**LEGAL FRAMEWORK**

**DETENTION OF “ARRIVING ALIENS” UNDER 8 U.S.C. § 1225(b).**

53. Pursuant to 8 U.S.C. § 1225, a noncitizen “who arrives in the United States or is present in this country but has not been admitted, is treated as an applicant for admission.” *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018); 8 U.S.C. § 1225(a)(1). Any applicant for admission “must ‘be inspected by immigration officers’ to ensure that they may be admitted into the country consistent with U.S. immigration law.” *Id*. at 836-837 (quoting 8 U.S.C. § 1225(a)(3).

54. Generally speaking, applicants for admission “fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).” *Id*. at 837. Noncitizens “arriving in the United States” and “initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation” fall under the provisions at 8 U.S.C. § 1225(b)(1). *Id*; 8 U.S.C. § 1225(b)(1)(A)(i). Such individuals are ordered removed “without further hearing or review” unless they “indicate[] either an intention to apply for asylum . . . or a fear of persecution[,]” in which case they are referred for further proceedings regarding their claim to asylum. 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235; 8 C.F.R. § 208.30; *see also Jennings*, 138 U.S. at 837. All applicants for admission “not covered by § 1225(b)(1)[,]” including Mr. PETITIONER, fall under the “broader . . . catchall provisions” at 8 U.S.C. § 1225(b)(2). *Id*. at 837. If an “examining immigration officer” determines an individual under § 1225(b)(2)(A) “is not clearly and beyond a doubt entitled to be admitted” to the United States, they are referred for full removal proceedings before an IJ. 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.6(a)(i); *see also* 8 U.S.C. § 1229a; *Jennings*, 138 S.Ct. at 837.

55. Regardless of whether § 1225(b)(1) or § 1225(b)(2) applies, the statutory text “mandate[s] detention of aliens throughout the completion of applicable proceedings[.]” *Jennings*, 138 S.Ct. at 845; 8 U.S.C. §§ 1225(b)(1)(B)(1)(B)(ii) (stating that upon determination that an individual “has a credible fear of persecution, the alien *shall be detained* for further consideration of the application for asylum.”) (emphasis added); § 1225(b)(2)(A) (stating that upon determination that an individual “is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under [8 U.S.C. §] 1229a”). Release in the form of parole is only allowed “for urgent humanitarian reasons or significant public health benefit,” 8 U.S.C. 1182(d)(5)(A), and parole determinations fall exclusively within the Department of Homeland Security’s exercise of discretion. *Id*.; 8 C.F.R. §§ 235.3(b)(2)(iii), § 235.3(c); *see also id*. at § 212.5(b); *Jennings*, 138 S.Ct. at 837. As such, IJs are fully divested of jurisdiction to grant bond to detainees held under § 1225(b) or review DHS’ decision to deny or terminate parole. *Matter of X–K–*, 23 I&N Dec. 731, 732 (BIA 2005) (“There is no question that IJs lack jurisdiction over arriving aliens who have been placed in section 240 [8 U.S.C. 1229a] removal proceedings, because they are specifically listed at 8 C.F.R. § 1003.19(h)(2)(i)(B) as one of the excluded categories.”); 8 C.F.R. § 1003.19(h)(2)(i)(B) (stating that “an immigration judge may not redetermine the conditions of custody imposed by the Service with respect to . . . arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to [8 U.S.C. § 1182(d)(5)(A)]”).

56. Mr. PETITIONER has now been detained under 8 U.S.C. § 1225(b)(2)(A) since January 30, 2018—over 22 months. DHS has refused to grant his release on parole, and he has no procedural protections outside of this Court. *See Matter of X–K–*, 23 I&N Dec. 731, 732 (BIA 2005); 8 C.F.R. § 1003.19(h)(2)(i)(B). The only available remedy for Mr. PETITIONER’s unconstitutionally prolonged detention is through a writ of habeas corpus.

