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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KOUYABA BACHIROU

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of the Department of Homeland Security, TODD BLANCHE, Acting Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, JEREMY CASEY, Warden at Imperial Regional Detention Facility,

Respondents.

Case No: 26-cv-3322-BAS-MMP

Amended Petition for a Writ of Habeas Corpus

INTRODUCTION

Kouyaba Bachirou has been detained pending his immigration proceedings for over 17 months. This Court should "join[] the majority of courts across the country in concluding that [his] unreasonably prolonged detention under 8 U.S.C. § 1225(b) without an individualized bond hearing violates due process." *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020) (Battaglia, J.). It should do so because Mr. Bachirou satisfies the six-factor test set forth in *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1118 (W.D. Wash. 2019).

STATEMENT OF FACTS

Mr. Bachirou was born in Benin. Exhibit A, Declaration of Kouyaba Bachirou at ¶ 1. He came to the United States to seek asylum from his home country. *Id.* He has been prosecuted and injured because of his sexual orientation. *Id.* Mr. Bachirou fears for his life if he is forced to return to Benin. *Id.*

Mr. Bachirou came into the United States on January 5, 2025 near the Calexico Port of Entry. *Id.* at ¶ 2. He immediately turned himself into immigration authorities, was immediately detained by Border Patrol, and has been detained ever since. *Id.*

When Mr. Bachirou was brought to his first credible fear interview, he asked for a Mokole interpreter, which is his native language. *Id.* at ¶ 3. The asylum officer could not find a Mokole interpreter. *Id.* Instead, they provided a French interpreter, but Mr. Bachirou did not speak French well. *Id.* He did not go to school in Benin, where people learn French. *Id.*

During Mr. Bachirou's immigration case, he asked for a Mokole interpreter repeatedly. *Id.* at ¶ 4. The court could never find one. *Id.* Mr. Bachirou had many master calendar hearings continued because the court could not provide an interpreter. *Id.* While he has been detained, Mr. Bachirou has been practicing his French with other detainees. *Id.* at ¶ 5. He has been forcing himself to speak French so he can communicate better and so he will have easier access to an

interpreter. *Id.*

Mr. Bachirou has been detained for over 17 months without a bond hearing. *Id.* at ¶ 8. He has appealed his case to the BIA, and if the BIA dismisses his appeal, he will appeal to the Ninth Circuit. *Id.* at ¶ 6. Because his case is currently on appeal with the BIA, he will likely be detained for several more years. *Id.* at ¶ 8.

LEGAL BACKGROUND

I. The Fifth Amendment's Due Process Clause prohibits prolonged immigration detention without a bond hearing.

This habeas petition presents a question about whether and when the Fifth Amendment's Due Process Clause countermands the government's statutory authority to detain immigrants without bond hearings. Mr. Bachirou is detained under one such statute, 8 U.S.C. § 1225(b). "Section 1225 applies to 'applicants for admission'—noncitizens who 'arrive[] in the United States,' or are 'present' in the United States but have 'not been admitted.'" *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1111 (W.D. Wash. 2019). It "applies to, among others, noncitizens initially determined to be inadmissible because of . . . lack of valid documentation." *Id.* That includes persons who, like Mr. Bachirou, seek asylum at or near the border. *See id.* at 1109–11 (describing a similar procedural history and finding that petitioner was detained under § 1225(b)). Such immigrants are detained under § 1225(b) not only during their initial proceedings, but also when they appeal to the BIA. *See id.* at 1111 (reaching same conclusion for immigrant with pending BIA appeal).

This statutory scheme has left courts to grapple with the limits (if any) of that detention power: Does this statute permit the government to detain immigrants indefinitely, without ever having to prove at a bond hearing that they pose a risk of danger or flight? Three Supreme Court cases are potentially relevant to answering that question.

First, in *Zadvydas v. Davis*, the Supreme Court indicated that indefinite immigration detention raises serious due process concerns. 533 U.S. 678 (2001). *Zadvydas* involved a statute authorizing the government to detain immigrants after they are ordered removed. *Id.* at 683. For immigrants who cannot be removed, that statute had the potential to subject them to years, decades, or a lifetime in custody. *See id.* at 690. The Supreme Court held that if the statue "permit[ed] indefinite detention of an alien[,] [it] would raise a serious constitutional problem," because

> [t]he Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person ... of ... liberty ... without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno,* 481 U.S. 739, 746 (1987), or, in certain special and 'narrow' nonpunitive 'circumstances,' *Foucha, supra,* at 80, where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.' *Kansas v. Hendricks,* 521 U.S. 346, 356 (1997).

Id. Ultimately, however, the Court declined to decide whether a statute permitting indefinite detention would violate the Due Process Clause. Instead, the Court employed the constitutional avoidance canon to read implicit limits into the statute, requiring release after detention became sufficiently prolonged. *Id.* at 699.

