BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division, United States Department of Justice
SARAH WILSON
Senior Litigation Counsel, Office of Immigration Litigation
IMRAN R. ZAIDI
Attorney, Office of Immigration Litigation

P.O. Box 878, Benjamin Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-4241
Email: Imran.Zaidi@usdoj.gov

Attorneys for Respondents

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LEONEL SANCHEZ LAGUNAS, Petitioner, v. DAVID W. JENNINGS, et al., Respondents.	CASE NO. 3:21-cv-05657-RS **RESPONDENTS' RETURN TO PETITIONER'S HABEAS PETITION**

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INTRODUCTION

Petitioner Leonel Sanchez Lagunas is being detained by U.S. Immigration and Customs Enforcement ("ICE") pending a final decision on whether he is to be removed to Mexico. He is held pursuant to 8 U.S.C. § 1226(c), which mandates that the Department of Homeland Security ("DHS") detain non-citizens, like Petitioner, who have committed an aggravated felony. As explained in *Jennings v. Rodriguez*, the plain text of § 1226(c) requires that Petitioner remain detained during the pendency of his removal proceedings, and the doctrine of constitutional avoidance cannot be used to create a right to a bond hearing. 138 S. Ct. 830 (2018). Petitioner's ongoing detention without a bond hearing does not violate his constitutional rights where there is no bright-line time limitation to such detention, and where Petitioner's ongoing detention continues to serve its immigration purpose of ensuring his appearance and protecting the community from someone who has committed an aggravated felony. This is particularly true where Petitioner's detention has been lengthened primarily by his own substantial requests for continuances during removal proceedings. Because Petitioner's detention continues to serve the purposes of the statute enacted by Congress, this Court should deny this petition.

FACTUAL BACKGROUND

Petitioner is a native and citizen of Mexico. *See* Declaration of Deportation Officer Rolan Reyes ("Reyes Decl.") ¶ 4; Exh. A. On March 24, 2017, Petitioner was convicted of three counts of assault with a semiautomatic firearm under CPC § 245(b), and accompanying three counts of enhancements for the personal use of a firearm under CPC § 12022.5(a); unlawful carrying a loaded firearm under CPC § 25850(a)/(c)(3); possession of firearm by a felon under CPC § 29800(a)(1); felon having concealed firearm under CPC § 25400(a)(1)(c)(1); possession of ammunition by prohibited person under CPC § 30305(a)(1); and exhibiting a firearm at day care center under CPC § 417(b). Reyes Decl. ¶ 40; Exh. I. Petitioner was sentenced to three years on each count of CPC § 245(b), and one year and four months on each of the remaining five counts, time to be served concurrently, for a total of three years. Reyes Decl. ¶ 40; Exh. I. Additionally, Petitioner was sentenced to three years' imprisonment for the enhancements under CPC § 12022.5(a) (personal use of a firearm), and thus his total time ordered served was six years. Reyes Decl. ¶ 40; Exh. I.

I. Underlying immigration proceedings

On December 23, 2019, DHS took custody of Petitioner after his release from the California Department of Corrections and Rehabilitation, Sierra Conservation Center, located at Jamestown, California. Reyes Decl. ¶ 5. On the same day, DHS served Petitioner with a Notice to Appear ("NTA") initiating removal proceedings pursuant to section 240 of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1229a. *Id*; Exh. A. He was charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i) as a non-citizen present in the United States without being admitted or paroled. Reyes Decl. ¶ 5; Exh. A. Given Petitioner's criminal history, he was subject to mandatory detention under 8 U.S.C. § 1226(c). Reyes Decl. ¶ 6.

On January 16, 2020, at his initial master calendar hearing, Petitioner requested a continuance to seek attorney representation, and the request was granted. Reyes Decl. ¶ 7. Petitioner sought two more continuances to seek attorney representation at hearings on February 6, 2020, and February 27, 2020, and both requests were granted. Reyes Decl. ¶ 8-9. On March 5, 2020, the immigration judge ("IJ") took pleadings on the NTA and granted Petitioner's request for another continuance to gather documents to establish eligibility for immigration relief. Reyes Decl. ¶ 10. On March 18, 2020, Petitioner requested a continuance to file a Form I-130 with DHS, and the request was granted. Reyes Decl. ¶ 11. On April 15, 2020, the IJ continued the matter for adjudication of Petitioner's Form I-130 with DHS. Reyes Decl. ¶ 12. On May 19, 2020, Petitioner requested to seek relief before the Immigration Court, and the IJ continued the matter for that purpose and for Petitioner to provide evidence of filing of the Form I-130. Reyes Decl. ¶ 13. On June 2, 2020, Petitioner again requested a continuance to provide evidence of filing of the Form I-130, and to seek additional relief before the Immigration Court, and the request was granted. Reyes Decl. ¶ 14.

