No.

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

D.C.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

Under 8 U.S.C. 1226(c), certain criminal aliens are required to be detained pending a decision on whether they are to be removed from the United States. In *Genalo* v. *Black*, No. 25-886, this Court granted certiorari to decide two questions concerning the constitutionality of detention under Section 1226(c). After the parties filed their principal merits briefs and the Court scheduled oral argument, however, that case was dismissed because it had become moot. This case presents the same two questions that the Court granted certiorari to decide in *Black*:

1. Whether there is a point at which an alien's detention under Section 1226(c), pending a decision on whether he is to be removed, becomes "unreasonably prolonged," such that due process requires a bond hearing.

2. If so, whether, in such a bond hearing, due process requires placing the burden on the government to justify the alien's continued detention by clear and convincing evidence.

PARTIES TO THE PROCEEDING

Petitioners (respondents-appellants below) are Kenneth Genalo, in his official capacity as Director of the New York Field Office of U.S. Immigration and Customs Enforcement; Markwayne Mullin, in his official capacity as Secretary of Homeland Security; Todd Blanche, in his official capacity as United States Attorney General; and Paul Arteta, in his official capacity as Sheriff of Orange County, New York.

Respondent (petitioner-appellee below) is D.C.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

D.C. v. *Noem*, No. 26-cv-1833 (Mar. 20, 2026)

United States Court of Appeals (2d Cir.):

D.C. v. *Mullin*, No. 26-1396 (Sept. 2, 2026)

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General—on behalf of Kenneth Genalo, the Director of the New York Field Office of U.S. Immigration and Customs Enforcement, and others—respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion and order of the district court (App., *infra*, 1a-33a) are reported at 825 F. Supp. 3d 309.

JURISDICTION

The final decision of the district court was entered on March 20, 2026. A notice of appeal was filed on May 19, 2026 (App., *infra*, 39a-40a). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The pertinent statutory provision, 8 U.S.C. 1226, is reproduced in the appendix to this petition. App., *infra*, 34a-38a.

INTRODUCTION

Under 8 U.S.C. 1226(c), the government must continue to detain certain criminal aliens pending a decision on whether they are to be removed from the United States. In *Jennings* v. *Rodriguez*, 583 U.S. 281 (2018), this Court ordered supplemental briefing and heard argument on the extent to which the Due Process Clause limits the government's authority under Section 1226(c). The Court, however, ultimately decided the case on statutory grounds, without reaching any constitutional issues.

Since then, the constitutional issues that *Jennings* did not resolve have divided the courts of appeals, with the Second Circuit in *Black* v. *Decker*, 103 F.4th 133 (2024), declaring Section 1226(c) unconstitutional as applied to any alien whose detention has become "unreasonably prolonged." App., *infra*, 90a. In June, this Court granted certiorari to review the court of appeals' decision in *Black*. See *Genalo* v. *Black*, No. 25-886 (June 15, 2026). But after the parties filed their principal merits briefs and the Court scheduled oral argument for October, that case was dismissed because it had become moot.

The Court should grant certiorari before judgment in this case as a replacement for *Black*. This case presents the same questions as *Black*, and granting immediate review would allow the Court to consider those questions during October Term 2026, just as it was scheduled to do in *Black*. The Court has previously granted certiorari before judgment to allow a case to replace one that was dismissed. See *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 625 (2022) (No. 21-401). The Court should do the same here, so that it may decide the exceptionally important constitutional issues that have divided the circuits since *Jennings*.

STATEMENT

A. Legal Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the government can remove from the United States "aliens applying for admission if they are 'inadmissible,' and it can remove already admitted aliens if they are 'deportable.'" *Blanche* v. *Lau*, 146 S. Ct. 1981, 1986 (2026) (citation omitted); see 8 U.S.C. 1229a(e)(2). "The INA specifies the respective grounds of inadmissibility and deportability with which the Government can charge an alien." *Lau*, 146 S. Ct. at 1986; see 8 U.S.C. 1182(a), 1227(a). As relevant here, various criminal and related grounds of inadmissibility are set forth in 8 U.S.C. 1182(a)(2).

Except where the INA otherwise specifies, a removal proceeding under 8 U.S.C. 1229a is the "sole and exclusive procedure" for determining whether an alien may be "removed from the United States." 8 U.S.C. 1229a(a)(3). Removal proceedings under Section 1229a generally include a hearing before an immigration judge (IJ) and can include an appeal to the Board of Immigration Appeals (Board). 8 U.S.C. 1229a; 8 C.F.R. 1003.1(d)(1). In removal proceedings, an alien may seek relief from removal, such as asylum or cancellation of removal. See, *e.g.*, 8 U.S.C. 1158, 1229b(a). An alien may also seek protection from removal to a particular country, such as withholding of removal under 8 U.S.C. 1231(b)(3) or withholding or deferral of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

2. The INA contains various provisions authorizing the detention of aliens in connection with their removal. One of those provisions is 8 U.S.C. 1226.

a. Section 1226 empowers the government to "arrest[]" and "detain[]" "an alien" "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1226(a) "sets out the general rule" for Section 1226 detainees. *Nielsen* v. *Preap*, 586 U.S. 392, 397 (2019). Under Section 1226(a), an alien's continued detention is discretionary: The government "may continue to detain" the alien or "may release" him—either on "bond of at least $1,500" or on "conditional parole." 8 U.S.C. 1226(a)(1) and (2).

An officer of the Department of Homeland Security (DHS) initially decides whether to release an alien under Section 1226(a). 8 C.F.R. 236.1(c)(8). An alien dissatisfied with that decision may request a bond hearing before an IJ. 8 C.F.R. 236.1(d)(1), 1003.19(b), 1236.1(d)(1).[1]

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[1] Although Section 1226 refers only to the Attorney General, authority under the provision is "shared" by the Attorney General and the Secretary of Homeland Security. *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003). Under the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135—which generally transferred the "administration and enforcement" of the INA to the Secretary,

Under applicable regulations and agency precedent, the alien bears the burden of justifying his release. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999).

In determining whether the alien has met that burden, the officer and the IJ consider the alien's dangerousness and flight risk. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8); *Matter of Martinez-Rodriguez*, 29 I. & N. Dec. 656, 657 (B.I.A. 2026). Dangerousness is the risk that, if released, the alien will commit crimes, threaten national security, or otherwise cause harm to persons or property. *Matter of Fatahi*, 26 I. & N. Dec. 791, 793-794 (B.I.A. 2016). Flight risk is the risk that he will not appear for his removal proceedings or, if ordered removed, will not surrender himself for removal. *Matter of C-M-M-*, 29 I. & N. Dec. 141, 144 (B.I.A. 2025).

b. For certain aliens—those "who have committed certain dangerous crimes" or "have connections to terrorism"—Congress concluded that Section 1226(a)'s general rule was "too risky." *Preap*, 586 U.S. at 396. It therefore prescribed a special rule for "criminal aliens" in Section 1226(c). Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, sec. 303(a), § 236(c), 110 Stat. 3009-585 (capitalization omitted). DHS "shall take into custody" such criminal aliens, 8 U.S.C. 1226(c)(1), and "may release" them "only" for narrow, witness-protection purposes, 8 U.S.C. 1226(c)(4). Section 1226(c) thus "mandate[s]" their con-

8 U.S.C. 1103(a)(1)—DHS officers "make the initial determination whether an alien will remain in custody during removal proceedings," *D-J-*, 23 I. & N. Dec. at 574 n.3. The Attorney General, however, retains the authorities exercised by immigration courts, including the authority to prescribe bond. *Ibid.*; see 8 U.S.C. 1103(g)(1).

tinued detention "without a chance to apply for release on bond or parole." *Preap*, 586 U.S. at 398.

Section 1226(c) applies to five categories of removable criminal aliens. The first three consist of aliens inadmissible or deportable by reason of having committed a covered offense, such as a crime involving moral turpitude or an aggravated felony. 8 U.S.C. 1226(c)(1)(A)-(C). The fourth category encompasses aliens inadmissible or deportable on grounds relating to terrorist activity. 8 U.S.C. 1226(c)(1)(D).[2] And the fifth category—recently added by the Laken Riley Act, Pub. L. No. 119-1, § 2(1)(C), 139 Stat. 3 (2025)—consists of aliens inadmissible on specified grounds who have been charged with, been arrested for, been convicted of, or admitted having committed certain offenses, including any crime resulting in death or serious bodily injury to another person. 8 U.S.C. 1226(c)(1)(E).

A detainee may challenge whether he falls within Section 1226(c) at a so-called *Joseph* hearing before an IJ. 8 C.F.R. 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I. & N. Dec. 799, 805-807 (B.I.A. 1999); *Matter of Kotliar*, 24 I. & N. Dec. 124, 126-127 (B.I.A. 2007). "At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore* v. *Kim*, 538 U.S. 510, 514 n.3 (2003). The alien or DHS may appeal an IJ's *Joseph*-

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[2] Although some aliens who fall within the fourth category, such as "close relatives of terrorists and those who are thought likely to engage in terrorist activity," "may never have been charged with any crime in this country," this brief follows Congress's (and this Court's) lead in referring to all aliens covered by Section 1226(c) as "criminal aliens." *Preap*, 586 U.S. at 399.

hearing decision to the Board. 8 C.F.R. 236.1(d)(3), 1236.1(d)(3).

3. In *Demore*, this Court rejected a due-process challenge to Section 1226(c), holding that Congress "may require that persons such as [Kim]," a lawful permanent resident convicted of an aggravated felony, "be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513. Subsequently, in *Jennings* v. *Rodriguez*, the Court ordered supplemental briefing on various issues concerning the constitutionality of Section 1226(c), including (1) "[w]hether the Constitution requires" that criminal aliens who are detained under Section 1226(c) "be afforded bond hearings" "if detention lasts six months," and (2) "[w]hether the Constitution requires that, in bond hearings for aliens detained for six months under [Section 1226(c)], the alien is entitled to release unless the Government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community." 580 U.S. 1040 (2016). The Court ultimately did not resolve those constitutional issues. *Jennings* v. *Rodriguez*, 583 U.S. 281, 312 (2018). Instead, the Court decided only that the statute itself does not authorize such bond hearings or impose such a burden on the government. *Id.* at 303-306.

B. The Court Of Appeals' Decision In *Black*

1. In *Black* v. *Decker*, 103 F.4th 133 (2024), the Second Circuit addressed the constitutional issues that *Jennings* did not resolve.[3] *Black* involved habeas petitions brought by two criminal aliens: Carol Black and Keisy G.M. App., *infra*, 88a. Both aliens were lawful

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[3] The court of appeals' decision in *Black*, which was controlling below, is reproduced in the appendix to this petition. App., *infra*, 86a-133a.

permanent residents who had been convicted of an aggravated felony, placed in removal proceedings, and detained under Section 1226(c). *Id.* at 88a, 91a, 93a. Both aliens argued that their continued detention under Section 1226(c) had become unreasonably prolonged, in violation of the Fifth Amendment's Due Process Clause. *Id.* at 89a. At the time of the district courts' decisions in their cases, Black had been detained for approximately 7 months, and G.M. had been detained for approximately 14. *Id.* at 89a, 94a. In Black's case, the district court granted habeas relief and ordered a bond hearing at which the government would bear the burden of demonstrating "by clear and convincing evidence that Black poses a risk of flight or a danger to the community." *Id.* at 92a (brackets and citation omitted). In G.M.'s case, the district court denied habeas relief, finding no "reason to think" that G.M.'s "continued detention [wa]s for any purpose other than to facilitate his deportation." *G.M.* v. *Decker*, No. 21-cv-4440, 2021 WL 5567670, at *13 (S.D.N.Y. Nov. 29, 2021).

2. The court of appeals agreed to consider Black's and G.M.'s habeas cases in tandem. App., *infra*, 88a. After one member of the panel that heard argument passed away, *id.* at 87a n.†, the two remaining judges issued a published decision affirming in Black's case and reversing in G.M.'s, *id.* at 86a-133a.

a. The court of appeals held that Section 1226(c) is unconstitutional as applied to aliens whose detention has become "unreasonably prolonged." App., *infra*, 90a. The court stated that when an alien's detention reaches that point, the Due Process Clause requires that the alien be afforded a bond hearing to determine whether he poses a flight risk or a danger to the community. *Id.* at 99a-105a. In the court's view, *Mathews* v. *Eldridge*, 424

U.S. 319 (1976), "supplies the proper framework for determining when" an alien is entitled to a bond hearing. App., *infra*, 90a; see *id.* at 105a-115a. The court explained that *Mathews* requires a balancing of three factors:

> (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 108a (quoting *Mathews*, 424 U.S. at 335).

Applying those factors, the court of appeals concluded that both aliens' detention under Section 1226(c) had become "unreasonably prolonged," such that they could not be further detained without a bond hearing. App., *infra*, 123a; see *id.* at 90a. In the court's view, all three *Mathews* factors supported that conclusion. *Id.* at 115a-123a. With respect to the first, the court characterized the private interest at stake as "the most significant liberty interest there is—the interest in being free from imprisonment." *Id.* at 115a (citation omitted). With respect to the second *Mathews* factor, it concluded that "almost *any* additional procedural safeguards at some point in the detention would add value," and it described "an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight" as "[t]he most obvious" safeguard. *Id.* at 120a. Finally, with respect to the third *Mathews* factor, the court expressed the view that "additional procedural safeguards" would "do nothing to undercut" the government's interests in "ensuring the noncitizen's appearance at proceedings" and "protecting the community from noncitizens who have been involved in crimes" because, "[a]t any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger." *Id.* at 120a-121a.

b. The court of appeals further held that, in bond hearings for Section 1226(c) detainees whose detention becomes prolonged, due process requires placing the burden on the government to justify the alien's continued detention by clear and convincing evidence. App., *infra*, 124a-132a. The court regarded its "analysis * * * of the first and third [*Mathews*] factors" as applying "with equal force" to its conclusion that the government must bear a heightened burden of persuasion. *Id.* at 124a. In "elaborat[ing]" on "the second *Mathews* factor," *ibid.*, the court stated that requiring detainees to "prove that they are *not* a danger and *not* a flight risk" would "present[] too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged," *id.* at 127a. The court additionally held that due process requires IJs to consider aliens' "ability to pay and alternatives to detention when setting" bond amounts. *Id.* at 130a; see *id.* at 130a-132a.

3. The government petitioned for rehearing en banc, which was denied by the court of appeals. *Black* v. *Almodovar*, 156 F.4th 171, 171 (2d Cir. 2025). The two members of the panel filed a joint statement in support of the denial, maintaining that "[t]he panel decision was correct." *Id.* at 191 (Chin and Carney, JJ.). Judge Lohier, joined by Judges Lee, Robinson, Pérez, Nathan, Merriam, and Kahn, concurred in the denial "[f]or the reasons set forth" in the "joint statement" and in the "panel opinion." *Id.* at 172.

Judge Nardini, joined by Chief Judge Livingston and Judges Sullivan, Park, and Menashi, dissented from the denial of rehearing en banc, expressing the view that the panel had erred in requiring the government to justify a Section 1226(c) detainee's continued detention by clear and convincing evidence; that the circuits have "diverge[d] widely" in addressing similar burden-allocation and standard-of-proof issues; and that "only [this] Court can clean up this intercircuit incoherence." *Black*, 156 F.4th at 173-174. Judge Menashi also filed a dissenting opinion, joined by Chief Judge Livingston and Judges Sullivan and Park, expressing the view that the panel had "provided no persuasive justification for invalidating the congressional policy reflected in § 1226(c)," *id.* at 182, and that its decision "entrenches a direct circuit split with the Eighth Circuit," *id.* at 191.

4. The government petitioned for certiorari, seeking review of the court of appeals' decision in *Black*. Pet. at I, *Genalo* v. *Black*, No. 25-886 (Jan. 22, 2026) (*Black* Pet.). At the certiorari stage, the parties agreed that Black's case had become moot after the court of appeals' decision, and this Court granted a writ of certiorari only as to G.M.'s case. See Gov't Letter at 1, *Genalo* v. *Black*, No. 25-886 (Sept. 11, 2026) (Gov't Letter). Three calendar days before G.M.'s merits brief was due, however, the Governor of New York granted a full and unconditional pardon with respect to G.M.'s aggravated-felony conviction. See *ibid.* The parties agreed that the pardon rendered G.M.'s habeas case moot. See *ibid.*

Although Black's and G.M.'s habeas cases had both become moot after the court of appeals' decision, the government did not seek vacatur of that decision under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The government explained that "[v]acatur would not eliminate the circuit conflicts or the need for this Court's review of the questions presented." Gov't Letter 1.

Thus, rather than force those questions to be relitigated within the Second Circuit—which had denied rehearing en banc in *Black*, after nearly a year of consideration, with a majority of the court's active judges agreeing with the panel members' defenses of the decision—the government stipulated to the dismissal of Black's and G.M.'s cases under this Court's Rule 46.1, with the aim of identifying alternative vehicles, including from the Second Circuit, that would still allow this Court to resolve the questions presented during October Term 2026. *Id.* at 1-2.

On September 11, 2026, the Court dismissed *Black* under Rule 46.1. The Court subsequently removed the case from the October argument calendar.

C. The Present Case

1. Respondent is a citizen of the Dominican Republic, where he was born in 1963. D. Ct. Doc. 11-7, at 1 (Mar. 13, 2026). At an unknown time and place, he unlawfully entered the United States. App., *infra*, 2a; see D. Ct. Doc. 11-4, at 1 (Mar. 13, 2026). He has since been convicted of multiple crimes. App., *infra*, 3a-4a.

In 1997, respondent was charged with selling, and possessing with intent to sell, a narcotic drug, in violation of New York law. D. Ct. Doc. 13, at 2 (Mar. 13, 2026). Respondent failed to appear for trial. App., *infra*, 3a. A jury found him guilty, and he was sentenced to three to nine years of imprisonment. D. Ct. Doc. 13, at 2. A bench warrant was issued, but respondent did not report to serve his sentence. D. Ct. Doc. 1-1, at 7 (Mar. 5, 2026).

In 2007, respondent was charged with possession of a forged instrument in the second and third degrees, in violation of New York law, for presenting false identification to law enforcement. App., *infra*, 3a. Although he was issued a summons, respondent failed to appear in court. D. Ct. Doc. 1-1, at 7.

In January 2016, respondent was involved in a domestic dispute with his partner. Pet. App. 4a. Respondent was arrested and charged with second-degree strangulation, third-degree assault, criminal obstruction of breathing or blood circulation, and acting in a manner to injure a child under 17—all in violation of New York law. D. Ct. Doc. 1-1, at 7; D. Ct. Doc. 13, at 2. Two days after his arrest, respondent pleaded guilty to criminal obstruction of breathing or blood circulation and was sentenced to a conditional discharge and a five-year order of protection. D. Ct. Doc. 1-1, at 7; D. Ct. Doc. 11-1, at 5 (Mar. 13, 2026). He also pleaded guilty to the 2007 charge of possession of a forged instrument in the third degree and was sentenced to time served. D. Ct. Doc. 11-1, at 6-7.

In October 2016, respondent was arrested and charged with second-degree criminal contempt, in violation of New York law, for disobeying a court. D. Ct. Doc. 13, at 2. He pleaded guilty and was sentenced to nine days of imprisonment and a five-year order of protection. *Id.* at 3.

In April 2024, respondent was arrested pursuant to the bench warrant for his drug-trafficking convictions. App., *infra*, 4a. The following month, respondent entered a state correctional facility to serve his three-to-nine-year prison sentence. *Ibid.* A state court subsequently reduced that sentence to one year. *Id.* at 6a n.3.

2. In February 2025, while respondent was in state custody, DHS served him with a notice to appear for removal proceedings under Section 1229a. D. Ct. Doc. 11-4, at 1-2. The notice charged him with being inadmissible on multiple grounds, including that he has a con-

viction for a crime involving moral turpitude, 8 U.S.C. 1182(a)(2)(A)(i)(I); that he has two or more criminal convictions for which aggregate sentences of confinement were five years or more, 8 U.S.C. 1182(a)(2)(B); and that he is an alien present in the United States without being admitted or paroled, 8 U.S.C. 1182(a)(6)(A)(i). D. Ct. Doc. 11-4, at 4-5.

In the months that followed, respondent appeared for several removal hearings via videoconference from prison. D. Ct. Doc. 13, at 4-5. At the first of those hearings, the IJ granted respondent additional time to obtain an attorney; at the second, respondent's attorney failed to appear; and at the third, the IJ granted the attorney additional time to prepare. *Ibid.*

On September 8, 2025, respondent finished serving his prison sentence and was released from state custody. App., *infra*, 6a. That same day, DHS arrested respondent and detained him under Section 1226(c) as an alien who "is inadmissible by reason of having committed an[] offense covered in section 1182(a)(2)." 8 U.S.C. 1226(c)(1)(A); see App., *infra*, 6a; D. Ct. Doc. 13, at 5-6. Respondent did not request a *Joseph* hearing to challenge his detention under Section 1226(c).

At respondent's next removal hearing, on September 15, 2025, the IJ again granted his attorney additional time to prepare. App., *infra*, 6a. That attorney subsequently withdrew, and the IJ scheduled respondent's next hearing for the following month. *Ibid.* In October 2025, with respondent appearing pro se, the IJ sustained the charges of inadmissibility referenced above. *Ibid.* After applying for asylum, withholding of removal, and cancellation of removal, respondent retained new counsel, who filed amended applications. *Id.* at 7a. In February 2026, at the request of new counsel, the IJ held a hearing on respondent's mental competency to participate in his removal proceedings. *Ibid.* The IJ found respondent "incompetent," but determined that his case could proceed with appropriate safeguards. *Ibid.*[4] Respondent's applications for relief and protection from removal remain pending before the IJ.

3. In March 2026, respondent filed a habeas petition in the United States District Court for the Southern District of New York, alleging that his detention under Section 1226(c) had become unreasonably prolonged in violation of the Due Process Clause. App., *infra*, 74a-78a. Respondent argued that he was entitled to a bond hearing under "a straightforward application of binding precedent in *Black*." D. Ct. Doc. 17, at 13 (Mar. 15, 2026). He also argued that he was entitled to immediate release pending such a bond hearing. 3/19/26 Conference Tr. 55; see App., *infra*, 78a-83a.

The government opposed habeas relief. D. Ct. Doc. 12 (Mar. 13, 2026). Although it recognized that the court of appeals' decision in *Black* was binding, the government reiterated its disagreement with that decision, "including its application of the *Mathews* framework." *Id.* at 14 n.2. The government further argued that "aliens charged with being removable or inadmissible have no fundamental right to be released during removal proceedings," *id.* at 15, and that respondent's "detention during his ongoing removal proceedings * * * contin-

[4] "Unlike in criminal proceedings, a lack of competency in civil immigration proceedings does not mean that the hearing cannot go forward." *Matter of M-A-M-*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011). Rather, "proceedings can go forward, even where the alien is incompetent, provided the proceeding is conducted fairly." *Id.* at 477. The Board has identified "appropriate safeguards" for ensuring that the proceeding is conducted fairly. *Id.* at 483.

ues to serve the statutory purpose of § 1226(c) and is not otherwise unconstitutional," *id.* at 14.

The district court granted respondent's habeas petition in part. App., *infra*, 1a-33a. The court recognized that it was bound by *Black* to apply "the balancing test of *Mathews*." *Id.* at 13a. "Guided by the Circuit's discussion in *Black*," the court considered each *Mathews* factor. *Id.* at 14a. With respect to the first, the district court observed that respondent had "been detained for nearly six and a half months," *ibid.*, and that under *Black*, "any immigration detention exceeding six months without a bond hearing raises serious due process concerns," *id.* at 14a-15a (quoting *id.* at 113a). The court also stated that "credible evidence" suggests that respondent's detention has taken a "toll" on his physical and mental health. *Id.* at 17a, 20a. With respect to the second *Mathews* factor, the court explained that *Black* had "found prolonged detention under § 1226(c) inherently to entail a high risk of erroneous deprivation of liberty." *Id.* at 21a. And with respect to the third *Mathews* factor, the court noted that *Black* had "held that holding a bond hearing 'does nothing to undercut'" the government's interests. *Id.* at 23a (brackets omitted) (quoting *id.* at 121a).

The district court concluded that, as in *Black*, due process required a bond hearing. App., *infra*, 25a; see *id.* at 24a-25a. The court also held that, "under *Black*," the government "will have the burden to establish, by clear and convincing evidence, that [respondent's] continued detention is justified." *Id.* at 27a. The court, however, denied respondent's request for immediate release. *Id.* at 32a.

An IJ conducted the court-ordered bond hearing and granted respondent release on a $1500 bond. App., *infra*, 41a-42a. After posting bond, respondent was released from DHS custody on March 31, 2026. D. Ct. Doc. 27 (Mar. 31, 2026).[5]

4. The government appealed the district court's grant of habeas relief, App., *infra*, 39a-40a, and filed an unopposed motion for summary affirmance in the court of appeals. In that motion, the government explained that although it disagrees with the court of appeals' decision in *Black*, that decision "controls the disposition of this case and forecloses the government's arguments on appeal." C.A. Doc. 17.1, at 3 (Sept. 2, 2026). The government further explained that it was raising "those arguments 'merely to preserve' them for potential 'review by'" this Court. *Ibid.* (citation omitted). Respondent filed a letter in response, stating that while he "does not oppose summary affirmance," he viewed the government's motion as "advanc[ing] arguments" that were not previously raised or addressed. C.A. Doc. 18.1, at 1 (Sept. 17, 2026). The government filed a letter in reply, disputing that characterization of its arguments. C.A. Doc. 19.1 (Sept. 18, 2026). The court of appeals has yet to rule on the government's motion.

REASONS FOR GRANTING THE PETITION

This past June, the Court granted certiorari in *Genalo* v. *Black*, No. 25-886, to decide two questions concerning the constitutionality of the detention of criminal aliens under 8 U.S.C. 1226(c). After the parties filed their principal merits briefs and the Court scheduled oral argument, however, *Black* was dismissed because it had become moot. This case presents the same two ques-

[5] DHS appealed the IJ's bond-hearing decision to the Board, but the IJ was bound by the district court's decision to give respondent a bond hearing as specified in *Black*. Accordingly, DHS has moved to withdraw its appeal, and the government is now seeking to vindicate its view that *Black* was wrongly decided in this Court.

tions as *Black*, and granting certiorari before judgment would allow the Court to decide those questions during the same Term as it was scheduled to hear argument in *Black*. Accordingly, this "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. The Court has previously granted certiorari before judgment in similar circumstances, where a new case presented the same question as a merits case that was dismissed, and granting immediate review allowed the Court to decide that question during the same Term. See *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 625 (2022) (No. 21-401). The Court should follow the same course here.

A. The Court Should Grant Certiorari Before Judgment In This Case As A Replacement For *Black*

The district court's decision in this case represents a straightforward application of the court of appeals' decision in *Black*. This case therefore raises the same questions that this Court granted certiorari in *Black* to decide. And because the court of appeals' decision in *Black* is controlling, the Court need not await the court of appeals' judgment in this case before granting review. Instead, the Court should grant certiorari before judgment, thereby allowing the Court to decide the questions presented during October Term 2026.

