**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

|  |  |
| --- | --- |
| **PETITIONER 1**;  **PETITIONER 2**;  **PETITIONER 3**;  **PETITIONER 4**;  **PETITIONER 5**;  **PETITIONER 6**; and  **PETITIONER 7**,  Petitioners,  v.  **William BARR**, Attorney General;  **Chad WOLF**, Acting Secretary, Department of Homeland Security;  **Matthew ALBENCE**, Senior Official Performing the Duties of the Director, Immigration and Customs Enforcement;  **Shawn BYERS,** Acting Director, St. Paul Field Office, Immigration and Customs Enforcement;  **Joel BROTT**, Sheriff, Sherburne County;  **Kurt FREITAG**, Sheriff, Freeborn County; and  **Jason KAMERUD**, Sheriff, Carver County,    Respondents. | Civil No.: 20-cv-\_\_\_\_  **PETITION FOR WRIT OF HABEAS CORPUS**  **8 U.S.C. § 1231**  **28 U.S.C. § 2241** |

1. **INTRODUCTION**
2. Petitioners are seven refugees who have final orders of removal to Burma[[1]](#footnote-2) and have been unlawfully detained by Respondents under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1231, in excess of 180 days each, despite no reasonable likelihood that they can be removed to Burma in the foreseeable future. Petitioners—PETITIONER 1, PETITIONER 2, PETITIONER 3, PETITIONER 4, PETITIONER 5, PETITIONER 6, and PETITIONER 7—who came to this country as refugees from Burma, seek a writ of habeas corpus to remedy their prolonged unlawful detention by the Department of Homeland Security (“DHS”) and its agents within Immigration and Customs Enforcement (“ICE”) at three county jails in Minnesota.
3. Petitioners’ periods of post-order custody have ranged from just over 180 days, in the case of Mr. PETITIONER 5, to 452 days, in the case of Mr. PETITIONER 2. The Petitioners’ prolonged mandatory detention under 8 U.S.C. § 1231 exceeds the statutory removal period and the presumptively reasonable period for removal under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).
4. Respondents have denied Petitioners’ release following 90-day and 180-day post custody reviews—and even one-year and 15-month reviews—with no apparent end in sight to their detention. On information and belief, Respondents currently have no plan or ability to execute the removal of Petitioners to Burma, and, even if it did, Petitioners’ removal is even less likely to occur in the foreseeable future given the continued dangers of the COVID-19 pandemic and restrictions on commercial travel to Burma. Further, despite likely assertions by ICE that it has travel documents for each Petitioner, Petitioners have been told by the Burmese embassy that it has not issued and will not issue travel documents to Petitioners, nor will Burma accept their repatriation. In fact, the only plan that Petitioners can surmise on the part of Respondents is to continue to detain them indefinitely, without regard for the mandates of the U.S. Constitution, the Immigration and Nationality Act, and the agencies’ own rules and regulations.
5. As a result, Respondents’ continued detention of Petitioners under 8 U.S.C. § 1231 is unlawful and violates § 1231 and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.
6. To remedy this unlawful detention, Petitioners seek declaratory and injunctive relief in the form of immediate release from detention on reasonable conditions determined by ICE pursuant to 8 C.F.R. § 241.5.
7. **JURISDICTION AND VENUE**
8. 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); Art. I, § 9, cl. 2 of the U.S. Constitution (“Suspension Clause”); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 2201 (Declaratory Judgment Act). Because Petitioners seek to challenge their 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 under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness of their detention. *See* *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (“[T]he primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear these cases.”); *Moallin v. Cangemi*, 427 F.Supp.2d 908, 920–21 (D. Minn. 2006).
9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e)(1)(B), and 2241(d) because Petitioners are detained within this District. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) because some of the Respondents are headquartered within this District.
10. **PARTIES**

