No. 07-55549

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND GERALD AUGUSTINO SOEOTH,

Appellee,

v.

PETER D. KEISLER, Acting Attorney General, et al.,

Appellant.

APPELLEE'S/CROSS APPELLANT'S PRINCIPAL AND RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

This case presents the question whether the government may detain a non-citizen for two and a half years while he litigates his immigration case, without ever holding a hearing to determine if his detention is justified. Raymond Soeoth, an ordained Christian minister from Indonesia who seeks asylum in this country, has lived here since entering lawfully in 1999. He has never been arrested for, let alone convicted of, any crime. Nonetheless, the government incarcerated him for two and a half years pending resolution of his immigration case and never afforded him a hearing to determine if he should be detained, until the district court ordered it in this case.

The government spends much of its brief arguing that Mr. Soeoth's case is governed by one detention statute rather than another. However, which of the two statutes – 8 U.S.C. 1231(a)(1)(C) or 8 U.S.C. 1226(a) – governs Mr. Soeoth's detention is irrelevant. As this Court has already established, Congress cannot authorize prolonged and indefinite detention absent a clear statement, and all of the general immigration detention statutes – those that do not explicitly authorize prolonged detention on national security grounds – are insufficiently clear to do so. Instead, they authorize detention for only a "brief and reasonable" period necessary for completion of removal proceedings. *Nadarajah v. Gonzales,* 443 F.3d 1069, 1079 (9th Cir. 2006). After this brief period–presumptively six

months–the government must either release the detainee, or, as the district court ordered here, hold a hearing where the government bears the burden of justifying continued detention in light of its length and the imminence of removal. *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (ordering detention hearing where government bears burden of proof where removal proceedings were not "expeditious").

In addition, this Court must construe the statutes to forbid Mr. Soeoth's prolonged detention without a hearing because permitting such detention would violate the Fifth Amendment's Due Process Clause. Prolonged immigration detention violates the Due Process Clause unless it is both reasonably related to a legitimate purpose and accompanied by stringent procedural protections to ensure that it remains reasonable in relation to that purpose. *See Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). In this case, the only interest the government asserts is its need to ensure Mr. Soeoth's presence for removal in the event that the government ultimately prevails in his immigration case and can effectuate his removal. Given that Mr. Soeoth has endured two and a half years of detention and faces future immigration proceedings of indeterminate duration, his detention is wholly unreasonable in relation to that purpose. Moreover, prior to the district court's preliminary injunction order, the government never justified his continued detention through the use of constitutionally-sufficient procedures.

The district court agreed with Mr. Soeoth's position. The court granted his motion for preliminary injunction and then ordered a detention hearing before an Immigration Judge (IJ), who ordered Mr. Soeoth's release on bond. However, the court erred by subsequently dismissing the habeas petition as moot rather than granting it on the merits, because the government continues to assert authority to detain Mr. Soeoth, which creates a "live" controversy.

Both the government and Mr. Soeoth now agree that this case is not moot, and that it is fully presented for resolution on the merits by this Court. Accordingly, this Court should reverse the decision of the district court dismissing Mr Soeoth's habeas petition, and remand with instructions that the district court grant the petition and order Mr. Soeoth's release.

FACTS AND PROCEDURAL HISTORY

Raymond Soeoth is a refugee from Indonesia who came to the United States with his wife in February of 1999. He and his wife applied for asylum based on his fear of persecution as a Christian of perceived Chinese ethnicity. While their case was pending, Mr. Soeoth and his wife obtained employment authorization and worked a number of jobs, eventually opening a small retail business in the Riverside area. In addition, Mr. Soeoth began to volunteer at a small church in San Bernardino, California. During this period he was neither arrested for nor

convicted of any crime. *See* SER 109-111 (Declaration of Raymond Soeoth).[1]

Nonetheless, after the Ninth Circuit denied the petition for review of his initial asylum application, the government incarcerated him, and proceeded to keep him in detention for two and a half years while his case continued in litigation, without ever affording him a detention hearing. He was still detained when he filed this habeas petition in federal district court, on November 21, 2006. The court ordered a detention hearing before an IJ, who ordered him released on bond. In the eight months since his release, he has resumed his work and complied with all release conditions. *See* Appendix I at 4-5; SER 110 at ¶ 11. During this entire time, Mr. Soeoth was never arrested for nor convicted of any crime.

A. Immigration Proceedings and Resolution of Mr. Soeoth's Asylum Claim.

Mr. Soeoth's current asylum case is based on substantial evidence that Chinese Christian ministers face persecution at the hands of Indonesia's Muslim majority. *See* Appendix II at 16-17, 41-45 (asylum application documenting several attacks against Christian ministers in Indonesia, including a number from

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[1]The government's excerpts of record are abbreviated as "ER." Petitioner's supplemental excerpts are abbreviated as "SER."

