U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

February 12, 2019

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: *Hechavarria* v. *Sessions*, No. 15-cv-1058, 2018 WL 5776421 (W.D.N.Y. Nov. 2, 2018), *Destine* v. *Doll*, No. 17-cv-1340, 2018 WL 3584695 (M.D. Pa. July 26, 2018), and *Sajous* v. *Decker*, No. 18-cv-244, 2018 WL 2357266 (S.D.N.Y. May 23, 2018)

Dear Senator Feinstein:

The Department of Justice is engaged in a vigorous defense of the constitutionality and continued vitality of mandatory immigration detention during removal proceedings under 8 U.S.C. 1225(b) and 1226(c). Section 1225(b) mandates detention of aliens who are seeking initial admission to the United States during proceedings to determine whether to remove them from the United States, subject to release only under the Secretary of Homeland Security's discretionary parole authority. See 8 U.S.C. 1182(d)(5). Section 1226(c) mandates detention of certain criminal aliens during their removal proceedings, subject to release only under a narrow exception for witness-protection purposes. See 8 U.S.C. 1226(c). Outside those narrow exceptions, however, both statutes categorically prohibit release during ongoing removal proceedings, and thus foreclose provision of a bond hearing with the possibility of release.

In 2018, after the Department sought the Supreme Court's review, the government prevailed in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), on the validity of continued detention during removal proceedings under these statutes. In *Jennings*, the Court held as a matter of statutory interpretation that Sections 1225(b) and 1226(c) unambiguously mandate detention until the end of removal proceedings, regardless of the duration of those proceedings, and accordingly that they prohibit release on bond outside the narrow statutory exceptions. In particular, the Court rejected the Ninth Circuit's holding that Sections 1225(b) and 1226(c) should be construed to contain an implicit six-month cap on detention without a bond hearing. See 138 S. Ct. at 842. The Supreme Court did not, however, address any constitutional question in *Jennings*, and instead remanded to the Ninth Circuit for further consideration of the constitutional claims in that case.

Following *Jennings*, district courts have decided a number of habeas corpus actions brought by individual aliens, involving as-applied due process challenges to continued detention under Sections 1225(b) or 1226(c) without a bond hearing. To our knowledge, no court has adopted (and some have squarely rejected) a bright-line rule that continued detention becomes unconstitutional under either of those provisions whenever removal proceedings last six months or any other defined period of time. See, *e.g.*, *Coello-Udiel* v. *Doll*, No. 17-cv-1414, 2018 WL 2198720 (M.D. Pa. May 14, 2018). And in some cases, district courts have held that continued detention without a bond hearing is consistent with due process based on the individual circumstances of a particular case. See, *e.g.*, *ibid.*; *Dryden* v. *Green*, No. 18-cv-2686, 321 F. Supp. 3d 496 (D.N.J. June 21, 2018).

In certain individual habeas cases, however, district courts have held that due process requires a bond hearing be provided to an alien under the unique facts and circumstances of that particular case. The Department is writing to inform you that the Department has decided not to appeal in three such cases: *Hechavarria* v. *Sessions*, No. 15-cv-1058, 2018 WL 5776421 (W.D.N.Y. Nov. 2, 2018), *Destine* v. *Doll*, No. 17-cv-1340, 2018 WL 3584695 (M.D. Pa. July 26, 2018), and *Sajous* v. *Decker*, No. 18-cv-244, 2018 WL 2357266 (S.D.N.Y. May 23, 2018). The decision not to appeal is not based on any determination that Sections 1225(b) and 1226(c) are unconstitutional. To the contrary, the Department believes that each of these decisions is wrongly decided. The Department has nonetheless determined that, consistent with the government's overall defense of the constitutionality of mandatory immigration detention under Sections 1225(b) and Section 1226(c), the individual facts and circumstances of these cases make them unsuitable vehicles for appellate review. Given the number of cases presenting these issues in the lower courts, this letter will serve as continuing notice that the Department intends only to appeal those cases that provide suitable vehicles for appellate review that advance the government's long-term interest in defending the constitutionality of Sections 1225(b) and 1226(c).

Please let me know if we can be of further assistance in this matter.

Sincerely,

Noel J. Francisco
Solicitor General

Enclosure(s)

2018 WL 5776421
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Joseph E. HECHAVARRIA, Petitioner,

v.

Jefferson B. SESSIONS III, Attorney General of the United States; Michael Philips, Field Director for Department of Homeland Security Immigration and Customs Enforcement Detention and Removal; and Todd Tryon, Facility Director, Buffalo Federal Detention Facility, Respondents.

15-CV-1058

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Signed 11/02/2018

Attorneys and Law Firms

Timothy W. Hoover, Spencer Leeds Durland, Hodgson Russ LLP, Buffalo, NY, for Petitioner.

Allison R. Frayer, Office of Immigration Litigation, Jesi Jean Carlson, U.S. Department of Justice, Washington, DC, Daniel Barrie Moar, Mary Pat Fleming, U.S. Attorney's Office, Buffalo, NY, for Respondents.

Decision and Order

LAWRENCE J. VILARDO, UNITED STATES DISTRICT JUDGE

*1 Petitioner Joseph E. Hechavarria is a "criminal alien" who is subject to mandatory detention while he awaits judicial review of his final order of removal, pursuant to the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c). *See Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018); *Hechavarria v. Sessions*, 891 F.3d 49, 58 (2d Cir. 2018). He has been detained by the United States Department of Homeland Security, Immigration and Customs Enforcement ("DHS") at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York, under this provision of the INA for over five years.

Before this Court is Hechavarria's petition for a writ of habeas corpus under 28 U.S.C. § 2241 seeking release from detention. This Court grants his petition. For the following reasons, this Court concludes that, given its length, Hechavarria's ongoing detention violates his right to due process. The government may not continue to detain Hechavarria unless a neutral decision-maker determines by clear and convincing evidence that his detention necessarily supports a legitimate and compelling regulatory purpose.

BACKGROUND

IMMIGRATION AND CRIMINAL HISTORY

Hechavarria, a Jamaican citizen, received conditional permanent resident ("CPR") status in 1987 after overstaying a visitor visa and marrying a United States citizen. Docket Item 6-2 at 2. Two years later, however, his status was terminated pursuant to 8 U.S.C. § 1186a(c). *Id.* In February 2010, Hechavarria was charged with being removable from the United States under 8 U.S.C. § 1227(a)(1)(D)(i), *id.*, which renders deportable individuals with terminated CPR status. Hechavarria was not detained; instead, he was released to the DHS Alternatives to Detention program. *Id.* On December 1, 2010, United States Citizen and Immigration Services granted a Form I-130 [1] that his son filed on his behalf. *Id.* at 3.

On December 13, 2010, state authorities issued a criminal arrest warrant for Hechavarria in connection with, among other things, an alleged rape and assault that occurred earlier that month. *Id.* at 35. After learning of Hechavarria's arrest warrant, DHS agents detained him in New York City on December 22, 2010, and transported him to Cheektowaga, New York, to face the charges. *Id.* at 3, 36. In 2011, he was convicted of assault in the second degree and sentenced to three years of incarceration and two years of post-release supervision. *Id.* at 3.

DEPORTATION PROCEEDINGS AND APPEALS

While Hechavarria was incarcerated on the state conviction, ICE added a charge of removability based on his conviction for an "aggregated felony" under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). *Id.* Under the statute, an "aggregated felony" includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 9 U.S.C. § 1101(a)(43)(F). On July 11, 2013, Hechavarria was released from criminal custody and immediately transferred to DHS

custody at the BFDF. Docket Item 6-2 at 3. In June 2015, he was ordered removed to Jamaica. *Id.*

*2 Hechavarria has a longstanding history of renal disease. Docket Item 1-1 at 38. He received a kidney transplant in 2008, but he has since faced life-threatening transplant rejection and other medical issues. *Id.* His medical conditions must be closely monitored, and he requires frequent life-sustaining medical services. *Id.* at 38-39. In April 2014, the Consulate General of Jamaica informed Hechavarria that "there will be challenges in accessing the appropriate medical care, as the services available are minimal and very costly in Jamaica." *Id.* at 43. Indeed, the services Hechavarria requires "are minimally available even for those certain individuals who are able to pay for this very expensive care, and would unlikely be available for [him]" in Jamaica." *Id.* at 39.

Hechavarria filed two appeals from his order of removal and a motion to reopen proceedings. Docket Item 6-1 at 7-8. In September 2015, the last of those appeals was dismissed by the Board of Immigration Appeals ("BIA"). *Id.* at 8. A short time later, Hechavarria filed a pro se petition for review of the BIA order dismissing his appeal, as well as for a stay of removal, in the United States Court of Appeals for the Second Circuit. *Id.* at 9. In December 2016, a Second Circuit panel granted a stay of removal because it found that Hechavarria has "an arguable claim that the BIA erred in adhering to the aggravated felony crime of violence determination without assessing whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), constitutes intervening precedent." Order Staying Appeal, *Hechavarria v. Lynch*, No. 15-3331 (2d Cir. 2016), ECF No. 55. In April 2018, the Supreme Court issued an opinion concluding that the definition of "crime of violence" incorporated into the INA's definition of aggravated felony violated due process because it was impermissibly vague. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). In August 2018, a Second Circuit panel requested briefing on the impact of *Dimaya* on Hechavarria's case. Order, *Hechavarria v. Sessions*, Docket No. 15-3331 (2018), ECF 79.

PETITION FOR WRIT OF HABEAS CORPUS

Hechavarria began this proceeding by filing a pro se petition for a writ of habeas corpus in December 2015. Docket Item 1. In April 2016, United States District Judge John T. Curtin denied the petition, premised on his determination that the government was detaining Hechavarria under 8 U.S.C. § 1231. Docket Item 16. Judge Curtin reasoned that Hechavarria's ninety-day removal period under § 1231 commenced on September 30, 2015, because that was the day the BIA dismissed his appeal of the Immigration Judge's decision. *Id.* at 7.

Hechavarria timely appealed Judge Curtin's denial of his petition. In May 2018, a Second Circuit panel determined that because of the ongoing appeal of his removal order, Hechavarria is being detained under 8 U.S.C. § 1226(c), the statute that governs the detention of criminal aliens before a removal order is issued, and not § 1231. *Hechavarria v. Sessions*, 891 F.3d 49, 56-57 (2018).

Until earlier this year, the Second Circuit had read an implicit temporal limitation into § 1226(c), requiring a bail hearing before an immigration judge—at which the government must establish by clear and convincing evidence that the immigrant poses a risk of flight or danger to the community—within six months of detention. *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018). But in *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018), the Supreme Court rejected that interpretation of the statute. In *Jennings*, the Court determined that § 1226(c) mandates detention of any alien falling within its scope and that under the statute detention may end prior to the conclusion of removal proceedings only if the alien is released for witness protection purposes. In reaching that conclusion, the Court left open the constitutional questions raised by prolonged mandatory detention under § 1226(c). *Id.* at 851.

*3 "In light of the substantial uncertainty surrounding the detention provisions in Section 1226(c) given the new legal landscape, [the Second Circuit panel] remand[ed] th[e instant] case to [this] [C]ourt for consideration in the first instance of the appropriate remedy for Hechavarria in light of the Supreme Court's decision in *Jennings*." *Hechavarria*, 891 F.3d at 58.

