1. **LEGAL FRAMEWORK**
   1. **STATUTORY & REGULATORY FRAMEWORK**
2. Under 8 U.S.C. § 1231, noncitizens with a final order of removal shall be removed from the United States within a period of 90 days. 8 U.S.C. § 1231(a)(1)(A).
3. The beginning of the 90-day removal period is determined by the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. at § 1231(a)(1)(B). Where a noncitizen has collaterally challenged removal, such as through a motion to reopen, the underlying removal order remains administratively final unless and until the challenge results in the vacatur of the removal order and proceedings are reopened. See Jamal v. Sessions, No. 5:18-06015-CV-RK, 2018 U.S. Dist. LEXIS 47577, at \*5 (W.D. Mo. Mar. 22, 2018) (“Because, here, Petitioner's case is not being judicially reviewed and is not subject to a court-ordered stay, but rather is subject to an administrative stay on collateral appeal, the Court declines to find that Petitioner's ‘removal period’ has not started under section 1231(a)(1)(B)(ii).”); see also 8 C.F.R. § 241.4(b)(1).

1. During the removal period, the noncitizen may be detained, and may not be released under any circumstances if found inadmissible or deportable on criminal or national security grounds. § 1231(a)(2).
2. If the noncitizen is not removed during the 90-day period, he or she “shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien”

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien’s nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien’s conduct or activities that the Attorney General prescribes for the alien.

§ 1231(a)(3).

1. The removal period may be extended beyond 90 days and the noncitizen may remain detained if the noncitizen frustrates his or her removal. § 1231(a)(1)(C).
2. Alternatively, the noncitizen may be detained beyond the 90 days if he or she is inadmissible under § 1182 or removable under various sections of § 1227, or determined to be a risk to the community or unlikely to comply with the order of removal. § 1231(a)(6); 8 C.F.R. § 241.4(a).
   1. **AGENCY REVIEW OF CUSTODY**
3. DHS may release an alien if the alien demonstrates that he or she is not a danger to the community or a flight risk. Id. at § 241.4(d)(1); see Moallin v. Cangemi, 427 F. Supp. 2d 908, 913–14 (D. Minn. 2006) (describing agency review process). DHS must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

Id. at § 241.4(e).

1. “The following factors should be weighed in considering whether to recommend further detention or release of a detainee:”

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to -

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

Id. at § 241.4(f).

