No. 23-7988

In The United States Court of Appeals for the Second Circuit

OSVALDO HODGE,

Petitioner-Appellant,

– against –

THOMAS BROPHY, Acting Field Office Director, Buffalo Field Office, U.S. Immigration and Customs Enforcement; MERRICK B. GARLAND, United States Attorney General, ALEJANDRO MAYORKAS, United States Secretary of Homeland Security; and MICHAEL BALL, Officer-in-Charge, Buffalo Federal Detention Facility,

Respondents-Appellees.

On Appeal from the United States District Court for the Western District of New York

BRIEF OF COMMUNITY ORGANIZATIONS AND LEGAL SERVICE PROVIDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND REVERSAL

BROOKLYN DEFENDER SERVICES
Kevin Siegel
Alexandra Lampert
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
(718) 254-0700 x630

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF INTEREST

Amici curiae are not-for-profit organizations that represent and/or support noncitizens who are detained in the custody of Immigration and Customs Enforcement ("ICE"), and that regularly train and consult with immigration and criminal defense attorneys regarding the immigration consequences of criminal convictions, immigration bond and custody matters, and habeas corpus petitions challenging unlawful ICE detention.[1] Amici are comprised of the The Bronx Defenders, Brooklyn Defender Services, the Immigrant Rights Clinic of Washington Square Legal Services, the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, Make the Road New York, Neighborhood Defender Services of Harlem, New York Legal Assistance Group, and UnLocal, Inc. Detailed statements of interest are included as Appendix A.

[1]Pursuant to Fed. R. App. P. 29(a)(4), *amici* state that none of *amici* are corporations, no party counsel authored any part of the brief, and no person or entity other than *amici* contributed money to prepare or file it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to provide the Court the stories of noncitizens subjected to mandatory detention under 8 U.S.C. § 1226(c) and to aid the Court in understanding how the absence of a rule requiring bond hearings harms noncitizens and their loved ones in the Second Circuit. These stories illustrate that, as this Court has previously noted, mandatory detention ensnares "non-citizens who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation[.]" *Lora v. Shanahan*, 804 F.3d 601, 605 (2d Cir. 2015), *vacated on statutory grounds*, *Shanahan v. Lora*, 583 U.S. 1165 (2018).

In *Lora*, this Court found "that in order to avoid serious constitutional concerns, section 1226(c) must be read as including an implicit temporal limitation." 804 F.3d at 614. While *Lora*'s statutory holding was vacated in 2018, the constitutional concerns identified by this Court have not changed, and it remains true that "the interests at stake in this Circuit are best served by [a] bright-line approach [requiring bond hearings at six months of detention]." *Id.* at 614-15. Absent the fundamental procedural protection of a bond hearing, prolonged detention under § 1226(c) violates due process, an injury that is particularly grievous for noncitizens who have meritorious claims for relief from removal.

Part I of the brief highlights the all-too-common plight of noncitizens subject to § 1226(c) who have meritorious claims for relief, yet lack any effective means to show that they merit release. Many noncitizens in this position, including lawful permanent residents ("LPRs"), are arbitrarily separated from their families in the United States and locked up in county jails for months or years, based on old, low-level, or nonviolent convictions. They are deprived of their liberty for extraordinary periods of time even though many ultimately win relief and, in many cases, even *after* an Immigration Judge ("IJ") grants them relief.

Part II of the brief explains why a rule requiring a bond hearing remains the best mechanism to cure the harms caused by mandatory detention. Following the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), district courts in this Circuit have reverted to an ad hoc approach in which each court determines which factors to use in assessing the reasonableness of prolonged detention and what weight to give them. This situation leads to an intolerable level of unpredictability, inconsistency, and inequity, demonstrated by the cases amici present and by the case of Petitioner-Appellant Osvaldo Hodge ("Mr. Hodge" or "Petitioner"). The most efficient and fairest approach to addressing these constitutional violations is to restore the requirement for constitutionally adequate bond hearings when detention reaches six months.

Part III, finally, describes in more vivid detail the real-life consequences of prolonged and unreviewed mandatory detention on noncitizens and those they hold

dear. The stories in this part recount the physical and psychological suffering of two noncitizens denied proper medical care while subject to mandatory detention, both of whom were subsequently granted immigration relief.

I. MANDATORY DETENTION DEPRIVES NONCITIZENS OF LIBERTY FOR MONTHS OR YEARS EVEN WHEN THEY HAVE MERITORIOUS DEFENSES TO DEPORTATION

Many noncitizens endure months or years in detention while they pursue meritorious claims for immigration relief, and many remain detained even after an IJ grants them relief. Noncitizens—including LPRs[2] like Mr. Hodge—often have strong defenses to deportation. Without a bright-line rule requiring a bond hearing, these noncitizens often face an excruciating choice between escaping the punishing conditions of detention and exercising their right to pursue relief from removal. *See, e.g.*, *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (discussing the right to have relief adjudicated as distinct from the right to relief itself). The stories in this section illustrate the harms that mandatory detention without a bond hearing inflicts on noncitizens subject to unconstitutional imprisonment while they pursue meritorious claims.