May to September 2007).[2] The government has not yet adjudicated this application for asylum.

Mr. Soeoth had previously applied for asylum in March of 2000, shortly after entering the United States. *See* ER 20-27; ER 22 (initial asylum application stating "We are afraid to go home there is political unrest in Indonesia [sic]. Moslems against Christians and also we look like Chinese. . . . They burned Chinese houses and stores, they even raped the women. Now they are hating Christians. They killed Christians. So we feel unsafe to go home. We are scared."). An IJ found him credible, but denied his application for asylum (although it granted him voluntary departure). ER 30, 39 (noting that IJ found him credible). The BIA affirmed that denial without issuing an opinion. ER 33. Mr.

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[2]As explained below, at the time of the district court's decision, Mr. Soeoth was seeking to reopen his asylum case based on the fact that his own personal circumstances had changed by his becoming a minister. Subsequently, this Court held that the proper way to present an asylum claim based on changed individual circumstances is through a new asylum application rather than a motion to reopen. *He v. Gonzales*, — F.3d —, 2007 U.S. App. LEXIS 21066 at *13 n.9 (9th Cir. Sept. 4, 2007). Consistent with that decision, Mr. Soeoth filed a new asylum application on September 28, 2007, along with a motion that this Court stay its mandate on the basis of that new application. *See Petitioner's Notice of Entry of Appearance of Counsel and Motion to Stay Mandate Pending Resolution of Affirmatively-Filed Asylum Application*, Nos. 05-71755 and 05-75655 (9th Cir. Oct. 11 2007). The motion, application, and list of exhibits are included as Appendix II to this brief. Because the exhibits themselves are voluminous, Petitioner has not included all of them, but can make them available upon request, as they have already been filed with this Court.

Soeoth then filed a petition for review with this Court and a motion for stay of removal in June 2003. This Court granted the stay of removal. *See* ER 44 (docket entry).

This Court denied Mr. Soeoth's petition for review on his first asylum application in June 2004. *See* ER 45 (docket entry). However, both the legal landscape and his personal circumstances had changed substantially from what they were when his application was originally adjudicated. The legal landscape had changed because this Court recognized that Chinese Christians were a "disfavored group" entitled to raise pattern or practice-based asylum claims. *See generally Sael v. Ashcroft*, 386 F.3d 922, 925-26 (9th Cir. 2004) (holding that Chinese Christians are a "disfavored group" who face a pattern and practice of persecution in Indonesia); *Lolong v. Gonzales*, 400 F.3d 1215, 1219 (9th Cir. 2004) (same) *vacated upon rehearing en banc*; 484 F.3d 1173 (9th Cir. 2007) (en banc).

His personal circumstances had also changed, because he was called to work in the ministry, thus making him more vulnerable to persecution at the hands of anti-Christian forces in Muslim-majority Indonesia. He trained and studied to become a pastor in the church, and after completing the training was ordained as a minister in June 2004. *See* SER 109 at ¶ 7. *See* also Appendix II 39-40, 54 (evidence of ordination as minister). Based on these changes, Mr. Soeoth sought

to file a motion to reopen and to reconsider his removal order.

Notwithstanding these intervening developments, the government detained him on September 1, 2004, and continued to detain him for the next two and a half years, during which time his immigration case remained in litigation.

In March 2005, the BIA denied Mr. Soeoth's motions to reopen and reconsider. ER 50-52. He then filed a petition for review in this Court, along with a motion for a stay of removal, which the government did not oppose. This Court granted the stay on August 8, 2005.

While this petition for review was pending, in May of 2007, this Court sitting *en banc* substantially altered once again the law governing asylum applicants from Indonesia. It reversed the panel's decision in *Lolong* and held that the mere fact that someone is a member of Indonesia's Chinese Christian minority is insufficient to support a "pattern or practice" asylum claim, but left open the possibility of claims based on individualized fear. *Lolong v. Gonzales*, 484 F.3d 1173, 1180, 1181 n.6 (9th Cir. 2007) (en banc) (rejecting petitioner's claim because "Lolong did not make any argument that she feared being individually targeted for persecution," but holding that claims based on particularized fear could still prevail because "[w]e do not read the BIA's decision as a determination that no ethnic Chinese or Christian in early 2000 could have an objectively reasonable fear of persecution.").