**RESPONDENTS’ MANDATORY DETENTION OF PETITIONER UNDER 8 U.S.C. § 1225(b) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.**

57. Mr. PETITIONER’s prolonged 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)

58. 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); *Jamal A. v. Whitaker*, 358 F.Supp.3d 853, 857-858 (D. Minn. 2019) (holding that noncitizens detained under 8 U.S.C. § 1225(b)(2)(A) are entitled to Due Process protection against prolonged detention); *Pierre v. Doll*, 350 F.Supp.3d 327, 332-333 (M.D. Pa. 2018) (holding that noncitizen detained under 8 U.S.C. § 1225(b)(1) “ha[d] a due process right to avoid unreasonably prolonged detention”); *Lett v. Decker*, 346 F.Supp.3d 379, 386 (finding “no logical reason to treat individuals . . . under § 1225(b), like Petitioner, differently than other classes of detained aliens”).

59. “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 primary purpose of immigration detention is to ensure a noncitizen’s appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697

60. At this point, Mr. PETITIONER has already suffered a severe and unreasonable deprivation of liberty, having been detained for more than 23 months without any bond hearing. *See*, *e.g.*, *Jamal A.*, 358 F.Supp.3d at 857-860 (holding that “continuing to detain” a noncitizen under § 1225(b)(2)(A) for 19 months “without giving him a bond hearing would violate his rights under the Due Process Clause”). Moreover, it is highly unlikely that ICE will ever obtain a removal order against Mr. PETITIONER, given his strong and meritorious claims for asylum and adjustment of status, as well as his eligibility for lawful permanent residence under the recently enacted Liberian Refugee Immigration Fairness act (“LRIF”). *See Gonzalez v. O’Connell*, 355 F.3d 1010, 1019-1021 (7th Cir. 2004) (explaining that the Supreme Court’s analysis in *Demore* “left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable[,]” which would present “a wholly different case”).

61. Currently, the government cannot execute a removal order as a matter of law as Mr. PETITIONER is protected by DED and cannot be removed from the United States until his DED grant expires on March 30, 2020. Moreover, if granted a waiver, Mr. PETITIONER is eligible to adjust status to lawful permanent residence through his US citizen spouse and under the Liberian Refugee Immigration Fairness act. § 7611(b)-(c). While adjustment of status through his wife is discretionary, adjustment of status of qualifying individuals is mandatory under LRIF, *see* § 7611(b)(1), and once an individual submits an adjustment of status application pursuant to the act, LRIF prohibits the entry of a removal order, unless and until the application is denied. § 7611(d)(2)(B).[[2]](#footnote-2) Mr. PETITIONER plans to submit his LRIF application as soon as possible and, given his equities and multiple paths to lawful permanent residence, will likely be granted lawful permanent residence, making it highly improbable that the present removal proceedings will ever culminate in a final order of removal. It is manifestly unreasonable to keep Mr. PETITIONER detained in the interim.

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

62. 23 months 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).

63. 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).

64. Mr. PETITIONER’s mandatory detention under § 1225(b)(2)(A) for over 23 months is unreasonable. The Supreme Court has not yet considered the constitutionality of prolonged detention under § 1225(b) or the other immigration detention provisions. *See Jennings*, 138 S.Ct. at 851. However, this Court and others have treated and analyzed as-applied challenges to § 1225(b)(2)(A) detention similarly to as-applied challenges raised by noncitizens detained under § 1226(c). *See*, *e.g.*, *Jamal A.*, 358 F.Supp.3d at 858 (noting that “it is not clear what, if anything, turns on” any Due Process differences between “aliens detained under § 1225(b)(2)(A) . . . [and] aliens detained under other provisions[,]” as “neither group of aliens can be detained indefinitely” and “most courts seem to apply pretty much the same factors”); Report & Recommendation, *Jenkins C. v. Barr*, No. 20-cv-320 (PAM/LIB), 2020 WL 2559562, at \*5 n.3 (D. Minn. May 4, 2020) (“For purposes of analyzing the due process considerations presented by the instant Petition for Writ of Habeas Corpus, the Court finds that detention under 1225(b)(2) is analogous to detention under 1226(c).”), *adopted*, 2020 WL 2557947 (May 20, 2020); *see also Lett v. Decker*, 346 F.Supp.3d 379, 386-388 (S.D.N.Y. 2018) (finding “no logical reason to treat individuals under § 1225(b), like Petitioner, differently than other classes of detained aliens” and explaining that the factors used to analyze detention under § 1226(c) “are equally appropriate in the § 1225(b) context”); *see also*, *e.g*, *Pierre v. Doll*, 350 F.Supp.3d 327, 329-332 (M.D. Pa. 2018) (applying 1226(c) factors to analyze detention of individuals under § 1225(b)(1)). The Court should do the same here now.