On June 10, 2020, a District Court Judge denied without prejudice Petitioner's application for bail as a class member of *Zepeda Rivas, et al. v. Jennings, et al.,* No. 20-cv-02731 (N.D. Cal. April 20, 2020). Reyes Decl. ¶ 14; Exh. B.

Petitioner requested additional continuances to seek attorney representation on June 30, July 20, and July 21, 2020, and all requests were granted. Reyes Decl. ¶ 16-18. On July 28, 2020, Petitioner requested a continuance for attorney preparation, and the request was granted. Reyes Decl. ¶ 19. On

August 25, 2020, Petitioner's matter was set to an individual hearing on applications for relief before the Immigration Court on September 24, 2020. Reyes Decl. ¶ 20-21. However, Petitioner subsequently filed a motion for a continuance of the individual hearing for attorney preparation, and the IJ granted the continuance and vacated the September 24, 2020 hearing. Reyes Decl. ¶ 21. On October 5 and October 9, 2020, the IJ took testimony on Petitioner's applications for relief, and the IJ took the matter under submission on October 9, 2020. Reyes Decl. ¶ 23-24.

On October 30, 2020, the IJ denied Petitioner's applications and ordered him removed to Mexico. Reyes Decl. ¶ 25; Exh. C. On or about November 23, 2020, Petitioner filed an appeal with the Board of Immigration Appeals ("BIA"). Reyes Decl. ¶ 26. On or about January 14, 2021, Petitioner requested a 21-day extension of time to file an appeal brief with the BIA, and the BIA granted the request. Reyes Decl. ¶ 27; Exh. D. On May 26, 2021, the BIA dismissed Petitioner's appeal. Reyes Decl. ¶ 28; Exh. E. On June 07, 2021, Petitioner filed a petition for review and motion for stay of removal with the U.S. Court of Appeals for the Ninth Circuit. Ninth Circuit Dkt 21-216, Entries 1 & 3. The government filed an opposition to Petitioner's stay motion on August 2, 2021. Ninth Circuit Dkt 21-216, Entry 11. The Ninth Circuit has not yet ruled on the stay motion.[1]

On July 21, 2021, Petitioner filed a Request for Custody Hearing with the IJ, and the IJ denied the request for lack of jurisdiction on July 30, 2021. Reyes Decl. ¶ 30; Exh. F. Petitioner is currently detained at the Yuba County Jail. Reyes Decl. ¶ 31.

II. The habeas petition

On July 23, 2021, Petitioner filed a Petition for Writ of Habeas Corpus. Dkt No. 1. On July 30, 2021, this Court issued an Order to Show Cause ("OSC"). Dkt No. 19. Respondents now timely submit this Return to Petitioner's Habeas Petition.

LEGAL BACKGROUND

I. Writs of habeas corpus

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

[1] Petitioner's removal is temporarily stayed pending further order of the Ninth Circuit per the court's General Order 6.4(c). *See* Ninth Circuit Dkt 21-216, Entry 3.

II. Mandatory detention pursuant to section 1226(c)

Petitioner has been convicted of three counts of assault with a semiautomatic firearm under CPC § 245(b). Reyes Decl. ¶ 40; Exh. I. As a result of Petitioner's convictions, the government was, and is, required to keep him in custody under section 1226(c)'s mandatory detention provisions. *See* 8 U.S.C. § 1226(c)(1)(B) (a non-citizen who is deportable by reason of having committed, inter alia, an aggravated felony under section 1227(a)(2)(A)(iii) is subject to mandatory custody).

Section 1226(c) mandates detention of certain terrorist and "criminal non-citizens" until their removal proceedings have been completed. 8 U.S.C. § 1226(c). Under section 1226(c), the Secretary of Homeland Security[2] "shall take into custody any [non-citizen] who" has committed an enumerated crime or act of terrorism "when the [non-citizen] is released, without regard to whether the [non-citizen] is released on parole, supervised release, or probation. . . ." 8 U.S.C. § 1226(c)(1). If section 1226(c) governs a non-citizen's detention, the Secretary "may release" the non-citizen during his removal proceedings "only if" release is "necessary" for witness-protection purposes, and "the [non-citizen] satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). In *Jennings*, the Supreme Court emphasized that "§ 1226(c) mandates detention of any [non-citizen] falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the [non-citizen] is released for witness-protection purposes." 138 S. Ct. at 847.