Shortly afterward, this Court dismissed Mr. Soeoth's petition for review in a short unpublished order. *Soeth v. Gonzales*, 2007 U.S. App. LEXIS 21345 (9th Cir. Aug. 30, 2007) (unpublished disposition). The Court rejected his argument that a changed individual circumstance – his having been ordained as a minister – could be presented via a motion to reopen, but did not rule out the possibility of his presenting that claim through some other method. Four days later, this Court stated that the proper forum for presenting such a claim is through the filing of a new asylum application. *He v. Gonzales*, — F.3d —, 2007 U.S. App. LEXIS 21066 at *13 n.9 (9th Cir. Sept. 4, 2007). *See also Haddad v. Gonzales*, 437 F.3d 515, 518-19 (6th Cir. 2006) ("It may seem odd that an asylum application that would not be considered when attached to a motion to reopen very well might be considered when simply filed anew under 8 U.S.C. 1158, but this result is required by the statute and the regulations.").

Based on these cases, Mr. Soeoth filed a new asylum application on September 28, 2007, along with a motion requesting that this Court stay its mandate to permit his claim to be adjudicated on the merits. *See* Appendix II (motion to stay the mandate with attached asylum application); *id.* at 47-53 (declaration in support of asylum application).[3]

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[3]The government characterized Mr. Soeoth's motion to reopen and reconsider as "attempts to prevent his removal," Gov't Br. at 5, but the

B. The Government's Detention of Mr. Soeoth.

Mr. Soeoth's lengthy incarceration began on September 1, 2004, shortly after this Court dismissed his first petition for review. Prior to that time, the government had chosen not to detain him, releasing him on his own recognizance while his asylum case was pending before the IJ, and requiring that he post a $500 bond when his case was pending on appeal before the Board of Immigration Appeals and this Court. *See* ER 30. Throughout this entire period, Mr. Soeoth appeared for his hearings, complied with all release conditions, and was never arrested for nor convicted of any crime. Nonetheless, even before his voluntary departure order had expired,[4] the government arrested and detained him, and

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government has never suggested that Mr. Soeoth is not a Christian minister from Indonesia, and it never even asserted, let alone proved, that Mr. Soeoth's claim for asylum on that basis is frivolous. The government had every opportunity to present such arguments at Mr. Soeoth's detention hearing before the IJ, at which both his wife and the head pastor of his church presented evidence, but it made no such claim and the Judge explicitly found Mr. Soeoth credible.

[4]At the time that the government detained Mr. Soeoth, he was under a grant of voluntary departure, and on release under a $500 bond. The government asserts that Mr. Soeoth breached his bond by failing to depart, but this is incorrect. Under then-applicable law, Mr. Soeoth had thirty days from the date that this Court's mandate issued to depart the United States under his grant of voluntary departure. The mandate issued on August 10, 2004, but the government detained him on September 1, 2004. *See Contreras-Aragon v. INS*, 852 F.2d 1088, 1090 (9th Cir. 1988)(*en banc*) (holding that voluntary departure period expires thirty days after the issuance of the mandate); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 982 (9th Cir. 2006) (recognizing that the "BIA has assumed that *Contreras-Aragon* applies to petitioners, like the Padillas, whose voluntary departure periods expired before

continued to incarcerate him for the next two an a half years without ever providing him with a custody hearing of any kind.

During those two and a half years, the only process afforded to evaluate the reasonableness of Mr. Soeoth's detention was the government's own "file custody review" process, of which Mr. Soeoth learned through three one-page written decisions that he received in the mail. The first, entitled "Decision of Post-Order Custody Review – Continue Detention," was dated January 24, 2005, nearly five months after his detention. The letter stated, in three lines, that Mr. Soeoth would remain in detention because his removal was imminent. The decision made no mention of Mr. Soeoth's pending motion to reopen before the Board, and did not even assert that he was a danger or flight risk. ER 55.

The second letter was sent about three months later, on about April 27, 2005. By this time Mr. Soeoth had been detained for nearly eight months, and this Court had ordered a stay of removal pending review of the BIA's denial of his motion to reopen. Nonetheless, the sum total of the explanation provided in the decision was the following

> The Immigration Judge ordered you removed on December 18, 2002 to the country of Indonesia. Due to your pending appeal with the U.S. Court of Appeals for the Ninth Circuit, you cannot be removed at this time. ICE is in

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[the change in law]").

possession of your valid passport. You will remain in custody until you are removed.

ER 55. Again, the decision made no mention of whether Mr. Soeoth posed any danger or flight risk, the length of his detention to date, the merits of his motion to reopen, or how long the petition for review would likely take to be adjudicated.[5] *Id.*

One year later, on about April 27, 2006, Mr. Soeoth received a third "Decision to Continue Detention." This decision was no longer than the others, but asserted for the first time that he had failed to depart within thirty days of the Immigration Judge's decision granting him voluntary departure *in 2001*.[6] It then stated, again, that "Due to your pending appeal with the Ninth Circuit, you cannot be removed at this time." ER 87.

