**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

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| Petitioner,  Petitioner,  v.  **William BARR**, U.S. Attorney General;  **Chad WOLF**, Acting Secretary, Department of Homeland Security;  **Matthew ALBENCE**, Acting Director, Immigration and Customs Enforcement;  **Peter BERG**, Director, St. Paul Field Office, Immigration and Customs Enforcement; and  **Joel BROTT**, Sheriff, Sherburne County,  Respondents. | Civil Action No: 19-cv-  **PETITION FOR WRIT OF HABEAS CORPUS** |

**INTRODUCTION**

1. Fifteen months ago, Judge Patrick Schiltz reviewed and granted Petitioner Petitioner’s (“Mr. Petitioner”) first Writ of Habeas Corpus. Ex. E. Mr. Petitioner remains detained and seeks his second Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 to remedy his unlawful detention by the Department of Homeland Security (“DHS”) in violation of the Immigration and Nationality Act (“INA”) and the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. DHS and its agents with Immigration and Customs Enforcement (“ICE”) have incarcerated Mr. Petitioner in a county jail for a period that has now reached 891 days––over 29 months––despite Mr. Petitioner’s grant of a writ of habeas corpus by a Minnesota Federal District Court over one year ago. ICE says the mandatory detention statute at 8 U.S.C. § 1226(c) authorizes its agents to jail Mr. Petitioner for the entire duration of his ongoing administrative removal proceedings because of a 2011 conviction in Alaska for simple assault and a 2014 financial transaction card fraud offense. ICE is wrong. The federal government’s application of 8 U.S.C. § 1226(c) to Mr. Petitioner violates his fundamental right to liberty under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

3. Mr. Petitioner is a Lawful Permanent Resident of the United States. Ex. E at 39. Mr. Petitioner was arrested by ICE on July 5, 2017, after he was released from county jail with a referral for Minneapolis’ homelessness court and an appointment with a social worker. Ex. A at 5. He has been detained ever since. Mr. Petitioner was placed in removal proceedings and charged with committing two “crimes involving moral turpitude”—a 2013 theft of services offense and a 2015 financial transaction card fraud offense. Ex. E at 39. Mr Petitioner has roughly 20 convictions in total, nearly all of which are attributable to his attempts to cope with the trauma he suffered as a child during the civil war in Somalia. Ex. Q. On November 6, 2017, the Immigration Judge (“IJ”) ordered cancellation of Mr. Petitioner’s removal order under 8 U.S.C. § 1229(b)(a), a decision DHS appealed to the Board of Immigration Appeals (“BIA”). Ex. A at 7.

4. Mr. Petitioner previously filed a Petition for Writ of Habeas Corpus with this Court on January 8, 2018, alleging that his mandatory detention without a bond hearing had become unconstitutionally prolonged. Ex. E at 40. While this Petition was pending before this Court, on April 10, 2018, the BIA sustained the DHS appeal and remanded to the IJ. On August 10, 2018, the IJ denied all forms of relief and ordered Mr. Petitioner deported to Somalia. Ex. D at 37. Mr. Petitioner appealed this decision to the BIA. Several days later, on August 14, 2018, this Court heard oral arguments on the Petition. Then, on September 18, 2018, this Court granted Mr. Petitioner’s Petition and ordered the government to provide him with a bond hearing within 30 days. Ex. E at 54. At a brief bond hearing on October 2, 2018, the IJ found Mr. Petitioner to be a flight risk and a danger to the community and denied bond. Ex. F at 56.

5. On February 11, 2019, the BIA denied Mr. Petitioner’s appeal. Ex. G at 62. Mr. Petitioner filed a timely Petition for Review of the decision to the U.S. Court of Appeals for the Eighth Circuit on March 13, 2019.

6. On March 8, 2019, the District Court for Olmsted County, Minnesota, vacated and dismissed Mr. Petitioner’s theft conviction upon the motion of the prosecutor’s office due to constitutional defects in the underlying proceedings. Ex. H at 64. Because of this, Mr. Petitioner was no longer removable as charged and could not be lawfully removed from the United States. The Eighth Circuit case was held in abeyance while Mr. Petitioner pursued a motion to reopen at the BIA. The DHS filed a brief at the BIA on March 21, 2019, alleging a new basis for removability, claiming that Mr. Petitioner’s 2011 conviction in Alaska for simple assault constituted a second “crime involving moral turpitude” and a “crime of domestic violence.” The BIA granted the motion to reopen and remanded to the IJ on June 7, 2019. Ex. J at 81. The same day, Mr. Petitioner filed a new bond motion with the IJ on the basis that he was no longer removable. On July 2, 2019, the IJ denied bond on the basis of mandatory detention under 8 U.S.C. § 1226(c). Ex. K at 82. On July 8, 2019, the IJ sustained the new charges and again ordered Mr. Petitioner removed to Somalia. Ex. L at 86, 92.

7. Mr. Petitioner filed a motion to reconsider with the IJ on July 30, 2019, asserting fundamental legal error in the decision, in particular, that the IJ ignored binding Eighth Circuit precedent and caselaw from the Ninth Circuit––in which Mr. Petitioner was convicted––holding that the statute of conviction cannot sustain a “crime involving moral turpitude” or “crime of domestic violence” charge. The IJ did not act on the motion prior to the appeal deadline, so Mr. Petitioner again appealed the decision to the BIA on August 7, 2019. Ex. M at 93. That appeal is still pending.

8. Mr. Petitioner’s constitutional right to due process has been violated repeatedly over the **891** days he has been detained by Respondents, and over the **450** days since his first Petition for Writ of Habeas Corpus was granted. First, Mr. Petitioner has still not received a constitutionally adequate bond hearing that comports with due process. Second, in the alternative, even if the bond hearings he received were constitutionally sufficient, Mr. Petitioner’s detention *since the bond hearing required by this Court’s September 18, 2018 order* has itself become unconstitutionally prolonged. Finally, the total length of detention that Mr. Petitioner has endured and will certainly continue to endure––already well over 29 months and without any end in sight––requires even stronger due process protections. The current BIA appeal will take, at a minimum, several more months, and further proceedings before the Immigration Court and/or the Eighth Circuit Court of Appeals are likely.

9. The continued mandatory detention of Mr. Petitioner serves no legitimate purpose, and there is no foreseeable end to this detention. Mr. Petitioner has no recent serious criminal history––his only conviction with potential immigration consequences was committed in 2015––and the evidence is entirely insufficient to establish that he would be a danger to the community or a flight risk if released. Rather, when Mr. Petitioner had a bond hearing, under current agency practices, these old offenses pretermitted his ability to prove to the satisfaction of the IJ that he would *not* be a danger. Even where Mr. Petitioner prevailed in his Petition for Writ of Habeas Corpus before this Court, the government continued to treat detention as the default rather than determining whether his ongoing detention was truly necessary. This detention therefore has violated, and continues to violate, the protections of the Due Process Clause.

10. As a result, Mr. Petitioner should be immediately or conditionally released from custody under reasonable conditions or, if the Court deems it necessary, provided with a constitutionally adequate bond hearing, this time at which the government shall bear the burden to prove by clear and convincing evidence that Mr. Petitioner would be a danger to the community and a flight risk to a degree that no bond could mitigate.

**JURISDICTION AND VENUE**

11. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question); § 1361 (federal employee mandamus action), § 1651 (All Writs Act), and §2241 (habeas corpus); U.S. Const. art. I, §9, cl. 2 (Suspension Clause); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 2201 (Declaratory Judgment Act).