III. Section 1226(c) prior to and following the Supreme Court decision in *Jennings*

Prior to the Supreme Court's decision in *Jennings*, Petitioner's detention would have been governed by the Ninth Circuit's decisions in *Rodriguez*. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*"), *rev'd, Jennings v. Rodriguez*, 138 S. Ct 830 (2018); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*"). Under the *Rodriguez* line of cases, detention that originated pursuant to section 1226(c) converted to detention pursuant to the Attorney General's

[2] Although the statute refers to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107–296 § 471, 116 Stat. 2135, transferred most immigration law enforcement functions from the Department of Justice (DOJ) to the Department of Homeland Security, while DOJ's Executive Office for Immigration Review retained its role in administering immigration courts and the Board of Immigration Appeals. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

discretionary authority under section 1226(a) after six months of detention. *See Rodriguez III*, 804 F.3d at 1079. Accordingly, under *Rodriguez III*, prior to *Jennings*, a non-citizen subjected to detention of six months or more – whether under the discretionary (8 U.S.C. § 1226(a)) or mandatory (8 U.S.C. § 1226(c)) detention provisions of the INA – was entitled to a "bond hearing[] at which the government bears the burden of proving by clear and convincing evidence that the [detained non-citizen] is a danger to the community or a flight risk." *Rodriguez III*, 804 F.3d at 1074. Under *Rodriguez III*, the government had to provide such a bond hearing every six months, *id.* at 1089, and the hearings were governed by various procedural requirements, including but not limited to consideration of the length of detention, *id.*

The Supreme Court's decision in *Jennings*, however, abrogated *Rodriguez II* and *III*. The Court expressly rejected the Ninth Circuit's determination that a section 1226(c) detainee must receive a bond hearing after six months of mandatory detention. 138 S. Ct. at 846-47. In reversing the *Rodriguez* cases, the Supreme Court held that the Ninth Circuit improperly applied the canon of constitutional avoidance to find that bond hearings were required under section 1226(c) and other relevant statutory provisions. *Id.* The Court remanded the case to the Ninth Circuit for consideration of the petitioners' constitutional claims, including whether the Constitution requires bond hearings for individuals held under section 1226(c). *Id.* at 851. The Ninth Circuit has, in turn, remanded those constitutional questions to the district court, where they remain pending. *See Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018).

ARGUMENT

I. Petitioner's detention is governed by 1226(c), not 1226(a).

Petitioner's detention is governed by section 1226(c). In *Jennings*, the Supreme Court explicitly held that "§ 1226(c) mandates detention of any [non-citizen] falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the [non-citizen] is released for witness-protection purposes." 138 S. Ct. at 847 (quoting 8 U.S.C. § 1226(c)). Here, Petitioner falls within the scope of section 1226(c), and there is no allegation that the witness-protection exception applies to him. Accordingly, under the plain text of the statute and the Supreme Court's ruling in

Jennings, his detention must continue under the mandatory provisions of section 1226(c) until the start of the removal period.

Petitioner urges that his detention is instead governed by 8 U.S.C. § 1226(a) pursuant to the Ninth Circuit's decision in *Casas v. DHS*, 535 F.3d 942 (2008). Dkt 1 ¶¶ 45-55. However, *Casas* is directly tied to the *Rodriguez* line of cases that were abrogated in *Jennings*, and its reasoning cannot be reconciled with *Jennings*. In *Casas*, just as in the later *Rodriguez* cases, the Ninth Circuit applied the canon of constitutional avoidance to hold that the detention of a criminal non-citizen initially subject to mandatory section 1226(c) detention converts to discretionary section 1226(a) detention when the non-citizen's removal is stayed for judicial review of the order of removal. 535 F.3d 942. This holding was based on a misreading of section 1226(c) that originated in the Ninth Circuit's decision in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), and which reasoned that "the authority conferred by § 1226(c)" must be interpreted as applying only "to expedited removal of criminal [non-citizens]," and that "the mandatory, bureaucratic detention of [non-citizens] under section 1226(c) was intended to apply only for a limited time." *Casas*, 535 F.3d at 948. The Ninth Circuit expanded upon *Casas* and its reliance on the canon of constitutional avoidance in *Rodriguez II*, 715 F.3d at 1137-39, which was likewise premised on *Tijani* and its animating concern that "[w]ithout [a limiting] construction," prolonged detention without adequate procedures authorized by the provision[] would raise serious constitutional concerns," *Jennings*, 138 U.S. at 842.

