travel documents should that become necessary, but his removal is not significantly likely to occur in the reasonably foreseeable future due to the nature of his immigration case.

First, whatever the ultimate outcome of his case, his removal is not significantly likely to occur in the reasonably foreseeable future because his case will undoubtedly take additional months, if not years, to be resolved. As explained above, Mr. Soeoth has recently filed an asylum application based on changed personal circumstances, namely his status as an ordained Christian minister. The Department of Homeland Security must now consider this application. Whether he wins or loses, either side could appeal. If the government finally prevails at the administrative level, then Mr. Soeoth will have the right to file a petition for review with this Court, which will likely take more than a year to decide. If this Court stays his removal, this would mean years more of detention. *See Tijani*, 430 F.3d at 1242 (stating that "the foreseeable process . . . is a year or more" where briefing was not yet completed in the Ninth Circuit); *see also* Ninth Circuit United States Courts 2006 Annual Report at 36-38, *available at* http://www.ca9.uscourts.gov/publications/AnnualReport2006.pdf (median time from filing of appeal to disposition for Ninth Circuit in 2006 was 15.5 months). Thus, because Mr. Soeoth's removal is not significantly likely to occur in the reasonably foreseeable future, no statute authorizes further detention.

Second, he has a strong claim that his removal is not significantly likely to occur at all, based on the arguments advanced in his asylum application. As explained there, he has a strong claim that he will face persecution as a Christian minister living in a Muslim-majority country. *See* Appendix II at 16-17, 41-45 (documenting attacks on Christian ministers by Muslims in Indonesia). For that reason as well, his removal is not significantly likely to occur in the reasonably foreseeable future.

Thus, just like the petitioners in *Nadarajah*, *Tijani*, and *Zadvydas*, Mr. Soeoth was detained far in excess of six months and his removal is not significantly likely to occur in the reasonably foreseeable future, if it ever occurs. Therefore, no statute authorizes his detention without a hearing.

The government seeks to avoid the force of the Supreme Court's and this Circuit's caselaw governing prolonged and indefinite immigration detention, arguing that it does not apply because Mr. Soeoth is still litigating his removal case. On the government's view, if a detainee's detention will some day come to an end (because they will either win their case and be allowed to stay or lose their case and be deported), they are not subject to indefinite detention. *See* Gov't Br. at 29 ("*Zadvydas* is not applicable when there is a judicial stay of removal. Soeoth's detention had a definite termination point . . . and thus Soeoth is not [sic] subject to a period of 'indefinite detention.'"). This argument is meritless for

several reasons.

First, it is foreclosed by *Nadarajah*. In *Nadarajah* this Court found indefinite detention even though Mr. Nadarajah's detention would some day end. The Court relied extensively on *Zadvydas*, even though neither side had ever suggested that Sri Lanka would not issue travel documents for the petitioner, and despite the fact that the length of his detention was solely a product of the length of proceedings in his case. *Nadarajah*, 443 F.3d at 1073-75 (recounting procedural history); *id.* at 1078 (basing holding on *Zadvydas*). In fact, *Nadarajah* rejected the same argument advanced by the government here: "Nor are we persuaded by the government's argument that because the Attorney General will someday review Nadarajah's case, his detention will at some point end, and so he is not being held indefinitely. No one can satisfactorily assure us as to when that day will arrive. Meanwhile, petitioner remains in detention." *Nadarajah*, 443 F.3d at 1081. Similarly, Mr. Soeoth seeks a final determination on his claim for asylum, and no one knows when that day will arrive.

Second, even if the government's attempt to distinguish *Nadarajah* were persuasive, its position was also rejected by *Tijani*. In *Tijani*, this Court held that the general detention statute at issue did not authorize the petitioner's twenty-eight month detention despite the fact that his detention would some day end. 430 F.3d at 1242. Mr. Tijani had been detained for that length of time only because he was

pursuing administrative and judicial review of his removal order, and the government had not deported him only because he had obtained a stay of removal. *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring) (stating that petitioner had obtained a stay of removal). Nonetheless, *Tijani* analyzed the length of detention and the likelihood that it would end in the foreseeable future in order to determine whether the detention at issue was authorized by the statute. *Id.* at 1242. Thus, the government's argument that it can indefinitely detain without a hearing those non-citizens who continue to litigate their cases is foreclosed by *Tijani*.[13]

Third, the government's narrow view of what constitutes indefinite detention has been rejected by two other circuits. The Sixth Circuit was unpersuaded by the government's limited conception of indefinite detention in *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (per Boggs, J.), when it struck down the indefinite detention of a non-citizen who was litigating his removal case. As Judge Boggs explained, "[A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to

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[13]The government argues that *Tijani* is distinguishable because there the alien did not concede removability. However, Mr. Soeoth also argues that the government has no authority to remove him because he is entitled to withholding of removal. In any event, if Mr. Soeoth's removability renders his claim for release somehow weaker, that is an issue that the government could have raised at his detention hearing, along with danger, flight risk, the length of detention, and foreseeability of removal.

indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him. Further, although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take. . . . The entire process, not merely the original deportation hearing, is subject to the constitutional requirement of reasonability." *Id.* at 272.

The Fourth Circuit has also taken a dim view of the government's argument, noting that detention pending completion of removal proceedings subjects aliens to prolonged and uncertain lengths of detention similar to those at issue in *Zadvydas*. "The *Zadvydas* Court stresses repeatedly that post-order detention may be 'indefinite, perhaps permanent.' [Petitioner's] detention pending a final removal order is similarly indefinite." *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002). *See also id.* at 231-32 (Williams, J., concurring) ("With respect to the *Zadvydas* majority's reliance on the potentially indefinite duration of detention . . . the detention authorized by [the general detention statute authorizing mandatory detention pending completion of removal proceedings] suffers from similarly lengthy delays.").[14]

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[14]The government also appears to suggest that *Zadvydas* does not apply because Mr. Soeoth's detention "was not extended by government delay." Gov't Br. at 29. But there was never any suggestion in *Zadvydas* that the government was to blame for its inability to remove the petitioners in that case. The delay in

C. Contrary to the Government's Claims, the Mere Fact That this Court Has Stayed Mr. Soeoth's Removal Does Not Permit the Government to Detain Him Indefinitely.