DISCUSSION

The federal government has detained Hechavarria since July 11, 2013—more than five years and three months—pending a final determination regarding his removal. What is more, he has not had an individualized determination as to whether he presents a flight risk or a

danger to society. He contends that his ongoing detention violates the Fifth Amendment.

I. STATUTORY FRAMEWORK AND HISTORY: 8 U.S.C. § 1226

"Hechavarria's detention is ... governed by 8 U.S.C. § 1226(c) and the case law surrounding that section of the INA." *Hechavarria v. Sessions*, 891 F.3d 49, 57 (2d Cir. 2018).

When the government seeks removal of an alien already present in the United States, 8 U.S.C. § "1226(a) creates a default rule for those aliens by permitting —but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings." [2] *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). "Section 1226(a) also permits the Attorney General to release those aliens on bond, 'except as provided in subsection (c) of this section.' " *Id.* (quoting 8 U.S.C. § 1226(a)). [3] "Section 1226(c) in turn states that the Attorney General 'shall take into custody any alien' who falls into one of the enumerated categories involving criminal offenses and terrorist activities." [4] *Id.* (quoting 8 U.S.C. § 1226(c)(1)). "Section 1226(c) then goes on to specify that the Attorney General 'may release' one of those aliens '*only if* the attorney general decides' both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk." *Id.* (quoting 8 U.S.C. § 1226(c)(2)) (emphasis in original).

*4 Section 1226(c) "does not on its face limit the length of detention it authorizes." *Id.* "[A]liens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." *Id.* "And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope *must* continue 'pending a [final] decision on whether the alien is to be removed from the United States.' " *Id.* (quoting 8 U.S.C. § 1226) (emphasis in original); *see Hechavarria*, 891 F.3d at 57 (Section 1226(c) governs detention during a stay of removal pending a court of appeals' resolution of petition for review).

Congress did not always mandate detention of all "criminal aliens" subject to what is now § 1226(c). The policy mandating detention of criminal aliens during their removal proceedings was adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303(b), 110 Stat. 3009-586 (Sept. 30, 1996), "against a backdrop of wholesale failure by the [Immigration and Naturalization Service ("INS") [5]] to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003). In the early 1990s, "[c]riminal aliens were the fastest growing segment of the federal prison population ... and they formed a rapidly rising share of the state prison populations." *Id.* Congressional "investigations showed ... that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." *Id.* (emphasis in original). "Congress ... had before it evidence that one of the major causes of the INS' failure to remove deportable aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 519. Congress found that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* So the statute reflects a congressional determination that "detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from the country." *Id.* at 521.

II. CONSTITUTIONAL FRAMEWORK AND ANALYSIS

Under the Fifth Amendment, "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "[G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections ... or, in certain special and 'narrow' nonpunitive 'circumstances,' ... where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.' " *Id.* (and cases cited therein) (emphasis in original). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). At the same time, Congress has "broad power over naturalization and immigration, [permitting it to] make[ ] rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

*5 "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Although Congress's broad immigration power justifies mandatory detention without the opportunity to be heard under § 1226(c), *see Demore*, 538 U.S. at 531, there are constitutional limitations on how long that detention can last. Indeed, in finding § 1226(c) constitutional on its face, the Supreme Court noted that the Due Process Clause is not offended by mandatory detention without a hearing for the "*brief period necessary* for ... removal proceedings." *Id.* at 513. (emphasis added).[6] The Court explicitly noted that "in the majority of cases [§ 1226(c) detention] lasts for less than the 90 days ... considered presumptively valid in *Zadvydas [v. Davis*, 533 U.S. 678 (2001)]." *Id.* at 529. Diving even deeper, the Court noted that "in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days." *Id.* And "[i]n the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter." *Id.*

A. HECHAVARRIA'S § 1226(c) PROLONGED DETENTION WITHOUT A HEARING

"[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty ... an individualized determination as to ... risk of flight and dangerousness [could be required] if the continued detention bec[omes] unreasonable or unjustified." *Id.* at 532 '(Kennedy, J., concurring). Hechavarria contends that the Due Process Clause mandates a bright-line rule prohibiting § 1226(c) detention for more than six months without a bond hearing.[7] Docket Item 27 at 20-24. The government concedes that due process prohibits indefinite detention without a hearing under § 1226(c), but it contends that the reasonableness of detention should be assessed on a case-by-case basis, focused on whether detention continues to serve its purported immigration purpose of preventing flight and protecting the public by preventing the commission of further crimes. Docket item 29 at 2.

*6 " 'Due process is flexible,' ... and it 'calls for such procedural protections as the particular situation demands.' " *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). In the words of Justice Frankfurter, due process

> is not a technical conception with a fixed content unrelated to time, place and circumstances.... Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring). In light of these principles and the Supreme Court's decision in *Jennings*, this Court has serious doubt that the clause imposes a six-month bright-line rule for § 1226(c) detention.[8] But regardless of whether the petitioner's bright-line approach or the government's case-by-case analysis applies, the five-year detention here is simply too long to survive due process scrutiny.[9]

Demore's assumptions regarding the typical § 1226(c) detention timeframes are blown away by the length of time that the government has detained Hechavarria without an opportunity to be heard. *See* 538 U.S. at 529. Far from the four-month average period contemplated in *Demore* for individuals who have appealed their removal decisions, Hechavarria has been detained for more than five years and counting—more than fifteen times the average period contemplated in *Demore*. *See id.*[10] Indeed, the length of Hechavarria's detention without a hearing is substantially longer than the prolonged § 1226(c) detention in several recent cases where district courts have found that due process demands a bond hearing. *See Cabral v. Decker*, 2018 WL 4521199, at *5 (S.D.N.Y. Sept. 21, 2018) (over seven months – nine months at next court date); *Muse v. Sessions*, 2018 WL 4466052, at *4 (D. Minn. Sept. 18, 2018) (over fourteen months); *Thomas C. A. v. Green*, 2018 WL 4110941, at *5 (D.N.J. Aug. 29, 2018) (approximately fifteen months); *Vallejo v. Decker*, 2018 WL 3738947, at *4 (S.D.N.Y. August 7, 2018) (length of time since petitioner's last *Lora* hearing—"almost seventeen months —is, to put it mildly, significant"); *K.A. v. Green*, 2018 WL 3742631, at *4 (D.N.J. Aug. 7, 2018) (approximately nineteen months); *Hernandez v. Decker*, 2018 WL 3579108

at *5 (S.D.N.Y. July 25, 2018), (nine months); *Sajous v. Decker*, 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018) (over eight months). *See also Chavez-Alverez v. Warden York Cty. Prison*, 783 F.3d 469, 477 (3d Cir. 2015) (nine-month § 1226(c) detention without bond hearing "strain[s] any common-sense definition of a limited or brief civil detention"), *abrogated in part and on other grounds by Jennings*, 138 S. Ct. at 847; *Muse, supra*, at *4 ("As detention continues past a year, courts become extremely wary of permitting continued custody absent a bond hearing").

*7 The government contends that § 1226(c) detention without a hearing survives due process scrutiny whenever a criminal alien chooses to request a stay of removal and thus litigate through ongoing appellate proceedings. Docket Item 29 at 21. And a close reading of *Demore* suggests that the government may reasonably detain an immigrant under § 1226(c) without a hearing for a somewhat longer period if the immigrant chooses to appeal. *See Demore*, 538 U.S. at 529 (differentiating between average lengths of detention among detainees who have appealed decisions to the BIA and those who have not); *see also Manley v. Delmonte*, 2018 WL 2155890, at *2 (W.D.N.Y May 10, 2018) (right of appeal "may [not necessarily] be exercised without consequence"). Even so, as this Court has noted above, the four-month average period considered in *Demore* for those detainees who appealed their decisions to the BIA is far shorter than the period of time that Hechavarria has been detained.

Furthermore, the government does not contend that Hechavarria has "filed frivolous appeals in order to delay [his] deportation," *Demore*, 538 U.S. at 530 n.14, or has otherwise "substantially prolonged his stay by abusing the processes provided to him," *Hechavarria v. Sessions*, 891 F.3d 49, 56 n.6 (2d Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 436 (2009)).[11] On the contrary, both the record and a review of Hechavarria's merits proceedings suggest that the delay in his deportation proceedings results largely from recent Supreme Court decisions that increase his appeal's likelihood of success and the time that it took the Court to decide those cases.[12] To the extent Hechavarria has taken advantage of the opportunities for administrative and judicial review of legitimate claims in his underlying proceedings, the appeals procedures provided by Congress are to blame for the length of his appeals.

B. Nature of Procedural Requirements Due to Hechavarria

Finally, this Court rejects the government's contention that Hechavarria's *Joseph* hearing and the other minimal process he has been provided satisfies his procedural due process rights.

"[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors," *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake," *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). Here, that analysis leads to the conclusion that Hechavarria must be released unless the government demonstrates by clear and convincing evidence that his continued detention is necessary to serve a compelling regulatory purpose.

Hechavarria's private interests in his freedom and his life deserve great "weight and gravity." *Addington v. Texas*, 441 U.S. 418, 427 (1979). Hechavarria has an obvious interest in his "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The government contends that in immigration detention cases such as this one, this interest is less weighty than other instances of imprisonment because the detainee "may voluntarily end removal proceedings and the immigration detention incident to them." Docket Item 29 at 27. But, as noted above, the record supports serious and legitimate concerns that Hechavarria's life-sustaining medical services are unavailable in Jamaica. Docket Item 1-1 at 38-39, 43; note 11, *supra*. Therefore, at least in Hechavarria's case, the decision that the government would force Hechavarria to make—whether to voluntarily end removal proceedings—is not one simply between detention in the United States and liberty somewhere else, but potentially between detention here and serious illness or death there. The record thus implicates Hechavarria's interest in his own life, another interest at the heart of the Due Process Clause. *See Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life").

*8 The government asserts that its interest also is strong. It contends that it has a regulatory interest in Hechavarria's detention pending removal based on his serious criminal history and risk of flight. Docket Item

29 at 19. This Court agrees that both of these interests may well be "legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 752 (1987). But those are the very interests that would be addressed at a detention hearing. So the government's continued assertion that Hechavarria must be detained because he is dangerous, *see, e.g.*, Docket Item 29 at 2, 19-20, 26, simply begs the question and suggests exactly why a hearing is necessary.

Moreover, given that the statute precludes any pre- or post-deprivation procedure to challenge the government's assumption that an immigrant is a danger to the community or a flight risk, it presents a significant risk of erroneously depriving Hechavarria of life and liberty interests. The proceedings that the government argues support Hechavarria's due process, such as a *Joseph* hearing, have no relation to the government's purported regulatory interests in detaining him. At a *Joseph* hearing, a "detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3. In other words, at a *Joseph* hearing, the § 1226(c) detainee has the burden of proving that he should not be a § 1226(c) detainee, and the government's regulatory purposes in detention itself—for example risk of flight or dangerousness—are irrelevant. Given the length of Hechavarria's detention, that is simply not good enough.

