U.S. Department of Justice

United States Attorney
Eastern District of New York

610 Federal Plaza
Central Islip, New York 11722

May 16, 2025

Via ECF

Honorable Pamela K. Chen
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *L.G.M. v. Anthony J. LaRocco et al.*
No. 25-cv-2631 (Chen, J.)

Dear Judge Chen:

This Office represents Respondents William P. Joyce, in his official capacity as Acting Field Office Director, New York City Field Office, U.S. Immigration and Customs Enforcement ("ICE"); Kristi Noem, in her official capacity as Secretary, U.S. Department of Homeland Security; and Pamela Bondi, in her official capacity as Attorney General, U.S. Department of Justice (collectively, the "government") in the above-referenced habeas proceeding, in which Petitioner, an alien, challenges his continued detention by ICE, a component of the U.S. Department of Homeland Security ("DHS"). The government still plans to address the issues of Petitioner's location on or before May 19, 2025 (the court ordered deadline for so doing) but in the interim respectfully submits this letter that may resolve Petitioner's claims in their entirety.

By way of background, Petitioner has been held in ICE custody since August 16, 2024 (nearly nine months at the time of this submission).[1] ECF No. 1 (Petition) at ¶¶ 1, 19. Petitioner is detained pursuant to 8 U.S.C. § 1226(c), which provides that the government "shall take into custody any alien who" has committed certain enumerated crimes and "may release" the noncitizen "only" under narrow witness-protection grounds not applicable here. 8 U.S.C. § 1226(c). Petitioner seeks an Order from this Court either granting a writ of habeas corpus directing his release from ICE detention, or directing the government to provide him with an individualized bond hearing before "an impartial adjudicator" at which the government must bear the burden of establishing by clear and convincing evidence that his continued detention is justified. Petition at 11. *See Black v. Decker*, 103 F.4th 133, 155-59 (2d Cir. 2024) (concluding that due process entitles 1226(c)

[1] The government notes that for two months, between mid-September and mid-November 2024, Petitioner requested adjournments of his removal proceeding because he had changed counsel and counsel required time to prepare.

detainees to an "individualized bond hearing by an IJ once their detentions became unreasonably prolonged," 103 F.3d at 155, and setting forth the procedures for an IJ to conduct a bond hearing.)

While reserving all rights, including the right to appeal, the government acknowledges that the facts and law set forth in *Black* would likely lead this Court to order that Petitioner receive a bond hearing before an IJ. At such a hearing, the government would have to show by clear and convincing evidence that Petitioner's continued detention is warranted, and if Petitioner is not found to be a danger to the community, the IJ would have to consider "alternatives to detention" and Petitioner's "ability to pay" when setting a bond amount.[2] 103 F.3d at 158. The government submits this letter to conserve judicial and party resources, and to expedite the Court's consideration of this case, in light of the Second Circuit's recent decision in *Black*.[3]

Background

Petitioner is a native and citizen of El Salvador.[4] He entered the United States near Hidalgo, Texas, on August 9, 2016, without inspection, and was issued a Notice to Appear ("NTA") that day that charged him with violating Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6)(A)(i). On December 5, 2023, he was convicted in state court in Nassau County, New York on Long Island and sentenced to one year of imprisonment on two counts of violent offenses: (1) Attempted Assault in the 2nd Degree: Intent to Cause Physical Injury with Weapon/Instrument in violation of N.Y. Penal Law ("NYPL") Sec. 120.05; and (2) Attempted Robbery-3rd Degree in violation of NYPL Sec. 160.05.

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[2] "[A] bond amount would be at issue only once the IJ has determined the noncitizen does not pose a danger to community." 103 F.3d at 158 (citing *Carlson v. Landon*, 342 U.S. 524, 539-42 (1952)). In this Circuit, IJ's rather than district courts routinely conduct 1226(c) bond hearings when a district court orders such a hearing after determining in an as-applied due process challenge that one is constitutionally required under the particular facts and circumstances of the case under review. See, e.g., *Cabral v. Decker*, 331 F. Supp. 3d 255 (S.D.N.Y Sept. 21, 2018); *Rodriguez-Figueroa v. Barr*, 442 F. Supp. 3d 549 (W.D.N.Y. Feb. 28, 2020); *Diaz v. Genalo*, 2023 WL 5322180 (S.D.N.Y July 6, 2023); *Toussaint v. Garland*, 2022 WL 2354547 (S.D.N.Y. June 30, 2022); *Doe v. Decker*, 2021 WL 5112624 (S.D.N.Y. Nov. 3, 2021); *Black v. Decker*, 2020 WL 4260994 (S.D.N.Y July 23, 2020); *Doe v. Decker*, 2020 WL 4937395 (S.D.N.Y Aug. 21, 2020); *Hernandez v. Decker*, 2018 WL 3579108 (S.D.N.Y July 25, 2018); *Sajous v. Decker*, 2018 WL 2357266 (S.D.N.Y May 28, 2018); *Sophia v. Decker*, 2020 WL 764279 (S.D.N.Y. Feb. 14, 2020).

