UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[redacted] Petitioner, **v.** **William BARR,** Attorney General; **Chad WOLF,** Acting Secretary, Department of Homeland Security; **Michael ALBENCE,** Acting Director, Immigration and Customs Enforcement; **Peter BERG,** Director, St. Paul Field Office Immigration and Customs Enforcement; and **Jason KAMERUD,** Sheriff, Carver County, Respondents.	Civil No.: 19-cv-_____ **PETITION FOR WRIT OF HABEAS CORPUS** **8 U.S.C. § 1226(c)** **28 U.S.C. § 2241**

INTRODUCTION

1. [redacted] ("Mr. [redacted] who first came to this country twenty-one years ago as a refugee from Somalia, seeks a writ of habeas corpus to remedy his extremely prolonged unlawful detention by the Department of Homeland Security ("DHS") and its agents within Immigration and Customs Enforcement ("ICE"). ICE is currently incarcerating Mr. [redacted] at the Carver County Jail and has detained him continuously, without bond, and in a county jail suited to criminal detention, for 666 days—a period approaching ***two years***, and with no end in sight to his detention. Mr.

[redacted] prolonged mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

2. Mr. [redacted] has lived in the United States for over twenty years. He initially entered the United States in October of 1998 as a refugee at the age of ten. *See* Ex. A at 3.[1] Mr. [redacted] has been diagnosed with serious mental illnesses including post-traumatic stress disorder, depression, anxiety, personality disorder, and cerebellar deterioration (brain damage). *See id*. at 4.

3. On September 16, 2011, ICE initiated removal proceedings against Mr. [redacted] charging him with removability for theft of a motor vehicle. *See id.* at 2. On October 4, 2013, Mr. [redacted] was ordered removed *in absentia* when he failed to appear at his preliminary hearing because he was in state custody. *See id.*

4. On April 10, 2018, the Immigration Court reopened Mr. [redacted] removal proceedings and rescinded his *in absentia* order to allow him to file for asylum, withholding of removal, and protection under the Convention of Torture ("CAT"). *See id.*

5. On September 12, 2018, the Immigration Judge ("IJ") denied Mr. [redacted] CAT claim finding that there was "insufficient evidence to suggest that [Mr. [redacted] is more likely than not to be tortured." *See id.* at 11–15. The IJ also found that Mr. [redacted] was statutorily barred from asylum and withholding of removal because he had committed a particularly serious crime. *See id.* at 9–11. On May 20, 2019, the Board of Appeals ("BIA") affirmed the IJ's decision. *See id.* at 20. On July 16, 2019, Mr. [redacted]

[1] Unless otherwise noted, all exhibits are cited as "Ex." and are listed on Mr. [redacted] index of supporting documents filed with this petition.

timely filed a petition for review with the U.S. Court of Appeals for the Eighth Circuit challenging the BIA final removal order. *See* Ex. B at 24. That appeal remains pending.

6. On Friday, November 22, 2019, Mr. [redacted] filed a motion for an emergency stay of removal with the Eighth Circuit. *See* Ex. B, at 25. Three days later, on Monday, November 25, 2019, the Eighth Circuit entered a stay and instructed the government to respond. *See id.* at 26. To obtain a stay of removal, Mr. [redacted] must show he has a strong likelihood of success on the merits of his pending petition for review, and also provide evidence he will suffer irreparable harm if removed to Somalia. *See Nken v. Holder*, 556 U.S. 418, 426 (2009); *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

7. Mr. [redacted] motion for stay asserted the BIA failed to factor two experts unchallenged in-court and written testimony that Mr. [redacted] has a 75% to 90% chance of being institutionalized, shackled, and chained in Somalia, because he is mentally ill, into its analysis of Mr. [redacted] eligibility for CAT protection. Ex. A, at 6, 11–14. These harms easily satisfy the legal standards for torture with government acquiescence.