The government's argument that it may indefinitely detain non-citizens merely because this Court has stayed their removal contravenes the plain language and structure of the immigration detention statutes. On the government's view, detainees who obtain stays of removal have caused their own detention by delaying their removal, and detention is therefore authorized under Section 1231(a)(1)(C), which states that the government may detain a non-citizen who conspires or acts to prevent his removal. Essentially, the government's argument is that Congress gave it unfettered authority to detain non-citizens without any time limit, as long as the detention happens while the non-citizen obtains a stay of removal to litigate his immigration case.

Fortunately, Congress did not give the government the authority to punish people who obtain stays of removal by subjecting them to indefinite detention. As explained above, none of the general detention statutes, including Section 1231(a)(1)(C), contain a clear statement authorizing prolonged and indefinite

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their removal was entirely the fault of third parties – in that case the other governments involved. Here, most of Mr. Soeoth's lengthy detention was caused by the time needed to adjudicate his immigration case – he is not to blame for the length of time at issue.

detention. *Cf. Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (ordering release of non-citizen detained approximately four years pending completion of removal proceedings because "[t]he price for securing a stay of removal should not be continuing incarceration. . . . [The Petitioner] should not be effectively punished for pursuing applicable legal remedies.").

In addition, as set forth below, the government is wrong in arguing that, because Mr. Soeoth sought a stay of removal, he has acted to obstruct his removal such that his detention is authorized by Section 1231(a)(1)(C). Finally, even if that provision did govern this case, it would not authorize Mr. Soeoth's detention absent a constitutionally-adequate hearing.

1. Petitioner's Detention Is Governed by Section 1226(a), Not Section 1231(a)(1)(C).

The text of the relevant statutes makes clear that Petitioner's detention is governed by Section 1226(a), not Section 1231(a)(1)(C). As a general matter, the parties agree that when the government seeks to detain an admitted non-citizen with no criminal history pending completion of removal proceedings, detention is governed by Section 1226(a), which provides simply that the Attorney General "may continue to detain the arrested alien" or "may release the alien on bond. . .". 8 U.S.C. 1226(a). The parties also agree that once removal proceedings conclude and the government seeks to remove a non-citizen, it has a period of time, known

as the "removal period," to effectuate removal, during which detention is governed by Section 1231(a). The parties disagree, however, over what statute governs while this Court is judicially reviewing a removal order and has stayed the non-citizen's removal. Petitioner contends that detention during that period is still under Section 1226(a), while the government contends that it is under Section 1231(a)(1)(C). The government is incorrect, for several reasons.

First, the plain text of the relevant statute makes clear that Mr. Soeoth's detention is governed by Section 1226(a), not Section 1231(a)(1)(C), because the latter provision does not govern until *after* the dissolution of any judicially-entered stay of removal. *See* 8 U.S.C. 1231(a)(1)(B)(ii). Section 1231(a)(1) provides as follows:

> (a) Detention, release, and removal of aliens ordered removed.
> (1) Removal period.
> (A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
> (B) Beginning of period. The removal period begins on the latest of the following:
> (i) The date the order of removal becomes administratively final.
> (ii) *If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.*
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
> (C) Suspension of period. The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application

> in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

8 U.S.C. 1231(a)(1) (emphasis added).

As subsection 1231(a)(1)(B)(ii) clearly provides, the removal period does not begin until the completion of any judicial review for which a non-citizen has obtained a stay of removal. In this respect, the statute makes perfect sense – if a federal court has ordered a stay of removal, detention remains under Section 1226 until the court issues its final order, and the government cannot attempt to remove the non-citizen until the proceedings associated with the stay have come to an end. In contrast, where no stay issues, detention falls under Section 1231(a), and the government can attempt removal.

The government reads the statute differently, arguing that when a non-citizen seeks judicial review of an administratively final removal order and obtains a stay, the non-citizen is then "conspir[ing] or act[ing] to prevent his removal" under Section 1231(a)(1)(C). On the government's view, Mr. Soeoth's action in filing a petition for review and obtaining a stay of removal from this Court operates to "suspend" the removal period under Section 1231(a)(1)(C), such that that provision permits his prolonged and indefinite detention. Gov't Br. at 24-25 ("Soeoth's litigation and request for stays were clearly an affirmative acts [sic] that prevented his removal and therefore suspended the removal period.").

The government's interpretation is at war with the plain language of the statute. As Section 1231(a)(1)(B)(ii) plainly states, the removal period does not begin once a non-citizen has an administratively final order if this Court orders a stay of removal. Rather, it begins when proceedings associated with the stay have concluded. It follows that the "act" of obtaining a stay of removal does not serve to suspend the removal period, because the removal period can only be "suspended" after it has begun, and it does not begin until all review associated with the stay is complete. Because Mr. Soeoth has obtained a stay of removal from this Court, Section 1231(a)(1)(C) provides no authority to detain him, and his detention is instead governed by Section 1226(a), as Section 1231(a)(1)(B)(ii) – the provision which specifically addresses stays of removal – makes clear.

In addition, the language of Section 1231(a) as a whole shows that Congress did not consider the act of obtaining a stay of removal to be interference with the removal process. While Section 1231(a)(1)(C) – the provision on which the government relies – nowhere mentions stays of removal when describing the kinds of acts that justify suspending the removal period, the neighboring provision at Section 1231(a)(1)(B)(ii) specifically discusses stays. Therefore, the specific provision should control. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 916 (9th Cir. 2005) (specific statutes control over general ones); *Nadarajah*, 443 F.3d at 1079 (applying that canon in this context). In addition, Section

1231(a)(1)(C)'s text suggests that Congress contemplated extending the removal period only in response to extra-judicial acts to prevent removal, such as refusing to apply for documents or engaging in a conspiracy of some kind, rather than the legitimate pursuit of judicial review and a stay. *See* 8 U.S.C. 1231(a)(1)(C) (authorizing suspension of period for, *inter alia*, refusal to timely apply "in good faith" for travel documents). The phrase concerning "acts to prevent . . . removal" should be read in light of its neighboring provisions. *See, e.g., United States v. King*, 244 F.3d 736, 740-41 (9th Cir. 2001) ("words in a series are to be understood by neighboring words in the series").