12. Because Mr. Petitioner seeks to challenge his custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this Court. Federal district courts have jurisdiction to hear habeas corpus claims by individuals challenging the lawfulness or constitutionality of their detention by DHS. *Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 839–41 (2018); *Nielsen v. Preap*, 139 S. Ct. 954, 961–63 (2019); *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 918–21 (D. Minn. 2006).

13. Venue is proper in this District under 28 U.S.C. § 1391 because at least one of the Respondents is a resident of this District. Mr. Petitioner is detained within this District at the Sherburne County Jail in Elk River, Minnesota, and a substantial part of the events giving rise to the claims in this action took place in this District. 28 U.S.C. §§ 1391(b), (e)(1); 2241(d).

**PARTIES**

14. Petitioner Petitioner is a citizen and national of Somalia. Mr. Petitioner entered the United States as a refugee in 1995 at the age of 13 and subsequently adjusted his status to that of a Lawful Permanent Resident. He remains a Lawful Permanent Resident. Mr. Petitioner has been detained for **891** days––over 29 months––and is currently in the physical and legal custody of Respondents at the Sherburne County Jail at 13880 Business Center Dr., Elk River, MN 55330.

15. Respondent William Barr is the Attorney General of the United States and the head of the Department of Justice, which encompasses Immigration Judges and the Board of Immigration Appeals as a subunit—the Executive Office for Immigration Review. Attorney General Barr shares responsibility for the administration and enforcement of the immigration laws, including the statutes authorizing detention within the INA, along with Respondent Chad Wolf. Attorney General Barr is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 950 Pennsylvania Avenue, NW, Washington, D.C. 20530.

16. Respondent Chad Wolf is the Acting Secretary of DHS. Acting Secretary Wolf is responsible for the administration and enforcement of the immigration laws, 8 U.S.C. § 1103(a), including pursuing Mr. Petitioner’s detention and removal. Acting Secretary Wolf is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 245 Murray Lane, SW, Washington, D.C. 20528.

17. Respondent Matthew Albence is the Acting Director of ICE, a subunit of DHS. Acting Director Albence is the head of the federal agency detaining Mr. Petitioner and has supervisory authority over ICE personnel in Minnesota. Acting Director Albence is a legal custodian of Mr. Petitioner and is named in his official capacity. His official address is 500 12th St., SW, Washington, D.C. 20024.

18. Respondent Peter Berg is the Field Office Director for the St. Paul Field Office for ICE within DHS. Field Office Director Berg has supervisory authority over the ICE agents responsible for detaining Mr. Petitioner. Field Office Director Berg is a legal custodian of Mr. Petitioner and is named in his official capacity. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, MN 55111.

19. Respondent Joel Brott is the Sherburne County Sheriff. Mr. Petitioner is detained at the Sherburne County Jail pursuant to its contract with ICE. Sheriff Brott is a legal custodian of Mr. Petitioner and is named in his official capacity. The address for the Sherburne County Jail is 13880 Business Center Dr., Elk River, MN 55330.

**EXHAUSTION**

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

21. No statutory requirement of exhaustion applies to Mr. Petitioner’s challenge to the lawfulness of his detention. *See,* *e.g.*, *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014) (“There is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention.”).

22. To the extent that prudential consideration may require exhaustion in some circumstances, Mr. Petitioner has exhausted all effective administrative remedies available to him. Prudential exhaustion is not required when to do so would be futile or “the administrative body . . . has . . . predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992), *superseded by statute on other grounds as stated in Woodford v. Ngo*, 548 U.S. 81 (2006). Here, despite already once having been granted a petition for a writ of habeas corpus, Petitioner has continued to be detained for an additional **450** days with no end in sight. Mr. Petitioner has no prospect of effectively challenging this ruling in any administrative forum, as the government will continue to assert detention authority under 8 U.S.C. § 1226(c). *See,* *e.g.*, *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 712 (D. Md. 2016) (“In light of the Government’s consistent position upholding categorical detention without any meaningful individualized bail review, exhaustion here would be futile.”); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116, 121–23 (D. Mass. 2009) (collecting cases and concluding that “the BIA has clearly and repeatedly upheld the denial of a bond hearing under the view that § 1226(c) mandates detention without bond.”).

23. Prudential exhaustion is also not required in cases where “a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.” *McCarthy*, 503 U.S. at 147. Every day that Mr. Petitioner is unlawfully detained causes him and his family irreparable harm. *Jarpa*, 211 F.Supp.3d at 711 (“Here, continued loss of liberty without any individualized bail determination constitutes the kind of irreparable harm which forgives exhaustion.”); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) (explaining that “a loss of liberty” is “perhaps the best example of irreparable harm”); *Hamama v. Adducci*, 349 F. Supp. 3d 665, 701 (E.D. Mich. 2018) (holding that “detention has inflicted grave” and “irreparable harm” and describing the impact of prolonged detention on individuals and their families).

24. Prudential exhaustion is additionally not required in cases where the agency “lacks the institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute.” *McCarthy*, 503 U.S. at 147–48. Immigration agencies have no jurisdiction over constitutional challenges of the kind Mr. Petitioner raises here. *See,* *e.g.*, *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992) (“[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.”); *Matter of Akram*, 25 I&N Dec. 874, 880 (BIA 2012); *Matter of Valdovinos*, 18 I&N Dec. 343, 345 (BIA 1982).

25. Because requiring Mr. Petitioner to exhaust administrative remedies would be futile, would cause him irreparable harm, and the immigration agencies lack jurisdiction over Mr. Petitioner’s constitutional claims, this Court should not require exhaustion as a prudential matter.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

26. This Petition incorporates by reference the factual findings of this Court’s order dated September 18, 2018, in *Muse v. Sessions*, --- F.Supp.3d ---, No. 18-cv-0054 (PJS/LIB), 2018 WL 4466052 (D. Minn. Sept. 18, 2018). Ex. D.

27. Mr. Petitioner is a native and citizen of Somalia who entered the United States as a refugee on September 7, 1995 at the age of 11. Exh. D at 21. After leaving Somalia, Mr. Petitioner lived in a refugee camp and then traveled to the United States with his aunt, her family, and his brother. *Id.* After entering the United States as a refugee, Mr. Petitioner subsequently adjusted his status to that of a lawful permanent resident. *Id.*

28. Mr. Petitioner’s father is believed to have been killed in Somalia during the civil war. *Id.* at 17. Mr. Petitioner was separated from his mother during the civil war, and she has since died in Somalia. *Id.* Mr. Petitioner does not have a spouse or child. *Id.* Mr. Petitioner’s brother and aunt still live in the United States, and Mr. Petitioner remains close with his aunt, with whom he has lived previously and who has expressed a willingness to take in Mr. Petitioner upon his release from detention. *Id.*

29. Mr. Petitioner did not have any serious criminal history for the first 15 years of his nearly quarter-century presence in the United States; Mr. Petitioner’s first conviction with immigration consequences was not until 2012. Although Mr. Petitioner has a noticeable criminal record, with 21 convictions, almost all of the convictions are consequences of Mr. Petitioner’s contemporaneous history of homelessness, chemical dependency, and severe mental health issues arising in part from his traumatic experiences in Somalia during the civil war—a fact noted in Mr. Petitioner’s favor by the IJ who granted Mr. Petitioner’s application for cancellation of removal. Ex. A at 5.