65. While the Supreme Court held in *Demore* that *brief* mandatory detention under § 1226(c) without a bond hearing did not violate due process, 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 529-531 (relying on evidence provided by the Government that, at the time, removal proceedings were completed in an average time of 47 days and a median time of 30 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);[[3]](#footnote-3) *see also Muse v. Sessions*, --- F.Supp.3d ---, 2018 WL 4466052 at \*3 (D. Minn. 2018) (“Woven throughout *Demore* are repeated references to the brevity of detention under § 1226(c).”)

66. 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 or 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 to then 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. *See*, *e.g.*, *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*).

67. Like the Supreme Court, the Eighth Circuit has not yet ruled on the constitutionality of prolonged detention under § 1225(b) or 1226(c). The Third Circuit in *Diop* held as a constitutional matter that due process prohibits mandatory detention under § 1226(c) for an unreasonable period of time. *Diop*, 656 F.3d at 232 (“[T]he 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).

68. Moreover, prior to the Supreme Court’s ruling in *Jennings*, a number of courts applying the canon of constitutional avoidance held that serious Fifth Amendment due process concerns required the statutory text of both §§ 1225(b) and 1226(c) to be interpreted as including an implicit reasonableness limitation on the duration of detention during removal proceedings. *See*, *e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013); *aff’d*, 804 F.3d 1060, 1081-84 (9th Cir. 2015) (reading implicit six-month limitation on the length of detention absent a bond hearing into text of both § 1225(b) and § 1226(c)); *Sing Fon Pan v. Sessions*, 290 F.Supp.3d 250, 253-258 (S.D.N.Y. 2018) (“Section 1225(b) will be read to include a six-month limitation on the length of detention of non-citizen arriving aliens . . . without an individualized bond hearing.”); *Abdi v. Duke*, 280 F.Supp.3d 373, 409 (W.D.N.Y. 2017) (same); *Maldonado v. Macias*, 150 F.Supp.3d 788, 805-809 (W.D. Tex. 2015) (reading reasonableness limitation into text of 8 U.S.C. § 1225(b)(2)(A)); *Bautista v. Sabol*, 862 F.Supp.2d 375, 379-381 (M.D. Pa. 2012); *Heredia v. Shanahan*, 245 F.Supp.3d 521, 526-27 (S.D.N.Y. 2017) (same), *vacated on other grounds by* *Heredia v. Decker*, No. 17-1720,2018 WL 1163180 (2d Cir. Jan. 2, 2018); *Ahad v. Lowe*, 235 F.Supp.3d 676, 686-688 (M.D. Pa. 2017) (same for individual detained under § 1225(b)(1)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) (reading six-month limitation on length of detention absent a bond hearing into text of § 1226(c)). Although *Jennings* abrogated the statutory holdings of such cases because the Supreme Court determined, as a predicate matter, that the text of §§ 1225(b) and 1226(c) were not properly subject to competing interpretations that would permit application of the canon of constitutional avoidance, *see* 138 S.Ct. 830, 842, the separate substantive analysis of due process those decisions provided remains persuasive. *See*, *e.g.*, *Muse*, --- F.Supp.3d ---, 2018 WL 4466052 at \*4 n.3 (D. Minn. 2018).

69. 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 v. Cangemi*, 427 F.Supp.2d 908, 926 (D. Minn. 2006) (applying principles of *Zadvydas* to § 1226(c) detention); *Bah v. Cangemi*, 489 F.Supp. 2d 905, 920 (D. Minn. 2007) (“This Court believes that allowing unlimited pre-removal period detention under § 1226 would be inconsistent with the reasoning underlying *Zadvydas*.”).

