UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.C.G.

Petitioner,

v.

JUDITH ALMODOVAR,
in her official capacity as Acting Field Office Director, New York Field Office, U.S. Immigration & Customs Enforcement;

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;

PAUL ARTETA,
in his official capacity as Sheriff and Warden of ICE facility at Orange County Jail.

Respondents.

Civil Action No. 1:26-cv-1065

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

INTRODUCTION

1. J.C.G.[1] is a 21-year-old young man who fled El Salvador after a childhood marked by [redacted] abuse and forced recruitment by [redacted]. He has been detained by Immigration and Customs Enforcement ("ICE") under 8 U.S.C. § 1226(a) for over 14 months without a constitutionally adequate bond hearing. There is no end in sight to his detention as J.C.G.'s removal proceedings are on appeal before the Board of Immigration Appeals ("BIA"), and, if necessary, he intends to pursue a Petition for Review before the Second Circuit Court of Appeals. J.C.G. remains in detention after he was denied bond by an Immigration Judge in a hearing where the burden was improperly placed on him to prove he was neither a flight risk nor a danger to the community. Absent intervention from this Court, J.C.G.'s unlawful detention will continue indefinitely.

2. By placing the burden on J.C.G. to prove that he was not a danger to the community at his bond hearing, the government violated his procedural due process rights under the Fifth Amendment, as well as the Administrative Procedure Act ("APA"). *See J.C.G. v. Genalo*, No. 1:24-CV-08755 (JLR), 2025 WL 88831, at *7 (S.D.N.Y. Jan. 14, 2025) (joining the numerous courts in this district to conclude that "the Fifth Amendment Due Process Clause requires the Government to bear the burden of proving, by clear and convincing evidence, that such detention is justified") (internal quotation marks omitted); *Quintanilla v. Decker*, No. 21-CV-417, 2021 WL 707062, at *3 (S.D.N.Y. Feb. 22, 2021) (joining the "'overwhelming consensus of judges in this district' in concluding that the Government should bear the burden to deny liberty at any Section 1226(a) bond hearing, regardless of the noncitizen's length of detention"); *Guerrero v. Decker*, 19-cv-11644 (KPF), 2020 WL

[1] A Motion to Proceed Under Pseudonym is forthcoming.

1244124, at *5 (S.D.N.Y. Mar. 16, 2020) ("[I]n accordance with every court to have decided this issue, [] the Court concludes that due process requires the Government to bear the burden of proving that detention is justified at a bond hearing under § 1226(a).") (internal citations omitted).

3. Moreover, J.C.G.'s detention is now unconstitutionally prolonged, and the government has never justified his continued detention on an individualized basis. This is also a violation of J.C.G.'s due process rights under the Fifth Amendment. Under Second Circuit case law, he is entitled to a new bond hearing. *See Velasco Lopez v. Decker*, 978 F.3d 842, 846 (2d Cir. 2020) ("We conclude 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. We further conclude that the district court appropriately addressed the violation by ordering a new hearing at which the Government was called upon to justify continued detention."). As the Second Circuit recently held in *Black v. Decker*, "any immigration detention exceeding six months without a bond hearing raises serious due process concerns." *Id.* 103 F.4th 133, 150 (2d Cir. 2024); *see, e.g.*, *J.C.G.*, 2025 WL 88831, at *10 (granting the writ and ordering a burden-shifted bond hearing to a petitioner detained for nine months at Orange County Jail, after analysis guided by the framework of *Velasco Lopez*); *Arana v. Decker*, No. 20 CV 4104-LTS, 2020 WL 7342833 (S.D.N.Y. Dec. 14, 2020) (same).

4. In line with the decisions in this district and the Second Circuit's holdings in *Velasco Lopez* and *Black*, J.C.G. seeks a constitutionally adequate bond hearing where the government bears the burden of justifying his continued detention by clear and convincing evidence

and where the immigration judge considers alternatives to detention and J.C.G.'s ability to pay.

PARTIES

5. Petitioner J.C.G. is a 21-year-old young man who fled to the United States in 2019 after a childhood of [redacted]. He is detained in the custody of ICE, a sub-agency of the United States Department of Homeland Security ("DHS"), at the Orange County Jail in Goshen, NY. He has been detained by ICE since November 20, 2024.
6. Respondent Judith Almodovar is named in her official capacity as the Acting Director of the New York Field Office for ICE within DHS. In this capacity, she is responsible for the administration of immigration laws and execution of detention and removal 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 at 26 Federal Plaza, New York, NY 10278.
7. Respondent Kristi Noem is named in her official capacity as Secretary of the Department of Homeland Security. In this capacity, she is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103(a); routinely transacts business in the Southern District of New York; she supervises Respondent Almodovar; and is legally responsible for the pursuit of Petitioner's detention and removal. As such, she is the custodian of Petitioner. Respondent Noem's office is at the Department of Homeland Security, Washington, DC 20528.
8. Respondent Pamela Bondi is named in her official capacity as the Acting 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 and bond proceedings and the standards used in those proceedings. As such, she is the custodian of Petitioner. Respondent Noem's office is at the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530.

9. Respondent Paul Arteta is the Sheriff of Orange County Jail ("OCJ"). In this capacity, he is the warden for the ICE facility at OCJ. As such, he is the custodian of Petitioner. Respondent Arteta's office is at 110 Wells Farm Road, Goshen, NY 10924.

JURISDICTION & VENUE

10. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. §§ 1331 (Federal question) and 2241 (Power to grant writ); Article I, § 9, cl. 2 of the Constitution (The Suspension Clause); the All Writs Act, 28 U.S.C. § 1651; and the Administrative Procedure Act, 5 U.S.C § 701. Petitioner's current detention as enforced by Respondents constitutes a "severe restraint[]" on [Petitioner's] individual liberty," such that Petitioner is "in custody in violation of the . . . laws . . . of the United States." *See Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973); 28 U.S.C. § 2241; *see also Fay v. Noia*, 372 U.S. 391, 430-31 (1963).

11. While only the federal courts of appeals have jurisdiction to review immigration removal orders through petitions for review, *see* 8 U.S.C. § 1252(a), the federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness of their detention by DHS. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

12. Venue properly lies in the Southern District of New York because J.C.G. is physically present in this district and in the custody of Respondents at the Orange County Jail in

Goshen, NY. *See* 28 U.S.C. §§ 1391(e), 2241; *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014); *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 495-97 (S.D.N.Y. 2009).

STATUTORY TEXT & FRAMEWORK

13. Congress has authorized DHS to detain noncitizens during their removal proceedings. *See generally Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (discussing authority to detain under 8 U.S.C. §§ 1225(b), 1226(a), 1226(c)). The general "discretionary" detention statute, § 1226(a), at issue in this petition enables noncitizens to seek release on bond from an Immigration Judge ("IJ"):

> (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—
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> (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.