**PETITIONERS**

1. **Petitioner PETITIONER 1** is a native and citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 1 was admitted to the United States as a refugee on or about February 23, 2012, at the age of 17. Mr. PETITIONER 1 subsequently adjusted his status to that of a lawful permanent resident, retroactive to the date of his entry. Mr. PETITIONER 1 was detained by ICE on or about August 15, 2019. Mr. PETITIONER 1 had accepted a removal order at his immigration hearing on November 13, 2019, thereby waiving appeal and making the order administratively final on that date. He was not represented by an attorney. Mr. PETITIONER 1 has been held in continued post-order detention for **292 days**, nearly 10 months. Mr. PETITIONER 1 is currently detained at Sherburne County Jail in Elk River, Minnesota.
2. **Petitioner PETITIONER 2** is a native and citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 2 was admitted as a refugee on or about August 16, 2011, at the age of 16. Mr. PETITIONER 2 adjusted his status to that of a lawful permanent resident on June 18, 2013, retroactive to the date of his entry. Mr. PETITIONER 2 was detained by ICE on February 13, 2019. Mr. PETITIONER 2 accepted his removal order on June 6, 2019, and his removal order became administratively final on that date. Mr. PETITIONER 2 has been held in continuous post-order detention for **452 days**, over 15 months. Mr. PETITIONER 2 is currently detained at Freeborn County Jail in Albert Lea, Minnesota.
3. **Petitioner PETITIONER 3** is a native of Thailand and a citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 3 was admitted to the United States as a refugee in approximately 2008, at the age of 10. He subsequently adjusted his status to that of a lawful permanent resident, retroactive to the date of his entry. Mr. PETITIONER 3 was detained by ICE on or about January 30, 2020. Mr. PETITIONER 3 accepted his removal order on February 20, 2020, and his removal order became administratively final on that date. Mr. PETITIONER 3 has been held in continuous post-order detention for **193 days**. Mr. PETITIONER 3 is currently detained at Carver County Jail in Chaska, Minnesota.
4. **Petitioner PETITIONER 4** is a native and citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 4 was admitted to the United States as a refugee on or about June 18, 2008, at the age of 14. Mr. PETITIONER 4 adjusted his status to that of a lawful permanent resident on December 10, 2009, retroactive to the date of his entry. ICE detained Mr. PETITIONER 4 on or about November 22, 2019, and his initial immigration court hearing took place December 10, 2019. Mr. PETITIONER 4 was not represented by counsel at the hearing and accepted his removal order. Mr. PETITIONER 4 waived appeal and the order became administratively final on that date. Mr. PETITIONER 4 has been held in continued post-order detention for **265 days**, just shy of nine months. Mr. PETITIONER 4 is currently detained at Sherburne County Jail in Elk River, Minnesota.
5. **Petitioner PETITIONER 5** is a native of Thailand and a citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 5 was admitted to the United States as a refugee on November 16, 2009, at the age of 12. He subsequently adjusted his status to that of a lawful permanent resident, retroactive to his date of entry. ICE detained Mr. PETITIONER 5 on or about July 1, 2019. Mr. PETITIONER 5 filed several applications for relief, all of which were denied by the Immigration Judge, and he was ordered removed on August 6, 2019. His appeal was dismissed by the Board of Immigration Appeals on February 24, 2020. He currently has a petition for review of that decision pending before the Court of Appeals for the Eighth Circuit in case number 20-XXXX; that petition does not affect the finality of his removal order. Mr. PETITIONER 5 has been held in continuous post-order detention for **189 days**. Mr. PETITIONER 5 is currently detained at Freeborn County Jail in Albert Lea, Minnesota.
6. **Petitioner PETITIONER 6** is a native of Thailand and a citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 6 entered the United States as a refugee in approximately 2009, at the age of 14. He subsequently adjusted his status to that of a lawful permanent resident. ICE detained Mr. PETITIONER 6 and placed him in removal proceedings on or about September 19, 2019. Mr. PETITIONER 6 accepted a removal order just seven days later, on September 26, 2019. Mr. PETITIONER 6 has been held in continuous post-order detention for **340 days**, over 11 months. Mr. PETITIONER 6 is currently detained at Freeborn County Jail in Albert Lea, Minnesota.
7. **Petitioner PETITIONER 7** is a native of Thailand and a citizen of Burma, and a member of the Karen ethnic minority. Mr. PETITIONER 7 entered the United States as a refugee, as a child, and subsequently adjusted his status to that of a lawful permanent resident. ICE detained Mr. PETITIONER 7 on or about November 26, 2019. Mr. PETITIONER 7 accepted an order of removal at a hearing on January 29, 2020, and the order became administratively final on that date. Mr. PETITIONER 7 has been held in continuous post-order detention for **215 days**, over seven months. Mr. PETITIONER 7 is currently detained at Sherburne County Jail in Elk River, Minnesota.