70. Following *Jennings*, decisions of this Court and other courts across the nation assessing as-applied challenges to prolonged § 1225(b) detention have applied the same individualized factor-based analysis the court use to examine prolonged detention under § 1226(c). *See*, *Jamal A.*, 358 F.Supp.3d 853, 858-860 (D. Minn. 2019) (employing *Muse* factors to analyze constitutionality of detention under § 1225(b)(2)(A) and explaining that “in deciding whether an alien’s continued detention would violate the Due Process Clause, most courts seem to apply pretty much the same factors”);  *Lett v. Decker*, 346 F.Supp.3d 379, 388 (S.D.N.Y. 2018) (holding that the factors used to analyze detention of “an individual detained under § 1226(c) are equally appropriate in the § 1225(b) context”) (internal quotations omitted); *Perez v. Decker*, No. 18-cv-5279, 2018 WL 3991497 at \*4 (S.D.N.Y. Aug. 20, 2018) (employing same analysis); *Brissett v. Decker*, 324 F.Supp.3d 444, 451 (S.D.N.Y. 2018) (same); *De Ming Wang v. Brophy*, No. 17-CV-6263, 2019 WL 112346 at \*3 (W.D.N.Y. Jan. 4, 2019) (same); *Vargas v. Beth*, 378 F.Supp.3d 716, 726-728 (E.D. Wis. 2019) (same); *Destine v. Doll*, No. 3:17-CV-1340, 2018 WL 3584695 at \*4-5 (M.D. Pa. July 26, 2018) (same); *Pierre v. Doll*, 350 F.Supp.3d 327, 331-333 (M.D. Pa. 2018) (same); *Banda v. McAleenan*, 385 F.Supp.3d 1099, 1105-1106 (W.D. Wash. 2019); (same); *Tuser E. v. Rodriguez*, 370 F.Supp.3d 435, 441-443 (D.N.J. 2019) (same); *Franklin K.B. v. Warden, Hudson Cty. Corr. Facility*, No. 18-9933, 2019 WL 2385701 at \*4-5 (D.N.J. June 3, 2019) (same).

71. Courts in this District consider 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 detention under 1225(b) or § 1226(c). *Jamal A. v. Whitaker*, 358 F.Supp.3d 853 (D. Minn. 2019) (employing *Muse* factors to analyze detention under § 1225(b)(2)(A)); *Jenkins C. v. Barr*, No. 20-cv-320 (PAM/LIB), 2020 WL 2557947, at \*1–2 (D. Minn. May 20, 2020); *see also* *Liban M. J. v. Sec’y, Dep’t of Homeland Sec.*, 367 F.Supp.3d 959 (D. Minn. 2019) (employing *Muse* factors to analyze detention under § 1226(c)); *Bolus A. D. v. Sec’y of Homeland Sec.*, 376 F.Supp.3d 959 (D. Minn. 2019) (same); *Muse v. Sessions*, --- F.Supp.3d ----, 2018 WL 4466052 (D. Minn. 2018) (same). In analyzing detention under either provision, the relevant factors include “(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal.” *See*, *e.g.*, *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Minn. 2019); *Muse v. Sessions*, --- F.Supp.3d ---, 2018 WL 4466052 at \*3 (D. Minn. 2018). In Mr. PETITIONER’s case, these factors establish that his constitutional interest in personal liberty is compelling and requires release.

*Length of Detention*

72. “[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), and “critical to the due-process inquiry.” *Jamal A.*, 358 F.Supp.3d at 859. As this Court has recognized, analysis of the length of detention must “bear in mind the context: The detention that is being examined here is the detention of a human being who has never been found to pose a danger to the community or to be likely to flee if released.” *Id*. The extreme length of Mr. PETITIONER’s detention “strongly favors” granting relief. *Id*. (describing 19 month detention under § 1225(b)(2)(A) as a “very long time” which “strongly favors” relief). Mr. PETITIONER has been in custody for 723 days, over 23 months, and there is no end in sight. Yet, despite the prolonged and ongoing period of Mr. PETITIONER’s detention, the government has never made any individualized determination as to whether his detention is necessary due to dangerousness or flight risk.

73. This Court and others have granted writs of habeas corpus in cases involving challenges to periods of 1225(b) detention that were comparable to or shorter than Mr. PETITIONER’s. *See e.g. Jamal A.*, 358 F.Supp.3d 853 (D. Minn. 2019) (19 months); *Brissett v. Decker*, 324 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) (nine months); *Perez v. Decker*, 18-CV-5279 (VEC), 2018 WL 3991497, at \*5 (S.D.N.Y. Aug. 20, 2018)(nine months); *Lett v. Decker*, 346 F. Supp. 3d 379, 387 (S.D.N.Y. 2018) (ten-months); *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1105 (W.D. Wash. 2019) (18 months); *Salazar v. Rodriguez*, CV 17-1099 (JMV), 2017 WL 3718380, at \*5 (D.N.J. Aug. 29, 2017) (holding detention just over a year was unreasonable); *Gutierrez Cupido v. Barr*, 19-CV-6367-FPG, 2019 WL 4861018, at \*2 (W.D.N.Y. Oct. 2, 2019) (16 months); *Tuser E. v. Rodriguez*, 370 F. Supp. 3d 435, 443 (D.N.J. 2019) (19 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 23 months of continuing civil imprisonment strongly support his claim for habeas relief.