14. For more than two decades, the BIA has consistently held that in order to succeed in a request for custody redetermination, a noncitizen detained pursuant to § 1226(a) "must establish to the satisfaction of the Immigration Judge and the Board of Immigration Appeals" that he is not a danger to property or persons, a flight risk, or a threat to national security. *Matter of Adeniji*, 22 I&N Dec. 1102, 1102, 1113 (BIA 1999); *see also Matter of*

Guerra, 24 I&N Dec. 37, 38 (BIA 2006); *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009); *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016); *Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018); *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020).

EXHAUSTION

15. There is no statutory requirement of exhaustion of administrative remedies where a noncitizen challenges the lawfulness of their detention. *See Louisaire v. Muller*, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010). No exhaustion requirement applies to the claims raised in this petition because the IJ and the BIA lack jurisdiction to entertain constitutional challenges. *Khan v. United States A.G.*, 448 F.3d 226, 228 (3d Cir. 2006); *Matter of Valdovinos*, 18 I. & N. Dec. 343, 345–46 (BIA 1982) (disclaiming jurisdiction to rule on constitutionality of immigration statute).

16. However, to the extent exhaustion is required, J.C.G. has exhausted all available remedies. He sought a custody redetermination pursuant to 8 U.S.C. § 1226(a) and the immigration judge denied bond on January 30, 2025. Ex. C, IJ Bond Order. J.C.G. timely appealed this decision to the BIA, which dismissed his appeal on June 27, 2025. Ex. E, BIA Bond Decision.

STATEMENT OF FACTS & PROCEDURAL HISTORY

17. J.C.G. fled to the United States from El Salvador as an unaccompanied minor in February 2019. *See* Ex. A, James Declaration ¶ 5. Shortly after entering in the United States, Border Patrol arrested and detained J.C.G. *Id.* He was held in the custody of the Office of Refugee Resettlement ("ORR") until March 28, 2019, when he was released to his mother. *Id.*

18. On August 23, 2019, J.C.G. applied for Special Immigrant Juvenile Status ("SIJS"), which is a humanitarian petition that provides a pathway for young people who have been abused, abandoned, or neglected to seek lawful permanent residence. *Id.* ¶ 12. J.C.G.'s SIJS application was approved on March 23, 2020. *Id.*

19. J.C.G. sought safety in the United States because his childhood in El Salvador was marked by unrelenting violence. *Id.* ¶¶ 6–8. He experienced physical abuse from [redacted] *Id.* ¶¶ 6–7. Moreover, starting when J.C.G. was a young boy, [redacted] began recruiting him. *Id.* ¶ 8. When J.C.G. attempted to resist their efforts, [redacted] *Id.*

20. Although J.C.G. had fled to the United States to escape [redacted]

21. Sexual abuse also followed J.C.G. in the United States. *Id.* ¶ 11. In 2020, when he was 17 years old, [redacted]. *Id.* J.C.G. cooperated with local law enforcement in the investigation, and the older man was ultimately convicted of eight counts of New York Penal Law ("N.Y.P.L.") § 130.40(1) (third-degree criminal sexual act) and eight counts of N.Y.P.L. § 260.10(1) (endangering the welfare of a child). *Id.*

22. J.C.G. has had three criminal cases. *Id.* ¶¶ 13–15. The first stemmed from a 2021 arrest that was resolved with a plea to [redacted] and an indeterminate sentence of one year and four months to four years. Because J.C.G. was a

minor when charged, he received a youthful offender adjudication, a non-criminal disposition under New York state law. While J.C.G. was imprisoned for his first case, he was accused of possessing a sharpened plastic toothbrush and convicted of N.Y.P.L. § 205.20 (promoting prison contraband) on June 21, 2023. Finally, in October 2025, J.C.G. was accused of N.Y.P.L. § 120.05(7) (assault while confined in correctional facility) based on an alleged altercation with another detained person. This case remains pending.

23. ICE detained J.C.G. on November 20, 2024, when he reported for a criminal parole check-in. *Id.* at ¶ 19. That same day, they issued a Notice to Appear ("NTA") and initiated removal proceedings against J.C.G. Ex. B, NTA. The NTA charged J.C.G. as removable as someone who is present in the United States without being admitted or paroled.

24. On November 27, 2024, J.C.G. appeared *pro se* before the Varick Street Immigration Court. Ex. A, James Declaration ¶ 20. The Immigration Judge adjourned the case to give J.C.G. time to retain an attorney.

25. On December 12, 2024, *pro bono* counsel from the Bronx Defenders appeared on behalf of J.C.G. and entered pleadings. *Id.* The Immigration Judge sustained the charge of removability and adjourned proceedings for counsel to file applications for relief. *Id.*

26. On January 15, 2025, J.C.G. filed two applications for relief: an application for adjustment of status based on his approved SIJS petition and an application for asylum, withholding of removal, and protection under the Convention against Torture ("CAT") based on his fear of returning to El Salvador. *Id.* ¶ 21. The next day, on January 16, 2025, the Immigration Court set J.C.G.'s case for an individual hearing[2] on March 11, 2025. *Id.*

[2] An "individual hearing" is analogous to a trial in immigration court.

27. While awaiting his individual hearing date, on January 24, 2025, J.C.G. requested a custody redetermination hearing (a "bond hearing") before the Immigration Judge. *Id.* ¶ 26. The Immigration Court scheduled the bond hearing for January 30, 2025. *Id.*

28. In support of his request for bond, J.C.G. provided a detailed release plan from his social worker who had identified GED courses as well as therapeutic and psychiatric services for J.C.G. to access upon release. *Id.* ¶ 26. J.C.G. also submitted evidence related to his pending applications for relief before the immigration court, documents regarding his contacts with the criminal legal system, and letters of support from family and community members. *Id.* In addition, he submitted a sworn declaration which included details about his fear of returning to El Salvador and explanations regarding his arrests. *Id.* Finally, J.C.G. provided a report from a licensed psychologist who evaluated J.C.G. and assessed the risk of his engaging in dangerous or high-risk sexual behaviors in the future. *Id.* The licensed psychologist concluded that the evidence presented demonstrated that J.C.G. is at low risk for future inappropriate sexual conduct. She also concluded that participation in mental health treatment and increasing his social support network would reduce his risk for engaging in delinquent behavior. *Id.*

29. DHS' evidentiary submission included a letter from the Suffolk County Police Department, a Form I-213, a RAP sheet, documents related to J.C.G.'s 2021 and 2023 arrests, a New York State Department of Corrections and Community Supervision Certificate of Release to Community Supervision, National Crime Information Center Additional Inquiry Response, and tattoo photographs. *Id.*

30. On January 30, 2025, the Immigration Court held a bond hearing. The Immigration Judge denied bond, finding that J.C.G. had not met his burden of demonstrating that he is not a

danger to the community. Ex. C, Immigration Judge Bond Order. As required under current agency precedents, the Immigration Judge placed the burden on J.C.G. to establish that he does not pose a danger or flight risk and found that J.C.G. had not met his burden to show that he does not pose a danger to persons or property. *See* Exh. D, Bond Memorandum.