30. On July 5, 2017, Mr. Petitioner was arraigned in Hennepin County for misdemeanor charges of obstructing legal process and trespass. He was released on his own recognizance and referred to Hennepin County’s HOMES Court—a pretrial diversionary court for those experiencing homelessness. As he left the court, Mr. Petitioner was arrested by ICE officers and taken into ICE custody.

31. Mr. Petitioner has been continuously detained in county jails throughout Minnesota ever since his arrest on July 5, 2017. Mr. Petitioner is currently detained in Sherburne County Jail, in Elk River, Minnesota. As of the date of this filing, his detention has lasted over 2.4 years (roughly 29 months, or 877 days).

32. The DHS initiated removal proceedings on July 10, 2017. Ex. D at 19.

33. The Government has charged Mr. Petitioner with removability for two crimes involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii)—his Alaska conviction for simple assault and his Minnesota conviction for fraud. The Ninth Circuit has already assessed the statute underlying Mr. Petitioner’s Alaska assault conviction and determined that it is not a categorical crime involving moral turpitude. *Yi v. Holder*, 350 F. App’x 185 (9th Cir. 2009).

34. As of the BIA’s June 7, 2019 order to reopen and remand Mr. Petitioner’s record to the IJ, the BIA agreed with Mr. Petitioner that the DHS had not brought sustained charges against Mr. Petitioner that were sufficient to show that he was removable. Ex. J at 80. Although the IJ sustained the new charges brought by DHS on remand, Mr. Petitioner has an appeal pending before the BIA challenging the IJ’s order on the grounds that it depends on an inaccurate understanding of the applicable law.

35. In brief, the IJ sustained the DHS’ charges on several erroneous grounds. First, the IJ wrongly ruled that the simple assault charge involves a domestic element, despite the fact that Alaska state courts have determined that it does not. Ex. M at 99; *see* *Makihele v. Municipality of Anchorage*, No. XX-XXX, 2015 WL 4599598, at \*2 (Ak. Ct. App. July 29, 2015). Second, the IJ incorrectly determined that Mr. Petitioner’s nolo contendere plea constituted an admission of factual guilt regarding the allegation that his assault was against his brother, despite the fact that no contest pleas constitute consent to the imposition of a sentence rather than admission of factual guilt regarding the allegations behind a charge. Ex. M at 100–01. Third, the IJ held that Mr. Petitioner’s plea can be considered in light of case law emerging subsequent to Mr. Petitioner’s plea, despite the fact that such consideration is impermissibly retroactive and fails to give full faith and credit to a plea guided by immigration consequences of contemporary case law. *Id.* at 101–03. Finally, the IJ erroneously decided that convictions for simple assault with a mens rea of recklessness are categorically crimes of violence, despite binding Eighth Circuit and BIA precedent to the contrary. *Id.* at 103–05.

36. Given these insufficient grounds to sustain the DHS’s charge that Mr. Petitioner’s Alaska conviction for simple assault is a crime involving moral turpitude or a crime of domestic violence, the DHS lacks any support for its allegation that Mr. Petitioner is removable.

37. However, even if the BIA ignores Eighth Circuit and BIA precedent requiring Mr. Petitioner’s release and orders him removed, Mr. Petitioner—as a Somali citizen with a criminal history—will not receive travel documents from the Somali consulate. His already unconstitutionally prolonged detention does not have an end in sight.

*Mr. Petitioner’s Grant of Cancellation of Removal*

38. The Government charged Mr. Petitioner with two crimes involving moral turpitude, making him removable under 8 U.S.C. § 1227(a)(2)(A)(ii): the first for Mr. Petitioner’s 2013 conviction of theft by obtaining services without payment and the second for Mr. Petitioner’s 2015 conviction of financial transaction card fraud. Ex. A at 2.

39. On November 6, 2017, the IJ granted Mr. Petitioner’s application for cancellation of removal under 8 U.S.C. § 1229b(a), finding that on balance Mr. Petitioner’s positive equities outweighed his negative equities. The IJ highlighted the facts that Mr. Petitioner has been in the country several decades, that Mr. Petitioner’s aunt—a “very significant positive factor”—is willing to help Mr. Petitioner, and that Mr. Petitioner’s legal troubles corresponded with his period of chemical dependency, housing insecurity, and mental health issues. Ex. A at 4.

40. DHS appealed on November 16, 2017, disagreeing with the IJ’s balancing of the equities. The BIA reversed the IJ’s grant of cancellation “as a matter of discretion” and remanded the case back to the IJ to consider relief on the basis of asylum under INA § 208, withholding of removal under INA § 241(b)(3), and the Convention Against Torture. Ex. C at 14.

*Mr. Petitioner’s Vacated Order of Removal on First Remand*

41. On August 10, 2018—day 402 of Mr. Petitioner’s detention, and 451 days prior to the filing of this petition—the IJ denied all forms of relief to Mr. Petitioner on remand and ordered him removed. Ex. D at 37.

42. On February 11, 2019, the BIA affirmed the IJ’s decision, denied Mr. Petitioner’s applications for asylum and withholding relief and relief under the Convention Against Torture, and ordered Mr. Petitioner removed. Ex. G.

43. On March 8, 2019, the Minnesota District Court for the Third Judicial District vacated Mr. Petitioner’s theft of services charge for procedural inadequacies. Ex. H at 64. This vacatur eliminated one of the underlying convictions for the DHS’ charge of removability under 8 U.S.C. § 1227(a)(2)(A)(ii), and on March 14, 2019, Mr. Petitioner subsequently moved the BIA to stay his removal and reopen his case. Ex. I at 68.

44. On March 21, 2019, the DHS added two new charges of removability on the basis of a 2011 Alaska assault conviction that the DHS incorrectly argues is a crime of domestic violence, which would render Mr. Petitioner removable under both INA § 237(a)(2)(E)(i), and—in conjunction with Mr. Petitioner’s 2015 fraud conviction—under INA § 237(a)(2)(A)(ii).

45. On June 7, 2019, the BIA granted Mr. Petitioner’s motion to reopen on the grounds that the vacatur of his theft conviction rendered him not removable by eliminating one of the two crimes involving moral turpitude required for removability under INA § 237(a)(2)(A)(ii). Ex. J at 80–81. The BIA remanded the record to the IJ to assess any new charges of removability that the DHS brings. *Id.*

*Mr. Petitioner’s Pending Order of Removal on Second Remand*

46. On July 8, 2019, the IJ sustained both new charges of removability and deferred to the BIA’s prior decisions denying relief as cause to refrain from revisiting relief. Ex. L at 92. On July 30, 2019, Mr. Petitioner moved the IJ to reconsider its decision on account of an erroneous application of erroneous law.

47. On August 7, 2019, Mr. Petitioner appealed the IJ’s order to the BIA, before which Mr. Petitioner’s consolidated appeal and motion to reconsider is currently pending. Ex. M at 94.

*Mr. Petitioner’s Fruitless First Habeas Grant*

48. Concurrent with Mr. Petitioner’s immigration proceedings, Mr. Petitioner pursued habeas relief through the federal courts.

49. On January 8, 2018—187 days into Mr. Petitioner’s detention, a period of time longer than the presumptive time period constituting prolonged detention for noncitizens detained under INA § 236(c) in *Demore*—Mr. Petitioner filed a habeas petition with this Court, arguing that his prolonged detention was an unconstitutional violation of his Fifth Amendment right to due process, mandating an individualized determination of the reasonableness of continued detention if not outright release from detention.

