**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

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| **NAME,** Petitioner, v.**Matthew G. WHITAKER**, Acting Attorney General; **Kirstjen NIELSEN**, Secretary, Department of Homeland Security; **Ronald VITIELLO**, Acting Director, Immigration and Customs Enforcement; **Peter BERG**, Director, St. Paul Field Office Immigration and Customs Enforcement; and **Joel BROTT**, Sheriff, Sherburne County,   Respondents. | Case No.: 18-cv-\_\_\_\_\_\_\_\_\_**PETITION FOR WRIT OF HABEAS CORPUS****8 U.S.C. § 1226(c)****28 U.S.C. § 2241** |

1. **INTRODUCTION**
2. Respondents are unlawfully detaining Petitioner under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(c). Respondents are currently unlawfully subjecting Petitioner to indefinite, prolonged detention, in excess of 6 months, despite one order from an Immigration Judge granting Petitioner relief from removal. Respondents have detained Petitioner since June 6, 2017, following his apprehension by ICE as he was released from criminal custody. Petitioner was found to be removable on the basis of a conviction for a controlled substance violation, a misdemeanor conviction from 2008. He was subsequently granted asylum by the Immigration Judge on December 18, 2017. The Department of Homeland Security appealed this grant of relief on January 12, 2018. That appeal is currently pending before the Board of Immigration Appeals. Briefing was concluded on September 17, 2018. There is no time frame for a decision. Depending on the outcome of the appeal, Petitioner may continue to be detained for further proceedings or appeals.
3. Petitioner has been unlawfully subjected to extended mandatory detention under 8 U.S.C. § 1226(c). Petitioner made an oral motion to the Immigration Court to redetermine his custody status on July 25, 2017. The Immigration Judge denied this request without a hearing, citing mandatory detention under § 1226(c). No specific findings were made in the written order. To date, no findings have been made about the dangerousness of Petitioner or his risk of flight. However, the discretionary grant of relief from removal and the IJ’s determination that Petitioner’s criminal offense is not particularly serious suggests that the Immigration Judge did not consider him to be a danger to the community because the Immigration Judge exercised discretion favorably. Indeed, Petitioner does not have a history of violent criminal offenses; rather, his only conviction is ….
4. The few Circuit Courts to have reviewed the question have found that mandatory detention cannot be applied where the government is substantially unlikely to prevail or where the alien has a substantial argument against removability, such as where there is a prima facie claim to relief. See Tijani v. Willis, 430 F.3d 1241, 1244–47 (9th Cir. 2005) (Tashima, J., concurring); Gonzalez v. O’Connell, 355 F.3d 1010, 1019–21 (7th Cir. 2004); see also Demore, 538 U.S. at 578 (Breyer, J., dissenting) (arguing that the “substantial question of law or fact” standard found in the federal bail statute, 18 U.S.C. § 3143(b)(1)(B), should be applied in the immigration context, as it would effectively balance the “special governmental interest in detention” while protecting “a detained alien’s liberty interest”); Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (requiring a bond hearing when it is substantially unlikely that the government will prevail on a charge of removability specified under 8 U.S.C. § 1226(c)(1)); Report and Recommendation, Muse v. Sessions, No. 18-cv-0054-PJS-LIB, at 11 (D. Minn. Apr. 12, 2018), ECF No. 9 (“It is inconceivable to the undersigned that those doubts [of the Supreme Court in Zadvydas regarding the constitutionality of indefinite detention] would somehow be less where the individual being detained has actually been granted relief from removal but is still being detained in the absence of an order of removal.”), adopted as modified, 2018 WL 4466052 (D. Minn. Sept. 18, 2018). Where the alien is significantly likely to prevail against removal, and especially where the alien has already been granted relief, continued mandatory detention without any individualized assessment violates fundamental principles of due process.
5. Because Petitioner has been granted relief from removal continued mandatory detention serves no legitimate purpose and, due solely to the government’s appeal, there is no foreseeable end date to this detention. Such detention falls squarely outside the bounds of the INA, the U.S. Constitution, Supreme Court precedent, and decisions from this District Court. Petitioner’s pre-removal order detention is lawful only while a determination of removability is pending and Petitioner is removable. Demore v. Kim, 538 U.S. 510, 528 (2003); Zadvydas v. Davis, 533 U.S. 678, 697 (2001). Such is not the case here. Petitioner has been granted relief from removal and, therefore, it is substantially unlikely that he will be removed. Detention, therefore, is no longer authorized under § 1226(c). DHS cannot unilaterally deprive Petitioner of due process simply by appealing, without some form of oversight.
6. Prolonged detention, or detention that has no obvious termination date, is unlawful under the Due Process Clause. Zadvydas, 533 U.S. at 690–92; see also Demore, 538 U.S. at 529 n.12 (referring to “[t]he very limited time of the detention at stake under § 1226(c)”). The mandatory detention statute “cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment . . . .” Rodriguez v. Robbins, 715 F.3d 1127, 1137–38 (9th Cir. 2013), aff’d, 804 F.3d 1060, 1079 (9th Cir. 2015), vacated sub nom. Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (rejecting construction of statute to require automatic bond hearings to avoid constitutional question and remanding for consideration of constitutionality of statute); see also Demore, 538 U.S. at 532 (Kennedy, J., concurring) (“Were there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.” ); 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.) (ordering petitioner released whether he was subject to pre-order or post-order detention).