*Conditions of Detention*

74. 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).

75. Mr. PETITIONER is currently confined in the Carver County Jail in Chaska, Minnesota. 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. Mr. PETITIONER suffers from a variety of illnesses including diabetes and cirrhosis of the liver. Letter from Gastroenterologist, See Ex. ZZ. He is in pain from his medical conditions, and the conditions of his confinement aggravate his discomfort. Additionally, while Mr. PETITIONER is in detention, he is separated from his family and unable to support them, something that burdens him and his family. Thus, his confinement conditions are indistinguishable from penal confinement in their character, and this factor weighs strongly in Mr. PETITIONER’s favor. *See*, *e.g.*, *Muse*, --- F.Supp.3d ---, 2018 WL 4466052 at \*5 (D. Minn. 2018) (finding ICE detention at Minnesota county jail “indistinguishable from penal confinement” and weighing the factor in detainees favor); *Padilla*, 387 F.Supp.3d at 1231 (explaining that ICE detainees are subject to “substandard physical conditions, low standards of medical care, lack of access to attorneys and evidence as Plaintiffs prepare their cases, [and] separation from their families[.]”), *appeal filed* No. 19-35565 (9th Cir. July 5, 2019).

*Responsibility for Delays*

76. 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.[[4]](#footnote-4)

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

77. The last two factors, which are closely linked, weigh in favor of granting habeas relief. Importantly, “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)).

78. Mr. PETITIONER has strong claims both for asylum and adjustment of status—including adjustment of status pursuant to the newly enacted LRIF—and is likely to ultimately prevail on both counts. 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.

79. Mr. PETITIONER has a meritorious claim to asylum based on the significant likelihood he will suffer persecution if returned to Liberia, a country where he already experienced extreme abuse at the hand of rebel soldiers. See Ex. Y. In its August 9, 2019 decision, the BIA found that the IJ erred in determining Mr. PETITIONER’s credibility based on a post-REAL ID standard, finding him non-credible based on a few minor inconsistencies. See Ex. Y. While the IJ again denied relief on remand, the case is again on appeal to the BIA. See Ex. DD; Ex. FF. Furthermore, the unsubstantiated allegations from the arrest, which IJ Wood repeatedly cited in denying relief, did not result in criminal charges. If granted, Mr. PETITIONER’s designation as an asylee would provide him with a lawful status to remain and work indefinitely in the U.S. and a path to U.S. citizenship.

80. Additionally, if approved by USCIS, Mr. PETITIONER’s pending I-601, Application for Waiver of Grounds of Inadmissibility, and I-485, Application to Register Permanent Residence, would bar his removal and provide Mr. PETITIONER with “the privilege of residing permanently in the United States[.]” 8 U.S.C. § 1101(a)(20). He also plans to amend his pending I-485 application to include an application under the recently enacted LRIF, providing him another path to lawful permanent residence. Given his substantial equities, USCIS is likely to grant the waiver and, ultimately, Mr. PETITIONER’s adjustment of status application as he is in a bona fide marriage with a United States Citizen and also meets the substantive requirements for LRIF relief.

81. Beyond his asylum claim and pending application for adjustment of status to lawful permanent residence, Mr. PETITIONER has a legitimate bar to removal through DED. On September 28, 2016, Barack Obama issued “Presidential Memorandum – Deferred Enforced Departure of Liberians” (“2016 Memorandum) directing the Secretary of Homeland Security to take necessary steps to defer for 18 months the removal of any Liberian national who was under a grant of DED as of September 30, 2011, and can demonstrate continuous residence in the United States since October 1, 2002. There is no need to apply for DED status; it is automatically granted for qualified individuals. See U.S. Citizenship & Immigration Servs, Affirmative Asylum Procedures Manual 37 (May 2016). Petitioner met the requirements set forth in the Memorandum and was thereby granted DED. See Ex. Z.