50. On September 18, 2018—253 days after Mr. Petitioner’s petition for habeas corpus was filed—Judge Schiltz agreed, finding that continued detention in the absence of an individualized determination of the reasonableness of continued detention would be a violation of Mr. Petitioner’s constitutional right to due process and ordering a bond hearing within 30 days. Ex. E at 54. The order left to the IJ the determination of which burden and standard of proof was appropriate.

51. On October 2, 2018, Mr. Petitioner had that bond hearing. At the hearing, the IJ placed the burden of proof on Mr. Petitioner to demonstrate why his detention was no longer necessary rather than shifting the burden to DHS to show by clear and convincing evidence that Mr. Petitioner’s detention is still required. The IJ denied bond, finding Mr. Petitioner to be a danger to the community and a flight risk. Ex. F at 56.

52. On March 8, 2019, the Minnesota District Court for the Third Judicial District vacated Mr. Petitioner’s theft of services charge for procedural inadequacies. Ex. H at 64. This vacatur eliminated one of the underlying convictions for the DHS’ charge of removability under 8 U.S.C. § 1227(a)(2)(A)(ii), and on March 14, 2019, Mr. Petitioner subsequently moved the BIA to stay his removal and reopen his case. Ex. I at 68.

53. On September 9, 2019, this Court granted Mr. Petitioner’s motion for attorney’s fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, finding that “the government’s position––that, as long as the government does not act in bad faith, an alien detained under § 1226(c) is *never* entitled to a bond hearing, no matter how long he is detained––was not substantially justified.” Ex. N at 121.

# LEGAL FRAMEWORK

## RESPONDENTS’ MANDATORY DETENTION OF MR. PETITIONER UNDER 8 U.S.C. § 1226(c) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

54. Mr. Petitioner’s detention without a bond hearing violates the Fifth Amendment’s guarantee that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”[[1]](#footnote-1)

55. It is “well-established” that the Fifth Amendment’s Due Process Clause protects the rights of noncitizens like Mr. Petitioner to due process of law during removal proceedings. *Demore*, 538 U.S. at 523 (internal citations omitted). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Due Process requires that detention “bear[] a reasonable relation to the purpose for which the individual [was] committed.” *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). The only legitimate justifications for civil detention in an immigration case like Mr. Petitioner’s are mitigating danger to the community or ensuring the noncitizen’s presence for a removal hearing. *Demore*, 538 U.S. at 528.

56. At this point, ICE has detained Mr. Petitioner for an unreasonably prolonged period of more than twenty-eight (28) months total, including 14 months since Mr. Petitioner’s first habeas corpus petition was granted. This is a severe deprivation of liberty, and Mr. Petitioner has no procedural protections available outside this Court. Moreover, it is highly unlikely that ICE will ever obtain a removal order against Mr. Petitioner. Mr. Petitioner has appealed his July 8, 2019 removal order to the BIA. Mr. Petitioner’s removal order is erroneously based in part on his 2011 conviction in Alaska for an assault against a family member. The IJ erred as a matter of law in finding that this was a “crime involving moral turpitude” and a crime of domestic violence. The IJ also erred as a matter of law by finding that Mr. Petitioner’s conviction was for a crime of domestic violence based on the record of proceedings, even though he pleaded no contest and the domestic relationship was neither an element of the offense nor admitted to by Mr. Petitioner. The IJ further erred by not considering the law at the time and place Mr. Petitioner pleaded no contest, when he necessarily pleaded in reliance on there being no immigration consequences. The IJ additionally erred as a matter of law by misapplying Eighth Circuit precedent, incorrectly relying on inapposite, less-recent cases. It is therefore manifestly unreasonable to impose an irrefutable presumption of flight risk and danger that will keep Mr. Petitioner detained for months, for a year, or for even longer, while Mr. Petitioner’s immigration proceedings are resolved.

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

57. Twenty-nine months of mandatory civil detention is extreme and nine months longer than the nineteen-month detention of a similarly situated individual to whom this Court previously granted habeas relief after determining the petitioner’s detention had been “staggeringly long.” *Haji S. v. Barr*, No. XX-XXX, 2019 WL 3238354 at \*2 (D. Minn. exact date 2019); *see also* *Abshir H.A. v. Barr*, No. XX-XXX, 2019 WL 3719414 at \*2 (D. Minn. exact date 2019). As detention grows in length, the justification for the increasingly severe deprivation of individual liberty must also grow stronger. *See Kansas v. Hendricks*, 521 U.S. 346, 363–64 (1997); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015), *abrogated in part and on other grounds by* *Jennings*, 138 S. Ct. at 847 (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232, 234 (3d Cir. 2011)). Moreover, as Justice Kennedy acknowledged in *Demore*, the ultimate purpose of immigration detention here—to effect removal upon a final order—is “premised upon the alien’s deportability.” 538 U.S. at 531 (Kennedy, J., concurring).

58. The Supreme Court “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979); *United States v. Salerno*, 481 U.S. 739 (1987); *Foucha*,504 U.S. at 80–83. Due process therefore requires “adequate procedural protections” to ensure that the government’s asserted justification for physical confinement “outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Zadvydas*, 533 U.S.at 690 (internal quotation marks omitted).

59.Mr. Petitioner’s mandatory detention for over 29 months is unreasonable. The Supreme Court held in *Demore* that *brief* mandatory detention under § 1226(c) without a bond hearing did not violate due process, and this holding was specifically premised on the short period for which the noncitizen had been detained as well as evidence—now discredited—that, at the time, § 1226(c) detention was neither indefinite nor prolonged. 538 U.S. at 529–31 (relying on evidence provided by the Government that, at the time, removal proceedings were completed in an average time of forty-seven days and a median time of thirty days in 85% of cases and that the remaining 15% of cases, in which there was an appeal, were completed in an average of four months).[[2]](#footnote-2)

60.As the crucial fifth vote in *Demore*, Justice Kennedy acknowledged in his concurrence that “if continued detention bec[omes] unreasonable or unjustified,” a noncitizen could be “entitled to an individualized determination as to his risk of flight and dangerousness.” 538 U.S. at 532 (Kennedy, J., concurring); *see also id.* at 532–33 (“Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.”); since *Demore*, the “time that each immigrant spends in detention has risen substantially.” *Diop*, 656 F.3d at 234 (explaining that mandatory detention becomes more constitutionally “suspect” as it extends beyond the brief detention periods considered by the Supreme Court in *Demore*).

61. The Eighth Circuit has not yet ruled on the constitutionality of prolonged detention under § 1226(c). The Third Circuit in *Diop* held as a constitutional matter that due process prohibits mandatory detention for an unreasonable period of time. *Diop*, 656 F.3d at 232 (“The constitutionality of [detention without a bond hearing] is *a function of the length of the detention*. At a certain point, continued detention becomes unreasonable, and the Executive Branch’s implementation of § 1226(c) becomes *unconstitutional* unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law’s purposes of preventing flight and dangers to the community.” (emphasis added)).