7. Petitioner has already been detained for 463 days, over 15 months, following his apprehension by DHS on June 6, 2017, pursuant to § 1226(c). He has been detained for almost six months—and counting—with a grant of relief in hand. This detention is more than two and a half times the presumptively reasonable period established in Zadvydas and the period of detention contemplated in Demore. See Bah, 489 F.Supp.2d at 919–20; Moallin, 427 F.Supp.2d at 926. It is certain that his detention will continue at least several more months without the intervention of this Court.[[1]](#footnote-2) See Chavez-Alvarez v. Warden York County Prison, 783 F.3d 469, 477–78 (3d Cir. 2015) (“[W]e have little doubt that the parties had, by then, a good understanding of the credibility and complexity of [the petitioner’s] case. Because of this, they could have reasonably predicted that Chavez-Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer.”).
8. To remedy this unlawful detention, Petitioner seeks declaratory and injunctive relief in the form of immediate, unconditional release from detention.
9. **JURISDICTION AND VENUE**
10. 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 Petitioner seeks to challenge his custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this court. Federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness of their detention. See Demore v. Kim, 538 U.S. 510, 516–17 (2003); Moallin v. Cangemi, 427 F.Supp.2d 908, 920–21 (D. Minn. 2006).
11. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e)(1)(B), and 2241(d) because Petitioner is 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.
12. **PARTIES**
13. Petitioner NAME is a native and citizen of Somalia. Petitioner entered the United States as a refugee on or about June 26, 1996, after living in a refugee camp in Kenya. He later adjusted his status to that of a Lawful Permanent Resident. He was convicted in Minnesota state court for misdemeanor possession of a controlled substance, to wit: … . Petitioner was sentenced to 364 days incarceration, stayed for two years with concurrent supervised probation. He was released from criminal court custody and immediately detained by Immigration and Customs Enforcement pending continued removal proceedings. He was charged with removability for a conviction for a controlled substance violation, 8 U.S.C. § 1227(a)(2)(B)(i); to wit, the Possession of Controlled Substance charge. On July 25, 2017, the Immigration Judge sustained the charge of removability for the controlled substance violation, and dismissed the charge related to the aggravated felony. On December 18, 2018 the Immigration Judge granted Petitioner relief from removal in the form of Cancellation of Removal for Lawful Permanent Residents and, in the alternative, Asylum and withholding of removal. The Immigration Judge specifically did not reach findings on Petitioner’s application for relief under the Convention Against Torture, as three forms of relief from removal were already granted. DHS appealed that decision and the Board of Immigration Appeals sustained the appeal in part and remanded the case to the Immigration Judge for further proceedings on May 31, 2018. Petitioner is currently detained by ICE at Sherburne County Jail in Elk River, Minnesota. On August 23, 2018, Petitioner had a final hearing on the applications for asylum, withholding of removal, and relief under the Convention Against Torture; the IJ indicated she would grant relief again but has not yet issued a decision, primarily due to DHS’s intent to appeal. Petitioner has been in ICE custody for 463 days—over 15 months.
14. Respondent Matthew G. Whitaker is being sued in his official capacity as the Acting 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. Acting Attorney General Whitaker shares responsibility for implementation and enforcement of the immigration laws, including detention statutes, along with Respondent Nielsen. Acting Attorney General Whitaker is a legal custodian of Petitioner. Acting Attorney General Whitaker’s official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.
15. Respondent Kirstjen Nielsen is being sued in her official capacity as the Secretary of the Department of Homeland Security. In this capacity, Secretary Nielsen 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 Petitioner’s detention and removal, and as such is a legal custodian of Petitioner. Secretary Nielsen’s official address is 245 Murray Lane SW, Washington, D.C. 20528.
16. Respondent Ronald Vitiello is being sued in his official capacity as the Acting Director of Immigration and Customs Enforcement, a sub-unit of the Department of Homeland Security. In that capacity, Acting Director Vitiello has supervisory capacity over ICE personnel in Minnesota, and he is the head of the agency that retains legal custody of Petitioner. Acting Director Homan’s official address is 500 12th Street SW, Washington, D.C. 20536.
17. Respondent Peter Berg is being sued in his official capacity as the Field Office Director for the St. Paul Field Office for ICE within DHS. In that capacity, Field Director Berg has supervisory authority over the ICE agents responsible for detaining Petitioner. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.
18. 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 Petitioner is currently in custody. The address for Sherburne County Jail—and the Sherburne County Sheriff’s Office—is 13880 Business Center Drive Northwest, Elk River, MN 55330.
19. **EXHAUSTION**
20. Petitioner has exhausted his administrative remedies as required by law. Judicial action is his only remedy. Petitioner is being detained pursuant to the mandatory detention provisions of 8 U.S.C. § 1226(c).