**RESPONDENTS**

1. **Respondent William Barr** is being sued in his official capacity as the Attorney General of the United States and the head of the Department of Justice, which encompasses the Board of Immigration Appeals and the immigration judges as a subunit—the Executive Office for Immigration Review. Attorney General Barr shares responsibility for implementation and enforcement of the immigration laws, including detention statutes, along with Respondent Wolf. Attorney General Barr is a legal custodian of the Petitioners. Attorney General Barr’s official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.
2. **Respondent Chad Wolf** is being sued in his official capacity as the Acting Secretary of the Department of Homeland Security. In this capacity, Acting Secretary Wolf is responsible for the administration of the immigration laws pursuant to § 103(a) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1103(a), routinely transacts business in the District of Minnesota, supervises the St. Paul ICE Field Office, and is legally responsible for pursuing the Petitioners’ detention and removal, and as such is a legal custodian of the Petitioners. Acting Secretary Wolf’s official address is 245 Murray Lane SW, Washington, D.C. 20528.
3. **Respondent Matthew Albence** is being sued in his official capacity as the Senior Official Performing the Duties of Director (“SOPDD”) of Immigration and Customs Enforcement, a sub-unit of the Department of Homeland Security. In that capacity, SOPDD Albence has supervisory capacity over ICE personnel in Minnesota, and he is the head of the agency that retains legal custody of the Petitioners. SOPDD Albence’s official address is 500 12th Street SW, Washington, D.C. 20536.
4. **Respondent Shawn Byers** is being sued in his official capacity as the Acting Field Office Director for the St. Paul Field Office for ICE within DHS. In that capacity, Acting Field Director Byers has supervisory authority over the ICE agents responsible for detaining the Petitioners. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.
5. **Respondent Joel Brott** is being sued in his official capacity as the Sheriff of Sherburne County, Minnesota. In that capacity, Sheriff Brott is responsible for the Sherburne County Jail—a detention facility under contract with ICE and the physical location where Petitioners PETITIONER 1, PETITIONER 4, and PETITIONER 7 are currently in custody. The address for Sherburne County Jail is 13880 Business Center Drive NW, Elk River, Minnesota 55330.
6. **Respondent Kurt Freitag** is being sued in his official capacity as the Sheriff of Freeborn County, Minnesota. In that capacity, Sheriff Freitag is responsible for the Freeborn County Jail—a detention facility under contract with ICE and the physical location where Petitioners PETITIONER 2, PETITIONER 5, and PETITIONER 6 are currently in custody. The address for Freeborn County Jail is 411 South Broadway Avenue, Albert Lea, Minnesota 56007.
7. **Respondent Jason Kamerud** is being sued in his official capacity as the Sheriff of Carver County, Minnesota. In that capacity, Sheriff Kamerud is responsible for the Carver County Jail—a detention facility under contract with ICE and the physical location where the Petitioner PETITIONER 3 is currently in custody. The address for Sherburne County Jail is 606 East Fourth Street, Chaska, Minnesota 55318.
8. **EXHAUSTION**
9. Petitioners have exhausted their administrative remedies as required by law. Judicial action is their only remedy. Petitioners are being detained despite their removal being significantly unlikely in the foreseeable future. Petitioners have completed custody reviews with ICE, which ignored ICE’s inability to remove them and arbitrarily decided to continue detention. There is no appeal process for custody decisions in this situation.
10. No statutory exhaustion requirement applies to Petitioners’ claim of unlawful detention.
11. The immigration court does not have jurisdiction to order Petitioners released.
12. No administrative remedies currently exist under the law to challenge indefinite post-order detention where there is no reasonable likelihood that removal will occur in the foreseeable future.
13. **FACTUAL ALLEGATIONS & PROCEDURAL HISTORY**

**PETITIONER PETITIONER 1**

1. Petitioner PETITIONER 1 is a 25-year-old native and citizen of Burma.[[2]](#footnote-3) Mr. PETITIONER 1 is a member of the Karen ethnic group. Mr. PETITIONER 1 fled Burma and was admitted to the United States as a refugee on or about February 23, 2012, when he was 17 years old. Mr. PETITIONER 1 later became a lawful permanent resident of the United States, retroactive to the date of his original entry.
2. ICE detained Mr. PETITIONER 1 and placed him in removal proceedings on or about August 15, 2019, following criminal convictions in Minnesota.
3. Mr. PETITIONER 1 was ordered removed by an Immigration Judge on November 13, 2019, and waived appeal. The order became administratively final and the removal period began to run that same day.
4. Mr. PETITIONER 1’s detention was reviewed by ICE after 90 and 180 days. Both times, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future.
5. To the best of Mr. PETITIONER 1’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 1 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 1 has now been detained by ICE for 381 days. He has been detained pursuant to 8 U.S.C. § 1231 for 292 days. It has been 112 days since his 180-day review.
7. Mr. PETITIONER 1 is currently detained at Sherburne County Jail in Elk River, Minnesota.