62. Moreover, prior to the Supreme Court’s ruling in *Jennings*, a number of circuit courts applying the canon of constitutional avoidance had held that serious Fifth Amendment due process concerns required the statutory text of § 1226(c) to be interpreted as including an implicit reasonableness limitation on the duration of detention during removal proceedings. *See, e.g.*, *Reid v. Donelan,* 819 F.3d 486 (1st Cir. 2016). *Jennings* abrogated the statutory holdings of such cases because the Supreme Court determined, as a predicate matter, that the text of § 1226(c) was not properly subject to competing interpretations that would permit application of the canon of constitutional avoidance. 138 S. Ct. 830, 842 (2018). However, while no longer good law for this distinct reason following *Jennings*, other circuit courts have found that the separate substantive analysis of due process these decisions provided remains persuasive. *See, e.g.*, *Dryden v. Green*, 321 F. Supp. 3d 496, 502 (D.N.J. 2019) (“The constitutional reasoning that underlay the Third Circuit's invocation of the constitutional avoidance canon [in *Diop*] still provides some persuasive guidance to how this Court should address § 1226(c) claims.”).

63. Prior to *Jennings*, a number of decisions of this Court—on purely constitutional grounds—had already held that due process places limits on mandatory § 1226(c) detention. *See, e.g.*, *Moallin*, 427 F. Supp. 2d at 926 (D. Minn. 2006) (Nelson, J.) (applying principles of *Zadvydas* to § 1226(c) detention); *Bah v. Cangemi*, 489 F. Supp. 2d 905, 920 (D. Minn. 2007) (Schiltz, J.) (“This Court believes that allowing unlimited pre-removal-period detention under § 1226 would be inconsistent with the reasoning underlying *Zadvydas*.”); *Nhean v. Brott*, No. 17-cv-28 (PAM/FLN), 2017 WL 5054390 (D. Minn. Aug. 7, 2017) (finding that the alien may not be detained indefinitely after having received a waiver of inadmissibility and adjustment of status); *Phan v. Brott*, No. 17-cv-432 (DWF/HB), 2017 WL 4460752 (D. Minn. Oct. 5, 2017) (granting petition for habeas corpus for petitioner detained pursuant to § 1226(c)); *Tindi v. Sec’y, Dep’t of Homeland Sec.*, 17-cv-3663 (DSD/DTS), No. XX-XXX, 2018 WL 704314 (D. Minn. Feb. 5, 2018) (finding 14 months of § 1226(c) detention to be constitutionally unreasonable, where petitioner appealed to the circuit court and the circuit court stayed removal pending the outcome of *Dimaya*); *Mohamed v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-5055 (DWF/DTS), 2018 WL 2390132 (D. Minn. May 25, 2018), *report and recommendation adopted*, 2018 WL 2392205 (D. Minn. Mar. 23, 2017) (indefinite detention impermissible and requires the Court to adopt a “fact-based individualized standard to determine the constitutionality of an alien’s continued pre-removal detention”); *cf. Davies v. Tritten*, 17-cv-3710 (SRN/SER), 2017 WL 4277145, at \*3-4 (D. Minn. Sept. 25, 2017) (stating that “[a]ll circuit courts of appeal who have addressed the question have read *Demore* and *Zadvydas* to impose a reasonableness requirement on detention before a final removal order,” but denying petition because detention was extended to eight months by an “unusual mistake,” a missing transcript).

64. When assessing as-applied challenges to prolonged § 1226(c) detention similar to Mr. Petitioner’s petition here, this Court has used a “fact-based individualized standard to determine the constitutionality of an alien’s continued pre-removal detention.” *Mohamed*, 2018 WL 2392205, at \*12 (citing *Tindi*,2018 WL 704314). Relevant factors this Court’s decisions have looked to include “(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays of the removal proceedings caused by the detainee; (5) delays of removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal.” *Muse*, 2018 WL 4466052 at \*XX (citing and applying factors articulated in *Reid*, 819 F.3d 486 (1st Cir. 2016)) (citation omitted).

65. After *Jennings*, this Court has continued to use the *Muse* factors outlined in *Muse*—referred to here and in some decisions as the “*Muse* factors,” a modified version of the *Reid* factors––when assessing as-applied due process challenges to § 1226(c). *See, e.g.*, *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853 (D. Minn. 2019); *Liban M. J. v. Sec’y, Dep’t of Homeland Sec.*, 367 F. Supp. 3d 959 (D. Minn. 2019); *Bolus A. D. v. Sec’y of Homeland Sec.*, 376 F. Supp. 3d 959 (D. Minn. 2019). This Court has gone so far as to hold that “the government’s position was not substantially justified” and did not have a “reasonable basis in law and fact” under the Equal Access to Justice Act, 28 U.S.C. § 2412. *Muse v. Barr* (“*Muse II*”), No. 18-cv-54 (PJS/LIB), 2019 WL 4254676 at \*3–4 (D. Minn. Sept. 9, 2019) (awarding attorneys’ fees and finding that this “position has not been accepted by a single court, and it cannot be squared with *Jennings* and *Zadvydas*”). In Mr. Petitioner’s case, these factors establish that his constitutional interest in personal liberty is compelling and requires release.

### Length of Detention

66. “[C]ourts have described the first factor, which looks at the length of detention, as the most important.” *Portillo v. Hott*, 322 F. Supp. 3d 698, 708 (E.D. Va. 2018). The length of Mr. Petitioner’s detention favors granting relief. Mr. Petitioner has been in custody for a total of 891 days, over 29 months. 15 of these months––over 461 days––have followed the grant of Mr. Petitioner’s first habeas petition. This Court and others have granted writs of habeas corpus in cases involving challenges to periods of 1226(c) detention that were significantly shorter than Mr. Petitioner’s. *See e.g.*, *Abdulkadir A.*, No. 19-cv-2353 (NEB/HB), 2019 WL 201761 (D. Minn. Jan. 15, 2019), *report and recommendation adopted*, 2018 WL 7048363, at \*12 (D. Minn. Nov. 13, 2018) (nine months); *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at \*1 (S.D.N.Y. May 23, 2018) (eight months); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 710, 717 n.6 (D. Md. 2016) (ten months); *Gordon v. Shanahan*, No. 15-cv-261, 2015 WL 1176706, at \*3–4 (S.D.N.Y. March 13, 2015) (eight months). As the length of detention increases, the government’s burden to justify the detention should be considered ever harder for it to meet. *See Kansas v. Hendricks*, 521 U.S. 346, 363–64 (1997); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015), *abrogated in part and on other grounds by* *Jennings*, 138 S. Ct. at 847 (citing *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232, 234 (3d Cir. 2011)).Mr. Petitioner’s 29 months of continuing civil imprisonment strongly support his claim for habeas relief.

### Conditions of Detention

67. The similarity between the conditions of Mr. Petitioner’s detention and penal confinement weigh in favor of granting habeas relief. Removal proceedings are civil, not criminal. As such, they are, at least in theory, “nonpunitive in purpose and effect.” *Zadvydas*, 533 U.S. at 690. However, “merely calling a confinement ‘civil detention’ does not, of itself, meaningfully differentiate it from penal measures.” *Chavez-Alvarez*, 783 F.3d at 478. The more that detention conditions resemble penal confinement, the stronger the argument that detainees are entitled to bond hearings. *Muse*, 2018 WL 4466052, at \*5 (“As the length of detention grows, the weight given to this aspect of detention increases.”) (citing *Chavez-Alvarez*, 783 F.3d at 478).