21. No statutory exhaustion requirement applies to Petitioner’s claim of unlawful detention.
22. The immigration agencies have no jurisdiction over constitutional claims. Matter of Akram, 25 I&N Dec. 874, 880 (BIA 2012); Matter of Fuentes-Campos, 21 I&N Dec. 905, 912 (BIA 1997); Matter of U–M–, 20 I&N Dec. 327 (BIA 1991).
23. The Immigration Courts do not have jurisdiction over custody or bond determinations for an alien subject to mandatory detention. No jurisdiction exists where the alien has been found removable but then granted relief from removal.
24. No administrative remedies currently exist under the law to challenge prolonged mandatory detention where the Petitioner has already been granted relief from removal.
25. **FACTUAL ALLEGATIONS & PROCEDURAL HISTORY**
26. Petitioner NAME is a native and citizen of Somalia who entered the United States as a refugee on or about June 26, 1996. See Exs. A, B, I. He adjusted his status to that of a lawful permanent resident post-dated to his date of entry. Exs. A, B, I.
27. Petitioner left Somalia with his mother, father, and four siblings before the age of 13 because of the civil war. They lived in a refugee camp in Kenya until about 1996 when they were admitted as refugees. His mother, father and several siblings reside in the United States. Petitioner is married to a U.S. citizen spouse and has 5 U.S. citizen children. Petitioner, his parents, and his siblings are members of the Benadiri clan, a persecuted minority clan in Somalia. Id.
28. On February 8, 2008, Petitioner was convicted of a charge for misdemeanor possession of a controlled substance, to wit: Cathinone (khat), in the Minnesota state court and sentenced to 1 year of supervised release. Petitioner completed the terms of his supervised release without incident on February 7, 2009. Id.
29. Petitioner was placed into removal proceedings on September 17, 2011 and charged with removability for a conviction for a controlled substance violation under 8 U.S.C. § 1227(a)(2)(B)(i). The Notice to Appear and subsequent hearing notice was sent to an address where Petitioner no longer resided. Petitioner was ordered removed *in absentia* on January 10, 2012; however, proceedings were reopened pursuant to a motion from petitioner which was granted by the Immigration Judge on July 25, 2016. Id.
30. On June 6, 2017, Petitioner was convicted of 2 counts of Insurance Fraud – Employment of Runners, in the Hennepin County Court of the State of Minnesota. Petitioner was sentenced to 364 days incarceration, which was stayed for two years with concurrent supervised probation. He was released from criminal court custody and immediately detained by Immigration and Customs Enforcement pending continued removal proceedings. Id.
31. At the continued removal proceedings, the Department of Homeland Security brought an additional charge of removability for a conviction for an aggravated felony under 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(M), for fraud or deceit in which the loss to the victim or victims exceeds $10,000. Ex. H. The Immigration Judge sustained the charge of removability for the controlled substance violation, and dismissed the charge related to the aggravated felony on July 25, 2017, as the conviction did not involve a loss in excess of $10,000. Ex. I.
32. On December 18, 2018 the Immigration Judge granted Petitioner relief from removal in the form of Cancellation of Removal for Lawful Permanent Residents and, in the alternative, Asylum and withholding of removal. The Immigration Judge specifically did not reach findings on Petitioner’s application for relief under the Convention Against Torture, as three forms of relief from removal were already granted. Ex. I.
33. DHS appealed that decision and the Board of Immigration Appeals sustained the appeal in part and remanded the case to the Immigration Judge for further proceedings on May 31, 2018. Exs. J-M.
34. Prior to the final hearing on August 23, 2018, in response to Petitioner’s offer to settle the case with a stipulated grant of withholding, Chief Counsel for DHS informed Petitioner’s attorney that DHS would appeal any grant of relief for Petitioner, regardless of the legal merits. By stipulating to a grant of withholding, Petitioner would be waiving his right to apply for asylum and his right to challenge the BIA’s denial of cancellation through further appeals, in exchange for finality in his case and release from jail. Declaration of XXX, at ¶ 3.
35. Petitioner’s hearing on his applications for relief was held on August 23, 2018. Ex. N. The Immigration Judge indicated she intended to grant relief, but a written decision has not yet been issued. A written decision is necessary because of DHS’s intent to appeal any grant, while a summary order could have been issued if DHS did not intend to appeal. Id., ¶ 4.
36. The Immigration Judge inquired of the parties on the record whether there was any possibility of settlement, in order to spare the court’s resources. Petitioner again offered to settle, but DHS counsel refused. Id. DHS counsel has since confirmed that DHS will not accept any outcome but Petitioner’s deportation. Id. at ¶ 5.
37. Petitioner is currently detained by ICE in Sherburne County Jail in Elk River, Minnesota. He has been in ICE custody for 463 days.
38. Petitioner has exhausted his administrative remedies. Pursuant to 8 U.S.C. § 1226(c), release from custody is not allowed. Requesting review of his custody status in Immigration Court and appealing the denial to the BIA would be futile, as the Immigration Court and the Board lack the authority to hear constitutional claims such as this.
39. Respondents’ continued detention of Petitioner has significantly harmed Petitioner and his U.S. citizen wife and five U.S. citizen children, by separating him from his family and severely restricting their ability to communicate.
40. **LEGAL FRAMEWORK**