These three paper reviews were the sum total of the process Mr. Soeoth received from the government during his two and a half years of incarceration. Prior to the district court's order, he never received a hearing of any kind, nor any

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[5]The government asserts that the custody reviewer found him to be a flight risk based on his alleged failure to depart on two occasions. Gov't Br. at 6. But the words "flight risk" never even appear in the decision. Moreover, Mr. Soeoth had never failed to depart. *See* ER 75.

[6]As explained above, this would have been incorrect even had it referred to the correct date of voluntary departure because Mr. Soeoth had no obligation to depart under his voluntary departure order until thirty days after the mandate issued from the Ninth Circuit's decision.

other process that took into account the length of his detention, the likelihood of his removal occurring in the reasonably foreseeable future, or whether he posed a flight risk or danger sufficient to justify his prolonged detention.

Mr. Soeoth filed this petition for writ of habeas corpus on November 21, 2006. SER 90. He argued that the district court should order his immediate release on the ground that no statute authorized his prolonged and indefinite detention, or, in the alternative, that the district court should order a detention hearing before an IJ for the government to prove that his detention was reasonable. On the same day, he filed a motion for preliminary injunction on the basis of those claims. *See* SER 68.

The government opposed the preliminary injunction, arguing that Mr. Soeoth's detention was authorized by 8 U.S.C. 1231(a)(1)(C). On the government's view, Mr. Soeoth's decision to file a petition for review and request for stay of removal from this Court constituted an "act[] to prevent his removal," which therefore authorized his continued detention while his case remained pending. SER 59, 66.

The district court rejected the government's arguments and granted the motion for preliminary injunction on January 3, 2007, ordering as follows:

> Petitioner must be . . . afforded an individual hearing before an immigration judge concerning whether his prolonged detention is justified. At the hearing, the immigration judge shall order Petitioner released on reasonable

> conditions unless the government shows by clear and convincing evidence that Petitioner presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

ER 7-8. The district court did not state its view as to what statute governs Mr. Soeoth's detention.[7]

The detention hearing was held before an IJ on February 5, 2007.[8] Both Mr. Soeoth and the government were given advance notice and an opportunity to prepare for the hearing, and both sides were represented by counsel. At the hearing, the IJ considered Mr. Soeoth's testimony, the testimony of his wife, the written declaration of the chief pastor of his church, and other documentary evidence. Appendix I at 2-4. Mr. Soeoth testified that he served as a pastor at his church, and had "never been arrested in this country or any other country," but that he had nonetheless been detained for 29 months. He also testified that his case was pending at the Ninth Circuit, which had ordered a stay of his removal, but that

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[7]The government's brief incorrectly asserts that the district court held that Section 1226 governs Mr. Soeoth's detention. Gov't Br. at 22. In fact, nothing in the court's order makes clear which statute governs in this case.

[8]The IJ's decision in the bond hearing was not made part of the record before the district court, because the district court dismissed the petition as moot upon its own motion shortly after the IJ's decision, despite both sides having requested the opportunity to add evidence into the record. *See* ER 2, Gov't Appendix D. Petitioner has attached the IJ's decision here as Appendix I to this brief.

there was no timetable for decision in his case. Appendix I at 3. His wife Cindy Soeoth also testified, corroborating his account in all respects and adding that the detention had been very difficult for her personally, as the couple "did everything together." *Id.* at 4. Finally, Richard Sompotan, the chief pastor of his church, submitted a declaration describing Mr. Soeoth's involvement in the church. The government declined to cross-examine him. *Id.* at 4.

The IJ subsequently issued a written opinion ordering Mr. Soeoth's release on a $7,500 bond. In it, she found "the witness testimony to be credible and persuasive." She also found that the government failed to meet its burden of demonstrating that Mr. Soeoth poses a sufficient danger or flight risk. She found that he "has no convictions or arrests . . . [,] has been gainfully employed, has significant ties to the community, and is an active assistant church pastor." She also characterized the government's argument that he poses a flight risk as "disingenuous," finding that "[t]here is no evidence to suggest that [Mr. Soeoth] did not appeared [sic] at his prior immigration proceedings or when ordered to report by DHS." *Id.* at 4-5. She also noted that "[t]he government has failed to justify why the [R]espondent's wife was not arrested as well on the same immigration case if the couple are allegedly such a high risk of flight or danger." *Id.* at 4. And, the IJ specifically credited Mr. Soeoth's testimony that he was not a flight risk, stating that "If [he] is not successful on his appeal he will comply as a

Christian and return along with his wife." *Id.*[9]

Mr. Soeoth posted bond on February 12, 2007, and subsequently rejoined his wife and church community.