However, *Jennings* explicitly vacated *Rodriguez II* (and *III*), and, with it, the foundational reasoning in *Casas*. *Jennings* vacated *Tijani*'s flexible approach to the temporal scope of section 1226(c)'s mandate by confirming that "section 1226(c) has a definite termination point," "pending a decision on whether the [non-citizen] is to be removed." *Jennings*, 138 U.S. at 846-47. *Jennings* likewise confirmed that the Ninth Circuit's constitutional concerns cannot override the clear meaning of the statute, explaining that "the constitutional avoidance canon does not countenance such textual alchemy." *Id*. at 846. The Supreme Court "sharply criticized" this Court's interpretation of section 1226(c) as "implausible" and concluded that, "subject only to express exceptions," "section 1226(c) authorizes detention until the end of applicable proceedings." *Aleman Gonzalez v. Barr*, 955 F.3d 762, 775 (9th Cir. 2020).

Without those vacated premises, *Casas*'s statutory construction falls. Every other circuit to address this issue has rejected *Casas*'s interpretation of the INA's detention scheme as containing a transition point between section 1226(c) and section 1226(a). Instead, these courts agree that detention moves directly from section 1226(c) to section 1231 detention. *See Hechavarria v. Sessions*, 891 F.3d 49, 53 (2d Cir. 2018) (detention during a stay of removal is governed by the statute that governed detention during the removal proceedings); *Leslie v. Att'y Gen.*, 678 F.3d 265, 270 (3d Cir. 2012) (detention during a stay of removal "reverts" to the provision that applied during proceedings); *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (detention during a stay is governed by section 1231(a)).

Casas is also irreconcilable with *Jennings* because its rationale that section 1226(a) and 1226(c) are interchangeable flatly contradicts *Jennings*' reasoning that these provisions apply to distinct categories of non-citizens for the same time period. According *Casas*, section 1226(c) ceases to apply before section 1226(a) does, allowing section 1226(a) to take over in cases like Petitioner's. *See Casas,* 535 F.3d at 947-948. Thus, *Casas* rests on the dual premise that section 1226(a) and section 1226(c) are interchangeable and have different termination points. *Id.* Both theories are inconsistent with *Jennings*.

First, as the text of section 1226 makes clear, both subsection (a) and subsection (c) apply during the same period: "pending a decision on whether the [non-citizen] is to be removed from the United States." 8 U.S.C. 1226(a). The Supreme Court has affirmed this reading of section 1226 in both *Jennings* and *Preap*. *See Jennings*, 138 S. Ct. at 846 ("[T]ogether with § 1226(a), § 1226(c) makes clear that detention of [non-citizens] within its scope must continue 'pending a decision on whether the [non-citizen] is to be removed from the United States.'") (emphasis altered); *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) (rejecting the Ninth Circuit's view that "subsections (a) and (c) . . . establish[] separate sources of arrest and release authority"). Thus, section 1226(a) and section 1226(c) do not apply during different periods and therefore cannot be applied interchangeably.

Second, consistent with their application during the same period, *Jennings* holds that section 1226(a) and section 1226(c) apply to mutually exclusive categories of non-citizens. *Jennings*, 138 S. Ct. at 837 ("Section 1226 distinguishes between *two different categories of [non-citizens]*." (emphasis added)). The Supreme Court explained that section 1226(c) "carves out a statutory category of [non-citizens] who may not be released under section 1226(a)." *Id*. at 837, 846. The Supreme Court also

emphasized that individuals covered by section 1226(c) may be released only "under the narrow conditions" enumerated in the statute, *id*. at 838, and that otherwise detention "must continue pending a decision on whether the [non-citizen] is to be removed from the United States," *id*. at 846. According to the Court, these enumerated exceptions demonstrate that there are no other exceptions—including "silent" shifts from section 1226(c) to section 1226(a). *Id*. at 846-47.

Jennings thus eliminates the textual basis for *Casas*'s conclusion that detention authority "shift[s]" from section 1226(a) to section 1226(c) "upon the dismissal of the [non-citizen]'s appeal by the [Board]." 535 F.3d at 948. *Jennings* instead confirms that section 1226(a) and section 1226(c) govern the detention of distinct individuals. The two provisions also share the same termination point, found in the very same language of the statute – "pending a decision on whether the [non-citizen] is to be removed from the United State" – and therefore cannot support a transition point that moves detention from one statute to the other. 8 U.S.C. § 1226(a). *Jennings* is therefore irreconcilable with reading section 1226 to require bond hearings for criminal non-citizens whenever the government prevails through the administrative process, and the non-citizen seeks judicial review of the final order of removal.

II. Petitioner's mandatory detention under section 1226(c) is constitutional.

A. There is no bright-line 6-month limitation to mandatory detention without a bond hearing.

Petitioner does not have a constitutional right to a bond hearing. It is well-established that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). The Supreme Court has repeatedly concluded that detention incident to removal proceedings is constitutional. *Id.*; *see Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress has the authority to detain [non-citizens] suspected of entering the country illegally pending their deportation hearings."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of [non-citizens], would be valid."). Longstanding precedent

establishes the validity of detention during removal proceedings without requiring a particular time limitation.