**SECTION 1226(c) MANDATORY DETENTION**

1. 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.
2. 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.”).
3. Section 1226(c) of Title 8 of the United States Code establishes the statutory authority for mandatory detention. That statute directs “the Attorney General [to] take into custody any alien who . . . is deportable by reason of having committed any offense covered in [8 U.S.C. §] 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D).” 8 U.S.C. § 1226(c)(1)(B). Such detention shall occur “when the alien is released” from non-DHS custody, typically after a criminal sentence is served. Id. at (c)(1). Release is statutorily allowed only in specific situations, such as where the alien is in witness protection. Id. at (c)(2).
4. By contrast, aliens who are not removable on the grounds established in § 1226(c)(1) are eligible for bond or conditional parole. Id. at (a)(2). If the alien cannot demonstrate that he/she is not a danger to the community or a flight risk, the Immigration Judge may continue to detain the alien, subject to future custody review. Id. at (a)(1); 8 C.F.R. § 1236.1(c)(3).
5. Detention under § 1226(c) is lawful so long as it “serves the purpose of preventing deportable aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” Demore v. Kim, 538 U.S. 510, 528 (2003). The statute authorizes “detention pending a determination of removability,” and nothing more. Zadvydas, 533 U.S. at 697.

**JUDICIAL REVIEW OF § 1226(c) MANDATORY DETENTION**

1. While the Supreme Court has not yet ruled on the constitutionality of prolonged detention under § 1226(c), the Court has referred to “[t]he very limited time of the detention at stake under § 1226(c).” Demore, 538 U.S. at 529 n.12. In Demore, the Court noted that “the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.” Id. at 530.[[2]](#footnote-3) Moreover, Demore is further limited in that it involved a noncitizen who had “conceded that he is deportable.” Id. at 522 n.6.
2. Justice Kennedy stated in his concurrence to Demore that “a lawful permanent resident alien such as [the petitioner] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified. Were there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.” Id. at 532 (Kennedy, J., concurring).
3. Every Court of Appeals to consider prolonged detention under § 1226(c) has held it to be limited to a reasonable period by the Due Process Clause. See Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016), vacated as moot, 890 F.3d 952 (11th Cir. 2018); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015), vacated by 138 S. Ct. 1260 (2018); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir.2011); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003). The Third Circuit has found that detention lasting nine months to “strain[s] any common-sense definition of a limited or brief civil detention.” Chavez-Alvarez, 783 F.3d at 477.
4. The Ninth Circuit held that Section 1226(c) “cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment. . . . [T]o avoid constitutional concerns, § 1226(c)’s mandatory language must be construed ‘to contain an implicit reasonable time limitation . . . .” Rodriguez v. Robbins, 715 F.3d 1127, 1137–38 (9th Cir. 2013), aff’d, 804 F.3d at 1079, vacated sub nom. Jennings v. Rodriguez, 138 S. Ct. 830 (2018). Under Rodriguez, the statutory authority for detention shifted after six months to § 1226(a), at which time the alien is entitled to a bond hearing. Id. at 1138.

**MANDATORY DETENTION AFTER *JENNINGS V. RODRIGUEZ***

1. The Supreme Court rejected the Ninth Circuit’s constitutional avoidance interpretation of the statute to require automatic periodic bond hearings. Jennings, 138 S. Ct. at 846. However, the Court expressly declined to reach constitutional arguments on their merits, as the Court of Appeals only decided the case on statutory grounds. Id. at 851 (“Instead, we remand the case to the Court of Appeals to consider them in the first instance.”). The constitutional arguments are now before the Court of Appeals. See Rodriguez v. Jennings, 887 F.3d 954 (9th Cir. 2018) (directing supplemental briefing on constitutional questions); Rodriguez v. Marin, No. 13-56706, 2018 U.S. App. LEXIS 10281 (9th Cir. Apr. 23, 2018) (denying motion to vacate injunction until after oral argument); Supp. Br. of Respondents, No. 13-56706 (9th Cir. July 13, 2018), ECF No. 174.
2. While Jennings has abrogated the holdings of the Circuit Court decisions cited in ¶ 4242, those cases nevertheless point to the unconstitutionality of prolonged mandatory detention. See Sopo, 825 F.3d at 1221 (“‘[T]here can be no question that [Sopo's] detention . . . without further inquiry into whether it was necessary to ensure his appearance at the removal proceedings or to prevent a risk of danger to the community, [is] unreasonable and, therefore, a violation of the Due Process Clause.’”) (alterations in original); Reid, 819 F.3d at 494 (“The concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns.”); Lora, 804 F.3d at 606 (identifying “significant constitutional concerns surrounding the application of section 1226(c)”); Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) (construing statute “to avoid constitutional concerns”); Diop, 656 F.3d at 232 (“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.”); Ly, 351 F.3d at 267 (“Since permanent detention of Permanent Resident Aliens under [§ 1226] would be unconstitutional, we construe the statute to avoid that result.”). The Jennings Court did not find prolonged detention under § 1226(c) to be constitutional permissible, but instead directed lower courts to cease construing the statute to avoid the constitutional question. This places the constitutional question front and center. See Jennings, 138 S. Ct. at 842; id. at 859 (Breyer, J., dissenting) (“The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view, the majority’s interpretation of the statute would likely render the statute unconstitutional.”); id. at 876 (Breyer, J., dissenting) (“The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required.”).[[3]](#footnote-4)
3. Indeed, even after Jennings, many district courts have continued to find the now-abrogated Circuit Court decisions to remain persuasive. See Carlos A. v. Green, 2018 U.S. Dist. LEXIS 121260, at \*14–15 (D.N.J. July 20, 2018) (finding Diop and Chavez-Alvarez to be persuasive as in Dryden but denying petition because duration was due to delays caused by petitioner); Dryden v. Green, No. 18-2686, 2018 U.S. Dist. LEXIS 103889, at \*11 (D.N.J. June 21, 2018) (“Although the Third Circuit's ultimate rulings in Diop and Chavez-Alvarez have been abrogated by Jennings, and those two cases are no longer binding upon this Court, it does not follow that those two cases should be ignored. The constitutional reasoning that underlay the Third Circuit's invocation of the constitutional avoidance canon still provides some persuasive guidance to how this Court should address § 1226(c) claims.”).

