

statute does not provide for a bond hearing. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court held that § 1226(c)'s denial of an initial bond hearing does not facially violate a noncitizen's due process rights where detention is "for the limited period of....removal proceedings." *Id.* at 531. There, the noncitizen challenged the constitutionality of § 1226(c) after being detained for six months. The Court disagreed and upheld Congress's power to detain noncitizens subject to mandatory detention "for the brief period necessary for their removal proceedings" without an initial bond hearing. *Id.* at 513-14.

3. Later in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), the Court upheld the detention of noncitizens under § 1226(c). "[T]ogether with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 303. The Court there only addressed the argument whether § 1226(c) could be read to limit a noncitizen's detention without a bond hearing because the alternative, that is prolonged detention, would raise serious constitutional concerns. *Id.* at 296-97. The Court expressly avoided the constitutional question of whether the Government can detain a noncitizen subject to § 1226(c) for a prolonged period of time. *Id.* at 312 ("Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as 'a court of review, not of first view,' we do not reach those arguments.").

4. Two circuit courts have held that noncitizens subject to § 1226(c) may bring constitutional challenges to their prolonged detention. *See Black v. Dir. Thomas Decker*, 103 F.4th 133, 143 (2d Cir. 2024); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020). District courts reviewing similar constitutional challenges have reached the same

decision. *See, e.g., De Oliveira Viegas v. Green*, 370 F. Supp. 3d 443 (D.N.J. 2019) (requiring a bond hearing when civil detention lasted fifteen months); *Smith v. Barr*, 444 F. Supp. 3d 1289 (N.D. Okla. 2020) (requiring a bond hearing when civil detention lasted over thirty months) *Santos v. Clesceri*, No. 3:20-cv-50349, (N.D. Ill. Feb. 19, 2021) (requiring bond hearing where noncitizen had been detained over 18 months); *Mohamed v. Sec'y, Dep't of Homeland Security*, 376 F. Supp. 3d 950 (D. Minn. 2018) (15 month detention under § 1226(c) held to be unreasonable and unlawful and recommending that a bond hearing be given to the petitioner). District courts in the Fifth Circuit have concluded that noncitizens may also challenge their prolonged detention under § 1226(c) as violative of their due process rights. *See, e.g., M.D.F. v. Johnson*, No. 3:20-CV-0829-G-BK, 2020 U.S. Dist. LEXIS 227595 (N.D. Tex. Dec. 3, 2020) (concluding that generally detention for more than 20 months is constitutionally suspect, and in the petitioner's case, his detention under § 1226(c) for over 22 months was unreasonable and thus ordering the Government to "schedule a bond hearing before an Immigration Judge at which the government must show 'by clear and convincing evidence' that the petitioner poses either a flight risk or a danger to the community"); *Diallo v. Pitts*, Civil Action No. 1:19-cv-216, (S.D. Tex. Jan. 15, 2020) (concluding that federal court has jurisdiction to consider challenge to prolonged detention); *Norales-Lopez v. Gomez*, No. SA-14-CA-149, 2014 U.S. Dist. LEXIS 125830 (W.D. Tex. Jun. 26, 2014) (concluding that detention of noncitizen under § 1226(c) for over 500 days was unreasonable, but the petition was moot).

5. To determine whether a noncitizen's detention under § 1226(c) has become unreasonably or unjustifiably prolonged, courts apply two approaches. The Second Circuit instructs lower courts to apply the *Mathews v. Eldridge*, 424 U.S. 319 (1976) framework. *See Black v. Dir. Thomas Decker*, 103 F.4th at 147-48. That approach requires courts to weigh (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 requirements may entail.” *Id.* at 335.

6. The Third Circuit’s approach expressly rejects “the presumption of reasonableness or unreasonableness of any duration.” *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d at 211. Instead, the court advocates for a “highly fact-specific inquiry” that takes into account the following factors: the length 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.

7. Regardless of the approach, Petitioner satisfies both tests. As it concerns the *Mathews* test, the private interest at stake is of the highest order: “the interest in being free from imprisonment.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). The Supreme Court has stressed that “in this country liberty is the norm and detention ‘is the carefully limited exception.’” *See Black v. Dir. Thomas Decker*, 103 F.4th at 151 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). Petitioner remains detained for civil, not criminal purposes. When he filed the instant petition, he had already been detained for over 31 months, far longer than the 18-month prison sentence he served for his federal criminal conviction and almost 8 times longer than the 4 months the Government represented to the Court removal proceedings last in *Demore*. *Demore v. Kim*, 538 U.S. at 529. As a result of his detention, Petitioner has lost his job and remains separated from his lawful permanent resident wife and U.S. citizen children. Thus, this first factor weighs heavily in Petitioner’s favor.