31. In denying J.C.G. bond, the Immigration Judge faulted him for failing to testify. J.C.G. did not testify due to concerns related to his mental health because he has not been able to access medication for his depression and anxiety while in ICE custody. Exh. A, James Declaration ¶ 17. While in prior criminal custody, J.C.G. had been prescribed medications, including [redacted]. *Id.* Despite repeated requests for at least a year, ICE has not provided J.C.G. medication. *Id.* He has consistently expressed to his legal team that medication helps him speak about his life. *Id.* Because the Immigration Judge found that J.C.G. did not meet his burden with respect to danger, she declined to reach the question of flight risk. Ex. D, Bond Memorandum. The Immigration Judge also did not consider whether the imposition of conditions could ameliorate any risk of danger. *Id.*

32. On March 3, 2025, J.C.G. filed a timely Notice of Appeal of the Immigration Court's bond denial. Ex. A, James Declaration ¶ 28. After both parties submitted briefing, the BIA issued an opinion on June 27, 2025, affirming the Immigration Judge's bond decision and dismissing J.C.G.'s appeal. Ex. E, BIA bond decision.

33. On March 3, 2025, J.C.G. filed a motion to reschedule his individual hearing date due to a tuberculosis outbreak at the Orange County Jail which led to a medical quarantine. Ex. A, James Declaration ¶ 22. The Immigration Judge granted the motion and rescheduled the hearing for April 9, 2025.

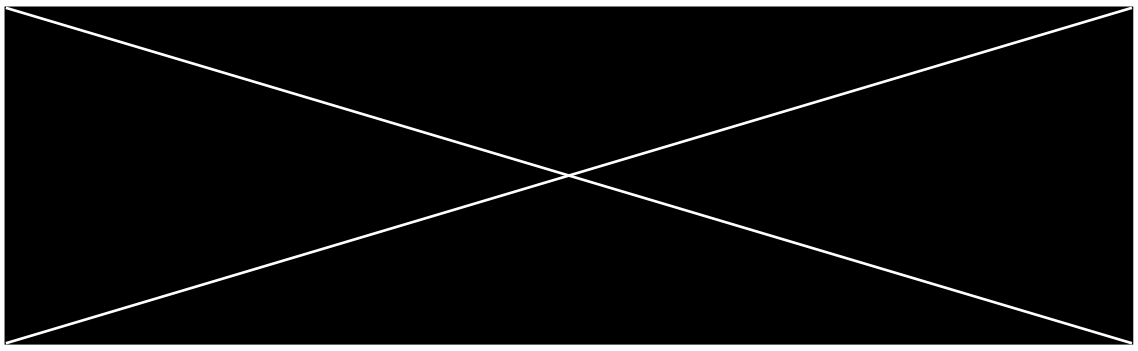
34. When J.C.G. had initial filed his applications for relief, he had noted, and the Immigration Judge had agreed, that because he entered as an unaccompanied minor and met other requirements for class membership, United States Citizenship and Immigration Services ("USCIS") had initial jurisdiction over his application for asylum, withholding of removal, and protection under the CAT. Ex. A, James Declaration ¶ 21. Because of this, J.C.G. and his counsel had initially expected that his individual hearing would only address his application for adjustment of status. *See J.O.P. v. DHS,* No. 8:19-CV-01944-SAG, ECF No. 199-2 (D. Md. July 30, 2024) (settlement agreement regarding processing of asylum applications for certain unaccompanied minors).

35. Before his individual hearing date, on March 11, 2025, USCIS notified J.C.G. that it would not take jurisdiction over his asylum application because he had been placed in adult immigration detention. Ex. A, James Declaration ¶ 22. That same day, DHS filed a motion to reconsider, asking that the Immigration Judge exercise jurisdiction over J.C.G.'s asylum application. *Id.* Because J.C.G. would now likely be proceeding before the immigration court on two applications instead of one, on March 22, 2025, he sought a brief continuance to prepare evidence related to his asylum application. *Id.* On March 24, 2025, the Immigration Judge granted DHS' motion to reconsider, finding that she had jurisdiction over J.C.G.'s asylum application. She also granted J.C.G.'s request for a brief continuance and reset his individual hearing date for April 15, 2025. *Id.*

36. On April 15, 2025, the Immigration Judge held the individual hearing on all of J.C.G.'s claims for relief. *Id.* Because J.C.G. did not finish testimony on that date, the Immigration Judge set the case for April 17, 2025. The hearing concluded on that date, and the Immigration Judge gave both parties the opportunity to submit written closings by May 6, 2025.

37. On May 16, 2025, the Immigration Judge issued a written decision denying all of J.C.G.'s applications for relief. Ex. F, IJ Merits Decision. J.C.G. timely appealed to the BIA. Ex. A, James Declaration ¶ 24. On August 7, 2025, the BIA set a briefing schedule. J.C.G. sought one extension of the briefing deadline. After the BIA granted that extension, appeal briefs were due on September 18, 2025. DHS filed its brief on September 16, 2025, and J.C.G. filed his on September 18, 2025. *Id.* This appeal remains pending. *Id.*

38. J.C.G.'s applications for relief include claims for protection under the Convention Against Torture because he fears [redacted]



39. The adjudication of J.C.G.'s claims for relief is likely to take, at a minimum, several more months. His case is currently pending before the BIA. If the BIA remands to the Immigration Judge, J.C.G. or DHS will likely return to the BIA for review, which would

again take months for briefing and adjudication. Ex. A, James Declaration ¶ 25. And if the BIA dismisses his currently pending appeal, J.C.G. intends to file a Petition for Review with the Second Circuit Court of Appeals. *Id.* Adjudication of that petition can take years. *See* 8 U.S.C. § 1252. In short, J.C.G. faces indefinite detention and the continuing violation of his constitutional rights.

LEGAL BACKGROUND

I. DUE PROCESS REQUIRES THAT PETITIONER BE AFFORDED A CONSTITUTIONALLY ADEQUATE BOND HEARING

40. "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 v. Davis*, 533 U.S. 678, 690 (2001). "It is well established that the Fifth Amendment entitles aliens to due process of law in [removal] proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). While "[d]etention during removal proceedings is a constitutionally valid aspect of the deportation process," there are "important constitutional limitations on that power's exercise." *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020) (internal quotations and citations omitted).

41. One of those limitations is the "fundamental requirement" of procedural due process, namely "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). When the government seeks to use its weighty power to confine a person, due process 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." *Zadvydas*, 533 U.S. at 690 (internal

quotation marks omitted). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and prevent flight. *Id.* at 690; *accord Velasco Lopez*, 978 F.3d at 854–55.

42. Because J.C.G. has never received adequate procedural protections to protect his weighty interest in freedom, J.C.G.'s continued incarceration violates his constitutional right to due process.