After Petitioner's release pursuant to the district court's preliminary injunction order, the parties filed a joint status report requesting the opportunity to submit any additional evidence and stating that the district court should resolve the petition on its merits. *See* Gov't Appendix D. However, on March 7, 2007, the district court dismissed the petition as moot, citing Mr. Soeoth's release from custody pursuant to the hearing. The court noted in its order that he could file a new petition if he were re-detained. ER 3 at n.1. Both sides timely appealed from the district court's order.

JURISDICTION

The district court had jurisdiction to consider the legality of Petitioner's detention pursuant to the general federal habeas statute. 28 U.S.C. 2241. This Court has jurisdiction over this appeal and cross-appeal under 28 U.S.C. 1291, and must review the district court's decision *de novo*.[10]

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[9]The government appealed the Immigration Judge's release order to the BIA. The BIA has yet to rule on the appeal.

[10]To the extent that the government suggests that individual detention decisions are not reviewable under Section 1226(e), that claim is incorrect because the federal habeas statute always permits review of the legality of detention.

STATEMENT OF ISSUES

1. Whether the district court should have granted Petitioner's habeas petition instead of dismissing it as moot, given that the government continues to assert authority to detain the petitioner.

2. Whether the general immigration detention statutes should be construed to authorize Petitioner's detention for only a brief and reasonable period of time, after which the government must either release him or hold a hearing where it bears the burden to justify his continued detention.

3. Whether Petitioner's two and a half year incarceration without a detention hearing violated Due Process.

SUMMARY OF ARGUMENT

This Court and the Supreme Court have held that Congress may not authorize prolonged and indefinite immigration detention absent a clear statement. Therefore, in contrast to those statutes that specifically authorize prolonged detention for national security reasons, none of the general immigration detention statutes authorizes such detention. Instead, they must be read to authorize detention for only a brief and reasonable period of time – presumptively six

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Compare Gov't Br. at 15 *with INS v. St. Cyr*, 533 U.S. 289, 305, 314 (2001) (holding that habeas remains available to challenge legality of detention); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (reviewing individual decision to detain under Section 1226 and ordering hearing).

months – after which the government must either release a detainee or afford him or her a hearing to determine that detention remains reasonable. *See infra.* Section II.A.

Petitioner was detained for two and a half years, and his removal was not – and is not – significantly likely to occur in the reasonably foreseeable future, because neither the immigration courts nor this Court have yet considered his current asylum claim on the merits. While it is true that Mr. Soeoth's detention will at some unknown point come to an end, this Court's precedent establishes that it is nonetheless prolonged and indefinite. Therefore, irrespective of which general detention statute governs his case, the statute does not authorize his detention without a constitutionally-sufficient hearing where the government bears the burden of justifying continued detention. *See infra.* Section II.B.

The government's argument to the contrary rests almost entirely on its position that, because this Court granted Mr. Soeoth's request for a stay of removal, he is a non-citizen who has "conspire[d] or act[ed] to prevent his removal," and therefore is subject to unlimited detention under Section 1231(a)(1)(C). This argument is wrong for several reasons. First, this Court has already established that no general detention statute – including Section 1231(a)(1)(C) – authorizes prolonged and indefinite detention. Second, the government is wrong in arguing that Section 1231(a)(1)(C) governs here, because

this Court has stayed Mr. Soeoth's removal. The plain language of the statute makes clear that Section 1231(a)(1)(C) does not apply when a judicial stay of removal is in effect. This makes sense – Congress did not intend to punish non-citizens who obtain stays of removal by subjecting them to prolonged and indefinite detention on the ground that they were "conspiring or acting" to prevent their removal. *See infra*. Section II.C.1. However, assuming *arguendo* that Section 1231(a)(1)(C) does apply, its language is nowhere near clear enough to authorize prolonged and indefinite detention. *See infra*. Section II.C.2.

Independently, if this Court adopted the government's interpretation of the statute, it would be faced with a serious constitutional problem. The Due Process Clause does not permit the civil detention of a non-citizen for two and a half years without a rigorous detention hearing where the government bears the burden of demonstrating that such detention is justified. Therefore, this Court must construe the statutes at issue to forbid that result, in order to comply with constitutional constraints. *See infra*. Section III.

The district court agreed with Mr. Soeoth's petition, and granted his motion for a preliminary injunction on that basis. However, after Mr. Soeoth was released pursuant to the preliminary injunction order, the district court should have granted his habeas petition on the merits instead of dismissing it as moot. *See infra*. Section I.