1. This case presents the same questions as *Black*. Like the aliens in *Black*, respondent falls within the scope of Section 1226(c). See App., *infra*, 12a ("It is undisputed that, under § 1226(c), [respondent] is subject to mandatory detention."); *id.* at 62a ("Because [respondent] has been found inadmissible under [8 U.S.C.] 1182(a)(2)(A)(i)(I), he concedes that he is subject to mandatory detention."). Like the aliens in *Black*, respond-

ent sought habeas relief on the premise that his continued detention without a bond hearing violated due process. See *id.* at 74a-78a, 89a. Like the court of appeals in *Black*, the district court in this case agreed, holding that respondent's detention had become "sufficiently prolonged" to require a bond hearing at which the government bore the burden of justifying his continued detention by clear and convincing evidence. *Id.* at 25a; see *id.* at 27a, 90a. Indeed, the government now agrees that the district court was bound by the court of appeals' opinion in *Black* to reach that conclusion—which is why it has filed an unopposed motion asking the court of appeals to summarily affirm the district court's decision. See p. 17, *supra*.

This case is also a suitable vehicle for resolving the questions presented in *Black*. Although respondent has been released from DHS custody, the parties' dispute over the extent to which due process limits the government's authority to detain him "remains live." *Mullin* v. *Al Otro Lado*, 146 S. Ct. 2079, 2090 n.7 (2026). The government has an ongoing interest in that dispute because it seeks to overturn the district court's decision that led to his release and because it wishes to be able to redetain him without having to justify his further detention by clear and convincing evidence at a bond hearing. Respondent has an ongoing interest in the dispute because he wishes to avoid redetention. There is thus no impediment to this Court's review. See *Nielsen* v. *Preap*, 586 U.S. 392, 403 (2019) (plurality opinion) (concluding that a dispute over the legality of aliens' Section 1226(c) detention was not moot, even though the aliens had been released from DHS custody); App., *infra*, 87a-88a (concluding that the dispute over the legality of Carol Black's Section 1226(c) was "not moot," even though he had been "released" after a bond hearing, because he "remain[ed] subject to possible detention" at the time of the court of appeals' decision).

2. There is also no need to await the court of appeals' judgment below. As noted, the government has asked that court to summarily affirm the grant of habeas relief in light of its decision in *Black*. See p. 17, *supra*. Respondent does not oppose summary affirmance. See C.A. Doc. 18.1, at 1. Respondent and the government agree that his due-process claim "turns on a straightforward application of binding precedent in *Black*." D. Ct. Doc. 17, at 13; see 3/19/26 Conference Tr. 4-5 ("Application of the *Mathews* framework, as required by *Black*[,] makes clear that [respondent's] detention has become unconstitutionally prolonged.").

The outcome below is thus not in doubt. The court of appeals' decision in *Black* forecloses the government's contention that *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), has no application to respondent's due-process claim. App., *infra*, 90a. It also forecloses any contention that the government can prevail under that court's view of *Mathews*. As the district court recognized, *Black* held, with respect to the first *Mathews* factor, that the private interest at stake is "the most significant liberty interest there is," *id.* at 115a (citation omitted); see *id.* at 14a; with respect to the second factor, that "almost *any* additional procedural safeguards at some point in the detention would add value," *id.* at 21a (quoting *id.* at 120a); and with respect to the third factor, that providing "a bond hearing 'does nothing to undercut' " the government's interests, *id.* at 23a (brackets omitted) (quoting *id.* at 121a). *Black* compelled the district court's conclusion that "these factors viewed in combination support affording [respondent] a bond hearing." *Id.* at 24a.

Because the court of appeals' decision in *Black* is controlling, there is no reason to await that court's disposition of the government's unopposed motion for summary affirmance. There is also no reason to think that the Second Circuit will revisit its decision in *Black*. When the court denied the government's petition for rehearing en banc in *Black* last year, a majority of the court's active judges concurred in the denial "[f]or the reasons set forth" in the panel members' "joint statement" defending their opinion and the "panel opinion" itself. *Black* v. *Almodovar*, 156 F.4th 171, 172 (2d Cir. 2025) (Lohier, J., joined by Lee, Robinson, Pérez, Nathan, Merriam, and Kahn, J.J., concurring in the denial of rehearing en banc). Awaiting further review in the court of appeals would needlessly delay this Court's consideration of the questions presented.

This Court has previously granted certiorari before judgment in analogous circumstances. In 2021, the Court had granted certiorari in *Servotronics, Inc.* v. *Rolls-Royce PLC*, 592 U.S. 1317 (No. 20-794), to decide whether private adjudicatory bodies count as "foreign or international tribunal[s]" under 28 U.S.C. 1782. After the parties filed their merits briefs and the Court scheduled oral argument, however, that case was dismissed under Rule 46.1. See *Servotronics, Inc.* v. *Rolls-Royce PLC*, 142 S. Ct. 54 (2021) (No. 20-794). The Court then granted certiorari before judgment in another case, *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, *supra*, as a replacement for *Servotronics*, thereby allowing it to decide the same question during the same Term. The Court should likewise grant certiorari before judgment in this case as a replacement for *Black*.

3. Granting immediate review would allow the Court to consider the questions presented during October

Term 2026, as it was scheduled to do in *Black*. The government filed a merits brief addressing those questions before *Black* became moot. If the Court were to grant certiorari before judgment in this case, the government would be in a position to file its opening merits brief on an expedited basis, thereby facilitating the Court's ability to schedule the case for oral argument.

Granting immediate review in this case would also allow the Court to consider the due-process issues here alongside the due-process issues raised in the government's pending petition for a writ of certiorari in *Putra* v. *Lopez-Campos*, No. 25-1415 (filed June 22, 2026). The second question presented in *Lopez-Campos* concerns the constitutionality of 8 U.S.C. 1225(b)(2)(A), which mandates the detention of certain aliens who are "applicant[s] for admission." Sections 1226(c) and 1225(b)(2)(A) mandate detention pending removal proceedings on different bases, and those differences may bear on the due-process analysis with respect to each provision. Granting certiorari in *Lopez-Campos* is therefore no substitute for granting review here. But the Court may find it efficient and useful to evaluate the due-process issues concerning Sections 1226(c) and 1225(b)(2)(A) in parallel. Granting review in both this case and *Lopez-Campos* would allow the Court to do so.[6]

[6] In the government's view, respondent in this case is both an applicant for admission and a criminal alien, so he could be subject to mandatory detention under Section 1225(b)(2)(A) or Section 1226(c). Not all criminal aliens, however, are also applicants for admission. And the government did not argue below that respondent is subject to Section 1225(b)(2)(A)—an argument that circuit precedent currently forecloses. See *Barbosa da Cunha* v. *Freden*, 175 F.4th 61 (2d Cir. 2026), petition for cert. pending, No. 26-104 (filed July 23, 2026). Accordingly, this petition does not present questions about the scope or constitutionality of Section 1225(b)(2)(A).

B. The Questions Presented Warrant This Court's Review, As They Did In *Black*

Just as the questions presented warranted further review in *Black*, they warrant further review here. See *Black* Pet. 15-20, 26-28. Both questions have divided the circuits, were the subject of supplemental briefing in *Jennings* v. *Rodriguez*, 583 U.S. 281 (2018), and involve a lower court's invalidation of an Act of Congress.

1. The first question presented warrants further review

a. The first question presented asks whether there is a point at which Section 1226(c) detention becomes "unreasonably prolonged," such that due process requires a bond hearing. App., *infra*, 90a. The court of appeals in *Black* answered in the affirmative. *Ibid.* Because that decision invalidates the application of a federal statute to an entire category of cases, this Court's review is warranted. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019) (explaining that "when a lower court has invalidated a federal statute," the Court's "usual" approach is to grant certiorari).

The court of appeals' reasoning in *Black* confirms the breadth of its holding. Although it disclaimed imposing any "bright-line constitutional rule," App., *infra*, 113a, the court articulated an exceedingly broad understanding of when *Mathews* requires a bond hearing, see pp. 9-10, *supra*. Indeed, the court of appeals' reasoning led the district court in this case to declare respondent's six-and-a-half-month detention "sufficiently prolonged to require a bond hearing," App., *infra*, 25a—despite the fact that this Court upheld the application of Section 1226(c) to an alien who had been detained for nearly the same amount of time in *Demore* v. *Kim*, 538 U.S. 510, 531 (2003).

b. The existence of a three-way division in the courts of appeals underscores the need for this Court's review. The Second Circuit's approach in *Black* conflicts with the Eighth Circuit's approach in *Banyee* v. *Garland*, 115 F.4th 928 (2024), reh'g en banc denied, 131 F.4th 823 (2025). See, *e.g.*, *id.* at 932 n.3 (rejecting the Second Circuit's approach); *Black*, 156 F.4th at 191 (Menashi, J., dissenting from the denial of rehearing en banc) (observing that *Black* "entrenches a direct circuit split with the Eighth Circuit"); *Black*, 156 F.4th at 201 (Chin and Carney, JJ., in support of the denial of rehearing en banc) (criticizing the Eighth Circuit's "fail[ure] to meaningfully address its split with [the Second Circuit] and others"). In *Banyee*, the Eighth Circuit held that "[d]ue process imposes no time limit on detention pending deportation." 115 F.4th at 930. The Eighth Circuit thus rejected the application of a "multi-factor 'reasonableness' test," such as the one articulated in *Mathews*, for determining when detention under Section 1226(c) has become unconstitutionally prolonged. *Id.* at 933; see *id.* at 932 n.3. Instead, it held that "the government can detain an alien for as long as deportation proceedings are still '*pending*.'" *Id.* at 933 (citation omitted). The court upheld the constitutionality of an alien's "yearlong" detention under Section 1226(c), *id.* at 931, finding "no indication that [his] ongoing proceedings [we]re a ruse 'to incarcerate him for other reasons,'" *id.* at 934 (brackets and citation omitted); see *id.* at 933-934.

Both the Second Circuit's and the Eighth Circuit's approaches also conflict with that of the Third Circuit in *German Santos* v. *Warden*, 965 F.3d 203 (2020). See, *e.g.*, *Banyee*, 115 F.4th at 932 n.3 (rejecting the Third Circuit's approach). Like the Second Circuit (but not the Eighth), the Third Circuit has held that detention under Section 1226(c) violates the Due Process Clause when it becomes "unreasonable." *German Santos*, 965 F.3d at 210. But unlike the Second Circuit, the Third Circuit does not recognize *Mathews* as the proper framework for determining when Section 1226(c) detention has reached that point. See *id.* at 210-211. Instead, the Third Circuit in *German Santos* adopted a four-factor "reasonableness" test for making that determination. *Id.* at 211. Under *German Santos*, those factors are: (1) "the duration of detention," (2) "whether the detention is likely to continue," (3) "the reasons for the delay," and (4) "the alien's conditions of confinement." *Ibid.* Applying those factors in *German Santos*, the Third Circuit concluded that an alien's detention "for more than two-and-a-half years" under Section 1226(c) had become "unreasonable," such that due process entitled him to "a bond hearing to gauge whether he still need[ed] to be detained." *Id.* at 213; see *id.* at 212-213.

In short, the Eighth Circuit disagrees with the Second and Third Circuits about whether a Section 1226(c) detainee has a due-process right to a bond hearing when his detention becomes "unreasonable" (in the words of the Third Circuit) or "unreasonably prolonged" (in those of the Second Circuit). And the Second and Third Circuits disagree with each other about how to determine when Section 1226(c) detention has reached that point. This Court's review is warranted to resolve those disagreements.

c. This Court should take this opportunity to resolve the constitutional questions that it considered but did not reach in *Jennings*. In that case, the Ninth Circuit had construed Section 1226(c) "as imposing an implicit 6-month time limit" on an alien's mandatory detention. *Jennings*, 583 U.S. at 292. It adopted that construction on the view that "prolonged detention without adequate procedural protections * * * would raise serious constitutional concerns." *Id.* at 296 (citation omitted).

After granting certiorari and hearing argument, this Court ordered supplemental briefing on the constitutional issues underlying the Ninth Circuit's statutory construction, including "[w]hether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under § 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months." *Jennings* v. *Rodriguez*, 580 U.S. 1040 (2016). But this Court ultimately decided the case—and rejected the Ninth Circuit's construction of Section 1226(c)—without reaching the constitutional issues. See *Jennings*, 583 U.S. at 312 (remanding for the Ninth Circuit to consider the "constitutional arguments" in "the first instance"). The Court should therefore take this opportunity to resolve them.

2. The second question presented warrants further review

The second question presented asks whether, if due process does entitle a Section 1226(c) detainee to a bond hearing, it requires placing the burden on the government to justify continued detention by clear and convincing evidence. That question follows from the first, and the Court ordered supplemental briefing on both questions in *Jennings*, 580 U.S. at 1040, and granted certiorari on both questions in *Black*. It should likewise grant certiorari on both questions here.

Moreover, the second question presented is the subject of a circuit conflict. Although the Third Circuit has agreed with the Second Circuit that the government must bear the burden of justifying the alien's detention by clear and convincing evidence, see *German Santos*, 965 F.3d at 210-214, other circuits have not, in cases involving bond hearings for aliens detained under Section 1226(a). See *Black*, 156 F.4th at 173-174 (Nardini, J., dissenting from the denial of rehearing en banc). The Fourth and the Ninth Circuits, for example, have held that due process allows placing the burden on a Section 1226(a) detainee to prove that he poses neither a flight risk nor a danger to the community. See *Miranda* v. *Garland*, 34 F.4th 338, 358-366 (4th Cir. 2022); *Rodriguez Diaz* v. *Garland*, 53 F.4th 1189, 1210-1212 (9th Cir. 2022). In contrast, the First Circuit has held that due process requires the government to prove that the Section 1226(a) detainee is a flight risk or a danger, though under different standards of proof: "a preponderance of the evidence" for flight risk, and "clear and convincing evidence" for dangerousness. *Hernandez-Lara* v. *Lyons*, 10 F.4th 19, 41 (2021). Those other circuits' approaches conflict with the Second Circuit's decision in *Black*. See 156 F.4th at 179-180 (Nardini, J., dissenting from the denial of rehearing en banc).

C. The Decision Below Is Incorrect

Finally, the district court's decision in this case is incorrect, for all the reasons set forth in the government's merits brief in *Black*. See Gov't Br. at 21-46, *Genalo* v. *Black*, No. 25-886 (July 30, 2026) (*Black* Gov't Br.).

1. The Due Process Clause did not require a bond hearing

The Constitution forbids the government to "deprive[]" a "person" of "life, liberty, or property, without due process of law." U.S. Const. Amend. V; see *id.* Amend. XIV, § 1. This Court has recognized two types of due-process claims. See *Washington* v. *Harper*, 494 U.S. 210, 219-220 (1990). A *procedural*-due-process claim takes as given the substantive determination that would justify a deprivation of life, liberty, or property, but challenges the "adequacy of the[] procedures" for making that determination. *Mathews*, 424 U.S. at 335. In contrast, a *substantive*-due-process claim challenges the substance of the determination itself, alleging that it is inadequate to justify the deprivation "*at all*." *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993); see *Harper*, 494 U.S. at 220.

a. Respondent's claim to a bond hearing fails as a matter of procedural due process. Under Section 1226(c)(1), respondent's detention rests solely on the determination that he is a criminal alien. Respondent does not challenge the procedures for making that determination. Instead, he contends that due process prohibits his detention absent a different determination—a determination that he presents a risk of flight or danger. Because that determination is substantively different from the one the statute requires, his challenge sounds in substantive, not procedural, due process. Respondent therefore fails to state any procedural-due-process claim at all.

Indeed, the Court has repeatedly recognized that a person has no procedural-due-process right to a hearing on a "different set of determinations than those set forth in the" challenged law. *Harper*, 494 U.S. at 220; see, *e.g.*, *Connecticut Dep't of Pub. Safety* v. *Doe*, 538 U.S. 1, 8 (2003) ("Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme."); *Flores*, 507 U.S. at 308 (holding that a challenge to a regulation on the ground that it failed to require a determination of a detainee's "interests" was "just [a] 'substantive due process' argument recast in 'procedural due process' terms"); *Michael*

H. v. *Gerald D.*, 491 U.S. 110, 119, 121 (1989) (plurality opinion) (treating as a "substantive due process" claim a request for an "evidentiary hearing" on an issue that was "*irrelevant*" under the statute).

Because claims like respondent's sound in substantive, not procedural, due process, the court of appeals in *Black* erred in holding that *Mathews* "supplies the proper framework for determining when" a Section 1226(c) detainee is entitled to a bond hearing. App., *infra*, 90a. *Mathews* articulates a three-factor test for analyzing certain "[p]rocedural due process" claims. 424 U.S. at 332. But that test has no application where, as here, the claim is a substantive-due-process claim.[7]

b. Respondent's claim also fails when properly analyzed in terms of substantive due process. In rejecting a substantive-due-process challenge to Section 1226(c) in *Demore*, this Court correctly declined to apply heightened scrutiny. Section 1226(c) does not implicate any fundamental rights. See 538 U.S. at 523 n.7 ("[P]rior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings."); *Black* Gov't Br. 28-33. Accordingly, rational-basis review applies. *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997).

Demore makes clear that Section 1226(c) is rationally related to two legitimate government interests: (1) ensuring that criminal aliens appear for their removal pro-

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[7] Not all Section 1226(c) detainees are aliens who have not "even been admitted into the country pursuant to law." *DHS* v. *Thuraissigiam*, 591 U.S. 103, 138 (2020) (citation omitted). But for those who have not, such as respondent, any procedural-due-process claim fails for the additional reason that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Ibid.* (citation omitted).

ceedings and, if ordered removed, for their removal; and (2) ensuring that criminal aliens do not continue to engage in crime while their removal proceedings are pending. 538 U.S. at 513. In Congress's view, permitting release on bond would unduly undermine those interests. See *Black* Gov't Br. 33-37. Experience had shown that bond hearings produced a substantial number of false negatives—*i.e.*, releases of criminal aliens based on erroneous predictions that they would not abscond or commit more crimes. See *id.* at 34-36. Congress rationally determined that permitting release on bond was too risky in cases involving criminal aliens.

Contrary to the court of appeals' conclusion in *Black*, Section 1226(c) does not become unconstitutional when detention reaches a certain duration. Neither the legitimacy of the government's interests, nor the relationship between those interests and mandatory detention, diminishes over time. Even so, detention under Section 1226(c) is not unlimited. The statute itself specifies a definite termination point: the conclusion of removal proceedings. *Jennings*, 583 U.S. at 304. Moreover, this Court has cautioned that an alien's detention would "no longer bear[] a reasonable relation to the purpose for which [he] was [detained]" if his removal were "no longer practically attainable." *Demore*, 538 U.S. at 527 (citation omitted). Here, however, respondent's removal remains practically attainable, so the application of Section 1226(c) is rationally related to the legitimate government interests identified in *Demore*. There was thus no constitutional basis for granting respondent a bond hearing.

2. *Even if the Due Process Clause required a bond hearing, it did not require the government to justify continued detention by clear and convincing evidence*

Even if the Due Process Clause required a bond hearing for a criminal alien detained under Section 1226(c), the court of appeals in *Black* erred in holding that the government must bear the burden of justifying an alien's continued detention. See *Black* Gov't Br. 41-43. Just as there is no historical basis for recognizing a fundamental right to a bond hearing in this context, there is also no historical basis for reading into the Constitution a presumption of release—as placing the burden of persuasion on the government effectively does. See *id.* at 41-42. Nor is there any practical justification for displacing the "ordinary default rule" that the burden of persuasion falls on "the party seeking relief." *Schaffer* v. *Weast*, 546 U.S. 49, 56, 58 (2005). To the contrary, an alien's flight risk and dangerousness are matters that "lie peculiarly in the knowledge of" the alien. *Smith* v. *United States*, 568 U.S. 106, 112 (2013) (citation omitted). Placing the burden on him provides "the incentive to produce all the evidence in [his] possession," creating a "more complete picture." *Medina* v. *California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring in the judgment).

The court of appeals in *Black* further erred in holding that the government must satisfy a heightened standard of proof. See *Black* Gov't Br. 43-45. Outside the criminal context, the "default standard of proof" is the "preponderance-of-the-evidence standard." *E.M.D. Sales, Inc.* v. *Carrera*, 604 U.S. 45, 50 (2025). Making a presumption of release rebuttable only by clear and convincing evidence would substantially increase the risk of false negatives—the very concern that led Congress to enact Section 1226(c) in the first place. Nothing in the Due Process Clause requires that result.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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SEPTEMBER 2026

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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26 Civ. 1833 (PAE)

D.C., PETITIONER

v.

KRISTI NOEM, IN HER OFFICIAL CAPACITY AS SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL., RESPONDENTS

Filed: Mar. 20, 2026

OPINION AND ORDER

PAUL A. ENGELMAYER, District Judge:

Detained noncitizen D.C.[1] petitions here for a writ of habeas corpus ordering that U.S. immigration authorities hold a bond hearing to determine whether his prolonged detention is necessary while he awaits removal. Dkt. 1 ("Pet."). D.C., age 62, is a citizen of the Dominican Republic who has lived in the United States for most

[1] On March 5, 2026, D.C. moved for leave, pursuant to Federal Rule of Civil Procedure 5.2(e), to proceed under his initials. Dkt. 3. Respondents do not oppose that request. The Court grants it for the reasons stated in D.C.'s motion. Dkt 3-1 at 2-5 (applying factors stated in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2d Cir. 2008)).

of his adult life. Since September 9, 2025, he has been detained by United States Immigration and Customs Enforcement ("ICE") under 8 U.S.C. § 1226(c), which provides for mandatory detention of noncitizens with certain prior convictions. In his petition, D.C. claims that his continued detention—which as of today has lasted nearly six and a half months—without a bond hearing violates due process. He also claims that his severe medical and mental health conditions warrant his immediate release pending adjudication of his petition.

For the reasons that follow, the Court grants the petition insofar as it seeks an individualized bond hearing, with constitutionally adequate procedural safeguards, to occur before an immigration judge ("IJ"), and orders that such a hearing be held by Friday, March 27, 2026. The Court, however, denies D.C.'s separate request that this Court order his immediate release.

I. Background[2]

A. D.C. Arrives in the United States and Builds a Life in New York City

D.C., age 62, is a citizen of the Dominican Republic ("D.R.") who has resided in the United States for most of his adult life. Dkt. 1-1 ("Jessar Decl.") ¶ 4. He unlawfully entered the United States at an unknown time and place. Dkt. 13 ("Irving Decl.") ¶ 3. D.C.'s counsel attests that D.C. migrated to the United States around

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[2] This account draws on D.C.'s petition, Dkt. 1; the declaration of his attorney, Alec Jessar, Dkt. 1-1; D.C.'s competency evaluation by Dr. Macarena Corral, Dkt. 1-2; D.C.'s medical evaluation by Dr. Jennifer Sugijanto, Dkt. 1-3; D.C.'s release plan, Dkt. 1-4; D.C.'s immigration documents, Dkt. 11; and the declaration of deportation officer Kerryn Irving, Dkt. 13.

1982 (at age 19), Jessar Decl. ¶ 4, although D.C. informed ICE that he entered the United States around 1996 (at age 33), Irving Decl ¶ 3.

D.C. has long lived in New York City. Jessar Decl. ¶ 24. He had three daughters with his then-partner, a United States citizen. *Id.* D.C.'s daughters, also U.S. citizens, are ages 15, 18, and 20. Dkt. 1-2 ("Competency Eval.") at 4; Pet. ¶ 9. The eldest attends Columbia University on a scholarship. Jessar Decl. ¶ 24.

Initially, D.C. worked as a school janitor and construction worker. *Id.*; Competency Eval. at 5. In 2004, he opened a hair salon in Central Harlem, Jessar Decl. ¶ 24, which he owned and operated until his arrest in 2024, Competency Eval. at 4.

B. D.C.'s Criminal Convictions and 2024 Incarceration

D.C. has four criminal convictions.

On February 7, 1997, D.C. was charged with one count of possession of a controlled substance in the third degree, in violation of N.Y. Penal Law ("NYPL") § 220.16(1), and three counts of sale of a controlled substance in the third degree, in violation of NYPL § 220.39(1). Irving Decl. ¶ 4. D.C. did not appear for trial. Jessar Decl. ¶ 34. On January 21, 1998, a jury found him guilty on all counts, and a bench warrant issued. Irving Decl. ¶ 4. On March 12, 1998, D.C. was sentenced in absentia to three to nine years' imprisonment. *Id.* As described below, he did not serve this sentence until 2024.

On May 17, 2007, D.C. was charged with possession of a forged instrument in the second and third degrees, in violation of NYPL §§ 170.25, 170.20, Irving Decl. ¶ 5, for presenting false identification to law enforcement, Jessar Decl. ¶ 36. On August 1, 2007, a bench warrant was issued in connection with those charges. Irving Decl. ¶ 5.

On January 12, 2016, after a dispute with his partner, D.C. was charged with strangulation in the second degree, in violation of NYPL § 121.12; assault in the third degree, in violation of NYPL § 120.00; criminal obstruction of breathing and circulation, in violation of NYPL § 121.11(A); and acting in a manner to injure a child under age 17, in violation of NYPL § 260.10. Irving Decl. ¶ 6. On January 14, 2016, D.C. pled guilty to criminal obstruction of breathing and circulation. *Id.* He also pled guilty to the 2007 charge (possession of a forged instrument). *Id.* D.C. was sentenced to a conditional discharge and five-year order of protection, *id.*, and ordered to participate in treatment programming, which he completed, Jessar Decl. ¶ 37.

On October 5, 2016, D.C. was charged with criminal contempt in the second degree, in violation of NYPL § 215.50(3). Irving Decl. ¶ 7. On October 7, 2016, he pled guilty and was sentenced to nine days' imprisonment and a five-year order of protection. *Id.*

On April 15, 2024, D.C. was stopped for a license-related violation, and the police arrested him, based on the bench warrant from 1998. Jessar Decl. ¶ 41; Irving Decl. ¶ 8. On May 7, 2024, the state court judge executed the three-to-nine-year sentence imposed in 1998. Jessar Decl. ¶ 42. On May 31, 2024, D.C. was admitted to the New York State Department of Corrections and Community Supervision Ulser Correctional Facility ("Ulster"), in Napanoch, New York, to serve that sentence. Irving Decl. ¶ 9.

C. ICE Initiates Removal Proceedings During D.C.'s Incarceration

On June 6, 2024, ICE agents conducted a consensual interview of D.C. at Ulster. *Id.* ¶ 10. D.C. told the agents that he was born in the D.R., was a citizen of the D.R., and entered the United States around 1996 using another person's identification. *Id.*

On February 13, 2025, D.C. was issued a notice to appear (Form I-862), charging him with inadmissibility pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) (presence without admission or parole), § 1182(a)(2)(B) (two or more criminal convictions for which aggregate sentences of confinement were five years or more), § 1182(a)(2)(C) (illegal trafficking in a controlled substance), and § 1182(a)(2)(A)(i)(I) (crime involving moral turpitude). Dkt. 11-4 ("NTA") at 4-5. The NTA directed him to appear before an IJ at a specified date and time. *Id.* at 1.

D.C. appeared in immigration court three times while in criminal custody. On April 10, 2025, he appeared *pro se* at a master calendar hearing by video teleconference. Irving Decl. ¶ 13. On June 12, 2025, D.C.'s retained attorney failed to appear at a master calendar hearing, and the matter was adjourned. *Id.* ¶ 14. On August 14, 2025, D.C. and his attorney appeared at a master calendar hearing by video conference. *Id.* ¶ 15. The matter was adjourned, at D.C.'s attorney's request, to enable him to prepare for the pleadings phase of the proceedings. *Id.*

On September 8, 2025, D.C. completed serving his sentence and was released. *Id.* ¶ 16.[3]

D. ICE Continues Removal Proceedings Upon Completion of D.C.'s Sentence

That same day, D.C. was arrested pursuant to a Form I-200, Dkt. 11-5 ("arrest warrant"), and detained pending resolution of removal proceedings. Irving Decl. ¶ 17. He was transferred to Orange County Jail ("OCJ") in Goshen, New York, where he remains detained today. *Id.*

On September 15, 2025, D.C. appeared with his attorney in immigration court. *Id.* ¶ 18; Jessar Decl. ¶ 28. Counsel requested time to gather information about the allegations in the NTA. Jessar Decl. ¶ 28. The IJ scheduled a merits hearing for later that month. Irving Decl. ¶ 18.