**THIS COURT’S DECISIONS ON MANDATORY DETENTION**

1. This Court has repeatedly agreed—on purely constitutional grounds—that § 1226(c) 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); Mohamed v. Sec’y, Dep’t of Homeland Sec., No. 17-cv-5055-DWF-DTS, 2018 WL 2390132 (D. Minn. May 25, 2018); Tindi v. Sec’y, Dep’t of Homeland Sec., No. 17-cv-3663-DSD-DTS, 2018 U.S. Dist. LEXIS 18472, 2018 WL 704314, at \*3 (D. Minn. Feb. 5) (finding 14 months of § 1226(c) detention to be unreasonable, where petitioner appealed to the circuit court and the circuit court stayed removal pending the outcome of Dimaya v. Sessions); 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)). 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).
2. Since Jennings, this Court has continued to find that prolonged detention under § 1226(c) violates due process. In Mohamed v. Sec’y, Dep’t of Homeland Sec., this Court found 15 months of pre-order detention to be unreasonable even though the IJ had yet to issue a decision. Report and Recommendation, No. 17-cv-5055-DWF-DTS, 2018 U.S. Dist. LEXIS 88643, 2018 WL 2392205 (D. Minn. Mar. 26, 2018), adopted by 2018 U.S. Dist. LEXIS, 2018 WL 2390132 (D. Minn. May 25, 2018). Analyzing Jennings, Demore, Moallin, and Tindi, “this Court concludes that unreasonably prolonged detention under § 1226(c) without an individualized determination of flight risk or danger to the community potentially violates a detainee's right to due process.” Id. at \*11–12; see also Report and Recommendation, Ahmed v. Sessions, No. 18-cv-0438-JRT-HB, at 16 (D. Minn. May 2, 2018), ECF No. 10; Report and Recommendation, Mohamud v. Sessions, No. 17-cv-5533-PJS-BRT, at 8 (D. Minn. Apr. 2, 2018), ECF No. 7.
3. This case is nearly identical to the facts in Mohamed. Report and Recommendation, 2018 U.S. Dist. LEXIS 88643 (D. Minn. Mar. 23, 2018), adopted by 2018 U.S. Dist. LEXIS 88169, 2018 WL 2390132 (D. Minn. May 25, 2018). There, the petitioner, also Somali, was detained for over 15 months; he was granted deferral of removal under the Convention Against Torture, DHS appealed, the BIA reversed and remanded, he was granted CAT protection again, DHS appealed again, the BIA reversed and remanded again, and he had remaining claims for protection that were not heard by the time the petition was granted. Id. at \*2–3. The two key differences further favor Petitioner: he has been granted, and likely will be granted a second time, relief that is superior to deferral under the Convention Against Torture; and there is much greater certainty about the outcome of the most recent Immigration Court proceedings—here, Petitioner will be granted relief by the Immigration Judge, while Mohamed had not received any decision or indication of outcome following the BIA’s second reversal. There is no basis to conclude that the instant Petition is distinguishable from Mohamed in any way that would justify denial of the Petition.
4. This Court has also found it to be “inconceivable” that the constitutional issues with prolonged detention “would somehow be less where the individual being detained has actually been granted relief from removal but is still being detained in the absence of an order of removal.” Report and Recommendation, Muse v. Sessions, No. 18-cv-0054-PJS-LIB, at 11 (D. Minn. Apr. 12, 2018), ECF No. 9.[[4]](#footnote-5)

**OTHER DISTRICTS’ TREATMENT OF MANDATORY DETENTION**

1. Several other Districts have also found prolonged detention under § 1226(c) to offend due process after Jennings, and have even followed this Court’s decisions as a guidepost on occasion. See Thomas C. A. v. Green, No. 18-1004, 2018 WL 4110941, 2018 U.S. Dist. LEXIS 146722, at \*16–17 (D.N.J. Aug. 29, 2018) (citing Mohamed, K. A., and Rodriguez Portillo and finding 15 month detention while petitioner’s appeal to BIA was pending was unreasonably prolonged); Vega v. Doll, No. 3:17-cv-1440, 2018 U.S. Dist. LEXIS 116307, at \*26–29, 35–36 (M.D. Pa. July 12, 2018) (following reasoning of Mohamed, collecting cases, and granting petition); Report and Recommendation, Maniar v. Warden Pine Prairie Correctional Center, No. 6:18-cv-00544-UDJ-PJH, Slip Op. at 10–11 (W.D. La. July 11, 2018), ECF No. 28 (citing Mohamed and Sajous and recommending granting petition after 10 months in detention); Rodriguez Portillo v. Hott, No. 118-470, 2018 WL 3237898, 2018 U.S. Dist. LEXIS 111368, at \*19 n.7 (E.D. Va. July 3, 2018) (relying on Mohamed and Sajous, and rejecting cases cited by government[[5]](#footnote-6) because “neither case includes analysis of the interaction of Zadvydas and Demore that persuades the Court to adopt the government’s position”); Mehmood v. United States A.G., No. 18-21095, 2018 U.S. Dist. LEXIS 104436 (S.D. Fla. June 21, 2018) (citing Mohamed, overruling recommendation to dismiss petition and allowing petitioner to file second amended petition to challenge prolonged § 1226(c) detention); see also Vallejo v. Decker, No. 18-5649, 2018 U.S. Dist. LEXIS 132366 (S.D.N.Y. Aug. 7, 2018) (finding 17 months to be unconstitutionally prolonged); K.A. v. Green, No. 18-3436, 2018 U.S. Dist. LEXIS 132482 (D.N.J. Aug. 7, 2018) (finding nineteen months prolonged where petitioner filed petition for review with circuit court and received stay); Hernandez v. Decker, No. 18-5026, 2018 U.S. Dist. LEXIS 124613, 2018 WL 3579108 (S.D.N.Y. July 25, 2018); Sajous v. Decker, No. 18-cv-2447, 2018 U.S. Dist. LEXIS 86921, 2018 WL 2357266 (S.D.N.Y. May 23, 2018); cf. Coello-Udiel v. Doll, No. 17-1414, 2018 U.S. Dist. LEXIS 80558, 2018 WL 2198720 (M.D. Pa. May 14, 2018) (performing unreasonableness analysis, but finding detention to be reasonable at 15 months because petitioner had been ordered removed).