82. An individual cannot be removed while under DED status. *See* Krua v. United States Dep't of Homeland Sec., 729 F. Supp. 2d 452, 453 (D. Mass. 2010) (“The effect of DED is essentially the same as TPS and Liberians were eligible for employment authorization and not subject to removal.); Macauley v. Unknown United States Fed. Gov't Agency or Agencies, No. 1:16-CV-1347-TWT, 2017 U.S. Dist. LEXIS 124872, at \*7 (N.D. Ga. Aug. 8, 2017) (holding that DED rendered presence in the US during a voluntary departure order lawful and prevented the order from becoming final); See also Immigrations and Customs Enforcement, Detention and Removal Operations Policy and Procedure Manual, ch. 20.10(c) (“Aliens who have been granted DED may not be removed from the United States until the designated period of DED has expired.”); U.S. Citizenship & Immigration Servs, Affirmative Asylum Procedures Manual 37 (May 2016) (DED status “prevents DHS from executing [a removal order] during the pendency of DED”).

83. Completion of Mr. PETITIONER’s removal proceedings—”taking into account the anticipated duration of all removal proceedings, including administrative and judicial appeals”—will take additional months or over a year. *See Muse*, --- F.Supp.3d ---, 2018 WL 4466052 at \* 5. In cases involving similar procedural postures, where the noncitizen has recently appealed an IJ decision to the BIA, courts within this District have not hesitated to find that the length of future detention favors granting habeas relief. *See id*.

84. In sum, without habeas relief, ICE will continue to detain Mr. PETITIONER for at least several more months beyond the already unreasonably prolonged period of 23 months he has already been imprisoned. Moreover, Mr. PETITIONER is not likely to be ordered 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.

85. 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). *Penaloza*, report and recommendation 2018 WL 7098981, at \*6; *Alier D.*,report and recommendation, 2018 WL 5849477, at \*7. This Court should hold Mr. PETITIONER’s prolonged mandatory detention unreasonable and unconstitutional.

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

86. 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.

87.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.[[5]](#footnote-5) 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 United States). Therefore, in contrast to the detention in *Demore*,[[6]](#footnote-6) 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.

88. As the facts relied upon by the USCIS and the IJ in making an adverse determination have changed materially, Mr. PETITIONER has DED and a strong claim for asylum and adjustment of status. While Mr. PETITIONER’s removal proceedings—including proceedings before the IJ, BIA, and potentially the Eighth Circuit—will result in Mr. PETITIONER’s continued detention for years, it is highly unlikely that the Government will ultimately prevail. Mr. PETITIONER has been lawfully and gainfully employed for more than 20 years. He is in a bona fide marriage with a U.S.-citizen spouse and has a daughter whom he loves dearly. His family, his job, and his community are in Minnesota. He has no incentive to flee anywhere, particularly given his strong claims to relief from removal. 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**

89. 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, 720-723 (D. Md. 2016).

90.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).

91. 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 1225(b) 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.

92. 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—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**

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

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

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

95.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*.

96. Mr. PETITIONER has been detained pursuant to 8 U.S.C. § 1225(b) for over 21 months. Mr. PETITIONER’s prolonged detention, in the absence of an individualized determination of Mr. PETITIONER’s 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—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.

97. 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.

98. 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 an alien seeking admission only when it is necessary to serve the purposes of Section 1225(b).

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

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

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

101.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).

102.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 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 IJ 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 IJ 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: 1/23/2020 Respectfully submitted,

 s/ John Bruning

 John Bruning (MN #399174)

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1. In *Jennings*, the Supreme Court held that “subject only to express exceptions, [the language of] §§ 1225(b) and 1226(c) authorize[s] 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. Appeals before the Board may be held in abeyance pending USCIS’ adjudication of LRIF relief. *See* <https://www.justice.gov/eoir/page/file/1234156/download>. [↑](#footnote-ref-2)
3. While *Jennings v. Rodriguez* 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 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.”). [↑](#footnote-ref-3)
4. 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. Mr. PETITIONER has raised legitimate defenses to removal, as evidenced by the BIA’s remand, asking IJ Wood to reconsider Mr. PETITIONER’s asylum case, and his DED status. [↑](#footnote-ref-4)
5. 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-5)
6. 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-6)