On September 24, 2025, D.C. appeared with his attorney for the merits hearing. *Id.* ¶ 19. Counsel moved to withdraw, citing a breakdown in the attorney-client relationship due to D.C.'s mistrust of him. Jessar Decl. ¶ 28. The IJ scheduled a master calendar hearing for October to enable D.C. to find new counsel, and, on October 6, 2025, again adjourned for this purpose. *Id.*

On October 15, 2025, D.C. appeared *pro se* at a master calendar hearing. Irving Decl. ¶ 20. The IJ took pleadings and sustained the charges of inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i), (a)(2)(B), and (a)(2)(A)(i)(I), but not under § 1182(a)(2)(C) (illegal trafficking in a controlled substance). Jessar Decl. ¶ 29. The IJ ordered D.C. to file applications for relief by the next court date. *Id.*

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[3] D.C.'s release that day resulted from a decision by the state court, on a motion by D.C., to resentence him to a one-year determinate sentence. Jessar Decl. ¶ 43.

On October 29, 2025, D.C. appeared *pro se* at a master calendar hearing and filed two applications for relief from removal: one for asylum and withholding of removal (Form I-589), and another for cancelation of removal and adjustment of status for certain nonpermanent residents (Form EOIR-42B). *Id.* ¶ 30. On November 12, 2025, the IJ adjourned to enable D.C. to gather evidence in support of his applications. *Id.* On December 1, 2025, the IJ scheduled a merits hearing for December 29, 2025 to adjudicate the applications. *Id.* The IJ stated that he would adjourn the hearing if D.C. retained counsel. *Id.* On December 15, 2025, D.C. retained counsel from the Bronx Defenders, who remain D.C.'s counsel. *Id.* ¶ 31.

On December 29, 2025, counsel moved to adjourn the merits hearing and schedule a master calendar hearing to enable counsel to submit amended applications for relief. *Id.* The IJ granted that request and scheduled a master calendar hearing for January. Irving Decl. ¶ 24.

On January 12, 2026, D.C. and counsel appeared at a master calendar hearing and filed amended applications for relief from removal. *Id.* ¶ 25. The IJ scheduled the merits hearing for February. *Id.*

On January 24, 2025, counsel informed the IJ that, due to growing concerns about D.C.'s mental health, counsel had retained a licensed psychologist to evaluate D.C. Jessar Decl. ¶ 32. Depending on the psychologist's findings, counsel stated, he might seek a competency hearing before the merits hearing. *Id.* On February 5, 2026, counsel moved for the merits hearing to be converted to a competency hearing. *Id.* On February 11, 2026, the IJ granted that motion. *Id.* The next day, the IJ found D.C. incompetent, but that his case could proceed with safeguards. *Id.* The IJ scheduled D.C.'s merits hearing for March 24, 2026. Irving Decl. ¶ 26. That hearing has since been adjourned *sine die* by the IJ. Dkt. 21.

E. D.C.'s Mental and Physical Health Worsens

D.C. has multiple chronic health conditions. Based on a review of medical records, Dr. Jennifer Sugijanto found that D.C. has type 2 diabetes mellitus, essential (primary) hypertension, and hyperlipidemia (elevated cholesterol). Dkt. 1-3 ("Medical Eval.") at 2.[4] These conditions continue to worsen. *Id.* at 3. As of September 11, 2025, the date of D.C.'s intake at OCJ, his blood sugar was approximately 500 mg/DL—a "medically dangerous level" associated with hyperosmolar hyperglycemic state, a "life-threatening condition that causes severe dehydration, altered mental status, seizures, coma, and death." *Id.* That same day, D.C.'s blood pressure was 190/88 and he was found to have peripheral edema (swelling of his lower extremities). *Id.* These symptoms indicate that D.C. had experienced a hypertensive crisis, which can cause damage to organs and lead to strokes, heart attacks, and kidney damage. *Id.* Based on her review, Dr. Sugijanto concluded that D.C.'s refusal to accept treatment since his detention has exacerbated his conditions. He has refused to take his prescribed diabetes medications, declined tests to monitor his blood sugar, and refused blood pressure lowering medications and further blood-pressure checks. *Id.* at 3-4. If D.C.'s conditions continue to go untreated, she opined, he will be at "increased risk of death." *Id.* at 3.

D.C.'s refusal to accept medical treatment appears to result from his mental health conditions. Dr. Macarena

[4] Dr. Sugijanto reviewed D.C.'s medical records but did not interview him or conduct a physical examination. Medical Eval. at 2.

Corral, a licensed psychologist, met with D.C. twice in January 2026 and tested him for depression, anxiety, mental status, and cognitive concerns. Competency Eval. at 2. She found that D.C. likely has an adjustment disorder, with mixed anxiety and depressed mood; a delusional disorder, persecutory type; and an unspecified neurocognitive disorder. *Id.* at 11-12. As to the delusional disorder, she stated: "His distrust is not rooted in religious delusions, but rather in a firm belief that others, particularly his attorneys and medical staff, are acting against his interests or seeking to harm him." *Id.* at 12. Dr. Corral found that D.C.'s untreated diabetes and hypertension likely exacerbate his cognitive challenges, leading to "a cycle in which worsening cognitive impairment may further his capacity to process information, make informed decisions, and engage in treatment, thereby reinforcing his mistrust and resistance to care." *Id.* As to treatment, Dr. Corral opined that D.C. "would likely have greater difficulty engaging in treatment while in detention" because detention "exacerbates his persecutory beliefs and mistrust of staff, further impeding his willingness to engage in medical and mental health care." *Id.* at 13.

F. D.C. Seeks Administrative Relief

On January 24, 2026, alerted to the severity of D.C.'s medical conditions, his counsel emailed a release request to ICE. Jessar Decl. ¶ 21. On February 11, 2026, counsel received a denial letter from ICE stating that there was "no compelling reason to warrant a favorable exercise of discretion in this case." *Id.* ICE's cover email directed counsel to advise D.C. to follow his treatment plan, which counsel did. *Id.*

On February 15, 2026, counsel submitted another release request to ICE and attached the competency and mental health evaluations. *Id.* ICE has not responded to that request. *Id.*

G. D.C. Files This Petition

On March 5, 2026, D.C. filed the instant petition for a writ of habeas corpus, a declaration, and supportive exhibits. Dkt. 1. That day, the Honorable Katherine Polk Failla, sitting in Part One, issued an order preserving the Court's jurisdiction pending adjudication of the petition. Dkt. 4.

On March 6, 2026, this Court scheduled a hearing and set a briefing schedule, Dkt. 6, which it later extended at respondents' request, Dkt. 9. On March 13, 2026, respondents opposed the petition, Dkt. 12 ("Opp'n"), and filed declarations and exhibits, Dkts. 11, 13-15.[5] On March 14, 2026, D.C. filed his reply, along with an exhibit. Dkt. 17 ("Reply").

On March 16, 2026, the Court directed respondents to confirm that, were the Court to order a bond hearing for D.C. before an IJ, they could guarantee that it would be held by Friday, March 27, 2026. Dkt. 18. That day, respondents filed a letter so confirming. Dkt. 19.

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[5] The Government simultaneously filed an unopposed motion to seal D.C.'s medical records and declarations discussing those records. Dkt. 10. The Court grants that motion. *See, e.g.*, *Gutierrez v. Dubois*, No. 20 Civ. 2079, 2020 WL 3072242, at *10 (S.D.N.Y. June 10, 2020) (noting "considerable privacy interest in . . . sensitive medical information" (citation omitted)); *Hand v. NYC Transit Auth.*, No. 11 Civ. 997, 2012 WL 3704826, at *5 (E.D.N.Y. Aug. 26, 2012) ("Federal law generally treats medical records as confidential." (citing Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191 (1996)).

On March 19, 2026, the Court held a hearing on D.C.'s petition.

II. Applicable Legal Standards

A. The Attorney General's Authority to Detain Noncitizens Pending Removal

Section 1226 of Title 8 generally governs the process of arresting and detaining noncitizens pending their removal. *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). Section 1226(a) sets out a default rule of discretionary detention, providing that the Attorney General may detain a noncitizen "pending a decision on whether the alien is to be removed from the United States," and "may release the alien on . . . bond . . . or conditional parole." *Id.* (citing 8 U.S.C. § 1226(a)(2)).

Salient here, however, § 1226(c) carves out a category of noncitizens who are subject to mandatory detention. *Id.* at 289. It states that the Attorney General "*shall* take into custody," 8 U.S.C. § 1226(c)(1) (emphasis added), any noncitizens "who have committed one of certain listed offenses or who have been identified by the government as involved in terrorist activities." *Black v. Decker*, 103 F.4th 133, 140-41 (2d Cir. 2024). For such persons, the statute "allows release in extremely limited circumstances: 'only if the Attorney General decides . . . that release of the alien from custody is necessary for [witness protection purposes].'" *Id.* at 141 (quoting 8 U.S.C. § 1226(c)(4)).

B. The District Court's Authority to Grant Relief

Section 2241 of Title 28 "authorizes a district court to grant a writ of habeas corpus whenever a petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Wang v. Ashcroft*, 320 F.3d

130, 140 (2d Cir. 2003) (quoting 28 U.S.C. § 2241(c)(3)). "This includes claims by non-citizens challenging the constitutionality of their detention without bail." *Cabral v. Decker*, 331 F. Supp. 3d 255, 258 (S.D.N.Y. 2018) (citing *Demore v. Kim*, 538 U.S. 510, 516-17 (2003)).

III. Discussion

D.C.'s petition raises three issues: (1) whether his prolonged detention without a bond hearing violates his due process rights; (2) if such a hearing is warranted, what procedural protections due process requires at that hearing; and (3) whether the Court should order D.C.'s immediate release pending adjudication of his habeas petition.

A. Whether Due Process Requires a Bond Hearing

It is undisputed that, under § 1226(c), D.C. is subject to mandatory detention. Pet. ¶ 19; Opp'n at 1. D.C. argues, however, that his continued detention without a bond hearing violates due process. Pet. ¶ 101. Respondents counter that D.C.'s removal proceedings have progressed "swiftly" and that ICE has not "unreasonably prolonged" his detention. Opp'n at 9.

As the parties agree, the Second Circuit's decision in *Black v. Decker* supplies the framework for analyzing D.C.'s due process claim. *See* Pet. ¶ 87; Opp'n at 9-10. The Circuit there considered whether "prolonged detention under [§] 1226(c) will *at some point* violate an individual detainee's due process rights." *Black*, 103 F.4th at 142 (emphasis in original). It noted that the Supreme Court has resolved certain questions governing mandatory detention under § 1226(c), holding that that provision (1) is facially constitutional insofar as it authorizes the Government to detain noncitizens "for the brief period necessary for their removal proceedings," *Demore*, 538 U.S. at 513; and (2) textually authorizes prolonged detention without a bond hearing and cannot be read, as many courts (applying the canon of constitutional avoidance) had held, to implicitly set a six-month time limit on holding a non-citizen without such a hearing, *Jennings*, 583 U.S. at 304. But, the Circuit noted, those decisions did not address whether—and if so, under what circumstances—prolonged detention under § 1226(c) would be unconstitutional. *Black*, 103 F.4th at 142. Nor did they address "what procedures due process may require." *Id.*

In *Black*, the Circuit addressed these constitutional questions. It held that "due process bars the Executive from detaining . . . individuals for an unreasonably prolonged period under [§] 1226(c) without a bond hearing." *Id.* at 143. It declined to adopt a "bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention." *Id.* at 150. Instead, it held, "due process challenges to prolonged detention under [§] 1226(c) should . . . be reviewed" under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which is used to determine what procedural due process is required before the government deprives a person of a liberty interest. *Id.* at 147. The *Mathews* test requires courts to balance the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

> and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Guided by the Circuit's discussion in *Black*, the Court considers these factors in tum.

1. The Private Interest

The first *Mathews* factor considers "the private interest that will be affected by the official action." *Id.* D.C.'s continued detention without a bond hearing implicates "the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020). "Case after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). Accordingly, detention "for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)).

For several reasons, D.C.'s liberty interest in being free from continued detention is substantial.

First, D.C. has been detained for nearly six and a half months. The Circuit underscored in *Black* that there is no bright-line test for when detention without a bond hearing violates due process. *Black*, 103 F.4th at 150. However, the Circuit read the case law, including *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Demore*, to "imply . . . that any immigration detention exceeding six months without a bond hearing raises serious due process concerns." *Black*, 103 F.4th at 150.[6] Consistent with that discussion, lower court decisions in this Circuit—before and after *Black*—have underscored the heightened severity of detention exceeding six months, and in cases under § 1226(c), have been more likely to find a due process violation where detention without a bond hearing has extended beyond six months.[7]

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[6] *Zadvydas* addressed challenges to 8 U.S.C. § 1231(a), which governs detention after a final order of removal has been entered. 533 U.S. at 682. That provision states that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days," but that such noncitizens "may be detained beyond the removal period." *Id.* (citing 8 U.S.C. § 1231(a)(1)(A), (a)(6)). Finding that a statute "permitting indefinite detention of an alien would raise a serious constitutional problem," *id.* at 690, the Court held that, under § 1231(a), there is an implicit "presumptively reasonable period of detention" of six months, after which a noncitizen would have the opportunity to seek release, *id.* at 701. In *Demore*, in the course of finding facially constitutional mandatory detention under § 1226(c) during a noncitizen's removal proceedings, the Court distinguished detention under § 1226(c) from that under § 1231(a) because it is "of a much shorter duration," noting that in 85% of cases in which noncitizens are detained under § 1226(c), "removal proceedings are completed in an average time of 47 days and a median of 30 days." *Demore*, 538 U.S at 529. The Circuit read these precedents to imply that detention for more than six months raises heightened due process concerns, much as a noncitizen's "liberty interests [are] more seriously infringed" where his detention under § 1226(c) exceeds the "relatively short duration"—a month and a half—envisioned in *Demore*. *Black*, 103 F.4th at 151 (citing *Demore*, 538 U.S. at 529).

[7] *See, e.g.*, *M.P.L. v. Arteta*, No. 25 Civ. 5307, 2025 WL 2938993, at *3 (S.D.N.Y. Oct. 16, 2025) (finding due process violation based on seven-month detention without bond hearing, which "far exceeds the 'relatively short duration of section 1226(c) detention' envisioned in *Demore*" (citation omitted)); *J.M.P. v. Arteta*, 804 F. Supp. 3d 387, 393 (S.D.N.Y. 2025) (same); *Veletanga v. Noemi*, No. 25 Civ.

To be sure, some adjournments of D.C.'s merits hearing have been at his request, although the most recent was not. (Due to the IJ's scheduling conflict, that hearing was adjourned from March 24, 2026 to an as-yet unscheduled date. Dkt. 21.) But *Black* does not "suggest that whether the detainee sought extensions is relevant to determining whether he or she has been subjected to 'prolonged detention.'"[8] *See J.C.G. v. Genalo*, No. 24 Civ. 8755, 2025 WL 88831, at* 10 (S.D.N.Y. Jan. 14, 2025). On the contrary, a petitioner in *Black* had received "numerous adjournments." *See Black*, 103 F.4th at 140 (recounting "delays occasioned in part by the need for [petitioner's] newly retained counsel to prepare his application for deferral of removal"). And the adjournments at D.C.'s request were not the product of "dilatory or bad-faith tactics," *J.C.G.*, 2025 WL 88831, at *10, but came

9211, 2025 WL 3751865, at *5-7 (S.D.N.Y. Dec. 26, 2025) (same as to three-month detention without bond hearing); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at *10 (S.D.N.Y. May 23, 2018) ("[D]etention that has lasted longer than six months is more likely to be 'unreasonable,' and thus contrary to due process, than detention of less than six months." (citation omitted)); *Cabral*, 331 F. Supp. 3d at 261 (seven-month detention without a bond hearing "is within the range that this Court has found sufficient to show a due process violation"); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 535 (S.D.N.Y. 2014) (granting release to noncitizen detained under § 1226(c) who "has been in detention for over six months without any hearing to determine whether his detention is appropriate or necessary"); *see also Lopez v. Sessions*, No. 18 Civ. 4189, 2018 WL 2932726, at* 14 (S.D.N.Y. June 12, 2018) ("[C]ourts in this Circuit have generally been skeptical of prolonged detention of removable immigrants, without process, lasting over six months.").

[8] Before *Black*, district courts assessing the constitutionality of prolonged detention under § 1226(c) considered, among several other factors, "whether the alien is responsible for the delay." *Sajous*, 2018 WL 2357266, at *10.

about, in sequence, because D.C. was unrepresented, required new counsel because of a breakdown in the relationship with retained counsel, and then required a competency hearing. Jessar Decl. ¶¶ 27-32. Such delays do not undermine his request for a bond hearing. *Diaz v. Genalo*, No. 22 Civ. 3063, 2023 WL 5322180, at *8 (S.D.N.Y. July 6, 2023) (declining to fault petitioner for "non-frivolous litigation choices" such as request for a competency hearing, which "was entirely appropriate, as evidenced by the fact that the government ultimately stipulated that he was in fact incompetent"), *report and recommendation adopted as modified*, No. 22 Civ. 3063, 2024 WL 4124756 (S.D.N.Y. Sept. 9, 2024).

Second, credible evidence supports that D.C.'s detention exacerbates his severe physical and mental health conditions. As to the former, his September 2025 medical records reflect that his type 2 diabetes mellitus and essential (primary) hypertension have worsened and may become life-threatening if untreated. Medical Eval. at 3 (conditions have "worsened" and will "place[] him at increased risk of death" if untreated); *id.* at 5 ("he is at high risk of serious harm and morbidity from uncontrolled diabetes and high blood pressure"). As to the latter, D.C.'s persecutory delusional disorder, adjustment disorder, and unspecified neurocognitive disorder have also worsened during his detention. *See* Competency Eval. at 11, 13 (detention "amplifies [D.C.'s] mistrust of staff and reinforces his persecutory beliefs" and has led to "severe sleep disturbances, chronic fatigue, and a notable 50-pound weight loss").[9] D.C.'s refusal of

[9] Respondents have stated, based on the declaration of licensed clinical psychologist Emily Streeter, that D.C. "carries no mental health diagnosis." Opp'n at 4 (citing Dkt. 15 ("Streeter Decl.") ¶ 9).

treatment while incarcerated, traceable to his mental disorders, heightens the risks detention presents for him. *See* Medical Eval. at 4 (D.C.'s thoughts that medical professionals "are out to harm him" are "undoubtedly driving his refusal of medical treatment").[10]

Third, as a result of D.C.'s detention, he has been separated from his three daughters, the youngest of whom is 15 years old. Competency Eval. at 4. That has taken a toll on him and his family. According to one daughter, before the detention, "she and her father were closer than they had ever been before," "were spending a lot of time together," and "[D.C.] taught her how to drive before college." Dkt. 1-4 ("Release Plan") at 2. D.C. has "expressed significant worry about how his incarceration is affecting his daughters, with particular concern

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But Streeter's declaration, while stating that D.C. had been "seen by a mental health provider on February 20, 2026," notably did not state that any mental health test had been administered. Streeter Decl. ¶ 9. In contrast, Dr. Corral's assessment was based on "a comprehensive clinical interview and mental health screening." Competency Eval. at 2. The Government's characterization is also undermined by the determination of the IJ, drawing on Dr. Coral's assessment, that D.C. is incompetent. Jessar Decl. ¶ 32.

[10] In her evaluation of D.C., Dr. Sugijanto noted that there are "significant gaps in medical care" at OCJ, and that OCJ has documented D.C.'s repeated refusals of care without evident "periodic reassessment/follow up, alternative strategies, or escalation to ensure that [D.C.] fully understands the severity and immediacy" of his conditions. Medical Eval. at 4-5. Other cases have described similar shortcomings. *See, e.g.*, *J.M.P. v. Arteta*, 807 F. Supp. 3d 265,290 (S.D.N.Y. 2025) ("[OCJ] has been the subject of complaints for its treatment of ICE detainees, including allegations of medical neglect, lack of access to unspoiled food, and abuse, harassment, and retaliation by jail personnel."); *O.F.C. v. Almodovar*, No. 25 Civ. 9816, 2026 WL 74262, at *9 (S.D.N.Y. Jan. 9, 2026) (same).

for his youngest . . . whom he believes is suffering the most because of his absence." Competency Eval. at 4.[11]

Respondents make two counterarguments. First, they note that a noncitizen who is detained pursuant to § 1226(c) does not have a right to be free from detention during removal proceedings. Opp'n at 10. That observation does not advance the analysis. Noncitizens are entitled to due process during their removal proceedings, regardless of whether their detention pending those proceedings is discretionary or mandatory. *See Demore*, 538 U.S. at 523. Under *Black*, after a point determined by the *Mathews* factors, D.C. is entitled to a hearing to determine whether his continued pre-removal detention is warranted. *Black*, 103 F.4th at 150-51.

Second, respondents blame D.C. for his worsening medical and mental health conditions, noting his refusal of treatment while in custody. Opp'n at 10, 15 (citing Dkt. 14 ("Moody Decl.")); *see* Moody Decl. ¶ 11 (since September 8, 2025, D.C. "has refused to be seen by medical staff for vital sign checks and blood glucose checks" and "has had well over 100 refusals documented for medical care"). D.C.'s refusal of treatment is well chronicled. But respondents unhelpfully elide the important fact that that refusal appears traceable to his serious mental health disorders. As his competency evaluation substantiated, D.C.'s unwillingness to accept medication or par-

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[11] Although more germane to the consequences of potential deportation, that D.C. has lived in the United States for much of his adult life also bears on the consequences to him of detention. *See Veletanga*, 2025 WL 3751865, at *6 (first *Mathews* factor "weighs heavily" in favor of petitioner who had lived in the country for "more than two decades" (quoting *Perez Flores v. Bondi*, No. 25 Civ. 306, 2025 WL 1921748, at *6 (W.D.N.Y. July 14, 2025)).

ticipate in check-ups appears to stem from his delusion of persecutions, which are exacerbated by continued detention. *See* Competency Eval. at 12.

Based on the duration of D.C.'s detention and the toll it takes for reasons particular to him, the Court finds that the first *Mathews* factor—the private interest affected by the Government's action—heavily favors a bond hearing to assess the continued need for detention. *See, e.g.*, *O.F.C. v. Almodovar*, No. 25 Civ. 9816, 2026 WL 74262, at *9 (S.D.N.Y. Jan. 9, 2026) (conditions of confinement "further heightens [petitioner's] liberty interest" where, "[a]s during his previous incarceration at OCJ, [p]etitioner's psychological and physical health has deteriorated" (citation omitted)); *Black*, 103 F.4th at 151 (liberty interest "seriously affected" based on financial consequences for petitioner's family, which included "three young children"); *M.P.L. v. Arteta*, No. 25 Civ. 5307, 2025 WL 2938993, at *3 (S.D.N.Y. Oct. 16, 2025) (similar).

2. The Risk of Erroneous Deprivation

The second *Mathews* factor concerns "the risk of an erroneous deprivation" of D.C.'s liberty, and "the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. The risk the Court considers is whether the noncitizen's "prolonged detention" may be "unjustified," *i.e.*, whether continued detention may be unnecessary to protect the community or guard against flight. *See Black*, 103 F.4th at 153. "The only interest to be considered at this part of the *Mathews* analysis is that of the detained individual[]—not the government." *Id.* at 152.

In *Black*, the Second Circuit noted that § 1226(c) affords few procedures for the detainee, in that it lacks a "mechanism for a detainee's release" and "for individualized review of the need for protection." *Id.* The sole procedural protection it embeds is a *Joseph* hearing, at which the noncitizen can contest whether he committed the crime that makes him subject to mandatory detention. *Id.* (citing *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999)). As a result, the Circuit stated, "many noncitizens are detained 'who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, [and] are not flight risks.'" *Id.* (citation omitted). The Circuit thus found prolonged detention under § 1226(c) inherently to entail a high risk of erroneous deprivation of liberty. And, it stated, "almost *any* additional procedural safeguards at some point in the detention would add value." *Id.* at 153 (emphasis in original).

This case is no exception to that norm. At no point has there been any assessment by a neutral of whether D.C.'s detention is necessitated by the interests in public safety or avoiding flight. This Court cannot prejudge those inquiries, which would turn on the evidence adduced by ICE and D.C. It suffices to note that D.C. has previewed responsible arguments in favor of his release on bond. These include that D.C. is age 62, frail, weak, and infirm; that his criminal record does not reflect any offense for nearly a decade; and that for approximately 20 years he maintained stable employment as the owner and operator of a hair salon. Jessar Decl. ¶¶ 22, 24, 33. In addition, D.C. has three daughters and claims to have the support of a community of "residents and other business owners" to which he would return upon release, which include his longtime friend and business partner. Release Plan at 2. A bond hearing would permit D.C. to pursue these arguments for release. The absence of such a hearing gives rise to a risk that his continued detention is unnecessary.

In their opposition brief, respondents do not argue that D.C. poses a risk of flight or danger to the public, although they have not abandoned such arguments. Instead, they argue that D.C. will shortly receive adequate process, in that he has a pending application for relief from removal, which, as of respondents' brief, was scheduled for March 24, 2026. Opp'n at 1, 11. Respondents' argument, however, was thereupon undercut by the adjournment, *sine die*, of that hearing. Regardless, a merits hearing is "separate and apart from" a bond determination. *Amides-Galdamez* v. *Barr*, 810 F. App'x 52, 53 (2d Cir. 2020) (summary order) (quoting 8 C.F.R. § 1003.19(d)). The former considers whether the noncitizen is removable from the U.S. or has valid claims for relief from removal, while the latter considers whether the noncitizen's detention pending such removal is justified. Because a merits hearing does not provide a mechanism "for individualized review of the need for detention," *Black*, 103 F.4th at 152, it is an inadequate safeguard against unnecessary detention. As a result, courts commonly order bond hearings notwithstanding that the noncitizen has a pending application for relief from removal. *See, e.g.*, *Veletanga v. Noemi*, No. 25 Civ. 9211, 2025 WL 3751865, at *1 (S.D.N.Y. Dec. 26, 2025) (ordering bond hearing for noncitizen with applications for cancelation of removal and asylum); *J.I.T. v. Francis*, No. 25 Civ. 6749, 2025 WL 3295851, at *2 (S.D.N.Y. Nov. 26, 2025) (same for noncitizen whose appeal of merits determination "remains pending"); *J.M.P. v. Arteta*, 807 F. Supp. 3d 265, 275 (S.D.N.Y. 2025) ("*J.M.P. II*") (same).