8. Mr. [redacted] motion for a stay of removal was also supported by a psychiatric evaluation of Mr. [redacted] by Dr. Deanna Bass, a professor of psychiatry at the University of Minnesota Medical School, and Mr. [redacted] most recent suicide attempt, on September 8, 2019, while in immigration custody at Kandiyohi County Jail. Ex. C, at 27–33. Dr. Bass related Mr. [redacted] suicide attempt to his fear of being institutionalized and chained in Somalia, and stated, ". . . it is clear to me that [redacted] is aware of and deeply impacted by the threat of these abuses, and . . . has an intention to kill himself

rather than suffer them." Ex. C, at 31. Dr. Bass concluded, "I am confident Mr. [redacted] will kill himself if removed to Somalia." *Id.*

9. The Eighth Circuit stayed Mr. [redacted] final removal order on November 25, 2019. *See id.* at 26.

10. Mr. [redacted] civil detention is now approaching two years without a bond hearing, 486 days longer than any period of civil detention presumed reasonable by the Supreme Court. *See Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). Moreover, this court and others have granted writs of habeas corpus in cases involving challenges to periods of 1226(c) detention that were shorter than Mr. [redacted] *See, e.g.*, *Abdulkadir A. v. Sessions*, No. 19-cv-2353 (NEB/HB), 2019 WL 201761 (D. Minn. Jan. 15, 2019) (nine months); *Abshir H.A. v. Barr*, No. 19-1033 (PAM/TNL), 2019 WL 3719414 (D. Minn. Aug. 7, 2019) (eighteen months); *Lebie B. v. Barr*, No. 19-CV-2177 (JNE/HB), 2019 WL 5715703 (D. Minn. Nov. 5, 2019) (twenty months). His continued and prolonged detention violates the Due Process Clause of the Fifth Amendment, especially considering his substantial arguments against removal on appellate review and his current stay of removal. ICE has exceeded the scope of its limited authority to deprive Mr. [redacted] of his physical liberty without affording him a bond hearing. Accordingly, Mr. [redacted] brings this Petition for Writ of Habeas Corpus to challenge his continued prolonged detention on constitutional grounds.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 2241; 28 U.S.C. § 1331; Article I, § 9, cl. 2 of the United States Constitution;

the All Writs Act, 28 U.S.C. § 1651; and the Administrative Procedure Act, 5 U.S.C § 701 *et seq*.

12. Federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness or constitutionality of their detention by DHS. *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

13. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), (e)(1)(B), and 2241(d) because Petitioner is detained within this District. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) because some of the Respondents are headquartered within this District.

PARTIES

14. [redacted] a citizen of Somalia, first arrived in the United States in October 1998 as a refugee at the age of ten. Mr. [redacted] has lived continuously in the United States since he was admitted for twenty-one years. He is currently in the physical custody of Respondents at the Carver County Jail at 606 E. 4th St, Chaska, MN 55318 while he awaits removal to Somalia.

15. Respondent William Barr is the Attorney General of the United States and the most senior official in the U.S. Department of Justice ("DOJ"), which encompasses the Board of Immigration Appeals and the immigration judges as a subunit—the Executive Office for Immigration Review ("EOIR"). He has the authority to interpret the immigration laws and adjudicate removal cases. The Attorney General delegates this responsibility to the EOIR, which administers the immigration courts and the Board of

Immigration Appeals ("BIA"). He is named in his official capacity. Attorney General Barr's official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.

16. Respondent Chad Wolf is the Acting Secretary of the U.S. Department of Homeland Security ("DHS"), an agency of the United States. He is responsible for the administration of immigration laws. 8 U.S.C. § 1103(a). Acting Secretary Wolf routinely transacts business in the District of Minnesota, supervises the St. Paul ICE Field Office, and is legally responsible for pursuing Mr. [redacted] detention and removal, and as such is a legal custodian and has immediate custody of Mr. [redacted] He is named in his official capacity. Acting Secretary Wolf's official address is 245 Murray Lane SW, Washington, D.C. 20528.

17. Respondent Michael Albence is being sued in his official capacity as the Acting Director of Immigration and Customs Enforcement, a sub-unit of DHS. In that capacity, Acting Director Albence has supervisory capacity over ICE personnel in Minnesota, and he is the head of the agency that retains legal custody and has immediate custody of Mr. [redacted] Acting Director Albence's official address is 500 12th Street SW, Washington, D.C. 20536.