Petitioner maintains that his detention has become unconstitutionally prolonged because it has exceeded six months. Dkt 1 ¶¶ 63-66. Citing to the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), and the Ninth Circuit's decision in *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011) ("*Diouf II*"), Petitioner asserts that when detention crosses the six-month threshold, it becomes unconstitutional. Dkt 1 ¶¶ 63-66. This assertion is incorrect; neither decision established a finite time limitation after which an individualized bond hearing is constitutionally required for those mandatorily detained pursuant to 8 U.S.C. § 1226(c).

As an initial matter, the Supreme Court already implicitly rejected a bright-line six-month limitation on detention in *Demore.* There, the Supreme Court addressed – and rejected – a constitutional challenge to section 1226(c) detention. The Court held that "Congress, justifiably concerned that deportable criminal [non-citizens] 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 [the petitioner in that case] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. The petitioner in *Demore* had already spent six months in immigration custody before the Court upheld the constitutionality of his mandatory detention. 538 U.S. at 531. And as a result of the Court's reversal of the decision affirming his release, he was to be returned to custody until removal proceedings were completed, which would take additional time. The effect of the Court's decision in *Demore* was to sanction the continued mandatory detention of the non-citizen for longer than six months without a bond hearing. *Demore*, 538 U.S. at 531. *Demore* thus "implicitly foreclose[s]" the notion that the Constitution mandates a bond hearing at the six-month mark under section 1226(c). *Reid v. Donelan*, 819 F.3d 486, 497 (1st Cir. 2016), *opinion withdrawn on reconsideration*, 2018 WL 4000993 (1st Cir. 2018) (concluding that a bright line temporal limitation for 1226(c) detention was foreclosed by *Demore*).

Moreover, the authorities cited by Petitioner – *Zadvydas* and *Diouf II* – both addressed the issue of post-removal order detention *under 8 U.S.C. § 1231(a)(6)*, a context that is "materially different" from the pre-removal detention at issue here, *Demore*, 538 U.S. at 527, because it involves "indefinite"

and "potentially permanent" detention with "no obvious termination point." *Zadvydas*, 533 U.S. at 690-691, 697. The petitioners in *Zadyvdas* were subject to a final order of removal, but removal was "no longer practically attainable," *id.* at 690, because there was no country willing to accept them, *id.* at 684-86. For that reason, as the Court explained in *Demore*, the detention in *Zadvydas* no longer "serve[d] its purported immigration purpose." *See Demore*, 538 U.S. at 527. The *Demore* Court found the *Zadyvdas* reasoning inapplicable to a petition involving detention *during* removal proceedings, which "necessarily serve[s] the purpose of preventing deportable criminal [non-citizens] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the [non-citizens] will be successfully removed." 538 U.S. at 527-528; *see also Avalos v. Sessions*, No. 18-cv-02342-HSG, 2018 U.S. Dist. LEXIS 88525, at *3 (N.D. Cal. May 25, 2018) (recognizing that "*Zadvydas* applies specifically to *indefinite* detention and not to 'detention pending a determination of removability,' which has a defined termination point" (quoting *Zadvydas*, 533 U.S. at 697) (emphasis in original)).

Neither *Demore* nor *Zadvydas* establishes a bright-line rule that detention without a bond hearing is unconstitutional after six months. Nor has the Ninth Circuit so ruled; indeed, that issue is currently on remand to the district court, after having been remanded to the Ninth Circuit in *Rodriguez*. *See Rodriguez v. Marin*, 909 F. 3d at 252. Such a rigid, six-month mandate is fundamentally inconsistent with the flexibility inherent in due process. The Supreme Court has "repeatedly stressed" that due process is a flexible concept that requires an individualized assessment of numerous factors including "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("due process is flexible and calls for such procedural protections as the particular situation demands"). Here, the constitutional concerns depend on the unique facts and circumstances of each case bearing upon whether *that particular detention* continues to "serve *its* purported immigration purpose." *Demore*, 538 U.S. at 527 (emphasis added); *see Gonzalez v. Bonnar*, 2019 WL 330906, at *2 (N.D. Cal. Jan. 25, 2019) ("Although Petitioner continues to insist on a bright-line rule that detention beyond 6-

months is constitutionally impermissible, the Supreme Court's decision in *Jennings* establishes there is no such bright-line rule.").