**PETITIONER PETITIONER 2**

1. Petitioner PETITIONER 2 is a 25-year-old native and citizen of Burma. Ex. A at 1, 4, 10. Mr. PETITIONER 2 is a member of the Karen ethnic group. Mr. PETITIONER 2 fled Burma and was admitted to the United States as a refugee on or about August 6, 2011, when he was 16 years old. Mr. PETITIONER 2 became a lawful permanent resident of the United States on June 18, 2013, retroactive to the date of his original entry.
2. ICE detained Mr. PETITIONER 2 and placed him in removal proceedings on February 13, 2019, following criminal convictions in Iowa. *Id.* at 3, 10.
3. Mr. PETITIONER 2 was ordered removed by an Immigration Judge on June 6, 2019, and waived appeal. *Id.* at 1. The order became administratively final and the removal period began to run that same day. *Id.* at 1, 10.
4. Mr. PETITIONER 2 completed a travel document request packet following entry of the removal order, and ICE forwarded the packet to the Burmese Embassy on June 25, 2019. *Id.* at 11.
5. Mr. PETITIONER 2 was interviewed by the Burmese Embassy on September 12, 2019. *Id.*
6. According to ICE, “on or before December 11, 2019, the Ministry of Home Affairs approved the request for [Mr.] PETITIONER 2’s travel documents.” *Id.* The Burmese Ministry of Immigration, however, has not issued the travel document. *Id.*
7. Mr. PETITIONER 2’s detention was reviewed by ICE on August 30, 2019 (90 days), December 11, 2019 (180 days), April 1, 2020 (270 days), and July 7, 2020 (one year). *See id.* at 2, 3, 11–12. Each time, ICE decided to continue detention on the basis that “ICE is currently working with the government of Myanmar to secure a travel document for your removal from the United States. A travel document from the Government of Myanmar is expected, therefore you are to remain in ICE custody at this time.” *Id.* at 2, 3; *see also id.* at 11–12. In his 270-day review decision, “ICE noted that documents typically issue in 6 to 9 months from Burma.” *Id.* at 16.
8. On January 21, 2020, after Mr. PETITIONER 2 had been detained for 229 days, Mr. PETITIONER 2 filed a habeas petition with the U.S. District Court for the Southern District of Iowa. *XXXX.* On March 18, 2020, after Mr. PETITIONER 2 had been detained for 286 days, his case was transferred to the Northern District of Iowa. *See XXXX*. On August 10, 2020, after 431 days of post-order detention, the court dismissed his petition, concluding that, despite this length of detention, Mr. “PETITIONER 2’s length of detention has not yet reached a length so extreme that release is warranted.” Ex. A at 16. Mr. PETITIONER 2 does not know how much longer he must be detained before his length of detention is considered “extreme.”
9. To the best of Mr. PETITIONER 2’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 2 is unaware of any timeframe for his removal.
10. Mr. PETITIONER 2 has now been detained by ICE for 565 days, over 18 months. He has been detained pursuant to 8 U.S.C. § 1231 for a staggering 452 days, over 15 months. It has been 272 days, nine months, since his 180-day review. Mr. PETITIONER 2 was due for his fifth custody review on or about August 29, 2020—his 450-day review—but expects the outcome to be the same as the last four.
11. Mr. PETITIONER 2 is no longer detained in Iowa, and is currently detained at Freeborn County Jail in Albert Lea, Minnesota.