In light of "the almost nonexistent procedural protections" available to D.C., *Black*, 103 F.4th at 152, and the potential for an individualized assessment of the need for further detention to result in D.C.'s release, this second *Mathews* factor also favors a bond hearing. *See, e.g.*, *Veletanga*, 2025 WL 3751865, at *6 (finding high risk of erroneous deprivation where petitioner "has had no opportunity . . . to argue that he poses no danger to the community and no risk of flight"); *J.M.P. v. Arteta*, 804 F. Supp. 3d 387, 394 (S.D.N.Y. 2025) ("*J.M.P. I*") (same where record reflected petitioner "had lived law-abiding li[fe]" since criminal activity); *M.P.L.*, 2025 WL 2938993, at *3 (finding "a bond hearing would add value by permitting review of [p]etitioner's custody status for the first time in over seven months").

3. The Government's Interest

The third *Mathews* factor considers the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Respondents argue that because a hearing could result in D.C.'s release, detaining him without a hearing would assure that he (1) will appear at future proceedings and (2) cannot commit crimes endangering the public. The Government, however, made the same argument in *Black*. *See Black*, 103 F.4th at 153. And the Circuit there, while recognizing that assuring the noncitizen's appearance and public safety are "legitimate" and "well-established" interests, held that holding a bond hearing "do[es] nothing to undercut those interests." *Id.* The Government, it stated, "ha[d] not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight." *Id.* at 154 (quoting *Velasco Lopez*, 978 F.3d at 854). The same is so here. The Court therefore puts these interests aside.

Respondents do not address the fiscal and administrative burdens of a bond hearing. In *Black*, the Government argued requiring a hearing would "strain the immigration adjudication system yet provide little value." *Id.* The Circuit acknowledged that "having to do something instead of nothing imposes an administrative and fiscal burden of some kind," but found that this burden "will likely be outweighed by costs saved by reducing unnecessary detention." *Id.* at 154-55. Consistent with *Black*, the Court finds that, as in any such case, a bond hearing stands to cost the Government time and resources, but that these costs merit limited weight in the *Mathews* analysis.

In consequence, the Court finds that the Government's interests, while legitimate, are not strong. *See, e.g.*, *Veletanga*, 2025 WL 3751865, at *7 (finding respondents have not "identified any particularized or heightened interest that would justify continued detention without such a hearing"); *J.M.P. I*, 804 F. Supp. 3d at 394-95 (similar); *M.P.L.*, 2025 WL 2938993, at *5 (similar). This factor does not materially favor respondents.

4. Overall Assessment

This Court, guided by *Black*, finds that these factors viewed in combination support affording D.C. a bond hearing. The first two factors (D.C.'s substantial liberty interests and the risk of error inherent in depriving him a bond hearing) outweigh the third (the modest administrative cost a hearing imposes on the Government). In *Black*, the Circuit recognized that the Government's legitimate administrative interests may justify a "relatively short-term deprivation of liberty," but that "the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need." *Black*, 103 F.4th at 154. Such is the case here. D.C. has been detained for nearly six and a half months under circumstances that make each day in custody extra onerous and hazardous due, in particular, to his serious medical and mental health deterioration. With his merits hearing having been deferred indefinitely, and with an appeals process likely to follow in the event of an adverse determination at that hearing, there is no end in sight to D.C.'s detention, whether via release on bail or removal from the country. *See* Reply at 5-6 (noting that "administrative appeal process can last several months," after which "D.C. can petition for review of the resulting decision to the Second Circuit"). D.C. therefore has a substantial liberty interest in a hearing to test the need for continued detention. That interest outweighs the Government's legitimate, but finite, interest in avoiding the administrative burdens of such a hearing.

The Court accordingly finds D.C.'s detention has been sufficiently prolonged to require a bond hearing as a matter of procedural due process. *See, e.g.*, *Black*, 103 F.4th at 155 (ordering bond hearing where noncitizen had been detained under § 1226(c) for seven months without such a hearing); *M.P.L.*, 2025 WL 2938993, at *5 (same); *J.M.P. I*, 804 F. Supp. at 395 (same); *Veletanga*, 2025 WL 3751865, at *7 (same where noncitizen had been detained for three months).[12]

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[12] At the March 19, 2026 hearing, D.C. requested, for the first time, that the Court enjoin the Government from seeking an automatic stay, pursuant to 8 C.F.R. § 1003.19(i)(2), of the IJ's bond decision in the event the IJ grants D.C.'s release. The Court notes that dozens of courts across the country have found that automatic stays, which allow DHS to unilaterally override an IJ's decision, violate due process, and thus enjoined the Government from invoking those procedures. *J.M.P. II*, 807 F. Supp. 3d at 288 (collecting cases); *O.F.C.*, 2026 WL 74262, at *15. But because this issue was not briefed by the parties, the Court denies without prejudice D.C.'s request to

B. What Procedural Protections Are Due

The Court briefly considers issues raised by the parties as to the nature of the upcoming bond hearing.

1. Proper Court to Hold the Bond Hearing

D.C. argues that this Court, not an IJ, should conduct D.C.'s bond hearing. Pet. ¶¶ 97-99. D.C. has identified one case in this Circuit in which the district court, after granting a petition for a bond hearing, presided over the hearing itself. *L.G.M. v. LaRocco*, 788 F. Supp. 3d 401, 405-06 (E.D.N.Y. 2025). Assuming *arguendo* that that case was properly decided, it is readily distinguished, as the court there noted "atypical" circumstances, including the noncitizen's "complicated" detention history, meriting heightened scrutiny. *Id.* at 405-06. D.C. does not cite similar circumstances here, or any reason to doubt that he would receive a fair bond hearing before an IJ. *See M.P.L.*, 2025 WL 2938993, at *5 (denying request that district court handle bond hearing). Accordingly, there is no basis to depart from the common practice of ordering a bond hearing before an IJ, whose expertise and experience in this area will enable efficient resolution of the proceedings consistent with immigration court precedents. *See, e.g.*, *J.C.G.*, 2025 WL 88831, at *11 (ordering IJ to hold bond hearing); *G.F.F. v. Francis*, No. 25 Civ. 7368, 2025 WL 3141735, at *7 (S.D.N.Y. Nov. 10, 2025) (same); *J.M.P. I*, 804 F. Supp. 3d at 395 (same); *M.P.L.*, 2025 WL 2938993, at *7 (same).

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enjoin the Government from seeking such a stay. In the event that D.C. prevails at his bond hearing and the Government invokes the automatic stay provision, this Court, which has retained jurisdiction over the case, will entertain a request by D.C. for further relief.

2. Procedural Protections at the Bond Hearing

D.C. seeks an individualized hearing at which ICE will have the burden to establish, by clear and convincing evidence, that his continued detention is justified. Pet. at 35. Respondents acknowledge that, under *Black*, ICE will have that burden. Opp'n at 12-13. D.C. further argues that the IJ should be ordered to consider alternatives to detention in assessing both danger to the community and flight risk, and to consider D.C.'s ability to pay, if setting a bond. Pet. at 35. Respondents acknowledge that *Black* supports an IJ's consideration of alternatives to detention with respect to flight risk and of the noncitizen's ability to pay with respect to the size of the bond. Opp'n at 13. But, respondents argue, there is "no basis" for an IJ to consider alternatives to detention with respect to danger. *Id.*

On this question, the Court holds with D.C.—and with the heavy weight of recent case law. *See, e.g.*, *Beltran Marroquin v. Genalo*, No. 24 Civ. 6376, 2025 WL 3241161, at *3-4 (S.D.N.Y. Nov. 20, 2025) (finding "due process requires an immigration judge to consider alternatives to detention when evaluating whether Petitioner poses a danger to the community"); *M.P.L.*, 2025 WL 2938993, at *6 (collecting cases holding same); *J.I.T.*, 2025 WL 3295851, at *5-6; *L.G.M. v. LaRocco*, No. 25 Civ. 2631, 2025 WL 2173577, at *3 (E.D.N.Y. July 31, 2025); *see also O.F.C. v. Decker*, No. 22 Civ. 2255, 2022 WL 4448728, at *10 (S.D.N.Y. Sept. 12, 2022) (pre-*Black* decision requiring IJ to "consider alternative conditions of release in deciding the danger question"); *Hernandez-Aviles v. Decker*, No. 20 Civ. 7636, 2020 WL 5836519, at *2-3 (S.D.N.Y. Oct. 1, 2020) (same). As these decisions recognize, the inquiry whether a detainee would present a danger if released is necessarily individualized. Among other considerations, detainees' criminal records may vary widely, as may their present-day physical conditions and capacities. For some, restrictions on liberty short of detention may suffice to protect the public. As one court has illustrated the point, "a noncitizen with a history of drunk driving might well pose a serious danger to the community," but such danger "would be ameliorated if the noncitizen were released on the condition that he or she not drive a car." *Cantor v. Freden*, 761 F. Supp. 3d 630, 637-38 (W.D.N.Y. 2025) (citation omitted). The IJ's consideration of alternatives to detention would guard against the risk of D.C.'s continued detention where less restrictive means are available to protect the public.

This consideration is supported by the analogous context of bail determinations in criminal cases. Federal courts, in assessing danger to the community under 18 U.S.C. § 3142, commonly consider alternatives to detention, including whether conditions such as house arrest, home detention, or electronic monitoring would suffice. *See, e.g.*, *United States v. Orena*, 986 F.2d 628, 632 (2d Cir. 1993) (considering whether conditions such as "house arrest, electronic surveillance, and interactions limited to immediate family . . . alleviate appellee's danger to the community"); *United States v. Paulino*, 335 F. Supp. 3d 600,612 (S.D.N.Y. 2018) (finding conditions including home incarceration with GPS monitoring "more than adequate to mitigate any concerns regarding dangerousness"). There is no sound reason to excise that sensible consideration in the context of immigration detention. *See, e.g.*, *Beltran Marroquin*, 2025 WL 3241161, at *4 ("Courts in this district have viewed [§ 3142] as instructive in determining due process requirements in the context of immigration proceedings."); *Fernandez Aguirre* *v. Barr*, No. 19 Civ. 7048, 2019 WL 4511933, at *5 (S.D.N.Y. Sept. 18, 2019) (court's requirement that IJ "consider alternatives to detention *before* concluding that detention was appropriate . . . was intended to track the framework for pretrial detention in the criminal context" (emphasis in original)).

Respondents' counterargument—that *Black* forecloses an IJ's consideration of alternatives to detention in assessing dangerousness—misreads that decision. In *Black*, the Circuit reviewed a district court order that, in pertinent part, required the IJ to "consider [p]etitioner's ability to pay and the availability of alternative means of *assuring his appearance*." *See Black v. Decker*, No. 20 Civ. 3055, 2020 WL 4260994, at *9 (S.D.N.Y. July 23, 2020) (emphasis added), *aff'd*, 103 F.4th 133 (2d Cir. 2024). That portion of the order did not concern the IJ's assessment of danger to the community and the Circuit's review of it likewise focused solely on the IJ's assessment of the risk of flight. *See Black*, 104 F.4th at 158. Respondents note that the Circuit, in its discussion, stated that "a showing of dangerousness by clear and convincing evidence would foreclose any possibility of bond," at which point the IJ would have "no reason to consider financial circumstances or alternatives to detention." Opp'n at 13 (quoting *id.* at 159). But that excerpt conveyed merely that, were a noncitizen's dangerousness to require detention, the IJ would have no occasion to consider risk of flight or the associated issues of the noncitizen's financial circumstances or alternatives to detention. Taken in context, it cannot fairly be read to bar an IJ from considering alternatives to detention in assessing whether a noncitizen would present a danger to the community if released. *See Beltran Marroquin*, 2025 WL 3241161, at *4 ("[U]nder *Black's* own conceptual framework . . . there is no logical reason why the Government's burden on dangerousness should be treated differently than risk of flight, at least when it comes to alternatives to detention.").

Accordingly, the Court grants D.C. a bond hearing at which: (1) the Government will have the burden of proof to establish by clear and convincing evidence that D.C. poses a flight risk or danger to the public; (2) the IJ must consider alternatives to detention in assessing D.C.'s flight risk and future dangerousness; and (3) the IJ, in setting the amount of a bond, must consider D.C.'s ability to pay.

C. Whether Immediate Release is Warranted Pending Adjudication of This Petition

D.C. separately asks the Court to order his immediate release pending adjudication of this habeas petition. Pet. 1118. Respondents oppose. Opp'n at 14-16.

The Court denies that request. Federal courts have inherent authority to grant bail to habeas petitioners detained by immigration authorities. *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001). But "[t]he standard for bail pending habeas litigation is a difficult one to meet." *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990). A court "must inquire into whether the habeas petition raises substantial claims and whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 230 (cleaned up). The power to release a habeas petitioner on bail "is a limited one, to be exercised in special cases only." *Id.* at 226.

At the outset, D.C.'s request appears moot. D.C. seeks release pending adjudication of this petition. Pet.

at 35. This decision, however, has granted D.C. the habeas relief he seeks—a bond hearing. There is nothing more to adjudicate.

In any event, even if D.C.'s request were construed to seek immediate release irrespective of the status of adjudication of his petition, the extraordinary remedy of immediate release is not warranted. A bond hearing with constitutionally adequate procedural safeguards, presided over by an IJ, will occur imminently—one week from today. As the case law reflects, nothing more is needed to make the habeas remedy effective. *See, e.g.*, *Fernandez Aguirre v. Barr*, No. 19 Civ. 7048, 2019 WL 3889800, at *4 (S.D.N.Y. Aug. 19, 2019) ("Because the petition seeks only a constitutionally-adequate bond hearing, and because the Court has granted that relief, immediate release is not necessary to make the habeas writ effective."); *G.F.F.*, 2025 WL 3141735, at *7 (same); *Reid v. Decker*, No. 19 Civ. 8393, 2020 WL 996604, at *13 (S.D.N.Y. Mar. 2, 2020) (same).

Only in rare cases have courts simultaneously granted immediate release and a request for a bond hearing.[13] Those largely arose during the early COVID-19 pandemic, in which every additional day in detention posed a mortal risk for immuno-compromised noncitizens. *See, e.g.*, *Coronel v. Decker*, 449 F. Supp. 3d 274, 289-90

[13] The two cases D.C. cited at the hearing are inapposite, as each reserved decision on the habeas petition. *See, e.g.*, *Salgado v. Francis*, No. 25 Civ. 6524, 2025 WL 2806757, at *8 (S.D.N.Y. Oct. 1, 2025) (granting *Mapp* release and "reserv[ing] decision on the Amended Petition's habeas claims"); *Barco Mercado v. Francis*, No. 25 Civ. 6582, 2025 WL 3295903, at *3 (S.D.N.Y. Nov. 26, 2025) (bench opinion "conditionally released [noncitizen] pending the determination of this habeas corpus petition promptly thereafter").

(S.D.N.Y. 2020) ("[t]ypically, courts do not find extraordinary circumstances for habeas petitioners where a constitutionally adequate bail hearing is the relief sought," but "these are not normal circumstances" due to COVID-19 pandemic); *Jovel v. Decker*, No. 20 Civ. 308, 2020 WL 1502038, at *5 (S.D.N.Y. Mar. 24, 2020) (finding extraordinary circumstances supporting release based on petitioner's "unique risk" of serious illness were he to contract COVID-19), *report and recommendation adopted*, No. 20 Civ. 308, 2020 WL 1539282 (S.D.N.Y. Mar. 31, 2020). D.C.'s ailments, although significant, are not comparable; he has not shown that his condition is so dire that one week in detention while he awaits his bond hearing would so endanger him as to make the bond hearing remedy moot. *See G.F.F.*, 2025 WL 3141735, at *7 ("It is unclear . . . how continued detention would deprive [petitioner] of his ability to participate meaningfully in the renewed bond hearing, particularly because that hearing is scheduled for no later than seven days from the date on which this order is issued"); *cf. Coronel*, F. Supp. 3d at 290 (petitioners' claims would "effectively be moot" if they were to contract COVID-19). Accordingly, the Court denies D.C.'s request for immediate release.

CONCLUSION

For the foregoing reasons, D.C.'s petition for a writ of habeas corpus is granted in part. The Court grants D.C.'s request for a bond hearing but denies his request for immediate release.

By **Friday, March 27, 2026**, respondents shall provide a bond hearing to D.C. Consistent with this decision, at such hearing: (1) the Government will have the burden of proof to establish by clear and convincing evidence that D.C. poses a flight risk or danger to the public;

(2) the IJ must consider alternatives to detention in assessing D.C.'s flight risk and future dangerousness; and (3) the IJ, in setting the amount of a bond, must consider D.C.'s ability to pay.

Respondents are ordered to: (1) file a letter on the docket by **March 24, 2026 at 5 p.m.**, confirming that the bond hearing has been scheduled and stating the date and time when it will occur; (2) furnish this decision to the IJ meaningfully in advance of the hearing; and (3) file a letter on the docket by **March 30, 2026 at 5 p.m.**, with an update as to the outcome of the bond hearing.

Should respondents fail to provide such a hearing, respondents shall release D.C. from detention. The Court retains jurisdiction over this matter to ensure compliance with this decision.

The Clerk of Court is respectfully directed to terminate the motions pending at dockets 3 and 10.

SO ORDERED.

/s/ PAUL A. ENGELMAYER
PAUL A. ENGELMAYER
United States District Judge

Dated: March 20, 2026
New York, New York

APPENDIX B

8 U.S.C. 1226, as amended by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025), provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year,

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or

(E)(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and

(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or

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[1] So in original. Probably should be "sentenced".

probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Definition

For purposes of paragraph (1)(E), the terms "burglary", "theft", "larceny", "shoplifting", "assault of a law enforcement officer", and "serious bodily injury" have the meanings given such terms in the jurisdiction in which the acts occurred.

(3) Detainer

The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien.

(4) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens un-

lawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

(f) Enforcement by Attorney General of a State

The attorney general of a State, or other authorized State officer, alleging an action or decision by the Attorney General or Secretary of Homeland Security under this section to release any alien or grant bond or parole to any alien that harms such State or its residents shall have standing to bring an action against the Attorney General or Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable. For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

26 Civ. 1833 (PAE)

D.C., PETITIONER

v.

MARKWAYNE MULLIN, ET AL., RESPONDENTS

Filed: May 19, 2026

NOTICE OF APPEAL

All Respondents appeal to the United States Court of Appeals for the Second Circuit from the opinion and order entered on March 20, 2026.

Dated: New York, New York
May 19, 2026

Respectfully submitted,

JAY CLAYTON
United States Attorney for the
Southern District of New York
Attorney for Respondents

By: /s/ MALLIKA BALACHANDRAN

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APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NEW YORK—VARICK IMMIGRATION COURT

Respondent Name: **[REDACTED]**	A-Number: **[REDACTED]**
To: Jessar, Alec 360 E 161st St Bronx, NY 10451	Riders: In Custody Redetermination Proceedings Date: 03/26/2026

ORDER OF THE IMMIGRATION JUDGE

The respondent requested a custody redetermination pursuant to 8 C.F.R. § 1236. After full consideration of the evidence presented, the respondent's request for a change in custody status is hereby ordered:

☐ Denied, because

☑ Granted. It is ordered that Respondent be:

- ☐ released from custody on his own recognizance.
- ☑ released from custody under bond of $ 1,500.00
- ☑ other:

  (1) The respondent will wear a GPS tracking device at all times.

(2) The respondent will report to ERO-ICE no more than once a week, the method of reporting (e.g. in-person, phone call, app, etc.) to be determined by ERO-ICE

(3) The respondent will not consume any alcohol and will not use controlled substances unless prescribed by a medical professional.

(4) The respondent will not associate with individuals involved in criminal activities nor will the respondent commit any criminal violations.

The respondent is on notice that any violation of the above may lead to re-detention.

☑ Other:

The Court notes the government has failed to establish by clear and convincing evidence, that the respondent would be a danger going forward. However, the government has demonstrated the respondent is a flight risk. Nonetheless, the court finds the aforementioned alternatives to detention are sufficient to mitigate the risk of flight.

/s/

Immigration Judge: CONROY, CHARLES 03/26/2026

Appeal:

Department of Homeland Security:

☐ waived ☑ reserved

Respondent:

☑ waived ☐ reserved

Appeal Due: 04/27/2026

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 26-cv-1833

D.C., PETITIONER

v.

KRISTI NOEM, IN HER OFFICIAL CAPACITY AS SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; PAMELA BONDI, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; JUDITH ALMODOVAR, IN HER OFFICIAL CAPACITY AS ACTING FIELD OFFICE DIRECTOR, NEW YORK CITY FIELD OFFICE, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT; PAUL ARTETA, IN HIS OFFICIAL CAPACITY AS THE ORANGE COUNTY, NEW YORK SHERIFF, RESPONDENTS

Filed: Mar. 5, 2026

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

INTRODUCTION

1. Petitioner, D.C. ("Petitioner" or "D.C."), [1] is a cognitively-impaired sixty-two-year-old man who

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[1] A motion to proceed anonymously in this action, using initials only, will be filed concurrently with this Petition.

has resided in the United States for over three decades. He suffers from life-threatening medical and mental health conditions and was deemed incompetent by an Immigration Judge ("IJ"). He petitions this Court for a writ of habeas corpus to remedy his unlawful prolonged detention by Respondents.

2. D.C., who has resided in the United States since 1982 and who concedes that he is detained pursuant to 8 U.S.C. § 1226(c), has been detained for nearly six months without the possibility of a bond hearing, since on or around September 9, 2025. *See* Ex. A, Alec Jessar Decl. ¶¶ 5, 20 [hereinafter Jessar Decl.].

3. D.C.'s cognitive and mental health challenges cause him to profoundly mistrust others. *See* Ex. B, Competency Evaluation 11. He holds a deeply-felt conviction that other people, even his advocates, intend him harm. *See id.* These beliefs, which an expert evaluator found strongly suggest that he suffers from "persecutory delusional disorder," are exacerbated by his ongoing detention and have led him to refuse life-saving medical treatment, including insulin for his diabetes, while in the custody of U.S. Immigration and Customs Enforcement ("ICE"). *Id.* Based on D.C.'s impaired cognitive functioning and mental health conditions, an IJ determined that he was incompetent to proceed in his removal proceedings absent safeguards. Jessar Decl. ¶ 32.

4. D.C.'s chronic medical conditions—most notably, diabetes, hypertension, and hyperlipidemia—have become acute in detention. His "blood sugar is at a medically dangerous level associated with hyperosmolar hyperglycemic state [], a life-threatening condition that causes severe dehydration, altered men-

tal status, seizures, coma, and death." Ex. C, Medical Records Review 1-2. His blood pressure readings have been high enough to indicate "a hypertensive crisis, a medical emergency that can cause damage to the body's orangs, leading to strokes, heart attacks, kidney injury, and other end organ damages." *Id.* at 2. Because "[u]ncontrolled high blood sugar and high blood pressure can . . . contribute to impaired cognitive functioning," D.C.'s acute medical distress, cognitive impairment, and mental health are inextricably intertwined, and their respective declines are mutually reinforcing. *Id.* at 3; *see also* Ex. B, Competency Evaluation 11.

5. Moreover, because detention "amplifies [D.C.'s] mistrust of staff and reinforces his persecutory beliefs," he will only be able to receive the life-saving medical care he requires in a community setting, with high levels of coordination between mental health and medical providers. *Id.* at 11-12. Without such interventions, "his health will undoubtedly continue to deteriorate, placing [him] at risk for life-threatening complications and death." Ex. C, Medical Records Review 4.

6. To date, the Department of Homeland Security ("DHS") has not justified the prolonged deprivation of D.C.'s liberty.

7. Absent intervention from this Court, D.C.'s unreviewed civil detention—which is, in fact, incarceration at a criminal jail—will continue for the foreseeable future, as his proceedings have not yet reached a final hearing before an IJ. His physical and mental health, including his life-threatening, uncon-

trolled diabetes and high blood pressure, will continue to deteriorate.

8. Because D.C.'s detention is unlawful and has led to his rapid decompensation, seriously endangering his health, he warrants immediate release under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), pending adjudication of this petition. Absent such release, he must receive a constitutionally adequate bond hearing before a neutral adjudicator as soon as feasible.

PARTIES

9. Petitioner, D.C., is a sixty-two-year-old resident of New York State who has lived in the United States since around 1982. *See* Jessar Decl. ¶¶ 23-24. He has three U.S. citizen daughters, ages fifteen, eighteen, and twenty. *See id.* ¶ 24; Ex. B, Competency Evaluation 3. His eldest daughter is a scholarship student at Columbia University. Jessar Decl. ¶ 24. Prior to his detention, he owned a hair salon in Harlem. *See id.* He has been detained by ICE at Orange County Jail ("OCJ") since on or about September 9, 2025. *Id.* ¶ 5. D.C. is diagnosed with cognitive and mental health disorders, including unspecified neurocognitive disorder, adjustment disorder with mixed anxiety and depressed mood, and a provisional diagnosis of delusional disorder, persecutory type. *See* Ex. B, Competency Evaluation 10-11. An IJ determined that D.C. was incompetent due to his impaired cognitive functioning and mental conditions. *See* Jessar Decl. ¶ 32. D.C. also suffers from severe medical conditions, including diabetes and high blood pressure. *See* Ex. B, Medical Records Review 1. These conditions are currently uncontrolled, such that his most recent blood sugar and

blood pressure readings reached medically dangerous levels. *See id.* at 2.

10. Respondent Kristi Noem is named in her official capacity as the Secretary of DHS. In this capacity, she is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103(a), she routinely transacts business in the Southern District of New York, she supervises Respondent Almodovar, and she is legally responsible for the pursuit of Petitioner's detention and removal. As such, she is the legal custodian of Petitioner. Respondent Noem's office is located at the United States Department of Homeland Security, Washington, District of Columbia 20528.

11. Respondent Pamela Bondi is named in her official capacity as the Attorney General of the United States. In this capacity, she is responsible for the administration of the immigration laws as exercised by the Executive Office for Immigration Review pursuant to 8 U.S.C. § 1103(g). She routinely transacts business in the Southern District of New York and is legally responsible for administering Petitioner's removal proceedings and the standards used in those proceedings. As such, she is the legal custodian of Petitioner. Respondent Bondi's office is located at the United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, District of Columbia 20530.

12. Respondent Judith Almodovar is named in her official capacity as the Acting Director of the New York ICE Field Office within the DHS. In this capacity, she is responsible for the administration of immigration laws and the execution of detention and re-

moval determinations for individuals under the jurisdiction of the New York Field Office. As such, she is the custodian of Petitioner. Respondent Almodovar's office is located at 26 Federal Plaza, 9th Floor, New York, New York 10278.

13. Respondent Paul Arteta is named in his official capacity as the Orange County, New York, Sheriff. In this capacity, he is responsible for the administration of OCJ and is its de facto warden. As such, he is the legal custodian of Petitioner. Respondent Arteta's office is located at Orange County Sheriff's Office, 110 Wells Farm Road, Goshen, New York 10924.

JURISDICTION

14. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 2241 (power to grant writ); 28 U.S.C. § 1331 (federal question); Article I, § 9, cl. 2 of the Constitution (writ of habeas corpus); and the All Writs Act, 28 U.S.C. § 1651. Additionally, the Court has jurisdiction to grant injunctive relief in this case pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Petitioner's current detention as enforced by Respondents constitutes a "severe restraint[] on [his] individual liberty," as he is "subject to restraints 'not shared by the public generally,'" he "cannot come and go as he pleases," and his "freedom of movement rests in the hands of" public officers. *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 371 U.S. 236, 240 (1963)).