B. Petitioner's detention is serving its immigration purpose and therefore remains constitutional.

Petitioner's detention under section 1226(c) incident to his removal proceedings remains constitutionally permissible. His conviction for three counts of assault with a semiautomatic firearm under CPC § 245(b) rendered him an aggravated felon, and thus brought him within the class of noncitizens that Congress categorically determined must be detained throughout their removal proceedings.[3] *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1226(c)(1)(B). Such mandatory detention under section 1226(c) during removal proceedings is constitutional when it continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527; *see Flores*, 507 U.S. at 306. As set forth above, Congress passed section 1226(c) out of a "justifiabl[e] concern[] that deportable criminal [non-citizens] who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore*, 538 U.S. at 513. Accordingly, the Supreme Court upheld the constitutionality of section 1226(c) against a facial challenge, concluding that mandatory detention of "deportable criminal [non-citizens] pending their removal proceedings . . . necessarily serves the purpose of preventing [such non-citizens] from fleeing prior to or during their removal proceedings." *Id*. at 527-28. *Demore* premised its due-process analysis on the fact that section 1226(c) detention has a "definite termination point"—as soon as removal proceedings are completed—and serves the government's interest in "increasing the chance that, if ordered removed, the [non-citizens] will be successfully removed." 538 U.S. at 528-29.

The government's interest in effectuating removal of those who fall under section 1226(c) does not dissipate at the six-month mark or any other fixed point. It cannot be conclusively established until

[3] A non-citizen who challenges inclusion in the class of individuals described in section 1226(c) is entitled to a hearing under *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999), where he can seek to establish that the government is substantially unlikely to prevail in demonstrating that his conviction is one that subjects him to mandatory detention. 8 C.F.R. § 1003.19(h)(2)(ii). The non-citizen may appeal an adverse *Joseph* decision to the BIA. 8 C.F.R. § 236.1(d)(3). If he prevails, section 1226(c) will not apply and he will be eligible for release on bond under section 1226(a). Thus, whenever a criminal non-citizen remains detained under section 1226(c), he has either foregone a *Joseph* hearing, or the IJ (or BIA) has found, on an individualized basis, "at least some merit to the [government's] charge." *Demore*, 538 U.S. at 531 (Kennedy, J., concurring). Here, Petitioner has never sought a *Joseph* hearing.

the end of removal proceedings whether a non-citizen will be ordered removed, so the government's interest in effectuating removal remains concrete throughout the length of the proceedings. Similarly, the risk that a "criminal non-citizen," if released, will fail to appear for removal proceedings does not dissipate at six months or some other point during the removal process. Indeed, the government's interest in keeping the non-citizen in custody (and the non-citizen's incentive to abscond) will typically *increase* over time as removal proceedings progress towards their completion and the likely conclusion that the non-citizen will be ordered removed.

Here, Petitioner's detention has clearly served its immigration purposes. His removal proceedings were marked by steady progress, and any delays were attributable almost entirely to his own extensive requests for continuances. Petitioner was placed in immigration custody in December 2019, immediately upon his release from state prison, and his initial master calendar hearing was set for just three weeks later in January 2020. Reyes Decl. ¶ 5, 7. Starting at that initial hearing, however, Petitioner proceeded to seek *twelve* continuances, accounting for approximately seven of the next nine months, before his individual hearings finally occurred in October 2020. *See* Reyes Decl. ¶¶ 7-24. On October 9, 2020, the IJ took the matter under submission, and issued his decision just three weeks later on October 30, 2020. Reyes Decl. ¶¶ 24, 25; *see* Exh. C. Petitioner filed an appeal to the BIA, during which he sought an additional extension of three weeks to file his brief, and the BIA issued its decision dismissing his appeal less than seven months later in May 2021. Reyes Decl. ¶¶ 26-28; *see* Exs. D, E. Petitioner then filed a petition for review with the Ninth Circuit, and, at that point could have been removed but for his decision to seek a stay of removal. *See* Ninth Circuit Docket No. 21-216, Entries 1, 3. The government has opposed the stay motion, and the Ninth Circuit has not yet determined whether Petitioner is entitled to a stay of his removal order, though his removal is temporarily stayed pending further order of the court.[4] *See* Ninth Circuit Docket No. 21-216, Entries 3, 11. The court has set a deadline of September 10, 2021 for Petitioner's opening brief, with the government's answering brief

[4] Under *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059-62 (9th Cir. 2008), upon issuance of this temporary stay, Petitioner's detention authority reverted back to that of his pre-final order detention statute, which remains § 1226(c).

due on November 9, 2021, and any reply brief due 21 days later. *See* Ninth Circuit Docket No. 21-216, Entry 5.

