**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;**Tony Pham**, Senior Official Performing the Duties of the Director, Immigration and Customs Enforcement;**Marcos Charles**, Director, St. Paul Field Office, Immigration and Customs Enforcement; and**Eric Holien**, Sheriff, Kandiyohi CountyRespondents. | Civil Action No: 19-cv-**PETITION FOR WRIT OF HABEAS CORPUS** |

**INTRODUCTION**

1. Petitioner Petitioner (“Mr. Petitioner”) 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”) in violation of the Immigration and Nationality Act (“INA”) and the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. The Department of Homeland Security (“DHS”) and its agents with Immigration and Customs Enforcement (“ICE”) arrested Mr. Petitioner on or about December 10, 2018, and have incarcerated him since that date in a county jail for a period that has now exceeded 361 days without opportunity for bond and with no end in sight to his detention. *See* Exh. C, I-213 Record of Deportable/Inadmissible Alien, at 7–9. ICE says the mandatory detention statute at 8 U.S.C. § 1226(c) authorizes its agents to jail Mr. Petitioner for the entire duration of his ongoing administrative removal proceedings because Mr. Petitioner poses a danger to the community due to his conviction for simple robbery under Minn. Stat. § 609.24. ICE is wrong. The federal government’s application of 8 U.S.C. § 1226(c) to Mr. Petitioner violates his fundamental right to liberty under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

3. Mr. Petitioner has been in the United States since February 21, 2006, when he entered the country lawfully as a refugee. *See* Exh. D., IJ’s November 8, 2019 Order, at 15. Mr. Petitioner was previously in removal proceedings and was granted withholding of removal on December 22, 2011, because his father, who was an Oromo soldier, was killed because he refused to give information about the Oromo tribe to the Tigray tribe. *Id*. at 14–15. Mr. Petitioner was convicted of simple robbery on July 21, 2017. *See* Exh. C. at 6. ICE encountered Mr. Petitioner in custody on December 10, 2018, and took him into ICE custody. On December 13, 2018, DHS moved to reopen Mr. Petitioner’s case, claiming that his conviction for simple robbery barred him from withholding of removal relief under INA § 241(b)(3)(B)(ii). Mr. Petitioner filed an application for protection under the Convention Against Torture (CAT), and a merits hearing was held before Immigration Judge Carr (IJ Carr) on July 9, 2019. *See* Exh. D. On November 8, 2009, IJ Carr terminated Mr. Petitioner’s prior grant of withholding of removal, denied his application for CAT relief, and ordered him removed to Ethiopia. *Id*. Mr. Petitioner has delivered his appeal of IJ Carr’s decision to the Board of Immigration Appeals (“BIA”) in advance of the deadline on December 9, 2019.

4. Mr. Petitioner’s continued and prolonged detention--now exceeding 361 days--violates the Due Process Clause of the Fifth Amendment, especially considering his substantial arguments against removal to Ethiopia. ICE has far exceeded the scope of its limited authority to deprive Mr. Petitioner of his physical liberty without affording him the most basic due process protections—an individualized bond hearing before an impartial arbiter. Accordingly, Mr. Petitioner brings this Petition for Writ of Habeas Corpus to challenge his continued detention on statutory and constitutional grounds.

**JURISDICTION AND VENUE**

5. The jurisdiction of this Court is invoked 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).

6. 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. *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 839-41 (2018); *Nielsen v. Preap*, 139 S. Ct. 954, 961-63 (2019); *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 918-21 (D. Minn. 2006).

7. 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 Kandiyohi County Jail in Willmar, 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**

8. Petitioner Mr. Petitioner is a citizen of Ethiopia. Mr. Petitioner has been in the United States since February 21, 2006. *See* Exh. C. at 6. Mr. Petitioner’s administrative removal proceedings remain ongoing, as he will file an appeal of IJ Carr’s denial of CAT relief to the BIA before the filing deadline on December 8, 2019. He is currently in the physical and legal custody of Respondents at the Kandiyohi County Jail at 2201 23rd St. NE, Willmar, Minnesota, 56201.

9. 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 Board of Immigration Appeals as a subunit—the Executive Office for Immigration Review. Attorney General Barr shares responsibility for the administration and enforcement of the immigration laws, including the statutes authorizing detention within the 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.

10. Respondent Chad Wolf is the Acting Secretary of DHS. Acting Secretary Wolf is 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.

11. 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.

12. 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.