**PETITIONER PETITIONER 3**

1. Petitioner PETITIONER 3 is a 22-year-old native of Thailand and citizen of Burma. Ex. D at 2. Mr. PETITIONER 3 is a member of the Karen ethnic group. Mr. PETITIONER 3 was born in a refugee camp in Thailand after his parents fled Burma. *See id.* He was admitted to the United States as a refugee on May 17, 2007, when he was nine years old. *Id.* at 4. Mr. PETITIONER 3 became a lawful permanent resident of the United States on April 21, 2009, retroactive to the date of his original entry. *Id.*
2. ICE detained Mr. PETITIONER 3 and placed him in removal proceedings on or about January 30, 2020, following criminal convictions in South Dakota. *Id.* at 2, 3.
3. Mr. PETITIONER 3 was ordered removed by an Immigration Judge on February 20, 2020, and waived appeal. Ex. D at 1. The order became administratively final and the removal period began to run that same day.
4. Mr. PETITIONER 3’s detention was reviewed by ICE after 90 and 180 days. After 90 days, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future. He has not yet received his 180-day review decision, but expects that ICE will decide to continue detention.
5. To the best of Mr. PETITIONER 3’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 3 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 3 has now been detained by ICE for 214 days. He has been detained pursuant to 8 U.S.C. § 1231 for 193 days. He is waiting for a decision on his 180-day review.
7. Mr. PETITIONER 3 is currently detained at Carver County Jail in Chaska, Minnesota.

**PETITIONER PETITIONER 4**

1. Petitioner PETITIONER 4 is a 26-year-old native and citizen of Burma. Ex. B at 1, 3. Mr. PETITIONER 4 is a member of the Karen ethnic group. Mr. PETITIONER 4 fled Burma and was admitted to the United States as a refugee on or about June 18, 2008, when he was 14 years old. *Id.* at 1, 3. Mr. PETITIONER 4 became a lawful permanent resident of the United States on December 10, 2009, retroactive to the date of his original entry. *Id.* at 3.
2. ICE detained Mr. PETITIONER 4 and placed him in removal proceedings on or about November 22, 2019, following criminal convictions in Minnesota. *Id.* 1, 3.
3. Mr. PETITIONER 4 was ordered removed by an Immigration Judge on December 10, 2019, and waived appeal. The order became administratively final and the removal period began to run that same day.
4. Mr. PETITIONER 4’s detention was reviewed by ICE after 90 and 180 days. He was interviewed by ICE for his 180-day review on May 25, 2020. *Id.* at 4. Both times, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future.
5. To the best of Mr. PETITIONER 4’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 4 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 4 has now been detained by ICE for 283 days. He has been detained pursuant to 8 U.S.C. § 1231 for 265 days. It has been 85 days since his 180-day review.
7. Mr. PETITIONER 4 is currently detained at Sherburne County Jail in Elk River, Minnesota.

**PETITIONER PETITIONER 5**

1. Petitioner PETITIONER 5 is a 22-year-old native of Thailand and citizen of Burma. Ex. C at 1, 6, 10, 25. Mr. PETITIONER 5 is a member of the Karen ethnic group. *Id.* at 14. Mr. PETITIONER 5 was born in a refugee camp in Thailand after his parents fled Burma. *Id.* He was admitted to the United States as a refugee on November 16, 2009, when he was 12 years old. *Id.* at 1, 6, 10. Mr. PETITIONER 5 later became a lawful permanent resident of the United States, retroactive to the date of his original entry. *Id.*
2. ICE detained Mr. PETITIONER 5 and placed him in removal proceedings on or about January 31, 2019, following criminal convictions in Iowa. *Id.* at 7.
3. Mr. PETITIONER 5 filed applications for cancellation of removal and asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 11. The Immigration Judge denied his applications and ordered him removed on August 6, 2019. *Id.* at 11, 24. Mr. PETITIONER 5 appealed to the Board of Immigration Appeals, which dismissed his appeal on February 24, 2020. *Id.* at 25. Mr. PETITIONER 5 filed a petition for review at the Eighth Circuit, case number 20-1508, which is currently pending. No stay of removal has been applied for or granted. Mr. PETITIONER 5’s removal order became administratively final on February 24, 2020.[[3]](#footnote-4)
4. Mr. PETITIONER 5 received his 90-day review decision on May 21, 2020. *Id.* at 32–33. ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future. *Id.* at 33. His interview for the 180-day review was on August 7, 2020. *Id.* at 34. He has not yet received his 180-day review decision, but expects that ICE will decide to continue detention.
5. To the best of Mr. PETITIONER 5’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 5 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 5 has now been detained by ICE for 578 days, over 18 months. He has been detained pursuant to 8 U.S.C. § 1231 for 189 days. He is waiting for a decision on his 180-day review.
7. Mr. PETITIONER 5 is currently detained at Freeborn County Jail in Albert Lea, Minnesota.