1. When § 241.4 of the regulations was promulgated by the now-defunct INS in 2000, it stated that the regulation “has the procedural mechanisms that...courts have sustained against due process challenges.” Detention of Aliens Ordered Removed, 65 Fed. Reg. 80281, 80283 (Dec. 21, 2000). INS cited to several court decisions from the Third, Fifth, and Tenth Circuits setting out procedural due process requirements for long-term post-order detention. Id.; see also Chi Thon Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1999) (holding that “the process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight”).
2. Courts have found that the agency’s failure to follow its own regulations and failure to exercise discretion is enforceable against the agency. See INS v. St. Cyr, 533 U.S. 289, 307 (2001) (allowing a habeas court to hear challenges to failure to exercise discretion); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954). “In response to Zadvydas, the regulations governing post-removal-order detention were amended to comply with the Constitutional concerns illuminated in Zadvydas. The amended regulations, 8 C.F.R. §§ 241.13 and 241.4, reflect the concerns of the Zadvydas Court and provide necessary procedural safeguards to ensure the detention of an alien beyond the removal period comports with due process requirements. Because these regulations confer important rights upon aliens ordered removed, DHS is bound by these regulations.” Bonitto v. Bureau of Immigration & Customs Enforcement, 547 F. Supp. 2d 747, 757 (S.D. Tex. 2008); see also D’Alessandro v. Mukasey, 628 F. Supp. 2d 368, 394 (W.D.N.Y. 2009) (quoting Bonitto). “The regulations involved here do not merely facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees.” Bonitto, 547 F. Supp. 2d at 756 (citing United States v. Caceres, 440 U.S. 741, 759, 760 (1979)). “While ICE does have significant discretion to detain, release, or revoke aliens, the agency still must follow its own regulations, procedures, and prior written commitments in the Release Notification.” Rombot v. Souza, 296 F. Supp. 3d 383, 388–89 (D. Mass. 2017).
   1. **PROLONGED DETENTION**
3. The Due Process Clause of the Fifth Amendment requires that “[n]o person shall . . . be deprived of liberty . . . without due process of law.” “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” Zadvydas, 533 at 690 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). In the context of immigration detention, at a minimum, detention must “bear[] a reasonable relation to the purpose for which the individual [was] committed.” Id. (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)). If “detention’s goal is no longer practically attainable,” detention becomes unreasonable and therefore violates the Fifth Amendment right to due process. Id.
4. The Fifth Amendment Due Process Clause also requires that Respondents follow procedures that are adequate to establish that detention is both statutorily and constitutionally valid. See Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) (“due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.”).
5. Under the canon of constitutional avoidance, no immigration detention statute should be construed in a way that would violate the Constitution where it is “fairly possible” to avoid doing so. Zadvydas, 533 U.S. at 689.
6. In Zadvydas, the Supreme Court held that, while the statute provides for a removal period of 90 days, post-order detention up to 180 days was presumptively reasonable. Id. at 701. After six months, the burden is on the government to rebut a showing by the noncitizen “that there is no significant likelihood of his removal in the reasonably foreseeable future.” Id. “[W]hat constitutes the ‘reasonably foreseeable future’ shrinks as the total period of postremoval confinement grows.” Moallin v. Cangemi, 427 F. Supp. 2d 908, 915 (D. Minn. 2006).
7. A grant of reopening and remand to the Immigration Court would not cure Petitioner’s detention of its unconstitutionality. Upon reopening, Petitioner could be detained pursuant to § 1225(b), which provides for mandatory detention, or § 1226(a), which allows for bond. Petitioner cannot predict which authority he would be detained under upon reopening, as that decision appears to lie exclusively within the discretion of DHS.
8. This Court has on several occasions agreed that § 1226(c)—functionally identical to § 1225(b)—does not allow for indefinite 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.”); Moallin v. Cangemi, 427 F.Supp.2d 908, 926 (D. Minn. 2006) (Nelson, J.) (applying principles of Zadvydas to § 1226(c) detention); Phan v. Brott, No. 17-cv-432-DWF-HB, 2017 WL 4460752, 2017 U.S. Dist. LEXIS 165060 (D. Minn. Oct. 5, 2017) (granting petition for habeas corpus for petitioner detained pursuant to § 1226(c) after reopening granted); Tindi v. Sec’y, Dep’t of Homeland Sec., No. 17-cv-3663-DSD-DTS, 2018 WL 704314 (D. Minn. Feb. 5, 2018) (same, in context of stay by Circuit Court); cf. Davies v. Tritten, No. 17-cv-3710-SRN-SER (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).
9. The Court, the government, and immigration advocates alike have recognized that detention may force aliens to give up meritorious claims in order to get out of jail. See Demore, 538 U.S. at 530 n.14 (“Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. As we have explained before, however, the legal system is replete with situations requiring the making of difficult judgments as to which course to follow.”) (internal citations omitted); Zadvydas, 533 U.S. at 713 (Kennedy, J., dissenting) (“Court ordered release cannot help but encourage dilatory and obstructive tactics by aliens.”); Gov't Supp. Br., Jennings v. Rodriguez, No. 15-1204, 2017 U.S. S. Ct. Briefs LEXIS 308, at \*31 (Jan. 31, 2017) (“Of course, the government allows aliens in immigration detention pending removal proceedings to end those proceedings, at any time, by accepting a final order of removal, qualifying for voluntary departure, or, in some circumstances, by simply returning home.”); Br. of Amici Curiae Americans for Immigrant Justice, id., 2017 U.S. S. Ct. Briefs LEXIS 454, at \*48 (Feb. 10, 2017) (“As the stories of our clients and community members illustrate, acceptance of deportation in order to escape prolonged detention imposes life-altering burdens on constitutional liberties. These include the ability to care for family, live in the home one has purchased, and contribute to longtime communities.”); Id. at \*15 (“The government's position gravely undervalues the serious liberty interests at stake in this case. It ignores the unique harms caused by prolonged detention, above and beyond those caused by one's placement in removal proceedings. Its position effectively permits the punitive conditions of prolonged detention to coerce people into giving up their meritorious claims.”).
10. **CAUSES OF ACTION**