In considering and balancing the three factors noted above, this Court finds little difference between Hechavarria's detention and other instances where the government seeks the civil detention of an individual to effectuate a regulatory purpose. In those cases, due process requires the government to demonstrate by clear and convincing evidence that detention serves a compelling interest. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992); *Addington*, 441 U.S. at 432-433. That standard applies equally here. *See Darko v. Sessions*, 2018 WL 5095671, at *6 (S.D.N. Y Oct. 19, 2018); ("government must bear the [bond hearing] burden by clear and convincing evidence"); *Linares v. Decker*, 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018) ("as a matter of due process, the Government must prove by clear-and-convincing evidence that an alien poses a risk of flight or a danger to the community before he or she may be detained under Section 1226(a)"); *Hernandez v. Decker*, 2018 WL 3579108, at *11 (S.D.N.Y. July 25, 2018) ("due process requires that the Government demonstrate dangerousness or risk of flight by a clear and convincing standard"); *Sajous v. Decker*, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) ("the Government must justify [§ 1226(c) detainee's] continued detention by proving by clear and convincing evidence that he is a flight risk or danger to the community"); *see also Manley v. Delmonte*, 2018 WL 2155890, at *2 (W.D.N. Y May 10, 2018) (deciding case without reaching due process question when Immigration Judge "applied the clear-and-convincing-evidence standard"). *Cf. Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011) ("clear and convincing evidence standard of proof applies in [§ 1226(a)] bond hearings").

"When the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. But the clear and convincing standard applies "when the individual interests at stake in a ... proceeding are both 'particularly important' and 'more substantial than mere loss of money,' " which is the case here. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424). Thus, the clear and convincing evidence standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* at 769; *see also Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285 (1966) ("clear, unequivocal, and convincing evidence" standard applies in deportation proceedings).

***9** Because Hechavarria's § 1226(c) detention has been unreasonably prolonged, and because § 1226(c) does not require the government to demonstrate by clear and convincing evidence that his detention necessarily serves a compelling regulatory purpose, the statute is unconstitutional as applied to him. His continued detention violates the Due Process Clause unless the government demonstrates by clear and convincing evidence before a neutral decisionmaker that it is necessary to serve [13] a compelling regulatory purpose. [14]

CONCLUSION

For the reasons stated above, Hechavarria's petition is GRANTED. **Within fourteen calendar days of the date of this Decision and Order**, the government must release

Hechavarria from detention unless a neutral decision-maker conducts an individualized hearing to determine whether his continued detention is justified. At any such hearing, the government has the burden of demonstrating by clear and convincing evidence that Hechavarria's continued detention is necessary to serve a compelling regulatory purpose. [15]

SO ORDERED.

All Citations

Slip Copy, 2018 WL 5776421

Footnotes

1 A Form I-130 is a "Petition for Alien Relative" and may be used by "a citizen or lawful permanent resident of the United States who needs to establish their [sic] relationship to certain alien relatives to wish to immigrate to the United States." https://www.uscis.gov/i-130

2 Although the statute refers to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security.

3 8 U.S.C. § 1226(a) provides:

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

4 8 U.S.C. § 1226(a) grants authority to conduct bail hearings for aliens pending removal decisions "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(c), captioned "Detention of criminal aliens," provides:

> (1) Custody
>
> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

5 The Immigration and Naturalization Service was an agency of the United States Department of Justice from 1940 to 2003. It ceased to exist under that name in March 2003 when most of its functions were transferred to new entities within the newly created Department of Homeland Security under the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

6 Aliens who are held under § 1226(c), such as the petititoner, have been convicted of a qualifying felony. *See* 8 U.S.C. § 1226(c). Thus, the due process accompanying a § 1226(c) detainee's criminal conviction ensures that a detainee's brief detention, "is not arbitrary" or "erroneously imposed." *Cf. Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 244-245 (1988) (finding of probable cause by independent grand jury is sufficient process to support bank regulator's decision to suspend bank official from working in bank for 90-day period without separate post-suspension ruling).

7 Hechavarria's argument that due process requires a six-month bright-line rule relies on *Lora v. Shannahan*, 804 F.3d 601, 616 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018). In *Lora*, to avoid constitutional concerns, the Second Circuit interpreted § 1226(c) to include an implicit bail hearing requirement within six months of detention. In *Jennings*, the Supreme Court found that Lora incorrectly interpreted that statute. *Jennings*, 138 S. Ct. at 846-847.
Lora's reasoning suggests (1) that the length of detention still is a key factor in determining whether § 1226(c) detention without an individualized hearing violates due process and (2) that detention lasting for six months or less is not likely to raise due process concerns. In that light, Hechavarria argues that what is left of *Lora* supports a bright-line six-month rule and that there are policy benefits to such a rule, including the fact that it is predictable, fair, and easily administered. Docket Item 27 at 22. This Court does not necessarily disagree with those arguments as a matter of policy, but it is not persuaded that those policy arguments support the conclusion that a six-month bright-line rule is required by the Due Process Clause, especially given more recent case law.

8 Many district courts have concluded that the Due Process Clause requires a case-by-case determination of whether a § 1226(c) detention requires an individualized hearing. *See, e.g., Cabral v. Decker*, 2018 WL 4521199, at *4 (S.D.N.Y. Sept. 21, 2018) (and cases cited therein).

9 The Second Circuit has rejected a substantive due process challenge to the length of a six-year detention by an immigrant detainee who had been denied admission to the United States. *Sanusi v. I.N.S.*, 100 Fed.Appx. 49, 51 (2d Cir. 2004) (citing *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991)). But questions about "the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal," *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987), differ from a detainee's procedural due process right to an individualized hearing. *See Doherty*, 943 F.2d at 211 (length of detention not unreasonable where "consistent administrative and judicial findings that [detainee] presents an exceptionally poor bail risk support the continuing decision to detain him").

10 Additionally, is unclear whether *Demore* even contemplated cases, such as this one, where a court of appeals has stayed removal pending judicial review of a BIA decision. In *Demore*, the Court statistically analyzed cases where aliens are detained pursuant to § 1226(c), dividing them into cases where the alien appealed the decision to the BIA (15% of cases), completed in four months on average, and those that are not appealed to the BIA (85% of cases), completed in 47 days on average. *Demore v. Kim*, 538 U.S. 510, 529 (2003). Depending on whether the Court included appeals to the circuit courts when it discussed the cases where an alien appeals the decision of an Immigration Judge to the BIA, this case may be outside the one hundred percent of cases analyzed in *Demore*.

11 At oral argument, the government suggested that Hechavarria has the power to free himself from detention simply by agreeing to be deported to his native Jamaica. But given Jamaica's warning that it may not have medical services capable of keeping Hechavarria alive, Docket Item 1-1 at 43, that suggestion is disingenuous, if not mean-spirited.

12 The stay issued by the Second Circuit demonstrates that Hechavarria's appeal is far from frivolous and may well have merit. Order Staying Appeal, *Hechavarria v. Lynch*, No. 15-3331 (2d Cir. 2016), ECF No. 55.

13 Whether detention is necessary to serve a compelling regulatory purpose requires consideration of whether a less restrictive alternative to detention, such as release on bond in an amount that the petitioner can reasonably afford, would also address those purposes.

14 Whether § 1226(a) (or another statute) provides the authority to conduct the bond hearing that due process requires is a matter of statutory interpretation that the Immigration Judge should have the first opportunity to address.

15 Detention under § 1226(c) is designed to serve the government's regulatory purposes of minimizing risks of flight and danger to the community. *Demore*, 538 U.S. at 518-21. These are compelling regulatory purposes. *Salerno*, 481 U.S. at 752.

End of Document

2018 WL 3584695
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Saul DESTINE, Petitioner,
v.
Warden DOLL, Respondent.

NO. 3:17-CV-1340
|
Signed 07/26/2018

Attorneys and Law Firms

Saul Destine, York, PA, pro se.

Kate Mershimer, Melissa Swauger, U.S. Attorney's Office, Harrisburg, PA, for Respondent.

MEMORANDUM

A. Richard Caputo, United States District Judge

*1 Presently before me is the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) filed by Petitioner Saul Destine ("Petitioner"). For the reasons that follow, the petition will be granted insofar as Petitioner seeks an individualized bond hearing.

I. Background

Petitioner is a citizen and national of Haiti. (*See* Doc. 4, Ex. "1", 3). On October 30, 2016, Petitioner applied for admission into the United States from Mexico via the Calexico Pedestrian Port of Entry. (*See id.* at 2-3). Petitioner was charged as inadmissible because he did not have valid entry documents. (*See id.* at 3).

On or about December 29, 2016, immigration officials charged Petitioner with a violation of § 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(7)(A)(i)(I). (*See id.* at Ex. "2", 1). That charge was sustained on February 1, 2017. (*See id.*).

On June 20, 2017, the Immigration Judge denied Petitioner's applications for asylum and withholding of removal and ordered Petitioner removed from the United States. (*See id.* at Ex. "3", 5). Petitioner reserved his appeal and on July 7, 2017, he filed an appeal with the Board of Immigration Appeals ("BIA"). (*See id.* at Ex. "4", 1).

On August 1, 2017, Petitioner filed for relief pursuant to 28 U.S.C. § 2241. (*See* Doc. 1, *generally*). Specifically, Petitioner contends that his continued detention is unconstitutional and that he should either be released or an individualized bond hearing should be ordered. (*See* Doc. 1, *generally*). The Government disputes that Petitioner is entitled to relief. (*See* Doc. 4, *generally*). The § 2241 petition is now ripe for disposition.

II. Legal Standard

Under 28 U.S.C. § 2241(c), habeas relief may be extended to a prisoner only when he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A federal court has jurisdiction over such a petition if the petitioner is "in custody" and the custody is allegedly "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *Maleng v. Cook*, 490 U.S. 488, 490, 109 S.Ct. 1923, 104 L.Ed. 2d 540 (1989). As Petitioner is currently detained within this Court's jurisdiction, by a custodian within the Court's jurisdiction, and asserts that his continued detention violates due process, this Court has jurisdiction over his claims. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed. 2d 43 (1998); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95, 500, 93 S.Ct. 1123, 35 L.Ed. 2d 443 (1973); *see also Zadvydas v. Davis*, 533 U.S. 678, 699, 121 S.Ct. 2491, 150 L.Ed. 2d 653 (2001).

III. Discussion

Petitioner is presently detained as an "arriving alien" pursuant to 8 U.S.C. § 1225(b). *See also* 8 C.F.R. § 1.2 ("Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, ..."). Section 1225(a)(1) provides that "[a]n alien present in the United States who has not been admitted or who arrives in the United States ... shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 122(a)(1). The Supreme Court recently explained that "applicants for admission fall in to one of two categories, those covered by § 1225(b)(1) and

those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, —— U.S. ——, 138 S.Ct. 830, 837, 200 L.Ed. 2d 122 (2018). "Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. Section 1225(b)(1) also applies to certain other aliens designated by the Attorney General in his discretion. Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here)." *Id.* (internal citations omitted). The *Jennings* Court went on:

> *2 Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens. Aliens covered by § 1225(b)(1) are normally ordered removed "without further hearing or review" pursuant to an expedited removal process. § 1225(b)(1)(A)(i). But if a § 1225(b)(1) alien "indicates either an intention to apply for asylum ... or a fear of persecution," then that alien is referred for an asylum interview. § 1225(b)(1)(A)(ii). If an immigration officer determines after that interview that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process. Those aliens "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" into the country. § 1225(b)(2)(A).

Id.

Insofar as Petitioner argues that he is statutorily entitled to a periodic bond hearing under § 1225(b), the *Jennings* Court rejected that reading of the statute:

> As noted, § 1225(b) applies primarily to aliens seeking entry into the United States ("applicants for admission" in the language of the statute). Section 1225(b) divides these applicants into two categories. First, certain aliens claiming a credible fear of persecution under § 1225(b)(1) "shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Second, aliens falling within the scope of § 1225(b)(2) "shall be detained for a [removal] proceeding." § 1225(b)(2)(A).
>
> Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and § 1225(b)(2) aliens are in turn detained for "[removal] proceeding[s]." Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.

