**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

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| **PETITIONER**,  Petitioner,  v.  **William Barr**, U.S. Attorney General;  **Chad Wolf**, Acting Secretary, Department of Homeland Security;  **Matthew Albence**, Acting Director, Immigration and Customs Enforcement;  **Peter Berg**, Director, St. Paul Field Office, Immigration and Customs Enforcement; and  **Kurt Freitag**, Sheriff, Freeborn County  Respondents. | Civil Action No: 20-cv-  **PETITION FOR WRIT OF HABEAS CORPUS** |

**INTRODUCTION**

1. Petitioner (“Mr. Petitioner”), a longtime lawful permanent resident of the United States and former refugee, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 to remedy his unlawful detention by the Department of Homeland Security (“DHS”). Immigration and Customs Enforcement (“ICE”) is currently jailing Mr. Petitioner at Freeborn County Jail pursuant to the mandatory detention statute, 8 U.S.C. § 1226(c), and has been incarcerating him without bond or access to a bond hearing since May 29, 2019—the date ICE also moved to initiate removal proceedings against him.
2. Mr. Petitioner has now been detained for a period of 233 days—nearly eight months. His prolonged mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. Without this Court’s intervention, Respondents’ unconstitutional incarceration of Mr. Petitioner is certain to extend for at least many more months and will easily surpass one year.
3. Further, the prolonged incarceration of Mr. Petitioner without even the possibility for a bond hearing, which is already unconstitutional, has accrued against a disturbing backdrop of dilatory and unlawful government conduct. As demonstrated below, *see* ¶¶ 24-28 *infra*, after Mr. Petitioner’s removal proceedings were lawfully terminated on October 3, Respondents acted together to unlawfully reopen them and keep Mr. Petitioner in detention. Mr. Petitioner does notask this Court to rule on the legality of Respondents’ actions in the underlying immigration proceedings—those issues must be decided in other fora—but it is important and necessary for this Court to understand those underlying issues as context for assessing Mr. Petitioner’s distinct constitutional challenge to his prolonged mandatory detention.
4. After Immigration Judge Sarah Mazzie (“IJ Mazzie”) lawfully terminated Mr. Petitioner’s removal proceedings on October 3, and instead of appealing that decision to the Board of Immigration Appeals (“BIA”) or releasing Mr. Petitioner, DHS proceeded to file a purported “Motion to Reconsider” that flouted controlling law governing post-decision motions. *See* Ex. G, Motion to Reinstate Termination Order (“Motion to Reinstate”), at 5-16. IJ Mazzie granted the motion—despite being bound by statute, regulation, and case law to deny it—and unlawfully “reopened” proceedings to permit DHS to lodge a new charge of removability against Mr. Petitioner. *See* *id*. In so doing, IJ Mazzie permitted Respondents to return Mr. Petitioner to the starting line of removal proceedings in an illegitimate manner that enabled ICE to extend Mr. Petitioner’s unconstitutional incarceration without bond or even a bond hearing. Again, Mr. Petitioner does not ask this Court to weigh the merits of his claims or arguments in the removal proceedings, but only to consider that the resolution of these issues will now keep him mired in litigation at the BIA, and quite possibly thereafter to the U.S. Court of Appeals for the Eighth Circuit—a process that will extend his detention by many months and quite possibly years.
5. ICE’s position is that the mandatory detention statute, 8 U.S.C. § 1226(c), authorizes its agents to jail Mr. Petitioner without bond for the full duration of his ongoing administrative removal proceedings and beyond. ICE is wrong. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court ruled that *brief* mandatory detention under § 1226(c) without a bond hearing did not violate due process. Crucially, however, this holding was specifically premised on the brevity of the pre-removal detention period. 538 U.S. at 529-31. Mr. Petitioner’s detention has already surpassed the brief period the Supreme Court considered in *Demore* and his case is still in its infancy.
6. Accordingly, because Mr. Petitioner’s continued and prolonged detention violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution, this Court should order the government to release Mr. Petitioner immediately. Alternatively, this Court either should provide Mr. Petitioner with an immediate bond hearing or else order Respondents to provide Mr. Petitioner an immediate bond hearing before a neutral arbiter, at which the *government* bears the burden to prove, by clear and convincing evidence, that Mr. Petitioner is a flight risk or a danger to the community—a burden the government cannot meet, because Mr. Petitioner is neither—and at which Mr. Petitioner’s ability to pay is factored.

**JURISDICTION AND VENUE**

1. Mr. Petitioner invokes this Court’s jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1361 (federal employee mandamus action), 1651 (All Writs Act), and 2241 (habeas corpus); U.S. Const. Art. I, § 9, cl. 2 (Suspension Clause); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 2201 (Declaratory Judgment Act).
2. Because Mr. Petitioner seeks to challenge his custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this Court. Federal district courts have jurisdiction to hear habeas corpus claims by individuals challenging the lawfulness or constitutionality of their detention by DHS. *See Demore*, 538 U.S. at 516-17; *see also Nielsen v. Preap*, 139 S. Ct. 954, 961-63 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830, 839-41 (2018); *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 918-21 (D. Minn. 2006).
3. Venue is proper in this District under 28 U.S.C. § 1391 because at least one of the Respondents is a resident of this District, Mr. Petitioner is detained within this District at the Freeborn County Jail in Albert Lea, Minnesota, and a substantial part of the events giving rise to the claims in this action took place in this District. 28 U.S.C. §§ 1391(b), (e)(1), 2241(d).

**PARTIES**

1. Petitioner Petitioner is a citizen of South Sudan. *See* Ex. A, Notice to Appear (“NTA”), at 3. Mr. Petitioner has been in the United States since he was 9 years old, when he entered with his family as a refugee in 2005. *Id.* Mr. Petitioner adjusted to lawful permanent resident status in 2007. *Id*. Mr. Petitioner is currently in the physical and legal custody of Respondents at the Freeborn County Jail, located at 411 S Broadway Ave, Albert Lea, MN 56007.
2. Respondent William Barr is the Attorney General of the United States and the head of the Department of Justice, which encompasses Immigration Judges and the BIA as a subunit—the Executive Office for Immigration Review (“EOIR”). Attorney General Barr shares responsibility for the administration and enforcement of the immigration laws, including the statutes authorizing detention within the Immigration and Nationality Act (“INA”), along with Respondent Chad Wolf. Attorney General Barr is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 950 Pennsylvania Avenue, NW, Washington, D.C. 20530.
3. Respondent Chad Wolf is the Acting Secretary of DHS. Acting Secretary Wolfis responsible for the administration and enforcement of the immigration laws, 8 U.S.C. § 1103(a), including pursuing Mr. Petitioner’s detention and removal. Acting Secretary Wolf is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 245 Murray Lane, SW, Washington, D.C. 20528.
4. Respondent Matthew Albence is the Acting Director of ICE, a subunit of DHS. Acting Director Albence is the head of the federal agency detaining Mr. Petitioner and has supervisory authority over ICE personnel in Minnesota. Acting Director Albence is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 500 12th St., SW, Washington, D.C. 20024.
5. Respondent Peter Berg is the Field Office Director for the St. Paul Field Office for ICE within DHS. Field Office Director Berg has supervisory authority over the ICE agents responsible for detaining Mr. Petitioner. Field Office Director Berg is a legal custodian of Mr. Petitioner and is named in his official capacity. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, MN 55111.
6. Respondent Kurt Freitag is the Freeborn County Sheriff. Mr. Petitioner is detained at the Freeborn County Jail pursuant to its contract with ICE. Sheriff Freitag is a legal custodian of Mr. Petitioner and is named in his official capacity. The address for the Freeborn County Jail is 411 S Broadway Ave, Albert Lea, MN 56007.