**MANDATORY DETENTION FOLLOWING A GRANT OF RELIEF**

1. 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.”).
2. The BIA has held that detention cannot be mandatory where the government is “substantially unlikely to prevail” on its charges of removability.[[6]](#footnote-7) Matter of Joseph, 22 I&N Dec. 799, 807 (BIA 1999). Additionally, the circuit courts to have taken up the issue have found that mandatory detention cannot be applied where the respondent has a substantial argument against removability. See Tijani v. Willis, 430 F.3d 1241, 1244–47 (9th Cir. 2005) (Tashima, J., concurring); Gonzalez v. O’Connell, 355 F.3d 1010, 1019–21 (7th Cir. 2004); see also Demore, 538 U.S. at 578 (Breyer, J., dissenting) (arguing that the “substantial question of law or fact” standard found in the federal bail statute, 18 U.S.C. § 3143(b)(1)(B), should be applied in the immigration context, as it would effectively balance the “special governmental interest in detention” while protecting “a detained alien’s liberty interest”); Gayle v. Johnson, 4 F.Supp.3d 692, 721 (D.N.J. 2014).
3. The only court outside this District that appears to have addressed the situation presented here—prolonged mandatory detention of a noncitizen who has been granted relief—is the Ninth Circuit, in Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006). There, the noncitizen sought asylum at the Mexican border in 2001, and was subjected to § 1225(b) mandatory detention for a total of five years, during which time he was granted asylum twice. Id. at 1071. He was initially granted parole with a bond, but he could not afford to pay $20,000. Id. at 1073. As a result of continuances requested by then-INS, Nadarajah did not have a hearing on his asylum application until he had been detained for over 17 months. Id. He was granted asylum at that hearing, but DHS moved, four days later, to reopen proceedings to present additional evidence; that motion was denied, and DHS appealed to the BIA. Id. The BIA affirmed the appeal. Id. “In its remand order, the BIA instructed the IJ to hear evidence in the form of testimony by the DHS witness . . . even though the IJ had given the DHS two postponements in order to present its witness without the witness appearing.” Id. More than a year after the initial grant of asylum, the IJ granted asylum again because, “[a]fter assessing the new evidence, the IJ concluded that ‘this Court finds nothing of significance which would seriously alter the Court's original finding.’” Id. at 1074–75. DHS continued to detain Nadarajah and denied his requests for parole, based on a determination that he “no longer met the criteria for bond” despite three years of detention and two grants of asylum. Id. at 1075. Another fifteen months later, the BIA dismissed DHS’s second appeal and affirmed the grant of asylum. Id. However, the next day, “the BIA Chairperson referred the case to the Attorney General for review, ‘seeking guidance from the Attorney General on whether he wishes to exercise his discretion and de novo review authority in this case of national interest.’” Id. Two months later, Nadarajah remained in detention and the Ninth Circuit, on appeal from the district court’s denial of the petition for writ of habeas corpus prior to the BIA’s affirmation of asylum, ordered his release. Id.; id. at 1080.
4. The Ninth Circuit held that

[T]he government does not possess the authority under the general detention statutes to hold Nadarajah, or any other alien who is similarly situated, indefinitely. Rather, consistent with the construction given by the Supreme Court to similar statutes, the detention must be for a reasonable period, and only if there is a “significant likelihood of removal in the reasonably foreseeable future. After a presumptively reasonable six-month detention, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.”

Id. at 1079–80 (quoting Zadvydas, 533 U.S. at 701)). The court further held that “Nadarajah has established that there is no significant likelihood of removal in the reasonably foreseeable future . . . [and the] government has failed to respond with evidence sufficient to rebut that showing.” Id. at 1080. Finally, the court noted,

Demore was decided in the context of an alien convicted of a crime who was detained pending a determination of removability. Here, the IJ first determined that Nadarajah is entitled to relief in the forms of asylum and withholding of removal under the Convention Against Torture, and on remand determined again that Nadarajah is entitled to relief from removal in the form of asylum, which was affirmed by the BIA. Thus, Nadarajah's detention is more akin to the situation in Zadvydas, which was “indefinite” and “potentially permanent.” 533 U.S. at 690-91.

Nadarajah, 443 F.3d at 1080. The court was not “persuaded by the government's argument that because the Attorney General will someday review Nadarajah's case, his detention will at some point end, and so he is not being held indefinitely. No one can satisfactorily assure us as to when that day will arrive. Meanwhile, petitioner remains in detention.” Id. at 1081; see also Report and Recommendation, Muse v. Sessions, No. 18-cv-0054-PJS-LIB, at 11 (D. Minn. Apr. 12, 2018), ECF No. 9 (“It is inconceivable to the undersigned that those doubts [of the Supreme Court in Zadvydas regarding the constitutionality of indefinite detention] would somehow be less where the individual being detained has actually been granted relief from removal but is still being detained in the absence of an order of removal.”).

1. Statistics from the Executive Office for Immigration Review reveal that about two-thirds of DHS’s appeals are dismissed.[[7]](#footnote-8) See also Resp. Supp. Br., Jennings v. Rodriguez, No. 15-1204, 2017 WL 430386, at \*35 (U.S. Jan. 31, 2017) (“At least three quarters [of § 1226(c) subclass members] have a substantial defense that, if successful, will prevent entry of a removal order. Thirty-eight percent of them won their cases even while detained.”) (citations omitted).
2. Here, Petitioner has been detained over two and a half times longer than the time period addressed in Demore and Zadvydas. Additionally, distinct from the precedential cases on prolonged detention heard by this Court and others, Petitioner’s actions are not the source of the prolonged nature of his detention. Petitioner is in detention after the grant of relief by the Immigration Judge, appeal by DHS, remand by the Board of Immigration Appeals, and additional proceedings before the Immigration Judge. Further, DHS has made it clear that they will continue to appeal any grant of relief by the Immigration Judge, significantly prolonging Petitioner’s detention, a frivolous and bad-faith action that would exploit the appeal process to sidestep the courts and continue to deny Petitioner the benefits of the relief he was granted. This specific situation is not contemplated by the immigration statutes, nor is it a situation that has arisen so frequently outside of this District since Nadarajah. Such detention cannot have been intended by Congress, as to do so would create a backdoor means to violate Due Process and indefinitely detain an alien.[[8]](#footnote-9)
3. The continuing detention of Petitioner does not serve to ensure the safety of the community or the appearance of Petitioner at future court hearings; instead, it effectively punishes him for having won relief in his case and continuing to fight the government’s attempts to overturn that decision, and implicitly attempts to torture Petitioner into giving up his meritorious claims and acquiescing to DHS’s intent to deport him to Somalia in violation of the statutes, treaties, and regulations prohibiting removal when persecution or torture is likely. Petitioner has been rendered so desperate by this prolonged detention that he proposed a deal to DHS whereby he would drop his claims to asylum or further appeal of the BIA’s denial of cancellation of removal, and forever forgo his status as a Lawful Permanent Resident, if DHS would agree to stipulate to a grant of withholding of removal and not oppose his release from custody. DHS declined and indicated that detention would continue well beyond the current hearing timeframe. See XXX Decl., at ¶¶ 3, 4.