13. Respondent Eric Holien is the Kandiyohi County Sheriff. Mr. Petitioner is detained at the Kandiyohi County Jail pursuant to its contract with ICE. Sheriff Holien is a legal custodian of Mr. Petitioner and is named in his official capacity. The address for the Kandiyohi County Jail is 2201 23rd St. NE, Willmar, Minnesota, 56201.

**EXHAUSTION**

14. ICE asserts authority to jail Mr. Petitioner pursuant to the mandatory detention provisions of 8 U.S.C. § 1226(c).

15. 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.”).

16. To the extent that prudential consideration 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, no remedies exist to challenge Mr. Petitioner’s detention as the government will continue to assert detention authority under 8 U.S.C. § 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”).

17. 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 and his family irreparable harm. *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.”); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (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) *rev’d on other grounds* (holding that “detention has inflicted grave” and “irreparable harm” and describing the impact of prolonged detention on individuals and their families).

18. 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 (BIA 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.”); *Matter of Akram*, 25 I&N Dec. 874, 880 (BIA 2012); *Matter of Valdovinos*, 18 I&N Dec. 343, 345 (BIA 1982).

19. Because requiring Mr. Petitioner to exhaust administrative remedies would be futile and would cause him irreparable harm, and because 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**

20. Mr. Petitioner has been living in the United States as a refugee since February 21, 2006. When Mr. Petitioner was about three years old, his father, an Oromo soldier and member of the Oromo Liberation Front (OLF), was kidnapped by Tigray soldiers in Ethiopia. *See* Exh. D at 13. After his father’s kidnapping, Mr. Petitioner fled to a refugee camp in Kenya with his mother and siblings. *Id*. Mr. Petitioner’s mother later returned to Ethiopia in search of her husband, but was discovered and killed by Tigray soldiers. *Id*. When he was approximately 8 or 9 years old, Mr. Petitioner and his brothers left the refugee camp and returned to their family home in Ethiopia. *Id*. Following their return, Tigray soldiers found Mr. Petitioner and his brothers at the family home and burned down the house with Mr. Petitioner and his brothers inside. *Id*. One brother died in the fire and the other was shot and killed by soldiers after escaping the burning house. *Id*. Mr. Petitioner suffered serious injuries and was in a coma for 23 days before returning to the refugee camp and eventually coming to the United States. *Id*.

21. After entering the United States, Mr. Petitioner settled in Minnesota. On June 8, 2007, Mr. Petitioner was convicted of criminal sexual conduct in the second degree under Minn. Stat. § 609.343. *See* Exh. D at 14. Mr. Petitioner was a minor at the time of conviction. On June 23, 2011, DHS initiated removal proceedings against Mr. Petitioner for failure to register as a sexual offender in violation of Minn. Stat. § 243.166, subd. 5(a). *Id*. Mr. Petitioner filed applications for asylum, adjustment of status, and withholding of removal on August 16, 2011, due to his past persecution and fear of future persecution in Ethiopia. His application for withholding of removal was granted and removal proceedings were terminated on December 22, 2011. *See* Exh. B. at 4–5.

22. On July 17, 2012, Mr. Petitioner was convicted of theft under Minn. Stat. § 609.52 subd. 2. *See* Exh. C. at 8. He was later convicted of simple robbery on July 21, 2017. *Id*. On June 22, 2018, DHS moved to reopen removal proceedings in order to terminate Mr. Petitioner’s grant of withholding of removal, arguing Mr. Petitioner was now ineligible on account of his criminal history. *Id*. at 7–8. The IJ granted DHS’s motion on July 11, 2018. *Id*.

23. After being encountered by ICE at the Anoka County Jail, Mr. Petitioner was transferred into DHS custody on December 10, 2018, where he remains to this day.

24. As part of his reopened removal proceedings, Mr. Petitioner filed renewed applications for withholding of removal and CAT relief, and a merits hearing was held before IJ Carr on July 9, 2019. In a written decision dated November 8, 2019, IJ Carr found Mr. Petitioner had been convicted of a “particularly serious crime” under INA § 241(b)(3)(B)(ii), thus barring him from eligibility for withholding of removal. *See* Exh. D. at 16–26. IJ Carr further held that Mr. Petitioner failed to establish it is more likely than not he would suffer torture by the Ethiopian government, or with the government’s acquiescence. *Id*.Based on these holdings, IJ Carr terminated Mr. Petitioner’s grant of withholding of removal, denied CAT relief, and ordered his removal. *Id*. Mr. Petitionerdelivered his appeal of IJ Carr’s decision to the BIA before the December 9, 2019, appeal deadline.