18. Respondent Peter Berg is the Field Office Director responsible for the Field Office of ICE with administrative jurisdiction over Mr. [redacted] case. Respondent Berg has supervisory authority over the ICE agents responsible for detaining petitioner. He is a legal custodian of Mr. [redacted] and an immediate custodian because he has immediate physical custody of Mr. [redacted] and he is named in his official capacity. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.

19. Respondent Jason Kamerud is the warden of the facility where Mr. [redacted] is held. He is a legal custodian of Mr. [redacted] and has physical custody of Mr. [redacted] as Mr. [redacted] is housed at the Carver County Jail pursuant to its contract with ICE. He is a legal custodian of Mr. [redacted] and is named in his official capacity. The address for the Carver County Jail is 606 E. 4th St, Chaska, MN 55318.

EXHAUSTION

20. There is no statutory requirement of exhaustion of administrative remedies when a noncitizen challenges the lawfulness of his detention.

21. To the extent that prudential considerations may require exhaustion in some circumstances, Mr. [redacted] has exhausted the effective administrative remedies available to him. Prudential exhaustion should not be required when to do so would be futile and would result in irreparable harm. See *McCarthy v. Madigan*, 503 U.S. 140, 146–47 (1992); *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006).

22. ICE has detained Mr. [redacted] continuously since January 31, 2018, for a period of 666 days, almost *two years*, without a bond hearing. The BIA entered its administratively final order of removal on May 20, 2019. *See* Ex. A at 16–20. Mr. [redacted] filed a timely appeal in July of 2019, followed by a motion for a stay of removal, which the Eighth Circuit granted on November 25, 2019. *See* Ex. B at 24–25.

23. Every day that Mr. [redacted] continued detention violates his due process right to liberty constitutes irreparable harm. *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

24. There is no other adequate procedure available to Mr. [redacted] to challenge his mandatory detention regardless of whether it is pursuant to 8 U.S.C. § 1231(a)(1)(A) or 8 U.S.C. § 1226. The BIA has already decided—erroneously, but finally—to dismiss Mr. [redacted] appeal, affirming the IJ's holding that Mr. [redacted] felony history bars him from asylum and withholding of removal and concluding that the IJ's findings and predictions of future torture regarding the CAT claim were not clearly erroneous. Mr. [redacted] has a pending appeal of the BIA decision before the Eighth Circuit and has been granted a judicial stay of removal. The only remedy to his prolonged detention available to a noncitizen like Mr. [redacted] is through a writ of habeas corpus.

FACTUAL ALLEGATIONS & PROCEDURAL HISTORY

25. Mr. [redacted] is a thirty-one year old native and citizen of Somalia. *See* Ex. A at 2. His father and two brothers were killed and his mother disappeared during the Somali civil war when he was three years old. *See id*. at 3. Mr. [redacted] fled the country with his three sisters and lived in a Kenyan refugee camp until 1998. *See id.* He arrived in the United States as a refugee when he was ten years old and has lived continuously here since then. *See id*.

26. During his teenage years, Mr. [redacted] grew up with little family support and suffered from physical and psychological abuse from his sister. *See id.* at 4. He was kicked out of his family and eventually began to stay in shelters in 2009. *See id.* In school, Mr. [redacted] had difficulty relating to his peers and associated with the "wrong crowd." *See id.*

27. Mr. [redacted] suffered from multiple physical injuries including restricted mobility in his right elbow from a gunshot and arthritis in his left ankle resulting from a fall from a third-floor balcony. *See id.* Mr. [redacted] has also been diagnosed with serious mental illnesses including post-traumatic stress disorder, depression, anxiety, personality disorder, and cerebellar deterioration (brain damage). *See id*. Mr. [redacted] has struggled with alcoholism and substance abuse. *See id*. Because of these mental health disorders, he had to live in a group home and felt isolated from the community. *See id.*

28. On September 8, 2011, Immigration and Customs Enforcement brought removal proceedings against Mr. [redacted] for having been convicted of a theft of a motor vehicle pursuant to INA § 237(a)(2)(A)(iii). *See id*. In August 2012, Mr. [redacted] was convicted a second-degree assault. *See id.* On October 4, 2013, Mr. [redacted] was ordered removed *in absentia* when he failed to appear at his preliminary hearing because he was in state custody. *See id.*

29. On or about January 31, 2018, Mr. [redacted] was detained by ICE after being convicted of gross misdemeanor trespassing. At that time, he learned of the prior *in absentia* removal order from 2013. He was transferred to the West Texas Detention Facility (WTDF) in Sierra Blanca, TX, where he experienced serious abuse by correctional officers.