Id. at 842. Accordingly, the Court concluded that both §§ 1225(b)(1) and (b)(2) "mandate detention until a certain point and authorize release prior to that point only under limited circumstances. As a result, neither provision can reasonably be read to limit detention to six months." *Id.* at 844. In view of *Jennings*, to the extent that Petitioner claims he is statutorily entitled to a periodic bond hearing based on the Third Circuit's decisions in *Diop v. ICE/ Homeland Sec.*, 656 F.3d 221, 232, 234 (3d Cir. 2011) and *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 473 (3d Cir. 2015), that claim fails. *See, e.g., Theophile v. Doll*, No. 1:17-cv-2404 (M.D. Pa. May 13, 2018) (Kane, J.), ECF No. 13; *see also Otis V. v. Green*, No. 18-742, 2018 WL 3302997, at *3 (D.N.J. July 5, 2018). [1]

Jennings, however, did not reach the merits of the constitutional challenge before it. *See Jennings*, 138 S.Ct. at 851 ("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. ... [W]e remand the case to the Court of Appeals to consider them in the first instance."); *see also Otis V.*, 2018 WL 3302997, at *6 ("The Supreme Court left open, however, the possibility of a successful as applied constitutional challenge to the statute on an individual case by case basis....").

*3 The United States District Court for the District of New Jersey's recent decision in *Otis V.* details the due process rights of a § 1225(b) detainee:

> To the extent that Petitioner asserts a constitutional claim for relief [from detention under § 1225(b)], such a claim would be affected by his status as an applicant for admission rather than an alien who has previously entered the country. *See, e.g., Maldonado v. Macias*, 150 F.Supp.3d 788, 798-800 (W.D. Tex. 2015). Petitioner's status as an applicant for admission affects his right to Due Process because applicants for admission are subject to the "entry fiction" which provides that, for

legal and constitutional purposes, an alien stopped at the border is considered to remain at the border even if he is paroled into the country, and is treated as such for the purpose of determining his rights to relief. *Id.*; *see also Kay*[, 94 F.Supp.2d at 554] (describing the "entry fiction"). The distinction is not one without a difference, as the Supreme Court in *Zadvydas* observed that it "is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders," and that "once an alien [for legal purposes] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." 533 U.S. at 693, 121 S.Ct. 2491. The Court has likewise suggested that even for those aliens found within the United States, "the Due Process Clause does not require [the Government] to employ the least burdensome means to accomplish [the removal of those aliens]." *Demore v. Kim*, 538 U.S. 510, 523, 123 S.Ct. 1708, 155 L.Ed. 2d 724 (2003). Indeed, "the Supreme Court has made clear that inadmissible aliens are entitled to less due process than are resident aliens." *Maldonado*, 150 F.Supp.3d at 799 (citing *Demore*, 538 U.S. at 547, 123 S.Ct. 1708 (O'Connor, J., concurring)). Indeed, as *Zadvydas* explained, an alien's treatment "as if stopped at the border" has historically been held sufficient to justify lengthy and seemingly interminable detention. 533 U.S. at 692-93, 121 S.Ct. 2491 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953)). By all appearances, then, Petitioner, as an alien deemed an applicant for admission who is legally treated as if stopped at the border is entitled to something less than the full panoply of rights usually conferred by the Due Process Clause. *Cf. Rosales-Garcia v. Holland*, 322 F.3d 386, 412 (6th Cir. 2003) (en banc) (holding that at least the substantive portion of the Due Process Clause must apply to even those aliens at the border as to hold otherwise would permit the Government to "torture or summarily execute them" which would amount to an absurd proposition).

Thus, although Petitioner is likely not entitled to all the rights Due Process would provide an alien considered [to be] within this country, he has at least some entitlement to proper procedures. The question that arises, then, is whether mandatory detention *ad infinitum* comports with that entitlement. On this issue, however, neither the Supreme Court nor the Third Circuit has provided clear guidance.

Id. (alterations in original).

*4 *Otis V.* is consistent with the weight of authority from this District finding that § 1225(b) detainees "enjoy the same basic due process right afforded to many other classes of detained aliens; that is, the right to an individualized bond determination once the length of their removal detention has become unreasonable." *Shire v. Decker*, No. 17-1984, 2018 WL 509740, at *4 (M.D. Pa. January 23, 2018) (Rambo, J.); *see also Barthelemy v. Doll*, No. 17-1508, 2018 WL 1008408, at *3 (M.D. Pa. Feb. 22, 2018) (Munley, J.); *Ahmed v. Lowe*, No. 16-2082, 2017 WL 2374078, at *4-5 (M.D. Pa. May 31, 2017) (Mariani, J.); *Ahad v. Lowe*, 235 F.Supp.3d 676, 678 (M.D. Pa. 2017) (Kane, J.); *Bautista v. Sabol*, 862 F.Supp.2d 375, 381-82 (M.D. Pa. 2012) (Caputo, J.).

Thus, the question is whether Petitioner's continued detention has "become so unduly prolonged that it renders § 1225(b) unconstitutional as applied to him?" *Otis V.*, 2018 WL 3302997, at *7. To answer that question, the *Otis V.* court reasoned:

> Although the Third Circuit's ultimate rulings in *Diop* and *Chavez-Alvarez* have been abrogated by *Jennings*, and those two cases are no longer binding upon this Court, it does not follow that those two cases should be ignored. The constitutional reasoning that underlay the Third Circuit's invocation of the constitutional avoidance canon still provides some persuasive guidance to how this Court should address § 1226(c) claims. Specifically, the Court accepts that the "constitutionality of [detention pursuant to § 1226(c) without a bond hearing] is a function of the length of the detention [and t]he constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [certain] thresholds." *Chavez-Alvarez*, 783 F.3d at 474 (quoting *Diop*, 656 F.3d at 232, 234). "This Court likewise is mindful that "any determination on reasonableness [must be] highly fact specific" and that "at a certain point—which may differ case by case[ ]—the burden to an alien's liberty outweighs" the Government's interest in detention without bond," *id.* at 474-75, and that detention which is so unreasonable as to amount to an arbitrary deprivation of liberty cannot comport with

the requirements of the Due Process Clause. *Id.* at 474; *see also Demore*, 538 U.S. at 432, 123 S.Ct. 1513 (Kennedy, J., concurring). Because, however, *Jennings* foreclosed the constitutional avoidance basis provided by the Third Circuit in its determination that detention will normally become suspect between six months and a year, and because *Jennings* leaves open only the question of whether § 1226(c) is unconstitutional as applied to the petitioner, it is insufficient that Petitioner's detention has merely become suspect by reaching this six month to a year threshold, in order for Petitioner to be entitled to release he must show that his ongoing detention is so unreasonable or arbitrary that it has actually violated his rights under the Due Process Clause. If Petitioner's detention has not become so unreasonable or arbitrary that continued application of the statute is unconstitutional as applied to Petitioner, § 1226(c) authorizes his continued detention until a final order of removal is entered and Petitioner would not be entitled to relief. *Jennings*, 138 S.Ct. at 846-47.

In prior cases which have applied a now-abrogated implied reasonableness limitation to § 1225(b) detainees, this Court and others in this District frequently found that detention for just over a year was, given the lesser Due Process protections applicable to applicants for admission, insufficient to render continued detention so suspect as to require a bond hearing. As this Court has previously determined that detention of just over a year is normally insufficient to render detention under § 1225(b) constitutionally suspect, it necessarily follows that detention for a similar period of time cannot be so prolonged and unreasonable as to actually render the statute unconstitutional as applied to Petitioner absent egregious factual circumstances not present in this case.

*5 *Id.* at *8.

In contrast to the petitioner in *Otis V.*, Petitioner in the matter *sub judice* has been detained for twenty-one (21) months at present. Nothing has been filed of record in this case in the past year. Moreover, while the parties have not provided any information regarding the status or outcome Petitioner's BIA appeal, he appears to be scheduled for a hearing before an Immigration Judge next month. Thus, on these facts, Petitioner has shown that an individualized bond hearing is warranted. *See, e.g., Ahmed*, 2017 WL 2374078, at *5 (twenty-seven (27) months unreasonable); *Shire*, 2018 WL 17-1984, at *4 (twenty-five (25) months unreasonable); *Ahad*, 235 F.Supp.3d at 688 (twenty (20) months unreasonable).

IV. Conclusion

For the above stated reasons, the § 2241 petition will be granted in part insofar as it seeks an individualized bond hearing before an Immigration Judge.

An appropriate order follows.

All Citations

Slip Copy, 2018 WL 3584695

Footnotes

1 *Diop* and *Chavez-Alvarez* both concluded that 8 U.S.C. § 1226(c), which applies only to criminal aliens who have already effected an entry into the United States, was subject to an implicit reasonable time limitation. *Jennings* rejected reading both §§ 1225(b) and 1226(c) as subject to such an implicit limitation. *See Otis V.*, 2018 WL 3302997, at *6 (*Diop* and *Chavez-Alvarez* abrogated by *Jennings*); *see also Coello-Udiel v. Doll*, No. 17-1414, 2018 WL 2198720, at *3 (M.D. Pa. May 14, 2018).

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United States District Court, S.D. New York.

Augustin SAJOUS, Petitioner,

v.

Thomas DECKER et al., Respondents.

18-CV-2447 (AJN)

Signed 05/23/2018

Attorneys and Law Firms

Jordan Wells, Aadhithi Padmanabhan, Christopher T. Dunn, Judy Rabinovitz, Michael Thomas Tan, Paige Austin, Robert Andrew Hodgson, American Civil Liberties Union Foundation, Andrea A. Saenz, Brooklyn Defender Services, New York, NY, Bridget Phillips Kessler, Brooke Menschel, Zoey Theo Jones, Brooklyn Defender Services, Brooklyn, NY, for Petitioner.

Brandon Matthew Waterman, United States Attorney's Office, New York, NY, for Respondents.

OPINION AND ORDER

ALISON J. NATHAN, United States District Judge

*1 The present case, initiated by the filing of a petition for habeas corpus under 28 U.S.C. § 2241, concerns the question recently left open by the Supreme Court in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018): whether prolonged mandatory detention of an alien under 8 U.S.C. § 1226(c), without access to a bond hearing, violates the Due Process Clause of the Fifth Amendment. Currently before this Court is the Petitioner's motion for preliminary injunction seeking an order that the Petitioner, who has been detained for over eight months, be given an individualized bond hearing. For the reasons that follow, the Court will grant the Petitioner's motion and order that he receive an individualized bond hearing, thus resolving this case with respect to the individual Petitioner.