25. Mr. Petitioner raised many issues on appeal, including the lack of due process he was afforded when DHS moved to reopen his case based on his robbery conviction but later cited to other criminal convictions, whether his robbery conviction could be considered a crime of violence and a particularly serious crime, the fact that the NTA Mr. Petitioner was issued was undated, and the fact that the prior agency decision was not given deference under *Chevron*. Mr. Petitioner has now been in ICE custody since December 10, 2018, a total of 361 days.

26. Mr. Petitioner is in close contact with his United States citizen sister and plans to join her in Nebraska if released from DHS custody. Mr. Petitioner plans to finish his GED after leaving custody and is interested in becoming a cook or working at a meat packing facility.

27. Mr. Petitioner has endured degrading treatment at Kandiyohi County Jail, including prison guards tossing his food trays on the floor. A guard made crude sexual comments to Mr. Petitioner while he was being strip-searched. Mr. Petitioner has been targeted by several of the prison guards due to his Ethiopian ethnicity and Muslim religion. Although Mr. Petitioner has submitted several complaints and grievance forms to the supervisors in Kandiyohi, no one has told him that any remedial action would be taken to account for his maltreatment.

**LEGAL FRAMEWORK**

**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.**

28. 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)

29. 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 (internal citations omitted). “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.” *Zadvydas*, 533 U.S. 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.

30. At this point, ICE has detained Mr. Petitioner for an unreasonably prolonged period of more than eleven months without any bond hearing. This is a severe deprivation of liberty, and Mr. Petitioner has no procedural protections available outside this Court. Moreover, it is highly unlikely that Mr. Petitioner’s immigration proceedings will result in his removal given his meritorious appeal to the IJ’s denial of CAT relief. It is therefore manifestly unreasonable to impose an irrefutable presumption of flight risk and danger that will keep Mr. Petitioner detained for months, for a year, or for even longer, while Mr. Petitioner’s immigration proceedings are resolved.

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

31. Nearly a year of mandatory civil detention is extreme. 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 Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015), *abrogated in part and on other grounds by* *Jennings*, 138 S. Ct. at 847 (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232, 234 (3d Cir. 2011)). 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).

32. 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 v. Louisiana*, 504 U.S. 71, 80–83 (1992). 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.” *Id.* at 690 (internal quotation marks omitted).

33.Mr. Petitioner’s mandatory detention for over eleven 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)

34.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.”); Since *Demore*, the “time that each immigrant spends in detention has risen substantially.” *Diop*, 656 F.3d at 234 (explaining that mandatory detention becomes more constitutionally “suspect” as it extends beyond the brief detention periods considered by the Supreme Court in *Demore*).

35. 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. *Diop*, 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).

36. 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 (1st Cir. 2016). *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. 830, 842 (2018). However, while no longer good law for this distinct reason following *Jennings*, the separate substantive analysis of due process these decisions provided remains persuasive.

37. 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.*, *Moallin*, 427 F. Supp. 2d at 926 (D. Minn. 2006) (Nelson, J.) (applying principles of *Zadvydas* to § 1226(c) detention); *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*.”); *Nhean v. Brott*, No. 17-cv-28 (PAM/FLN), 2017 WL 5054390 (D. Minn. Aug. 7, 2017) (finding that the alien may not be detained indefinitely after having received a waiver of inadmissibility and adjustment of status); *Phan v. Brott*, No. 17-cv-432 (DWF/HB), 2017 WL 4460752 (D. Minn. Oct. 5, 2017) (granting petition for habeas corpus for petitioner detained pursuant to § 1226(c)); *Tindi v. Sec’y, Dep’t of Homeland Sec.*, 17-cv-3663 (DSD/DTS), 2018 WL 704314 (D. Minn. Feb. 5, 2018) (finding 14 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 *Dimaya*); *Mohamed v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-5055 (DWF/DTS), 2018 WL 2390132 (D. Minn. May 25, 2018), *report and recommendation adopted*, 2018 WL 2392205 (D. Minn. Mar. 23, 2017) (indefinite detention impermissible and requires the Court to adopt a “fact-based individualized standard to determine the constitutionality of an alien’s continued pre-removal detention”). *Cf. Davies v. Tritten*, 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).