**BURDEN OF PROOF STANDARD FOR BOND**

1. Petitioner requests his unconditional release; however, if this Court were to decide to order a bond hearing before an Immigration Judge, the district courts have uniformly held that the burden must be borne by the Government to satisfy due process. *See* *Sajous v. Decker*, No. 18-2447, 2018 U.S. Dist. LEXIS 86921, 2018 WL 2357266 (S.D.N.Y. May 23, 2018) (requiring government to prove dangerousness and flight risk by clear and convincing evidence); *Pensamiento v. McDonald*, No. 18-10475-PBS, 2018 U.S. Dist. LEXIS 84818, 2018 WL 2305667 (D. Mass. May 21, 2018) (requiring government to prove dangerousness and flight risk); *see also Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (striking down detention system that placed burden on detainee to prove nondangerousness); *United States v. Salerno*, 481 U.S. 739, 750–52 (1987) (requiring proof of dangerousness by clear and convincing evidence). Therefore, placing the burden on the government by clear and convincing evidence would be most consistent with due process, especially in light of the grant of relief and the potential for Petitioner remaining in detention despite a writ of habeas corpus that, if granted, finding Petitioner’s detention to be unconstitutional.
2. **CAUSES OF ACTION**

**COUNT ONE: VIOLATION OF 8 U.S.C. § 1226 – PROLONGED DETENTION**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. “A statute permitting indefinite detention of an alien would raise a serious constitutional problem.” Zadvydas, 533 U.S. at 690.
3. While Zadvydas, id. at 697, and Demore, 538 U.S. at 528–30, presume that § 1226(c) detention is normally of short duration, that presumption has always relied on an order of removal being entered by the Immigration Judge and detention lasting less than six months.[[9]](#footnote-10) Here, however, detention has persisted for 500 days since Petitioner was taken into custody by DHS, and over half of that time has been while Petitioner has a grant relief from removal—facts that turn the holding in Demore upside-down. See Demore, 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, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”); Nadarajah, 443 F.3d at 1080 (quoted at ¶ 55, supra). Where the alien has been granted relief and the Government appeals, this justification disappears.
4. The District of Minnesota has repeatedly held that § 1226(c) detention that exceeds the Zadvydas six-month period is presumptively unreasonable. Bah, 489 F.Supp.2d at 920; Moallin, 427 F.Supp.2d at 926. This Court, in Bah, reasoned that if “removal is not reasonably foreseeable (the necessary condition for a successful Zadvydas claim), then there is no more justification for pre-removal-period detention under § 1226 than there is for post-removal-period detention under § 1231(a)(6). This is particularly true where, as here, the removal order's finality is disturbed. A removal that was legally sanctioned but factually unlikely (the basis for a Zadvydas claim) remains factually unlikely but becomes, in addition, legally uncertain.” 489 F.Supp.2d at 920 (emphasis added). Here, Petitioner has been granted relief, and the Immigration Judge indicated she would grant relief again—making the prospect of future removal all the more unlikely.
5. Therefore, 8 U.S.C. § 1226(c) does not authorize detention of Petitioner as such detention has become prolonged and indefinite and the legal justification for continuing to hold him has disappeared.

**COUNT TWO: VIOLATION OF 8 U.S.C. § 1226 – MANDATORY DETENTION**

**GOVERNMENT SUBSTANTIALLY UNLIKELY TO PREVAIL**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. Mandatory detention cannot be applied where the government is “substantially unlikely to prevail” in removing the alien or where the alien “can raise substantial arguments against his removal.” Matter of Joseph, 22 I&N Dec. at 807; Tijani, 430 F.3d at 1248 (Tashima, J., concurring); see also Demore, 538 U.S. at 578 (Breyer, J., dissenting). Where the detainee has a meritorious claim against removal, continuing “detention without the possibility of release, based on nothing more than the fact that he may someday be removable, is clearly a violation of his due process rights.” Tijani, 430 F.3d at 1249 (Tashima, J., concurring); see also Nadarajah, 443 F.3d at 1080 (ordering release of petitioner where he had been granted asylum twice, the second grant affirmed by the BIA, but was still detained).
3. Petitioner is being detained despite the fact that relief from removal will be granted. Therefore, it is clear that the Government is substantially unlikely to prevail in removing Petitioner. His continued mandatory detention thus serves no justifiable purpose and is unlawful.

**COUNT THREE: 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 after being granted relief in the forms of cancellation of removal, asylum, and withholding of removal, and the Immigration Judge will grant relief again, his continued detention violates the Fourth Amendment.

**COUNT FOUR: VIOLATION OF FIFTH AMENDMENT**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. The Fifth Amendment Due Process Clause protects against arbitrary 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 has become arbitrary and unreasonable, and therefore in violation of the Fifth Amendment’s guarantee of Due Process.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner asks 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 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;
5. If a bond hearing is ordered before the Immigration Court, issue an order requiring that the Government bear the burden of proving by clear and convincing evidence that Petitioner is a danger to the community and a flight risk;
6. Award reasonable attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A); and
7. Grant any and all further relief this Court deems just and proper.