Petitioner's argument based on the plain language of the statute has already been implicitly accepted by this Court. In *Tijani*, 430 F.3d at 1242, this Court applied Section 1226 to the petitioner's detention, even though that petitioner had filed a petition for review and obtained a stay of removal. Like the petitioner in *Tijani*, Mr. Soeoth has obtained a stay from this Court and is detained pending completion of review of his removal order. Thus, under *Tijani*, his detention is governed by Section 1226. Petitioner's position was also endorsed in *dicta* in another opinion of this Court, and in the holding of an unpublished disposition. *See Ma v. Ashcroft*, 257 F.3d 1095, 1104 n.12 (9th Cir 2001) ("If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. 1231(a)(1)(B)(ii)."); *Martinez-Jaramillo*

v. Thompson, 120 Fed. App'x 714, 717 (9th Cir. 2005) (unpublished disposition). Furthermore, this Court's cases applying Section 1231(a)(1)(C) also counsel against the government's view. *See Pelich v. INS*, 329 F.3d 1057, 1059 (9th Cir. 2003) (non-citizen deemed to be acting to prevent his removal because he refused to apply for Polish travel document); *Lema v. INS*, 341 F.3d 853, 856-57 (9th Cir. 2003) (same, for non-citizen who made misleading statements concerning his Ethiopian identity).

In addition, the weight of authority from other courts supports Petitioner's position. *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003) ("where a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under [Section 1226] until the court renders its decision."); *Martinez v. Gonzales*, 504 F.Supp.2d 887, 897 (C.D. Cal. 2007) ("Nothing in that statutory language suggests that an alien's exercise of his right to seek judicial review of an order of removal qualifies as 'conspir[ing or act[ing] to prevent' his removal within the meaning of the statute."); *Arevalo v. Ashcroft*, 260 F.Supp.2d 347, 349 (D.Mass. 2003) (same); *Alafyouny v. Chertoff*, 2006 U.S. Dist. LEXIS 40854 at *38-39 (D. Tex. 2006) (collecting cases and holding that "Because the entry of a stay pursuant to § 1231(a)(1)(B)(ii) delayed the commencement of the removal period, this delay precludes applicability of § 1231(a)(2) and (a)(6)."); *Kothandaraghupathy v. DHS*, 396 F.Supp.2d 1104, 1107

(D. Ariz. 2005) (holding that petitioner was detained under section 1226 after Ninth Circuit had granted a stay of removal); *Morena v. Gonzales*, 2005 WL 3277995, at *3-4 (M.D. Pa. 2005) (same); *Yang v. Chertoff*, 2005 WL 2177097, *3 (E.D. Mich. 2005) (same); *Milbin v. Ashcroft*, 293 F.Supp.2d 158, 161 (D. Conn. 2003) (same); *Clavis v. Ashcroft*, 281 F.Supp.2d 490, 493 (E.D.N.Y. 2003) (same).[15]

The government also argues that its interpretation is bolstered by Section 1252(b)(8)(A), which states that nothing in subsection 1252(b) prevents the Attorney General from detaining an alien who has sought judicial review under Section 1231. But Section 1252(b)(8) adds nothing to the government's argument. Petitioner agrees that non-citizens who seek judicial review are detained under Section 1231, *as long as this Court has not issued a stay*. This makes sense – the government has authority to deport non-citizens when no stay is in effect, even if

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[15]The government argues for the first time on appeal that the district court erred in failing to accord *Chevron* deference to the agency's interpretation of what statute governs. Gov't Br. at 22. However, the BIA case cited by the government does not address stays of removal, which is unsurprising given that the BIA would have no occasion to address what detention statute governs when a case is pending before this Court and this Court orders a stay. In any event, *Chevron* principles have no application where the language of the statute is plain or prior precedent and traditional tools of statutory construction dictate a clear result. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987). Nor do they apply where the canon of constitutional avoidance is at issue, *Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001).

they seek judicial review, and they are detained under Section 1231 once the government has authority to deport them. *See* Section 1252(b)(3) (authorizing deportation during pendency of judicial review where no stay is in effect). However, if a stay is in effect, then the removal period does not begin to run, and detention is under Section 1226.

Petitioner is aware of only one court to consider the government's argument based on Section 1252(b)(8)(A), and that court rejected it. *See Rodriguez-Carabantes v. Chertoff*, 2006 U.S. Dist. LEXIS 96023, *10 n.4 (W.D. Wash. 2006) ("Respondents argued [that] 8 U.S.C. 1252(b)(8), bolstered its position . . . Respondents' argument lacks merit. [Section 1252(b)(3)(B)] specifically states that service of the petition for review 'does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.' Under [Section 1231(a)(1)(B)(ii)], when a court issues a stay of removal, the removal period does not begin until that court issues a final order. Thus, during the pendency of a court-ordered stay of removal, the Attorney General cannot detain an alien under [Section 1231]. Nothing in [Section 1252(b)(8)] purports to modify [Section 1231(a)(1)(B)(ii)].").

Finally, the government appears to argue that even if Section 1226 governs detention during the *first* petition for review, detention during any further judicial review is governed by Section 1231. Gov't Br. at 29 (distinguishing between

"direct appeal" of removal order and "collateral attack" on removal order). However, this distinction, along with the government's "direct" and "collateral" nomenclature, appears nowhere in either the statute or this Court's decision in *Tijani*. Rather, Section 1231(a)(1)(B)(ii) provides that detention under Section 1231 does not begin until the date of the reviewing court's *final* order after a stay of removal is granted. For purposes of determining which statute governs, the relevant question is whether this Court has ordered a stay, not whether the petition for review at issue is the first or second one filed.

Because this Court has stayed Mr. Soeoth's removal, his detention is governed by Section 1226(a). That provision does not authorize his prolonged and indefinite detention, and the government does not argue to the contrary. *See* 8 U.S.C. 1226(a) (stating that Attorney General "may" detain alien or may release on bond, while making no mention of time limits).

2. Even If Section 1231(a)(1)(C) Applies, it Would Not Authorize Petitioner's Prolonged and Indefinite Detention.

Even assuming *arguendo* that the provision relied upon by the government – Section 1231(a)(1)(C) – governs Petitioner's detention notwithstanding the fact that his removal has been stayed by order of this Court, it does not authorize his prolonged and indefinite detention without a hearing.