Thus, while Petitioner asserts that his detention has been unconstitutionally prolonged at 19 months, a full eight months of that period is directly attributable to his own delays while litigating his case, and he would no longer be in custody but for his request for a stay of removal. Although Petitioner was certainly entitled to avail himself of the various procedural mechanisms available to him as he navigated the removal process, a "delay caused by petitioner's litigation strategy 'does not ripen his detention into a constitutional claim.'" *Manley v. Delmonte*, No. 17-cv-953, 2018 WL 2155890, at *2 (W.D.N.Y. May 10, 2018). In *Demore*, the Supreme Court likewise noted that removal proceeding had taken longer than average, but found no constitutional concern where the prolonged detention was attributable in part to choices the noncitizen had made, such as "request[ing] a continuance" of his removal proceedings. 538 U.S. at 530-31 & n.15. The Supreme Court also noted that a non-citizen's § 1226(c) detention would be even longer if he appeals a removal order, but it found no constitutional problem with attributing that delay to the non-citizen, explaining that the legal system is "replete with situations requiring the making of difficult judgments as to which course to follow, and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Demore*, 538 U.S. at 530 n.14 (citation and internal quotation marks omitted); *see also Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) ("Although this litigation strategy is perfectly permissible, we hold that [the non-citizen] may not rely on the extra time resulting therefrom to claim that his prolonged detention violates substantive due process."); *Fatule-Roque v. Lowe*, No. 3:17-cv-1981, 2018 WL 3584696, at *6 (M.D. Pa. July 26, 2018) (holding that "[w]hile Petitioner has been detained for fifteen (15) months, the length of his detention can be attributed, in large part, to the multiple motions to reset he submitted before the Immigration Court").

Importantly, Petitioner has never suggested that the government has improperly extended the course of his proceedings or otherwise acted in bad faith. In this respect, Justice Kennedy, in his concurrence in *Demore*, explained that the constitutionality of continuing detention without a bond hearing depended on *why* the detention was continuing; if there were an "unreasonable delay by the [government] in pursuing and completing deportation proceedings," it "could become necessary" to ask

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 532-533 (emphasis added). There has been no such delay here. To the contrary, the government has consistently sought a swift yet fair adjudication of Petitioner's case, and it is hard to fathom what more the government could have done to expedite Petitioner's proceedings short of *denying* his continuance requests. Given these circumstances, there is certainly no basis for concluding the government has prolonged proceedings pointlessly or punitively, and Petitioner's detention instead continues to be constitutionally justified by the interest in "protect[ing] against risk of flight or dangerousness." *Id.* at 532-33; *see Arizmendi v. Kelly*, No. 17-4791-JAT (DMF), 2018 WL 3912279, at *4 (D. Ariz. July 23, 2018), report and recommendation adopted, No. 17-04791-PHX-JAT, 2018 WL 3872228 (D. Ariz. Aug. 15, 2018) (rejecting the petitioner's due process challenge to his eight and a half month detention noting that he "submitted no evidence that the government has improperly or unreasonably delayed the regular course of proceedings, or that the government has detained him for any purpose other than the resolution of his removal proceedings").

In short, the circumstances of this case do not demonstrate that Petitioner's continued detention under section 1226(c) violated the Constitution. As in *Demore*, his detention under section 1226(c) during removal proceedings has continued to "serve its purported immigration purpose," *Demore*, 538 U.S. at 527—that is, ensuring his appearance and protecting the community from someone who has already committed crimes that Congress has determined warrant mandatory detention. The current length of Petitioner's detention is largely the result of his own significant litigation delays, and certainly cannot be attributed to a government purpose "to incarcerate for other reasons." *Demore*, 538 U.S. at 533 (Kennedy, J., concurring). Accordingly, Petitioner's ongoing detention under section 1226(c) is constitutional.[5]

[5] Petitioner maintains that his detention is unconstitutional under the tests in *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020), or, alternatively, *Mathews*, 424 U.S. at 319. *See* Dkt 1 ¶¶ 67-85. The Supreme Court has never applied these tests to section 1226(c) claims, and there is no basis for doing so now. *German Santos*, for its part, is also readily distinguishable. Petitioner here has been detained for a substantially shorter period of time, is subject to an administratively final order of removal, and could be removed tomorrow if the Ninth Circuit denies the motion for a stay of removal. *See German Santos*, 965 F.3d at 210-212.