**EXHAUSTION**

1. ICE asserts authority to jail Mr. Petitioner pursuant to the mandatory detention provisions of 8 U.S.C. § 1226(c).
2. No statutory requirement of exhaustion applies to Mr. Petitioner’s challenge to the lawfulness of his detention. *See, e.g.*, *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014) (“There is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention.”).
3. To the extent that prudential considerations may require exhaustion in some circumstances, Mr. Petitioner has exhausted all effective administrative remedies available to him. Prudential exhaustion is not required when to do so would be futile or “the administrative body . . . has . . . predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992), *superseded by statute on other grounds as stated in Woodford v. Ngo*, 548 U.S. 81 (2006). Here, Mr. Petitioner was detained under § 1226(c), which mandates detention for noncitizens who have certain criminal convictions. Mr. Petitioner requested that an IJ review ICE’s custody determination, but his request was denied on July 2, 2019, as IJ Mazzie found that the mandatory detention statute applied. Ex. B, Notice of Custody Determination and Order of Immigration Judge with Respect to Custody. Mr. Petitioner continues to be held under the mandatory detention statute. Mr. Petitioner has no prospect of effectively challenging this ruling in any administrative forum, as the government will continue to assert detention authority under § 1226(c). *See*, *e.g.*, *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 712 (D. Md. 2016) (“In light of the Government’s consistent position upholding categorical detention without any meaningful individualized bail review, exhaustion here would be futile.”); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116, 121-23 (D. Mass. 2009) (collecting cases and concluding that “the BIA has clearly and repeatedly upheld the denial of a bond hearing under the view that § 1226(c) mandates detention without bond”).
4. Prudential exhaustion is also not required in cases where “a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.” *McCarthy*, 503 U.S. at 147. Every day that Mr. Petitioner is unlawfully detained causes him irreparable harm. *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) (explaining that “a loss of liberty” is “perhaps the best example of irreparable harm”); *Hamama v. Adducci*, 349 F. Supp. 3d 665, 701 (E.D. Mich. 2018) (holding that “detention has inflicted grave” and “irreparable harm” and describing the impact of prolonged detention on individuals and their families); *Jarpa*, 211 F. Supp. 3d at 711 (“Here, continued loss of liberty without any individualized bail determination constitutes the kind of irreparable harm which forgives exhaustion.”).
5. Prudential exhaustion is additionally not required in cases where the agency “lacks the institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute.” *McCarthy*, 503 U.S. at 147-48. Immigration agencies have no jurisdiction over constitutional challenges of the kind Mr. Petitioner raises here. *See*, *e.g.*, *Matter of C-*, 20 I. & N. Dec. 529, 532 (B.I.A. 1992) (“[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.”).
6. Because requiring Mr. Petitioner to exhaust administrative remedies would be futile, would cause him irreparable harm, and the immigration agencies lack jurisdiction over Mr. Petitioner’s constitutional claims, this Court should not require exhaustion as a prudential matter.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