I. Background

A. Statutory Framework—§ 1226(c)

Under federal immigration law, the Department of Homeland Security is authorized to arrest and initially detain an alien who has entered the United States but is believed to be removable. 8 U.S.C. § 1226(a); *Lora v. Shanahan*, 804 F.3d 601, 608-09 (2d Cir. 2015), *vacated* 138 S. Ct. 1260 (2018). The alien may be detained "pending a decision on whether the alien is to be removed," or federal officials may choose to release the alien on bond or conditional parole. 8 U.S.C § 1226(a)(1)-(2). Even if officials decide to detain the alien, "an [immigration judge] can ordinarily conduct a bail hearing to decide whether the alien should be released or imprisoned while proceedings are pending." *Lora*, 804 F.3d at 608. Under § 1226(c), however, certain classes of aliens are subject to mandatory detention and may not, under the statute, be released on bond. *Jennings v. Rodriguez*, 138 S. Ct. 830, 837-38 (2018). Broadly speaking, aliens subject to mandatory detention include those who have committed certain "crimes involving moral turpitude" as defined by statute, controlled substance offenses, aggravated felonies, firearm offenses, or terrorist activities. *See* 8 U.S.C. § 1226(c)(1)(A)-(D). An alien who is detained pursuant to § 1226(c) may seek discretionary release from the Head of the Department of Homeland Security if he is a witness, a potential witness, a cooperator, or an immediate family member or close associate of someone who is acting as a witness, potential witness, or cooperator in an investigation into major criminal activity. *Id.* § 1226(c)(2). No other category of discretionary release exists under the statute.

B. Judicial Interpretation of § 1226(c)

1. *Lora*

In 2015, the Second Circuit decided *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), which held that "in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention." *Id.* at 616. In deciding the case, the Second Circuit relied primarily on two Supreme Court cases related to the detention of aliens. The first, *Zadvydas v. Davis*, 533 U.S. 678 (2001), applied the canon of constitutional avoidance and held that aliens who had been ordered removed, but for whom "removal is no longer reasonably foreseeable" could not

be detained. *Id.* at 699. The Second Circuit in *Lora* interpreted *Zadvydas* as "the Supreme Court signal[ing] its concerns about the constitutionality of a statutory scheme that ostensibly authorized indefinite detention of non-citizens." 804 F.3d at 613. The second case *Lora* relied on, *Demore v. Kim*, 538 U.S. 510 (2003), upheld the constitutionality of § 1226(c)'s mandatory detention, concluding that Congress "may require that [removable aliens detained under § 1226(c)] be detained for the brief period necessary for their removal proceedings." *Id.* at 513. The *Lora* decision described the Supreme Court's decision in *Demore* as "emphasiz[ing] that, for detention under the statute to be reasonable, it must be for a brief period of time." 804 F.3d at 614. The Second Circuit found further support for its conclusion in Justice Kennedy's concurrence in *Demore*, in which he reasoned that "[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* (alteration in original) (quoting *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring)). The Second Circuit concluded that *Zadvydas* and *Demore*, taken together, "clearly establish that mandatory detention under section 1226(c) is permissible, but that there must be some procedural safeguard in place for immigrants detained for months without a hearing." *Id.* As a result, the Second Circuit employed the canon of constitutional avoidance to read "an implicit temporal limitation" in the statute. *Id.*

***2** Having concluded that *some* temporal limitation on mandatory detention was constitutionally necessary, the Second Circuit further held that the appropriate limitation to read into the statute was six months. *Id.* at 614-15. The Second Circuit found support for this conclusion in *Zadvydas* and *Demore*, reasoning that those cases "suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention." *Id.* at 615. Specifically, in *Zadvydas*, "the Court held that six months was a 'presumptively reasonable period of detention' in a related context." *Id.* (quoting *Zadvydas*, 533 U.S. at 700-01). In *Demore*, "the Court held that section 1226(c) authorized mandatory detention only for the 'limited period of [the alien's] removal proceedings,' " which, at the time of the Supreme Court's decision, " 'last[ed] roughly a month and a half in the vast majority of cases in which [section 1226(c) was] invoked, and about five months in the minority of cases in which the alien cho[se] to appeal.' " *Id.* (alterations in original) (quoting *Demore*, 538 U.S. at 529-31). In contrast, at the time of the *Lora* decision in 2015, "a non-citizen detained under section 1226(c) who contests his or her removal regularly spen[t] many months and sometimes years in detention due to the enormous backlog in immigration proceedings." *Id.* at 605 & n.9.

The Second Circuit further reasoned that a brightline rule was necessary because of "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis." *Id.* at 615. In addition, a six-month rule was appropriate, according to *Lora*, because "endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families." *Id.* at 616. As a result, the Second Circuit concluded that an alien detained pursuant to § 1226(c) was entitled to a bail hearing after six months of detention and that the detainee "must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." *Id.*

2. *Jennings*

From October 2015 through February 2018, *Lora* remained good law, and Immigration and Customs Enforcement ("ICE") officials routinely acquiesced to bail hearings before an immigration judge within six months of detention. Decl. of Andrea Saenz, Dkt. No. 14-6, ¶ 3. On February 27, 2018, the Supreme Court decided *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), in which it held that the Ninth Circuit had erred in applying the canon of constitutional avoidance to § 1226(c), as well as other related provisions of federal immigration law, because the express language of § 1226(c) can only mean "that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." *Id.* at 846. In other words, the only reasonable interpretation of § 1226(c) "makes clear that detention of aliens within [§ 1226(c)'s] scope *must* continue 'pending a decision on whether the alien is to be removed from the United States.' " *Id.* (quoting 8 U.S.C. § 1225(a)). As a result, the Ninth Circuit erred when it interpreted § 1226(c) to contain an implicit six-month limitation on detention absent a bail hearing. The Supreme Court described

this interpretation as "textual alchemy" and concluded that "[e]ven if courts were permitted to fashion 6–month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite." *Id.*

In dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, warned that interpreting the statute to foreclose any bond hearing while detained "at the very least would raise 'grave doubts' about the statute's constitutionality." *Id.* at 861 (Breyer, J., dissenting). Specifically, the dissent concluded that the Constitution's "language, its basic purposes, the relevant history, our tradition, and many of the relevant cases" all support the conclusion that a statute "that would deny bail proceedings where detention is prolonged would likely mean that the statute violates [the Fifth Amendment to] the Constitution." *Id.* at 869. In support of this conclusion, the dissent demonstrated that reasonable bail, and the opportunity for a bail hearing, were considered necessary in a long line of Supreme Court precedent, the law of England before the Founding of the United States, and even in the structure of the U.S. Constitution, *See id.* at 862-69. The majority opinion in *Jennings* took no position on this constitutional analysis, instead simply remanding the case to the Ninth Circuit to address the constitutional issue in the first instance. *Id.* at 851 (majority opinion).

*3 Because the Ninth Circuit's interpretation of § 1226(c) had been identical to the Second Circuit's in *Lora*, the Supreme Court's decision in *Jennings* abrogated *Lora*'s constitutional avoidance holding. And so, on March 5, 2018, the Supreme Court granted certiorari in *Lora*, vacated the Second Circuit's judgment, and remanded the case to the Second Circuit for further consideration in light of *Jennings*. *Shanahan v. Lora*, 138 S. Ct. 1260 (2018). On remand, the Second Circuit dismissed the case as moot because the petitioner, Mr. Lora, had been granted cancellation of removal. *Lora v. Shanahan*, 719 Fed.Appx. 79, 80 (2d Cir. 2018). The question, taken up shortly, is whether this posture requires the Court to treat itself as bound by *Lora*'s constitutional analysis.

C. The Petitioner

Augustin Sajous came to the United States from Haiti in 1972 when he was 14 years old. Decl. of Augustin Sajous ("Sajous Decl."), Dkt. No. 27-2, ¶¶ 1, 3; *see also* Decl. of Matthew Zabbia ("Zabbia Decl."), Dkt. No. 39, 4-5. He was admitted as a Lawful Permanent Resident. Sajous Decl. ¶¶ 1, 3; Zabbia Decl. ¶ 5. He was trained as an auto mechanic and worked for 30 years in that field. Sajous Decl. ¶¶ 4-5. Sajous suffers from schizophrenia, which was untreated for many years because he "did not know that the voices [he] was hearing were caused by a mental illness." Sajous Decl. ¶ 9. During this period of untreated mental illness, Sajous committed numerous low-level, non-violent offenses. Decl. of Jesse Rockoff ("Rockoff Decl."), Dkt. No. 27-3, ¶ 3. He was arrested 16 times between 1994 and 2017. Decl. of Brandon Waterman, Ex. A ("RAP Sheet"), Dkt. No. 37-1. He was convicted of crimes including aggravated unlicensed operation of a motor vehicle, attempted criminal possession of stolen property, attempted criminal possession of a controlled substance, petit larceny, criminal possession of a forged instrument, attempted forgery, and criminal trespass. *See* RAP Sheet. Two of these convictions are relevant to the present case. First, on July 6, 2015, Sajous was convicted of criminal possession of a forged instrument in the third degree in violation of New York Penal Law § 170.20, for which he was sentenced to 30 days in jail. RAP Sheet at 20-21. Second, on August 20, 2015, Sajous was convicted of attempted forgery in the third degree in violation of New York Penal Law § 170.05, for which he was sentenced to 30 days in jail. RAP Sheet at 18-19.

On September 21, 2017, Sajous was arrested by ICE officials while appearing in court and served with a Notice to Appear for removal proceedings. Petition, Dkt. No. 13, ¶ 19. The Notice to Appear charges Sajous as removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act as an alien who after admission has been convicted of two or more crimes involving moral turpitude. Petition ¶¶ 17-19; Zabbia Decl. ¶ 12; *see also* 8 U.S.C. § 1227(a)(2)(A)(ii). ICE officials detained Sajous subject to the mandatory detention provision contained in 8 U.S.C. § 1226(c). See Decl. of Brandon Waterman, Ex. C ("Custody Notice"), Dkt. No. 37-3. Sajous has remained in ICE custody since his arrest on September 21, 2017, and has been held in the immigration jail at Hudson County Correctional Facility in New Jersey. Sajous Decl. 12; Zabbia Decl. ¶ 12.

On September 26, 2017, ICE officials filed the Notice to Appear with the immigration court, which commenced Sajous's removal proceedings. Zabbia Decl. ¶ 13. On November 13, 2017, Sajous appeared for his first master calendar hearing before an immigration judge. At that appearance, he indicated that he was not prepared to

plead to the Notice to Appear. Zabbia Decl. ¶ 14. The immigration judge adjourned the case to December 6, 2017. Zabbia Decl. ¶ 14.

*4 On November 30, 2017, Sajous filed a motion to terminate his removal proceedings on the grounds that the two forgery convictions described above did not qualify as crimes involving moral turpitude. Zabbia Decl. ¶ 15. ICE officials opposed the motion. Zabbia Decl. ¶ 15. On December 6, 2017, at Sajous's second master calendar hearing, Sajous admitted to the allegations in the Notice to Appear but denied removability. Zabbia Decl. ¶ 16. The immigration judge denied Sajous's motion to terminate and found him removable. Zabbia Decl. ¶ 16. A third master calendar hearing was scheduled for December 27, 2017, at which Sajous could submit applications for relief from removal. Zabbia Decl. ¶ 16.

On December 6, 2017, following the second master calendar hearing, Sajous's counsel submitted a FOIA request to the U.S. Citizenship and Immigration Services ("USCIS") to obtain a complete copy of Sajous's immigration A-file. Rockoff Decl. ¶ 6. On December 20, 2017, USCIS received the FOIA request. Decl. of Jill Eggleston ("Eggleston Decl."), Dkt. No. 41, ¶ 7. That same day, USCIS determined that the A-file was in the custody of ICE's New York branch, and USCIS requested the A-file from ICE to be processed pursuant to Sajous's FOIA request. Eggleston Decl. ¶ 8. On January 9, 2018, ICE forwarded the file to USCIS data entry personnel in New York. Decl. of Michael McFarland ("McFarland Decl."), Dkt. No. 40, ¶¶ 4-5. A USCIS contractor received the file on January 23, 2018. McFarland Decl. ¶ 5. However, the A-file was never forwarded from USCIS personnel in New York to the records processing center in Missouri and was never sent to Sajous. *See* McFarland Decl. ¶¶ 5-7.