III. In the event the petition is granted, the only available relief is a new bond hearing.

Even if this petition is granted, the appropriate relief is a new bond hearing, not release from detention. *See, e.g., Demore*, 538 U.S. at 532 (explaining that "an individualized determination as to his risk of flight and dangerousness" is the proper remedy "if the continued detention became unreasonable or unjustified") (Kennedy, J., concurring). Circuit courts that evaluated mandatory pre-removal detention (prior to the Supreme Court's *Jennings* decision) determined that a bond hearing before an IJ is an appropriate remedy for unreasonably prolonged detention. *See, e.g.*, *Rodriguez III*, 804 F.3d at 1084; *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1219 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018). To order otherwise would unnecessarily contravene the statute's implementing regulations, which place review of custody determinations in the hands of the immigration court and the BIA. If the Court rules that habeas relief is warranted, the appropriate remedy here is not release, but a bond hearing that provides Petitioner "an opportunity to contest the necessity of his detention before a neutral decisionmaker and an opportunity to appeal that determination to the BIA." *Prieto-Romero*, 534 F.3d at 1065-66.

Should the Court order a bond hearing, moreover, Petitioner is mistaken that the burden should be on the government to justify Petitioner's detention by clear and convincing evidence. *See* Dkt 1 ¶¶ 86-88. The Constitution does not require the government to bear the burden of establishing that the non-citizen will be a flight risk or danger—much less by clear-and-convincing evidence—to justify temporary detention pending removal proceedings. The Supreme Court has consistently affirmed the constitutionality of detention pending removal proceedings notwithstanding that the government has *never* borne the burden to justify that detention by clear and convincing evidence. *See, e.g.*, *Demore*, 538 U.S. at 531; *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson*, 342 U.S. at 538; *Zadvydas*, 533 U.S. at 701. In fact, the Supreme Court has repeatedly upheld detention pending removal proceedings

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Similarly, whether or not Petitioner "poses a danger to the community or a flight risk" is, in view of the statutory basis for Petitioner's detention, irrelevant. *See* Dkt 1 ¶¶ 81-83. A new bond hearing would not change the fact that Petitioner is subject to mandatory dentition under 8 U.S.C. § 1226(c). His claim for additional process and a bond hearing necessarily relies on the presumption that he must be released if the government fails to make an individualized showing that he is a flight risk or a danger to the community. At this point, however, detention is constitutional even absent a showing of danger or flight risk. *Demore*, 538 U.S. at 531 ("Detention during removal proceedings is a constitutionally permissible part of that process.").

on the basis of a categorical, rather than individualized, assessment that a valid immigration purpose warranted interim custody. *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538.

Furthermore, *Demore* upheld mandatory detention under section 1226(c), which expressly puts the burden on the non-citizen even in the only situation in which release is permitted: When release is for witness-protection purposes. Section 1226(c) altogether prohibits release of the specified criminal or terrorist noncitizens unless it is "necessary" for witness protection and "the [noncitizen] satisfies the Attorney General" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). And in *Zadvydas*, the Court placed the burden on the non-citizen who is subject to potentially indefinite detention following entry of a final order of removal to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701.

Petitioner nevertheless contends this court should follow *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), which applied the canon of constitutional avoidance to section 1226(a) to require the government to "prove by clear-and-convincing that continued detention is justified" at bond hearings held pursuant to *Casas*, 535 F.3d 942, for criminal non-citizens (initially held under section 1226(c)) who convert to section 1226(a) detention following the entry of a stay of removal by a court of appeals. But as explained above, *Jennings* effectively overruled *Casas*, and it thus did the same to *Singh*. *Jennings* held that it is "clearly contrary" to section 1226(a) to require the government to bear the burden of proof at bond hearings, much less by clear-and-convincing evidence:

> The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the [non-citizen]'s continued detention is necessary. Nothing in § 1226(a)'s text – which says only that the Attorney General "may release" the non-citizen "on . . . bond" – even remotely supports the imposition of either of those requirements.

138 S. Ct. at 847-48. The Court held that "there is no justification for any of the procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation." *Id.* at 842. Even the dissent in *Jennings* concluded that there would be no constitutional concerns with providing bond hearings "in accordance with customary rules of procedure and burdens of

proof rather than the special rules that the Ninth Circuit imposed." *Id.* at 876 (Breyer, J., dissenting). Because the reasoning of *Singh* is "clearly irreconcilable" with *Jennings*, this Court is bound by *Jennings*—not *Singh*. *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2002).

In short, there is no support in the Constitution or in Supreme Court precedent for a requirement that the burden of proof be on the government to justify the continued detention of a noncitizen subject to mandatory detention under section 1226(c).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Habeas Corpus.

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Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division, United States Department of Justice

SARAH WILSON
Senior Litigation Counsel, Office of Immigration Litigation

/s/ Imran R. Zaidi
IMRAN R. ZAIDI
Attorney, Office of Immigration Litigation