68. Mr. Petitioner is currently confined in the Sherburne County Jail in Elk River, MN. He is detained alongside inmates who are serving criminal sentences and awaiting criminal trials. A county jail is primarily designed to house criminal defendants for the short period of time pending trial, and then only upon the finding of a neutral arbiter that the government has proven that no combination of bail and conditional release can mitigate the defendant’s danger to the community or risk of flight. Such facilities are not designed to house civil detainees for periods of time extending indefinitely beyond one year. Immigrant detainees at Sherburne County Jail are subject to disciplinary actions that include solitary confinement and shackling. Ex. R at 136 (“Formal Disciplinary Sanctions may include . . . Placement in Disciplinary Segregation”). In isolation, detainees are kept in lockdown for at least 22 hours per day and have limited access to recreation and other privileges. When in lockdown, Mr. Petitioner only has one hour shower, clean his cell, receive video visits, or use the telephone—including the time needed to communicate with his attorney. Mr. Petitioner has frequently been subject to disciplinary solitary confinement in excess of 15 days, a length of time that the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment considers to be prolonged solitary confinement which may constitute torture. Ex. T at 158–161. In a draft resolution signed by the United States, the U.N. further notes that prolonged solitary confinement should be prohibited “in the case of prisoners with mental and physical disabilities.” Ex. U at 189. Access to robust mental health services for detainees in Sherburne County Jail is limited, and there is limited professional support for individuals struggling with sobriety. Thus, Mr. Petitioner’s confinement conditions are indistinguishable from penal confinement in their character, and this factor weighs strongly in Mr. Petitioner’s favor. *See* *Abshir H.A.*, 2019 WL 3719567, at \*7; *Bolus A.D.*, 376 F. Supp. 3d, at 962; *see also* *Tao J.*, 2019 WL 1923110, at \*4 (criminal correctional facility); *Liban M. J.*, 367 F. Supp. 3d at 964 (criminal correctional facility); *Abdulkadir A.*, 2018 WL 7048363, at \*12 (county jail); *Muse*, 2018 WL 4466052, at \*5 (county jail).

### Responsibility for Delays

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

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

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

71. As noted in Paragraphs 35–37 above, Mr. Petitioner has a strong case that the BIA must reverse the IJ’s order of removal on the grounds that the IJ mischaracterized the simple assault conviction as containing a domestic violence element; the IJ misconstrued a *nolo contendere* plea consenting to the imposition of a sentence as an admission of factual guilt; the IJ impermissibly applied subsequent case law retroactively to Mr. Petitioner’s conviction; and the IJ ignored binding BIA precedent and Eighth Circuit case law in erroneously finding that a conviction for simple assault with a *mens rea* of recklessness is categorically a crime of violence.

72. Mr. Petitioner’s appeal is currently pending before the BIA and briefs for the case have yet to be filed. *See* Ex. O at 124. Several months have passed between previous appeals to the BIA in Mr. Petitioner’s case and an order from the BIA. Two of the BIA’s orders have remanded Mr. Petitioner’s case to the IJ, resulting in several more months of detention while Mr. Petitioner waits for a final decision on the merits of his case. There is no reason to believe that his current appeal will move any more quickly. Of course, Mr. Petitioner does not ask this Court to decide the substance of his removal proceedings, and it need not do so to appreciate that has raised substantial defenses to removal.

73. In sum, without habeas relief, ICE will continue to detain Mr. Petitioner for at least months beyond the unreasonably prolonged period of 29 months he has already been imprisoned. Moreover, Mr. Petitioner is not likely to be ordered removed from the United States, which further precludes any legitimate government interest in and justification for detaining him at all, let alone without any bond.

74. Under the *Muse* framework emerging from Mr. Petitioner’s first successful habeas petition, four of the six factors weigh sharply in Mr. Petitioner’s favor, and two are neutral. *See Muse*, 2018 WL 4466052, at \*6 (finding detention violates the Petitioner’s due process rights when four factors weigh in his favor, one weighs against him, and one is neutral). Report and Recommendation, *Penaloza*, 2018 WL 7098981, at \*6; Report and Recommendation, *Alier D.*,2018 WL 5849477, at \*7. This Court should hold Mr. Petitioner’s prolonged mandatory detention unreasonable and unconstitutional.

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

75. Mr. Petitioner’s prolonged mandatory detention also violates due process because it is unreasonable to impose an irrebuttable presumption of flight risk and danger on a noncitizen who, like Mr. Petitioner, has a substantial challenge to removability. In *Demore*, the Supreme Court upheld the mandatory detention of “a criminal alien who ha[d] conceded that he [was] deportable, for the limited period of his removal proceedings.” 538 U.S. at 511. The Court held that mandatory detention of “deportable criminal aliens” was permissible to address the heightened flight risk and risk to public safety. *Id.* at 518 (emphasizing the government’s “near total inability to remove deportable criminal aliens” and that “deportable criminal aliens who remained in the United States often committed more crimes before being removed”). However, *Demore* left open the question of whether mandatory detention of a noncitizen violates due process if they have a substantial challenge to their removability.

76.Immigrants who raise substantial challenges to removability are, unlike the petitioner in *Demore*, neither “already subject to deportation,” *id.*, nor at risk of “fail[ing] to appear for their removal hearings,” *id.* at 519. On the contrary, they have strong incentives to appear at their proceedings and litigate those defenses. *See Zadvydas*, 533 U.S. at 690 (calling the “justification” of “preventing flight” “weak or nonexistent where removal seems a remote possibility at best”). Nor is the mandatory detention of individuals with substantial challenges to removability reasonably related to Congress’s goal of “protecting the public from dangerous criminal aliens.” *Demore*, 538 U.S. at 515. By enacting statutory forms of relief and protection such as asylum, cancellation of removal, and adjustment of status, Congress allowed qualified individuals convicted of less serious offenses the opportunity to reside permanently in the United States.[[4]](#footnote-4) If Congress had viewed those individuals as presenting such a heightened danger to the public as to require their mandatory detention, it would not have made them eligible for permanent relief from removal. *See, e.g.*, *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778, at \*5 (N.D. Ill. May 3, 2012) (holding mandatory detention violated due process where IJ had granted lawful permanent resident a new adjustment allowing him to retain this status United States). Therefore, in contrast to the detention in *Demore*,[[5]](#footnote-5) it is unreasonable to impose an irrebuttable presumption that noncitizens with substantial arguments against deportability categorically present a heightened flight risk or threat to public safety such that they require mandatory detention without an opportunity for bond.

77. Here, as indicated in paragraphs 35–37 above, Mr. Petitioner has a strong case that the DHS’s charges will not be sustained and so he will not be found to be removable. Mr. Petitioner has no incentive to flee anywhere. Mr. Petitioner should be immediately or conditionally released from detention. At the very least, a neutral arbiter should be required to make an individualized determination as to his danger and flight risk, placing the burden of proof on the government to demonstrate by clear and convincing evidence that Mr. Petitioner’s detention is still necessary.

## Burden of Proof on Standards for Bond

78. Mr. Petitioner asks this Court to order his immediate release. Alternatively, Mr. Petitioner asks this Court to conditionally grant his petition––requiring the government to release Mr. Petitioner within fourteen calendar days unless it demonstrates to a neutral arbiter by clear and convincing evidence that Mr. Petitioner’s detention continues to fulfill a compelling regulatory purpose and there are no less-restrictive alternatives that could address this interest. This remedy is appropriate because Mr. Petitioner’s detention has been unreasonably prolonged, and § 1226(c) “does not require an individualized hearing.” *Campbell v. Barr*, 387 F. Supp. 3d 286, 300–01 (W.D.N.Y. 2019); *Rosado Valerio v. Barr*, No. XX-XXX, 2019 WL 3017412 at \*7 (W.D.N.Y. exact date 2019); *Joseph v. Barr*, No. XX-XXX, 2019 WL 3842359 at \*9 (W.D.N.Y. exact date 2019). If this Court were to determine it more proper to grant Mr. Petitioner an immediate bond hearing, either before this court or before an IJ, procedural due process should require that the government bear the burden of proving by clear and convincing evidence that the government’s interest in continuing to detain Mr. Petitioner—taking into consideration available alternatives to detention—outweighs the severe deprivation of his constitutionally protected interest in liberty. *See, e.g.*, *Jarpa*, 211 F. Supp. 3d at 720–23.