---

[2] Vera Institute of Justice, *Analysis of Lora Bond Data: New York Immigrant Family Unity Project* (2016), **https://perma.cc/CGC5-S48F** (showing that almost 70% of those eligible for *Lora* bond hearings—all held under § 1226(c)—were LPRs).

A. Noncitizens Subject to § 1226(c) Routinely Have Highly Meritorious Defenses to Deportation

IJs routinely grant immigration relief to noncitizens subject to § 1226(c), and the government frequently chooses not to appeal these decisions. As the stories below show, mandatory detention subjects noncitizens to needless separation from their families and communities even when they are ultimately victorious.

Two recent examples of noncitizens represented by amicus The Bronx Defenders illustrate the problem. **Mr. Jose Lopez ("Mr. Lopez")**,[3] first, was subjected to mandatory detention following a single conviction for conspiracy in the fourth degree. Mr. Lopez had previously been granted Special Immigrant Juvenile Status ("SIJS"), a pathway to LPR status for vulnerable young people under the age of 21 who have been abused, neglected, or abandoned by a parent. While he was detained, Mr. Lopez filed for and, in December 2023, won relief under the Convention Against Torture ("CAT") in light of his fear of reprisal from gangs in Honduras that had targeted his family, and he was released after nearly six months in detention. **Mr. Antonio Ramirez Gonzalez ("Mr. Gonalez")**[4] was similarly subjected to mandatory detention following a conviction for drug trafficking. In

[3] "Jose Lopez" is a pseudonym, and his country of origin has been changed to protect his privacy. The full facts of Mr. Lopez's case are detailed in a declaration by his attorney. *See* Decl. of Tal Eisenzweig, The Bronx Defenders (on file with counsel).

[4] "Antonio Ramirez Gonzalez" is a pseudonym, and his country of origin has been changed to protect his privacy. The full facts of Mr. Gonzlez's case are detailed in a declaration by his attorney. *See* Decl. of Hibah Siddiqui, The Bronx Defenders (on file with counsel).

March 2023, he also won relief under the CAT, in his case in light of his fear he would be killed due to his cooperation with American law enforcement during his criminal proceedings. ICE did not appeal either grant, and both were released.

Although Mr. Lopez and Mr. Gonalez won relief a few weeks before reaching six months in detention, even that length of time is damaging. Detention arbitrarily and unnecessarily deprived them of liberty and separated them from their homes and communities, despite the fact that they merited relief from removal and a right to stay in the United States. Moreover, if ICE had appealed their grants of relief, their detention would have been certain to pass the six month mark. *See infra* Part II.B. A bright-line rule requiring bond hearings at least as of six months, while leaving open the possibility of individualized habeas challenges to seek bond hearings even before that point, is the only way to protect against these harms.

Unlike Mr. Lopez and Mr. Gonzalez, **Mr. Joseph Brown ("Mr. Brown")**,[5] an LPR, did not have counsel as he fought against deportation while detained over 1,000 miles from home. Despite the immense barriers of mandatory detention, Mr. Brown still won relief after nine months in detention, and ICE did not appeal.

Mr. Brown immigrated to the United States from Trinidad as an LPR at the age of 13 to live with his mother. His mother's new husband, however, did not want him

[5] "Joseph Brown" is a pseudonym, and his country of origin has been changed to protect his privacy. The full facts of Mr. Brown's case are detailed in a declaration by his attorney. *See* Decl. of David Jimenez, The Bronx Defenders (on file with counsel).

in the home and forced Mr. Brown to relocate, depriving him of family support. After serving sentences for petit larceny and drug possession, Mr. Brown was transferred to ICE custody, subjected to mandatory detention under § 1226(c), and placed in removal proceedings in December 2009.

Mr. Brown was detained for over nine months in Pearsall, Texas, far from his home and family, including his young son, in New York. Because *Lora* had not yet been decided, Mr. Brown was unable to request a bond hearing. Mr. Brown recalls the poor treatment in the Texas facility, including lengthy delays in receiving medical attention and color-coding detainees based on the reason for their detention in order to indicate their perceived level of "dangerousness."