1. Mr. Petitioner is a 24-year-old lawful permanent U.S. resident who came to the United States as a refugee in 2005. *See* Ex. A, NTA, at 3. DHS has been detaining Mr. Petitioner at Freeborn County Jail for 233 days, or nearly eight months. Despite his already lengthy and unconstitutional detention, during which he has endured Respondents’ unlawful and dilatory conduct, Mr. Petitioner’s removal proceedings remain in their early stages. The intent of this petition for writ of habeas corpus is, of course, separate from Mr. Petitioner’s removal proceedings; he does not ask this Court to rule on the question of whether he is removable. However, to understand why this Court should grant him a writ of habeas corpus, it is necessary to lay out in detail the factual and procedural history of his removal proceedings.
2. In the NTA issued on May 29, 2019, and filed with the immigration court on June 7, 2019 (initiating removal proceedings), DHS alleged that Mr. Petitioner was removable under 8 U.S.C § 1227(a)(2)(B)(i) (Immigration and Nationality Act (“INA”) § 237(a)(2)(B)(i)). Ex. A, NTA, at 3. Pursuant to this NTA, Mr. Petitioner was detained and brought from South Dakota to Freeborn County Jail in Minnesota, where he was placed into detention alongside people who are awaiting their criminal trials. On June 18, 2019, IJ Mazzie sustained the NTA’s charge of removability, and thereafter Mr. Petitioner filed applications for relief from removal. *See* Ex. D, Memorandum and Order of the Immigration Judge Terminating Removal Proceedings Without Prejudice (“Order of Termination”), at 2. IJ Mazzie set the case for a September 23, 2019 individualized hearing on relief from removal. *Id.* Throughout this process, Mr. Petitioner appeared pro se. *Id.* at 1.
3. At the hearing onSeptember 23 (after 117 days of detention),the government suddenly added two additional charges of removability. *See* Ex. C, Additional Charges of Removability, at 1. DHS charged that Mr. Petitioner was removable under 8 U.S.C. § 1227(a)(2)(A)(ii) (INA § 237(a)(2)(A)(ii)) for committing two “crimes involving moral turpitude,” and that he was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) (INA § 237(a)(2)(A)(iii)) for committing an “aggravated felony” as defined in 8 U.S.C. § 1101(a)(43)(G) (INA § 101(a)(43)(G)). *Id*. Because these two charges could impact Mr. Petitioner’s eligibility for relief from removal, IJ Mazzie continued the individual hearing. *See* Ex. D, Order of Termination, at 2.
4. In an order dated October 3, 2019 (after 127 days of detention), however, IJ Mazzie concluded that Mr. Petitioner was not removable under any of the various legal theories DHS had advanced, and she lawfully terminated his removal proceedings. *See id.* at 2-8. DHS then had thirty days, or until November 4, 2019, to appeal this order to the BIA or release Mr. Petitioner. *See*  8 C.F.R. § 1003.38
5. Instead of taking either of those actions, on October 28, 2019 (after 152 days of detention), DHS filed an unlawful “Motion to Reconsider” with IJ Mazzie, *see* Ex. E, DHS Motion to Reconsider—a motion untethered to the statute, regulations, and case law controlling post-termination motions, specifically, motions to reconsider, *see* Ex. G, Motion to Reinstate, at 4-13. Instead of setting forth any legitimate grounds under 8 U.S.C. § 1229a(c)(6)(C) (INA § 240(c)(6)(C)) and 8 C.F.R. § 1003.23(b)(2) for *reconsideration* of IJ Mazzie’s facially valid Order of Termination, DHS’s motion effectively sought to unlawfully reopen proceedings in order to lodge a brand new charge of removability under 8 U.S.C. § 1227 (a)(2)(A)(iii) (INA § 237(a)(2)(A)(iii)) and 8 U.S.C. § 1101(a)(43)(S) (INA § 101(a)(43)(S)), the “obstruction of justice” aggravated felony provision. *See* Ex. E, DHS Motion to Reconsider, at 1. DHS’s “Motion to Reconsider,” however, contravened all controlling authority regarding post-termination motions, because, among other things, DHS knew of the evidence underlying its motion and could have brought the “obstruction of justice” charge of removability long before IJ Mazzie terminated proceedings on October 3. *See* Ex. G, Motion to Reinstate, at 4, 6-8.
6. The very next day, IJ Mazzie granted DHS’s motion and “reopened” proceedings to “address the new . . . charge.” Ex. F, Immigration Judge Order Granting Motion to Reconsider (“Order Granting Motion to Reconsider”). In so doing, IJ Mazzie contravened binding authority that compelled denial of DHS’s motion. *See* Ex. G, Motion to Reinstate Termination, at 4-7. What is more, IJ Mazzie granted DHS’s purported “Motion to Reconsider” before Mr. Petitioner—who was still pro se—received any notice of it or had an opportunity to respond, *see* Ex. F, Order Granting Motion to Reconsider (granting the motion the day after it was filed), thus violating Mr. Petitioner’s rights to due process and fundamental fairness in immigration proceedings, *see* Ex. G, Motion to Reinstate, at 14-16 (explaining due process violation). Because Mr. Petitioner was not put on notice of DHS’s motion and no appeal had been filed, he believed that he would be released on November 5, 2019. However, Mr. Petitioner remains detained to this day.
7. In a motion dated November 29, 2019 (after 184 days of detention), Mr. Petitioner, now through counsel, challenged his “reopened” proceedings as contrary to controlling statutes, regulations, case law, and due process. *See id.* at 4-15. At a subsequent preliminary hearing on December 3, 2019, however, IJ Mazzie summarily denied Mr. Petitioner’s motion, orally and without substantively engaging with any of the arguments he had presented. *See* Ex. H, Immigration Judge Order Denying Motion to Reinstate Termination Order. Mr. Petitioner’s “reopened” proceedings thus continued.
8. On December 11, 2019 (after 196 days of detention), and while continuing to maintain that his “reopened” proceedings violate controlling law, Mr. Petitioner filed a Motion to Terminate, arguing that he is not removable even under the new “obstruction of justice” charge that IJ Mazzie permitted DHS to lodge. Ex. I, Motion to Terminate, at 2-9. Mr. Petitioner’s motion argued that the state conviction underlying that charge of removability is categorically broader than the federal definition of an aggravated felony “offense relating to obstruction of justice” as defined under federal law and thus cannot lead to his removability. *Id.*
9. On December 18, 2019 (after 203 days of detention), IJ Mazzie orally denied Mr. Petitioner’s motion without meaningful substantive analysis and found Mr. Petitioner removable as charged. *See* Ex. J, Immigration Judge Order Denying Motion to Terminate; Ex. K, Declaration of Benjamin Casper Sanchez (“Casper Sanchez Declaration”) ¶ 3. IJ Mazzie set a new preliminary hearing date of January 7, 2020, when Mr. Petitioner would be expected to file any applications for relief from removal that he wished to pursue. Ex. K, Casper Sanchez Declaration ¶ 3.
10. At the hearing on January 7, Mr. Petitioner decided, in consultation with his attorney, that he would not pursue any applications for relief from removal and would withdraw those he previously filed. *Id.*  ¶ 4. Instead, and to challenge IJ Mazzie’s rulings that would deprive him of his long-term lawful permanent resident status, he decided to continue directly to appealing the issues related to IJ Mazzie’s reopening of proceedings and finding him removable as having been convicted of an “offense relating to obstruction of justice” under 8 U.S.C. § 1101(a)(43)(S). *Id.*
11. Based on Mr. Petitioner’s decision not to pursue any applications for relief from removal, IJ Mazzie issued an oral decision at the January 7 hearing ordering Mr. Petitioner removed to South Sudan, *see id.*; Ex. L, Deportation Order, and expounding on her reasons for denying Mr. Petitioner’s Motion to Reinstate and Motion to Terminate. This, however, is not a final order of removal, as Mr. Petitioner now has the opportunity to appeal to the BIA. *See* 8 C.F.R. § 1241.1.
12. Mr. Petitioner will file an appeal with the BIA by the February 6 deadline and will continue challenging the plethora of legal errors that his case has thus far involved and contesting his removability to defend his lawful permanent resident statu. Ex. K, Casper Sanchez Declaration ¶¶ 4-5. Thus, this certain BIA appeal will extend Mr. Petitioner’s unconstitutional detention by many months. *Id.* Any BIA appeal includes a thirty-day period following the decision of the immigration judge within which either party must file its notice of appeal. *Id.* ¶ 4.Thereafter, the parties often wait many weeks or months for production of the transcripts of the hearings in immigration court, take weeks or months for briefing of all appealable issues (which will be complex in Mr. Petitioner’s case for the reasons articulated in both motions he has filed in immigration court), and then generally wait many months longer after that to receive a final decision by the BIA. *Id.* ¶¶ 5-6. Mr. Petitioner is thus likely to accrue nine months or more of detention on top of the nearly eight months he has already been incarcerated by ICE before he has a final BIA decision in his case. *Id.* ¶¶ 5-7.
13. An appeal to the Eighth Circuit is all but inevitable in the event of any adverse BIA decision. *Id.* ¶ 7. If the BIA does not reverse IJ Mazzie’s reopening of immigration proceedings or her erroneous decision as to the new aggravated felony removal charge, Mr. Petitioner will have to appeal to the Eighth Circuit to reclaim his lawful permanent resident status. The circuit-level appellate process typically lasts about nine months to one year from the date of the adverse BIA decision to the Eighth Circuit’s final ruling. *Id.* In all, then, having already been detained for almost eight months, Mr. Petitioner faces the very real possibility of *years* in ICE detention absent relief from this Court. *Id.* ¶¶ 7-8.