**PETITIONER PETITIONER 6**

1. Petitioner PETITIONER 6 is a 25-year-old native of Thailand and citizen of Burma. Mr. PETITIONER 6 is a member of the Karen ethnic group. Mr. PETITIONER 6 was born in a refugee camp in Thailand after his parents fled Burma. He was admitted to the United States as a refugee in approximately 2009, when he was about 14 years old. Mr. PETITIONER 6 later became a lawful permanent resident of the United States, retroactive to the date of his original entry.
2. ICE detained Mr. PETITIONER 6 and placed him in removal proceedings on or about September 19, 2019, following criminal convictions in Minnesota.
3. Mr. PETITIONER 6 was ordered removed by an Immigration Judge on September 26, 2019, just seven days after he was detained, and waived appeal. The order became administratively final and the removal period began to run that same day.
4. Mr. PETITIONER 6’s detention was reviewed by ICE after 90 and 180 days. Both times, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future.
5. To the best of Mr. PETITIONER 6’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 6 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 6 has now been detained by ICE for 347 days, over 11 months. He has been detained pursuant to 8 U.S.C. § 1231 for 350 days. It has been 167 days since his 180-day review. In a few weeks, he will receive a one-year custody review.
7. Mr. PETITIONER 6 is currently detained at Freeborn County Jail in Albert Lea, Minnesota.

**PETITIONER PETITIONER 7**

1. Petitioner PETITIONER 7 is a 24-year-old native of Thailand and citizen of Burma. Mr. PETITIONER 7 is a member of the Karen ethnic group. Mr. PETITIONER 7 was born in a refugee camp in Thailand after his parents fled Burma. He was admitted to the United States as a refugee as a child. Mr. PETITIONER 7 later became a lawful permanent resident of the United States, retroactive to the date of his original entry.
2. ICE detained Mr. PETITIONER 7 and placed him in removal proceedings on or about November 26, 2019, following criminal convictions in Minnesota.
3. Mr. PETITIONER 7 was ordered removed by an Immigration Judge on January 29, 2020, and waived appeal. The order became administratively final and the removal period began to run that same day.
4. Mr. PETITIONER 7’s detention was reviewed by ICE after 90 and 180 days. Both times, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future.
5. To the best of Mr. PETITIONER 7’s knowledge, no travel document has been issued by the government of Burma. He believes the government of Burma is not going to issue a travel document. Mr. PETITIONER 7 is unaware of any timeframe for his removal.
6. Mr. PETITIONER 7 has now been detained by ICE for 279 days. He has been detained pursuant to 8 U.S.C. § 1231 for 215 days.
7. Mr. PETITIONER 7 is currently detained at Sherburne County Jail in Elk River, Minnesota.