30. On April 10, 2018, the Immigration Court reopened Mr. [redacted] removal proceedings and rescinded his *in absentia* order to allow him to file for asylum, withholding of removal, and protection under the Convention of Torture ("CAT"). *See id.* at 2.

31. On July 26, 2018, Mr. [redacted] had his first merits hearing where two expert witnesses, Dr. [redacted] and Dr. [redacted], testified to the likelihood that Mr. [redacted] would face torture if removed to Somalia. *See id.* at 5–7. The Immigration Judge ("IJ") entered both declarations into evidence and heard testimony from Mr. [redacted] and Dr. [redacted] *See id.*

32. On September 12, 2018, the IJ found Mr. [redacted] was statutorily ineligible for asylum and withholding of removal because he had committed a particularly serious crime. *See id.* at 9–11. The IJ also denied Mr. [redacted] CAT claim finding that there was "insufficient evidence to suggest that [Mr. [redacted] is more likely than not to be tortured." *See id.* at 11–15. On May 20, 2019, the BIA affirmed the IJ's decision that his felony history would bar him from applying for withholding of removal and found that the IJ's findings and predictions of future torture regarding the CAT claim were not clearly erroneous. *See id.* at 20. On October 3, 2019, Mr. [redacted] timely filed a Petition for Review with the Eighth Circuit. *See* Ex. B at 24.

33. On Friday, November 22, 2019 Mr. [redacted] filed an emergency motion for a stay of removal with the Eighth Circuit. *See* Ex. B at 25. Mr. [redacted] has argued he was very likely to succeed on the merits of his pending appeal to the Eighth Circuit because the BIA committed several legal errors in affirming the denial of protection under CAT in violation of its own regulation. *See* 8 C.F.R. § 1208.16(c) (requiring the agency to factor "all evidence relevant to the possibility of torture."); *see also Hernandez v. Reno*, 258 F.3d 806, 814 (8th Cir. 2001) (BIA commits legal error if it "d[oes] not consider . . . uncontroverted testimony" and "omit[s] most of the facts in the record from its legal

analysis."). The BIA failed to assess Mr [redacted] key arguments and unchallenged expert testimony that he has a 75% to 90% chance of being institutionalized and chained in Somalia, because he is mentally ill, and failed to conclude that such mistreatment that Mr. [redacted] likely faces if removed satisfies the legal standards for torture with government acquiescence.

34. Furthermore, Mr. [redacted] provided evidence showing he will suffer extreme irreparable harm if the stay was not granted. In addition to a 75% to 90% percent chance that he will be institutionalized and chained in Somalia, he will be deprived of the necessary mental health treatment he requires. On September 8, 2019, Mr. [redacted] attempted suicide while in detention at Kandiyohi County Jail. *See* Ex. C at 33. This is the fourth time Mr. [redacted] has attempted suicide. Ex. C, at 29. A psychiatric evaluation completed by Dr. Bass on November 21, 2019 stated that Mr. [redacted] almost certainly will commit suicide if he is removed to Somalia. *See* Ex. C at 31 ("As a consequence of untreated depression, and the conditions, isolation, and abuses he faces in Somalia, . . . [redacted] will have no mental resilience and that his suicide risk will be extremely high."). The Eighth Circuit agreed and granted Mr. [redacted] a stay of removal halting his deportation to Somalia. *See* Ex. B at 26.

35. As of the date of this filing, Mr. [redacted] remains in the Carver County Jail and has spent 666 days in ICE custody. Yet, he has never received any bond hearing, and there has never been any factual determination that his ongoing and prolonged detention is related to any legitimate government interest. Every day his detention goes on, Mr. [redacted] suffers the irreparable injury of lost liberty. Furthermore, Mr. [redacted] pending

appeal at the Eighth Circuit will certainly prolong his detention for many more months, unless this Court intervenes now.