43. First, at no time during J.C.G.'s more than fourteen-month detention has DHS justified his ongoing incarceration. As a chorus of district courts in this Circuit has held, due process requires the government to bear the burden of proof by clear and convincing evidence at all bond hearings regardless of the length of detention. Instead, the immigration judge at J.C.G.'s initial bond hearing unconstitutionally placed the burden of proof on him. In addition, regardless of whether the initial hearing was adequate, J.C.G.'s detention is now prolonged, which is an independent basis entitling him to a new bond hearing with the burden of proof on the government, as dictated by the Second Circuit in *Velasco Lopez* and *Black*.

44. Second, to ensure that J.C.G.'s detention is related to a legitimate government interest as the Due Process Clause requires, an immigration judge must meaningfully consider alternatives to detention and his ability to pay. These procedural protections were absent from J.C.G.'s initial hearing and are necessary in any subsequent hearing.

Due Process Requires That Petitioner Receive a Hearing Where the Government Bears the Burden of Proof by Clear and Convincing Evidence.

The Burden Must Be on the Government Regardless of the Length of Detention.

45. As repeatedly recognized by courts in this Circuit, the government must bear the burden of proof by clear and convincing evidence for a bond hearing to be constitutionally adequate, regardless of the length of detention.

46. The Second Circuit requires that, once detention is prolonged, the government *must* bear the burden of justifying detention by "clear and convincing evidence." *Black*, 103 F.4th at 155; *Velasco Lopez*, 978 F.3d at 855. Nevertheless, the Second Circuit has expressly declined to reach the question of what protections due process requires, even before detention becomes prolonged. *See Velasco Lopez*, 978 F.3d at 855 n.13; *Quintanilla v. Decker*, No. 21 CIV 17 (GBD), 2021 WL 707062, at *4 (S.D.N.Y. Feb. 22, 2021) (discussing *Velasco Lopez*); *Jimenez v. Decker*, No. 21-CV-880 (VSB), 2021 WL 826752, at *8 (S.D.N.Y. Mar. 3, 2021) (declining to interpret *Velasco Lopez* to foreclose petitioner's argument that a burden-shifted hearing was required before detention was prolonged).

47. Even prior to *Velasco Lopez*, an "overwhelming consensus" of district courts had held that placing the burden on the noncitizen was unconstitutional regardless of the noncitizen's length of detention. *See Quintanilla*, 2021 WL 707062, at *3 (collecting cases).

48. In *Velasco Lopez*, the Second Circuit suggested that placing the burden on the petitioner at the time of his initial bond hearing was unconstitutional. *See* 978 F.3d at 852 n.8 (noting the time lapse between petitioner's detention and the initial bond hearing and observing that, "[h]ad he been charged with a violent felony . . . the Government would have been required . . . to carry the burden of establishing by a preponderance of the evidence that no conditions of release would reasonably assure the defendant's presence at trial and by clear

and convincing evidence that no conditions could assure the safety of the community"). The First Circuit has also held that the government must bear the burden at all 1226(a) custody hearings. *Hernandez-Lara v. Lyons*, 10 F.4th 19, 35 (1st Cir. 2021) (relying on the logic of *Velasco Lopez*).

49. Since *Velasco Lopez*, district courts that have considered the procedural protections required at the initial bond hearing have continued to require the burden to be on the government at all Section 1226(a) custody hearings.[3] *J.C.G. v. Genalo*, No. 1:24-CV-08755 (JLR), 2025 WL 88831, at *9 (S.D.N.Y. Jan. 14, 2025) ("According to the Government, *Velasco Lopez* 'suggests that there is no constitutional infirmity in an immigration judge's placement of the burden of proof on a noncitizen detained under § 1226(a) at his initial bond hearing where the noncitizen has been afforded adequate process.' This Court declines to read any such 'suggestion' into *Velasco Lopez's* holding."); *B.S. v. Joyce*, No. 22-CV-9738 (PKC), 2023 WL 1962808, at *4 (S.D.N.Y. Feb. 13, 2023) ("Like other courts faced with due process challenges to initial bond hearings since *Velasco Lopez*, this Court will continue to require the government to bear the burden of proof at all section 1226(a) bond hearings."); *Reyes v. King*, No. 19 CIV. 8674 (KPF), 2021 WL 3727614, at *7 n.7 (S.D.N.Y. Aug. 20, 2021) (agreeing with the "'overwhelming majority of courts' that have found that the Due Process Clause of the Fifth Amendment requires" the government to bear the burden of demonstrating by clear and convincing

[3] Some district courts have focused on the narrower question posed by *Velasco Lopez*, analyzing only whether detention is prolonged such that a new bond hearing is required. *See Arana v. Decker*, No. 20 CV 4104-LTS, 2020 WL 7342833, at *6–7 (S.D.N.Y. Dec. 14, 2020); *Gonzalez Evangelista v. Decker*, No. 20 CIV. 8758 (AKH), 2021 WL 101201, at *5 (S.D.N.Y. Jan. 12, 2021).

evidence that detention is justified" and refusing to alter the analysis in light of *Velasco Lopez*); *Banegas v. Decker*, No. 21-CV-2359 (VEC), 2021 WL 1852000, at *3 (S.D.N.Y. May 7, 2021) ("[N]either the Circuit's decision in *Velasco Lopez* nor any other binding appellate authority overrules the 'overwhelming consensus' of courts in this District that the Due Process Clause of the Fifth Amendment requires the Government to bear the burden . . . even absent 'prolonged detention.'"); *Jimenez v. Decker,* No. 21-CV-880 (VSB), 2021 WL 826752, at *8, 11 (S.D.N.Y. Mar. 3, 2021) (rejecting the government's argument that *Velasco Lopez* only authorized shifting the burden with prolonged detention and applying the *Mathews* factors); *Quintanilla v. Decker*, No. 21 CIV. 417 (GBD), 2021 WL 707062, at *3 (S.D.N.Y. Feb. 22, 2021) (joining the "'overwhelming consensus of judges in this district' in concluding that the Government should bear the burden to deny liberty at any Section 1226(a) bond hearing, regardless of the noncitizen's length of detention").

50. This consensus approach aligns with the Second Circuit's analysis in *Velasco Lopez*, which affirmed that longstanding Supreme Court precedents in other civil confinement contexts apply with equal force in the immigration context. 978 F.3d at 856; *see Hernandez-Lara*, 10 F.4th at 37–38.