**REPATRIATION FLIGHTS TO BURMA**

1. Visa sanctions are currently in place against Burma, and the country is currently listed as a “recalcitrant country” by ICE, as “refusing to allow charter removal flights into the country, and denials or delays in issuing travel documents.” ICE, “Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act” (Aug. 13, 2020), *available at* https://www.ice.gov/visasanctions (accessed Aug. 24, 2020); *see also* DHS, “DHS Announces Implementation of Visa Sanctions” (July 10, 2018), *available at* https://www.dhs.gov/news/2018/07/10/dhs-announces-implementation-visa-sanctions (accessed Aug. 24, 2020).
2. On March 30, 2020, the Burmese government suspended all international commercial flights into the country, and the suspension has been extended month by month, and is currently in effect until at least August 31, 2020. U.S. Embassy in Burma, “COVID-19 Information” (Aug. 21, 2020), *available at* https://mm.usembassy.gov/covid-19-information (accessed Aug. 24, 2020).
3. The Vice President of Burma has stated that airports are not likely to reopen for international commercial passenger flights until at least October 2020. Aung Thiha, “Int’l Passenger Flights Likely Banned Until October: Myanmar Vice-President,” The Irrawaddy (July 10, 2020), *available at* https://www.irrawaddy.com/news/burma/intl-passenger-flights-likely-banned-october-myanmar-vice-president.html (accessed Aug. 24, 2020).
4. While some relief flights are permitted, the Burmese government has thus far only allowed repatriation flights from Thailand, Singapore, India, and South Korea. *Id.*
5. On information and belief, Burma has not issued travel documents for Petitioners. Petitioners have spoken to the Burmese Embassy, which has informed them that it *had not issued travel documents and* *will not* do so. *See* Ex. A at 12 (recognizing that travel documents had not been issued after 431 days in the case of Mr. PETITIONER 2).
6. The inability of ICE to obtain travel documents and execute the removal of Petitioners is evident from the length of time some of the Petitioners have been awaiting their own removal. Petitioner PETITIONER 2 has been subjected to 446 consecutive days of post-order detention. After 180 days, ICE decided to continue his detention on the basis that “ICE is currently working with the government of Myanmar to secure a travel document for your removal from the United States. A travel document from the Government of Myanmar is expected, therefore you are to remain in ICE custody at this time.” Ex. A at 2. The *exact same language* was used seven months later to deny his one-year custody review. Mr. PETITIONER 2 had “completed a travel document request packet, which was forwarded to Burma on June 25, 2019. On September 12, 2019, the Embassy of Burma interviewed PETITIONER 2 and on or before December 11, 2019, the Ministry of Home Affairs approved the request for [Mr.] PETITIONER 2’s travel documents. The final step is the issuance of travel documents from the Ministry of Immigration, which ICE believes to be forthcoming.” Ex. A at 16. To this date, and contrary to the likely assertions of Respondents, there is *still* no travel document for Mr. PETITIONER 2 after over 14 months. If this case is any indication, some Petitioners in this case will still not have travel documents and will still be languishing in jail eight months from now.
7. In another recent case, a Burmese national filed a *pro se* petition, stating that his removal order became final on July 23, 2019, and he completed an interview with the Burmese Embassy on September 30, 2019. Memorandum, *XXXX*. At the time of his filing, on June 16, 2020, there was still no travel document. The petition was dismissed as moot on July 13, 2020, after ICE agreed to release Mr. XXXX. *See id.*, XXXX. Presumably, there was still no travel document at that time, no ability to execute his removal order, and no significant likelihood of removal in the reasonably foreseeable future.
8. ICE claimed in Mr. PETITIONER 2’s case that “documents typically issue in 6 to 9 months from Burma,” Ex. A at 16, but that does not reflect the current situation with COVID-19. Nor does it comport with Burma’s inclusion on the “recalcitrant countries” list. And, of the eight Burmese citizens who are currently being detained in excess of 180 days in Minnesota, half have been detained longer than nine months (Mr. PETITIONER 2 14 and a half months, Mr. PETITIONER 6 11 months, Mr. PETITIONER 1 nine and a half months, and Mr. XXXX nine months). Mr. PETITIONER 4 has also been detained just short of nine months. In fact, the average length of detention among the eight is currently 277 days—nine months and one week. Mr. XXXX had not been issued a travel document by the time he was released, after just 10 days shy of a year.
9. Petitioners have exhausted their administrative remedies. No other court of competent jurisdiction has the authority to order the release of the Petitioners.
10. Without the intervention of this Court, Petitioners are guaranteed to spend months, if not a year or longer, detained pursuant to § 1231, even though ICE is unable to remove them.
11. **LEGAL FRAMEWORK**
    1. **STATUTORY & REGULATORY FRAMEWORK**
12. 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).
13. 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).

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. **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 § 1231 “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” *Id.* At 689–90. “Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority.” *Id.* at 699. “In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal.” *Id.* “[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.” *Id.* at 699–700. If continued detention is unreasonable, “the alien’s release may and should be conditioned on any of the various forms of supervised released that are appropriate in the circumstances.” *Id.* at 700.
7. 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); *see also Zadvydas*, 533 U.S. at 701.
8. Courts have generally found no significant likelihood of removal in five types of cases:

(1) where the detainee is stateless and no country will accept [him or her]; (2) where the detainee’s country of origin refuses to issue a travel document; (3) where there is no repatriation agreement between the detainee’s native country and the United States; (4) where political conditions in the country of origin render removal virtually impossible; and (5) where a foreign country’s delay in issuing travel documents is so extraordinarily long that the delay itself warrants an inference that the documents will likely never issue.

*Ahmed v. Brott*, No. 14-cv-5000 (DSD/BRT), 2015 WL 1542131, at \*4 (D. Minn. Mar. 17, 2015) (collecting cases), report and recommendation adopted, 2015 WL 1542155 (D. Minn. Apr. 7, 2015). “In other words, for there to be no significant likelihood of removal in the foreseeable future, there must be some indication that the government is either unwilling or, due to seemingly insurmountable barriers, incapable executing an alien’s removal.” *Id.*