38. 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*, 2018 WL 2392205, at \*12 (citing *Tindi*,2018 WL 704314 (D. Minn. 2018)). 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*, F. Supp.3d 18-cv-54 (PJS/LIB), 2018 WL 4466052 (D. Minn. Sept. 9, 2018) (citing and applying factors articulated in *Reid*, 819 F.3d 486 (1st Cir. 2016)) (citation omitted).

39. After *Jennings*, this Court has continued to use the *Muse* 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). *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853 (D. Minn. 2019); *Liban M. J. v. Sec’y, Dep’t of Homeland Sec.*, 367 F. Supp. 3d 959 (D. Minn. 2019); *Bolus A. D. v. Sec’y of Homeland Sec.*, 376 F. Supp. 3d 959 (D. Minn. 2019); *Abshir H. A. v. Barr*, No. 19-cv-1033 (PAM/TNL), 2019 WL 3719414 (D. Minn. June 28, 2019); *Haji S. v. Barr*, No. 18-3493 (PAM/LIB), 2019 WL 3238354 (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 (D. Minn. June 17, 2019); *Duol J. v. Sec’y Dep’t of Homeland Sec.*, No. 18-cv-3266 (PJS/LIB), 2019 WL 3769711 (D. Minn. June 17, 2019), *report and recommendation vacated as moot*, 2019 WL 3767535 (Aug. 9, 2019); *Mohamed A. v. Nielsen*, No. 19-cv-49 (ECT/ECW), 2019 WL 2396761 (D. Minn. May 16, 2019), *report and recommendation vacated as moot*, 2019 WL 2395408 (June 6, 2019); *Tao J. v. Sec’y, Dep’t of Homeland Sec.*, No. 18-cv-1845-NEB-HB, 2019 WL 1923110 (D. Minn. Apr. 30, 2019); *Abdulkadir A. v. Sessions*, No. 18-cv-2353-NEB-HB, 2018 WL 7048363 (D. Minn. Nov. 13, 2018). 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 this “position has not been accepted by a single court, and it cannot be squared with *Jennings* and *Zadvydas*”). In Mr. Petitioner’s case, these factors establish that his constitutional interest in personal liberty is compelling and requires release.

*Length of Detention*

40. “[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 favors granting relief. Mr. Petitioner has been in custody for 361 days, over 11 months, *see* Exh. C, and the government has never made any individualized determination as to his 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.*, No. 19-cv-2353 (NEB/HB), 2019 WL 201761 (D. Minn. Jan. 15, 2019), *report and recommendation adopted*, 2018 WL 7048363, at \*12 (D. Minn. Nov. 13, 2018) (nine months); *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at \*1 (S.D.N.Y. May 23, 2018) (eight months); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 710, 717 n.6 (D. Md. 2016) (ten months); *Gordon v. Shanahan*, No. 15-cv-261, 2015 WL 1176706, at \*3–4 (S.D.N.Y. Mar. 13, 2015) (eight 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 Kansas v. Hendricks*, 521 U.S. 346, 363–64 (1997); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015), *abrogated in part and on other grounds by* *Jennings*, 138 S. Ct. at 847 (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232, 234 (3d Cir. 2011)).Mr. Petitioner’s almost twelve months of continuous civil imprisonment strongly support his claim for habeas relief.

*Conditions of Detention*

41. 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.”) (citing *Chavez-Alvarez*, 783 F.3d at 478).

42. Mr. Petitioner is currently confined in the Kandiyohi County Jail in Willmar, MN. 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. As stated before, Mr. Petitioner has endured degrading, dehumanizing treatment at Kandiyohi County jail. Although Mr. Petitioner has submitted several complaints and grievance forms to the supervising officers in Kandiyohi, he has not yet seen any action taken. Thus, the character of his confinement conditions is indistinguishable from penal confinement, and this factor weighs strongly in Mr. Petitioner’s favor.

*Responsibility for Delays*

43. The two factors related to responsibility for delay neither weigh in favor of nor against Mr. Petitioner’s habeas petition because neither Mr. Petitioner nor DHS have caused delays in the proceedings.[[3]](#footnote-3)

*Likely Duration of Future Detention & Likelihood of Final Order of Removal*

44. The last two factors, which are closely linked, weigh in favor of granting habeas relief. “The entire process [including administrative and judicial appeals] is subject to the constitutional requirement of reasonability.” *Muse*, 2018 WL 4466052, at \*5 (citing *Ly v. Hansen*, 351 F.3d, 263, 272 (6th Cir. 2003)).