LEGAL FRAMEWORK

ICE'S AUTHORITY TO DETAIN MR. [redacted] IS UNDER § 1226, NOT § 1231

36. The government's authority to detain noncitizens is provided for in the Immigration & Nationality Act ("INA"), codified at Title 8 of the U.S. Code. Under 8 U.S.C. § 1226, particular noncitizens may or shall be detained awaiting a decision on whether they are to be removed. *Nielsen v. Preap*, 139 S. Ct. 954, 959–60 (2019). Under § 1231, noncitizens with a final order of removal are detained to be removed from the United States within a period of 90 days. 8 U.S.C. § 1231(a)(1)(A). The statute specifies when the removal period starts. In this case, the removal period has not started because an appeal of the order of removal is pending before the Eighth Circuit and the Court has issued a stay of removal. 8 U.S.C. § 1231(a)(1)(B)(ii).

37. Despite the plain language of the statute, ICE has presumably asserted authority pursuant to § 1231 to detain Mr. [redacted] However, detention under § 1231 is inconsistent with the statute's purpose of ensuring that a noncitizen who is subject to a final order of removal is available for removal. The removal period in Mr. [redacted] case has not started as a result of the Eighth Circuit's November 25, 2019 grant of a judicial stay of Mr. [redacted] removal. *See* Ex. B at 26. Mr. [redacted] cannot be removed and the 90-day removal period has not started. Therefore, Mr. [redacted] detention cannot fall under § 1231. *Tindi v. Sec'y, Dep't of Homeland Sec.*, 363 F. Supp. 3d 971 (D. Minn. 2017), report and recommendation adopted, No. CV 17-3663(DSD/DTS), 2018 WL 704314 (D. Minn. Feb.

5, 2018) (abrogated on other grounds by *Ali v. Sessions*, No. CV 18-2617 (DSD/LIB), 2019 WL 121946, at *1 (D. Minn. Jan. 7, 2019)); *Bah v. Cangemi*, 489 F. Supp. 2d 905, 916 (D. Minn. 2007) (stating that a stay of removal "does not suspend the removal period; instead, it defers the start of the removal period"); *id.* at 916 ("[I]f the removal period never began, neither did the *Zadvydas* clock, and § 1226 . . .rather than § 1231 . . . governs the alien's detention."); *Casas-Castrillon v. DHS*, 535 F.3d 942, 948 (9th Cir. 2008); *see also Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1209 (11th Cir. 2016) (internal quotation marks omitted) ("If a court stays an alien's removal during judicial review of the alien's removal order, the statutory 90-day removal period does not begin until the court's final order."); *Codina v. Chertoff*, 283 F. App'x 432, 433 (8th Cir. 2008) (holding that because "[petitioner's] removal had been stayed by the Second Circuit, and she had a petition for review of her removal order pending before that court… she was not yet under a final order of removal."); *Hechavarria v. Sessions*, 891 F.3d 49, 51, 54–55 (2d Cir. 2018) (finding that "when a stay has been issued, an immigrant is not held pursuant to Section 1231(a) because he is not in the 'removal period' contemplated by statute until his appeal is resolved by [the Circuit] Court").

38. Various courts have taken the position that a judicial stay pending a decision on a petition for review leads to detention pursuant to § 1226 as opposed to § 1231. *See, e.g.*, *Hechavarria v. Sessions*, 891 F.3d at 53 (holding that § 1226 governs the petitioner's claim, not § 1231, because he has obtained a stay of removal); *Leslie v. Att'y Gen.*, 678 F.3d 265, 270-71 (3d Cir. 2012) (concluding that § 1226, not § 1231, governed detention where there was a judicial stay of removal pending further judicial review, and

ordering an individualized bond hearing as the noncitizen's detention had become "unreasonably long"); *Casas-Castrillon v. DHS*, 535 F.3d at 948 (while DHS argued that a noncitizen with a pending petition for review and judicial stay was subject to mandatory detention under § 1231, the Ninth Circuit concluded that § 1226 "governs the prolonged detention of aliens awaiting judicial review of their removal orders"); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003) ("[W]here a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under [1226] until the court renders its decision."); *Sopo v. U.S. Att'y Gen.*, 825 F.3d at 1209 ("If a court stays an alien's removal during judicial review of the alien's removal order, the statutory 90-day removal period does not begin until the court's final order.") (internal quotation marks omitted).