ARGUMENT

I. The District Court Erred in Dismissing the Petition as Moot Rather than Granting it on the Merits.

As a preliminary matter, Petitioner agrees with the government that the district court erred in dismissing the petition as moot, and that this case is properly presented to this Court for decision on the merits. After ruling on the motion for preliminary injunction, the district court should have proceeded to decide the petition on the merits.

A case is not moot unless it no longer presents a "live case or controversy" because the parties no longer "have a personal stake in the outcome" of the case. *Clark v. Martinez*, 543 U.S. 371, 376 n.3 (2005) (holding that detention challenge was not moot notwithstanding release of petitioner). Here, a live controversy remained even after Mr. Soeoth was ordered released by the IJ pursuant to the district court's preliminary injunction order, because the government continued to assert authority to detain Mr. Soeoth. There is no dispute that the government has maintained its interest in detaining Mr. Soeoth, which it has manifested by appealing the preliminary injunction order, by continuing to litigate the case on the merits before the district court, and by appealing the IJ's decision to the BIA. Because the government asserts that both the preliminary injunction order and the IJ's release order are incorrect, and because it would re-detain Mr. Soeoth in the

event that either order were vacated, the case is not moot.

In addition, Petitioner has cross-appealed to preserve his interest in obtaining a final ruling on the merits, because of ambiguity concerning the continuing effect of the district court's preliminary injunction order. To the extent that the district court appears to have rested its mootness determination on its belief that the government could not lawfully re-detain Mr. Soeoth after the IJ ordered him released, it is unclear whether that assumption was correct, given that the district court's order dismissing the case as moot arguably had the effect of vacating its preliminary injunction order. If the order is no longer operative, then Mr. Soeoth's current freedom is a product of the government's grace, rather than any legal obligation, and it remains "live" because Mr. Soeoth seeks a ruling that the government has no authority to detain him. *See Clark*, 543 U.S. at 376 n.3 (petitioner's discretionary release did not moot habeas petition because he sought a determination that his detention was illegal).[11]

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[11]After the parties appealed the district court's order dismissing this case as moot, the district court (with the same judge) declined to dismiss as moot the two other cases in which non-citizens subject to prolonged and indefinite detention had been released pursuant to the court's preliminary injunction order. In one of the cases, the Court issued a thorough opinion granting the petition on the merits, and in that opinion explained that the case was not moot. *See Martinez v. Gonzales*, 504 F.Supp.2d 887 (C.D. Cal. Aug. 17, 2007). Thus, it appears that the district court itself has not adhered to its mootness ruling in this case.

II. None of the General Detention Statutes Authorize Petitioner's Prolonged and Indefinite Detention Without a Hearing.

This Court has already held that no general detention statute authorizes prolonged and indefinite detention. *Nadarajah*, 443 F.3d at 1078 ("we conclude that the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period"); *Tijani*, 430 F.3d at 1242. Petitioner's detention was clearly prolonged, and his removal is not significantly likely to occur in the reasonably foreseeable future because he faces lengthy proceedings of indeterminate duration pending adjudication of his asylum application. Therefore, none of the general detention statutes authorize his continued detention without a constitutionally-sufficient hearing. Because he has already been ordered released pursuant to the detention hearing ordered by the district court, no further detention is authorized.

While the government spends a large portion of its brief arguing that the district court erred in determining that Section 1226(a) rather than Section 1231(a)(1)(C) governs Mr. Soeoth's detention, the resolution of that question is immaterial to the central issue in this case, because neither provision authorizes his continued detention. In any event, this Court has already implicitly rejected the government's argument concerning which statute governs cases like this one, which is unsurprising given that the government's position contravenes the plain

language of Section 1231. However, even if the government were correct that Section 1231(a)(1)(C) applies, the language of that statute does not authorize Petitioner's prolonged and indefinite detention without a hearing.

A. Under Binding Precedent, Congress Cannot Authorize Prolonged and Indefinite Detention – Detention Beyond a "Brief and Reasonable" Time – Absent a Clear Statement.

The precedent of this Court and the Supreme Court firmly establishes that Congress cannot authorize prolonged and indefinite detention absent a clear statement. *See Nadarajah*, 443 F.3d at 1076 ("Congress cannot authorize indefinite detention in the absence of a clear statement"); *Tijani*, 430 F.3d at 1242 (holding mandatory "shall detain" language insufficiently clear to authorize detention of 28 months, and ordering hearing to determine if such detention was justified); *Zadvydas*, 533 U.S. at 699 (granting petition after finding nothing in text or history of statute "that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention," given obviously inadequate procedures). In the absence of such a clear statement, this Court must read an immigration detention statute as authorizing detention for only a brief and reasonable period of time – presumptively six months. Under the general detention statutes, after this presumptively reasonable period the government must either release the detainee or hold a hearing where it bears the burden to show that

continued detention is justified.