45. On November 8, 2019, Immigration Judge Carr issued her Order granting DHS’s Motion to Terminate Withholding of Removal, and denying Mr. Petitioner’s petition for Convention Against Torture (CAT) relief. *See* Exh. D. Mr. Petitioner has thirty (30) days to appeal this Order to the BIA, 8 U.S.C. § 1252(b)(1), which he will do. His appeal has a strong likelihood of success, mainly because the IJ failed to recognize the overbreadth of Minn. Stat. § 609.24.

46. The “aggravated felony” provision, 8 U.S.C. § 1227(a)(2)(A)(iii), holds that an alien is ineligible for certain forms of relief if he has been convicted of an aggravated felony. “To determine whether a state offense constitutes an aggravated felony under the INA, we apply a categorical approach to ascertain whether the state statute categorically fits within the generic offense.” *Bedolla-Zarate v. Sessions*, 892 F.3d 1137, 1139 (10th Cir. 2018) (citing *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (internal quotation marks omitted)). When the state statute is divisible, i.e. it lists several elements in the alternative as constituting the crime so defined, a court should use a “modified categorical approach” that looks at “a limited class of documents . . . to determine what crime, . . . , a defendant was convicted of.” *Mathis v. U.S.*, 136 S. Ct. 2243, 2249 (2016) (citing *Shepard v. United States*, 544 U.S. 13 (2005)). The Minnesota statute at issue does *not* require *actual* use of physical force; it only requires “use *or* threat [of] imminent force against any person . . .” Minn. Stat. § 609.24 (emphasis added). IJ Carr’s decision only reviews the constituent elements of the theft statute, Minn. Stat. § 609.52. *See* Exh. D, at 16–21. Were Mr. Petitioner’s 33-month sentence for the robbery conviction removed from the aggregate imprisonment term calculation, he would easily fall short of the Withholding of Removal Eligibility provisions of the INA, 8 U.S.C. § 1231(b)(3)(B)(i) and (iv). Because the IJ did not follow the analysis described in *Mathis*, Mr. Petitioner should succeed in his appeal to the BIA. Mr. Petitioner does not ask this Court to pass on the merits of this issue, but his claim is complex and meritorious, and so it is likely to take an extended period to be resolved on appeal to the BIA, and, if necessary thereafter, in any appeals before the federal courts.

47. The procedural posture shows that Mr. Petitioner is likely facing an extended period of future detention in Kandiyohi County Jail. He will timely appeal to the BIA before the December 8, 2019 deadline, and if the BIA finds in his favor, it will remand the case back to the IJ for reconsideration. IJ Carr issued her written Order about four months after Mr. Petitioner’s hearing. Therefore, Mr. Petitioner is facing several more months of unconstitutional civil detention while his proceedings remain pending. *See* Exh. E, Affidavit of John Bruning, at 27–32. Of course, Mr. Petitioner does not ask this Court to decide the substance of his removal proceedings, and it need not do so to appreciate that the government faces a very steep uphill battle.

48. In sum, without habeas relief, ICE will continue to detain Mr. Petitioner for several months beyond the already unreasonably prolonged period of months he has already been imprisoned. Moreover, Mr. Petitioner is not likely to be removed from the United States, which further precludes any legitimate government interest in and justification for detaining him at all, let alone without any bond.

49. Under the *Muse* framework, four of the six factors weigh sharply in Mr. Petitioner’s favor, and two are neutral. *See Muse*, 2018 WL 4466052, at \*6 (finding detention violates the Petitioner’s due process rights when four factors weigh in his favor, one weighs against him, and one is neutral). This Court should hold Mr. Petitioner’s prolonged mandatory detention unreasonable and unconstitutional.

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

50. 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.” 538 U.S. at 511. 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 (emphasizing the government’s “near total inability to remove deportable criminal aliens” and that “deportable criminal aliens who remained in the United States often committed more crimes before being removed”). 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.