On December 27, 2017, Sajous appeared for a third master calendar hearing before the immigration judge. Zabbia Decl. ¶ 17. Sajous's counsel stated that he could not file applications for relief at that hearing because ICE had not yet sent Sajous's A-file. Zabbia Decl. ¶ 17. ICE stated at the hearing that a FOIA request was the appropriate method for obtaining documents from the A-file. Zabbia Decl. ¶ 17. The immigration judge adjourned the case to February 20, 2018. Zabbia Decl. ¶ 17. On January 9, 2018, ICE provided Sajous's counsel with certain documents from a prior removal proceeding that occurred in 2008, at which an immigration judge ultimately terminated the removal proceedings without prejudice on ICE's motion. Zabbia Decl. ¶¶ 9, 18.

On February 20, 2018, Sajous appeared before the immigration judge without counsel for a fourth master calendar hearing and *Lora* bond hearing. Zabbia Decl. ¶ 19. However, the hearings did not proceed because although the hearing had been scheduled for the morning, the hearing notice provided to Sajous and his counsel stated that the hearing was scheduled for the afternoon docket. Zabbia Decl. ¶ 19. The immigration judge rescheduled the hearings for March 19, 2018. Zabbia Decl. ¶ 19.

On March 19, 2018, Sajous and his attorney appeared for the adjourned fourth master calendar hearing, at which Sajous's counsel filed two applications for relief from removal. Zabbia Decl. ¶ 20. Sajous's counsel informed the immigration judge that he had not yet received the complete copy of Sajous's A-file pursuant to the December 6, 2017 FOIA request. Zabbia Decl. ¶ 20. Over ICE's objection, the immigration judge adjourned the case to May 1, 2018 for a fifth master calendar hearing. Zabbia Decl. ¶ 20. The immigration judge further concluded that he could not hold a *Lora* bond hearing because Sajous was subject to mandatory detention under § 1226(c), and *Lora* had been vacated by the Supreme Court following its decision in *Jennings*. Zabbia Decl. ¶ 20.

Following the March 19, 2018 master calendar hearing, Sajous's counsel filed an initial habeas petition with this Court. Dkt. No. 1. On March 20, 2018, after learning that Sajous had filed a habeas petition, ICE Deputy Chief Counsel Michael McFarland instructed an ICE clerk to obtain Sajous's A-file, which ICE knew through electronic records was still located at USCIS offices in New York. McFarland Decl. ¶ 6. On March 22, 2018, an ICE clerk retrieved the file, and ICE became aware that USCIS had never delivered the A-file to the records department in Missouri for FOIA processing. McFarland Decl. ¶ 7. On March 29, 2018, ICE once again forwarded the A-file to USCIS data personnel in New York. McFarland Decl. ¶ 8. Also on March 29, 2018, USCIS personnel forwarded the file to the records department in Missouri. The file was received in Missouri on or before April 6, 2018. McFarland Decl. ¶ 8. USCIS sent the processed A-file to ICE's FOIA Office on April 16, 2018. Eggleston Decl. ¶ 9.

*5 On April 5, 2018, Sajous filed an amended petition with this Court. *See* Petition. He simultaneously filed a motion to certify a class of similarly situated plaintiffs, Dkt. No. 14, and shortly thereafter filed a motion for preliminary injunction ordering that he be granted a bond hearing, Dkt. No. 27. On May 18, 2018, the Court heard oral argument in this matter.

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A court may issue a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. As a general matter, a party seeking a preliminary injunction must make one of two showings: First, he may "show that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest." *ACLU v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015). Alternatively, he "may show irreparable harm and either a likelihood of success on the merits or 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.' " *Id.* (quoting *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012)). When a party seeks a preliminary injunction that "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits," the movant bears a more substantial burden and "must show 'clear' or 'substantial' likelihood of success on the merits and make a 'strong showing' of irreparable harm in addition to showing that the preliminary injunction is in the public interest." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (citations omitted).

III. Petitioner Sajous Is Entitled to a Preliminary Injunction

The Court concludes that the Petitioner has demonstrated that he is entitled to a preliminary injunction. Based on the circumstances of his case, he has made a clear and substantial showing that he will prevail on the merits. Additionally, the continued deprivation of his freedom from detention without due process constitutes irreparable harm. Finally, the balance of equities and public interest tip decidedly in his favor because the continued deprivation of his liberty outweighs the boilerplate suggestion that granting Sajous a hearing undermines the immigration laws of the United States.

A. Likelihood of Success on the Merits

*6 There is a clear and substantial likelihood that the Petitioner will succeed on the merits. In fact, the Court concludes that the Petitioner does succeed on the merits in this case. Applying existing case law, the Court first concludes that under the Due Process Clause, the reasonability of detention under § 1226(c) is an individualized inquiry. Considering the particular circumstances of this case, the Court next concludes that it would violate the Petitioner's right to due process to continue to detain him without prompt access to an individualized bond hearing. As a result, Sajous is substantially likely to succeed (and does, in fact succeed) on the merits.

1. Effect of *Lora*

The first question the Court must answer is whether the Second Circuit's constitutional analysis in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *vacated* 138 S. Ct. 1260 (2018), remains binding authority that the Court must follow. Petitioner argues that *Lora* remains precedential despite the Supreme Court's grant, vacatur, and remand of the judgment in that case, relying primarily on a decision of the D.C. Circuit. *See* Memo. in Support of Mot. for Prelim. Injunction ("Support"), Dkt. No. 27-1, at 7 n.2 ("When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb it.") (alteration in original) (quoting *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006)). The Government, on the other hand, argues that "[t]he Court's holding in *Jennings* ... abrogates *Lora*'s prolonged detention holding." Memo. in Opp. to Mot. for Prelim. Injunction ("Opp."), Dkt. No. 36, at 11.

As a preliminary matter, it is worth noting that by definition, vacating a decision divests that decision of legal force. *Vacate*, Black's Law Dictionary (10th ed. 2014) (defining "vacate" as "[t]o nullify or cancel; make void;

invalidate"). Moreover, the Court concludes that under the Second Circuit's case law, the opinion in *Lora* is no longer binding but carries significant persuasive weight. In *Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010), the Second Circuit stated that following the Supreme Court's vacatur of a prior Second Circuit decision, the *Brown* panel was no longer bound to follow the Circuit's prior precedent. Specifically, it reasoned that "[b]ecause the Supreme Court vacated" the Second Circuit's prior decision, that prior decision "is not technically binding on us." *Id.* at 476. In so stating, the Second Circuit relied on its analysis in a previous case, in which it had written in dicta that "[w]hen imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit." *Id.* at 477 (alteration in original) (quoting *Russman v. Bd. of Educ. of the Enlarged City Sch. Dist. of the City of Watervliet*, 260 F.3d 114, 122 n.2 (2d Cir. 2001)). The Second Circuit further noted, however, that it should "nonetheless treat [the vacated decision] as persuasive authority." *Id.*

Courts in this district, following the Second Circuit's conclusion in *Brown*, have treated vacated Second Circuit opinions as persuasive—but nonbinding—authority. *See Silverman v. Miranda*, 213 F. Supp. 3d 519, 530 (S.D.N.Y. 2016) ("Although *Miranda III* is no longer binding on this Court, it was vacated on grounds unrelated to damages, and the Court treats the decision as persuasive authority as to those issues."); *United Nat'l Ins. Co. v. Waterfront N. Y. Realty, Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996) ("Because the Second Circuit's decision in *United National v. Waterfront* was vacated on jurisdictional grounds, it is not controlling precedent. Nonetheless, as the decision was not vacated on the merits, it remains strong persuasive authority." (citation omitted)).[1] The Court will do the same here. The Government notes that this language in *Brown* may be dicta rather than a holding. *See* Dkt. No. 61. Neither the Petitioner, Dkt. No. 63, nor the Government suggests, however, that this Court should disregard the *Brown* language on vacatur, and this Court sees no basis for doing so.

*7 The Second Circuit cases cited by the Petitioner do not compel a contrary result. First, Petitioner cites *Wojchowski v. Daines*, 498 F.3d 99 (2d Cir. 2007). *See* Support at 11. There, the Second Circuit, in laying out the general rule that previously decided opinions of one panel bind all other future panels, recognized an exception when "an intervening Supreme Court decision ... casts doubt on our controlling precedent." 498 F.3d at 106 (quoting *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 141 (2d Cir. 2006)). But *Wojchowski* does not speak to the context in which the Supreme Court has directly vacated a Circuit decision. Second, Petitioner's reliance on *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993), is unavailing. *See* Reply at 2 n.1. There, the Second Circuit considered its own ability to reach the same conclusion as it had previously reached in a case in which the Supreme Court had granted certiorari, vacated the decision, and remanded. 999 F.2d at 35 n.1. The Court agrees that the Second Circuit can—and may very well—reach the same conclusion as it did in *Lora* in a subsequent case. That proposition, however, does not suggest that this Court is bound by the now-vacated decision in *Lora*, or its reasoning, and can thus apply the rule of that decision without independent analysis.

At oral argument, the Petitioner contended that the Second Circuit has implicitly signaled the continuing authority of *Lora*. This argument was premised on the fact that when the Second Circuit dismissed *Lora* as moot on remand from the Supreme Court, it did not cite the *Munsingwear* doctrine or "vacat[e] the panel decision." Tr. of May 18, 2018 Oral Argument ("Tr.") 4:10-5:24; *see also Lora v. Shanahan*, 719 Fed.Appx. 79 (2d Cir. 2018) (dismissing the appeal as moot); Letter Brief of Appellant Lora at 4-5, 719 Fed.Appx. 79 (2d Cir. 2018) (No. 14-2343), Dkt. No. 182 (requesting the original panel decision be vacated pursuant to the *Munsingwear* doctrine). Under *Munsingwear*, if a case becomes moot before it can be fully litigated on appeal, the reviewing court's "decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 40 (1950). This ensures that "the rights of all parties are preserved" to fully litigate the issues in a future case. *Id.* In this case, the Petitioner argues that because the appellant in *Lora* requested that the Second Circuit vacate the panel decision under the *Munsingwear* doctrine following the Supreme Court's vacatur and remand, and because the Second Circuit did not cite the doctrine or vacate the panel decision when it dismissed the *Lora* case as moot, the Second Circuit intended that its prior decision remain in effect. This argument is not persuasive. The Supreme Court had already vacated the *Lora* panel opinion before remanding it to the Second Circuit. *See* 719 Fed.Appx. at 80. There was thus no precedential decision left for the

Second Circuit to vacate on remand under *Munsingwear* before it dismissed the appeal as moot. And so, as the Government concedes in its May 23, 2018 letter, all of *Lora*'s holdings are, at most, merely persuasive authority. *See* Dkt. No. 61.

The Court thus concludes that the entirety of the Second Circuit's decision in *Lora* is no longer binding authority. Nevertheless, consistent with the Second Circuit's decision in *Brown*, the reasoning of *Lora* remains strong persuasive authority to guide the decision in this case.