51. Those precedents underscore that civil detention must be carefully limited to avoid due-process concerns. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997); *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

52. These precedents further instruct that, given the gravity of the liberty deprivation when the government preventively detains individuals, due process requires the jailers—not the person detained—to establish the necessity of that detention. *See, e.g.*, *Salerno*, 481 U.S. at 751 (affirming legality of pre-trial detention where burden of proof was on the government); *see also Foucha*, 504 U.S. at 81-82, 86 (holding unconstitutional a state civil insanity detention "statute that place[d] the burden on the detainee to prove that he is not dangerous"). That interest in liberty is strong even at the outset of detention: "[I]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Velasco Lopez*, 978 F.3d at 851 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)); *United States v. Comstock*, 560 U.S. 126, 130–31 (2010) (clear and convincing standard applies under a federal statute which permits a continued confinement of a "mentally ill, sexually dangerous" prisoner beyond a date that the prisoner would otherwise be released, from the outset of that continued detention period). That is particularly true where, as here, a detainee has developed close and meaningful ties to the United States. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (noting that noncitizens' rights increase with increased ties to the country). Even when the Supreme Court upheld the constitutionality of categorical detention for certain noncitizens with criminal convictions, it relied on those individuals having received "the *full procedural protections* our criminal justice system offers," *Demore v. Kim*, 538 U.S. 510, 513 (2003) (emphasis added); on Congress considering specific studies regarding its legislative choice, *id.* at 518–21; and on the relatively short duration of detention it anticipated, *id.* at 529. None of those circumstances are applicable to the discretionary, potentially indefinite

detention at issue here. *See Velasco Lopez*, 978 F.3d at 850 n.7, 852; *Hernandez-Lara*, 10 F.4th at 35–36.

53. And finally, those precedents hold that, in contrast to the preponderance-of-the-evidence standard in most civil proceedings, the government must be held to a clear-and-convincing standard of proof when an individual's liberty is at stake. *Black*, 103 F.4th at 138; *Velasco Lopez*, 978 F.3d at 856 n.15 ("When someone stands to lose an interest more substantial than money, we protect that interest by holding the Government to a higher standard of proof." (quoting *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 214 (3d Cir. 2020))); *see Cooper*, 517 U.S. at 363; *Foucha,* 504 U.S. at 81. In cases where the individual's interest is of "such weight and gravity," it is improper to ask an individual to "share equally with society the risk of error." *Addington*, 441 U.S. at 427. Immigration detention implicates "the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851.

The Burden Must Be on the Government When Detention Becomes Prolonged.

51. Regardless of whether J.C.G.'s initial bond hearing was unconstitutional, a hearing where the burden is shifted to the government is required once detention becomes prolonged under the clear holdings of *Black*, 103 F.4th at 138 and *Velasco Lopez*, 978 F.3d at 855.

52. While in *Velasco Lopez*, the Second Circuit declined to "establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden," *id.* at 855 n.13, the Second Circuit later held "that any immigration detention exceeding six months without a bond hearing raises serious due process concerns," *Black*, 103 F.4th at 150. It must be underscored that the bond hearing that *Black* is referring to, is one where the government *must* bear the burden of justifying detention

by "clear and convincing evidence." 103 F.4th at 155. This comports with Supreme Court precedent, which requires additional scrutiny of detention as the period of incarceration approaches or surpasses six months. *See Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months"); *Demore*, 538 U.S. at 529-30; *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018) (requiring bail hearings "within six months" of detention); *Arana v. Decker*, No. 20 CV 4104-LTS, 2020 WL 7342833, at *6–7 (S.D.N.Y. Dec. 14, 2020) (citing cases invoking the six-month threshold as significant and holding that nine months was sufficiently prolonged to warrant an individualized hearing with a shifted burden); *Graham v. Decker*, No. 20 CIV. 3168 (PAE), 2020 WL 3317728, at *5 (S.D.N.Y. June 18, 2020) ("[A] detention exceeding six months fairly favors the claimant in a multi-factor analysis"); *see also Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (limiting imposable sentence to six months for a criminal offense without procedural protection of a jury trial). The Supreme Court has also looked at six months as a benchmark in other civil detention contexts. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 407 U.S. 245, 249, 250-52 (1972) (recognizing six months as outer limit for confinement without individualized inquiry for civil commitment).

53. The Second Circuit has repeatedly emphasized that where the Supreme Court has upheld the constitutionality of detention pursuant to removal proceedings, it has done so in reliance on "the relatively short duration of detention"—between one-and-a-half and four months in the vast majority of cases. *Black*, 103 F.4th at 151 (citing *Demore*, 538 U.S. at 529); *Velasco Lopez*, 978 F. at 852 (same). In contrast, Mr. Black's seven-month detention without an individualized determination "more seriously infringed" on his liberty interest.

Black, 103 F.4that 151. In the case of Mr. Velasco Lopez, his fifteen-month incarceration without individualized justification was unconstitutional "on any calculus." *Id.* at 855 n.13; *see also J.C.G.*, 2025 WL 88831, at *9 ("Even if *Velasco Lopez* were construed as requiring a finding of 'prolonged detention' prior to granting a noncitizen a burden-shifting hearing, J.C.G.'s nine-month detention qualifies as a 'prolonged detention.'"); *Banegas v. Decker*, No. 21-CV-2359 (VEC), 2021 WL 1852000, at *3 (S.D.N.Y. May 7, 2021) (holding that "even if *Velasco Lopez* were correctly read to impose a bright line requirement of 'prolonged detention', Mr. Banegas would qualify for a new hearing because of his nine-month detention"); *Gonzalez Evangelista v. Decker*, No. 20 CIV. 8758 (AKH), 2021 WL 101201, at *5 (S.D.N.Y. Jan. 12, 2021) (applying the *Mathews* analysis and finding that the petitioner's 11-month "detention has been unreasonable in duration"); *Jimenez v. Decker*, No. 21-CV-880 (VSB), 2021 WL 826752, at *11 (S.D.N.Y. Mar. 3, 2021) (granting relief where petitioner was detained for twelve months).

54. In *Velasco Lopez*, to determine whether a new bond hearing with the burden on the Government was required, the Circuit conducted the three-factor analysis laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Velasco Lopez*, 978 F.3d at 851–55.

55. Under the first *Mathews* factor, the court recognized that "the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment." *Id.* at 851. Noting the Supreme Court's jurisprudence on the relatively brief length of the detention described in *Demore*, the Circuit further recognized that "[t]he longer the duration of incarceration, the greater the deprivation." *Id.* at 852. District courts in this Circuit have examined "whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable" and "whether the petitioner's

detention is near conclusion" under this prong. *See, e.g.*, *Gonzalez Evangelista*, 2021 WL 101201, at *4. Also relevant to the petitioner's interest are the conditions of confinement. The *Velasco Lopez* court noted that the petitioner there had spent his "civil detention" "incarcerated in the Orange County Correctional Facility where he was held alongside criminally charged defendants and those serving criminal sentences." 978 F.3d at 851.