First, as the Ninth Circuit explained in *Nadarajah*, the structure of the

immigration detention statutes as a whole reveals that when Congress intended to authorize prolonged and indefinite detention, *i.e.*, in cases involving specific types of national security risks, it did so clearly. *See Nadarajah*, 443 F.3d at 1079. In contrast, the "general detention statutes" contain no such language and therefore authorize detention only for "brief and reasonable" time periods. *Id.*

Here, the particular language of the general detention provisions on which the government relies is nowhere near clear enough to authorize Petitioner's detention. Section 1231(a)(1)(C) states that the period during which the government is required to deport the non-citizen is "extended beyond" the removal period if the non-citizen "acts to prevent" his removal, and that the non-citizen "may remain in detention" during this period. However, it does not state for *how long* the non-citizen "may" be detained, or for how long "beyond" the removal period detention can be "extended," pending completion of judicial review. The Supreme Court and this Court have required far greater specificity before upholding prolonged and indefinite detention. *See Zadvydas*, 533 U.S. at 697 ("'may' . . . does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous"); *Ma v. Ashcroft*, 257 F.3d 1095, 1112 (9th Cir. 2001) ("[T]o say that the INS may hold persons *beyond* a particular date does not answer the question 'for how long?'") (emphasis in original). Indeed, even statutes containing the mandatory word "shall" have been found insufficiently clear to

authorize such detention. *Nadarajah*, 443 F.3d at 1076-77 (holding that provision stating that non-citizen "shall be detained" for further consideration of an asylum application does not clearly authorize prolonged and indefinite detention); *Tijani*, 430 F.3d at 1242 (holding that mandatory "shall detain" provision does not clearly authorize prolonged detention without a hearing).

Although the government cites several circuit court cases to support its position that Petitioner's detention is authorized, only one of them actually involves prolonged detention, and that case is contrary to circuit precedent and unpersuasive. Gov't Br. at 26-27. The government cites two Eleventh Circuit cases to support its position, but neither one upholds prolonged detention pending completion of removal proceedings. *See De La Teja v. United States*, 321 F.3d 1357, 1363 (11th Cir. 2003) (upholding detention of an alien with an un-appealed final order of removal); *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002) (upholding detention of alien held for four months).

The First Circuit's decision in *Lawrence v. Gonzales*, 446 F.3d 221, 227 (1st Cir. 2006) is equally unpersuasive, because, again, the Court did not rule on the legality of detention pending completion of removal proceedings. That case involved a petition for review of a removal order in which the non-citizen also challenged his detention. While the court opined that detention pending completion of proceedings was necessary to effectuate the alien's removal, the

court dismissed the detention challenge because removal was "imminent" in light of the court's having affirmed the removal order.

The only circuit court case that does actually uphold prolonged detention pending completion of removal proceedings is *Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. 2004). However, *Soberanes* is contrary to *Tijani* and *Nadarajah*. The court assumed that the alien's petition for review would be resolved "in due course," assumed that detention pending judicial review would necessarily have a "definite and evidently impending termination point," and explicitly left open the possibility that evidence of a delay in resolving the immigration case might lead to a different outcome. *Id.* at 1311. However, the court's assumption that detention pending judicial review necessarily occurs expeditiously was rejected by *Nadarajah* and *Tijani*, as well as by decisions from the Sixth and Fourth Circuits. It is also demonstrably false in cases like this one, where Mr. Soeoth has waited literally for years while his case continues to be litigated.

The government also relies, by analogy, on criminal cases involving speedy trial rights to support its position. Gov't Br. at 30. This argument is surprising. The Constitution requires that a criminal defendant be given a detention hearing where the government bears the burden of proof within forty-eight *hours* of arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). *See also id.* at 68 (Scalia, J., dissenting) (arguing that twenty-four hours should be the maximum

permissible limit). Final resolution of the case through trial, which comes long after the detention hearing, must still occur within seventy days of indictment. *See* 18 U.S.C. 3161(c)(1). Thus, any analogy to the criminal law works entirely in Petitioner's favor.

In any event, the cases cited by the government do not support, even by analogy, the claim that the government can indefinitely detain non-citizens who seek stays of removal. The government's cases do not involve detention at all, and therefore in no way undermine the general rule that detention must be reasonably related to its purpose. Of course, Mr. Soeoth concedes that a non-citizen who unreasonably delays his own removal proceedings is not thereby entitled to release, but if the government claims that a non-citizen is unreasonably prolonging his proceedings in order to win release, it can raise that argument at the detention hearing. Here, the government had every opportunity to argue that Mr. Soeoth had unreasonably delayed his removal proceedings, but it did not make any such showing.[16]

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[16]The cases cited by the government establish only the narrow rule that delays caused by continuances and pre-trial motions filed by the defendant do not count against the speedy trial clock. They provide no support for prolonged and indefinite detention. *See, e.g.*, *United States v. King*, 483 F.3d 969, 977 (9th Cir. 2007) (finding no speedy trial violation because delay was due to defendant's requested continuances in case where defendant was not detained); *United States v. Johnson*, 953 F.2d 1167, 1172 (9th Cir. 1992) (sixteen days of delay due to pre-trial motions did not create unreasonable trial delay).

For all of these reasons, Section 1231(a)(1)(C) does not clearly authorize the prolonged and indefinite detention of non-citizens pending completion of judicial review of their removal orders. Assuming *arguendo* that it governs Mr. Soeoth's case, it does not authorize his detention without a hearing.

III. Petitioner's Prolonged Detention Without a Constitutionally-Adequate Hearing Violates the Due Process Clause.

If the Court rejects Petitioner's statutory arguments above, it would have to consider Petitioner's argument that his prolonged immigration detention without a constitutionally-adequate hearing violates the Due Process Clause. Petitioner believes that this Court must read the statute to require that he be afforded the hearing that the district court ordered, because any other interpretation would violate the Constitution.

A. Petitioner's Prolonged Detention Without a Hearing Before an Immigration Judge Violates the Due Process Clause.

Immigration detention restricts a fundamental liberty interest protected by the Due Process Clause. "Freedom from imprisonment-from Government custody, detention, or other forms of physical restraint, lies at the heart of the liberty that the Clause protects." *Zadvydas*, 533 U.S. at 690. *See also Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment *for any purpose* constitutes a significant deprivation of liberty that

requires due process protection.") (emphasis added). As the government acknowledges, all civil detention, including immigration detention, must always be reasonable in relation to its purpose. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *see also Demore*, 538 U.S. at 527-29 (applying "reasonable relation" test).

In the immigration context, the primary purpose of detention must be to ensure the non-citizen's availability for removal proceedings and for removal itself, if the government prevails.[17] Where removal is not significantly likely to occur in the reasonably foreseeable future, however, prolonged detention may become unreasonable in relation to that purpose. *Zadvydas*, 533 U.S. at 690-91 ("where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed."). As a result, the Constitution requires strict procedural safeguards to ensure that prolonged detention continues to serve its purpose. *See id.* at 691-92. *See also Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment for periods of one year at a time, subject to "strict procedural safeguards" including right to jury trial before state court and burden of proof

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[17]While the government may also assert a secondary interest in protecting the community from danger, there is no dispute that Mr. Soeoth has never presented a danger to anyone.

beyond a reasonable doubt); *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987) (suggesting that if pretrial detention is excessively prolonged it would violate Due Process).