Following *Zadvydas*, the Ninth Circuit applied similar reasoning to § 1225(b). *Rodriguez v. Robbins*, 804 F.3d 1060, 1087–89 (9th Cir. 2015). Employing the constitutional avoidance canon, the Ninth Circuit held that § 1225(b) implicitly entitled detained immigrants to bond hearings every six months. *Id.*

The Supreme Court overruled that precedent in *Jennings v. Rodriguez*, holding that the statute does not entitle detainees to bond hearings or otherwise

impose "any limit on the length of detention." 583 U.S. 281, 297 (2018). But though *Jennings* held that § 1225(b) imposes no statutory limit on the length of detention, it reserved the question of whether prolonged, mandatory detention without bond hearings violates due process. *Id.* at 312.

Finally, the Supreme Court held in *Demore v. Kim* that at least some statutes mandating detention during immigration proceedings do not automatically violate the Due Process Clause. 538 U.S. 510, 513 (2003). *Demore* addressed 8 U.S.C. § 1226(c), which mandates detention without a bond hearing for persons with certain criminal convictions. *Id.* The Court upheld § 1226(c) in a 5-4 opinion based on (1) the government interests justifying the detention of immigrants with certain, aggravated criminal convictions, and (2) the relative brevity of detention in most cases, with the vast majority taking only about five months. *Id.* at 517–31. Justice Kennedy supplied a deciding vote. His concurrence left open the possibility that individual immigrants could be "entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532–33.

"In the wake of *Jennings*," *Zadvydas*, and *Demore*, "district courts have grappled with how to address due process challenges to prolonged mandatory detention under § 1225(b)." *Banda*, 385 F. Supp. 3d at 1116. But after a full evaluation, "[n]early all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process." *Id.* (cleaned up) (collecting cases).

These Courts have relied on the due process concerns recognized in *Zadvydas*. *See, e.g.*, *Kydyrali*, 499 F. Supp. 3d at 771; *Banda*, 385 F. Supp. 3d at 1113–17; *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at *3 (S.D. Cal. Oct. 15, 2025). As the Ninth Circuit put it in *Jennings*' wake, those considerations raise "grave doubts that any statute that allows for arbitrary

prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018).

Neither *Jennings* nor *Demore* undermines that conclusion. *Jennings* held only that the statute itself did not impose any limits on detention. It "did not foreclose as-applied constitutional challenges to detention under" mandatory-detention statutes. *Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 209 (3d Cir. 2020). And *Demore* held only that conviction-based mandatory detention during immigration proceedings does not necessarily violate due process, particularly when the detention has an expected duration of about five months. *Id.* at 208–11. As Justice Kennedy's concurrence made clear, *Demore* does not prevent immigrants from arguing that sufficiently prolonged detention violates due process in their individual cases. *See id.*[1]

Thus, this Court should hold that sufficiently prolonged detention violates the Due Process Clause, as most courts have. *See, e.g.*, *Gao v. LaRose*, No. 25-CV-2084-RSH-SBC, 2025 WL 2770633, at *3 (S.D. Cal. Sept. 26, 2025); *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at *4 (S.D. Cal. Oct. 15, 2025); *Cong v. Noem*, No. 25-CV-3730-GPC-DEB, 2026 WL 76566, at *3 (S.D. Cal. Jan. 9, 2026); *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020) (Battaglia, J.); *Mardian v. Mayorkas*, 25-cv-3467-JLS; *Raeva v. Mayorkas*, 25-cv-3175-JO; *Abdul-Samed v. Warden of Golden State Annex Det. Facility*, No.

[1] The Supreme Court's later decision in *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020), is also inapposite, because it addressed only immigrants' due process rights in deportation proceedings—i.e., the process due when noncitizens seek to stay in the country instead of being removed. *See Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828, at *7–9 (W.D. Tex. Sept. 22, 2025). It does not purport to hold that immigrants have no constitutional right to due process before the government holds them indefinitely in immigration detention. *Id.*

25-cv-98-SAB-HC, 2025 WL 2099343, at *6 (E.D. Cal. July 25, 2025); *Hernandez v. Wofford*, No. 25-cv-986-KES-CDB (HC), 2025 WL 2420390, at *3 (E.D. Cal. Aug. 21, 2025); *Padilla v. ICE*, 704 F. Supp. 3d 1163, 1171–72 (W.D. Wash. 2023).

II. Courts have reached different conclusions about when immigration detention becomes indefinitely prolonged, but Mr. Bachirou would prevail under any standard, including the *Banda* factors.