Representing himself from detention, Mr. Brown won cancellation of removal, a discretionary form of immigration relief available to certain LPRs. Although Mr. Brown remarkably prevailed, no one should be forced to defend against deportation not only without counsel,[6] but without access to nearby family and friends to help

[6] Pro se litigants in immigration face immense barriers to positive outcomes. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L.R. 1, 70 (2015), https://scholarship.law.upenn.edu/penn_law_review/vol164/iss1/2 (showing that *pro se* noncitizens in detention are approximately 7 times less likely to be released than those with representation); Kara A. Naseef, *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. Mich. J.L. Reform 771, 784 (2019), https://repository.law.umich.edu/mjlr/vol52/iss3/6 (noting that, despite instruction to assist *pro se* applicants, when surveyed, 92% of IJs agreed that "when the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly.").

build the substantial record necessary in Immigration Court. A bright-line rule requiring bond hearings at six months would have spared Mr. Brown both this extraordinary challenge and the anguish of his nine months in detention.

B. Even Winning Relief Before the Immigration Court Does Not Guarantee Liberty for People Subject to § 1226(c) If ICE Chooses to Appeal

The injustice of mandatory detention without a bond hearing does not necessarily end even when an IJ grants a noncitizen immigration relief. Unlike in criminal proceedings, where an acquittal precludes further incarceration, nothing prevents ICE from continuing to detain noncitizens when the agency chooses to appeal a grant of relief by the IJ before the BIA. *See, e.g.*, *Hechavarria v. Sessions*, 891 F.3d 49, 56 (2d Cir. 2018). Thus, when ICE appeals a grant of relief, mandatory detention continues for months and even years without a bond hearing, punishing immigrants even when a neutral decisionmaker has granted them relief. A bright-line rule would reduce the risk of prolonged detention in this circumstance.

For example, despite winning immigration relief under the CAT, **Pierre Baptiste ("Mr. Baptiste")**[7] remained subject to mandatory detention under § 1226(c) during ICE's appeal, suffering severe harm to his mental health and losing

[7] "Pierre Baptiste," is a pseudonym, and his country of origin has been changed due to the sensitive nature of his case. The full facts of Mr. Baptiste's case are detailed in a declaration by his attorney. *See* Decl. of Nora Searle, The Bronx Defenders (on file with counsel).

the opportunity to say goodbye to his grandmother, who passed away during his detention.

Fearing for his life, Mr. Baptiste fled Haiti for the United States over a decade before his proceedings began and settled in the Bronx to be with his family, including his grandmother, who was a mother figure to him.

ICE arrested Mr. Baptiste in August 2020 and determined that he was subject to mandatory detention under § 1226(c). While in detention, Mr. Baptiste was diagnosed with posttraumatic stress disorder ("PTSD") with psychotic features causing hallucinations. Detention severely exacerbated these symptoms. His attorney requested that ICE release him in light of the harm to his mental and physical health, but ICE refused.

Mr. Baptiste's immigration proceedings were delayed for months through no fault of his own. After the IJ rescheduled his merits hearing, Mr. Baptiste contracted Covid-19 shortly before the new date he was assigned. Distressed by his lengthy period in detention, Mr. Baptiste decided to move forward with the hearing even though he was still testing positive for Covid. This meant conducting the entire hearing over the phone as videoconferencing was unavailable in the quarantine unit at the facility in which he was detained in jail-like conditions.

Following the hearing, the IJ granted Mr. Baptiste relief under the CAT. ICE, however, appealed the grant and continued to refuse to release Mr. Baptiste. Mr.

Baptiste was not released until eight months later—after 14 months of detention—when, in October 2021, the BIA upheld the IJ's grant of relief.

The BIA's action came unfortunately too late for Mr. Baptiste to see his grandmother before her death in August 2021. Because his prolonged detention continued even after he won relief, Mr. Baptiste was irredeemably robbed of the opportunity to say goodbye.

Mr. Rivera Cruz,[8] a stateless person living with HIV, was also needlessly detained while the BIA adjudicated ICE's appeal of his immigration relief. The BIA ultimately affirmed his grant of relief, freeing him from detention.

Mr. Rivera Cruz was born on a cargo ship as his parents fled his country of origin and became parentless at the age of 12. After fleeing his first country of residence for Mexico, he was held captive in a brothel during his teenage years, forced at gunpoint to perform countless sexual acts. He then fled to the United States, where, struggling to cope with his extreme trauma, he was convicted of robbery. In prison, he was placed in solitary confinement for allegedly possessing a plastic knife, then transferred to civil confinement following multiple attempts to take his own life. He was also diagnosed with HIV at that time. After release, as he continued to

[8] "Mr. Rivera Cruz" is a pseudonym, and his country of origin has been changed to protect his privacy. The full facts of Mr. Rivera Cruz's case are detailed in a declaration by his attorney. See Decl. of Sophia Gurulé, The Bronx Defenders (on file with counsel).

struggle with his mental health, Mr. Rivera Cruz was convicted of drug trafficking and use of a firearm and sentenced to time served. Nonetheless, on the day of conviction for those crimes, he was placed in removal proceedings and detained pursuant to § 1226(c).