56. Next, the Circuit found that the second *Mathews* factor, "the risk of erroneous deprivation of such private interest . . . and the probable value, if any, of additional or substitute procedural safeguards," also weighed "heavily" in the petitioner's favor. *Id.* at 852. This was true even where the petitioner had been arrested three times, had a conviction for driving while ability impaired, pending charges for aggravated unlicensed operation and driving while intoxicated, and dismissed charges for a bar fight. *Id.* at 846–47. As the Circuit held, "Velasco Lopez was neither a flight risk nor a danger to the community but was unable to prove that was the case." *Id.* at 853. Specifically, the Circuit pointed to the difficulties petitioner faced in challenging outstanding criminal charges while confined in detention and in accessing relevant documents. *Id.* at 852; *see also Hernandez-Lara*, 10 F.4th at 30–31 (noting, as well, that the government will know immigration law and procedures much better than the petitioner and that "proving a negative" can itself be difficult). By contrast, the government had "substantial resources to deploy" in obtaining information about the petitioner, including access to government databases. *Velasco Lopez*, 978 F.3d at 853. The existing framework of administrative review does not change this calculus, as it is unable to correct the fundamental misallocation of the risk of error. *See Hernandez-Lara*, 10 F.4th at 32 ("Loaded dice rolled three times are still loaded dice.").

57. As to the third factor of the government's interest, the Circuit recognized only two valid governmental interests in detaining noncitizens under Section 1226 pending removal proceedings: to prevent absconding and to prevent the commission of crimes. *Velasco Lopez*, 978 F.3d at 854–55. However, the Court was unequivocal that "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." *Id.* at 854. The Circuit also found that the public interest cut "strongly in favor" of the petitioner, because the Government failed to demonstrate any justification for "separat[ing] families and remov[ing] from the community breadwinners, caregivers, parents, siblings, and employees" whom the Government cannot show are in fact a poor bail risk. *Id.* at 855.

58. The government must justify itself when it deprives someone of their exceptional interest in liberty. When an immigration judge does not require the government to do so at the initial hearing, or when a person's detention has become prolonged, the caselaw is clear: the government cannot continue detaining that person unless they receive a bond hearing where the government bears the burden of proof by clear and convincing evidence.

Petitioner's Bond Hearing Must Have Further Procedural Protections to Satisfy Due Process.

59. The Due Process Clause requires that detention "bear a reasonable relation to its purpose." *Zadvydas*, 533 U.S. at 690; *see also Velasco Lopez*, 978 F.3d at 854–55 (holding that the only legitimate purposes for immigration detention are to protect community safety and to ensure that noncitizens attend future hearings); *Hernandez-Lara*, 10 F.4th 19, 32 n.5 (1st Cir. 2021) (same). To satisfy this requirement, a bond hearing must include additional procedural protections. Specifically, the IJ must consider an individual's ability to pay, as well as alternative conditions of release.

60. Under binding Second Circuit case law, due process requires the consideration at any bond hearing of "alternatives to detention and the noncitizen's ability to pay." *Black*, 103 F.4th at 159; *accord Hernandez v. Sessions*, 872 F.3d 976, 991 & n.4 (9th Cir. 2017) ("[A] bond determination that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests."). After a noncitizen has been deemed eligible for bond, "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." *Black*, 103 F.4th at 58. Indeed, at that point, the noncitizen will continue to be detained not for a legitimate purpose but solely due to their indigency, accomplishing "little more than punishing a person for his poverty." *Hernandez*, 872 F.3d at 992 (quoting *Bearden v. Georgia*, 461 U.S. 660, 671 (1983)).

61. Similarly, if the government can protect its regulatory interests through less restrictive means, detention is no longer reasonably related to a legitimate purpose. *See Salerno v. United States*, 481 U.S. 739, 755 (1987) (approving a pre-trial detention act that required the Government to show that no conditions of release could satisfy its interests); *Bell v. Wolfish*, 441 U.S. 520, 538 (1979); *Hernandez*, 872 F.3d at 991. Where an alternative condition of release would reasonably safeguard the government's interest, the government has no legitimate interest in detaining that person. *See Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 231 (W.D.N.Y. 2019) ("[T]he determination of whether detention was 'necessary to serve a compelling regulatory purpose' necessarily required the decisionmaker to consider whether 'a less restrictive alternative to detention' would suffice."). Accordingly, due process requires that the government, to meet their burden of

justifying detention, show why no alternative short of detention would suffice to protect their interests, and the immigration judge in turn must consider those alternatives. *See Cantor v. Freden*, 761 F. Supp. 3d 630, 640 (W.D.N.Y. 2025) ("This Court therefore holds that when a petitioner is entitled to a hearing because his detention pending removal has become unreasonably prolonged, the hearing requires a neutral decisionmaker to address whether alternatives to detention might ameliorate risk of danger as well as risk of flight" and *Black* does not state otherwise); *see also Hernandez*, 872 F.3d at 991 (noting that such programs were empirically highly effective at ensuring court appearances).

62. In light of the strong interest that Petitioner has in his bodily liberty, the Constitution requires adequate procedural protections—namely the consideration of his ability to pay and alternative conditions of release—prior to depriving him of his freedom.

II. THE CURRENT BURDEN ALLOCATION IN § 1226(A) BOND HEARINGS VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

63. The Administrative Procedure Act ("APA") creates a presumption in favor of judicial review over agency action. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001). A petitioner "adversely affected" by agency action may seek judicial review through a petition for habeas corpus. 5 U.S.C. §§ 702, 703. A reviewing court must set aside agency action that is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right; (3) in excess of statutory authority or limitations; (4) without observance of procedures required by law; or (5) unwarranted by the facts. 5 U.S.C. §§ 702, 706(2); *Natural Resources Defense Council v. U.S. E.P.A.*, 808 F.3d 556, 569 (2d Cir. 2015).

64. The allocation of the burden of proof to the noncitizen in Section 1226(a) bond hearings violates the APA because the decision in *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999),

which established the burden, is both "contrary to constitutional right," § 706(2)(B), and "arbitrary and capricious," § 706(2)(A). In *Adeniji*, the BIA placed the burden of proof squarely on the noncitizen in custody redetermination proceedings, even while acknowledging that Section 1226(a) has no such requirement. *Adeniji*, 22 I. & N. Dec. at 1113 ("[T]he alien must demonstrate that 'release would not pose a danger to property or persons,' even though section [1226(a)] does not explicitly contain such a requirement.").

65. An APA claim alleging that a detention policy violates due process under § 706(2)(B) is distinct from a free-standing constitutional claim. *See Dolan v. Fed. Emergency Mgmt. Agency*, No. CIV 23-0908 JB/JFR, 2025 WL 2023315, at *20 (D.N.M. July 18, 2025) ("The presence of a Constitutional claim does not take a court's review outside of the APA[.]"); *California v. U.S. Dep't Homeland Sec.*, 612 F. Supp. 3d 875, 894-95 (N.D. Cal. 2025) ("[P]laintiffs could assert a cause of action under the APA so long as Congress had not limited review through other statutes or committed the administrative decision to agency discretion," and "Plaintiffs' claim 'may exist wholly apart from the APA.'") (citing *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019)). Courts have applied this principle in the immigration context as well. *See, e.g.*, *Kidd v. Mayorkas*, No. 2:20-CV-03512, 2021 WL 1612087, at * 10 (C.D. Cal. Apr. 26, 2021) (finding an APA claim was validly pleaded where the plaintiffs alleged a "Fourth Amendment violation resulting from [ICE's] policy.").