Though courts agree that due process mandates a bond hearing when detention grows unreasonably prolonged, they disagree about how to assess whether a particular migrant's detention has reached that point. *Sanchez-Rivera v. Matuszewski*, No. 22-CV-1357-MMA (JLB), 2023 WL 139801, at *5–6 (S.D. Cal. Jan. 9, 2023) (Anello, J.) (surveying the various approaches). Because it incorporates nearly all the factors, many courts have found it "most appropriate to apply the *Banda* test to Petitioner's detention here under § 1225(b), as other courts within this district have done in the past." *Sandesh v. Noem*, 26-cv-846-JES-DDL, Dkt. 13 at 5 (Mar. 5, 2026 S.D. Cal). The *Banda* factors include:

(1) the total length of detention to date;

(2) the likely duration of future detention;

(3) the conditions of detention;

(4) delays in the removal proceedings caused by the detainee;

(5) delays in the removal proceedings cause by the government; and

(6) the likelihood that the removal proceedings will result in a final order of removal.

Banda, 385 F. Supp. 3d at 1106. Applying these factors here shows that Mr. Bachirou's detention has become prolonged.

First, the "most important factor," the length of detention, favors Mr. Bachirou. *Banda*, 385 F. Supp. 3d at 1118. In assessing this factor, "[i]t is important to bear in mind the context: The detention that is being examined here is the detention of a human being who has never been found to pose a danger to

the community or to be likely to flee if released." *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Minn. 2019). With that context, courts have granted bond hearings for persons detained between six and eleven months. *See Alizadeh v. Mullin*, No. 26-CV-2924-JLS-MPP, ECF 9 (S.D. Cal. June 5, 2026) (granting bond hearing for petitioner detained over six months); *Fofie v. Warden Otay Mesa Detention Center*, No. 26-CV-1900-JLS-MSB, ECF 14 at 5 (S.D. Cal. May 29, 2026) (granting bond hearing for petitioner detained over six months); *Bendekaca v. Brightman*, No. 26-CV-2934-JLS-BLM, 2026 WL 1400584, at 2 (S.D. Cal. May 19, 2026) (collecting cases); *Amando v. United States Dep't of Just.*, No. 25-CV-2687-LL-DDL, 2025 WL 3079052, at *5 (S.D. Cal. Nov. 4, 2025) (collecting cases). Mr. Bachirou has been detained for over 17 months—nearly three times as long as other petitioners who have received relief. Exh. A at ¶ 8. This factor therefore strongly favors Mr. Bachirou.

Second, Mr. Bachirou has reason to anticipate significant future detention, as his case is on appeal to the BIA and will likely go to the Ninth Circuit. *Id.* at ¶ 6. All told, "[t]his process may take up to two years or longer." *Banda*, 385 F. Supp. 3d at 1119. Because "Petitioner's future detention can last several more months or even years[,]" this factor favors Mr. Bachirou. *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at *5 (S.D. Cal. Oct. 15, 2025).

Third, conditions of confinement weigh in favor of Mr. Bachirou. "Petitioner's confinement at [Imperial Regional Detention Facility] is 'indistinguishable from penal confinement.'" *Abdul Kadir*, 2025 WL 2932654, at *5 (quoting *Kydyrali*, 499 F. Supp. 3d at 773).

Fourth, Mr. Bachirou has not caused any unreasonable delays in his removal proceedings.

Fifth, the government has caused delays because a Mokole interpreter was not provided for Mr. Bachirou during immigration court hearings. The government is responsible for providing an appropriate interpreter for noncitizens.

"If [a noncitizen] does not speak English, deportation proceedings must be translated into a language the [noncitizen] understands." *Perez-Lastor v. Immigr. & Naturalization Serv.*, 208 F.3d 773, 778 (9th Cir. 2000). Further, "[i]f the [noncitizen] is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the [noncitizen] speaks and understands, *the asylum officer shall arrange* for the assistance of an interpreter in conducting the interview." 8 C.F.R. § 208.30(d)(5). Because a Mokole interpreter was never provided, and because this caused delays in Mr. Bachirou's asylum case, this factor weighs in his favor.

Sixth, regarding the likelihood that the removal proceedings will result in a final order of removal, Mr. Bachirou has a strong asylum claim and could likely win on appeal. *Id.* at ¶ 1. Accordingly, under the *Banda* factors, Mr. Bachirou is entitled to release or a bond hearing.

CLAIM AND PRAYER FOR RELIEF

Accordingly, Petitioner respectfully requests that this Court order Respondents to provide Petitioner with a hearing and individualized bond determination at which the government shall bear the burden of establishing by clear and convincing evidence that Petitioner poses a danger or flight risk. At this hearing, the IJ should consider alternative conditions of release that could mitigate any concerns about his flight risk and, separately, if bond is deemed necessary, Petitioner's ability to pay bond. Finally, this Court should order that Respondents make the audio of the bond hearing available to Petitioner and his counsel upon request.

Respectfully submitted,

Dated: June 17, 2026

s/ Hannah Basalone

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