Here, the procedures afforded to ensure that Mr. Soeoth's detention remained reasonable were grossly deficient. He was never even interviewed, let alone afforded a hearing, and the people reviewing his detention failed to consider either the length of his detention or the likelihood of his removal occurring in the reasonably foreseeable future. Indeed, the government scarcely defends the minimal "custody review" procedures it employed – it nowhere explicitly disputes the district court's conclusions that the hearing it ordered had to be held before an IJ and that the hearing had to take into account the length of detention and foreseeability of removal. *See* ER 7.[18]

The particular reviews in this case provide confirmation that the existing procedures are grossly deficient. The letter Mr. Soeoth received after being detained for more than six months provides literally no reason for the detention; it

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[18]The government does claim at one point that the hearing ordered in *Tijani* did not require that the IJ take into account length of detention and forseeability of removal. However, the *Tijani* court itself took those factors into account. *Tijani*, 430 F.3d at 1242 (analyzing both length of detention and forseeability of removal). In any event, the logic of *Zadvydas* and *Nadarajah* also make abundantly clear that a constitutionally-adequate hearing must consider these criteria, because they must be considered to ensure that detention remains reasonably related to the purpose of effectuating removal.

states that Mr. Soeoth has a pending case in the Ninth Circuit and concludes that he will remain detained until he is removed, which strongly suggests that the real reason for detention here was to punish Mr. Soeoth for pursuing a petition for review in this Court. *See* ER 75. He received no further process until *one year later*, at which time he received an equally nonsensical letter decision, this time faulting him for failing to depart after the IJ initially granted him voluntary departure five years earlier, even though he had no obligation to voluntarily depart at that time because his case was pending on appeal to the BIA. *See* ER 87. Neither decision mentions the inordinate length of his detention or explains how he could be a danger or flight risk given that he was never charged with any crime, never failed to appear for any proceeding, and had extensive community ties.

Shockingly, in the two and a half years that he was detained prior to the hearing before the IJ, these incoherent decisions constituted the sum total of the process he received concerning whether or not his detention was justified. This review process obviously does not suffice for the "strict procedural safeguards" required by the Constitution. *Cf. Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (criticizing INS's "rubberstamp denials based on temporally distant offenses" under file review system).

B. The District Court Properly Placed the Burden of Proof on the Government.

The government argues incorrectly that the district court should have placed the burden of proof on Mr. Soeoth, rather than on the government, in the detention hearing. Gov't Br. at 33-34. In support, the government cites the governing regulations. However, because the hearing ordered by the district court here was constitutionally mandated, the language of the existing regulations is not controlling.

Due process requires that the government bear the burden of justifying prolonged immigration detention. In *Zadvydas*, the Supreme Court criticized the regulations governing prolonged immigration detention for placing the burden of proof on the non-citizen, noting that it had struck down other civil commitment schemes for improperly placing the burden of proof on the detainee. 533 U.S. at 691.

Consistently with *Zadvydas*, this Court held in *Tijani* that the government must bear the burden of proof in hearings to justify prolonged immigration detention. *Tijani*, 430 F.3d at 1242. *Tijani* in turn relied upon the Supreme Court's unanimous decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which held that "due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both 'particularly important' and

'more substantial than mere loss of money.'" *Id.* at 363. *See also Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982) (due process requires that the government bear the of proof by clear and convincing evidence before termination of parental rights); *Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting) (it is "beyond question" that "in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence."). Thus, the Constitution demanded that the district court place the burden of proof on the government.

Notwithstanding this authority, the government suggests that the district court's order placing the burden on the government was inconsistent with *Zadvydas*. Gov't Br. at 33-34. This suggestion is meritless. *Zadvydas'* statement, at the end of the opinion, that the non-citizen must come forward with evidence to show that his or her removal is not significantly likely to occur in the reasonably foreseeable future was made in the context of its explanation of the habeas process – the statement refers only to the fact that the detainee must file the petition. 533 U.S. at 701. The Court was perfectly clear, during its earlier discussion of the procedures that must accompany prolonged detention, that administrative procedures governing such detention must place the ultimate burden of proof on the government. *Compare Zadvydas*, 533 U.S. at 692 (noting that civil detention provisions had been struck down for placing burden on detainee) *with id.* at 701

(stating that once non-citizen provides reason to believe his removal is not significantly likely by filing habeas petition, burden shifts to government). Any other reading of *Zadvydas* would be impossible to reconcile with the overwhelming precedent that the Court cited on this issue.

In light of this constitutional requirement, the government's reliance on the regulations is irrelevant. While Mr. Soeoth does not dispute that the regulations place the burden of proof on non-citizens in typical bond proceedings and during the post-order custody review process, they need not apply where *prolonged* detention is at stake. *See* 8 C.F.R. 1003.19(h)(3) (establishing procedures for initial bond hearings). Given that the relevant statutes say nothing about the burden of proof, *see* 8 U.S.C. 1226(a) (providing only that the Attorney General may release the alien on bond), and that the Constitution requires that the burden be placed on the government where prolonged detention is at stake, this Court should conclude that the regulations do not apply here. *Cf. Kwong Hai Chew v. Colding*, 344 U.S. 590, 600-03 (1953) (holding that immigration regulation does not apply to certain non-citizens, so as to preserve its constitutionality). Thus, the district court was correct to place the burden of proof on the government in order to render Petitioner's detention constitutional.[19]

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[19]The government's argument that IJ's lack authority under the regulations to make custody determinations in cases such as this one is irrelevant for the same

C. To Avoid the Constitutional Problem, this Court Should Construe the Statute to Require a Hearing If the Government Does Not Release the Detainee after Six Months.

To avoid the constitutional problem created by Mr. Soeoth's detention, this Court should read a six month time limit into the statute governing his detention and construe it to require a constitutionally-adequate hearing to determine whether detention is justified beyond that limit. In this case, the Court should simply order Petitioner's release, because he was already detained well beyond the six month limit established in *Nadarajah*, and the record reflects that he would be released if given a hearing, because he received that hearing pursuant to the district court's preliminary injunction order.