**COUNT ONE: VIOLATION OF 8 U.S.C. § 1231 – PROLONGED DETENTION**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. Petitioner’s detention has exceeded the six-month presumptive threshold under Zadvydas, as he has now been detained for 264 days under § 1231, and a total of 650 days in Respondents’ custody.
3. Although Respondents purportedly possess a valid travel document for Petitioner, Respondents are legally prohibited from removing Petitioner, while his appeal is pending at the BIA. Once that appeal is determined, there is no possible outcome where Petitioner would become removable as a result. If the BIA grants reopening, his removal order will be vacated. If the BIA remands to the Immigration Court, it should do so with a stay in place. If the BIA denies the appeal, Petitioner will receive an automatic stay from the Circuit Court as soon as he can file a petition for review. There is no other outcome. There is no definite timeframe for the BIA to issue a decision; it could be tomorrow, or it could be a year from now. Added to the uncertainty of when that decision will be made, Petitioner’s removability will depend on the actions of at least one other court, and the time for that decision will be uncertain as well.
4. Therefore, 8 U.S.C. § 1231 does not authorize detention of Petitioner as removal is no longer likely to occur in the reasonably foreseeable future.

**COUNT TWO: VIOLATION OF FIFTH AMENDMENT**

**SUBSTANTIVE DUE PROCESS**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. The Fifth Amendment Due Process Clause protects against arbitrary and indefinite detention by the executive branch. Zadvydas, 533 U.S. at 699.
3. Due process requires that detention be reasonably related to its purpose and accompanied by adequate procedures to ensure that detention is serving its legitimate goals. See Zadvydas, 533 U.S. at 690-91. As removal is no longer reasonably foreseeable for Petitioner—in fact, it is a near impossibility—his detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment’s guarantee of Due Process.

**COUNT THREE: VIOLATION OF THE FIFTH AMENDMENT**

**PROCEDURAL DUE PROCESS**

1. Due process is further violated by Respondents’ failure to follow its regulations and failure to exercise discretion in issuing its Decision to Continue Detention under Accardi. Petitioner and counsel provided Respondents with sufficient information and evidence to meet the criteria and factors enumerated in 8 C.F.R. §§ 241.4(e) and (f). This information was ignored, and the decision to continue detention appears to have been made solely on the basis of a purported travel document. However, 8 C.F.R. § 241.4(e)(1) makes clear that a travel document alone, where removal is not practicable, is insufficient to bar release. See also id. at § 241.13(f) (outlining factors to consider when determining whether removal is likely in the reasonably foreseeable future). Such a decision is therefore not in line with agency regulations, and constitutes both a violation of procedural due process and an arbitrary and capricious exercise of agency authority.

**COUNT FOUR: VIOLATION OF THE FOURTH AMENDMENT**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. The Fourth Amendment prohibits unreasonable seizures and does not allow the detention of individuals without a sufficient legal reason. The Government must always justify civil detention. If civil detention is no longer justified by a legal reason, such detention is unconstitutional.
3. Civil detention in the immigration context has been permitted when it is to make sure that an individual appears at removal proceedings or to make sure that an individual will appear for removal. As removal is not reasonably foreseeable for Petitioner, the Constitution does not permit it.
4. Because Petitioner has not been released despite his removal not being reasonably foreseeable, lack of dangerousness, and lack of flight risk, his continued detention violates the Fourth Amendment.
5. His detention further violates the Fourth Amendment as he was and has been improperly subjected to continued detention in violation of agency regulations.