**ARGUMENT**

**RESPONDENTS’ MANDATORY DETENTION OF MR. PETITIONER UNDER 8 U.S.C. § 1226(c) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.**

1. Mr. Petitioner’s detention without a bond hearing violates the Fifth Amendment’s guarantee that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”[[1]](#footnote-1) U.S. Const. Amend. V.
2. It is “well established” that the Fifth Amendment’s Due Process Clause protects the rights of noncitizens like Mr. Petitioner to due process of law during removal proceedings. *Demore*, 538 U.S. at 523. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Due process requires that detention “bear[] a reasonable relation to the purpose for which the individual [was] committed.” *Id.* at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). The only legitimate justifications for civil detention in an immigration case like Mr. Petitioner’s are mitigating danger to the community or ensuring the noncitizen’s presence for a removal hearing. *Demore*, 538 U.S. at 528.
3. At this point, ICE has detained Mr. Petitioner for an unreasonably prolonged period of nearly eight months without a bond hearing. This is a severe deprivation of liberty, and Mr. Petitioner has no procedural protections available outside this Court. Additionally, there is no end in sight for Mr. Petitioner’s detention. His proceedings are still in their infancy, and his case already presents several complex issues he will contest before the BIA and the Eighth Circuit if necessary. *See, e.g.*, Ex. G, Motion to Reinstate; Ex. I, Motion to Terminate.
4. Worse, it is highly likely that IJ Mazzie’s order of removal will be overturned by either the BIA or the Eighth Circuit for the reasons Mr. Petitioner articulated in his Motion to Reinstate and his Motion to Terminate. It is therefore manifestly unreasonable to impose an irrefutable presumption of flight risk and danger that will keep Mr. Petitioner detained for almost a year, or for even longer, while his immigration proceedings are resolved.
5. Because he has been detained for an unreasonably long time, his detention has no end in sight, and he is not likely to be removed, Mr. Petitioner should be released from detention immediately. In the alternative, Mr. Petitioner must be granted a bond hearing before this Court or a neutralarbiter, where the *government* bears the burden of proving, by clear and convincing evidence, that Mr. Petitioner’s further detention is justified because he is a danger to the community or a flight risk and no condition or combination of conditions will reasonably assure his future appearance in immigration proceedings and the safety of the community. Additionally, if the adjudicator determines that release on bond is warranted, he or she must consider Mr. Petitioner’s ability to pay in setting any bond amount.