Courts around the country have adopted two different approaches when faced with unlawful detention pursuant to the general immigration detention statutes. In some cases, the courts have ordered the petitioner's release. In others, the courts have ordered hearings to ensure that the detention remains reasonable. *Compare Zadvydas*, 533 U.S. at 701 (imposing six month presumptive time limit on post-removal order detention); *Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (holding that "the INS may not detain Ma any longer"); *Nadarajah*, 443

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reason. The regulations need not be read to apply to prolonged detention, and if they cannot be otherwise interpreted then they are unconstitutional.

F.3d at 1084 (ordering petitioner's "immediate release"); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (ordering release rather than hearing) *with Tijani*, 430 F.3d at 1242 (ordering hearing); *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) (affirming district court's decision ordering hearing rather than release). *Cf. Martinez v. Gonzales*, 504 F.Supp.2d 887, 896 n.8 (C.D. Cal. Aug. 17, 2007) (ordering release after hearing had been held at preliminary injunction stage because further hearing would serve "no useful purpose").

Petitioner believes that, as a general matter, when the government has detained someone for six months under the general immigration detention statutes, it must either release them or give them a hearing. Here, the district court chose to order a hearing rather than ordering Petitioner's immediate release. That construction of the statute is a constitutionally-permissible alternative, and this Court should affirm it.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the district court's decision dismissing the habeas petition as moot. Petitioner requests that this Court hold that no statute authorizes detention beyond a presumptively-reasonable six month period absent a constitutionally-adequate hearing. For that reason, Petitioner requests that this Court reverse and remand to the district court with instructions that it grant the petition and order that he be

allowed to remain released on reasonable conditions of supervision under the decision that the IJ made pursuant to the district court's preliminary injunction order.

Respectfully submitted,

ACLU OF SOUTHERN CALIFORNIA

Dated: October 29, 2007

By: Ahilan Arulanantham /LG
AHILAN T. ARULANANTHAM
Attorneys for Appellee

STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, the below are known related cases pending before this Court:

1. *Amadou Lamine Diouf v. Alberto Gonzalez*, No.07-55337 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings – appeal of grant of preliminary injunction)

2. *Victor Martinez v. Alberto Gonzalez*, No. 07-55332 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings)

3. *Luis Felipe Casas-Castrillon v. Bill Lockyer*, No. 07-56261 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings)

4. *Jose Manuel Prieto-Romero v. A. Neil Clark*, No. 07-35458 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings)

5. *Maudo L. Fofana v. Neil Clark, et al.*, No. 07-35147 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings)

6. *Mohammed Ali v. Phillip Crawford, et al.*, No. 07-16349 (habeas petition challenging prolonged and indefinite detention pending completion of removal proceedings)

7. *Raymond Gerald A. Soeoth and Mumu Cindy Soeoth v. Alberto Gonzales*, No. 05-71755 (removal case involving the petitioner) (consolidated with No. 05-75655)

8. *Raymond Gerald A. Soeoth and Mumu Cindy Soeoth v. Alberto Gonzales*, No. 05-75655 (removal case involving the petitioner) (consolidated with No. 05-71755)

ACLU OF SOUTHERN CALIFORNIA

Dated: October 29, 2007

Ahilan Arulanantham /s/

AHILAN T. ARULANANTHAM

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App., P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,991 words.

ACLU OF SOUTHERN CALIFORNIA

Dated: October 29, 2007

Ahilan Arulanantham /AT

AHILAN T. ARULANANTHAM
Attorneys for Appellees

APPENDICES

Appendix I - Bond Order of the Immigration Judge
(dated February 9, 2007)

Appendix II - Motion to Stay Mandate Pending
Resolution of Affirmatively-Filed Asylum
Application (excerpts)
Raymond Gerald A. Soeoth and Mumu Cindy Soeoth v. Alberto Gonzales
(9th Cir. Nos. 05-71755, 05-75655)

Appendix I

Bond Order of the Immigration Judge
(dated February 9, 2007)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN PEDRO, CALIFORNIA

FILE A#75 694 789

POST REMOVAL BOND PROCEEDINGS

IN THE MATTER OF:
Raymond Agustino Soeoth

ON BEHALF OF RESPONDENT:

Ahilant T. Arulanantham.Esq.
Ranjana Natarajan, Esq.

ON BEHALF OF INS:

Tara Naselow,
Deputy Chief Counsel

BOND MEMORANDUM ORDER

BOND MEMORANDUM ORDER

Based upon a review of the evidence and the prior decisions in this case, there is a final administrative order of removal. The government has argued this Court does not have jurisdiction under §241 of the Act to hear this case. Apparently United States District Court Judge Terry J. Hatter disagrees with the government. Judge Hatter has conferred jurisdiction on this Court and issued the following guidelines to conduct this custody hearing within 30 days:

> This Court is to determine if respondent's prolonged detention is justified. At the hearing this Court shall order respondent released on reasonable conditions unless the government shows by clear and convincing evidence that respondent presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

This order is dated January 3, 2007.

Respondent's counsel filed a motion to continue these proceedings with this Court on January 30, 2007, arguing he had contracted a viral laryngitis and had completely lost his voice. He further filed a motion for extension of time with Judge Hatter on January 31, 2007. This Court denied the motion because of the time constraints placed in the original order issued by

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Judge Hatter. On January 31, 2007, Judge Hatter granted an extension of time for only one week until February 9, 2007.

Respondent's attorney appeared in this Court on February 1, 2007. and was remarkably healthier. He acknowledged this in court. Based upon the improvement in his health, this Court set the bond hearing for February 5, 2007, and granted his continuance until that date. Mr. Arulananthan then requested additional time because he argued he had little time to prepare. The government stated they were ready to proceed. Both sides blamed the other for failing to file the motion for a timely bond redetermination before this Court. DHS argued respondent had more than ample time to prepare knowing Judge Hatter had issued a 30 days time limit on the original order of January 5, 2007.

Respondent's counsel should have been prepared for hearing on the issue of bond when he was before Judge Hatter in district court on his writ or shortly thereafter. Counsel for respondent has disregarded Judge Hatter's original order of January 5, 2007 which stated the bond hearing had to be completed within 30 days and now with the new deadline of February 9, 2007. In addition, respondent has failed to articulate sufficient facts to show "reasonable cause" as to why a second continuance should be granted in this case. His second request for bond continuance was denied on February 1, 2007.