1. In some cases, this Court has found that diligent efforts on the part of ICE and the foreign government to produce travel documents, paired with the regular occurrence of repatriation flights, demonstrates a significant likelihood of removal in the foreseeable future. *See, e.g.*, *Ahmed*, 2015 WL 1542131, at \*4 (“Where, as here, ICE has made diligent and reasonable efforts to obtain travel documents, the alien’s native country ordinarily accepts repatriation, and that country is acting on an application for travel documents, most courts conclude that there is a significant likelihood of removal in the foreseeable future.” (internal quotation marks omitted)); *Jaiteh v. Gonzales*, No. 07-cv-1727, 2008 WL 2097592, at \*2–3 (D. Minn. Apr. 28, 2008) (“If travel documents are pending before a foreign government, and a consular official suggests that the documents are forthcoming, this Court cannot find no significant likelihood of removal.”).
2. However, where the government’s only evidence of the likelihood of removal “consists almost entirely of generalities and hypothetical statements,” such as where the country of removal “has *not* told ICE that it would *not* issue a travel document” or simply that the country’s “issuance of travel documents is historically slow,” the government has not met its burden of demonstrating that removal is significantly likely in the reasonably foreseeable future. *Bah v. Cangemi*, 489 F.Supp.2d 905, 923 (D. Minn. 2007). “Where a foreign country delays issuance of travel documents for an extraordinarily long period, it is possible to infer . . . that the documents will not issue at all, and thus that there is no significant likelihood of removal.” *Jaiteh*, 2008 WL 2097592, at \*3.
3. **CAUSES OF ACTION**

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

1. Petitioners re-allege and incorporate by reference the paragraphs above.
2. Petitioners’ detention has exceeded the six-month presumptive threshold under *Zadvydas*. Each petitioner has been detained in excess of 180 days under 8 U.S.C. § 1231, and as long as 452 days. The average post-order length of detention is now 277 days.
3. Although Respondents have twice, if not three or four times, denied Petitioners’ release following 90-day and 180-day post order custody review, Respondents have not articulated a justification for the continued excessive detention of Petitioners. Burma has not apparently issued any travel documents, and, due to the ongoing COVID-19 pandemic, Burma has banned international commercial flights. Thus, it is not possible to execute removal of Petitioners in the reasonably foreseeable future.
4. Therefore, 8 U.S.C. § 1231 does not authorize detention of Petitioners as removal is not likely to occur in the reasonably foreseeable future.

**COUNT TWO: VIOLATION OF FIFTH AMENDMENT**

**SUBSTANTIVE DUE PROCESS**

1. Petitioners re-allege and incorporate 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 the Petitioners—in fact, it is a near impossibility due to the recalcitrance of Burma *and* the COVID-19 pandemic—their detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment’s guarantee of Due Process.

**PRAYER FOR RELIEF**

WHEREFORE, the Petitioners ask this Court for the following relief:

1. Assume jurisdiction over this matter;
2. Expedite consideration of this action pursuant to 28 U.S.C. § 1657 because it is an action brought under chapter 153 (habeas corpus) of Title 28;
3. Pursuant to 28 U.S.C. § 2243 issue an order directing the Respondents to show cause within 3 days why the writ of habeas corpus should not be granted;
4. Order Respondents to produce to the Court and Petitioners any valid travel documents for Petitioners in their possession;
5. Order Respondents to produce to the Court and the Petitioners evidence demonstrating their ability to execute the removal of Petitioners to Burma in the reasonably foreseeable future;
6. Grant the Petitioners a writ of habeas corpus, jointly, severally, or in the alternative, directing the Respondents to immediately release Petitioners from custody with any conditions deemed necessary pursuant to 8 C.F.R. § 241.5; and
7. Grant any and all further relief this Court deems just and proper.

DATED: August 31, 2018 Respectfully submitted,

/s *John Bruning*

John Bruning (MN #0399174)

THE ADVOCATES FOR HUMAN RIGHTS

330 Second Avenue South, Suite 800

Minneapolis, Minnesota 55401

(612) 746-4668

jbruning@advrights.org

*Pro Bono Counsel for Petitioners*

1. Also known as Myanmar. [↑](#footnote-ref-2)
2. Unfortunately, as many of the Petitioners were not represented by counsel and had expected to have been deported by now, they have not maintained copies of records. Records have also been lost as they were transported between detention centers in different states. Some documents have pages missing. [↑](#footnote-ref-3)
3. The Warning for Failure to Depart issued to Mr. PETITIONER 5 lists February 10, 2011, as the date the removal order became administratively final. Ex. C at 30. This is clearly erroneous. [↑](#footnote-ref-4)