**Mr. Petitioner’s Prolonged Detention Without Bond Is Unconstitutional**

1. Mandatory civil detention of nearly eight months, without bond or even access to a bond hearing, violates due process. As detention grows in length, the justification for the increasingly severe deprivation of individual liberty must also grow stronger. *See Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997); *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015), *abrogated in part and on other grounds by* *Jennings*, 138 S. Ct. at 847. Moreover, as Justice Kennedy acknowledged in *Demore*, the ultimate purpose of immigration detention here—to effect removal upon a final order—is “premised upon the alien’s deportability.” 538 U.S. at 531 (Kennedy, J., concurring).
2. The Supreme Court “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979); *United States v. Salerno*, 481 U.S. 739 (1987); *Foucha*, 504 U.S. at 80-83. Due process therefore will require “adequate procedural protections” to ensure that the government’s asserted justification for physical confinement “outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Zadvydas*, 533 U.S. at 690 (internal quotation marks omitted).
3. Mr. Petitioner’s mandatory detention of nearly eight months is unreasonable. The Supreme Court held in *Demore* that *brief* mandatory detention under § 1226(c) without a bond hearing did not violate due process, and this holding was specifically premised on the short period for which the noncitizen had been detained as well as—now discredited—evidence that, at the time, § 1226(c) detention was neither indefinite nor prolonged. 538 U.S. at 529-31 (relying on evidence provided by the government that, at the time, removal proceedings were completed in an average time of forty-seven days and a median time of thirty days in 85% of cases and that the remaining 15% of cases, in which there was an appeal, were completed in an average of four months).[[2]](#footnote-2)
4. As the crucial fifth vote in *Demore*, Justice Kennedy acknowledged in his concurrence that “if continued detention bec[omes] unreasonable or unjustified,” a noncitizen could be “entitled to an individualized determination as to his risk of flight and dangerousness.” 538 U.S. at 532 (Kennedy, J., concurring); *see also id.* at 532-33 (“Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.”); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011) (explaining that mandatory detention becomes more constitutionally “suspect” as it extends beyond the brief detention periods considered by the Supreme Court in *Demore*), *overruled on other grounds by Jennings*, 138 S. Ct. at 846-47.
5. The Eighth Circuit has not yet ruled on the constitutionality of prolonged detention under § 1226(c). The Third Circuit in *Diop* held as a constitutional matter that due process prohibits mandatory detention for an unreasonable period of time.656 F.3d at 232 (“The constitutionality of [detention without a bond hearing] is *a function of the length of the detention*. At a certain point, continued detention becomes unreasonable and the Executive Branch’s implementation of § 1226(c) becomes *unconstitutional* unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law’s purposes of preventing flight and dangers to the community.” (emphasis added)).
6. Moreover, prior to the Supreme Court’s ruling in *Jennings*, a number of circuit courts applying the canon of constitutional avoidance had held that serious Fifth Amendment due process concerns required the statutory text of § 1226(c) to be interpreted as including an implicit reasonableness limitation on the duration of detention during removal proceedings. *See, e.g.*, *Reid v. Donelan,* 819 F.3d 486, 494 (1st Cir. 2016), *opinion withdrawn by Reid v. Donelan*, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. May 11, 2018). *Jennings* abrogated the statutory holdings of such cases because the Supreme Court determined, as a predicate matter, that the text of § 1226(c) was not properly subject to competing interpretations that would permit application of the canon of constitutional avoidance. 138 S. Ct. at 842. However, while no longer good law for this distinct reason following *Jennings*, the separate substantive analysis of due process these decisions provided remains persuasive.
7. Prior to *Jennings*, a number of decisions of this Court—on purely constitutional grounds—had already held that due process places limits on mandatory § 1226(c) detention. *See, e.g.*, *Mohamed v. Sec’y, Dep’t of Homeland Sec.*, 376 F. Supp. 3d 950, 957 (D. Minn. 2018) (explaining precedent applying a “fact-based individualized standard to determine the constitutionality of an [noncitizen]’s continued pre-removal detention”); *Tindi v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-3663 (DSD/DTS), 2018 WL 704314, at \*3 (D. Minn. Feb. 5, 2018) (finding fourteen months of § 1226(c) detention to be constitutionally unreasonable, where petitioner appealed to the circuit court and the circuit court stayed removal pending the outcome of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)); *Phan v. Brott*, No. 17-cv-432 (DWF/HB), 2017 WL 4460752, at \*1 (D. Minn. Oct. 5, 2017) (granting petition for habeas corpus for petitioner detained pursuant to § 1226(c)); *Nhean v. Brott*, No. 17-cv-28 (PAM/FLN), 2017 WL 5054390, at \*1 (D. Minn. Aug. 7, 2017) (finding that the noncitizen may not be detained indefinitely after having received a waiver of inadmissibility and adjustment of status); *Bah v. Cangemi*, 489 F. Supp. 2d 905, 920 (D. Minn. 2007) (Schiltz, J.) (“This Court believes that allowing unlimited pre-removal-period detention under § 1226 would be inconsistent with the reasoning underlying *Zadvydas*.”); *Moallin*, 427 F. Supp. 2d at 926 (Nelson, J.) (applying principles of *Zadvydas* to § 1226(c) detention); *cf. Davies v. Tritten*, No. 17-cv-3710 (SRN/SER), 2017 WL 4277145, at \*3-4 (D. Minn. Sept. 25, 2017) (stating that “[a]ll circuit courts of appeal who have addressed the question have read *Demore* and *Zadvydas* to impose a reasonableness requirement on detention before a final removal order,” but denying petition because detention was extended to eight months by an “unusual mistake”—a missing transcript).
8. When assessing as-applied challenges to prolonged § 1226(c) detention similar to Mr. Petitioner’s petition here, this Court has used a “fact-based individualized standard to determine the constitutionality of an alien’s continued pre-removal detention.” *Mohamed*, 376 F. Supp. 3d at 957. Relevant factors this Court’s decisions have looked to include: “(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays of the removal proceedings caused by the detainee; (5) delays of removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal.” *Muse v. Sessions*, No. 18-cv-54 (PJS/LIB), 2018 WL 4466052, at \*3 (D. Minn. Sept. 18, 2018) (citing and applying factors articulated in *Reid*, 819 F.3d at 500-01).
9. After *Jennings*, this Court has continued to use the factors outlined in *Muse*—referred to here and in some decisions as the “*Muse* factors,” a modified version of the *Reid* factors—when assessing as-applied due process challenges to § 1226(c). *See*  *Bolus A. D. v. Sec’y of Homeland Sec.*, 376 F. Supp. 3d 959, 961 (D. Minn. 2019); *Liban M. J. v. Sec’y, Dep’t of Homeland Sec.*, 367 F. Supp. 3d 959, 963 (D. Minn. 2019); *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 858-59 (D. Minn. 2019); *see also Abshir H. A. v. Barr*, No. 19-cv-1033 (PAM/TNL), 2019 WL 3719414, at \*2 (D. Minn. Aug. 7, 2019); *Haji S. v. Barr*, No. 18-cv-3493 (PAM/LIB), 2019 WL 3238354, at \*2 (D. Minn. July 18, 2019); *Omar M. v. Barr*, No. 18-cv-2646 (JNE/ECW), 2019 WL 2755937, at \*1 (D. Minn. July 2, 2019); *Enrique U. R. v. Sec’y of Homeland Sec.*, No. 19-cv-1063 (MJD/BRT), 2019 WL 4120149, at \*3 (D. Minn. June 17, 2019), *report and recommendation adopted by Enrique U.R. v. Barr*, 2019 WL 4081129 (D. Minn. Aug. 29, 2019); *Duol J. v. Sec’y Dep’t of Homeland Sec.*, No. 18-cv-3266 (PJS/LIB), 2019 WL 3769711, at \*4 (D. Minn. June 17, 2019), *report and recommendation vacated as moot* *by* 2019 WL 3767535 (D. Minn. Aug. 9, 2019); *Mohamed A. v. Nielsen*, No. 19-cv-49 (ECT/ECW), 2019 WL 2396761, at \*4 (D. Minn. May 16, 2019), *report and recommendation vacated as moot* *by* *Mohamed A. v. McAleenan*, 2019 WL 2395408 (D. Minn. June 6, 2019); *Tao J. v. Sec’y, Dep’t of Homeland Sec.*, No. 18-cv-1845 (NEB/HB), 2019 WL 1923110, at \*3 (D. Minn. Apr. 30, 2019); *Abdulkadir A. v. Sessions*, No. 18-cv-2353 (NEB/HB), 2018 WL 7048363, at \*11 (D. Minn. Nov. 13, 2018), *report and recommendation adopted by* 2019 WL 201761 (D. Minn. Jan. 15, 2019). This Court has gone so far as to hold that “the government’s position was not substantially justified” and did not have a “reasonable basis in law and fact” under the Equal Access to Justice Act, 28 U.S.C. § 2412. *Muse v. Barr* (“*Muse II*”), No. 18-cv-54 (PJS/LIB), 2019 WL 4254676, at \*3-4 (D. Minn. Sept. 9, 2019) (awarding attorneys’ fees and finding that the government’s “position has not been accepted by a single court, and it cannot be squared with *Jennings* and *Zadvydas*”). As demonstrated below, in Mr. Petitioner’s case, the *Muse* factors establish that his constitutional interest in personal liberty is compelling and requires release.