66. Here, for the reasons already explained in depth, placing the burden on noncitizens to carry the burden in all bond hearings, even when detention has become prolonged, violates due process. *See supra* Part I. As such, this burden allocation violates the APA, because it is contrary to a constitutional right. § 706(2)(B).

67. In addition, the burden allocation is arbitrary and capricious. First, the BIA in *Adeniji* analyzed and applied the wrong federal regulation to decide what standards should govern Mr. Adeniji's bond hearing. Specifically, the BIA held that 8 C.F.R. § 236.1(c)(8)[4] "is binding on us" to conclude that Mr. Adeniji must shoulder the burden of proof in arguing for his release before an immigration judge. *See Adeniji*, 22 I&N Dec. at 1112. That regulation applies to ICE officers (employees of DHS) who determine whether a newly detained noncitizen should be granted bond by ICE in the first instance; it is inapplicable on its face to custody redetermination proceedings before an Immigration Judge (an employee of the Department of Justice). *See* 8 C.F.R. § 236.1(c)(8); *see also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (clarifying that bond hearings in front of IJs are custody redeterminations). Bond hearings are held after ICE's initial determination to deny bond; different regulations and procedures apply. *See* 8 C.F.R. § 1003.19; *compare* 8 C.F.R. § 236.1(c) *with* 8 C.F.R. § 236.1(d). For the BIA to state that the standard set out in the inapplicable regulation was "binding" is plainly erroneous and unreasoned.

68. The Second Circuit acknowledged this shift, and reliance on an inapplicable regulation, in *Velasco Lopez*, explaining:

> Until the early 1990s, the Attorney General exercised his discretion with a presumption in favor of liberty during the pendency of removal proceedings. This presumption was repeatedly affirmed by the Board of Immigration Appeals ("BIA"). *Velasco Lopez*, 978 F.3d at 848 (citing *Matter of Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (B.I.A. 1987).

[4] Section 236.1(c)(8) reads in pertinent part, "Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act . . . ; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."

> . . .
>
> Following the enactment of IIRIRA, the Immigration and Naturalization Service ("INS"), not Congress, implemented new regulations that altered the standard for the initial post-arrest custody determinations made by INS officials. 8 C.F.R. § 236.1(c)(2)-(8). The new regulations established a presumption of detention and placed on the arrested individual the burden of demonstrating, to the satisfaction of the arresting officer, that release would not pose a danger to property or persons and that the individual is likely to appear for any future proceedings. *See* 8 C.F.R. § 236.1(c)(8). The regulation applies only to the initial custody determination made by the arresting officer and not to immigration judges in bond hearings. However, shortly after the new regulations were implemented, the BIA began applying the rule provided in § 236.1(c)(8) for arresting officers, including the presumption of detention, to bond hearings conducted by immigration judges under § 1226(a). *Matter of Adeniji*, 22 I. & N. Dec. at 1112; *Matter of Guerra*, 24 I. & N. Dec. at 38.

Velasco Lopez, 978 F.3d at 849.

69. The correct regulation governing custody redetermination hearings at issue here is 8 C.F.R. § 236.1(d)(1). This regulation—which plainly applies to bond redeterminations before an IJ—does not place the burden on the noncitizen. *See id.* The agency's decision in *Adeniji* is therefore arbitrary and capricious as it was not the result of reasoned decision-making: it ignored § 236.1(d)(1)[5] and applied a regulation that is entirely irrelevant to custody hearings before an IJ. *See Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2015); *see also* 5 U.S.C. § 706(2).

70. Second, *Adeniji*'s burden shift constituted an unexplained rule change; as an "[u]nexplained inconsistency" that was a "change from agency practice," it is invalid under the APA. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). When *Adeniji* placed the burden on detained noncitizens, it ended the presumption

[5] Not only is 8 C.F.R. § 236.1(d) on its face more relevant for bond hearings before an immigration judge than 8 C.F.R. § 236.1(c)(8), it is also silent on the burden of proof, much like § 1226(a).

of liberty and broke from the established precedent in *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *see also Velasco Lopez*, 978 F.3d at 849. Nothing in § 1226(a), prior statutes, or the regulations relevant to bond redeterminations for non-criminal noncitizens gave rise to this radical shift; the agency's decision to place the burden on non-criminal detainees during bond redetermination hearings is therefore arbitrary and capricious. *See* 5 U.S.C. § 706(2); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting that "[a]n agency may not . . . depart from prior policy sub silentio"); *but see Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 13 n.1 (D. Mass. 2017).

71. Third, *Adeniji*'s burden shift "failed to consider . . . important aspect[s] of the problem" before it. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020) (quoting *State Farm*, 463 U.S. at 43). When an agency makes a decision, fundamental principles of administrative law dictate that the agency "must explain the evidence which is available, and must offer a rational connection between the facts found at the choice made." *State Farm*, 463 U.S. at 52 (internal quotation marks omitted). Under the pre-*Adeniji* precedents, when the government made the weighty decision to detain someone, it would explain that decision, and this explanation would be scrutinized by an immigration court. Now, the government can detain someone without providing any explanation to the person detained or the immigration judge. The reversal in *Adeniji* has enabled the creation of thousands of unreviewed agency decisions, a dramatic shift unconsidered and unaddressed by the BIA.

72. Thus, the Court should set aside the misallocation of the burden to the non-citizen as both unconstitutional and arbitrary and capricious.

CLAIMS FOR RELIEF

COUNT ONE

J.C.G.'S ONGOING DETENTION VIOLATES HIS RIGHT TO PROCEDURAL DUE PROCESS

73. Requiring J.C.G. to bear the burden in bond hearings pursuant to § 1226(a) violates his due process rights in two ways: First, J.C.G. has never had a constitutionally adequate bond hearing that justifies his detention. Second, J.C.G. has been subject to prolonged detention of over fourteen months. Under either situation, a constitutionally adequate bond hearing where the burden of proof is placed on DHS to justify detention by clear and convincing evidence, with consideration of ability to pay and alternatives to detention, is required under *Black, Velasco Lopez*, and *Mathews*. As a district court sitting in this state recently held, "when a petitioner is entitled to a hearing because his detention pending removal has become unreasonably prolonged, the hearing requires a neutral decisionmaker to address whether alternatives to detention might ameliorate risk of danger as well as risk of flight." *Cantor*, 761 F. Supp. 3d at 640.