In July 2019, after a year in detention, an IJ granted Mr. Rivera Cruz's application for protection under the CAT, finding that his cooperation with the U.S. government exposed him to a risk of torture if deported. ICE appealed, and Mr. Rivera Cruz remained detained without the possibility of a bond hearing. The BIA affirmed the IJ's grant of relief in January 2020, and Mr. Rivera Cruz was finally released after 20 months in detention.

* * *

The cases above illustrate how § 1226(c) ensnares noncitizens with meritorious claims for immigration relief. Mandatory detention locks up individuals, including those whose stories are recounted here, while they fight for their right to remain in the United States and, as in Mr. Baptiste's and Mr. Rivera Cruz's cases, even *after* they win relief—an outrageous outcome that a bright-line rule requiring bond hearings at six months would prevent.

II. THIS COURT SHOULD FIND THAT DUE PROCESS REQUIRES A BOND HEARING AFTER SIX MONTHS IN MANDATORY DETENTION

As Mr. Hodge explains in his opening brief, detaining an individual for a prolonged period without a bond hearing violates due process. *See* Pet. Brief at 24-42.

The most efficient and fairest remedy for this due process violation is to require the government to provide a bond hearing, at a minimum, once detention passes six months. Six months is the timeframe identified by the Supreme Court in *Zadvydas v. David*, 533 U.S. 678, 701 (2001), and by this Court in *Lora*, as triggering constitutional concerns. Without an opportunity for a bond hearing, noncitizens subjected to mandatory detention have no effective mechanism to show what are often simple realities: that they are neither a danger to the community nor a flight risk, that they have meritorious defenses to deportation, or that they are pursuing those defenses in good faith.

The stories in this section illustrate that a rule requiring bond hearings at six months would promote efficiency and fairness. *See* Pet. Brief at 39-42. A bright-line rule would significantly unburden noncitizens and federal district courts from the onerous tasks of litigating and adjudicating individual habeas petitions, even though some noncitizens may still merit habeas relief when the particular circumstances of a shorter period of detention, or other claims for relief, amount to a due process violation. A bright-line rule would furthermore avoid the unpredictability and inconsistency of the current system in which district courts apply reasonableness factors individually, lengthening detention for some—like Mr. Hodge—without any ability for a neutral adjudicator to review their detention.

A. A Bond Hearing at Six Months Allows Efficient Review of Detention for Noncitizens Subject to § 1226(c), Who Often Are Not Flight Risks and Pose No Danger to the Community

Habeas petitions are no substitute for a rule requiring bond hearings. Recognizing that fact, this Court in *Lora* implemented a bright-line rule requiring bond hearings when detention under § 1226(c) reaches six months. Notably, it did so after considering and rejecting an alternative ad hoc approach in which "every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the 'reasonableness' threshold, thus entitling him to a bail hearing." 804 F.3d at 614. When the Supreme Court reversed *Lora*'s statutory holding, it in effect imposed this ad hoc approach on noncitizens and district courts in this Circuit.

Nonetheless, due process still requires that noncitizens receive a bond hearing when detention becomes unreasonably prolonged.[9] *See* Pet. Brief at 24-42. As the story of Mr. Tayeh shows, case-by-case litigation of habeas petitions remains a hardship for noncitizens forced to litigate an Article III action at the same time they seek relief in immigration court—all while subject to detention in jail-like conditions.

[9] *See also, e.g.*, *German Santos v. Warden, Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020) ("'When detention becomes unreasonable, the Due Process clause demands a hearing.'") (quoting *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011); *Rodriguez Sanchez v. Decker*, 431 F. Supp. 3d 310, 315 (S.D.N.Y. 2019) (Nathan, J.) (concluding that petitioner was "entitled to an individualized bond hearing" where detention was unreasonably prolonged); *Kabba v. Barr*, 403 F. Supp. 3d 180, 190-91 (W.D.N.Y. 2019) (concluding, after applying the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), balancing test, that a bond hearing is the process due where mandatory detention is unreasonably prolonged).

Ali Tayeh[10] filed a habeas petition that went unadjudicated as he languished in prolonged detention. Born in Jordan to Palestinian refugees, Ali came to the United States as an infant and grew up in New York City. As a fourteen-year-old LPR, he visited Jordan and suffered severe abuse, including repeated rape by a male relative. After learning of the rape, family members accused him of being gay and beat him. Ali returned to the United States, severely traumatized, and began to self-medicate to deal with intrusive memories and nightmares.

In 2017, Ali was convicted of two drug-related offenses. The following year, he was arrested by ICE and subjected to mandatory detention in harsh conditions, including a yearlong wait to see a dentist for a tooth injury.[11] Seeking protection under the CAT, Ali was initially denied relief before IJ and appealed to the BIA, which

---

[10] "Ali Tayeh" is a pseudonym to protect Ali's identity. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Ellen Pachnanda, Brooklyn Defender Services (on file with counsel).