*1. Length of Detention*

1. “[C]ourts have described the first factor, which looks at the length of detention, as the most important.” *Portillo v. Hott*, 322 F. Supp. 3d 698, 708 (E.D. Va. 2018). The length of Mr. Petitioner’s detention strongly favors granting relief. Mr. Petitioner has been in custody for 233 days, nearly eight months, without even an opportunity for an individualized determination as to any dangerousness or flight risk. This Court and others have granted writs of habeas corpus in cases involving challenges to periods of § 1226(c) detention that were comparable to or shorter than Mr. Petitioner’s. *See, e.g.*, *Abdulkadir A.*, 2018 WL 704863, at \*1-2, 12 (petition filed at 6 months of detention and report and recommendation recommended habeas relief at nine months of detention); *Bolus A. D. v. Sec’y of Homeland Sec.*, No. 18-cv-1557 (WMW-KMM), 2019 WL 1905848 (D. Minn. Feb. 11, 2019) (petition filed at 5.5 months and habeas relief recommended at 13.5 months), *report and recommendation adopted as modified* *by* 376 F. Supp. 3d 959; *Liban M.J. v. Sec'y of Dep't of Homeland Sec.*, No. 18-cv-1843, 2018 WL 8495827, at \*2 (D. Minn. Dec. 10, 2018) (petition filed at 7.5 months and habeas relief recommended at 12.5 months), *report and recommendation adopted* *by* 367 F. Supp. 3d 959; *Tao J. v. Sec'y of Dep’t of Homeland Sec.*, No. 18-cv-1845 (NEB/HB), 2018 WL 8141439 (D. Minn. Nov. 2, 2018) (petition filed at 4.5 months and habeas relief recommended at 10 months of detention), *report and recommendation adopted by* 2019 WL 1923110; *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at \*1 (S.D.N.Y. May 23, 2018) (habeas relief granted at eight months); *Gordon v. Shanahan*, No. 15-cv-261, 2015 WL 1176706, at \*3-4 (S.D.N.Y. March 13, 2015) (habeas relief granted at 8.5 months). As the length of detention increases, the government’s burden to justify the detention should be considered ever harder for it to meet. *See Hendricks*, 521 U.S. at 363-64; *Chavez-Alvarez*, 783 F.3d at 474.
2. Additionally, in keeping with *Demore*, this Court has previously concluded that a challenge to § 1226(c) detention must be resolved by closely examining the facts of the particular case to determine whether the detention is reasonable or it violates due process. The Court should not just look at the length of detention in a vacuum but look to specifics of the case to determine reasonableness. *See, e.g.*, *Muse*, 2018 WL 4466052, at \*3. When looking at the specific facts of Mr. Petitioner’s case, this Court should find the length of his detention to be manifestly unreasonable. Mr. Petitioner’s civil imprisonment for nearly eight months, which is set to continue, strongly supports his claim for habeas relief.

*2. Likely Duration of Future Detention*

1. Absent this Court’s intervention, Mr. Petitioner will spend many more months, or even *years*, in detention. Even though Mr. Petitioner has already been detained for nearly eight months, his removal proceedings before the agency are still in their early stages and it is reasonable to expect that they will remain pending in that forum for at least nine months, if not more. Mr. Petitioner will appeal Judge Mazzie’s legally erroneous rulings and order of removal to the BIA, and the Eighth Circuit if necessary. Currently, appeals to the BIA in detained cases typically take more than six months from the immigration judge’s decision—and in Mr. Petitioner’s case will likely take closer to nine months—and it takes about a year from the date of an adverse BIA decision to reach a final Eighth Circuit decision. Accordingly, absent intervention from this Court, Mr. Petitioner is sure to remain detained for many additional months and quite likely for years in all.

*3. Conditions of Detention*

1. The similarity between the conditions of Mr. Petitioner’s detention and penal confinement weigh in favor of granting habeas relief. Removal proceedings are civil, not criminal. As such, they are, at least in theory, “nonpunitive in purpose and effect.” *Zadvydas*, 533 U.S. at 690. However, “merely calling a confinement ‘civil detention’ does not, of itself, meaningfully differentiate it from penal measures.” *Chavez-Alvarez*, 783 F.3d at 478. The more that detention conditions resemble penal confinement, the stronger the argument that detainees are entitled to bond hearings. *Muse*, 2018 WL 4466052, at \*5 (“As the length of detention grows, the weight given to this aspect of detention increases.”).
2. Mr. Petitioner is currently confined in the Freeborn County Jail. He is detained alongside inmates who are serving criminal sentences and awaiting criminal trials. A county jail is primarily designed to house criminal defendants for the short period of time pending trial; such facilities are not designed to house civil detainees for extensive periods of time. The criminal inmates and immigration detainees are all required to wear the same prison uniform and occupy the same spaces within the jail. Thus, Mr. Petitioner’s confinement conditions are indistinguishable from penal confinement in their character, and this factor weighs strongly in his favor.

*4. Mr. Petitioner’s Responsibility for Delays*

1. Mr. Petitioner has not caused a delay in the proceedings. For the entirety of his detention he has been diligently pursuing his rights, first pro se and now through counsel. As such this factor is neutral.

*5. The Government’s Responsibility for Delays*

1. In contrast to Mr. Petitioner, DHS has repeatedly engaged in dilatory and unlawful conduct throughout Mr. Petitioner’s proceedings, and this factor thus weighs strongly in his favor. DHS not once, but *twice* delayed Mr. Petitioner’s proceedings, prolonging his detention, by deliberately lodging charges against him in a dilatory, piecemeal fashion, as Mr. Petitioner has argued before the immigration court. *See* Ex. G, Motion to Reinstate. DHS first charged Mr. Petitioner with removability on May 29, 2019. Ex. A, NTA, at 1. It continued to argue for removability solely based on those charges until September 23, 2019. DHS waited until Mr. Petitioner’s individual hearing on that date, nearly *four* months later, when his applications for relief from removal were to be adjudicated, to file additional charges that it could have brought long before. *See* Ex. C, Additional Charges of Removability*.* Thereafter, once *all* these charges were terminated on October 3, DHS proceeded to file *another* *new* charge, unlawfully, and under the guise of a “Motion to Reconsider.” *See supra* ¶¶ 26-28. DHS could have brought this charge at Mr. Petitioner’s merits hearing on September 23, and indeed long before, but DHS chose not to, again prolonging Mr. Petitioner’s detention by many months. *See* Ex. G, Motion to Reinstate. As Mr. Petitioner demonstrated in his Motion to Reinstate, DHS’s move, and IJ Mazzie’s “reopening of proceedings,” was contrary to law. *See generally id.*