15. While the federal courts of appeals have jurisdiction to review removal orders directly through petitions for review, *see* 8 U.S.C. §§ 1252(a)(1), (b), the federal district courts have jurisdiction to hear habeas cor-

pus claims by noncitizens challenging the lawfulness or constitutionality of their detention by ICE. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

VENUE

16. Venue properly lies in the Southern District of New York. *See* 28 U.S.C. §§ 2241(d), 1391(b); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 537-38 (S.D.N.Y. 2014). Petitioner is physically present within the district, as he is detained at OCJ, located at 110 Wells Farm Road, Goshen, New York 10924. The material events leading to Petitioner's detention and removal proceedings also occurred in the Southern District of New York: his immigration proceedings are venued in New York, New York; prosecuted by the Office of the Chief Counsel for ICE in New York, New York; and presided over by an IJ located in New York, New York. Further, Petitioner has New York City-based counsel.

17. The place of employment of Respondent Almodovar is also located within the district, at 26 Federal Plaza, New York, New York. *See Braden v. 30th Judicial Circuit of Ky.*, 410 U.S. 484, 493-94 (1973) (setting forth traditional venue factors).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

18. There is no statutory requirement to exhaust administrative remedies where a noncitizen challenges the lawfulness of his immigration detention. *See Louisaire v. Muller*, 758 F. Supp. 2d 229, 234-35 (S.D.N.Y. 2010). Moreover, no exhaustion requirement applies to the claims raised in this Petition because the IJ and Board of Immigration Ap-

peals ("BIA") lack jurisdiction to entertain constitutional challenges. *See Arango-Aradondo v. I.N.S.*, 13 F.3d 610, 614 (2d Cir. 1994); *Matter of Valdovinos*, 18 I. & N. Dec. 343, 345-46 (BIA 1982) (disclaiming jurisdiction to rule on constitutionality of immigration statute).

19. Further action with the agency is not necessary when pursuing administrative remedies would be futile or the agency has predetermined a dispositive issue. *See, e.g.*, *Araujo-Cortes*, 35 F. Supp. 3d at 538-39; *Monestime v. Reilly*, 704 F. Supp. 2d 453, 456-57 (S.D.N.Y. 2010); *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 179-80 (S.D.N.Y. 2009). Here, D.C. is subject to mandatory detention under 8 U.S.C. § 1226(c) and therefore is ineligible for a bond hearing under BIA precedent. *See Matter of Joseph*, 22 I. & N. Dec. 799, 802 (BIA 1999) ("The regulations generally do not confer jurisdiction on Immrigation Judges over custody or bond determinations respecting those [noncitizens] subject to mandatory detention . . . .").

20. Regardless, D.C. has exhausted the informal administrative remedies available to him. Through counsel, he submitted a release request to ICE on January 24, 2026. *See* Jessar Decl. ¶ 21; *see also* Ex. F, Release Requests and Correspondence with ICE 12-13.[2] The request highlighted that D.C.'s blood sugar measured 500 mg/DL upon intake at OCJ, which qualifies as a medical emergency, and, fur-

[2] As the requests included hundreds of pages of medical records, D.C. submits here only the request letters and accompanying correspondence with ICE without exhibits. Exhibits will be made available to the Court and the Respondents upon request.

ther, that his blood pressure measured 190/88, a hypertensive crisis. *See id.* at 12. D.C.'s counsel also noted that, in recent weeks, he had observed that D.C. had developed "bloody marks on his face and head." *Id.*

21. On February 11, 2026, D.C., through counsel, received a denial of his release request. The decision letter indicated that there was "no compelling reason to warrant a favorable exercise of discretion." *Id.* at 5. The letter additionally asserted that D.C.'s "medical concerns have been reviewed and are being managed by the ICE Health Services Corps [] and the Orange County Correctional Facilities [*sic*] medical staff, despite [D.C.'s] repeated non-compliance of testing and treatment." *Id.*

22. On February 15, 2026, D.C.'s counsel submitted a renewed release request exhibiting Dr. Corral's evaluation and Dr. Sugijanto's medical records review, among other records. *See id.* at 7-11. He highlighted that D.C.'s refusal of care is tied to cognitive limitations and mental health conditions beyond his control. *See id.* at 7-9. As of filing, the request remains pending. *See* Jessar Decl. ¶ 21.

23. However, D.C.'s counsel does not expect that this additional information will change ICE's decision. *Id.* Indeed, over the past year, ICE has implemented an official "no-release policy," "mov[ing] quickly to restrict officers from releasing individuals from immigration detention on bond or other forms of condition release." *See Immigration Detention Expansion in Trump's Second Term*, Amer. Immigr. Council 18 (Jan. 2026), https://www.americanimmigration

council.org/wp-content/uploads/2026/01/immigration-detention-report.pdf.

24. Petitioner therefore has exhausted his administrative remedies to the extent required by law, and his only remedy is by way of this judicial action.

REQUIREMENTS UNDER 28 U.S.C. § 2243

25. Courts considering petitions for writs of habeas corpus are directed to either issue a writ "forthwith," or to direct the respondent to show cause why the writ should not be granted within three days, or, with good cause, within twenty days. 28 U.S.C. § 2243.

26. Once the government has responded, the statute directs the Court to schedule a hearing on the petition "not more than five days after the return unless for good cause additional time is allowed." Id.

27. Because D.C.'s liberty remains heavily burdened during his continued detention, he asks the Court to adhere to the schedule set forth in § 2243 and order the Respondents to show cause within three days as to why the Petition should not be granted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

28. D.C. is a sixty-two-year-old Dominican citizen who migrated to the United States around 1982. Jessar Decl. ¶ 23. He has three U.S. citizen daughters, ages fifteen, eighteen, and twenty. *See id.* ¶ 24; Ex. B, Competency Evaluation 3. His eldest daughter is a scholarship student at Columbia University. Jessar Decl. ¶ 24. Prior to his detention, he owned a hair salon in Harlem. *See id.*

29. D.C. suffers from life-threatening diabetes and high blood pressure. *Id.* ¶ 4; *see also* Ex. B, Medical Rec-

ords Review 2-4. He is also diagnosed with unspecified neurocognitive disorder and adjustment disorder, and has been provisionally diagnosed with delusional disorder, persecutory type. Jessar Decl. ¶ 4; *see also* Ex. B, Competency Evaluation 10-11. Based on D.C.'s impaired cognitive functioning and mental health conditions, an IJ determined that he was incompetent to proceed in his removal proceedings absent safeguards. Jessar Decl. ¶ 32.

30. ICE has detained D.C. without a bond hearing for nearly six months. *See id.* ¶ 5.

D.C.'s Detention History

31. ICE detained D.C. on or around September 9, 2025—nearly six months ago. *Id.* He has been held at OCJ since. *Id.*

32. D.C. retained The Bronx Defenders as pro bono immigration counsel around December 15, 2025. Jessar Decl. ¶ 2. He has consistently reported to his counsel that his health is declining at OCJ, who arranged to request D.C.'s medical records from OCJ. *Id.* ¶¶ 7, 11.

33. Upon receiving D.C.'s medical records, D.C.'s counsel learned that, before D.C. arrived at OCJ, he had been taking medication for diabetes and blood pressure. *See id.* ¶ 8. However, upon intake at OCJ, he told medical staff that he had stopped taking his medications. *See id.*

34. At that same intake appointment, D.C.'s blood pressure was 190/88 and his blood sugar level was 500. *Id.* ¶ 8. Both measures are dangerously high. *See* Ex. C, Medical Records Review 2 ("[D.C]'s blood sugar is at a medically dangerous level associated

with hyperosmolar hyperglycemic state [], a life-threatening condition that causes severe dehydration, altered mental status, seizures, coma, and death."); *id.* ("His highest blood pressure reading was 190/88 . . . and he was noted to have peripheral edema, or swelling of his lower extremities in this report. These two symptoms suggest that [D.C.] may have experienced a hypertensive crisis, a medical emergency that can cause damage to the body's organs, leading to strokes, heart attacks, kidney injury, and other end organ damage.").

35. Yet D.C. has consistently refused medical treatment, even as he has reported worsening symptoms and as his counsel has urged him to seek care. *See* Jessar Decl. ¶¶ 10-11.

36. In light of D.C.'s refusal of medical treatment despite his rapidly declining condition, D.C.'s counsel engaged Dr. Jennifer Sugijanto to conduct an independent review of D.C.'s medical records, and Dr. Macarena Corral to conduct a mental health evaluation of D.C. *See id.* ¶¶ 12, 19.

37. Dr. Sugijanto found that D.C. "has multiple chronic health conditions, most notably Type 2 diabetes mellitus, essential (primary) hypertension, and hyperlipidemia (elevated cholesterol." Ex. C, Medical Records Review 1. Dr. Sugijanto noted that "[e]levated blood sugar levels can cause acute and chronic changes in a patient's . . . decision making, complicating [D.C.'s] continued refusal of diabetes care." *Id.* at 2. She also found that detention is likely "exacerbating [D.C.'s] mental distress," as "[s]tress is a known exacerbator for physical ailments like diabetes and high blood pressure, as well as mental ill-

nesses like anxiety, depression, and delusional disorder." *Id.* at 4.

38. According to Dr. Sugijanto, D.C.'s uncontrolled, untreated diabetes "places him at increased risk of death." *Id.* Similarly, "[u]ncontrolled high blood pressure significantly increases the risk of" medical conditions including heart disease, "as well as premature death." *Id.* at 3 Ultimately, she concluded that, "[s]hould [D.C.] remain detained, he is at high risk of serious harm and morbidity from uncontrolled diabetes and high blood pressure, like acute metabolic emergencies, cardiovascular events, kidney failure, and death." *Id.* at 4.

39. Dr. Corral, in turn, diagnosed D.C. with unspecified neurocognitive disorder and adjustment disorder with mixed anxiety and depressed mood. *See* Ex. B, Competency Evaluation 10. In assessing D.C.'s cognitive functioning, she found that his verbal comprehension is in the seventh percentile and his working memory is in the nineteenth percentile. *Id.* at 8.

40. Dr. Corral also provisionally diagnosed D.C. with delusional disorder, persecutory type, noting that his "pervasive mistrust of others, including legal and medical professionals," is consistent with this diagnosis," but that psychiatric treatment "could help clarify whether his beliefs are responsive to treatment or represent a fixed delusional disorder." *Id.* at 11.

41. Dr. Corral indicated that D.C.'s mental health conditions have led him to refuse life-saving medical care at OCJ. *See id.* He holds a "firm belief that others, particularly his attorneys and medical staff, are acting against his interests or seeking to harm

him." *Id.* This belief "has led to significant functional impairment, most notably his refusal of medical treatment . . . ." *Id.*

42. Moreover, both Dr. Corral and Dr. Sugijanto noted that D.C.'s cognitive impairment, mental health disorders, and physical health are interconnected, such that their respective declines are mutually reinforcing. *See id.* Because untreated diabetes and hypertension can cause "difficulty concentrating, memory problems, and confusion," his refusal to seek treatment intensifies his preexisting cognitive impairment. *Id.*; *see also* Ex. C, Medical Records Review 3. In turn, "[D.C.'s] worsening cognitive impairment may further reduce his capacity to process information, make informed decisions, and engage in treatment, thereby reinforcing his mistrust and resistance to care." Ex. B, Competency Evaluation 11; *see also* Ex. C, Medical Records Review 3.

43. Dr. Corral also noted that detention "amplifies [D.C.'s] mistrust of staff and reinforces his persecutory beliefs, making it challenging to develop a therapeutic alliance and participate in care, especially given his cognitive difficulties." Ex. B, Competency Evaluation 11. She therefore recommended that D.C. receive treatment in a community setting that could provide a "a more supportive atmosphere, making it easier to build trust and tailor interventions to his needs." *Id.*

44. Dr. Sugijanto observed that detention also exacerbates the acute medical risk faced by D.C., including "metabolic emergencies, cardiovascular events, kidney failure, and death." Ex. C, Medical Records Review 4. In a detention setting, these risks are "mag-

nified," as "monitoring and rapid access to care may be limited," particularly because D.C.'s "willingness to engage with care is further complicated by delusional beliefs around medical professionals." *Id.*

45. Dr. Sugijanto also found "limited evidence of sustained engagement and culturally appropriate interventions to support [D.C.] in maintaining his health" at OCJ. *Id.* at 3. Although D.C., due to the combination of his cognitive impairment and mental health disorders, has repeatedly refused medical care, those refusals have been documented "without evidence of periodic reassessment/follow up, alternative strategies, or escalation to ensure that [D.C.] fully understands the severity and immediacy of untreated diabetes and high blood pressure." *Id.*

46. D.C.'s counsel has not sought a bond hearing for D.C. because he is subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(A) due to past criminal convictions, further described *infra*. *See* Jessar Decl. ¶ 20.

47. Nonetheless, after becoming aware of the severity of D.C.'s medical conditions, counsel submitted a release request to ICE via email on January 24, 2026. *Id.* ¶ 21; *see also* Ex. F, Release Requests and Correspondence with ICE. On February 11, 2026, ICE denied the release request, stating that there was no "compelling reason to warrant a favorable exercise of discretion in this case." *Id.*; *see also* Jessar Decl. ¶ 21. ICE's cover email instructed D.C.'s counsel to advise D.C. to comply with his medical treatment plan, which D.C.'s counsel has done repeatedly. *See id.*

48. On February 15, 2026, D.C.'s counsel submitted a renewed release request exhibiting Dr. Corral's evaluation and Dr. Sugijanto's medical records review, among other records. *See id.* He highlighted that D.C.'s refusal of care is tied to cognitive limitations and mental health conditions beyond his control. *See id.*; *see also* Ex. F, Release Requests and Correspondence with ICE. As of filing, the request remains pending. *See* Jessar Decl. ¶ 21.

D.C.'s Criminal Convictions

49. In D.C.'s approximately forty-four years in the United States, he has been convicted of a crime on four occasions. *Id.* ¶ 34. His final conviction is from 2016, over a decade ago. *Id.*

50. On February 7, 1997. D.C. was arrested in Manhattan and charged with three counts of N.Y. Penal Law § 220.39(1) (sale of a controlled substance) and one of count of § 220.16(1) (possession of a controlled substance). *Id.* ¶ 35. Trial commenced on January 12, 1998. *Id.* He did not appear on January 21, 1998, and the court issued a bench warrant. *Id.* A jury subsequently found D.C. guilty on all counts. *Id.* On March 12, 1998, D.C. was sentenced in absentia to three to nine years imprisonment. *Id.*

51. In the years that followed, D.C. lived in the community, meeting his partner, starting his business, and having his children. *Id.* ¶ 36. He knew that he had made a mistake in not appearing in court back in 1998. *Id.* However, he assumed that if he were subject to a warrant, law enforcement would contact him, particularly because he had three more contacts with law enforcement in the years that followed. *Id.*

52. On May 15, 2007, D.C. was issued a summons in Manhattan for presenting false identification to law enforcement. *Id.* ¶ 37. To his regret, he did not follow up on the summons. *Id.*

53. Nearly a decade later, on January 12, 2016, D.C. was arrested in Manhattan following a dispute with his partner. *Id.*

54. On January 14, 2016, D.C. resolved both the 2007 and 2016 cases. *Id.* ¶ 38. In connection with the 2007 summons, he pled guilty to N.Y. Penal Law § 170.20, misdemeanor possession of a forged instrument, and was sentenced to time served. *Id.* In connection with his 2016 arrest, he pled guilty to N.Y. Penal Law § 121.11, misdemeanor obstruction of breathing or blood circulation. *Id.* He was ordered to participate in treatment programming, which he successfully completed. *Id.*

55. D.C.'s final conviction is from October 7, 2016. *Id.* ¶ 39. On that date, he pled guilty to N.Y. Penal Law § 215.50(3), misdemeanor contempt, and was sentenced to nine days in jail. *Id.*

56. In completing treatment programming in 2016, D.C. tells his counsel that he believed he was making things right with the law. *Id.* ¶ 40. He thought that any and all old warrants were handled during those court appearances. *Id.*

57. D.C.'s final conviction in 2016 marked a turning point in his life. *Id.* ¶ 42. He was not arrested again until 2024, when he was stopped for a license-related violation. *Id.*

58. At that time, police identified the twenty-six-year-old bench warrant and arrested him. *Id.* While the

presiding criminal judges expressed bewilderment as to how the bench warrant had gone unexecuted for so long, on May 7, 2024, a judge executed the three-to-nine-year sentence previously imposed in 1998. *Id.*

59. Following a postconviction motion, D.C. was resented to a one-year determinate sentence. *Id.* ¶ 44. He was released from custody and apprehended by ICE on or around September 9, 2025. *See id.*

D.C.'s Removal Proceedings

60. According to ICE records, on June 6, 2024, an ICE officer interviewed D.C. while he was in state criminal custody. *Id.* ¶ 25. Based on that conversation, ICE determined that it would serve him with an administrative arrest warrant and Notice to Appear ("NTA"). *Id.*

61. On February 21, 2025, while D.C. was still in state criminal custody, he was served with the NTA. *Id.* ¶ 26. The NTA charged him with inadmissibility pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection), § 1182(a)(2)(B) (convicted of two or more offenses for which the aggregate sentence of confinement was five years or more), § 1182(a)(2)(C) (illicit trafficking in controlled substances), and § 1182(a)(2)(A)(i)(I) (crime involving moral turpitude). *Id.*

62. While in criminal custody, D.C. appeared three times in Immigration Court through the Institutional Hearing Program, which permits IJs to conduct removal proceedings for noncitizens serving sentences in certain correctional facilities. *Id.* ¶ 27. At the first appearance, on April 10, 2025, D.C. appeared

pro se and was advised of his rights. *Id.* By the next appearance, June 12, 2025, a previously-retained attorney had entered his appearance, but he did not actually appear for court. *See id.* The IJ adjourned. *Id.* At the following hearing on August 14, 2025, prior counsel appeared and requested time to prepare for pleadings. *Id.*

63. On September 15, 2025, after completing his criminal sentence and being detained by ICE, D.C. appeared for the first time before the Varick Street Immigration Court. *Id.* ¶ 28. Prior counsel requested time to gather information about the allegations in the NTA. *Id.* At the next appearance, on September 24, 2025, prior counsel withdrew, apparently due to a breakdown in the attorney-client relationship and D.C.'s mistrust of him. *See id.* The IJ adjourned to afford D.C. time to find new counsel. *Id.* On October 6, 2025, the IJ again adjourned for this purpose. *Id.*

64. On October 15, 2025, D.C. again appeared pro se. *Id.* ¶ 29. The IJ took pleadings and ultimately sustained the charges of inadmissibility against him under 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection), § 1182(a)(2)(B) (convicted of two or more offenses for which the aggregate sentence of confinement was five years or more), and § 1182(a)(2)(A)(i)(I) (crime involving moral turpitude). He did not sustain the charge under 8 U.S.C. § 1182(a)(2)(C) (illicit trafficking in controlled substances). *Id.*; *see also Minter v. United States*, 80 F.4th 406, 407 (2d Cir. 2023) (concluding that N.Y. Penal Law § 220.39(1), the relevant statute of conviction for D.C., is categorically overbroad relative to its federal counter-

part). Because D.C. has been found inadmissible under § 1182(a)(2)(A)(i)(I), he concedes that he is subject to mandatory detention. *See* 8 U.S.C. § 1226(c)(1)(A) (providing for mandatory detention of noncitizens inadmissible under § 1182(a)(2)(A)).

65. After taking pleadings on October 15, 2025, the IJ ordered D.C. to file applications for relief pro se by the next court date. Jessar Decl. ¶ 29.

66. On October 29, 2025, the IJ accepted the two applications filed by D.C.—a Form I-589, Application for Asylum and Withholding of Removal, and Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents—as complete. *Id.* ¶ 30. At the next appearance, November 12, 2025, the IJ adjourned to allow D.C. time to gather evidence in support of his applications. *Id.* On December 1, 2025, the IJ scheduled D.C. for an individual hearing—the hearing at which respondents in Immigration Court present evidence in support of their applications for relief—but advised that he would allow him to adjourn the hearing if D.C. retained counsel. *Id.*

67. D.C. retained The Bronx Defenders as pro bono counsel around December 15, 2025. *Id.* ¶ 31. Initially, D.C. insisted on moving forward with his individual hearing on December 29, 2025, despite not having any evidence prepared or filed with the court. *Id.* He told his counsel that he believed God would ensure his success at the hearing. *Id.* After multiple conversations in which counsel explained that he could not prepare for an individual hearing in two weeks, D.C. eventually agreed to allow him to request an adjournment. *Id.*

68. On December 29, 2025, D.C. appeared with counsel from The Bronx Defenders for the first time. *See id.* The IJ reset proceedings for a master calendar hearing on January 12, 2026, at which D.C. submitted amended applications for relief. *See id.* At that hearing, the IJ inquired as to whether D.C.'s counsel would be raising competency as an issue. *Id.* He also scheduled D.C. for an individual hearing on February 12, 2026. *Id.*

69. In light of the emerging concerns with respect to D.C.'s mental health, counsel submitted correspondence to the Immigration Court on January 24, 2026, indicating that The Bronx Defenders had retained Dr. Corral to conduct an evaluation and that it was possible counsel would be seeking a competency hearing before D.C.'s individual hearing date. *See id.* ¶ 32. After receiving Dr. Corral's evaluation and competency assessment, on February 5, 2026, counsel filed a motion with the Court requesting that the individual hearing be converted to a competency hearing. *See id.* On February 11, 2026, the IJ granted the motion. *Id.*

70. The following day, February 12, 2026, the IJ determined that D.C. was incompetent, but permitted the case to proceed with certain safeguards. *Id.*; *see also Reid v. Bondi*, 132 F.4th 109, 122 (setting forth criteria for whether respondents are competent to participate in immigration proceedings); *Matter of M-A-M-*, 25 I. & N. Dec. 474, 474 (BIA 2011) (describing procedure for evaluating competency and potential safeguards). D.C.'s final hearing before the IJ is now scheduled for March 24, 2026. *Id.*

Release Plan

71. If released from ICE custody, D.C. will return to his home in Yonkers. *See* Ex. D, Release Plan 2. He will have the support of his family and business partner, a friend of twenty years, in accessing care. *See id.* at 2; *see also* Ex. B, Competency Evaluation 12 (noting that, in a community setting, D.C.'s "children would be able to be present and involved in his care, offering emotional support and helping facilitate his engagement with treatment").

72. D.C. will require comprehensive medical and mental health care to stabilize his condition, including supportive psychotherapy and psychiatric treatment, all "approached with sensitivity to ensure collaboration." *Id.* at 11. Further, "[a]ddressing both his mental health and medical needs simultaneously is essential, as improvement in physical health through medication adherence may help alleviate some of his cognitive symptoms and enhance his overall ability to participate in his own care." *Id.* at 12.

73. D.C.'s social worker at The Bronx Defenders has identified a facility that can offer him both mental health treatment for him aligned with Dr. Corral's recommendations and complex medical care responsive to his various acute needs. Specifically, he will be able to access comprehensive medical and mental health services at Mount Sinai Morningside, a location near the hair salon he co-owns in Central Harlem. Ex. D, Release Plan 2. Among other services, this location houses an endocrinology and diabetes center, neurology department, and outpatient mental health clinic. *Id.* at 2-3. Receiving care at a single facility "will encourage the holistic collaborative

care that Dr. Corral recommends to appropriately treat all of Mr. [C.'s] medical and mental health concerns." *Id.* at 3.

74. Further, D.C.'s social worker at The Bronx Defenders "will be available as an ongoing support . . . to help facilitate accessing the recommended care at Mount Saini and engaging his family and loved ones so that he feels as safe and secure as possible in accessing this care." *Id.*

LEGAL FRAMEWORK

75. Respondents are subjecting D.C. to prolonged detention without an individualized bond hearing based on an unconstitutional application of the mandatory detention scheme at 8 U.S.C. § 1226(c).

76. D.C.'s near-six months in detention without review by an independent body requires that he be afforded a constitutionally adequate bond hearing before this Court or another neutral adjudicator or, in the alternative, that he be released.

Statutory Detention Authority, 8 U.S.C. § 1226(c)

77. Congress authorized civil detention of noncitizens in removal proceedings for specific, non-punitive purposes. *See Jennings*, 538 U.S. at 285-86; *Demore*, 538 U.S. at 513; *Zadvydas*, 533 U.S. at 690. Detention is either discretionary, *see* 8 U.S.C. § 1226(a), or mandatory, *see id.* §§ 1225(b), 1226(c), 1231(a).

78. Under the discretionary detention statute, a noncitizen may request a bond hearing at any time to contest whether he is a danger or a flight risk and thus properly detained during the pendency of his removal proceedings. *See id.* § 1226(a).

79. Conversely, § 1226(c)[3] authorizes DHS to detain certain noncitizens without the opportunity to request review as to whether detention is necessary. *See Black v. Decker*, 103 F.4th 133, 140-41 (2d Cir. 2024) (noting that, as relevant here, "noncitizens who have committed one of certain listed offenses . . . are subject to mandatory detention"). The text of § 1226(c) does not limit the length of detention under the statute, only permitting the Attorney General to release a noncitizen subject to § 1226(c) under narrow sentences inapplicable here. *See Jennings*, 538 U.S. at 304; *see also* 8 U.S.C. § 1226(c)(2).

80. The Supreme Court has nonetheless left open the question of whether the Constitution requires bond hearings for noncitizens subject to mandatory, prolonged detention under § 1226(c), as well as what procedures may be due under such circumstances.

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[3] Section 1226(c)(1) provides in full:

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1).

See id. at 312; *see also Black*, 103 F.4th at 142. This circuit has held that "[t]he Constitution does not permit the Executive to detain a noncitizen for an unreasonably prolonged period under section 1226(c) without a bond hearing . . . ." *Id.*

Constitutional Framework of Immigration Detention

81. "It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Demore*, 538 U.S. at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)); *see also Black*, 103 F.4th at 143 (2d Cir. 2024) ("The Supreme Court long ago held that the Fifth Amendment entitles noncitizens to due process in removal proceedings."). In immigration habeas petitions, the "procedural and substantive due process inquiries overlap." *Id.* at 142 n.12.

82. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. "The Constitution establishes due process rights for 'all "persons" within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.'" *Black*, 103 F.4th at 143 (quoting *Zadvydas*, 533 U.S. at 693).

83. As such, detention pursuant to immigration proceedings—which are civil, not criminal—is constitutionally permissible only in "certain special and 'narrow' nonpunitive 'circumstances.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Moreover, "[d]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for

which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

84. "A statute permitting indefinite detention of [a noncitizen] would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. Due process thus also requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

Due Process Protections for Individuals Detained under 8 U.S.C. § 1226(c)

85. In 2024, this circuit held in *Black v. Decker* that the "due process bars the Executive from detaining . . . individuals for an unreasonably prolonged period under section 1226(c) without a bond hearing." *Black*, 103 F.4th at 143.

86. The *Black* court's analysis drew on years of precedent that "suggest strongly that due process places *some* limits on detention under section 1226(c) without a bond hearing." *Id.* at 145; *see also Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 529-31; *Velasco Lopez v.* , 978 F.3d at 855.

87. In *Black*, the Second Circuit adopted the test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether a noncitizen's mandatory detention under § 1226(c) violates due process. 103 F.4th at 147.

88. The three Mathews factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such in-

terest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335

89. In adopting this "flexible . . . framework to assess, case by case, whether an individual's prolonged section 1226(c) detention violates due process," the court noted that "*Demore* and *Zadydvas* impl[ied] . . . any immigration detention exceeding six months without a bond hearing raised serious due process concerns." *Id.* at 150; *see also Reid v. Donelan*, 17 F.4th 1, 7-9 (1st Cir. 2021); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020).