79. Although neither the Constitution nor the federal habeas statutes delineate the necessary content of habeas relief, *I.N.S. v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (“A straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to . . . the writ of habeas corpus”), implicit in habeas jurisdiction is the power to order release. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (“[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained.”). Both the Supreme Court and the Eighth Circuit have noted that the typical remedy for unlawful detention is release from detention. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674 (2008) (“The typical remedy for [unlawful executive detention] is, of course, release.”); *Wajda v. US*, 64 F.3d 385, 389 (8th Cir. 1995) (stating the function of habeas relief under 28 U.S.C. § 2241 “is to obtain release from the duration or fact of present custody.”). That courts with habeas jurisdiction have the power to order outright release is justified by the fact that, “habeas corpus is, at its core, an equitable remedy,” *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and that as an equitable remedy, federal courts “[have] broad discretion in conditioning a judgment granting habeas relief [and are] authorized . . . to dispose of habeas corpus matters ‘as law and justice require.’” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987), *quoting* 28 U.S.C. § 2243. Other circuit courts have also found that an order of release falls under their broad discretion to fashion relief. *See, e.g.*, *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 636 (D. Mass. 2018) (“Habeas corpus is an equitable remedy. The court has the discretion to fashion relief that is fair in the circumstances, including to order an alien’s release.”).

80. Providing the government an opportunity to continue detaining Mr. Petitioner so long as they prove by clear and convincing evidence to a neutral arbiter—either this Court or an IJ—both that no alternative to detention could ensure Mr. Petitioner’s continued presence in his removal proceedings, and that the community would be safe with his release, will not be a fair remedy to Mr. Petitioner’s unlawful detention. Even with a shifted and heightened burden of proof, an IJ is still bound by agency precedent to determine bond in accordance with the factors delineated in *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). The IJ on Mr. Petitioner’s first remand indicated that sobriety in detention cannot be grounds for a prediction of sobriety upon release. *See* Ex. D at 26 (“[Mr. Petitioner’s] current sobriety, an incidental consequence of his detention, is not indicative of his likelihood of success in a treatment program should he be released from detention, and therefore does not affect his eligibility for a discretionary grant of relief.”). There is no reason to believe that this rationale would not also apply to other *Guerra* factors—e.g., employment history or criminal history—that cannot be ameliorated while in prison. In other words, if the IJ is bound by BIA precedent to consider certain factors in determining a respondent’s eligibility for bond, and the IJ has determined that the fact of detention nullifies evidence of rehabilitation along these same factors, then an individualized hearing as described in this paragraph is unlikely to cure the unlawfulness of Mr. Petitioner’s detention. *See, e.g.*, *Jarpa*, 211 F. Supp. 3d at 723 (“it bears noting that to place the burden on [petitioner] at this juncture visits a special unfairness on him. Prolonged detention undoubtedly weakens an individual's ties to society. Employment and education opportunities are severed, family relations are strained, and residences are uprooted. It would create an unusual disadvantage to now make [petitioner] marshal the very evidence that has been compromised, if not outright destroyed, by the prolonged detention that triggered increased procedural protections in the first place.”). This is all the more so if—as is the case for Mr. Petitioner—removal proceedings are not likely to end for another 180 days, and the government is unlikely to secure travel documents for Mr. Petitioner even if the IJ’s most-recent removal order is sustained. Given that outright release is a fair remedy that this court has jurisdiction to grant, Mr. Petitioner should be released accordingly.

81. Alternatively, considering the length of Mr. Petitioner’s detention and the significant risk that his liberty interests will be erroneously deprived by further detention, a conditional grant requiring Mr. Petitioner’s release is appropriate. In other § 1226(c) cases where the petitioner, as here, has met the burden of demonstrating that his or her detention has been unreasonably prolonged, courts have granted the remedy of releasing the petitioner no later than fourteen days from the date of the court’s decision unless the government demonstrates before a neutral decision maker, by clear and convincing evidence, that the petitioner’s continued detention is necessary to protect government interests such as protecting public safety or preventing flight. *See* *Campbell v. Barr*, 387 F. Supp. 3d 286, 301 (W.D.N.Y. 2019); *Rosado Valerio*, 2019 WL 3017412 at \*7; *Joseph*, 2019 WL 3842359 at \*9; *Portillo*, 322 F. Supp. 3d at 709.

82. Mr. Petitioner was previously granted his petition for habeas, but the Court concluded that the IJ “should have the first opportunity to address” the issue of burden of proof. *Muse*, 2018 WL 4466052, at \*6. The IJ declined to place the burden of proof on the government to prove by clear and convincing evidence that Mr. Petitioner was a danger or a flight risk. Now, after an additional fourteen months of detention since this Court first granted Mr. Petitioner a habeas petition, it is even more urgent that the burden be on the government to justify Mr. Petitioner’s further detention. To justify prolonged immigration detention, the government must prove by clear and convincing evidence that Mr. Petitioner is a danger or flight risk. *See, e.g.*, *Jarpa,* 211 F. Supp. 3d at 720–23; *Hernandez v. Decker*, No. 18-CV-5026 (ALC), 2018 WL 3579108, at \*11 (S.D.N.Y. July 15, 2018) (“[D]ue process requires that the government demonstrate dangerousness or risk of flight by a clear and convincing standard at [the alien’s] bond hearing.”); *Portillo*, 322 F. Supp. 3d at 709 (“[A]t the bond hearing, the government must demonstrate that [the alien] is either a flight risk or a danger to the community by clear and convincing evidence.”); *Sajous*, 2018 WL 2357266 (requiring government to prove dangerousness and flight risk by clear and convincing evidence); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018) (requiring government to prove dangerousness and flight risk); *see also Foucha*, 504 U.S. at 81–83 (1992) (striking down detention system that placed burden on detainee to prove non-dangerousness); *Salerno*, 481 U.S. at 750–52 (1987) (requiring proof of dangerousness by clear and convincing evidence).

83. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, the civil detention authorized by Section 1226(c) deprives Mr. Petitioner of his liberty interest. Second, the risk of error is great when detainees like Mr. Petitioner are incarcerated in prison-like conditions that severely hamper their ability to gather evidence and prepare for a bond hearing. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to Mr. Petitioner’s immigration records and other information that it can use to make its case for continued detention. Therefore, subjecting the government to a heightened burden of proof strikes an appropriate balance between that individual interest and the government’s interest in protecting the community and in effective removal procedures, affording Mr. Petitioner the fundamental requirement of due process rights.