*6. Likelihood of Final Order of Removal*

1. Finally, the government is unlikely to obtain a final order of removal against Mr. Petitioner, which further precludes any legitimate government interest in and justification for detaining him at all, let alone without an opportunity for bond. Here, the government is unlikely to obtain a final order of removal for at least two reasons, as Mr. Petitioner has vigorously argued throughout his immigration proceedings. Mr. Petitioner again stresses that he is not asking this Court to adjudicate the issues that have transpired in his immigration proceedings, but presents them here to assist the Court in evaluating the final *Muse* factor.
2. *First*, as Mr. Petitioner demonstrated in his Motion to Reinstate, IJ Mazzie was without authority to “reopen” proceedings based on DHS’s purported “Motion to Reopen.” *See* Ex. G, Motion to Reinstate, at 5-15. As many U.S. Courts of Appeals have held, agencies are bound to follow their own procedures and regulations when adjudicating the rights of individuals. *See, e.g.*, *Garcia-Mata v. Sessions*, 893 F.3d 1107, 1109 (8th Cir. 2018); *Johnson v. Ashcroft*, 378 F.3d 164, 169 (2d Cir. 2004). In fact, in a case with great similarity to this one, the Second Circuit reversed the BIA for failure to follow its own regulations and case law when adjudicating post-decision motions, invalidating a final order of removal. *Johnson*, 378 F.3d at 171-72; *see also* Ex. G, Motion to Reinstate, at 11-13. That is precisely what is set to occur in this case once Mr. Petitioner appeals IJ Mazzie’s rulings. *Second*, and independently, as Mr. Petitioner argued in his December 11 Motion to Terminate, the state statute underlying his latest charge of removability is categorically overbroad. *See* Ex. I, Motion to Terminate, at 3. It thus cannot ever support removability, precluding a final order of removal in his case. *Id.* Accordingly, the final *Muse* factor also weighs strongly in Mr. Petitioner’s favor.

\* \* \*

1. Under the *Muse* framework, five of the six factors weigh sharply in Mr. Petitioner’s favor, and one is neutral. This Court should thus hold that Mr. Petitioner’s prolonged mandatory detention is unreasonable and unconstitutional. *See, e.g.*, *Muse*, 2018 WL 4466052, at \*6 (finding that detention violated the Petitioner’s due process rights when four factors weighed in his favor, one weighed against him, and one was neutral); *Abdulkadir A.*, 2018 WL 704863, at \*13 (same).

**Mr. Petitioner’s Mandatory Detention Is Unconstitutional Because He Has a Substantial Challenge to Removability**

1. Mr. Petitioner’s prolonged mandatory detention also violates due process because it is unreasonable to impose an irrebuttable presumption of flight risk and danger on a noncitizen who, like Mr. Petitioner, has a substantial challenge to removability. In *Demore*, the Supreme Court upheld the mandatory detention of “a criminal alien who ha[d] conceded that he [was] deportable, for the limited period of his removal proceedings.” *Demore*, 538 U.S. at 531. The Court held that mandatory detention of “deportable criminal aliens” was permissible to address the heightened flight risk and risk to public safety. *Id.* at 518. However, *Demore* left open the question of whether mandatory detention of a noncitizen violates due process if they have a substantial challenge to their removability. *Id.*
2. Immigrants who raise substantial challenges to removability are, unlike the petitioner in *Demore*, neither “already subject to deportation,” *id.*, nor at risk of “fail[ing] to appear for their removal hearings,” *id.* at 519. On the contrary, they have strong incentives to appear at their proceedings and litigate those defenses. *See Zadvydas*, 533 U.S. at 690 (calling the “justification” of “preventing flight” “weak or nonexistent where removal seems a remote possibility at best”). Nor is the mandatory detention of individuals with substantial challenges to removability reasonably related to Congress’s goal of “protecting the public from dangerous criminal aliens.” *Demore*, 538 U.S. at 515. Therefore, in contrast to the detention in *Demore*,[[3]](#footnote-3) it is unreasonable to impose an irrebuttable presumption that non-citizens with substantial arguments against removability categorically present a heightened flight risk or threat to public safety such that they require mandatory detention without an opportunity for bond.
3. Here, Mr. Petitioner has various strong avenues by which to challenge removability: his proceedings are contrary to law and invalid and his substantive charge of removability for “obstruction of justice” fails as a matter of law. Given these claims and arguments, Mr. Petitioner has no incentive to flee anywhere. At the very least, a neutral arbiter should be required to make an individualized determination as to his danger and flight risk.

**Burden of Proof and Standards for Bond Hearing**

1. Mr. Petitioner asks this Court to order his immediate release. However, if this Court determines that it would be more appropriate for Mr. Petitioner to be granted an immediate bond hearing, either before this Court or before a neutral immigration judge, procedural due process requires that the *government* bear the burden of proving by clear and convincing evidence that the government’s interest in continuing to detain Mr. Petitioner—taking into consideration available alternatives to detention—outweighs the severe deprivation of his constitutionally protected interest in liberty. *See*, *e.g.*, *Jarpa*, 211 F. Supp. 3d at 720-23.
2. As a multitude of courts have now held, to justify prolonged immigration detention, the government must prove by clear and convincing evidence that Mr. Petitioner is a danger or flight risk. *See, e.g.*, *Brito v. Barr*, No. 19-cv-11314 (PBS), 2019 WL 6333093, at \*4 (D. Mass. Nov. 27, 2019) (for entire class of noncitizens, holding that due process requires that the *government* bear the burden of proof in bond hearings); *Hernandez v. Decker*, No. 18-CV-5026 (ALC), 2018 WL 3579108, at \*11 (S.D.N.Y. July 15, 2018) (“[D]ue process requires that the government demonstrate dangerousness or risk of flight by a clear and convincing standard at [the noncitizen’s] bond hearing.”); *Portillo*, 322 F. Supp. 3d at 709 (“[A]t the bond hearing, the government must demonstrate that [the alien] is either a flight risk or a danger to the community by clear and convincing evidence.”); *Sajous*, 2018 WL 2357266, at \*2 (requiring government to prove dangerousness and flight risk by clear and convincing evidence); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (requiring government to prove dangerousness and flight risk); *Jarpa*, 211 F. Supp. 3d at 720-23; *see also Foucha*, 504 U.S. at 80-83 (striking down detention system that placed burden on detainee to prove non-dangerousness); *Salerno*, 481 U.S. at 750-52 (requiring proof of dangerousness by clear and convincing evidence).
3. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, the civil detention authorized by § 1226(c) deprives Mr. Petitioner of his liberty interest. Second, the risk of error is great when detainees like Mr. Petitioner are incarcerated in prison-like conditions that severely hamper their ability to gather evidence and prepare for a bond hearing. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to Mr. Petitioner’s immigration records and other information that it can use to make its case for continued detention. Therefore, subjecting the government to a heightened burden of proof strikes an appropriate balance between the individual’s interest and the government’s interest in protecting the community and in effective removal procedures, affording Mr. Petitioner the fundamental requirement of due process rights.
4. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen’s appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979). ICE’s alternatives to detention program—the Intensive Supervision Appearance Program (“ISAP”)—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP “resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings”). It follows that alternatives to detention must be considered in determining whether prolonged incarceration is warranted.
5. Finally, due process requires that, if release on bond is warranted, the adjudicator must consider Mr. Petitioner’s ability to pay before determining bond amount. *See, e.g.*, *id.* at 990-94; *see also Reid*, 390 F. Supp. 3d at 225. As the Ninth Circuit has explained, “‘[d]etention of an indigent ‘for inability to post money bail’ is impermissible if the individual’s ‘appearance at trial could reasonably be assured by one of the alternate forms of release.’” *Hernandez*, 872 F.3d at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). Due process thus requires the “consideration of the detainees’ financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings.” *Id.* at 990-91. By contrast, the failure “to consider the individual’s financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release . . . risks detention that accomplishes ‘little more than punishing a person for his poverty.’” *Id.* at 992 (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 (1983)).