[11] Such conditions are not uncommon in immigration detention facilities. *See, e.g.,* New York Lawyers for the Public Interest, *supra* n.8; D.H.S. Office of Inspector General, *Issues Requiring Action at the Essex County Correctional Facility in Newark, New Jersey* 4 (Feb. 13, 2019), _https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-20-Feb19.pdf (documenting "slimy, foul-smelling lunch meat, which appeared to be spoiled, held in the refrigeration unit . . . . [and] facility staff serving this potentially spoiled meat to detainees." This facility ended its contact with ICE in April 2021.); Freedom for Immigrants, *New Report Documents Increase in Hate Incidents in Immigration Detention in First National Study* (June 26, 2018), https://www.freedomforimmigrants.org/news/2018/6/26/new-report-documents-increase-in-hate-incidents-in-immigration-detention-in-first-national-study (documenting over 800 complaints of abuse motivated by hate or bias in immigration detention).

remanded his proceedings in April 2019—by which time he had been detained for over 14 months.

Facing months more in detention despite winning at the BIA, Ali filed a habeas petition. The petition presented a straightforward claim that § 1226(c) was unconstitutional as applied to him in light of the length of his detention and, among other factors, the facts that the BIA remand demonstrated the merits of his application for relief and that administrative delays accounted for the length of his detention. The habeas petition, which was procedurally unremarkable, remained unadjudicated for over five months, including three during which it was fully briefed. Ali was finally freed from detention when the IJ granted his application for CAT relief on remand and the government did not appeal. At the time of Ali's release, 20 months after he was initially detained, his habeas petition was still pending with no ruling.

Had a bright-line rule been in place, Mr. Ali would have been spared the burden of litigating a habeas petition, as well as the frustration of waiting in vain for that petition to be adjudicated. *See Lora*, 804 F.3d at 615 (noting that a bright-line rule "avoids the random outcomes resulting from individual habeas litigation in which . . . some habeas petitions are adjudicated in months and others are not adjudicated for years.").

B. Case-By-Case Individualized Adjudication Leads to Arbitrary and Inconsistent Outcomes

Today, district courts assessing the constitutionality of detention on a case-by-case basis "exhibit[]" the same "pervasive inconsistency and confusion" that this Court sought to avoid by instituting a bright-line rule. *See Lora*, 814 F.3d at 615. A majority of courts, for example, hold that noncitizens should not be punished for availing themselves in good faith of all available defenses to deportation.[12] Yet a minority of courts, including the court adjudicating Mr. Hodge's petition, arrive at the opposite conclusion, finding that noncitizens "retain[] the keys to [their] liberty if [they] were to agree to removal to [their] native country." Dec. at 1. Without a bright-line rule, such inconsistencies in the application of a factor-specific approach lead to

[12] *See, e.g.*, *Graham v. Decker*, No. 20-cv-3168 (PAE), 2020 WL 3317728, at *6 (S.D.N.Y. June 18, 2020) ("[P]ursuit of relief from removal does not, in itself, undermine a claim that detention is unreasonably prolonged." (internal citation and quotation marks omitted)); *Falodun v. Session*, No. 18-cv-06133 (MAT), 2019 WL 6522855, at *10 (W.D.N.Y. Dec. 4, 2019) (declining to "penalize [the noncitizen petitioner] for the delays occasioned due to his pursuit of a good-faith, colorable legal and factual challenge[s]" in his immigration proceedings). As one judge explained, "the Court does not assume that delay was intentional, bearing in mind that even innocent, reasonable errors may collectively result in unreasonable detention." *Bugianishvili v. McConnell*, No. 15-cv-3360 (ALC), 2015 WL 3903460, at *7-8 (S.D.N.Y. June 24, 2015); *see also Hechavarria*, 891 F.3d at 56 n.6 (2d Cir. 2018) (rejecting argument that petitioner's pursuit of relief should foreclose due process challenges to prolonged detention, noting that "'appeals and petitions for relief are to be expected as a natural part of the process . . .'") (quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003)); *German Santos*, 965 F.3d at 211 ("[W]e do not hold a[] [noncitizen]'s good-faith challenge to his removal against him, even if his appeals or applications for relief have drawn out the proceedings.").

unnecessary and unfair detention. A bright-line rule providing a bond hearing at least at six months better upholds due process.

Mr. Antonie Hylton ("Mr. Hylton"), for example, saw his due process claim denied on the same basis as Mr. Hodge. Although the court hearing Mr. Hylton's habeas petition ordered a bond hearing on the basis of a since-foreclosed statutory argument,[13] its consideration of the factors in his due process claim still illustrates the inconsistent outcomes that prevail in the absence of a brightline rule.