39. While the Eighth Circuit has not yet considered whether a noncitizen that has received both an administratively final order of removal and a judicial stay of removal is held under § 1226 or § 1231, this Court has considered the issue and held that the detention authority is under § 1226. For example, in *Tindi*, Judge Schultz determined that because a petitioner was "in custody but not currently subject to a final removal order [due to a stay of removal pending circuit court review] . . . the Court must evaluate Tindi's request for release under 8 U.S.C. § 1226(a) and the law governing pre-removal detention under that statute." *Tindi*, 2017 WL 10259531, at *3 (recommending that Tindi be released based in part on the discretionary detention authority during a stay of removal). In *Enique U.R. v. Secretary of Homeland Security*, this Court confirmed that the plain language of 8 U.S.C. § 1231(a)(1)(B) specifies that a petitioner's removal

period has not begun once a judicial stay of removal has been entered. *Enrique U.R. v. Sec'y of Homeland Sec.*, No. CV 19-1063 (MJD/BRT), 2019 WL 4120149, at *2 (D. Minn. June 17, 2019), report and recommendation adopted *sub nom. Carlos Enrique U.R. v. Barr*, No. CV 19-1063 (MJD/BRT), 2019 WL 4081129 (D. Minn. Aug. 29, 2019). In *Lebi B. v. Barr*, this Court once again held that a judicial stay deferred the start of the removal period, and because the removal period never began, § 1226 governed the petitioner's detention. *Lebie B. v. Barr*, No. 19-CV-2177 (JNE/HB), 2019 WL 5715703, at *2 (D. Minn. Nov. 5, 2019). Thus, this Court has consistently held that once there is a stay of removal, detention is governed by § 1226 not § 1231.

40. Regardless of the detention authority, constitutional concerns plague ICE's detention of Mr. [redacted] for nearly 22 months.[2] *See Bah*, 489 F. Supp. 2d at 920 ("But if an alien's continuous detention under § 1226 and § 1231 combined is potentially indefinite . . . constitutional concerns arise regardless of how the detention is characterized by a court.").

CONTINUED DETENTION OF MR. [redacted] IS A VIOLATION OF THE DUE PROCESS CLAUSE

41. Mr. [redacted] detention is an egregious violation of the Fifth Amendment's guarantee that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U. S. Const. Amend. V. Noncitizens are entitled to due process during

[2] Using the "unencumbered time" approach, Mr. [redacted] was under § 1231 detention for 190 days, from May 20, 2019 (administratively final removal order) to November 25, 2019 (date of temporary stay grant). See *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007).

deportation proceedings. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). ("[I]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings"). Mr. [redacted] continued detention violates the Due Process Clause of the Fifth Amendment. *Liban M.J. v. Sec'y of Dep't of Homeland Sec.*, 367 F. Supp. 3d 959, 961 (D. Minn. Mar. 18, 2019).

42. The government's authority to hold Mr. [redacted] without bond has limitations. The Supreme Court considered a facial constitutional challenge to § 1226 in *Demore v. Kim*, and held that the mandatory detention statute was consistent with the Due Process Clause, but explained it was limiting its holding to the "brief period necessary for [] removal proceedings." 538 U.S. 510, at 523 (2003). Notably, in finding § 1226(c) constitutional, the Court relied upon the government's erroneous representations that the average length of detention was fairly short.[3] *Id.* at 529–31 (finding that removal proceedings on average were completed in 47 days and on average an appeal took an additional four months to complete).[4] As a result, constitutional concerns arise when detention exceeds a "brief period." *See Demore*, at 529–30. For almost 22 months Mr. [redacted] has languished in ICE custody. The length of his detention far surpasses the "brief period" the Court considered permissible in *Demore*. *See id.*; *Abshir H.A. v. Barr, et al.*,

[3] The Solicitor General's office has stated that the government "made several significant errors in calculating" the statistics which it provided to the Court in *Demore*, 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.
[4] 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.*

19-CV-1033 (PAM/TNL), at *4 (D. Minn. Aug. 7, 2019); *Liban M.J.*, 367 F. Supp. 3d at 962; *Tindi v. Sec'y, Dep't of Homeland Sec.*, No. CV 17-3663 (DSD/DTS), 2018 WL 704314, at *4 (D. Minn. Feb. 5, 2018) ("Courts have been clear that as the period of detention grows longer, the heavier is the government burden to justify continued detention."); *Reid v. Donelan*, 991 F. Supp. 2D 275, 281 (D. Mass. 2014), aff'd, 819 F.3d 486 (1st Cir. 2016) (finding that fourteen months of detention is "well beyond the brief detainment contemplated in *Demore*."); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) ("[W]e affirm ... that incarceration for eighteen months pending removal proceedings is unreasonable.").