[3] On November 20, 2024, the government petitioned for rehearing *en banc* in *Black*. *See* No. 20-3224 (2d Cir.), Dkt. 190. Petitioners filed a response on March 7, 2025. No. 20-3224 (2d Cir.), Dkt. 203. The government's petition for rehearing remains pending. The government acknowledges, however, that the Second Circuit's decision in *Black* binds this Court unless and until that precedent is abrogated.

[4] Unless otherwise noted, the facts in this background are taken from ICE records. The government can provide a declaration or other ICE documents upon request.

On August 16, 2024, ICE took Petitioner into custody under 8 U.S.C. § 1226(c). On September 18, 2024, Petitioner appeared with counsel before an IJ at the Executive Office of Immigration Review (EOIR); his counsel made an oral motion to withdrawal from representation, which the IJ granted. The case was adjourned until September 25, 2024, to allow Petitioner to retain new representation. On September 25, 2024, and again on October 16, 2024, Petitioner appeared with counsel, who requested an adjournment for attorney preparation, which was granted until November 19, 2024.

On November 19, 2024, the IJ received expert witness testimony on Petitioner's mental competency. On January 29, 2025, Petitioner appeared with counsel and, the IJ conducted a mental competency hearing. The IJ adjourned the case until January 29, 2025, for continued testimony from witnesses. Following completion of the competency hearing, the IJ found Petitioner competent as to some aspects of the removal proceedings and not competent as to others and instituted safeguards to proceed. On February 27, 2025, Petitioner appeared for an individual merits hearing with counsel and testimony was taken.

On April 1, 2025, the IJ issued a written decision ordering Petitioner's removal to El Salvador, but granting deferral of removal under the Convention Against Torture ("CAT"). On April 25, 2025, ICE timely appealed to the Board of Immigration Appeals (the "BIA") Petitioner's deferral of removal under the CAT. The appeal remains pending at the BIA.

The Second Circuit's Holding in *Black*

On May 31, 2024, the Second Circuit issued its decision in *Black*, holding that "due process bars the Executive from detaining . . . individuals for an unreasonably prolonged period under [8 U.S.C. §] 1226(c) without a bond hearing." *Black*, 103 F.4th at 143. The court further held that the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), governs an alien's challenge to his 8 U.S.C. § 1226(c) detention without a bond hearing pending his removal proceedings. *Black,* 103 F.4th at 147. These three factors are: "(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 151 (quoting *Mathews*, 424 U.S. at 335). The court then applied this test to two aliens detained under 8 U.S.C. § 1226(c) who had never received bond hearings -- one who had been detained for seven months, the other for 21 months -- and found that all three factors weighed in their favor. *Id.* at 151-55. The court thus concluded that "due process entitled [the noncitizens] to individualized bond hearings by an [IJ] once their detentions became prolonged." *Id.* at 155. Then, again applying the *Mathews* balancing test, the court approved one district court's determination 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." *Id.* Lastly, the court also required that, if an IJ determines at a bond hearing that the alien does not pose a danger to the community, then the IJ must consider the detainee's "ability to pay" and "alternatives to detention" when setting a bond. *Id.* at 158-59.

Discussion and Proposal

The government respectfully disagrees with the Second Circuit's decision in *Black* and, as noted above, has filed a petition for rehearing *en banc*. Nonetheless, the government acknowledges that this Court is currently bound by *Black* and that applying *Black* in this case likely would lead to a grant of the habeas petition. As an initial matter, Petitioner has been detained for nearly nine months, which is longer than the seven-month period of detention for one of the petitioners discussed in *Black*, though this period does include two months where Petitioner sought time to obtain new representation and for his new counsel to further prepare. Additionally, given that Petitioner's case is on appeal to the BIA, he may be detained for an additional period of time before the conclusion of his appeal and any further removal proceedings. Finally, although Petitioner has prolonged his own detention by challenging his removability, seeking adjournments, and pursuing an appeal before the BIA, the *Black* court did not find this to be a sufficient justification to continue detention without a bond hearing.

Accordingly, to conserve judicial resources and to expedite the Court's resolution of this case, the government hereby respectfully relies upon, and incorporates by reference, the legal arguments presented in *Black*, *see* No. 20-3224 (2d Cir.) Dkt. 190, but respectfully submits that the Court may resolve this habeas petition promptly without further briefing and order ICE to undertake the type of burden-shifted bond hearing referenced in *Black*, to be conducted by the IJ within the time period and under conditions the Court finds appropriate. Notwithstanding the submission of this letter in lieu of a formal brief, the government respectfully reserves all rights, including the right to appeal.

Thank you for Your Honor's consideration of this submission.

Respectfully submitted,

JOSEPH NOCELLA, JR.
United States Attorney

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