The following evidence was presented during the February 5, 2007 bond hearing:

Documentary Evidence

Exhibit #1	The Notice to Appear dated May 1, 2000;
Exhibit# 2	Order of the immigration judge in 2001; BIA decision in 2002 in addition to another decision denying respondent's motion to reopen by the Board in 2005;
Exhibit #3	Ninth Circuit Court of Appeals decision's in 2005, 2006 and the Court's docket and a declaration of Richard Sompotan (minister);
Exhibit #4	List of church congregation members in support of respondent and a certificate relating to respondent;
Exhibit #5	Respondent failed to provide copies of this document as agreed to in court;
Exhibit #6	This exhibit was misnumbered as a duplicate number Exhibit #4. This exhibit contains respondent's witness list.

Testimony of Witnesses

Raymond Agustino Soeoth

Respondent testified he is from Indonesia. He first came to the United States in February 1999 with a B-2 visitor visa along with his wife. He has filed an I-360 as a religious immigrant, however, he does not know if it was denied or not. His lawyer never contacted him about the application. At this point, he nor his wife have ever obtained any other status in the

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United States.

Respondent applied for asylum on the basis of religion in March of 2000. He appeared before an immigration judge and lost his case. The BIA denied his appeal and he filed a motion to reconsider to the BIA. He subsequently filed a motion to reopen with the BIA which was also denied. He later filed a petition and request for stay with the Ninth Circuit, however, the Ninth Circuit also declined his petition in 2003. He was taken into custody 2004 after he lost before the Ninth Circuit. He filed a second motion to reopen 2005 with the BIA which was denied and he appealed that denial to the Ninth Circuit which is still pending. He filed a third petition with the Ninth Circuit which was consolidated with his second petition. Respondent testified he called the Ninth Circuit last Friday and the clerk said there was no decision yet. Right now he has a stay of removal. The Ninth Circuit clerk had no idea when the decision would be issued. Respondent testified he has waited over 2 years in custody waiting a final decision. He has been in San Pedro Detention Center for 29 months.

Respondent testified he appeared before the immigration courts whenever he was ordered to. Respondent has never been arrested in this country or any other country.

Respondent testified he is married to Cindy Ansila Soeoth. His wife has not been detained by DHS even though there cases are consolidated and they applied for asylum together. Before he was arrested he had a store in Riverside selling cellar phones and school supplies. He owned the store for 4 months with his wife before he was arrest by DHS. Respondent was also previously employed by Super Shuttle as a bus driver for 3 years.

Before he was arrested, respondent testified. he was involved in Bethany International Church which is primarily Indonesian. He and his wife have been members since 1999. With time, respondent became a worker in the church. attended educational classes and was ordained a pastor. He has not been able to perform his duties at his church since his detention. Respondent testified he has not been able to meet his obligations as a husband because of his detention. Although he talks to his wife quite often, his detention has been hard on her.

Respondent testified he would rather not return to Indonesia. When questioned on cross examination, respondent was reluctant to state he would leave the country if ordered to do so. Respondent finally testified he would leave depending on what the Ninth Circuit decides. If respondent is not successful on his appeal he will comply as a Christian and return along with his wife. Respondent testified he would agreed to check in with immigration officials as often as required. He did this before when he had applied for asylum. Respondent further testified there are people at the church that will assist him in posting a bond. His wife has $2,000 or $3,000 in the bank.

Cindy Ansila Soeoth

Mrs. Soeoth testified she is 40 years old. She has been married to respondent for 8 years. They do not have any children. They were married in Indonesia. She first came to the United States in 1999 along with her husband with tourist visas. She and respondent applied for asylum March 22, 2000. Respondent was detained in 2004. She believed her husband's I-360 was denied.

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Prior to her husband's detention, they had a store called Water and Cell Phone Store. They owned it for approximately one year. She had to close the business because it was too hard to run it by herself. It has been very hard for her without her husband. They did everything together. Mrs. Soeoth has worked for a courier service for almost 2 years now and has work authorization from the government. Mrs. Soeoth would be able to help support respondent if he is released. Mrs. Soeoth testified respondent drove for Super Shuttle for over 2 years and believes he will be able to obtain employment there again.

Mrs. Soeoth testified she and her husband were both involved in Bethany International Church. They were involved in the ministry in many facets and respondent became a an assistant pastor. He went to a ministry school and has a certificate marked as Exhibit 4 Tab F. Respondent is very well known at the church. In their country they could not practice their religion freely.

Mrs Soeoth testified respondent will follow the rules and appear for deportation if it becomes necessary. Respondent is a man of the law and would follow it. Respondent has never been arrested anywhere including the United States. Respondent does not pose a danger to anyone and everyone likes him.

Richard Ferdinand Sompotan

This witness was also available to testify in court, however, he was not called. He is the pastor of respondent's church. Mr. Sompotan's declaration is located at Exhibit 3 Tab A.

Analysis of this Bond Hearing

Under Judge Hatter's order, the government has the burden of proof to establish by clear and convincing evidence that respondent presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

This Court has reviewed all of the evidence and finds the witnesses testimony to be credible and persuasive.

After hearing and reviewing all of the evidence in this case, this Court finds the government has failed to meet their burden of proof in establishing by clear and convincing evidence that respondent presents a sufficient danger or risk of flight to justify his detention without a reasonable bond being set in his case. Respondent has been detained for 29 months and he has no convictions and nor arrests. He has been gainful employed, has significant ties to his community and is an active assistant church pastor. Although DHS argued respondent is a flight risk because he did not leave the country on his order of voluntary departure and has filed procedural motions or writs to remain in the United States; this argument is disingenuous. The government has failed to justify why the respondent's wife was not arrested as well on the same immigration case if the couple are allegedly such a high risk of flight or danger. In addition, the government has continued to grant his wife work authorization.

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DHS pointed out that respondent, during his testimony, was reluctant about leaving the United States, however, with additional questioning, respondent finally did state he would leave as directed. There is no evidence to suggest that respondent did not appeared at his prior immigration proceedings or when ordered to report by DHS.

This Court was only provided with speculation during this hearing as to how long it would take in the foreseeable future to finally resolved the respondent's case in favor of the government with the pending petitions before the Ninth Circuit. Therefore, this Court cannot reasonably speculate on this prong of Judge Hatter's instructions.

Based upon Judge Hatter's guidelines, DHS has failed to present clearing and convincing evidence of respondent's risk of flight or danger after respondent's prolonged detention for 29 months. There is sufficient evidence to justify respondent being placed on a reasonable bond to ensure his appearance for removal if it becomes necessary in the future. Because of respondent's reluctance in this case to depart if necessary during his testimony, this court believes a higher bond should be ordered in this case based on the evidence.