84. Due process also requires consideration of alternatives to detention. *See* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When a plausible, less restrictive alternative is offered to a [regulation burdening a constitutional right,] it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”). The primary purpose of immigration detention is to ensure a noncitizen’s appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See* *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). District courts in other circuits have required the government to prove to a neutral arbiter by clear and convincing evidence that “*no* conditions of release can reasonably assure the safety of the community or any person,” in order for the government to possibly continue detaining noncitizens subject to removal proceedings. *Campbell v. Barr*, 387 F. Supp. 3d 286 (W.D.N.Y 2019) (quoting [*Salerno*, 481 U.S. at 751, 107 S. Ct. 2095](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987064904&pubNum=0000780&originatingDoc=I2b2c12f076f311e9a3ecec4a01914b9c&refType=RP&fi=co_pp_sp_780_751&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_780_751)) (emphasis added); *see also* *Diaz-Ceja v. McAleenan*, No. XX-XXX, 2019 WL 2774211 (D. Colo. Exact date 2019). ICE’s alternative program to detention––the Intensive Supervision Appearance Program—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP “resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings”). It follows that alternatives to detention must be considered in determining whether prolonged incarceration is warranted.

# CAUSES OF ACTION

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

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

86.Immigration detention violates due process unless such detention is reasonably related to its purpose. *Demore*, 538 U.S. at 513 (2003); *Zadvydas*, 533 U.S. at 690–91. Moreover, as detention becomes prolonged, the Due Process Clause requires an even stronger justification to outweigh the significant deprivation of liberty, as well as strong procedural protections. *Id*.

87. Mr. Petitioner has been detained pursuant to 8 U.S.C. § 1226(c) for over 29 months. Mr. Petitioner’s prolonged detention lacks sufficient justification and violates his due process rights. This Court has considered six factors to determine whether prolonged pre-final order detention is unreasonable. *See Muse*, 2018 WL 4466052, at \*5. Application of the relevant factors to the facts and circumstances in this case—four factors weighing in Mr. Petitioner’s favor and two favoring neither party—supports a conclusion that Mr. Petitioner’s continued detention without an individualized bond hearing violates due process under the Fifth Amendment.

88. Moreover, Mr. Petitioner has a substantial argument against removal. Therefore, the assumption underlying *Demore* that noncitizens who have conceded deportability uniformly present elevated risk of flight and danger does not apply here. Mr. Petitioner cannot reasonably be subject to an irrebuttable presumption of flight risk and danger necessitating mandatory detention.

89. For the foregoing reasons, only Mr. Petitioner’s immediate or conditional release, or an immediate bond hearing at which the government bears the burden to prove Mr. Petitioner’s danger and flight risk will protect his due process rights and the government’s legitimate interest in detaining a removable alien only when it is necessary to serve the purposes of § 1226(c).

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

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

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

92.The government’s categorical denial of bail to certain noncitizens violates the right to bail encompassed by the Eighth Amendment. *See Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting).

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

# PRAYER FOR RELIEF

WHEREFORE, Mr. Petitioner prays that this Court grant the following relief:

1. Assume jurisdiction over this matter;
2. Expedite consideration of this petition pursuant to 28 U.S.C. §§ 1657 and 2243;
3. Pursuant to 28 U.S.C. § 2243 issue an order directing the Respondents to show cause within three days why the writ of habeas corpus should not be granted;
4. Grant Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody; hold a hearing before this Court if warranted; determine that Petitioner’s detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention; and order Petitioner’s release, with appropriate conditions of supervision if necessary.
5. In the alternative, issue a Writ of Habeas Corpus and order Petitioner’s release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner’s release would present; and (2) if the government cannot meet its burden, the immigration judge order Petitioner’s release on appropriate conditions of supervision.
6. Grant Mr. Petitioner reasonable attorneys’ fees, costs, and other disbursements pursuant to the Equal to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
7. Grant such other relief as the Court deems just and proper.

Dated: December 13, 2019

Respectfully submitted,

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1. In *Jennings*, the Supreme Court held that “subject only to express exceptions, §§ 1225(b) and 1226(c) authorize detention until the end of applicable [removal] proceedings.” 138 S. Ct. at 842 (reversing Ninth Circuit’s interpretation requiring automatic periodic bond hearings under §§ 1225(b) and 1226(c)). The Supreme Court remanded to the Ninth Circuit, however, to address the Petitioner’s alternative argument—that his prolonged detention violated the Due Process Clause of the Fifth Amendment. *Id*. at 851. Here, like the Petitioner in *Jennings*, Mr. Petitioner argues that his prolonged mandatory detention violates the Due Process Clause of the Fifth Amendment. [↑](#footnote-ref-1)
2. While *Jennings v. Rodriguez* was being briefed, the government informed the Supreme Court it had “made several significant errors in calculating” the statistics which it provided to the Court in *Demore* and which the Court relied upon in its decision. Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), available at http://on.wsj.com/2mtjnUP. The government had represented in *Demore* that cases of detained noncitizens involving a BIA appeal took on average “about five months;” however, those statistics did not acknowledge that cases took much longer at the IJ stage when there was an appeal, and that other time in those cases was unaccounted for. *Id.* at 3. The government’s revised statement is that total completion time in cases where there was an appeal averaged 382 days, with a median of 272 days. *Id.*; *see also* *Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (“The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did. And, as I have pointed out, thousands of people here are held for considerably longer than six months without an opportunity to seek bail.”). For the *Jennings* “mandatory subclass” of individuals like Mr. Petitioner, who are subject to 1226(c) detention, “the average detention . . . is nearly ten times the average assumed in *Demore* (427 days). Even for appeals, the average is three times what *Demore* envisioned (448 days).” Resp. Supp. Br., *Jennings v. Rodriguez*, No. 15-1204, 2017 WL 430386, at \*31 (U.S. Jan. 31, 2017). [↑](#footnote-ref-2)
3. Courts do not hold the time required to litigate “avenues of relief that the law makes available” against a detainee. *Ly*, 351 F.3d at 272. Mr. Petitioner has raised legitimate defenses to removal, as evidenced by the reopening of his case by the BIA on the basis of the vacateur of his 2013 theft conviction and its remand to the IJ. The DHS subsequently alleged that Mr. Petitioner’s 2011 conviction in Alaska constitutes a domestic violence offense that renders him removable under INA § 237(a)(2)(A)(ii) (adding this additional charge nine months after Mr. Petitioner’s initial detention), and that in combination with his 2015 financial transaction card fraud conviction he is removable under INA § 237(a)(2)(A)(ii). The IJ sustained the new charges of removability brought by the DHS and Mr. Petitioner appealed this decision to the BIA on the grounds that the IJ erred as a matter of law. The matter is currently pending. [↑](#footnote-ref-3)
4. For example, eligibility for cancellation of removal is predicated on factors such as the absence of an aggravated felony conviction and the length of ties to the community—both of which are factors that correspondingly decrease the risks of flight and danger. *See* 8 U.S.C. § 1229b(b)(1)(A), (C). Similarly, cancellation for immigrants who are not lawful permanent residents requires a showing of “good moral character,” *id.* § 1229b(b)(1)(B), making it unlikely that an immigrant who qualifies for such relief could present a heightened danger to the public. [↑](#footnote-ref-4)
5. The *Demore* Court notably took it for granted that individuals subject to § 1226(c) would be removed eventually, or at least lose their case. *See, e.g.*, 538 U.S. at 528 (“Such detention necessarily serves the purpose of preventing *deportable* criminal aliens from fleeing prior to or during their removal proceedings.” (emphasis added)); *id.* at 529 (“In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals . . . .”); *id.* at 531 (Kennedy, J., concurring) (“[T]he ultimate purpose behind the detention is premised upon the alien’s deportability.”). [↑](#footnote-ref-5)