**CAUSES OF ACTION**

**COUNT ONE: MR. PETITIONER’S MANDATORY DETENTION VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT**

1. Mr. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.
2. Immigration detention violates due process unless such detention is reasonably related to its purpose. *Demore*, 538 U.S. at 513; *Zadvydas*, 533 U.S. at 690-91. Moreover, as detention becomes prolonged, the Due Process Clause requires an even stronger justification to outweigh the significant deprivation of liberty, as well as strong procedural protections.
3. Mr. Petitioner has been detained pursuant to 8 U.S.C. § 1226(c) for nearly eight months. Mr. Petitioner’s prolonged detention, in the absence of an individualized determination of his dangerousness or flight risk, lacks sufficient justification and violates his due process rights. This Court has considered six factors to determine whether prolonged pre-final order detention is unreasonable. *See Muse*, 2018 WL 4466052, at \*5. Application of the relevant factors to the facts and circumstances in this case compels the conclusion that Mr. Petitioner’s continued detention without an individualized bond hearing violates due process under the Fifth Amendment.
4. Moreover, Mr. Petitioner has multiple, substantial arguments against removal. Therefore, the assumption underlying *Demore*—that noncitizens who have conceded removability uniformly present elevated risk of flight and danger—does not apply here. Mr. Petitioner cannot reasonably be subject to an irrebuttable presumption of flight risk and danger necessitating mandatory detention.
5. For the foregoing reasons, only Mr. Petitioner’s immediate release or an immediate bond hearing at which the government bears the burden to prove Mr. Petitioner’s danger and flight risk will protect his due process rights and the government’s legitimate interest in detaining a removable alien only when it is necessary to serve the purposes of §1226(c).

**COUNT TWO: MR. PETITIONER’S PROLONGED DETENTION VIOLATES THE EIGHTH AMENDMENT**

1. Mr. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.
2. The Eighth Amendment prohibits “[e]xcessive bail.” U.S. Const. amend. VIII.
3. The government’s categorical denial of bail to certain noncitizens violates the right to bail encompassed by the Eighth Amendment. *See Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting).
4. For these reasons, Mr. Petitioner’s ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

**PRAYER FOR RELIEF**

WHEREFORE, Mr. Petitioner prays that this Court grant the following relief:

1. Assume jurisdiction over this matter;
2. Expedite consideration of this petition pursuant to 28 U.S.C. §§ 1657 and 2243;
3. Pursuant to 28 U.S.C. § 2243, issue an order directing the Respondents to show cause within three days why the writ of habeas corpus should not be granted;
4. Grant Mr. Petitioner a writ of habeas corpus directing the Respondents to immediately release him from custody, or alternatively, directing a hearing before this Court to determine that Mr. Petitioner’s detention is not justified because the government has not established by clear and convincing evidence that he presents a risk of flight or danger in light of available alternatives to detention, and thereafter order Mr. Petitioner’s release, with appropriate conditions of supervision if necessary.
5. In the alternative, issue a writ of habeas corpus ordering Mr. Petitioner’s release within 30 days unless Respondents schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Mr. Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Mr. Petitioner’s release would present; and (2) if the government cannot meet its burden, the immigration judge must order Mr. Petitioner’s release, on appropriate conditions of supervision if necessary.
6. Grant Mr. Petitioner reasonable attorneys’ fees, costs, and other disbursements pursuant to the Equal to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
7. Grant such other relief as the Court deems just and proper.

Dated: January 16, 2020

Respectfully submitted,

s/Nadia Anguiano-Wehde

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1. In *Jennings*, the Supreme Court held that “subject only to express exceptions, §§ 1225(b) and 1226(c) authorize detention until the end of applicable [removal] proceedings.” 138 S. Ct. at 842 (reversing the Ninth Circuit’s interpretation requiring automatic periodic bond hearings under §§ 1225(b) and 1226(c)). The Supreme Court remanded to the Ninth Circuit, however, to address the Petitioner’s alternative argument—that his prolonged detention violated the Due Process Clause of the Fifth Amendment. *Id*. at 851. Here, like the Petitioner in *Jennings*, Mr. Petitioner argues that his prolonged mandatory detention violates the Due Process Clause of the Fifth Amendment. [↑](#footnote-ref-1)
2. While *Jennings* was being briefed, the government informed the Supreme Court that it had “made several significant errors in calculating” the statistics which it provided to the Court in *Demore* and which the Court relied upon in its decision. Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), available at http://on.wsj.com/2mtjnUP. The government had represented in *Demore* that cases of detained noncitizens involving a BIA appeal took on average “about five months;” however, those statistics did not acknowledge that cases took much longer at the IJ stage when there was an appeal, and that other time in those cases was unaccounted for. *Id.* at 3. The government’s revised statement is that total completion time in cases where there was an appeal averaged 382 days, with a median of 272 days. *Id.*; *see also* *Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (“The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did. And, as I have pointed out, thousands of people here are held for considerably longer than six months without an opportunity to seek bail.”). For the *Jennings* “mandatory subclass” of individuals like Mr. Petitioner, who are subject to § 1226(c) detention, “the average detention . . . is nearly ten times the average assumed in *Demore* (427 days). Even for appeals, the average is three times what *Demore* envisioned (448 days).” Resp. Supp. Br., *Jennings v. Rodriguez*, No. 15-1204, 2017 WL 430386, at \*31 (U.S. Jan. 31, 2017). [↑](#footnote-ref-2)
3. The *Demore* Court notably took it for granted that individuals subject to § 1226(c) would be removed eventually, or at least lose their case. *See, e.g.*, 538 U.S. at 528 (“Such detention necessarily serves the purpose of preventing *deportable* criminal aliens from fleeing prior to or during their removal proceedings.” (emphasis added)); *id.* at 529 (“In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals . . . .”); *id.* at 531 (Kennedy, J., concurring) (“[T]he ultimate purpose behind the detention is premised upon the alien’s deportability.”). [↑](#footnote-ref-3)