90. Detention of less than six months may also raise such concerns. In *Demore*, the Supreme Court "upheld the facial constitutionality of detention under section 1226(c) without a bond hearing"—but "it did so while emphasizing the apparent brevity of detentions pending removal." *Black*, 103 F.4th at 143-44 (citing *Demore*, 538 U.S. at 527-31); *see also Demore*, 538 U.S. at 529 (citing government data indicating that, at the time the case was adjudicated, removal proceedings were "completed in an average of time of 47 days and a median of 30 days," with appeals "tak[ing] an average of four months"). Following *Demore*, in *Reid v. Donelan*, the First Circuit observed that *Demore* "seem[ed] to leave open the possibility that in most individual cases, detentions of six months (or of even less time) might necessi-

tate some type of hearing to see if continued detention is reasonably necessary to serve the statute's purposes." 17 F.4th at 8; *see also Demore*, 538 U.S. at 530-31 (indicating that detention under § 1226(c) lasts "about five months in the minority of cases in which the [noncitizen] chooses to appeal"); *Tkochenko v. Sabol*, 792 F. Supp. 2d 733, 740 (M.D. Pa. 2011) (noting that *Demore* emphasized that "most removal proceedings . . . rarely exceeded five months"); *Monestime*, 704 F. Supp. 2d at 458 (observing that the *Demore* Court "noted that five months is generally the upper limit for mandatory detention under § 1226(c)").

91. Ultimately, the *Black* court counseled that "courts hearing due process challenges to prolonged section 1226(c) detention should apply the *Mathews* framework to determine, case by case, whether and when due process requires that a particular detained noncitizen receive a bond hearing." 103 F.4th at 150-51.

Procedural Safeguards at Immigration Bond Hearing

92. An immigration bond hearing must include certain safeguards and meet certain standards for it to provide meaningful process for an individual subject to prolonged detention.

93. Specifically, when the *Mathews* test compels the conclusion that a bond hearing is necessary, the Second Circuit "require[s] the government to bear the burden of proving the need for continued detention," and further mandates that the government demonstrate that need with clear and convincing evidence. *Id.* at 155, 157. Absent such a burden allocation, "'the risk of erroneous deprivation' of a de-

tainee's liberty interest would remain unacceptably high." *Id.* at 155 (quoting *Mathews*, 424 U.S. at 335).

94. In reaching this conclusion, *Black* followed the First Circuit's reasoning in *Hernandez-Lara*, 10 F.4th 19, 30-32 (1st Cir. 2021). *See id.* at 155-56. The court observed that "noncitizens—detained or not—are not entitled to counsel in removal proceedings," such that "detained noncitizens often find themselves far from any community support that might help them to find representation." *Id.* at 156. Further, "detained noncitizens may have a much harder time preparing their cases because of difficulties in communicating with counsel and gathering evidence." *Id.* Finally, "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern." *Id.* (quoting *Hernandez-Lara*, 10 F.4th at 31). Consequently, "[r]equiring that detainees . . . prove that they are *not* a danger and *not* a flight risk—after the government has enjoyed a presumption that detention is necessary—presents too great a risk of an erroneous deprivation of liberty that has already been unreasonably prolonged." *Id.*

95. In the same vein, this circuit found it proper to require consideration of the petitioner's "ability to pay and alternatives to detention when setting any bond amount." *Id.* at 158 (citing risk of erroneous deprivation as "the focus of [the court's] concern"). With respect to alternatives to detention, "[a] neutral decisionmaker cannot fully evaluate the danger [one] poses to the community without first weighing the mitigating effect of [such] alternatives . . . ." *Cantor v. Freden*, 761 F. Supp. 3d 630, 638 (W.D.N.Y. 2025) (holding that "failing to consider whether al-

ternatives to detention might ameliorate any danger to the public posed by [the petitioner's] release clearly impacts the risk that he will be wrongly detained without any means of challenging the length of his detention"); *see also Beltran Marroquin v. Genalo*, No. 24-CV-06376 (MMG), 2025 WL 3241161, at *3-*4 (S.D.N.Y. Nov. 20, 2025) (observing that "the need for procedural due process protections—including considerations of alternatives to detention when determining whether [the] [p]etitioner can safely be released—is high at this stage of detention"); *G.F.F. v. Francis*, No. 25-CV-7368 (JGK), 2025 WL 3141735, at *6 (S.D.N.Y. Nov. 10, 2025) (noting that "[n]umerous courts in the Second Circuit have . . . concluded that due process requires that IJs consider alternatives to detention when evaluating a noncitizen's dangerousness); *M.P.L. v. Arteta*, No. 25-CV-5307 (VSB) (SDA), 2025 WL 2938993, at *6 (S.D.N.Y. Oct. 16, 2025) (same); *L.G.M. v. LaRocco*, No. 25-CV-2631 (PKC), 2025 WL 2173577, at *3 (E.D.N.Y. July 31, 2025) (same).

96. Numerous courts in this district have followed *Black* to order an individualized bond hearing for petitioners subject to prolonged § 1226(c) detention, requiring that the burden be on the government to prove the need for continued detention by clear and convincing evidence, as well as consideration of ability to pay and alternatives to detention when setting any bond amount. *See, e.g.*, *J.M.P. v. Arteta*, 804 F. Supp. 3d 387, 395 (S.D.N.Y. 2025); *M.P.L.*, 2025 WL 2938993, at *7; *Diaz v. Genalo*, No. 22-CV-3063, 2024 WL 4124756, at *6 (S.D.N.Y. Sept. 9, 2024).

97. Notably, an IJ need not be the adjudicator to conduct the bond hearing. *See L.G.M. v. LaRocco*, 788 F. Supp. 3d 401, 404 (E.D.N.Y. 2025) ("This Court's authority to hold the bond hearing is uncontested."). Federal courts, not immigration courts, "are the arbiters of constitutional rights such as those at issue in" habeas petitions. *Id.* at 405. When complex issues requiring "constitutional scrutiny" are brought to bear, the need for such scrutiny "outweighs any claimed efficiencies" of seeking bond before an IJ. *Id.* at 406 (noting that numerous bond hearing by IJs have been found "constitutionally lacking by district courts"); *see also Centeno-Martinez v. Jamison*, No. CV 25-3593, 2025 WL 3157711, at *3 (E.D. Pa. Nov. 12, 2025) (ordering that the reviewing court would "conduct the individualized bond hearing"); *Leslie v. Holder*, 865 F. Supp. 2d 627, 634-35 (M.D. Pa. 2012) (same); *Thaxter v. Sabol*, No. 14-02413, 2016 WL 3077351, at *3 (M.D. Pa. June 1, 2016) (same).

98. Indeed, contrary to the notion that an IJ conducting a bond hearing promotes administrative efficiency, recent actions by ICE attorneys and immigration judges during and after habeas court-ordered bond hearings have necessitated enforcement proceedings across the country, creating significant inefficiencies for the court and the parties, all while petitioners' unlawful detention continued. *See Pedroso de Oliveira v. Freden*, No. 6:25-CV-6663 2025 WL 3554686, at *1 (W.D.N.Y. Dec. 11, 2025) (granting motion to enforce where "the IJ wholly failed to follow the Court's directions to require Respondents to bear the clear and convincing evidence burden of proof at the bond hearing, nor did the IJ even attempt to consider alternatives to detention"); *Ma-*

thon v. Searls, 623 F. Supp. 3d 203, 208 (W.D.N.Y. 2022) (granting motion to enforce and ordering immediate release after the IJ did not hold DHS to his court-ordered burden of proof or properly consider alternatives to detention, and thus "failed to provide him with the bond hearing to which he was constitutionally entitled"); *Luciano-Jimenez v. Doll*, 543 F. Supp. 3d 69, 72 (M.D. Pa. 2021) (finding court-ordered bond hearing was not individualized and granting federal court hearing); *Santos v. Lowe*, No. 1:18-cv-1553, No. 2020 WL 4530728, at *3 (M.D. Pa. Aug. 6, 2020) (after court-ordered bond hearing for § 1226(c) prolonged detention claim, finding that "[m]echanistic reliance on factors that are common to all 1226(c) detainees will not suffice").

99. Consequently, absent immediate release pursuant to *Mapp*, this Court may conduct an individualized bond hearing for D.C. as the ultimate remedy sought.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

D.C.'s PROLONGED MANDATORY DETENTION VIOLATES THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

100. Petitioner hereby realleges and incorporates by reference the foregoing paragraphs.

101. D.C.'s prolonged incarceration without a bond hearing violates his procedural and substantive due process rights. *See Black*, 103 F.4th at 142 n.12 (acknowledging that the "procedural and substantive due process inquiries overlap"); *Jackson*, 406 U.S. at 738 (finding that "[d]ue process requires that the nature and duration of commitment bear some rea-

sonable relation to the purpose for which the individual is committed").

102. All three *Mathews* factors weigh heavily in D.C.'s favor.

103. First, the private interest implicated with mandatory immigration detention is "the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)). The Supreme Court has repeatedly held that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 425, (1979)). Most importantly, "[t]he longer the duration of incarceration, the greater the deprivation." *Velasco Lopez*, 978 F.3d at 852; *see also Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

104. For D.C., his prolonged detention is a substantial deprivation of his liberty that has led to the rapid deterioration of his physical and mental health. D.C. has been detained for nearly six months—the period the *Demore* Court contemplated as "generally the upper limit for mandatory detention under § 1226(c)." *Monestime*, 704 F. Supp. 2d at 458; *Black*, 103 F.4th at 150 ("*Demore* and *Zadvydas* imply, we agree, that any immigration detention exceeding six months without a bond hearing raises

serious due process concerns."); see *also Demore*, 538 U.S. at 530-31; *Reid*, 17 F.4th at 8; *Tkochenko*, 792 F. Supp. 2d at 740.

105. Moreover, the severity of D.C.'s medical and mental health conditions heighten the harm of each additional day he spends in detention: "[i]ncarceration amplifies his mistrust of staff and reinforces his persecutory beliefs," leading him to refuse life-saving medical treatment. Ex. B, Competency Evaluation 12; *see also id.* ("It is important to note that [D.C.] would likely have greater difficulty engaging in treatment in detention than in a community setting."). In this context, the "flexible" *Mathews* framework suggests that D.C.'s liberty interest—in being free from imprisonment and able to access the coordinated care he requires to treat his complex, life-threatening medical and mental health conditions—is especially significant. *Black*, 103 F.4th at 151.

106. The second *Mathews* factor—risk of erroneous deprivation of the private interest and probable value of additional safeguards—also weighs heavily in D.C.'s favor. Under § 1226(c), there is no independent opportunity to assess whether a detained individual poses a danger to the community or risk of flight. The only process—however informal—available to Petitioner is appealing to ICE to exercise its inherent prosecutorial discretion and release him from custody. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). D.C. has

submitted such a request, which ICE denied. *See* Ex. F, Release Requests and Correspondence with ICE. He has renewed that request; the renewed request has not yet been adjudicated. *See* Jessar Decl. ¶ 21. As a result, D.C. is detained without meaningful consideration as to whether he is dangerous or likely to abscond. *See, e.g.*, *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015), *cert. granted, judgment vacated*, 568 U.S. 1165 (2018) (noting that habeas petitioner had been detained for nearly six months even though "[n]o principled argument has been mounted for the notion that he is either a risk of flight or is dangerous"); *see also Black*, 103 F.4th at 153. The proposed procedural safeguard —an individualized hearing at which this Court or another neutral adjudicator may consider a range of factors related to dangerousness and flight risk and consider alternatives to detention—would significantly reduce the risk of erroneous deprivation of D.C.'s liberty.

107. The third *Mathews* factor also militates in favor of providing D.C. with a bond hearing, which will not harm the government's interests in preventing flight and danger to the community, reducing fiscal and administrative burdens, or promoting the broader public interest. *See Mathews*, 424 U.S. at 347 ("In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs[.]").

108. Providing a bond hearing will not undermine the government's interest in preventing flight and danger to the community because an adjudicator will as-

sess these risks in the hearing. *See Black*, 103 F.4th at 154. Nor will it be unduly burdensome for ICE to justify continued detention when an individual is dangerous or a flight risk, given its access to relevant sources of information. Finally, unnecessary prolonged detention does not serve the broader public interest—rather, it imposes substantial costs on society. *See Velasco Lopez*, 978 F.3d at 854 ("[T]he Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight. On the contrary, shifting the burden of proof to the Government to justify continued detention promotes the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose.").

109. Respondents have stripped D.C.—a sixty-two-year-old, cognitively-impaired man with severe medical and mental health conditions—of his liberty for nearly six months. DHS must now bear the burden of establishing by clear and convincing evidence that this ongoing deprivation of liberty is constitutionally permissible.

SECOND CAUSE OF ACTION

D.C. WARRANTS IMMEDIATE RELEASE UNDER *MAPP V. RENO* PENDING ADJUDICATION OF HIS HABEAS PETITION DUE TO EXTRAORDINARY CIRCUMSTANCES

110. Petitioner hereby realleges and incorporates by reference the foregoing paragraphs.

111. This Court has the authority to grant bail to habeas petitioners like D.C. pending consideration of their claims.

112. *Mapp* affirmed that the "inherent authority" of the federal courts "to release habeas petitioners" includes the power to release petitioners in immigration detention. 241 F.3 at 222. That inherent authority, the court explained, can only be limited by a clear congressional statement, absent which "the authority of the federal courts to admit to bail parties properly within their jurisdiction remains unqualified." *Id.* at 227; *see also Elkimya v. DHS*, 484 F.3d 151 (2d Cir. 2007) (clarifying that the REAL ID Act "did not qualify [the court's] inherent authority to admit to bail petitioners in immigration cases"); *accord Lopez v. Sessions*, No. 18 Civ. 4189, 2018 WL 2932726, at *15 (S.D.N.Y. June 12, 2018). The *Mapp* court found, moreover, that "general attitudes cobbled together from [immigration] laws of varying vintage and scope, rather than by specific statutory provisions," were insufficient to constitute such a qualification. *Id.* at 229.

113. The *Mapp* court further held that the inherent authority to grant bail should be exercised when "the habeas petition raises substantial claims [for relief] and [when] extraordinary circumstances make the grant of bail necessary to make the habeas remedy effective." *Id.* at 230. In determining whether release is warranted, a court considers whether the petition "raises substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective.'" *Id.* (quoting *Iuteri v. Nardoza*, 662 F.2d

159, 161 (2d Cir. 1981)); *see also Graham v. Decker*, 454 F. Supp. 3d 347, 358 (S.D.N.Y. 2020) (noting that "some courts applying *Mapp* also consider 'whether the petitioner has demonstrated a likelihood of success on the merits of his or her petition'" (quoting *Boddie v. New York State Div. of Parole*, No. 08 Civ. 9287, 2009 WL 1531595, at *1 (S.D.N.Y. May 28, 2009))).

114. As detailed *supra*, D.C. has raised substantial claims for relief, identifying violations of his constitutional rights. He has demonstrated a likelihood of success on the merits, providing evidence of his prolonged unconstitutional detention, his cognitive impairment, his intellectual disability, and serious mental health diagnoses and medical conditions. He has also provided evidence of his grave risk of harm if he remains detained, given his comorbidities.

115. Several decisions within this circuit support the conclusion that a petitioner's medical needs can constitute "extraordinary circumstances" warranting release under *Mapp*. *Coronel*, 449 F. Supp. 3d at 289 (finding that "severe health issues have been the prototypical but rare case of extraordinary circumstances that justify release pending adjudication of habeas"); *see also Ozturk v. Trump*, 783 F. Supp. 3d 801, 811 (D. Vt. 2025) (noting that the petitioner's "declining health in custody provide[d] another basis for finding extraordinary circumstances"); *Jovel v. Decker*, No. 20-CV-0308 (GBD) (SN), 2020 WL 1502038, at *4 (S.D.N.Y. Mar. 24, 2020), *report and recommendation adopted*, 2020 WL 1539282 (S.D.N.Y. Mar. 31, 2020) (finding that individuals in immigration detention at particular

risk of harm due to COVID-19 meet the "extraordinary circumstances" requirement under *Mapp*); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1953847, at *13-*14 (S.D.N.Y. Apr. 23, 2020) (same); *United States v. Nkanga*, 452 F. Supp. 3d 91 (S.D.N.Y. 2020) (granting bail in light of extraordinary circumstances including petitioner's multiple health issues); *Avendano Hernandez v. Decker*, 450 F. Supp. 3d 443, 446 (S.D.N.Y. 2020) (finding release warranted due to petitioner's medical conditions and high risk of serious injury or death in the event he contracted COVID-19); *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 2513468, at *7-*8 (S.D.N.Y. May 15, 2020) (finding extraordinary circumstances warranting release in case of petitioners with medical conditions placing them at a higher risk of severe illness or death from COVID-19).

116. Mental health concerns have also supported a grant of bail under *Mapp* in this circuit and under an analogous standard in the Third Circuit. *See Salgado v. Francis*, No. 25-CV-6524 (VEC), 2025 WL 2806757, at *6-*7 (S.D.N.Y. Oct. 1, 2025) (ordering release of transgender woman with severe mental health issues where "credible evidence demonstrate[d] that the proposed detention conditions would aggravate Petitioner's well-established mental health problems"); *S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (ordering release under *Mapp* to allow petitioner with Post-Traumatic Stress Disorder to "access . . . counseling to manage her symptoms"); *see also Jose B.R. v. Tsokaris*, No. CV 20-3347 (MCA), 2020 WL 2744586 at *13 (D.N.J. May 27, 2020) (finding extraordinary circumstances

under *Lucas v. Hadden*, 790 F.2d 365, 366 (3d Cir. 1986), for petitioner in immigration detention with schizophrenia-spectrum disorder who provided evidence of deteriorating mental health); *Kolawole O.T. v. Ahrendt*, 466 F. Supp. 3d 457, 472 (D.N.J. 2020), *appeal dismissed sub nom. Tomiwa v. Warden Bergen Cty. Jail*, No. 20-2643, 2020 WL 8461702 (3d Cir. Dec. 23, 2020) (finding same for petitioner with post-traumatic stress disorder, depression with anxiety and atypical psychosis).

117. D.C. is at grave risk of further decompensation and irrevocable damage to his health should he remain detained. As a cognitively-impaired person with severe mental health needs and life-threatening medical conditions, he falls squarely within the ambit of circumstances that warrant release in order to "make effective" the habeas relief he seeks. *See* Ex. C, Medical Records Review 4 ("Should he remain detained, [D.C.] is at high risk of serious harm and morbidity from uncontrolled diabetes and high blood pressure."). D.C. requires comprehensive medical and mental health care to stabilize his condition, including supportive psychotherapy and psychiatric treatment, all "approached with sensitivity to ensure collaboration." Ex. B, Competency Evaluation 11. Further, "[a]ddressing both his mental health and medical needs simultaneously is essential, as improvement in physical health through medication adherence may help alleviate some of his cognitive symptoms and enhance his overall ability to participate in his own care." *Id.* at 12. Yet detention "amplifies [his] mistrust of staff and reinforces his persecutory beliefs, making it challenging to develop a therapeutic alliance and par-

ticipate in care, especially given his cognitive difficulties." *Id.* Dr. Corral therefore recommends that he receive treatment in a community setting that could provide a "a more supportive atmosphere, making it easier to build trust and tailor interventions to his needs." *Id.* His social worker has identified appropriate treatment options in D.C.'s community. *See* Ex. D, Release Plan 2-3.

118. Release of D.C. is there called for under *Mapp*. Crucially, he is neither a flight risk nor a danger. He is sixty-two years old; his last criminal conviction is over a decade old. *See* Jessar Decl. ¶¶ 23, 39. He has resided in the United States for over forty-four years, has three U.S. citizen children, and has a robust release plan in place. *See id.* ¶¶ 23-24; *see also* Ex. D, Release Plan.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

1. Assume jurisdiction over this matter;
2. Enjoin Respondents from transferring the Petitioner outside the jurisdiction of the New York Field Office and the Southern District of New York pending the resolution of this case;
3. Order a stay of removal to retain the Court's jurisdiction while these proceedings are pending;
4. Under the Court's inherent powers as detailed in *Mapp v. Reno*, 241 F.3d 221, 230 (2d Cir. 2001), order Respondents to immediately release Petitioner pending adjudication of this Petition, under any appropriate conditions, to end the violations

of his due process rights and resulting grave harm he is suffering;

5. Declare that Petitioner's prolonged mandatory detention violates the Due Process Clause of the Fifth Amendment;
6. Issue a writ of habeas corpus ordering Respondents to release Petitioner or provide Petitioner, within eight (8) days, a constitutionally adequate, individualized hearing before this Court or another impartial adjudicator at which Respondents bear the burden of establishing by clear and convincing evidence that continued detention is justified and that no alternative to detention will suffice as to dangerousness and flight risk, and at which ability to pay is considered, and to immediately release Petitioner from custody on his own recognizance if such hearing is not provided;
7. In the alternative, issue an order to show cause directing the government to respond to this Petition within three (3) days, and hold a hearing within eight (8) days, pursuant to 28 U.S.C. § 2243;
8. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
9. Grant any other and further relief that this Court deems just and proper.

Dated: March 5, 206

Respectfully submitted,

/s/ JESSICA COFFRIN-ST. JULIEN

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Counsel for Petitioner

EXHIBITS

A. Declaration of Alec Jessar, Esq.

B. Competency Evaluation of D.C. by Dr. Magdalena Corral, with Dr. Corral's curriculum vitae

C. Medical Records Review by Dr. Jennifer Sugijanto, with Dr. Sugijanto's curriculum vitae

D. Release Plan by Ashley Guzman, D.C.'s Social Worker, with Ms. Guzman's curriculum vitae

E. Notice to Appear

F. Release Requests and Correspondence with ICE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-3224

CAROL WILLIAMS BLACK, PETITIONER-APPELLEE

v.

DIRECTOR THOMAS DECKER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ALEJANDRO MAYORKAS, SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, SHERIFF PAUL ARTETA, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ORANGE COUNTY, NEW YORK, RESPONDENTS-APPELLANTS

No. 22-70

KEISY G.M., PETITIONER-APPELLANT

v.

THOMAS DECKER, NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MERRICK B. GARLAND, UNITED STATES ATTORNEY GENERAL, ALEJANDRO MAYORKAS, RESPONDENTS-APPELLEES

DAVID L. NEIL, DEFENDANT-APPELLEE*

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Paul Arteta—the current Sheriff of Orange County—is automatically substituted in the caption for his predecessor in that office as a defendant in No. 20-3224. We further grant G.M.'s unopposed motion to abbreviate his name as "Keisy G.M." in this opinion. The Clerk of Court is directed to amend the case caption to conform to the above.

August Term, 2022
Argued: Jan. 5, 2023
Decided: May 31, 2024

OPINION

Before: CHIN and CARNEY, *Circuit Judges*.[†]

These tandem appeals arise from habeas petitions brought under 28 U.S.C. § 2241 by legal permanent residents Carol Williams Black, in No. 20-3224 (Schofield, *J.*), and by Keisy G.M., in No. 22-70 (Cronan, *J.*). As directed by 8 U.S.C. § 1226(c), the government detained Black and G.M. pending their removal proceedings: Black, for seven months, and G.M., for twenty-one months. Neither had a bond hearing when first detained or during detention. Section 1226(c) mandates detention for noncitizens who are charged with removability based on certain prior convictions or on allegations of involvement with terrorism. As grounds for habeas relief, Black and Williams each asserted that the prolonged detentions without any bond hearing violated their Fifth Amendment due process rights. The district court adjudicating Black's petition granted relief, and he was released; the district court adjudicating G.M.'s petition denied relief. (He was later released for pandemic-related reasons.) Because

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[†] Circuit Judge Rosemary S. Pooler, originally a member of this panel, passed away on August 10, 2023. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b).

each remains subject to possible detention, their appeals are not moot. On de novo review, we conclude that the constitutional guarantee of due process precludes a noncitizen's unreasonably prolonged detention under section 1226(c) without a bond hearing, and that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the proper framework for determining when and what additional procedural protections are due. In Black's case, we conclude that the district court properly required the government to show, at such a hearing, the necessity of his continued detention by clear and convincing evidence; it also correctly directed the IJ, in setting bond and establishing appropriate terms for potential release, to consider Black's ability to pay and alternative means of assuring appearance. We therefore affirm the district court's judgment granting habeas relief as to Black. As to G.M., we conclude that his detention had become unreasonably prolonged and accordingly reverse the district court's judgment denying habeas relief.

AFFIRMED, with respect to No. 20-3224, and REVERSED, with respect to No. 22-70.

CARNEY, *Circuit Judge*:

These tandem appeals arise from habeas petitions brought under 28 U.S.C. § 2241 by Carol Williams Black (in No. 20-3224) and by Keisy G.M. (in No. 22-70). Black and G.M. (together, "Petitioners") are two legal permanent residents ("LPRs") who were detained by the government for many months without a bond hearing under the authority of 8 U.S.C. § 1226(c), pending conclusion of their separate removal proceedings. Section 1226(c) directs that the government "shall detain" noncitizens who are charged with removability based on a prior conviction on specified criminal grounds or on allegations of involvement with terrorism. It makes no explicit provision for an initial or other bond hearing during the period of detention and places no limit on the duration of detention under its authority.

Black and Williams each sought habeas relief, asserting that the prolonged detentions by the government—Black, for seven months, and G.M., for twenty-one months—without any bond hearing violated their Fifth Amendment rights to due process. The district court adjudicating Black's petition granted him relief. *Black v. Decker*, No. 20-cv-3055 (LGS), 2020 WL 4260994, at *9-10 (S.D.N.Y. July 23, 2020). The district court adjudicating G.M.'s petition denied relief. *Keisy G.M. v. Decker*, No. 21-cv-4440 (JPC), 2021 WL 5567670, at *1-2, *13 (S.D.N.Y. Nov. 29, 2021).[1] The government appeals the district court's judgment granting Black's petition; G.M., for his part, appeals the district court's judgment denying his.

[1] G.M. was later released on grounds related to the COVID-19 public health emergency, by virtue of a nationwide injunction entered in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020). But the Ninth Circuit reversed the *Fraihat* order in October 2021. *Fraihat*, 16 F.4th 613, 647 (9th Cir. 2021). U.S. Immigration and Customs Enforcement ("ICE") is thus no longer barred by that injunction from detaining G.M., and section 1226(c), as we have noted, directs the detention of noncitizens in G.M.'s position. So far as our record reflects, ICE has not detained G.M. anew. Still, because ICE has not disclaimed its intent or the requirement to detain him, G.M. remains "threatened with[] an actual injury traceable to the [respondents] and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks omitted). Thus, G.M.'s appeal seeking a bond hearing continues to present a live controversy under Article III.

On de novo review, we conclude that a noncitizen's constitutional right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing. We further decide that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the proper framework for determining when and what additional procedural protections are due such a detainee. In Black's case, the district court properly required the government to show at such a bond hearing, by clear and convincing evidence, the necessity of his continued detention. It further correctly directed the immigration judge ("IJ"), in setting his bond and establishing appropriate terms for his potential release, to consider his ability to pay and alternative means of assuring appearance. As to Black, we therefore affirm the district court's judgment. As to G.M., we conclude that his detention had become unreasonably prolonged, and accordingly, we reverse.

BACKGROUND[2]

I. Factual and Procedural History

A. Carol Williams Black

Black is a native and citizen of Jamaica who was admitted to the United States as an LPR in 1983 at the age of twenty-one. He has lived here for the past forty years. Before his detention in 2019, he lived in Mount Vernon, New York, with his wife of almost ten years and his stepdaughter. He owned and ran a boat repair business and was the sole income provider for his family. He was able,

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[2] This factual statement is drawn from the evidence presented below, including the administrative materials before the IJs adjudicating Black's and G.M.'s cases. Any disputes are noted.

after working for ten years, to buy the home that he had been living in since 2007.