This Court articulated the clear statement rule in *Nadarajah*, where it held that the general immigration detention statutes did not authorize the detention of a non-citizen for four-and-a-half years, even though there had been no final determination concerning his right to remain in this country. *Nadarajah* based the clear statement rule on two simple principles. The first relies on ordinary principles of statutory construction: the general detention statutes should not be read to authorize prolonged and indefinite detention when other specific statutes explicitly authorize prolonged detention in cases implicating national security. *See* 8 U.S.C. 1226a; 8 U.S.C. 1537. As *Nadarajah* explained,

> Our conclusion that the general detention statutes cannot be read as authorizing indefinite detention is bolstered by considering the immigration statutes as a whole. In fact, Congress has enacted provisions that allow the Attorney General to detain certain aliens for lengthy periods, but certain defined categories of aliens, and only with procedural safeguards. . .
> . . . the structure of the immigration statutes, with specific attention given to potential detentions of over six months in carefully defined categories, indicates that the period of detention allowed under the general detention statutes must be construed as being brief and reasonable.

Nadarajah, 443 F.3d at 1078-79. The Supreme Court also relied on the existence of specific national security statutes authorizing prolonged detention in its two decisions holding that Congress had not authorized prolonged detention after removal proceedings had been completed under 8 U.S.C. 1231(a). *See Zadvydas*, 533 U.S. at 697, 699 (citing specific national security statute at 8 U.S.C. 1537, and

concluding that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [the general detention] statute"); *Clark*, 543 U.S. at 379 n.4, 386 n.8 (citing specific statutes at 8 U.S.C. 1537 and 8 U.S.C. 1226a, and concluding that the general statutes governing detention of inadmissible aliens do not authorize indefinite detention); *id.* at 387 (O'Connor, J., concurring) (citing 8 U.S.C. 1226a).

The second basis for the clear statement rule comes from the doctrine of constitutional avoidance. It is the duty of every Court to adopt any "fairly possible" construction of a statute that allows the Court to avoid resolving a serious constitutional problem. *See Zadvydas*, 533 U.S. at 689. Accordingly, courts should not interpret statutes to authorize prolonged and indefinite detention absent a clear statement, because of the "obvious" constitutional problems with prolonged immigration detention, particularly in the absence of strong procedural protections. *See Zadvydas*, 533 U.S. at 692. *See also id.* at 697 ("if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms"); *Nadarajah*, 443 F.3d at 1076.

Nadarajah also held that detention becomes "prolonged" for purposes of the detention statutes after removal proceedings exceed a brief and reasonable period of time, which this Court defined as presumptively six months. *Nadarajah*, 443 F.3d at 1079-80. This Court's holding on that issue derives directly from the

Supreme Court's holding in *Zadvydas*. There, when considering detention after the completion of removal proceedings, the Supreme Court observed that "Congress previously doubted the constitutionality of detention for more than six months." *Zadvydas*, 533 U.S. at 701. Shortly after the Supreme Court decided *Zadvydas*, Congress passed the Patriot Act, which authorized immigration detention for more than six months in certain specified cases involving national security, and provided greater procedural protections in such cases. *See* 8 U.S.C. 1226a. That Congress specifically legislated detention for longer than six months in a narrow set of cases implicating national security shows that the general immigration detention statutes do not authorize detention beyond six months for routine immigration cases, like that at issue here. *See Nadarajah*, 443 F.3d at 1078-80.

The *Nadarajah* court further supported its holding that detention pending completion of removal proceedings was presumptively reasonable for only six months by relying on the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003). Two years after the enactment of the Patriot Act, the Supreme Court once again considered a general immigration detention statute in *Demore*. The Court upheld detention without hearings for periods averaging up to five months in cases involving non-citizens convicted of certain crimes, while suggesting that detention for significantly longer time periods would not be so authorized.

Demore, 538 U.S. at 528 (distinguishing *Zadvydas* because, *inter alia*, "the detention here is of a much shorter duration."). *Nadarajah* stated that *Demore*'s endorsement of brief detention pending completion of removal proceedings supported its rule that six months was the presumptively reasonable length of detention pending completion of removal proceedings. *Nadarajah*, 443 F.3d at 1080 ("*Demore* endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable."); *cf. Ly v. Hansen*, 351 F.3d 263, 275 (6th Cir. 2003) (Haynes, J., concurring in part and dissenting in part) (interpreting *Demore* to set presumptively unconstitutional time period of four months for mandatory detention pending completion of proceedings).