Mr. Hylton, a longtime LPR who won immigration relief after this Court vindicated his argument that he was not removable, *see Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), filed his habeas petition after 19 months in detention, following ICE's appeal of the IJ's order terminating his removal proceedings. Mr. Hylton was never afforded a bond hearing during that time. The district court nonetheless found that his detention was not unreasonably prolonged in light of his "requests for time to seek representation, to prepare adequately for each conference before the [IJ], to prepare his case in opposition to removal, and to seek relief from the removal order, and by his appeal of the order of removal against him." *Hylton v. Shanahan*, No. 15 Civ. 1243 (LTS), 2015 WL 3604328, at *5 (S.D.N.Y. June 9, 2015).

---

[13] Mr. Hylton argued, and the court held, that § 1226(c) did not reach him because he was never "released" to ICE within the meaning of the statute. *See Hylton*, 2015 WL 3604328, at *3-4. This argument has since been foreclosed. *See Nielsen v. Preap*, 139 S. Ct. 954 (2019).

Although it was the government's appeal of an IJ's decision that was extending Mr. Hylton's detention, the court declined to weigh that fact in Mr. Hylton's favor. Other courts, however, have come to the opposite conclusion, illustrating the unpredictability of an ad hoc approach. *Compare id.* (finding, additionally, that "further delay" because of the government's "prosecution of an appeal of [Mr. Hylton's immigration relief]" was not "unreasonable") *with Hernandez*, 2018 WL 3579108, at *9 ("[T]he mere fact that a noncitizen opposes his removal is insufficient to defeat a finding of unreasonably prolonged detention, *especially where the Government fails to distinguish between bona fide and frivolous arguments in opposition*.") (emphasis added).

Thankfully, because of the availability of the now-foreclosed statutory argument, Mr. Hylton was ultimately released after 24 months of detention. If Mr. Hylton had not been afforded a bond hearing, he would have remained detained for another *three years*, after which he finally succeeded in demonstrating his right to maintain his LPR status.

The case of **Mr. Dejan Nikolic ("Mr. Nikolic")**[14] also illustrates the punishing outcomes when the right to a bond hearing depends on the inconsistent reasoning of individual courts. In 1993, when he was 15 years old, Mr. Nikolic and his

[14] The facts of Mr. Nikolic's case are detailed in his habeas record and decision. *See Nikolic v. Decker*, No. 19 Civ. 6047 (LTS), 2019 WL 5887500 (S.D.N.Y. Nov. 12, 2019). *See also* Decl. of Molly Lauterback, Brooklyn Defender Services (on file with counsel).

family fled the extreme violence of the Yugoslav Wars and sought safety in the United States. He obtained permanent residency and became a successful and respected contractor and businessman.

Despite this success, the horrors of Mr. Nikolic's childhood—witnessing war atrocities and severe abuse from his father—overwhelmed him. Severely traumatized, Mr. Nikolic self-medicated with alcohol and drugs, leading to the several misdemeanor convictions that led to his removal proceedings. Ultimately, he was diagnosed with PTSD, mood disorders, and Korsakoff Syndrome, a type of retrograde amnesia resulting from malnutrition. Based on these diagnoses, the IJ determined that Mr. Nikolic was incompetent to participate in his immigration case.

Mr. Nikolic filed a habeas petition, which the district court denied after Mr. Nikolic had been detained for 11 months. While one court has described it "[a]s a rule of thumb" that "detentions exceeding six months without a bond hearing [favor] the finding of a due process violation," *Graham*, 2020 WL 3317728 at *5, the court in Mr. Nikolic's case applied its own reasoning to determine that 11 months was not unreasonable—the kind of inconsistency that results from the lack of a brightline rule. *See Nikolic v. Decker*, No. 19 Civ. 6047 (LTS), 2019 WL 5887500, at *5 (S.D.N.Y. Nov. 12, 2019). The court determined that, because an IJ denied him relief and his case was on appeal, Mr. Nikolic's detention was unlikely to continue much longer, *id.* at *5, even as other courts recognize that the lengthy nature of immigration proceedings in general weighs in favor of finding a due process violation. *See, e.g.*, *Vallejo v. Decker*,

No. 18 Civ. 5649 (JMF), 2018 WL 3738947, at *5 (S.D.N.Y. Aug. 7, 2018) (noting that immigration case completion, including appeals, can take over a year); *Cabral v. Decker*, 331 F. Supp. 3d 255, 262 (S.D.N.Y. 2018) (finding that uncertainty as to when proceedings would end weighs in favor of petitioner).