51.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. By enacting statutory forms of relief and protection such as asylum, cancellation of removal, and adjustment of status, Congress allowed qualified individuals convicted of less serious offenses the opportunity to reside permanently in the United States.[[4]](#footnote-4) If Congress had viewed those individuals as presenting such a heightened danger to the public as to require their mandatory detention, it would not have made them eligible for permanent relief from removal. *See, e.g.*, *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778, at \*5 (N.D. Ill. May 03, 2012) (holding mandatory detention violated due process where IJ had granted lawful permanent resident a new adjustment allowing him to retain this status in the United States). Therefore, in contrast to the detention in *Demore*,[[5]](#footnote-5) it is unreasonable to impose an irrebuttable presumption that noncitizens with substantial arguments against deportability categorically present a heightened flight risk or threat to public safety such that they require mandatory detention without an opportunity for bond.

52. Here, Mr. Petitioner presents compelling arguments why the BIA will reverse the November 8, 2019 Order of the Immigration Judge. Accordingly, 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 on Standards for Bond**

53. Mr. Petitioner asks this Court to order his immediate release. However, if this Court were to determine that it would be more proper for Mr. Petitioner to be granted an immediate bond hearing, either before this court or before an IJ, procedural due process should require 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 v. Mumford*, 211 F. Supp. 3d 706, 720-23 (D. Md. 2016).

54.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.*, *id.*; *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 alien’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 (requiring government to prove dangerousness and flight risk by clear and convincing evidence); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018) (requiring government to prove dangerousness and flight risk); *see also Foucha*, 504 U.S. at 81–83 (1992) (striking down detention system that placed burden on detainee to prove non-dangerousness); *United States v. Salerno*, 481 U.S. 739, 750–52 (1987) (requiring proof of dangerousness by clear and convincing evidence).

55. 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 Section 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 that individual 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.

56. 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 alternative to detention program—the Intensive Supervision Appearance Program—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.

**CAUSES OF ACTION**

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

57. Mr. Petitioner re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

58.Immigration detention violates due process unless such detention is reasonably related to its purpose. *Demore*, 538 U.S. at 513 (2003); *Zadvydas*, 533 U.S. at 690–91 (2001). 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. *Id*.

59. Mr. Petitioner has been detained pursuant to 8 U.S.C. § 1226(c) for over eleven 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, e.g.*, *Muse*, 2018 WL 4466052, at \*5. Application of the relevant factors to the facts and circumstances in this case—four factors weighing in Mr. Petitioner’s favor and two favoring neither party—supports a conclusion that Mr. Petitioner’s continued detention without an individualized bond hearing violates due process under the Fifth Amendment.

60. Moreover, Mr. Petitioner has a substantial argument against removal. Therefore, the assumption underlying *Demore* that noncitizens who have conceded deportability 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.

61. 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 Section 1226(c).

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

62. Mr. Petitioner re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

63.The Eighth Amendment prohibits “[e]xcessive bail.” U.S. Const. amend. VIII.

64.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).

65.For these reasons, Mr. Petitioner’s ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

**PRAYER FOR RELIEF**

WHEREFORE, 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 Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody; hold a hearing before this Court if warranted; determine that Petitioner’s detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention; and order Petitioner’s release, with appropriate conditions of supervision if necessary.
5. In the alternative, issue a Writ of Habeas Corpus and order Petitioner’s release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner’s release would present; and (2) if the government cannot meet its burden, the immigration judge order Petitioner’s release on appropriate conditions of supervision.
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: December 6, 2019

Respectfully submitted,

s/Benjamin Casper Sanchez

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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 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 v. Rodriguez* was being briefed, the government informed the Supreme Court 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 v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (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. Courts do not hold the time required to litigate “avenues of relief that the law makes available” against a detainee. *Ly*, 351 F.3d at 272. Since his arrival to the U.S. in 2006, Mr. Petitioner has raised legitimate defenses to removal, as evidenced by IJ Olmanson’s grant of Withholding of Removal in her December 22, 2011 Order. In later removal proceedings, IJ Olmanson granted Mr. Petitioner’s Motion to Reopen on July 10, 2018, finding good cause was established for doing so. [↑](#footnote-ref-3)
4. For example, eligibility for cancellation of removal is predicated on factors such as the absence of an aggravated felony conviction and the length of ties to the community—both of which are factors that correspondingly decrease the risks of flight and danger. *See* 8 U.S.C. § 1229b(b)(1)(A), (C). Similarly, cancellation for immigrants who are not lawful permanent residents requires a showing of “good moral character,” *id.* § 1229b(b)(1)(B), making it unlikely that an immigrant who qualifies for such relief could present a heightened danger to the public. [↑](#footnote-ref-4)
5. 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-5)