On December 4, 2019, ICE served Black with a Notice to Appear ("NTA") and took him into custody. The NTA charged him as removable under 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony conviction), and *id.* § 1227(a)(2)(E)(i) (child abuse, neglect, or abandonment), based on New York state convictions dating from 2000, when a jury convicted Black of sexual abuse in the first degree, *see* N.Y. Penal Law § 130.65(3), and endangering the welfare of a child, *see id.* § 260.10(1). Black was sentenced to and served concurrently five years' probation for each crime, completing his term in 2005.

ICE further determined that this criminal history made Black subject to detention under section 1226(c).[3] *See* 8 U.S.C. § 1226(c)(1)(B). During Black's seven-month detention, before he won habeas relief and was released on August 4, 2020, he appeared at seven master calendar hearings. At his fourth master calendar hearing, on March 16, 2020, the IJ denied his request for a change in custody status, found him to be ineligible for cancellation of removal, and denied his request for bond (and for a bond hearing).[4] At his seventh master calendar hearing, on June 8, 2020, the IJ adjourned proceedings to allow his counsel time to obtain documents supporting

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[3] The full text of section 1226(c) appears at note 9, *infra*.

[4] In his May 2020 written decision, the IJ explained that he "d[id] not need to address whether [Black] poses a danger to the community or if there is a risk of flight because [he] does not have jurisdiction to adjudicate the custody issue since [Black] is mandatorily detained under INA § 236(c)." Black App'x at 100 (citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and *Shanahan v. Lora*, 583 U.S. 1165 (2018)).

his then-pending application for asylum and withholding of removal. On June 20, 2023, the IJ ordered removal; Black's appeal to the BIA is currently pending.

In June 2020, Black filed an amended petition for habeas relief under 28 U.S.C. § 2241, contending primarily that his detention without a bond hearing, which by then had reached the six-month mark, violated due process. Applying a fact-specific multifactor test, the district court granted relief. *Black*, 2020 WL 4260994, at *7-9.[5] The court determined that the Constitution "entitled [Black] to an individualized bond hearing before an IJ" at which the government would bear the burden of "justify[ing] by clear and convincing evidence that [Black] poses a risk of flight or a danger to the community." *Id.* at *8-9. It required the IJ to consider Black's "ability to pay and the availability of alternative means of assuring his appearance" when setting a bond amount. *Id.* at *9. On remand, the IJ conducted the required hearing and ordered Black's release on a $15,000 bond.

B. <u>Keisy G.M.</u>[6]

G.M. was born in the Dominican Republic in 1988. In 2011, he entered the United States as an LPR, and has

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[5] The court considered: (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) the petitioner's asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime underlying his removal; (5) whether the immigration detention facility is different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner's detention is near conclusion. *See Black*, 2020 WL 4260994, at *7-9.

[6] G.M. moves to supplement the record on appeal with the BIA's December 2021 decision remanding his case to the IJ for consider-

mostly lived in the Bronx since then. In 2012, he was involved in a fight outside a restaurant in New York City; it led to state charges against him for robbery and possession of stolen property. He was released on bail during the criminal proceedings. In May 2015, he pleaded guilty to second-degree assault in connection with that incident and was sentenced to two years' imprisonment followed by three years of supervised release. In December 2016, after being released early on parole, G.M. began living with his mother to assist with her medical needs.

Four years later, on October 5, 2020, ICE arrested G.M. at his home and served him with an NTA charging him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) based on his 2015 guilty plea. Characterizing the crime as an aggravated felony, ICE determined that section 1226(c) required that G.M. be detained, and placed him in the Hudson County Correctional Facility ("HCCF"). Over the next several months, G.M. appeared at seven master calendar hearings after numerous adjournments, delays occasioned in part by the need for his newly retained counsel to prepare his application for deferral of removal under the Convention Against Torture ("CAT"). COVID-19 restrictions then in place at HCCF hampered preparation.

In March 2021, the IJ denied G.M.'s application for CAT deferral, but in December 2021, on appeal, the BIA remanded for further analysis of G.M.'s claims that he

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ation of his CAT deferral claims. The government similarly moves to supplement the record with (1) the IJ's June 2022 decision on remand, (2) a filing receipt of G.M.'s appeal to the BIA on July 5, 2022, and (3) documentation from DHS pertaining to G.M.'s release from custody. We grant both motions.

would likely be tortured if he was returned to the Dominican Republic. In June 2022, the IJ again denied CAT relief, and G.M. again appealed. Since then, both G.M. and the government have submitted further briefing to the BIA, but no decision has issued.

G.M. sought habeas relief in May 2021, after about seven months of detention, alleging that his continued detention without a bond hearing violated his due process rights. Using the same multifactor test that Judge Schofield applied in Black's case, the district court reached a different conclusion and in November 2021 denied G.M.'s petition. *G.M.*, 2021 WL 5567670, at *7-13. By that time, G.M. had been detained for thirteen months and twenty-four days.

In July 2022, G.M. was released under a nationwide injunction entered in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021).[7] He ultimately spent twenty-one months in detention, and never received a bond hearing.

II. The Government's Detention Authority Under 8 U.S.C. § 1226

Section 1226 of title 8 authorizes the government to detain a noncitizen "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a); *see also Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018) ("Section 1226(a) generally governs the process of arresting and detaining . . . aliens pending their

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[7] As noted above, *supra* note 1, the Ninth Circuit has since vacated the nationwide injunction that allowed G.M.'s release, *Fraihat*, 16 F.4th at 647, but as of this writing ICE has not returned him to detention.

removal.").[8] As the Court instructed in *Jennings*, "[s]ection 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien" pending a removal decision, and "'may release' an alien detained under § 1226(a) 'on bond . . . or conditional parole.'" 583 U.S. at 288 (ellipses in original) (quoting 8 U.S.C. § 1226(a)).

Under section 1226(c), however, noncitizens who have committed one of certain listed offenses or who have been identified by the government as involved in terrorist activities are subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(A)-(D). As mentioned above, this subsection specifies that the "Attorney General *shall* take into custody" any such noncitizen. *Id.* (emphasis added).[9] It

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[8] This opinion uses "noncitizen" rather than "alien" to refer to a "person not a citizen or national of the United States." *See* 8 U.S.C. § 1101(a)(3) (defining "alien"). *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103-04 (2009) (using "undocumented immigrant" instead of "illegal"). In quoted text, however, we retain the language used by the writer.

[9] Section 1226(c)(1) provides in full:

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without addresses and allows release in extremely limited circumstances: "only if the Attorney General decides . . . that release of the alien from custody is necessary for [witness protection purposes]." *Id.* § 1226(c)(1)-(2).

The Supreme Court has held that detention under section 1226(c) without an *initial* bond determination does not, on its face, violate the detainee's due process rights where detention is "for the limited period of . . . removal proceedings." *Demore v. Kim*, 538 U.S. 510, 531 (2003). In *Demore*, Hyung Joon Kim, an LPR who had been detained under section 1226(c) for six months, challenged the constitutionality of the statute, arguing that detention with "no determination that he posed either a danger to society or a flight risk" violated his due process rights. *Id.* at 514, 530-31. The Supreme Court disagreed. Finding that Congress was "justifiably concerned" that criminal noncitizens would "fail to appear for their removal hearings in large numbers," the Court held that Congress "may," consistent with due process restrictions on government power, "require that persons such as respondent be detained for the brief period necessary for their removal proceedings" without an initial bond hearing. *Id.* at 513-14.[10]

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regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c).

[10] The U.S. Department of Justice's Executive Office for Immigration Review ("EOIR") reported as of October 2023 that a removal decision is completed in 94% of "detained cases" within six months of the start of detention. Exec. Off. for Immigr. Rev., Adjudication Statistics: Percentage of DHS-Detained Cases Completed Within Six Months 1 (Oct. 12, 2023), available at https://www.justice.gov/eoir/page/file/1163631/download [https://perma.cc/KBY8-Y8X2]. EOIR counts a "detained case" as "complete" upon "initial

The Supreme Court has also ruled that section 1226(c) itself authorizes prolonged detention. Indeed, it has construed the statute, together with section 1226(a), to provide that detention "*must* continue 'pending a decision on whether the alien is to be removed from the United States.'" *Jennings*, 583 U.S. at 303 (emphasis in original) (quoting 8 U.S.C. § 1226(a)). And the text of section 1226(c) does not require a bond hearing after some predetermined period of detention: in *Jennings*, the Court rejected the Ninth Circuit's reading of section 1226 to include a six-month cap as "implausible," and warned that "there is no justification for" identifying such a time limit "without any arguable statutory foundation." *Id.* at 296-97, 311-12.

Read together, then, *Demore* and *Jennings* instruct that (1) due process does not require an *initial* bond determination for those detained under section 1226(c), and (2) section 1226's text cannot be construed to require a bond hearing after any particular fixed period of detention.

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case completion." *Id.* at 1 n.1. It defines "initial case completion" as "the first dispositive decision rendered by an immigration judge," including "an order of removal, relief, voluntary departure, termination, or other." Exec. Off. for Immigr. Rev., Statistics Yearbook Fiscal Year 2018, at 6 (2019), available at https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/GEY2-99CC]. This statement suggests that when a noncitizen is ordered removed but appeals that order, the case still counts as "complete" for the purpose of this statistic, even though the noncitizen remains detained pending a final decision on appeal. These are the circumstances faced by Petitioners. In some cases, noncitizens have waited in detention for more than four years without a decision, and without an individual bond determination—despite the distinct possibility that the proceeding will not culminate in removal. *See Reid v. Donelan*, 17 F.4th 1, 8 n.7 (1st Cir. 2021).

Critically, however, *Demore* and *Jennings* leave open the question whether prolonged detention under section 1226(c) without a bond hearing will *at some point* violate an individual detainee's due process rights. They also do not teach what procedures due process may require, and whether due process principles (as opposed to section 1226(c)'s terms) may properly be understood to call for a bright-line rule as to timing or in any other respect. Indeed, the Court—having reached a statutory decision —remanded *Jennings* to the Ninth Circuit for consideration of the constitutional arguments in the first instance. *Id.* at 312.[11] We now face the same questions.

DISCUSSION

We review de novo a district court's grant or denial of a habeas petition brought under 28 U.S.C. § 2241. *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020).

Black and G.M. agree that the government may detain noncitizens under section 1226(c) without an initial bond determination and that section 1226(c) applies to them. Both argue that their prolonged detentions without a bond hearing violated their due process rights. They urge that precedent supports adoption of a bright-line rule requiring a bond hearing after a section 1226(c) detention passes the six-month mark.[12]

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[11] Neither the Ninth Circuit nor the District Court for the Central District of California has yet ruled on the merits of the constitutional challenge. The most recent decision in the *Jennings* litigation is a remand from the Ninth Circuit instructing the district court "to follow . . . the Supreme Court's instructions in *Jennings*." *Rodriguez v. Barr*, No. 20-55770, 2021 WL 4871067, at *1 (9th Cir. Oct. 19, 2021).

[12] G.M. frames his arguments under both the procedural and substantive due process rubrics, arguing that his detention under sec-

The government counters that, while in "an extraordinary case" a section 1226(c) detainee may have grounds to bring an as-applied constitutional challenge to the statute, neither Black's nor G.M.'s appeal presents such a case. Black Gov't Br. at 25-33; G.M. Gov't Br. at 31-36. Further, in the government's view, to impose a bright-line rule requiring bond hearings after six months' detention as a constitutional matter would conflict with *Jennings* and *DeMore*.

We consider, first, whether a noncitizen's right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing. Concluding that it does, we then address how a court is to determine whether a noncitizen's detention has become so prolonged that such rights are fairly placed at issue. Finally, we address the procedures and standards applicable to Black's bond hearing.

I. A noncitizen's right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing.

The Supreme Court long ago held that the Fifth Amendment entitles noncitizens to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The Constitution establishes due process rights

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tion 1226(c) runs afoul of the Supreme Court's general instruction that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Because the procedural and substantive due process inquiries overlap, and because—as G.M. acknowledges—any distinction between the resulting remedies would be "largely academic in this case," G.M. Reply Br. at 17-18 n.6, we do not separately address substantive due process concerns.

for "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Accordingly, and as the Supreme Court recognized in *Zadvydas*, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. In light of the constitutional concerns identified by the Supreme Court and this Court in connection with the Executive's detention of noncitizens, and the authorities discussed below, we conclude that due process bars the Executive from detaining such individuals for an unreasonably prolonged period under section 1226(c) without a bond hearing.

In *Zadvydas*, for example, the Court heard a noncitizen's challenge to prolonged detention under 8 U.S.C. § 1231(a)(6). *Id.* at 682, 684-85.[13] Recognizing that the proceedings at issue were "civil, not criminal," and therefore "nonpunitive in purpose and effect," it pointed out that the government offered "no sufficiently strong special justification here for indefinite civil detention." *Id.* at 690. In response to the government's proffered justification of "preventing danger to the community," the Court explained that "[i]n cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." *Id.* at 691 (emphasis in original). It ultimately avoided the

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[13] Section 1231(a)(1)(A) allows the government ninety days to remove a noncitizen ("removal period") once a final removal order is issued. 8 U.S.C. § 1231(a)(1)(A). Section 1231(a)(6) authorizes detention beyond that removal period for certain categories of removable noncitizens, and places no explicit temporal limit on such a detention. *Id.* § 1231(a)(6).

constitutional challenge to section 1231(a)(6), however, by "constru[ing] the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682. Thus, it held that the "statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689.

Even in *Demore*, where the Court upheld the facial constitutionality of detention under section 1226(c) without a bond hearing, it did so while emphasizing the apparent brevity of detentions pending removal. 538 U.S. at 527-31. In concluding that such mandatory detention comported with substantive due process, the Court highlighted two key distinctions between section 1226(c) detention and section 1231(a)(6) detention, the detention authority at issue in *Zadvydas*.

First, it observed that the noncitizens in *Zadvydas*—having been ordered removed but still being detained in the United States—"were ones for whom removal was 'no longer practically attainable,'" depriving detention of "its purported immigration purpose" of facilitating removal. *Id.* at 527.

Second, the Court pointed out that "the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,'" while "the detention [in *Demore*] is of a much shorter duration." *Id.* at 528. It cited data presented by the government to the effect that, for 85% of section 1226(c) detainees, "removal proceedings are completed in an average time of 47 days and a median of 30 days," and that "[i]n the remaining 15% of cases, in which the alien appeals the decision . . . , appeal takes an average of four months, with a median time that is slightly shorter."[14] *Id.* The Court's emphasis on this "limited" period of detention strongly suggests a view that, while it found detention without an initial bond determination to be facially constitutional, "indefinite" and "potentially permanent" detention without a bond hearing would violate due process. *Id.* at 529-31.

More than a decade later, this Court applied *Zadvydas* and *Demore* to a challenge to prolonged detention under section 1226(c) without a bond hearing—the same type of challenge we now address. In *Lora v. Shanahan*, Alexander Lora was detained under section 1226(c) based on a drug-related conviction. 804 F.3d 601, 605 (2d Cir. 2015). After four months in detention, he sought habeas relief, challenging on due process grounds his continued detention without a bond hearing. *Id.* This Court, heeding the *Demore* Court's "[e]mphas[is] [on] the relative brevity" of section 1226(c) detention "in most cases," read Supreme Court precedent as having "made clear that the indefinite detention of a non-citizen raises serious constitutional concerns." *Id.* at 604, 606 (internal quotation marks and alterations omitted). We avoided those concerns, however, and followed *Zadvydas* by reading into section 1226(c) "an implicit temporal limitation" requiring that detainees be afforded a bond hearing after six months. *Id.* at 606.

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[14] It appears that in *Demore* the government incorrectly informed the Court and that "[d]etention normally lasts twice as long as the Government then said it did." *Jennings*, 583 U.S. at 343 (Breyer, *J.*, dissenting); *see also* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, Supreme Ct. of the U.S. at 1 (Aug. 26, 2016), available at https://on.wsj.com/2sUWIGk [https://perma.cc/U3KR-C56W] (letter "to correct and clarify statements the government made in its submissions in *Demore v. Kim* . . . which this Court relied upon in its opinion").

The Supreme Court's subsequent decision in *Jennings* invalidated *Lora*'s statutory approach. *See Shanahan v. Lora*, 583 U.S. 1165 (2018). But in doing so, the Court did not answer the question whether due process places *any* limits on the government's detention authority under section 1226(c).[15] The Court's reversal of our statutory holding in *Lora* did not resolve the constitutional concerns we expressed in that case.

Our post-*Jennings* decision in *Velasco Lopez v. Decker*, concerning the government's discretionary detention authority under section 1226(a), highlighted the gravity of these concerns.[16] Velasco Lopez was taken into detention under section 1226(a). 978 F.3d at 846-47.

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[15] As already noted with respect to *Jennings*, *supra* note 11, neither this Court nor the Ninth Circuit has since had occasion to address the due process challenges that the Supreme Court left open in *Jennings* and *Lora*.

[16] Section 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a).

Three and a half months later, he had an initial bond hearing, but bore the burden of proving that he was neither a flight risk nor dangerous. *Id.* at 847, 849 (citing *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006)). He had another bond hearing five months after the first, again unsuccessfully bearing the burden of proof. *Id.* at 847. After fourteen months in detention, he sought and was granted habeas relief. *Id.* at 847-48.

On appeal, we decided his petition on constitutional grounds. Recognizing the *Jennings* Court's admonition that section 1226(a) may not be read as implicitly imposing any specific procedural protections, *id.* at 851, we concluded that "Velasco Lopez's prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process," *id.* at 855. Notably, we rejected the government's contention that *Jennings* foreclosed all relief for Velasco Lopez, observing that the Court in *Jennings* had "expressly declined to reach the constitutional issues." *Id.* at 857.

Accepting the government's assertion that the Constitution "provides no basis for requiring bond hearings whenever the detention of a criminal noncitizen under § 1226(c)" exceeds any set duration, G.M. Gov't Br. at 31, we nonetheless read *Zadvydas*, *Demore*, *Jennings*, and *Velasco Lopez* to suggest strongly that due process places *some* limits on detention under section 1226(c) without a bond hearing. We cautioned accordingly in *Lora* (as mentioned above) that "serious constitutional concerns" would arise absent "some procedural safeguard in place for immigrants detained for months without a hearing." 804 F.3d at 614. The Constitution does not permit the Executive to detain a noncitizen for an unreasonably prolonged period under section 1226(c) without a bond hearing; at some point, additional procedural protections —like a bond hearing—become necessary.

II. We evaluate procedural due process challenges to prolonged section 1226(c) detention under the *Mathews* framework.

When do additional procedural protections become constitutionally necessary? We begin by surveying other courts' approaches to this question post-*Jennings*. We then conclude that the *Mathews* framework applies generally, and will govern in individual cases.

A. <u>Courts' Approaches Post-*Jennings*</u>

As described, neither the Supreme Court nor this Court has squarely decided a due process challenge to an individual's prolonged detention under section 1226(c). After *Jennings*, courts have taken a variety of approaches.

1. The S.D.N.Y. Approach

Courts in the Southern District of New York have used a multifactor, case-by-case analysis to determine whether the section 1226(c) petitioner's detention has become "unreasonable or unjustified." *E.g.*, *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018); *see also Jack v. Decker*, No. 21-cv-10958, 2022 WL 4085749, at *10 (S.D.N.Y. Aug. 19, 2022) (collecting cases taking this approach). In *Cabral*, Judge Koeltl highlighted that the *Jennings* court "left open the possibility that individual detentions without bond hearings might be so lengthy as to violate due process" and stressed the *Jennings* Court's emphasis on "the flexible nature of the Due Process Clause." 331 F. Supp. 3d at 260. Observing that courts in the district had taken a "case-by-case approach to petitions for bail hearings," and rejecting the argument that the Constitution mandates a hearing in every case at six months, he identified the factors that had been considered as follows:

(1) the length of time the petitioner has been detained;

(2) the party responsible for the delay;

(3) whether the petitioner has asserted defenses to removal;

(4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable;

(5) whether the detention facility is meaningfully different from a penal institution for criminal detention;

(6) the nature of the crimes committed by the petitioner; and

(7) whether the petitioner's detention is near conclusion.

Id. at 261 (spacing altered).

2. The Third Circuit Approach

Since *Jennings*, the Third Circuit is the only federal court of appeals to have squarely ruled on the questions posed here.[17] *See German Santos v. Warden Pike County*

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[17] In 2021, the First Circuit addressed the appeal of a class of section 1226(c) detainees who argued that "all persons detained under section 1226(c) have a constitutional right to a hearing concerning the reasonableness of their continued detention after they have been detained longer than six months." *Reid*, 17 F.4th at 7. In rejecting this contention, the *Reid* court acknowledged "that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention under section 1226(c)," *id.* (in-

Corr. Facility, 965 F.3d 203 (3d Cir. 2020). There, petitioner German Santos was detained under section 1226(c) for over two-and-a-half years without a bond hearing, and sought habeas relief on due process grounds. *Id.* at 207-08.

Like the S.D.N.Y. courts, the Third Circuit "explicitly declined to adopt a presumption of reasonableness or unreasonableness of any duration." *Id.* at 211. Instead, it undertook a "highly fact-specific inquiry" that considered four factors: "the duration of detention," "whether the detention is likely to continue," "the reasons for the delay," and "whether the alien's conditions of confinement are meaningfully different from criminal punishment." *Id.* at 210-11 (internal quotation marks and alterations omitted). Applying these factors, the court concluded that German Santos's detention had become unreasonably long and ordered a bond hearing at which the government must justify continued detention by clear and convincing evidence. *Id.* at 212-14.

3. The Velasco Lopez *Approach*

Our October 2020 decision in *Velasco Lopez* bears on our determination here. As discussed, *Velasco Lopez*

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ternal quotation marks and alterations omitted), but did not address when and under what circumstances additional procedural protections are due.

The Fifth Circuit, in an unpublished opinion, also rejected a noncitizen's constitutional challenge to his continued detention under section 1226(c). In doing so, it focused instead on the statutory text, which as discussed above allows release in only extremely limited circumstances. *Wekesa v. United States Att'y*, No. 22-10260, 2022 WL 17175818, at *1 (5th Cir. Nov. 22, 2022). One panel member wrote in dissent that he "would instead hold that Wekesa's prolonged detention without a bond hearing implicates due process protections and must be analyzed further." *Id.* at *2 (Dennis, *J.*, dissenting).

dealt with a Deferred Action for Childhood Arrivals recipient's challenge to his prolonged detention under the government's discretionary section 1226(a) authority. 978 F.3d at 847. We identified the "dispositive" issue there as "whether Velasco Lopez's ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Id.* at 851.

We held that the three-factor balancing test established in *Mathews*, 424 U.S. at 335, applied.[18] *See Velasco Lopez*, 978 F.3d at 851. The Supreme Court in *Mathews* identified three factors bearing on the constitutional need for procedural protections: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Applying these factors to Velasco Lopez's section 1226(a) detention, we determined that the district court "appropriately addressed the [asserted due process] violation by ordering a new hearing at which the Government was called upon to justify continued detention." *Velasco Lopez*, 978 F.3d at 855.

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[18] In *Mathews*, the Supreme Court considered whether due process "requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." 424 U.S. at 323. It concluded that an evidentiary hearing was not required before termination of disability benefits and that the existing administrative procedures comported with due process. *Id.* at 349.

B. The *Mathews* framework applies.

Here, we conclude that due process challenges to prolonged detention under section 1226(c) should also be reviewed under *Mathews*. Many courts have applied the *Mathews* factors, as we did in *Velasco Lopez*, to determine what process is due to noncitizens in removal proceedings. *Velasco Lopez*, 978 F.3d at 851; *see, e.g.*, *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203-07 (9th Cir. 2022) (collecting cases that applied *Mathews* to determine process due to section 1226(a) detainees, and then assuming without deciding that *Mathews* applied to petitioner); *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (applying *Mathews* to conclude that due process did not require additional procedural protections for section 1226(a) detainee); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27-28, 41 (1st Cir. 2021) (applying *Mathews* and concluding that government must prove that section 1226(a) detainee poses a danger to the community or a flight risk); *German Santos*, 965 F.3d at 213 (applying *Mathews* and concluding that at ordered bail hearing, government must show by clear and convincing evidence that section 1226(c) detainee should stay detained); *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 225 (3d Cir. 2018) (applying *Mathews* to identify due process requirements for noncitizen detained pursuant to ICE's section 1231 authority).[19]

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[19] The statutory holding in *Guerrero-Sanchez*—that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (i.e., 180 days) of custody," *Guerrero-Sanchez*, 905 F.3d at 226—was later abrogated by the Supreme Court in *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 576 (2022). *Arteaga-Martinez*, however, dealt only with whether the text of section 1231(a)(6) can be read to require, after six months of detention, a bond hearing at

The Supreme Court has also, in other contexts, applied *Mathews* to examine the adequacy of procedures provided to individuals in custody, including noncitizens legally present in the United States. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (applying *Mathews* to assess whether due process entitled enemy combatant to evidentiary hearing to contest the basis for his detention); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (observing that *Mathews* governs evaluation of noncitizen's claim that she was denied due process at her exclusion hearing); *Addington v. Texas*, 441 U.S. 418, 425-33 (1979) (observing that *Mathews* applies to assess adequacy of procedural safeguards for people subject to civil commitment).[20]

As the Ninth Circuit put it, *Mathews* "remains a flexible test," and takes account of individual circumstances. *Rodriguez Diaz*, 53 F.4th at 1206. It allows for what might appear to be "conflicting outcomes." *Id.* Applying *Mathews* comports with the Supreme Court's guidance in *Jennings* that "'due process is flexible,' . . . and . . . 'calls for such procedural protections as the particular situation demands.'" 583 U.S. at 314 (alteration omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). And it can account for those concerns that the

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which the government bears the burden of proof. *See id.* It said nothing about the applicability of the *Mathews* framework to a *constitutional* challenge to prolonged detention under section 1231(a)(6), and the Court remanded the case for consideration of the constitutional claims in the first instance. *Id.* at 583. No further decisions in that litigation have been reported.

[20] *But see Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002) (stating, in due process challenge to sufficiency of property forfeiture notice, that "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

S.D.N.Y. and the Third Circuit have considered when deciding when detention has become unreasonably prolonged, and the detainee entitled to a bond hearing.

Thus, *Mathews* provides the proper framework to assess Black's and G.M.'s respective due process challenges.

The government offers three reasons not to apply the *Mathews* framework here. We find none persuasive. First, it contends that *Velasco Lopez* does not govern. It stresses that Velasco Lopez was detained under section 1226(a), rather than section 1226(c). Because he was already entitled to a bond hearing, the government asserts, his challenge focused not on the threshold need for a hearing but rather on whether the hearing procedures utilized were satisfactory. *See Velasco Lopez*, 978 F.3d at 851-54.

None of this suggests to us that *Mathews* should not apply to Petitioners' claims here. That *Velasco Lopez* dealt with section 1226(a) detention means only that the case is not directly binding here, not that its reasoning is irrelevant.[21] As to *Velasco Lopez*'s discussion of the differences between detention under section 1226(a) and under section 1226(c), that discussion followed the Court's determination that the *Mathews* framework governed the challenge. We discussed those differences, in fact, as part of our analysis of the first and second *Mathews* factors. *See id.* So that observation carries little persuasive weight.