Despite *Nadarajah*'s repeated reference to the general detention statutes, the government argues that it does not apply in this case both because the non-citizen there was detained under a different statute, and because he was detained pending resolution of the government's appeal of his victories before the IJ and BIA. Gov't Br. at 18, 23 n.10. However, this Court's holding was not limited to those narrow facts. On the contrary, as the district court below explained in another case concerning the same issue, "[t]he Ninth Circuit in *Nadarajah* did not limit its holding to the facts of that case or otherwise indicate that it was crafting a rule of limited application because of the relatively unusual posture of the petitioner's

application for relief from removal." *Martinez v. Gonzales*, 504 F.Supp.2d 887-896 (C.D. Cal. Aug. 17, 2007); *see also id.* at 899 ("the Ninth Circuit did not suggest that the rare success enjoyed by the petitioner in *Nadarajah* was a prerequisite for demonstrating the absence of a significant likelihood of removal in the reasonably foreseeable future").

Prior to its detailed treatment of the issue in *Nadarajah*, this Court also rejected prolonged and indefinite immigration detention in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). The petitioner in *Tijani* had been detained for twenty-eight months and was likely to remain incarcerated for at least another year (because his removal case was pending before this Court, which had stayed his removal). This Court held that it was "doubtful" whether such detention could be consistent with the Due Process Clause, particularly given that the "foreseeable process" for completing his removal case would likely take a year or more. *Id.* This Court therefore construed the general detention statute at issue – Section 1226(c) – to apply only to "expeditious" removal proceedings and, having analyzed both the length of his past detention and the likely timetable for completion of his case, ordered that the petitioner be released unless the government proved at a hearing before an immigration judge that he presented a sufficient flight risk or danger to justify his detention. *Id.*

In construing the statute to require a hearing so as to preserve its

constitutionality, this Court specifically ordered that the government bear the burden of proof at the detention hearing. *Id.* at 1242. *See infra.* Section III.B. (arguing that the Constitution requires that the government bear the burden of proof at the detention hearing).

Thus, both *Nadarajah* and *Tijani* establish that the general detention statutes do not authorize prolonged detention where removal is not significantly likely in the reasonably foreseeable future. Because these statutes authorize only *brief and reasonable* detention, this Court should read a six month time limit into the statute governing Petitioner's detention and require the government to either release detainees after that time or hold hearings where the government bears the burden to prove that detention beyond six months is justified. Here, because an IJ ordered Mr. Soeoth's release after he received that hearing, he is entitled to remain released.[12]

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[12]Courts throughout the country have reached similar conclusions, and in doing so have applied the Supreme Court's law governing immigration detention to limit prolonged and indefinite detention pending completion of removal proceedings. *See Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (per Boggs, J.) (holding that eighteen month pre-removal detention of lawful permanent resident not authorized); *Welch v. Ashcroft*, 293 F.3d 213, 226-27 (4th Cir. 2002) (holding, prior to *Demore*, that fourteen month mandatory detention prior to final removal order was excessive in violation of substantive due process) (per Beezer, J., sitting by designation); *Oyedeji v. Ashcroft*, 332 F.Supp. 2d 747, 753 (M.D. Pa. 2004) (granting habeas relief to alien detained for approximately four years while pursuing challenge to removal order); *Lawson v. Gerlinski*, 332 F.Supp.2d 735, 745 (M.D.Pa. 2004)(granting habeas relief to alien detained eighteen months

B. Petitioner's Two and a Half Year Detention Pending Review of His Removal Order Was Prolonged and Indefinite Notwithstanding That it Would at Some Point End.

Mr. Soeoth's detention was prolonged and indefinite, because it lasted far longer than six months and his removal is not significantly likely to occur in the reasonably foreseeable future. His detention is clearly prolonged – he was detained five times longer than the presumptively "brief and reasonable" six month period established in *Nadarajah*, and slightly longer than the petitioner in *Tijani*. 430 F.3d at 1242 ("Two years and four months of process is not expeditious.").

In addition, his removal was (and is) not significantly likely to occur in the reasonably foreseeable future, just as in *Zadvydas*, *Tijani*, and *Nadarajah*. Removal was not reasonably foreseeable for the petitioners in *Zadvydas* because the government was unlikely to obtain travel documents for them. However, in both *Tijani* and *Nadarajah* removal was not reasonably foreseeable because of the nature of the petitioners' immigration cases, which were pending with no fixed termination point. Similarly, Mr. Soeoth does not anticipate problems obtaining

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pending challenge to removal order); *Parlak v. Baker*, 374 F.Supp.2d 551, 561-62 (E.D. Mich. 2005) (same, for alien detained eight months).