2. Due Process Claim

Having concluded that the decision in *Lora* is not binding authority that neatly resolves this case, the Court must decide whether the Petitioner is likely to succeed on his claim that his detention of longer than six months without a bond hearing violates the Fifth Amendment's due process guarantee. The Court concludes that the particular circumstances surrounding the Petitioner's detention make the duration for which he has been held without a bond hearing unreasonable, and he is therefore likely to succeed on the merits of his claim.

a. Prolonged Detention Without a Bond Hearing Violates the Fifth Amendment

*8 The Court's first conclusion is essentially conceded by the Government: that prolonged detention under § 1226(c) without providing an alien with a bond hearing will—at some point—violate the right to due process.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. This liberty interest applies equally to aliens present within the United States. The Supreme Court has repeatedly recognized that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Demore*, 538 U.S. at 523 (same). As a result, the Supreme Court concluded in *Zadvydas* that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Fifth Amendment. 533 U.S. at 690.

Furthermore, in *Demore*, the Supreme Court held that mandatory detention under § 1226(c) was not unconstitutional on its face, but limited its holding to a brief period of detention, stating "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for *the brief period* necessary for their removal proceedings." 538 U.S. at 513 (emphasis added). The Court described the "brief period" that it held valid: "in the majority of cases," detention pursuant to § 1226(c) in 2003 "lasts for less than ... 90 days." *Id.* at 529. In the overwhelming majority of cases—85%—"removal proceedings are completed in an average time of 47 days and a median of 30 days." *Id.* "In the remaining 15% of cases," in which an appeal was taken, "appeal takes an average of four months." *Id.* The Court thus concluded that "[i]n sum, the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases." *Id.* at 530. Throughout the opinion, the Supreme Court emphasized the brevity of detention under § 1226(c). *See id.* at 522-23 ("Rather, respondent argued that the Government may not, consistent with the Due Process Clause of the Fifth Amendment, detain him for the *brief* period necessary for his removal proceedings." (emphasis added)); *id.* at 526 ("Despite this Court's longstanding view that the Government may constitutionally detain deportable aliens during the *limited* period necessary for their removal proceedings, respondent argues that the narrow detention policy reflected in 8 U.S.C. § 1226(c) violates due process." (emphasis added)); *id.* at 528 ("*Zadvydas* is materially different from the present case in a second respect as well. While the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a *much shorter duration*." (emphasis added) (citation omitted)); *id.* at 531 ("The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the *limited* period of his removal proceedings, is governed by these cases." (emphasis added)). Justice Kennedy's concurring opinion identified the duration of detention as dispositive of the Court's holding, reasoning that "[w]ere there to be an unreasonable delay by the INS in pursuing and

completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532-33 (Kennedy, J., concurring). Under those circumstances, "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness." *Id.* at 532.

***9** As a result, the Second Circuit in *Lora* concluded that mandatory detention under § 1226(c) could become so prolonged that it would violate the right to due process, as suggested in Justice Kennedy's *Demore* concurrence. *See Lora*, 804 F.3d at 614 ("[M]andatory detention under section 1226(c) is permissible, but ... there must be some procedural safeguard in place for immigrants detained for months without a hearing."). In so ruling, the Second Circuit "join[ed] every other circuit that has considered this issue." *Id.*; *see Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1213 (11th Cir. 2016) ("ICE's continuous mandatory detention of Sopo without a bond hearing has lasted for four years, including through two BIA remands to the IJ, and patently raises serious constitutional concerns."), *vacated*, No. 14-11421, 2018 WL 2247336, at *1 (11th Cir. May 17, 2018); *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) ("The concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns."); *Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013) ("[I]t is clear that while mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment."); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011) ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (holding that the Constitution would require "that removal proceedings be concluded within a reasonable time"). *Lora*'s constitutional analysis also echoed the decisions of courts within this district that had reached the constitutional issue rather than applying the doctrine of constitutional avoidance. *See, e.g., Young v. Aviles*, 99 F. Supp. 3d 443, 455 (S.D.N.Y. 2015) ("[T]his Court agrees with those that have found that, at some point, detention without a hearing offends the Due Process Clause."); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 548 (S.D.N.Y. 2014) ("Six months' detention without an opportunity to be heard raises serious constitutional questions.").

The Government in this case similarly conceded at oral argument that, although the language of § 1226 technically ascribes an end point to all detention under the section by authorizing detention only until "a decision on whether the alien is to be removed" is reached, 8 U.S.C. § 1226(a), such detention in reality could, for some detained aliens, become potentially indefinite. Tr. 48:21-49:19. In such cases, the Government recognized, aliens must have a remedy to redress such unreasonable detention through an as-applied challenge to continued detention. Tr. 36:19-37:2, 48:13-14, 48:21-49:19.

The Court likewise concludes based on the text of the Fifth Amendment, the Supreme Court's decisions in *Zadvydas* and *Demore*, as well as the persuasive interpretation of these cases offered by other federal courts and the Government's concessions in this case, that prolonged mandatory detention under § 1226(c), under certain circumstances discussed below, can become unreasonable such that an alien is "entitled to an individualized determination as to his risk of flight and dangerousness." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

b. A Brightline Rule of a Bond Hearing after Six Months Is Not Constitutionally Mandated

While the Court adopts the holding of *Lora* that the Fifth Amendment requires aliens to be afforded bail hearings if detained for a prolonged period, the Court cannot conclude—as either a matter of first impression or in reliance on *Lora*'s analysis—that the Constitution would deem any detention beyond six months per se unconstitutional. The Second Circuit in *Lora* adopted a six-month brightline rule as a matter of statutory interpretation, and it is not clear from the opinion in that case whether the six-month rule can be disaggregated from the court's constitutional avoidance analysis. In reaching a brightline rule, the Second Circuit largely relied on practical concerns such as the predictability of district court decisions that, while useful when choosing among alternative statutory constructions, have no obvious

significance under a due process analysis engaged in by a district court. *See Lora*, 804 F.3d at 616 ("With such large dockets, predictability and certainty are considerations of enhanced importance and we believe that the interests of the detainees and the district courts, as well as the government, are best served by this approach."). Because the Second Circuit's opinion provides no guidance on the brightline question outside of the constitutional-avoidance mode, the Court is not persuaded that the six-month brightline rule adopted in *Lora* is applicable when considering the constitutional question at issue before this Court and in this case. The Court also finds reason to doubt that the Due Process Clause requires a six-month brightline rule for bail hearings based on the *Demore* decision. There, the Supreme Court upheld the mandatory detention of an alien who had already been detained for six months and would continue to be detained following remand of the case. The Court reasoned that the alien in that case "was detained for somewhat longer than the average—spending six months in INS custody prior to the District Court's order granting habeas relief, but respondent himself had requested a continuance of his removal hearing," thus justifying his somewhat longer detention. *Demore*, 538 U.S. at 530-31.

***10** Because *Lora* analyzed its six-month brightline rule only as a matter of statutory construction and because it is uncertain, based on existing precedent, whether the Due Process Clause mandates such a brightline rule, the Court concludes that it may not impose a six-month rule as a matter of constitutional interpretation.

c. Whether Detention Is "Unreasonable" Requires a Case-Specific Analysis

Rather than employ a brightline rule, the Court concludes that whether mandatory detention under § 1226(c) has become "unreasonable," *Demore*, 538 U.S. at 532 (Kennedy, J., concurring), and thus a due process violation, must be decided using an as-applied, fact-based analysis. "Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all the circumstances of any given case." *Diop*, 656 F.3d at 234. Such an analysis will require examining several factors that have been derived from the Supreme Court's decisions in *Zadvydas* and *Demore* and adopted by courts in this circuit and elsewhere when determining whether an alien's detention has become unreasonable.

The first, and most important, factor that must be considered is the length of time the alien has already been detained. In *Zadvydas*, the Court identified six months of detention as presumptively reasonable. 533 U.S. at 701. Conversely, it noted "that Congress previously doubted the constitutionality of detention for more than six months." *Id.* (citing *United States v. Witkovich*, 353 U.S. 194 (1957)). As a result, detention that has lasted longer than six months is more likely to be "unreasonable," and thus contrary to due process, than detention of less than six months. *See Sopo*, 825 F.3d at 1217 ("The need for a bond inquiry is likely to arise in the six-month to one-year window, at which time a court must determine whether the purposes of the statute—preventing flight and criminal acts—are being fulfilled, and whether the government is incarcerating the alien for reasons other than risk of flight or dangerousness."); *Diop*, 656 F.3d at 234 ("[G]iven that Congress and the Supreme Court believed those purposes [of § 1226(c)] would be fulfilled in the vast majority of cases within a month and a half, and five months at the maximum, the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past those thresholds." (citation omitted)); *Araujo-Cortes*, 35 F. Supp. 3d at 548 ("[I]t is longer than the six-months after which detention becomes prolonged and presumptively unreasonable under *Zadvydas*."). As part of this analysis, the likely duration of continued detention is pertinent. *See Reid*, 819 F.3d at 500; *Araujo-Cortes*, 35 F. Supp. 3d at 549.

Second, courts should consider whether the alien is responsible for the delay. If the alien has requested several continuances or otherwise delayed immigration proceedings, it is less likely that the length of his detention could be deemed unreasonable because "aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015); *Ly*, 351 F.3d at 272 ("[C]ourts must be sensitive to the possibility that dilatory tactics by the removable alien may serve ... to compel a determination that the alien must be released because of the length of his incarceration."); *see also Demore*, 538 U.S. at 531 (justifying the alien's six-month detention by stating that "respondent himself had requested a continuance"). If immigration officials have caused delay, it weighs in

favor of finding continued detention unreasonable. *See Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring) ("Were there to be an unreasonable delay *by the INS* in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." (emphasis added)); *Reid*, 819 F.3d at 500 (considering "the promptness (or delay) of the immigration authorities" as a relevant factor); *Young*, 99 F. Supp. 3d at 455-56 (holding that an alien's detention did not yet violate due process because, "[f]irst and foremost, '[t]here is no evidence that the immigration authorities have unreasonably prolonged [Young's] removal proceedings and consequent detention.' " (second and third alteration in original) (citation omitted)).

*11 Continued detention will also appear more unreasonable when the delay in proceedings was caused by the immigration court or other non-ICE government officials. The Court thus rejects the Government's position at oral argument that "the Court's focus should be on ICE's action as the prosecuting agency" and that if "the immigration court just sits on [an alien's case] either because of capacity or negligence or something," that should not be considered. Tr. 30:4-31:16, 40:16-18. When an alien's detention becomes prolonged because his case has "slipped through the cracks," such detention is unreasonable whether the failure was caused by ICE officials, an immigration judge, an administrative clerk, or another agency such as USCIS. As the Sixth Circuit concluded in *Ly*, "although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take." 351 F.3d at 272. The *Ly* opinion criticizes the immigration court for taking "a year and a half with no final decision as to removability in this case," concluding that such delay was unreasonable. *Id.* at 271. The Court finds this reasoning persuasive and agrees that the operative question should be whether the alien has been the cause of delayed immigration proceedings and, where the fault is attributable to some entity other than the alien, the factor will weigh in favor of concluding that continued detention without a bond hearing is unreasonable.