[21] And even so, the dispositive issue is the same: as remarked earlier, we phrased it as "whether Velasco Lopez's ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Velasco Lopez*, 978 F.3d at 851.

Second, the government argues that *Demore* applies directly here and forecloses our application of *Mathews*. But we do not read *Demore* so broadly. *Demore* upheld the government's authority under section 1226(c) to detain noncitizens without an initial bond hearing "for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513, 531. It said nothing about whether due process may *eventually* require a hearing. If *Demore* had, in fact, foreclosed the due process challenge now before us, the *Jennings* Court would have had no reason to remand to the Ninth Circuit "to consider . . . in the first instance" the detainees' argument that "[a]bsent . . . a bond-hearing requirement, . . . [section 1226(c)] would violate the Due Process Clause of the Fifth Amendment." *Jennings*, 583 U.S. at 291, 312.

Third, the government posits that "the *Mathews* framework does not necessarily apply simply because a case involves a procedural due process claim." Black Gov't Reply Br. at 17-18. It seeks support in the observation that "the Supreme Court has not referred to the *Mathews* balancing test in any case involving a challenge to immigration detention—including *Demore*—since [*Landon*]," G.M. Gov't Br. at 27-28. Largely for the reasons already discussed, however, this contention, too, fails. *Demore* did not present a due process challenge of the sort we now address. And the absence of a *Mathews* reference in any immigration detention decision since *Landon* means little when, so far as we can see, the Court has not had any subsequent occasion to address such a constitutional challenge at all.[22] We

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[22] *Demore* ruled on a due process challenge to the facial constitutionality of section 1226(c); *Zadvydas* and *Jennings* were decided on statutory grounds.

agree with the government that not all procedural due process challenges require courts to apply the *Mathews* framework. *See Dusenbery*, 534 U.S. at 167-68. But the *Mathews* framework is apt for Petitioners' challenges.

As a final note, we find it troubling that the government offers no alternative framework for application here. Rather, it states only that "in an extraordinary case, a noncitizen detained under § 1226(c) may have grounds to bring an as-applied challenge asserting that his detention is unconstitutional," and then summarily concludes that Black's and G.M.'s appeals "present[] no such case." G.M. Gov't Br. at 31; *see also* Black Gov't Br. at 25. In our view, these appeals raise precisely such as-applied challenges, and are properly assessed under *Mathews*.

In adopting the flexible *Mathews* framework to assess, case by case, whether an individual's prolonged section 1226(c) detention violates due process, we also join the First and Third Circuits in rejecting a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention—in the context of a Congressional mandate, in the immigration context, to detain. *See Reid v. Donelan*, 17 F.4th 1, 7-9 (1st Cir. 2021); *German Santos*, 965 F.3d at 211. More broadly, we, too, "explicitly decline[] to adopt a presumption of reasonableness or unreasonableness of any duration" of detention. *German Santos*, 965 F.3d at 211.

Demore and *Zadvydas* imply, we agree, that any immigration detention exceeding six months without a bond hearing raises serious due process concerns.[23] We

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[23] Black argues that we should now simply adopt as law the constitutional analysis motivating our statutory ruling in *Lora* and hold that section 1226(c) detention beyond six months, without a

nevertheless conclude that the Supreme Court's pronouncements in this context do not support imposing a bright-line rule as a matter of constitutional law.

The Supreme Court's jurisprudence regarding the government's authority to detain removable noncitizens under 8 U.S.C. § 1231(a)(6), while not binding here, is instructive. In *Zadvydas*, the Supreme Court recognized a "presumptively reasonable period of detention" of "six months," and required that beyond this period, if "there is no significant likelihood of removal in the reasonably foreseeable future, the Government . . . respond with evidence sufficient to rebut that showing" to justify continued detention. 533 U.S. at 701. This was the closest the Court has come to adopting a bright-line rule.

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bond hearing, per se violates a detainee's due process rights. G.M. argues similarly that, under *Lora*, a noncitizen's detention is likely to become unreasonable at the six-month mark. In *Lora*, we read into section 1226(c) "an implicit temporal limitation," "in order to avoid serious constitutional concerns." *See* 804 F.3d at 606. We read *Zadvydas* and *Demore* to "suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention." *Id.* at 615. *Zadvydas* was explicit that six months was a "presumptively reasonable period of detention" in the context of post-removal-period detention under section 1231(a)(6). 533 U.S. at 700-01. Much like our holding in *Lora*, the Supreme Court's statutory holding in *Zadvydas*, it explained, was motivated by constitutional concerns. *See id.* (describing Congress as "previously doubt[ing] the constitutionality of detention for more than six months"). Similarly, although the *Demore* Court upheld the facial constitutionality of Kim's prolonged detention without a bond determination under section 1226(c), it also stated that such detention was authorized only for the "limited period of his removal proceedings." 538 U.S. at 531. Kim himself had already been detained for six months, but the length of his detention was not at issue—only "the constitutionality of § 1226(c) itself." *Id.* at 514, 530-31.

And *Jennings*, while also decided on statutory grounds, similarly suggests that a bright-line rule would be inappropriate in the constitutional context. The Court's remand order cautioned that "[d]ue process . . . calls for such procedural protections *as the particular situation demands*." 583 U.S. at 314 (emphasis added) (internal quotation marks omitted).

Here, too, the flexible due process analysis counsels against establishing a bright-line rule. Instead, courts hearing due process challenges to prolonged section 1226(c) detention should apply the *Mathews* framework to determine, case by case, whether and when due process requires that a particular detained noncitizen receive a bond hearing.

III. Due process entitled Black and G.M. to individualized bond hearings to determine whether their continued detentions were justified.

Turning to Black's and G.M.'s claims, we evaluate their respective circumstances under the *Mathews* factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

A. <u>Their Private Interests</u>

In both cases, "the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851 (citing *Hamdi*, 542 U.S. at

529). As we have previously observed, "[c]ase after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). True, in *Velasco Lopez*, we contrasted section 1226(a) detention with section 1226(c) detention, observing that "[t]he deprivation that Velasco Lopez experienced was not the result of a criminal adjudication." *Id.* And Petitioners' detentions in some sense were "the result of a criminal adjudication," since a conviction was the premise for applying section 1226(c). But each had served his entire sentence. And their detentions did not arise from new or unpunished conduct.

Moreover, much like someone detained under section 1226(a), Black and G.M. had "no administrative mechanism by which [they] could have challenged [their] detention on the ground that it reached an unreasonable length." *Id.* at 852. In approving detention for the pendency of removal proceedings, *Demore* was careful to emphasize the relatively short duration of section 1226(c) detention, stressing data showing that detention under section 1226(c) lasts roughly a month and a half in 85% of cases, and four months where the noncitizen chooses to appeal. *See Demore*, 538 U.S. at 529. Both Petitioners here were detained for far longer, and their liberty interests more seriously infringed.

In addition, the private interests of both Petitioners were seriously affected by their prolonged detention. Black's seven-month-long detention led unsurprisingly to serious financial difficulties for his family. He was the sole income provider before his detention; he helped keep up their mortgage payments; and he cared for his wife as she experienced ongoing health issues. Similarly, G.M.'s family relied on him for financial support, and his mother counted on him for help in managing her medical conditions. G.M. is a father to three young children, two of whom were at his home when he was arrested by ICE. His third child was born while he was in ICE custody; when he filed his habeas petition, he had yet to meet her. G.M. also experienced his own health difficulties (in part leading to his *Fraihat* release), and his legal preparations were significantly delayed by COVID-19 restrictions at his detention facility. Many of these difficulties persisted throughout G.M.'s twenty-one-month detention—a detention that outstripped by two months his nineteen-month incarceration for the underlying assault.

For these reasons, we conclude that the first *Mathews* factor weighs heavily in favor of Black and G.M.

B. <u>The Risk of an Erroneous Deprivation of Their Interests and the Probable Value of Additional Procedural Safeguards</u>

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. It, too, weighs heavily in favor of Black and G.M. The only interest to be considered at this part of the *Mathews* analysis is that of the detained individuals—not the government. *See Hamdi*, 542 U.S. at 530. Here, the almost nonexistent procedural protections in place for section 1226(c) detainees markedly increased the risk of an erroneous deprivation of Petitioners' private liberty interests.

At the threshold, two general observations are in order with respect to section 1226(c) detention. First, the "procedures used" for section 1226(c) detainees are very few. *Mathews*, 424 U.S. at 355. They include no mechanism for a detainee's release, nor for individualized review of the need for detention. The only procedural protection in place is the *Joseph* hearing, at which noncitizens can contest whether they in fact committed a crime that makes them subject to mandatory detention. *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Even in the context of Velasco Lopez's section 1226(a) detention, where he received two bond hearings at which he bore the burden of proof, we concluded that "the procedures underpinning [his] lengthy incarceration markedly increased the risk of error." *Velasco Lopez*, 978 F.3d at 852. Section 1226(c) detainees receive even less procedural protection, and the risk of erroneous deprivation is correspondingly greater.

Further, as we remarked with concern in *Lora*, section 1226(c)'s broad reach means that many noncitizens are detained "who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation at such time as they are able to present them." 804 F.3d at 605. Section 1226(c) sweeps in people convicted of many nonviolent offenses, *see id.* at 616, and does not take into account when the prior crime was committed, suggesting that the prior conviction may well be a poor proxy for a finding of dangerousness.[24]

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[24] As Justice Breyer once observed, section 1226(c) detainees "may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of 'moral turpitude' such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person." *Nielsen v. Preap*, 586 U.S. 392, 430 (2019) (Breyer, *J.*, dissenting).

These concerns were vindicated in the years after we decided *Lora*: Before *Jennings* vacated *Lora* in 2018, data showed that 62% of section 1226(c) detainees given bond hearings under *Lora* were released, confirming the absence in many cases of a sound justification for detention.[25] Similarly, in the First Circuit, where the district court in *Reid v. Donelan* had ordered bond hearings for a class of section 1226(c) detainees, almost half of those who had bond hearings were ordered released, having been found not to pose a danger or a flight risk. *See Reid*, 17 F.4th at 18 (Lipez, *J.*, dissenting).

It is in this context that we consider Black's and G.M.'s respective circumstances under the second *Mathews* factor.

In Black's case, no doubt remains that these minimal procedures led to an unwarranted detention. For the almost twenty years since his criminal conviction in March 2000, he led a peaceful life, helping to support his family. When he ultimately had the bond hearing ordered by the district court, he was released because the government could not justify his continued detention. As to Black, therefore, rather than worrying of a "risk" of erroneous deprivation, we can be virtually certain that his prolonged detention was unjustified.

In G.M.'s case, the record appears to show that for the four years after he completed his sentence (and while on bail pending the criminal proceedings), he led a lawful life. When, in 2014, G.M.'s roommate was mur-

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[25] *See* Vera Inst. of Just., *Analysis of* Lora *Bond Data: New York Immigrant Family Unity Project (NYIFUP) October 28, 2015-July 31, 2016*, at 1 (2016), available at https://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf [https://perma.cc/7FEW-BBYR].

dered in front of G.M. and his family, G.M. assisted law enforcement with the investigation and eventually testified at the trial of the murderer. During his four post-release years of freedom, he maintained steady employment and helped to provide for his family. And since his *Fraihat* release, no further criminal issues involving him have been brought to this Court's attention. Taken together with the general concerns noted above, G.M.'s circumstances similarly suggest a high likelihood that he was subject to an erroneous deprivation of liberty as his section 1226(c) detention was prolonged.

In the absence of any meaningful initial procedural safeguards, it appears to us that almost *any* additional procedural safeguards at some point in the detention would add value. The most obvious of these—and that sought by Petitioners—would be an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight. As borne out by the bond hearings held under our decision in *Lora*, we expect that many detained noncitizens would be released after a bond hearing conducted to satisfy their due process protections.

We therefore conclude that the second *Mathews* factor, too, weighs heavily in favor of Black and G.M.

C. The Government's Interest

The third *Mathews* factor considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The government has identified two primary interests in support of unlimited mandatory detention: (1) ensuring the noncitizen's appearance at proceedings, and (2) protecting the community from noncitizens who have been involved in crimes that Congress has determined differentiate them from others. These interests are legitimate and their importance well-established. *See Demore*, 538 U.S. at 518-21, 527-28 (noting that section 1226(c) detention serves these dual purposes).

The government contends that these concerns persist unaltered until the noncitizen's removal proceedings are complete. But the additional procedural safeguards we would allow here under *Mathews* do nothing to undercut those interests. At any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger to the community, as IJs routinely do for other noncitizen detainees. *See, e.g.*, 8 U.S.C. § 1226(a). And while the government's legitimate interests justify a relatively short-term deprivation of liberty, *Demore*, 538 U.S. at 513, the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need.

Just as in *Velasco Lopez*, here, too, "the Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight." 978 F.3d at 854. To require that the Government justify continued detention "promotes the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.* Where the noncitizen poses no danger and is not a flight risk, all the government does in requiring detention is "separate[] families and remove[] from the community breadwinners, caregivers, parents, siblings and employees." *Id.* at 855; *see also Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (observing that "any amount of actual jail time . . . has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration" (internal quotation marks and alterations omitted)); *Mathews*, 424 U.S. at 347 (instructing that "the public interest" drives analysis of the third factor).

Both cases here illustrate this effect. Black was separated from his family, who relied on him as the sole income provider. G.M. lived peacefully with his mother, assisting with her medical needs while helping care for his two sons. By detaining them for many months without an individualized assessment, the government eliminated vital support for Petitioners' families and, potentially, served no public interest.

The government also argues that the "fiscal and administrative burdens" of additional bond hearings would strain the immigration adjudication system yet provide little additional value. But just as the "burdens" argument failed to convince us in *Velasco Lopez*, we are not convinced here. Certainly, having to do something instead of nothing imposes an administrative and fiscal burden of some kind. But the Department of Justice reported an average cost of detaining noncitizens, in 2019, of $88.19 per prisoner per day.[26] Other estimates have placed the cost as high as $134 per day. *See Velasco Lopez*, 978 F.3d at 854 n.11 (citing Dep't of Homeland Security, U.S. Immigration and Customs Enforcement Budget Overview 14 (2018)). So, retaining and housing detainees imposes substantial costs as well. And, as far

[26] Off. of Pub. Affairs, Dep't of Just., *Departments of Justice and Homeland Security Release Data on Incarcerated Aliens* (Oct. 16, 2020), available at https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-release-data-incarcerated-aliens [https://perma.cc/68NY-GDLM].

as we can tell, ICE may readily access the records of other law enforcement agencies for information bearing on its case for detention where necessary. *See* 8 U.S.C. § 1229a(c)(3)(B) (listing the various types of records that the government may reference in proving a criminal conviction for removal proceedings); *Velasco Lopez*, 978 F.3d at 853, 855 (observing that the government has "computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities," and, for information not already at its fingertips, "broad regulatory authority to obtain it"). We expect that the additional resources that the government will need to expend to justify continued detention at bond hearings will be minimal—and will likely be outweighed by costs saved by reducing unnecessary detention. The government has therefore not substantiated its administrative burden argument sufficiently for it to weigh much against Petitioners' liberty interests.

For these reasons, we conclude that this third factor, too, favors Petitioners.

* * *

Thus, applying the *Mathews* factors, we conclude that due process entitled Black and G.M. to individualized bond hearings by an IJ once their detentions became unreasonably prolonged.

IV. In the hearing it required for Black, the district court properly placed the burden on the government to justify Black's continued detention by clear and convincing evidence and directed the IJ to consider Black's ability to pay and alternatives to detention.

In Black's case, in addition to ordering a bond hearing, the district court held that "[t]he burden at the bond hearing is on the Government to justify by clear and convincing evidence that Petitioner poses a risk of flight or a danger to the community," and that "the IJ must . . . consider Petitioner's ability to pay and the availability of alternative means of assuring his appearance." *Black*, 2020 WL 4260994, at *9. The government challenges each of these rulings, and we now address them.[27]

In this, the *Mathews* factors again serve as our guide. Our analysis above of the first and third factors applies with equal force to these questions. We elaborate briefly on the second *Mathews* factor—the risk of erroneous deprivation and the probable value of additional procedural safeguards—in evaluating the specific procedures that will be required at Black's bond hearing, should one again be needed. *Mathews*, 424 U.S. at 335. We conclude that the district court properly directed the government to justify Black's continued detention by clear

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[27] G.M., too, asks this Court to "clarify" on remand to the district court that the government bears the burden of justifying G.M.'s continued detention by clear and convincing evidence, and that the IJ must consider his ability to pay and alternatives to detention. G.M. Br. at 56-59. As the government correctly points out, however, because the district court in G.M.'s case denied him a bond hearing, it never reached the issue of what procedural requirements would follow. *See G.M.*, 2021 WL 5567670, at *13; G.M. Gov't Br. at 36-37. The district court should consider these issues in accordance with the principles outlined in this opinion.

and convincing evidence and the IJ to consider both Black's ability to pay and any alternatives to detention.

A. The district court properly determined that the government had to justify Black's continued detention by clear and convincing evidence.

Where the government seeks to continue depriving a person of their liberty—especially when a district court has already found that deprivation to be unconstitutionally prolonged—we must require the government to bear the burden of proving the need for continued detention. Otherwise, "the risk of an erroneous deprivation" of a detainee's liberty interest would remain unacceptably high. *See Mathews*, 424 U.S. at 335.[28] In so concluding, we find persuasive the First Circuit's reasoning in the context of section 1226(a). *See Hernandez-Lara*, 10 F.4th at 30-32.

First, noncitizens—detained or not—are not entitled to counsel in removal proceedings. *See* 8 U.S.C. § 1362 (outlining the noncitizen's "privilege of being represented (at no expense to the Government)" in removal proceedings). According to a 2016 study by the American Immigration Council, only 14% of detained noncitizens are represented by counsel in their removal proceedings.[29] A significant factor in this alarmingly low rate is that noncitizens in such proceedings can be trans-

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[28] A standard of proof "serves to allocate the risk of error between the litigants" and must reflect the "relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423.

[29] Ingrid Eagly & Steven Shafer, Am. Immig. Council, Access to Counsel in Immigration Court at 5 (Sept. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/AN9B-FMX9].

ferred to any ICE detention center, even one not located in the district of the alleged offense—take, for instance, G.M.'s overnight transfer, without notice, from HCCF (in New Jersey) to a county jail in Alabama.[30] Unsurprisingly, then, detained noncitizens often find themselves far from any community support that might help them to find representation. Similarly unsurprising is the finding that noncitizens represented at their bond hearings are about four times more likely to be released on bond than those who are unrepresented.[31]

Second, as demonstrated by G.M.'s case, detained noncitizens may have a much harder time preparing their cases because of difficulties in communicating with counsel and gathering evidence. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting that detained noncitizens have difficulty locating witnesses and collecting evidence); *Velasco Lopez*, 978 F.3d at 852-53 (describing how Velasco Lopez was prevented from appearing in criminal proceedings while detained by ICE). Further, like G.M., most noncitizens appearing in immigration proceedings lack English proficiency and require an interpreter, making preparation of their cases more difficult while in detention—with or without a lawyer.[32]

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[30] *See* Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States, Hum. Rts. Watch (Dec. 2, 2009), available at https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states [https://perma.cc/4U7Z-NZ2A].

[31] Eagly & Shafer, *supra* note 29.

[32] Laura Abel, Brennan Ctr. for Just., Language Access in Immigration Courts 3 (2011), available at https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/SQJ6-KALL] ("[M]ore than 85% of people appearing before the Immigration Courts are

Finally, as the First Circuit observed, "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern." *Hernandez-Lara*, 10 F.4th at 31 (citing *Elkins v. United States*, 364 U.S. 206, 218 (1960)). Requiring that detainees like Black prove that they are *not* a danger and *not* a flight risk—after the government has enjoyed a presumption that detention is necessary—presents too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged.

The government raises two arguments in opposition. First, it points to the provision in section 1226(c) allowing release of a detailed noncitizen for witness protection purposes only if the *noncitizen* "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). The government contends that, where the statute's text requires the noncitizen to bear the burden of persuasion in one circumstance, this Court cannot conclude in another that due process requires the government to bear the burden.

We read section 1226(c)(2), however, as having "nothing to do with bail." *Jennings*, 583 U.S. at 351 (Breyer, *J.*, dissenting). Rather, it concerns "a special program, the Witness Protection Program, set forth in 18 U.S.C. § 3521," in which the government would usually be required to detain the noncitizen based on a presumption of dangerousness and flight risk. Section 1226(c)(2) allows the Attorney General to "release" the noncitizen in

[limited English proficiency]."); Dep't of Just., Language Access in Immigration Court, DM 23-02, at 1-2 (noting that "most noncitizens who appear in immigration courts require . . . interpretation").

this limited circumstance, potentially doing "far more" than granting bail: instead, it would be "freeing the witness from a host of obligations and restraints, including those many obligations and restraints that accompany bail." *Id.* Section 1226(c)(2) says nothing about who should bear the burden of proof at a bond hearing once detention has been deemed unconstitutionally prolonged. We will not assume that procedures governing "far more" than *discretionary* release for protected witnesses will meet the requirements for a *constitutionally required* bail proceeding.

The government's second argument is that, under BIA precedent, even those noncitizens discretionarily detained under section 1226(a) must demonstrate that they are not flight risks or dangers to the community before release. Black Gov't Br. at 36 (citing *Matter of Guerra*, 24 I. & N. Dec. at 40). The government suggests that our decision in *Velasco Lopez* means that the noncitizen, even when not subject to mandatory detention, has been allowed to shift the burden to the government only at second or third bond hearings—and not at the initial bond hearing. Accordingly, the government asserts, the noncitizen subject to mandatory detention must bear the burden at the first hearing.

We find this argument unpersuasive. It is rooted neither in the text of section 1226 nor in our reasoning in *Velasco Lopez*. Both sections 1226(a) and (c) aim to prevent flight and danger to the community. Once those detentions have been unconstitutionally prolonged, the due process analysis adopted in *Velasco Lopez* applies with equal force to both situations. Accepting the government's argument would lead to an asymmetrical, puzzling result: section 1226(a) detainees like Velasco Lopez, who had already received (and did not prevail at) an initial bond hearing, would at future bond hearings be entitled to shift the burden to the government to prove the need for continued detention; section 1226(c) detainees like Black, who never had a similar opportunity to show at an initial hearing that he should be released, would bear the burden of proof. Accordingly, we conclude that once detention under section 1226(c) has become so prolonged that due process warrants a bond hearing, as in Black's case, the government must justify continued detention at such a hearing.

As for what that justification could be, we again view *Velasco Lopez* as instructive, and we require only that the government justify continued detention by clear and convincing evidence. *See* 978 F.3d at 855-57. Where an individual's liberty is at stake, the Supreme Court has consistently used this evidentiary standard for continued detention. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126, 129-31 (2010) (instructing that under a federal statute permitting continued confinement of "mentally ill, sexually dangerous federal prisoner[s] beyond the date the prisoner would otherwise be released," the government must prove its claims by clear and convincing evidence); *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992) (requiring proof by clear and convincing evidence for involuntary civil commitment); *Salerno*, 481 U.S. at 751 (observing that pretrial detention is permitted when the government can justify its need by clear and convincing evidence). We see no reason here to deviate from this approach.

B. The district court properly required the IJ to consider Black's ability to pay and alternatives to detention in setting a bond amount.

The district court in Black's case also properly required the IJ to consider Black's ability to pay and alternatives to detention when setting any bond amount. Once again, we are guided principally by our *Mathews* analysis. The "risk of an erroneous deprivation" of the noncitizen's liberty if alternatives to detention and ability to pay are not considered at the ordered bond hearing is the focus of our concern. *See Mathews*, 424 U.S. at 335. Our analysis is informed by the government's legitimate interests in protecting the public and in ensuring that noncitizens appear for their removal proceedings, and by the caution that any detention incidental to such interests must "bear[] [a] reasonable relation to" those interests. *Zadvydas*, 533 U.S. at 690 (internal quotation marks omitted) (second alteration by *Zadvydas* Court) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

As an initial matter, a bond amount would be at issue only once the IJ has determined that the noncitizen does not pose a danger to the community. *See Carlson v. Landon*, 342 U.S. 524, 539-42 (1952) (finding no due process violation where there is cause to believe noncitizen's release would pose a safety risk); *Matter of Guerra*, 24 I. & N. Dec. at 38 ("An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings."). At that point, refusing to consider ability to pay and alternative means of assuring appearance creates a serious risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons. *Cf. Bearden v. Georgia*, 461

U.S. 660, 672-73 (1983) (holding that revocation of probation for failure to pay fines, without first considering ability to pay or alternatives to imprisonment, "would be contrary to the fundamental fairness required by the Fourteenth Amendment").[33]

The government resists, arguing that "the district court's unqualified requirement that the immigration judge consider alternatives to detention and Black's ability to pay a bond improperly obligated the immigration judge to consider those factors notwithstanding a potential finding that Black . . . posed a danger to the community." Black Gov't Br. at 38-39. We do not read the district court's order in that way: it required only that "the IJ . . . consider Petitioner's ability to pay and the availability of alternative means of *assuring his appearance*." *Black*, 2020 WL 4260994, at *9 (emphasis added). The district court said nothing about considering ability to pay and alternative means of assuring appearance *despite* a finding that the noncitizen is a danger to the community. But to the extent the district court's order might be read as the government suggests, we stress that a showing of dangerousness by clear and convincing evidence would foreclose any possibility of bond. The IJ would then have no reason to consider financial circumstances or alternatives to detention.

The government next submits that ordering consideration of these factors interferes with the "'broad dis-

[33] Like the Ninth Circuit, "we cannot understand why [the government] would ever refuse to consider financial circumstances . . . [n]or can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances." *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017).

cretion'" to be afforded an IJ in determining a noncitizen's eligibility for release on bond. Black Gov't Br. at 39 (quoting *Matter of Guerra*, 24 I. & N. Dec. at 40). An IJ, it says, may consider financial circumstances and alternatives to detention, but has discretion to consider many different factors and "may choose to give greater weight to one factor over others, as long as the decision is reasonable." *Id.* (quoting *Matter of Guerra*, 24 I. & N. Dec. at 40). We agree, and we do not read the district court's order as saying otherwise. The IJ does indeed have broad discretion in setting terms and can exercise that discretion by considering a multitude of relevant factors. Requiring that two of those factors be alternatives to detention and the noncitizen's ability to pay does nothing to constrain its discretion: the IJ is free to give as much or as little weight to these factors as appropriate, as long as *some* weight is given, and "as long as the decision is reasonable." *Matter of Guerra*, 24 I. & N. Dec. at 40.

CONCLUSION

For the foregoing reasons, we conclude that the Fifth Amendment's guarantee of due process precludes a noncitizen's unreasonably prolonged detention under section 1226(c) without a bond hearing. We further decide that the *Mathews* framework applies when determining when and what additional procedural protections are due. In Black's case, the district court properly granted Black's petition, required a bond hearing be conducted, and further required the government to show at such a bond hearing, by clear and convincing evidence, the need for Black's continued detention. And it correctly directed the IJ conducting Black's bond hearing to consider his ability to pay and alternative means of assuring his appearance. In G.M.'s case, the district court erred by concluding that his prolonged detention comported with due process, denying his petition, and failing to order a hearing.

We therefore **AFFIRM** the judgment of the district court in No. 20-3224, and we **REVERSE** the judgment of the district court in No. 22-70.