The court also found that Mr. Nikolic's detention was reasonable because he lacked "at least some possibility of remaining in the country." *Id.*, at *5. But other courts have positively weighed the simple existence of a defense to removal, which Mr. Nikolic certainly showed. *See, e.g.*, *Hernandez Aguilar v. Decker*, 482 F. Supp. 3d 139, 148 (S.D.N.Y. 2020) (""The Court need not inquire into the strength of [a petitioner's] defenses—it is sufficient to note their existence and the resulting possibility that the [p]etitioner will ultimately not be removed[.]"") (quoting *Sajous v. Decker*, No. 18 Civ. 2447 (AJN), 2018 WL 2357266, at *11 (S.D.N.Y. May 23, 2018). Indeed, as the stories in this brief show, noncitizens subject to mandatory detention frequently have meritorious defenses to deportation.

As in Mr. Hodge's case, the district court additionally held Mr. Nikolic responsible for the prolonged nature of his detention—a result of litigating procedurally crucial issues in his case, specifically his competency to stand trial. *See Nikolic*, 2019 WL 5887500, at *5. The district court determined that Mr. Nikolic was responsible for these delays, even though the obligation to evaluate competency is shared by all parties, *see Matter of J-S-S-,* 26 I. & N. Dec. 679, 682 (BIA 2015), and even though the IJ ultimately determined that he was *not* competent. The district court's

finding illustrates the irrational outcomes when challenges to prolonged detention are resolved on a case-by-case basis.

Arbitrarily denied a bond hearing because of the district court's application of a multifactor test, Mr. Nikolic remained detained. He was then diagnosed with Hepatitis C and denied treatment for his debilitating mental and physical illnesses. After more than 16 months of mandatory detention, he was granted release during the Covid-19 pandemic due to his medical vulnerabilities. Tragically, Mr. Nikolic passed away a few months later. At the time of his death, Mr. Nikolic's removal case had been ongoing for over a year and a half, and his appeal was still pending.

* * *

The cases of Mr. Ali, Mr. Hylton, and Mr. Nikolic—as well as Mr. Hodge's own case—all demonstrate the vagaries of a system of case-by-case adjudication of habeas petitions. This Court could eliminate both the inconsistency among district judges and the harms it causes to noncitizens by instituting a bright-line rule requiring bond hearings when mandatory detention becomes unreasonably prolonged, at least at six months.

III. PROLONGED DETENTION INFLICTS EXTRAORDINARY AND UNNCESSARY HARDSHIP ON NONCITIZENS AND THEIR FAMILIES

Apart from resolving the perverse and inconsistent outcomes that currently characterize § 1226(c), a bright-line rule would reaffirm this Court's recognition of "the disastrous impact of mandatory detention" and its "real-life consequences for

immigrants and their families." *Lora*, 804 F.3d at 614, 616. Although nominally in "civil" custody, noncitizens detained by ICE are frequently held in county jails and prisons, alongside individuals serving criminal sentences.[15] They must wear jumpsuits and shackles and undergo strip searches; their movement and communication are similarly restricted; and their visitation opportunities are severely curtailed. *See Velasco Lopez v. Decker*, 978 F.3d 842, 851–52 (2d Cir. 2020) (describing deprivations of immigration detention, including no access to employment, internet, family or friends outside of visiting hours, and "limited access to the telephone"); *Charles v. Orange Cnty.*, 925 F.3d 73, 78 n.3 (2d Cir. 2019) ("[C]ivil immigration detainees are housed in conditions similar to those experienced by detainees awaiting trial on criminal charges.").

The prolonged, indefinite, and often sudden nature of immigration detention inflicts extraordinary harm, whether due to unsanitary conditions of confinement, delays or denials of medical and mental health care, physical or sexual abuse, or excessive use of solitary confinement.[16] Moreover, detained noncitizens are not alone

---

[15] *See Lora*, 804 F.3d at 605; Immigrant Advocates Response Collaborative, *Behind Bars in the Empire State: An Assessment of the Immigration Detention of New Yorkers* 8 (2019), **https://perma.cc/3BG8-H8CX**.

[16] *See, e.g.,* Matt Katz, Gothamist, *Allegations Surface About Treatment of ICE Detainees in Orange County* (Dec. 2, 2021), https://gothamist.com/news/allegations-surface-about-treatment-ice-detainees-orange-county (reporting on alleged denial of mental health treatment and racist and abusive behavior toward noncitizens detained by ICE at Orange County Jail); New York Lawyers for the Public Interest, *Still Detained and Denied: The Healthcare Crisis in Immigrant Detention Continues* (Apr. 2020), https://nylpi.org/wp-content/uploads/2020/04/NYLPI-report-Detained-

in their suffering. Their families—suddenly and arbitrarily left without a parent or caregiver—also suffer forced separation from a loved one.