74. With regard to the first *Mathews* factor, J.C.G.'s interest is in being free from imprisonment, which is "the most significant liberty interest there is." *Velasco Lopez*, 978 F.3d at 851. Like the petitioner in *Velasco Lopez*, J.C.G. is incarcerated at the Orange County Jail, where conditions are indistinguishable from those charged criminally or serving criminal sentences. *Id.* The Second Circuit made clear that the reality of detainees' day-to-day experiences in detention must be considered when analyzing whether due process has been violated, stating "[t]he deprivation [petitioner] experienced while incarcerated was, on any calculus, substantial. He was locked up in jail. He could not maintain employment or see his family or friends or others outside visiting hours. The use of a cell phone was prohibited,

and he had no access to the internet or email and limited access to the telephone." *Id.* All of these circumstances apply to J.C.G., who is at the same facility, and applied to him at the time of his initial bond hearing.

76. In addition, J.C.G.'s detention has become prolonged, strengthening the gravity of his private interest, and additional process is required. *See Black,* 103 F.4th at 150; *Velasco Lopez*, 978 F.3d at 853. His more than fourteen-month detention is now more than three times the four-month period the *Demore* Court viewed as "typical of agency trial and appeal periods combined." *Arana*, 2020 WL 7342833 at *6; *see also Hernandez-Lara*, 10 F.4th 19, 30 ("The ten months Hernandez was incarcerated . . . significantly exceeds the 'very limited time of the detention at stake' in *Demore*."). Moreover, J.C.G. has asserted meaningful defenses to removal, and as such, his time in detention is not nearing its end. *See Gonzalez Evangelista*, 2021 WL 101201, at *4 (noting that it was unclear if the petitioner's detention was nearing its conclusion).

77. The second factor, risk of erroneous deprivation, also weighs in J.C.G.'s favor. The government has "substantial resources to deploy" to obtain and present evidence justifying detention. *See Velasco-Lopez*, 978 F.3d at 852. By contrast, detention is hampering J.C.G.'s ability to present evidence and secure bail. The Immigration Judge cited J.C.G.'s failure to testify as one of the reasons he did not meet his burden at his bond hearing. Despite repeated attempts, while in ICE custody J.C.G. has been unable to access appropriate medication for his depression and anxiety, a central reason why he did not testify at his bond hearing. In denying bond, the Immigration Judge did not consider whether conditions, such as electronic monitoring or mandating enrollment in therapeutic or other supportive services, could mitigate the risk of danger. *Hechavarria v. Sessions*,

2018 WL 5776421, at *9 n.13 (W.D.N.Y. Nov. 2, 2018) ("Whether detention is necessary to serve a compelling regulatory purpose requires consideration of whether a less restrictive alternative to detention ... would also address those purposes."). The constitutionally inadequate procedural protections at J.C.G.'s first bond hearing pose a risk of erroneous deprivation.

78. The third *Mathews* factor involves an examination of the government's interests at stake. *Velasco Lopez*, 979 F.3d at 854. This factor also weighs in J.C.G.'s favor because the government has no interest in detaining someone who poses neither a danger nor a risk of flight. *Id.*; *see also Arana*, 2020 WL 7342833 at *6-7. The additional burden on the government to attempt to prove the necessity of detention is minimal here, where it can rely upon its "substantial resources and access to sources of information" and has already done so for purposes of the merits case. *Velasco Lopez*, 978 F.3d at 854.

79. The IJ's requirement that J.C.G. carry the burden at his bond hearing, as well as the failure to consider alternatives to detention, despite the gravity of J.C.G.'s liberty deprivation, was unconstitutional. The lack of sufficient process, wherein the government justifies his detention by clear and convincing evidence, after this prolonged period of detention, similarly violates his due process rights.

80. Should J.C.G. be released on bond after a constitutionally adequate bond hearing, "all interested parties" will have prevailed: the Government "because it has no interest in the continued incarceration of an individual who it cannot show to be either a flight risk or a danger to his community;" J.C.G. "because he is no longer incarcerated;" and the public because its "interest in seeing that individuals who need not be jailed are not incarcerated has been vindicated." *Velasco Lopez*, 978 F.3d at 857.

COUNT TWO
J.C.G.'S DETENTION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT – 5 U.S.C. § 701 et seq.

83. The Immigration Judge's requirement that J.C.G. carry the burden in his § 1226(a) bond hearing was rooted in an invalid agency interpretation.

84. The burden allocation violates the APA because it violates the Due Process clause of the Fifth Amendment.

85. In addition, the decision in *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999), is arbitrary and capricious.

86. *Adeniji* was arbitrary and capricious because the BIA relied on an incorrect and inapplicable regulation when it shifted the burden to establish eligibility for release to detainees. *Compare* 8 C.F.R. § 236.1(c)(8), *with* § 236.1(d)(1).

87. The agency also acted unreasonably in deciding *Adeniji* because its decision constituted an unexplained departure from precedent that called for a presumption against detention. Specifically, the BIA abandoned the long-standing case law that favored liberty for non-criminal detainees and created a new presumption in favor of detention.

88. Lastly, *Adeniji* is an invalid agency decision as applied to J.C.G. because it was a custom-made solution for a uniquely situated detainee based on a stipulation from the parties. The outcome of *Adeniji* depended on a stipulation on a significant legal issue and a desire to avoid a windfall for a specific noncitizen convicted of an aggravated felony whose eligibility for bond was mere happenstance. *See Adeniji*, 22 I&N Dec. at 1109, 1112. The BIA's precedent placing the burden on all noncitizens, including those who do not have aggravated felony convictions, in § 1226(a) hearings, is therefore arbitrary and capricious.

PRAYER FOR RELIEF

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

1) Assume jurisdiction over this matter;

2) Enjoin Respondents from transferring Petitioner outside the jurisdiction of the New York ICE Field Office pending the resolution of this case;

3) Issue a writ of habeas corpus directing Respondents to provide Petitioner, within fourteen to twenty-one days, a constitutionally adequate, individualized hearing before an 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, and at which ability to pay is considered, and to immediately release Petitioner from custody on his own recognizance or on reasonable conditions of supervision if such hearing is not provided;

4) 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

5) Grant any other and further relief that this Court deems just and proper.

Dated: February 6, 2026
New York, NY

Respectfully submitted,

/s/ Nhu-Y Ngo

Nhu-Y Ngo
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Counsel for Petitioner

Exhibits

A. Declaration of Keiana A. James, Esq. (*forthcoming with motion to file under seal)*
B. Notice to Appear
C. Immigration Judge Bond Order
D. Immigration Judge Bond Memorandum (*forthcoming with motion to file under seal*)
E. Board of Immigration Appeals Bond Decision (*forthcoming with motion to file under seal*)
F. Immigration Judge Merits Decision (*forthcoming with motion to file under seal*)

VERIFICATION

I, Nhu-Y Ngo, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that, on information and belief, the factual statements in the foregoing Petition for Writ of Habeas Corpus are true and correct.

Dated: February 6, 2026

/s/ Nhu-Y Ngo
Nhu-Y Ngo
The Bronx Defenders
360 East 161st Street
Bronx, NY 10451