This Court hereby enters the following order:

ORDER

Based on the totality of the facts in this case respondent should be released on a bond of $7,500.

D.D. Sitgraves

D.D. SITGRAVES
U. S. Immigration Judge
February 9, 2007

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer ( ) Alien's ATT/REP ( ) INS
DATE: 2-9-07 BY: COURT STAFF Ana Benitez Faxed by DHS
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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The DHS Attorney will serve this document by electronic mail to:

Attorney Ahilan T. Arulanantham/ACLU

and

U.S. Attorney Robert Laster

The U.S. Attorney will forward this document to District Court.

Appendix II

Motion to Stay Mandate Pending Resolution of
Affirmatively-Filed Asylum Application (excerpts)
Raymond Gerald A. Soeoth and
Mumu Cindy Soeoth v. Alberto Gonzales
(9th Cir. Nos. 05-71755, 05-75655)

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Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Raymond Gerald A. SOETH and Mumu Cindy SOETH Petitioners, v. Peter D. KEISLER, Acting Attorney General,[1] Respondent.	Case Nos. 05-71755 05-75655 Agency Nos: A75-694-789 A75-696-058

PETITIONER'S NOTICE OF ENTRY OF APPEARANCE OF COUNSEL

AND

MOTION TO STAY MANDATE PENDING RESOLUTION OF AFFIRMATIVELY-FILED ASYLUM APPLICATION

[1]Acting Attorney General Peter D. Keisler has been substituted for his predecessor, former Attorney General Alberto Gonzales. Fed. R. App. P. 43(c)(2).

I. INTRODUCTION

Petitioners respectfully request that the Court enter the appearance of new counsel, Marc Van Der Hout and Stacy Tolchin, Van Der Hout, Brigagliano & Nightingale, in their case.

In addition, pursuant to Fed. R. App. P. 41(d)(1), Petitioners, through counsel, respectfully request that this court stay the mandate in their case pending the adjudication of their second asylum application,[2] which was filed with United States Citizenship and Immigration Services' ("USCIS") on October 1, 2007. Exhs. A and B.

Petitioners have filed this new asylum application based on the Court's decision in He v. Gonzales, --- F.3d ----, 2007 WL 2472546 *4, n. 9 (9th Cir. Sept. 4, 2007), which holds that while a motion to reopen cannot be filed for a change in individual circumstances, a noncitizen who is subject to a final order of removal and who has a change in individual circumstances, may file a new application for asylum. Id. ("Although the Hes are barred in the motion to reopen context, they may file a new asylum application pursuant to 8 U.S.C. § 1158(a)(2)(C), which allows for the filing of multiple or untimely asylum applications if an alien can establish changed or extraordinary circumstances under § 1158(a)(2)(D).")

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[2] The application is also one for withholding of removal and protection under the Convention Against Torture.

Petitioners have experienced a change in individual circumstances because Petitioner Raymond Soeth became an ordained pastor after the entry of his order of removal. Exh. A.J. As this Court acknowledged in He v. Gonzales, 8 U.S.C. § 1158(a)(2)(D) permits the filing of a new and successive asylum application if the claim is based on the "existence of changed circumstances which materially affect the applicant's eligibility for asylum."

Petitioners request that the Court stay the mandate in their case and, hence, the stay of removal, while this successive asylum application is considered. This Court's precedent supports a stay of the mandate in cases in order to allow unsuccessful petitioners to seek further relief from the agency. See e.g., Dhangu v. INS, 812 F.2d 455 (9th Cir. 1987); Alvarez-Ruiz v. INS, 749 F.2d 1314 (9th Cir. 1984); Roque-Carranza v. INS, 778 F.2d 1373 (9th Cir. 1985); Aguilar-Escobar v. INS, 136 F.3d 1240 (9th Cir. 1998). If the mandate, and stay of removal, is not in effect, then Petitioners are subject to removal while the asylum office is considering their new application. Removal would subject Petitioners to persecution in their native Indonesia, and would be in violation of the Immigration and Nationality Act, Due Process, and International Law.

Petitioners are not in the custody of the Department of Homeland Security. They have a pending application for asylum that was filed with US CIS on October 1, 2007.

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II. STATEMENT OF THE FACTS AND CASE

Petitioners are natives and citizens of Indonesia who have resided continuously in the United States since February 4, 1999. Petitioners applied for asylum affirmatively on February 2, 2000, claiming persecution in Indonesia based on their Chinese ethnicity and Christian faith. Petitioners' applications were referred to the Immigration Judge ("IJ"), who on February 2, 2001, denied asylum, withholding of removal, and protection under the Convention Against Torture (CAT) because Petitioners did not show past persecution or a well-founded fear of future persecution as members of the general Christian population. Exh. A.A.

Thereafter Petitioners filed a timely Notice of Appeal with the Board of Immigration Appeals ("BIA"). On December 18, 2002 the BIA affirmed the Immigration Judge's decision without opinion. Exh. A.B. Petitioners then filed a Petition for Review with this Court, which was denied on June 14, 2004. Case No. 03-70303. Exh. A.C.

On June 15, 2004 Petitioner Raymond Soeoth was ordained by the "Gereja Bethel Indonesia" church as a pastor. Exh. A.J. He is now a Church Minister for the Bethany International Church in San Bernardino, California and holds a prominent position with the church as the church minister. Exh. A.I.

Petitioners subsequently, through prior counsel, filed a Motion to Reopen to the BIA for asylum and withholding of removal based on a change in

circumstances. Exh. A.D. The BIA denied the motion to reopen on March 7, 2005, and a petition for review was filed. See Case No. 05-71755. Exh. A.E. A motion to reconsider was also filed by different counsel, which was denied on September 7, 2005. Exhs. A.F and A.G. That case was also appealed to this Court, and the two petitions for review were consolidated. See Case Nos. 05-75655 and 05-71755. On August 30, 2007, the Court denied the petition for review because it found that, inter alia, changes in personal circumstances do not constitute a basis for a motion to reopen. Exh. A.H

On October 1, 2007, Petitioners filed a second asylum application with USCIS. Exhs. A, B. That application remains pending.

III. NOTICE OF ENTRY OF APPEARANCE

Petitioners respectfully request that this Court enter the appearance of new counsel in their case. Petitioners' new counsel is:

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