Third, it may be pertinent whether the detained alien has asserted defenses to removal. If an alien has not asserted any grounds on which his removal may be cancelled, he will presumably be removed from the United States eventually. Under these circumstances, detaining the alien will always at least marginally serve "the ultimate purpose behind the detention," and the continued detention of the alien will be more reasonable than if the alien had at least some possibility of remaining in the country. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("[T]he ultimate purpose behind the detention is premised upon the alien's deportability."). Conversely, because the mandatory detention statute "is premised upon the alien's *presumed* deportability and the government's *presumed* ability to reach the removal decision within a brief period of time," as "the actualization of these presumptions grows weaker or more attenuated, the categorical nature of the detention will become increasingly unreasonable." *Reid*, 819 F.3d at 499-500.

Other factors may also be relevant, including "whether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable," *Sopo*, 825 F.3d at 1218; *Reid*, 819 F.3d at 500, and "whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention," *Sopo*, 825 F.3d at 1218; *Chavez-Alvarez*, 783 F.3d at 478.

d. Due Process Requires that the Petitioner Be Given an Immediate Bond Hearing

Applying the factors identified above, the Court concludes that continued detention of the Petitioner pursuant to § 1226(c) without access to a bond hearing is unreasonable, and thus unconstitutional, as applied to him. The Petitioner in this case has already been in detention for longer than eight months. Moreover, the reason why the Petitioner's removal proceedings have been delayed is largely attributable to immigration officials' failure to process and send Sajous's A-file to his counsel. The Petitioner's counsel sent a FOIA request for his complete A-file on December 6, 2017. Rockoff Decl. ¶ 6. After that file was sent to USCIS here in New York, it languished for months, forgotten. *See* McFarland Decl. ¶¶ 5, 7. Despite counsel for Petitioner repeatedly asking about the status of the A-file and representing that he had not received it, Rockoff Decl. ¶¶ 7-10, 13, 15, no action was taken by ICE or USCIS to confirm that it had been processed and would be sent to the Petitioner. Tr. 32:2-34:3. It was only the filing of this habeas petition that caused

the error to be discovered, and only because ICE itself sought to have the A-file returned to its offices. As the Government stated at oral argument, had the Petitioner not had reason to believe that he was entitled to a bond hearing after six months and thus filed a habeas petition, it is possible that USCIS's error would not have been discovered, and the Petitioner could have remained in detention, seeking continuances while awaiting a critical file that was substantially delayed or not coming. Tr. 33:22-34:10. The Court squarely rejects Government's assertion that Sajous is responsible for the delay in his proceedings because he sought a continuance. Opp. at 20-21. The Petitioner was required to seek a continuance *because* of a prolonged, uncorrected failure by the relevant immigration agencies. Principles of logic and fairness prevent the Court from attributing such a delay to the Petitioner. In addition, the Petitioner has asserted several defenses to his removal. The Court need not inquire into the strength of these defenses—it is sufficient to note their existence and the resulting possibility that the Petitioner will ultimately not be removed, which diminishes the ultimate purpose of detaining the Petitioner pending a final determination as to whether he is removable. Moreover, as both parties conceded at oral argument, the Government has not argued—either in immigration proceedings or before this Court—that the defenses raised by Sajous are frivolous. Tr. 22:21-23:5, 38:6-12. It is also relevant that the Petitioner has been detained for over eight months for two offenses that were each punishable by up to 30 days in jail. As a result, his detention under § 1226(c) has already been over four times longer than the maximum sentence he faced for his underlying offenses. Finally, the Petitioner is now being detained in an actual jail.

***12** Simply put, the factors identified above all demonstrate that continued detention of the Petitioner without a bond hearing is unreasonable and unconstitutional. As a result, the Petitioner has demonstrated a substantial likelihood of success on the merits of his petition, and he is thus entitled to an individualized bond hearing, which provides full relief on his claim.

e. The Burden of Proof at the Petitioner's Bond Hearing Will Be on the Government

In his memorandum in support of the motion for a preliminary injunction, the Petitioner argues that the burden at a bond hearing should be on the Government to justify by clear and convincing evidence that Sajous poses a risk of flight or a danger to the community. Support at 14-15. In support of this proposition, he identifies numerous cases in which the Supreme Court has placed the burden on the Government to justify civil detention or the deprivation of other constitutional rights by making a showing of at least clear and convincing evidence. *See id.* (citing *Zadvydas*, 533 U.S. at 692; *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992); *United States v. Salerno*, 481 U.S. 739, 741 (1987); *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997); *Addington v. Texas*, 441 U.S. 418, 424 (1979); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Woodby v. I.N.S.*, 385 U.S. 276, 285-286 (1966); and *Chaunt v. United States*, 364 U.S. 350, 353 (1960)). In its opposition, the Government makes no argument regarding which party should bear the burden, or what standard of proof should govern, at a bond hearing. As a result, the Government has "waived this argument by failing to raise it in opposition to plaintiffs' motion." *NML Capital, Ltd. v. Republic of Argentina*, No. 05-cv-2434 (TPG), 2009 WL 1528535, at *1 (S.D.N.Y. May 29, 2009); *see also Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (citation omitted)); *Kao v. British Airways, PLC*, No. 17-cv-0232 (LGS), 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018) ("Plaintiffs' failure to oppose Defendants' specific argument in a motion to dismiss is deemed waiver of that issue.").

Nonetheless, at oral argument, in response to a question from the Court, the Government argued that "to the extent the bond hearing is required, the bond procedures under 1226(a) that placed the burden on the alien should control here." Tr. 42:3-5. The Government provided no support or authority for the proposition that the appropriate way for the Court to resolve what the Constitution requires regarding the burden and showing in a bond hearing would be to graft the standard from a separate statutory provision onto § 1226(c). Because the Government waived any argument regarding who bears the burden and what showing must be made at a bond hearing, and because the untimely argument advanced at oral argument is unsupported by precedent and is otherwise not persuasive, the Court concludes that at the Petitioner's bond hearing, the Government must justify

Sajous's continued detention by proving by clear and convincing evidence that he is a flight risk or danger to the community. *Cf.* Memo. & Order, *Pensamiento v. McDonald*, No. 18-10475 (D. Mass. May 21, 2018).

B. Irreparable Harm

The Petitioner has made a strong showing that he will suffer irreparable harm unless he is granted an immediate bond hearing. If, as here, a party alleges a violation of a constitutional right, a presumption of irreparable harm attaches. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Several courts in this circuit have concluded that "[t]he deprivation of [an alien's] liberty is, in and of itself, irreparable harm." *Peralta-Veras v. Ashcroft*, No. CV 02-1840 (IRR), 2002 WL 1267998, at *6 (E.D.N.Y. Mar. 29, 2002); *see also Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) ("Ongoing unlawful deprivations of liberty and the threat of unlawful detention and reimprisonment would violate plaintiffs' constitutional rights and therefore constitute quintessential irreparable harm."); *Lynch v. Campbell*, No. 96-cv-0127 (RSP/DRH), 1997 WL 18141, at *2 (N.D.N.Y. Jan. 15, 1997) ("[D]eprivation of liberty due to unnecessary incarceration 'clearly constitutes irreparable harm[.]' " (quoting *United States v. Bole*, 855 F.2d 707, 710-11 (11th Cir. 1988))).

*13 Here, the Petitioner has alleged that he is being deprived of his liberty without due process of law by being detained by ICE for over eight months without having a bond hearing. Moreover, as explained above, he has demonstrated that he is substantially likely to succeed on the merits. Thus, he has made an adequately strong showing that he will suffer irreparable harm absent a preliminary injunction.

Because the Petitioner has made a strong showing of irreparable harm because of his deprivation of a constitutionally protected right, the Court need not consider his alternative argument that he will suffer other irreparable injuries, including ongoing pain from his worsening back condition, inability to develop a long-term plan to address his mental health needs, interference with his ability to return to work, loss of rent-assisted housing and a return to homelessness, or his inability to fully participate in his own removal proceedings. *See* Support at 6-7.

C. Balance of the Equities and Public Interest

The Petitioner has also demonstrated that the balance of equities and public interest tip decidedly in his favor. As discussed above, the Petitioner is experiencing a deprivation of liberty without due process of law. The Second Circuit has concluded that, where a plaintiff alleges constitutional violations, the balance of hardships tips decidedly in the plaintiff's favor despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government. *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984). The Petitioner is also exposed to the risk that if he is allowed to remain in the United States, he will have lost his access to housing and his employment. He has suffered (and alleges that he will continue to suffer) adverse effects on his health —namely, the exacerbation of a back injury—and is being prevented from creating a long-term plan to deal with his substantial mental health issues.

The Government, on the other hand, is unlikely to suffer any harm from the granting of this preliminary injunction. There is nothing in the record to suggest that granting a bond hearing to the Petitioner will strain ICE resources or undermine its effective enforcement of the immigration laws. Such a hearing, of course, does not mean that the Petitioner will be released—it requires only that he be given a right to demonstrate that he is not a flight risk or danger and thus is entitled to be released on bond pending a determination of removability. *See Lora*, 804 F.3d at 616; *Sopo*, 825 F.3d at 1223. Indeed, the bond hearing that the Petitioner will receive is exactly what he would have received on February 20, 2018 but for a clerical error by the clerk of the immigration court in scheduling his hearing, Zabbia Decl. ¶¶ 17, 19, and it is exactly what *all* aliens detained pursuant to § 1226(c) received as a matter of course between late 2015 and early 2018 when *Lora* was controlling precedent in this circuit. There is no argument in the Government's brief that under that system, ICE was thwarted from effectively enforcing U.S. immigration laws, or that public safety was put at risk. As a result, the balance of equities tips decidedly in the Petitioner's favor.

Likewise, the public interest is best served by granting Petitioner's motion for a preliminary injunction. The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld. *See Mitchell*, 748 F.2d at 808; *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled in part by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en

banc); *Abdi v. Duke*, 280 F. Supp. 3d 373, 410 (W.D.N.Y. 2017). And, in light of the minimal burden placed on ICE as a result of this decision, the Court cannot conclude, as the Government argues, that the public interest in "the government's enforcement of its laws and regulations" outweighs its interest in ensuring that the guarantees of the Constitution are enforced. The Court thus concludes that the balance of equities and the public interest weigh heavily in favor of granting a preliminary injunction.

***14** For all of the foregoing reasons, the Petitioner has carried his burden of demonstrating that he is entitled to a preliminary injunction. Because the Court will order that the Petitioner be granted a bond hearing, the Petitioner has thus received the complete relief that he has sought in this action, thus resolving this case as to the individual Petitioner. Tr. 51:4-52:6, 58:10-18, 59:23-60:1.

IV. Conclusion

The motion for a preliminary injunction is granted. The Respondents shall take Augustin Sajous before an immigration judge within fourteen days of this order for an individualized bond hearing, or else they must immediately release Sajous. At the bond hearing, the Petitioner must be released on bail unless the Government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community. This resolves docket number 27.

Within seven days of this Opinion and Order, the parties shall submit a revised schedule for the briefing of the motion to certify a class and motion for a classwide preliminary injunction so that the parties may incorporate the effect of this decision into their discussion of those motions.

SO ORDERED.

All Citations

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Footnotes

1 The Court recognizes that in *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 550 (S.D.N.Y. 2011), *rev'd*, 726 F.3d 290 (2d Cir. 2013), the court concluded that a Second Circuit decision "continue[d] to have precedential effect notwithstanding the issuance of" the Supreme Court's order granting certiorari, vacating the judgment, and remanding. However, because that decision is incompatible with the Second Circuit's clear admonition in *Brown*, the Court does not find that case persuasive here.