DATED: September 11, 2018 Respectfully submitted,

 /s *John Bruning*

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1. Petitioner was previously detained for 164 days—from December 18, 2017, until May 31, 2018 — from the date of the first grant of relief until the BIA ruled on the appeal. Assuming the same timeframe for adjudication of a new appeal arising out of an Order of the Immigration Judge on August 23, 2018, the BIA will not issue a decision until around February 3, 2019, resulting in a period of detention of 606 days—19 months— not including possible further detention based on remand or additional proceedings or appeals. [↑](#footnote-ref-2)
2. While Jennings v. Rodriguez was initially briefed before the Supreme Court, the Solicitor General’s office notified the Court that the Government had “made several significant errors in calculating” the statistics which it provided to the Court in Demore and which were relied upon in the Court’s 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>. Gershengorn’s letter indicated that the prior statistics implied that cases involving a BIA appeal resulted in a time of detention of “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. **In fact, at the time of the Demore briefing, the total completion time in cases where there was an appeal averaged 382 days, with a median of 272 days.** Id.; see also Jennings v. Rodriguez, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) (“The Government now tells us that the statistics it gave to the Court in Demore were wrong. Detention normally lasts twice as long as the Government then said it did. And, as I have pointed out, thousands of people here are held for considerably longer than six months without an opportunity to seek bail.”). For the Jennings “mandatory subclass” members, “the average detention . . . is nearly ten times the average assumed in Demore (427 days). Even for appeals, the average is three times what Demore envisioned (448 days).” Resp. Supp. Br., Jennings v. Rodriguez, No. 15-1204, 2017 WL 430386, at \*31 (U.S. Jan. 31, 2017). Petitioner here has already exceeded those averages by several months with no end in sight, and on account of DHS’s actions rather than his own appeal. [↑](#footnote-ref-3)
3. The Government has argued that Demore and Jennings hold that prolonged, indefinite detention under § 1226(c) is in all cases constitutional. See Rodriguez v. Marin, No. 13-56706, at 57 (9th Cir. July 13, 2018), ECF No. 174 (“In the wake of Jennings, any constitutional analysis of the statute must acknowledge that the statute unambiguously requires detention for the entirety of the removal proceedings, and must presume that such detention is constitutional.”). However, the Government’s analysis rests on factors that are materially different than Petitioner’s case. For example, the Government argued that “[i]t cannot be conclusively established until the end of removal proceedings whether an alien will be ordered removed because those proceedings are the ‘sole and exclusive’ means for making that determination. The prospect of removal, and the government’s interest in effectuating it, thus remain concrete throughout.” Id. at 58. But this is not the case where the Immigration Court has granted relief from removal. Similarly, it cannot be said here that “the government’s interest in keeping the alien in custody (and the alien’s incentive to abscond) will typically increase over time as removal proceedings progress towards their completion and the likely conclusion that the alien will be ordered removed.” Id. at 59 (emphasis in original). [↑](#footnote-ref-4)
4. A hearing on Respondents’ objections was held on Aug. 14, 2018, before Judge Schiltz, but a decision has not yet been issued. [↑](#footnote-ref-5)
5. Coello-Udiel v. Doll, No. 3:17-cv-1414, 2018 U.S. Dist. LEXIS 80558, 2018 WL 2198720 (M.D. Pa. May 14, 2018); Manley v. Delmonte, No. 17-cv-953, 2018 U.S. Dist. LEXIS 79107, 2018 WL 2155890 (W.D.N.Y. May 10, 2018). [↑](#footnote-ref-6)
6. However, this does not address the likelihood of prevailing on applications for relief after the charge of removability is sustained, and thus the actual likelihood that the noncitizen can be or will be ordered removed or actually removed. [↑](#footnote-ref-7)
7. A 2004 BIA report on its Pro Bono Project states that aliens represented by pro bono counsel prevailed in 62 percent of appeals filed by DHS, while *pro se* aliens prevailed in 69 percent of appeals filed by DHS. Board of Immigration Appeals, *The BIA Pro Bono Project is Successful* at 12 (Oct. 2004), <https://www.justice.gov/sites/default/files/eoir/legacy/2005/02/01/BIAProBonoProjectEvaluation.pdf>. No more recent statistics on appeals filed by DHS are available. Assuming that rate has stayed the same, it is clear that DHS is statistically unlikely to prevail on appeal. [↑](#footnote-ref-8)
8. For example, without constitutional limits to § 1226(c) detention, an executive administration wishing to increase the number of migrants detained and the length of detention (such as to fill beds pursuant to detention contracts) could appeal every case in which the respondent has been granted relief. See H.R. Rep. No.112-492, at 201 (2013), available at <https://www.gpo.gov/fdsys/pkg/CRPT-112hrpt492/pdf/CRPT-112hrpt492.pdf> (“Immigration and Customs Enforcement (ICE) [must] maintain a level of not less than 34,000 detention beds . . . . As ICE Assistant Secretary John Morton has stated, not only does this language mandate that he maintain 34,000 detention beds, but that he fill those beds with detainees on a daily basis.”); Letter from Bill Foster and Theodore E. Deutch, Congressmen, to President Barack Obama (Sept. 25, 2013), available at <https://teddeutch.house.gov/uploadedfiles/deutch_foster_detention_letter.pdf> (“In FY13, Congress required ICE to fill at least 34,000 immigration detention beds on any given day.”); see also Anita Sinha, Aribrary Detention? The Immigration Detention Bed Quota, 12 Duke J. Const. L. & Pub. Pol’y 77 (2016) (describing enactment of bed quota in 2009 and arguing that bed mandate violates constitutional due process). That would keep more individuals detained after being granted relief while also significantly increasing the processing time for *all* appeals to the BIA. In turn, it would result in longer detention periods for everyone detained pursuant to § 1226(c) pending appeal. As described *supra*, this would pressure many more migrants to sign away their rights and accept deportation despite meritorious claims. [↑](#footnote-ref-9)
9. Again, this was based on incorrect statistics provided to the Court by the government. See note 4, *supra*. [↑](#footnote-ref-10)