April 14, 2022, the district court ordered the government to afford Banyee a bond hearing at which the government was required to bear the burden of proving flight risk or danger by clear and convincing evidence to justify continued detention.

App. 16–28. In applying the *Muse* factors, the district court considered the length of Banyee's 12-month detention as part of three of the *Muse* factors—the only three factors the court weighed in favor of granting the petition (the court found all other factors to be neutral). A21–22. A16–28. Banyee was afforded a bond hearing consistent with the court's order. The immigration judge determined that the government had not met its burden of proof and granted Banyee a bond in the amount of $7,500. Petitioner's Supplemental Record at SA0040.

The government appealed the court's order. On September 17, 2024, the panel reversed the judgment of the district court and remanded for the denial of Banyee's habeas petition. The panel held that Banyee's "year-long detention" without a bond hearing did not violate his due process rights. Op. 4. In so holding, the panel rejected the *Muse* factors as a viable test. *Id.* Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the panel recognized that "deciding what process is due ordinarily requires a form of interest balancing." Op. 4. But the panel understood the Supreme Court's decisions in *Zadvydas* and *Demore* as "hav[ing] already done whatever balancing is necessary." *Id.* The panel then concluded that, under those precedents, Banyee's detention without a bond hearing did not violate due process. *Id.* at 7-8. In reaching that conclusion, the panel emphasized that Banyee's detention proceedings were still pending, *id.* at 7; that "deportation remains a possibility," *id.* at 8; and that there is "no indication that the ongoing proceedings are a ruse 'to detain [Banyee] for other reasons,'" *id.* at 8 (quoting *Demore*, 538 U.S. at 533 (Kennedy, J., concurring)).

ARGUMENT

I. The panel correctly rejected Banyee's as-applied due process challenge, and the panel's decision is consistent with Supreme Court precedent.

The panel correctly rejected Banyee's as-applied due process challenge to his detention under section 1226(c) without a bond hearing. The Supreme Court has upheld the constitutionality of detention without a bond hearing under section 1226(c) for the "limited period of [a noncitizen's] removal proceedings," *Demore v. Kim*, 538 U.S. 510, 531 (2003), and Banyee has failed to identify any circumstances that would call into question the constitutionality of his detention in this particular case.

Contrary to Banyee's contention, the panel's decision does not conflict with Supreme Court precedent. The Supreme Court has never held, as Banyee suggests, that the governmental purpose of immigration detention must always be tested in an "individualized hearing," Petition for Rehearing En Banc (PFREB) at 11. In *Demore*, the Supreme 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 criminal noncitizens (such as Banyee) "be detained for the brief period necessary for their removal proceedings." *Id.* at 513.

Neither has the Supreme Court applied caselaw involving potentially indefinite civil commitment or pretrial criminal detention to find pre-order civil immigration detention to require a "special justification" to outweigh individual liberty interests. PFREB 12–13 (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)). Rather, the Supreme Court rejected a similar argument in *Demore*, and only the dissent addressed that line of cases. *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).

Demore similarly forecloses Banyee's reliance on *Zadvydas*—a case involving potentially indefinite post-removal-order detention under 8 U.S.C. § 1231(a)(6)—for

the proposition that "[d]ue 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.'" PFREB at 11. In *Demore*, the Supreme Court 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 court 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" with respect to section 1226(c). *Id.* at 515; *see also Jennings*, 538 U.S. at 286 ("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).").

Finally, the panel did not hold that "due process imposes no constraints on prolonged mandatory detention," as Banyee suggests (PFREB at 3). Instead, the panel recognized that under *Mathews v. Eldridge*, 424 U.S. 319 (1976), "deciding what process is due ordinarily requires a form of interest balancing." Op. 4. And the panel understood the Supreme Court's decisions in *Zadvydas* and *Demore* as "hav[ing] already done whatever balancing is necessary." *Id.* The panel then applied those precedents to the facts of this case and concluded that Banyee's detention did not violate due

process in light of the fact that his detention proceedings were still pending, *id.* at 7; that "deportation remains a possibility," *id.* at 8; and that there is "no indication that the ongoing proceedings are a ruse 'to detain [Banyee] for other reasons,'" *id.* at 8 (quoting *Demore*, 538 U.S. at 533 (Kennedy, J., concurring)). In so concluding, the panel did not rule out the possibility of a successful as-applied challenge in a case involving different facts that indicate that "otherwise legal detention" has turned into "unconstitutional punishment." *Id.* at 9.

Accordingly, the panel's conclusion here—that Banyee's year-long detention under section 1226(c) without a bond hearing did not violate due process—is consistent with Supreme Court precedent and does not warrant rehearing

II. Although there is division among the courts of appeals, the panel's decision in this case does not warrant rehearing.

Banyee points to two post-*Jennings* decisions to support the petition for rehearing.[2] PFREB at 7-10 (citing *Black v. Decker*, 101 F.4th 133 (2d Cir. 2024), and

[2] The remaining cases cited by Banyee have been directly overruled or otherwise abrogated by the Supreme Court's decision in *Jennings*. PFREB at 8-10 (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)

Continued on next page.

German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 210 (3d Cir. 2020)). Banyee acknowledges that none of the circuit decisions are aligned on the appropriate test for resolving as-applied challenges to section 1226(c), and argues a split based on the panel's treatment of *Demore*. In particular, Banyee argues that "the Second and Third Circuits agree that *Demore* was cabined to a facial challenge to section 1226(c)" and notes that those courts treat *Demore*'s reference to the "brief period necessary" for removal proceedings as creating a time-based limitation on section 1226(c) detention. These distinctions are overstated and, in any event, do not justify rehearing.

First, as noted above, the panel decision should not be read as ruling out as-applied challenges to section 1226(c) detention or suggesting that due process imposes no constraints on prolonged mandatory detention. The panel acknowledged that the *Mathews v. Eldridge*, 424 U.S. 319 (1976), "ordinarily requires a form of interest balancing," Op. 4, but took the view that *Demore* and *Zadvydas* "ha[d] already done whatever balancing is necessary" in this context. *Id.* Although the facts of this case—including that Banyee's detention proceedings were still pending, *id.* at 7; that "deportation remains a possibility," *id.* at 8; that there is "no indication that the ongoing proceedings are a ruse to detain [Banyee] for other reasons," *id.* at 8 (internal

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(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)).

quotation marks omitted), and that "there have been no 'dilatory tactics' by either side, *id.*—created a high bar for Banyee's constitutional challenge, other cases may present closer questions.

Second, Banyee overstates the split on "the brief period" language from *Demore*. The Second Circuit has not yet issued its mandate in *Black*. The government has petitioned for rehearing on this issue, and the Second Circuit has called for a response to the government's petition. The Third Circuit has not clearly embraced Banyee's position on the outer bounds of section 1226(c). The Third Circuit addressed the issue in the context of a claim brought by a detainee who had been in custody for nearly three years. *German Santos*, 965 F.3d at 207. It is not clear that the Third Circuit would find Banyee's twelve months of detention to be inconsistent with its interpretation of *Demore*'s "brief period" language. *See id.* at 209-211.

Finally, the court should decline to rehear the case on this basis because the panel's decision here is consistent with Supreme Court precedent, as explained above. For the reasons discussed, the panel correctly reversed the district court's decision granting Banyee's habeas petition and finding him entitled to a bond hearing.

CONCLUSION

This Court should deny the petition for rehearing en banc.

Dated: January 23, 2025

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) because it contains 3,536 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 January 23, 2025, 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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