8. The second *Mathews* factor also weighs in favor of Petitioner. This factor concerns “the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” *Mathews*, 424 U.S. at 335. Only the Petitioner’s interest is considered in this analysis. *Hamdi*, 542 U.S. at 530. Detention under § 1226(c) contains no procedural safeguards. Noncitizens subject to mandatory detention are not eligible for a bond hearing or review of their detention status at any time. Of course, the noncitizen can challenge whether they should be subject to mandatory detention under § 1226(c). But once that determination is made against the noncitizen, neither the immigration court nor the government review *the reasonableness of the duration* regardless of the criminal grounds for the noncitizen’s detention, whether s/he is a danger to the public, the noncitizen’s community ties, or the merits of the noncitizen’s defense to removal.

9. Petitioner has been a lawful permanent resident for over 30 years. He has deep ties to the United States. Admittedly, he stands convicted of two federal crimes: mail fraud and conspiracy to transport aliens. But neither conviction involved drugs, guns or violence. “[T]he almost nonexistent procedural protections in place for section 1226(c) detainees markedly increase[s] the risk of an erroneous deprivation of [a noncitizen’s] private liberty interests.” *Black v. Dir. Thomas Decker*, 103 F.4th at 152.

10. The last factor concerns the Government’s interest that takes into account the function involved and the fiscal and the attendant fiscal and administrative burdens due to additional or substitute procedural requirements. To be sure, Respondents have an interest in ensuring Petitioner’s presence at future hearings and safeguarding the community from someone with a criminal history. But immigration judges routinely consider these interests in bond hearings, so affording Petitioner a bond hearing does not eliminate the Government’s interests. “And while

the government's legitimate interests justify a relatively short-term deprivation of liberty, the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need." *Black v. Dir. Thomas Decker*, 103 F.4th at 155. No new procedure needs to be designed or established since immigration judges are already holding bond hearings. On the other hand, Petitioner's continued detention is costing the government. This third factor therefore favors the Petitioner.

11. As it concerns the Third Circuit approach, Petitioner also comes out ahead of Respondents. The duration of his detention is already more than two and a half years, far longer than his criminal sentence and 8 times longer than the 4 months the Government represented to the Court that removal proceedings last *Demore v. Kim*, 538 U.S. at 529. The DHS initiated removal proceedings in November 2022. Since then, the case has been appealed twice to the Board of Immigration Appeals (BIA). The immigration court has still not determined whether Petitioner is ineligible for relief. And if denied relief, Petitioner intends to appeal that determination. Thus, his detention is likely to continue for several months or years.

12. Petitioner has not been at fault for the delay. Early in the proceedings, his counsel requested a short continuance because the hearing was set on short notice. All the delay is attributable to the BIA. It is true that Petitioner has twice appealed to the BIA but that is his right, and he succeeded in both appeals. *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d at 211 ("But we do not hold an alien's good faith challenge to his removal against him, if his appeals or applications for relief have drawn out the proceedings. Doing so, and counting this extra time as reasonable, would "effectively punish an alien for pursuing applicable legal remedies.") (internal citations omitted). The BIA took over 6 months to render a decision on the first appeal and more than 9 months on the second appeal.

13. Further, the appeals were necessary because the DHS refused to issue a correct Notice to Appear (NTA). The November 11, 2022 NTA set a hearing time of 12 A.M. The DHS refused to amend the NTA and the immigration judge overruled the objection to the NTA. The second appeal concerned the DHS's ineffective efforts to amend the NTA by making a "pen and ink" amendment. The BIA agreed with Petitioner that the DHS had not properly amended the NTA.

14. Lastly, detention pending removal proceedings are civil, not criminal. The longer such detention lasts, the more it looks penal. *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d at 211 "[As] the length of detention grows, so does the weight [given to this] factor. *Id.*

15. Thus, if a hearing is held, Petitioner will be able to demonstrate that his prolonged detention under § 1226(c) is unreasonable and unjustified and violates his due process rights.

16. Respondents misunderstand the scope and application of 8 U.S.C. § 1226(e). Section 1226(e) shields discretionary determinations concerning bond. 8 U.S.C. § 1226(e) (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."). "But § 1226(e) does not preclude 'challenges to the statutory framework that permits the alien's detention without bail.'" *Jennings v. Rodriguez*, 583 U.S. at 295 (quoting *Demore v. Kim*, 538 U.S. at 517).

17. Further, Petitioner is not asking the Court to "overrule the determination that he has been convicted of an aggravated felony..." He is challenging the legality of his continued detention because it has grown unreasonable and unjustified.

Petitioner urges the Court to conclude that his prolonged detention is no longer justified and that Respondents should afford him a bond hearing where they must demonstrate by clear and convincing evidence that Petitioner is a danger to the public or a flight risk, or release him.

Dated: September 14, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On September 14, 2025, I, Javier N. Maldonado, electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Javier N. Maldonado
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