Mr. Mateo Alvarez ("Mr. Alvarez")[17] knows firsthand the painful consequences of mandatory detention. Mr. Alvarez was born in the Dominican Republic and has been an LPR since 1987. He lived in the same apartment in New York with his ailing U.S. citizen mother for over thirty years and has an adult U.S. citizen daughter and extensive U.S. citizen and LPR family in New York. For decades, Mr. Alvarez worked for a fashion company, and later for FedEx, consistently paying his taxes. He had a brain aneurysm in 2012 that required surgery and suffered from additional medical conditions requiring back and knee surgery.

In 2015, Mr. Alvarez applied to become a citizen of the United States, the country he had considered home for three decades. His application was denied because of a 2001 conviction for attempted sale of narcotics, for which he completed five years' probation. Following this denial, and *14 years* after this single nonviolent conviction, ICE came to his home and arrested him, alleging that his conviction made him deportable.

Denied.pdf (a common problem in ICE detention is weeks- or months-long waits to receive treatment).

[17] "Mateo Alvarez" is a pseudonym. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Suchita Mathur, The Bronx Defenders (on file with counsel).

ICE detained Mr. Alvarez under § 1226(c) at a county jail for almost nine months. Shortly after arriving at the jail, he started experiencing searing pain in his side that felt as though someone was stabbing him. Mr. Alvarez complained repeatedly to jail staff, who largely ignored his requests for medical assistance. Medical appointments were repeatedly cancelled and would not be rescheduled for weeks or months. Most troubling, on at least one occasion, jail staff placed Mr. Alvarez in solitary confinement after he complained of experiencing debilitating pain.

By August 2015, ICE acknowledged that Mr. Alvarez required surgery, but stated it could not provide the procedure in detention. His attorney subsequently filed a release request citing Mr. Alvarez's need for surgery and appropriate treatment, his lack of dangerousness due to his single, old, nonviolent conviction, and his significant family and community ties. ICE denied the request.

Two months later, on October 28, 2015, this Court issued its decision in *Lora*. By the end of the following month, the IJ had held a bond hearing pursuant to the new bright-line rule and ordered Mr. Alvarez's release. As for so many others subject to mandatory detention, all that was necessary for Mr. Alvarez to secure his liberty was a requirement that someone assess the propriety of his continued detention.

After his release on bond, Mr. Alvarez was rushed to the hospital for emergency surgery to address gallstones left untreated during his detention by ICE. His medical team told him he was lucky to be alive.

Like so many of the people whose stories this brief recounts, Mr. Alvarez's story ends in a grant of immigration relief. Several months after his release, the IJ granted Mr. Alvarez cancellation of removal. In today's post-*Lora* environment, however, Mr. Alvarez would remain detained—or else be forced to demonstrate the unreasonableness of his detention in a habeas proceeding—despite his urgent and untreated medical needs.

A bright-line rule requiring bond hearings for people subject to 1226(c) is the proper response to the kind of suffering that Mr. Alvarez, along with many others, have experienced and that this Court has itself decried.

CONCLUSION

For the foregoing reasons, amici curiae respectfully ask this Court to reverse the district court decision and find that unreviewed detention under § 1226(c) becomes presumptively unreasonable and in violation of due process as it approaches six months, unless the government justifies by clear and convincing evidence at an individualized bond hearing that further detention is necessary.

DATED: April 23, 2024

Respectfully submitted,

/s/ Kevin Siegel
BROOKLYN DEFENDER SERVICES
Kevin Siegel
Alexandra Lampert
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
(718) 254-0700

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4), because the brief contains 6,257 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 point Garamond.

/s/ Kevin Siegel
Kevin Siegel
Brooklyn Defender Services

Counsel for Amici Curiae

APPENDIX A:

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to low-income Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal district court litigation and appeals.

Brooklyn Defender Services ("BDS") is a public defender organization that represents approximately 25,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS represented Alexander Lora, the petitioner in *Lora v. Shanahan*, 803 F.3d 601 (2d Cir. 2015) in his removal proceedings and habeas corpus proceedings and has brought dozens of challenges to prolonged immigration detention.

The Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases before this Court and others, challenging the legality and constitutionality of the government's detention authority and its failure to provide immigrants in detention with due process of law.

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the United States, including representing people who face detention without bond pending removal proceedings.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 26,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its

attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

The New York Legal Assistance Group ("NYLAG") is a leading not-for-profit civil legal services organization advocating for adults, children, and families that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG's Immigrant Protection Unit (IPU) provides New York immigrant communities experiencing poverty with comprehensive legal services through consultation and direct representation. IPU represents detained and non-detained immigrants in removal proceedings, as well as immigrants with final orders of removal who face imminent removal from the United States.

Neighborhood Defender Service of Harlem ("NDS") is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, housing court, and civil court, as well as in immigration and custody proceedings. NDS has a strong interest in protecting its clients and all New Yorkers from inappropriate prolonged detention and harmful separation from their families and communities as they pursue claims for relief from deportation in immigration court.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, placed of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include individuals who have faced detention without bond during the pendency of their removal proceedings.