43. Mr. [redacted] has been held in prolonged immigration detention without adequate procedural safeguards. Pursuant to the Due Process clause, detention is valid if ordered "with adequate procedural safeguards or a special justification outweighs the individual's liberty interest," *Zadvydas*, 533 U.S. at 679, and the Supreme Court has continuously held that civil detention "for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979). After the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), courts have looked to "address the constitutional issue directly." *Mohamed v. Sec'y, Dep't of Homeland Sec.*, 2018 WL 2392205, at *8 (D. Minn. Mar. 26, 2018) (applying fact-based individualized standard and granting request for habeas relief).

44. While the Eighth Circuit has not opined on this issue, courts in the District of Minnesota have applied a "fact-based individualized standard to determine the constitutionality of an alien's continued pre-removal detention." 138 S. Ct. 830; *Liban*

M.J. 367 F. Supp. 3d at 963; *Mohamed*, 2018 WL 2392205, at *12 (citing *Tindi,* 2018 WL 704314); see also *Abdulkadir A.*, 2018 WL 7048363, at *10–13. The relevant factors in this inquiry 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 the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Liban M.J.*, 367 F. Supp. 3d at 963. (citing *Muse v. Sessions*, No. 18-CV-0054 (PJS/LIB), 2018 WL 4466052, at *2 (D. Minn. Sept. 18, 2018)).

45. Applying this test to Mr. [redacted] case, the first factor is the total length of detention to date. *Id.* "This inquiry 'contemplates how long th[e] deprivation has lasted . . .' and is critical of detention that can no longer be categorized as 'brief.'" *Id.* (citing *Muse v. Sessions*, 2018 WL 4466052, at *4). Mr. [redacted] has been detained for 666 days, almost 22 months, without a bond hearing. His detention is more than sixteen months longer than any period considered by the Supreme Court in *Demore*. 538 U.S. at 529-530; *Abshir H.A. v. Barr, et al.*, 19-CV-1033 (PAM/TNL), at *4 (D. Minn. Aug. 7, 2019) (finding that the Petitioner's detention of eighteen months far exceeds the periods of detention considered by the Supreme Court in *Demore* and weighs heavily in favor of the petitioner.) This factor weighs heavily in Mr. [redacted] favor.

46. The second factor is the likely duration of future detention. *Liban M.J.*, 367 F. Supp. 3d at 963. Mr. [redacted] has a judicial stay in place. His detention will likely continue for months unless this Court intervenes. The removal proceedings are highly

likely to continue into 2020.[5] The likely duration of future detention also weighs in Mr. [redacted] favor.

47. The third element to determine the reasonableness of detention are the conditions of detention. *Liban M.J.*, 367 F. Supp. 3d at 963. This Court found in *Muse* that "[t]he more that the conditions under which the alien is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing." *Muse*, 2018 WL 4466052, at *5. Mr. [redacted] is being detained at the Carver County Jail alongside inmates serving criminal sentences and awaiting criminal trials. His detainment is "indistinguishable from penal confinement." *Id.* In addition, Mr. [redacted] detention deprives him from receiving timely and appropriate mental health treatment, subjecting him to conditions resemble penal confinement in their character, including isolation and segregation. Therefore, this factor weighs strongly in his favor.

48. The fourth factor recognized by this Court are any delays in proceedings caused by the detainee. *Muse*, 2018 WL 4466052, at *5; *Liban M.J.*, 367 F. Supp. 3d at 963. Mr. [redacted] pursued litigation to defend himself in his removal proceedings in good faith. See *Tindi,* 2017 WL 10259531, at *5 (holding that absent evidence of bad faith or dilatory tactics, a detainee may not be detained indefinitely "merely because he has pursued his legal rights"). Detention is not reasonable solely because the delay is caused by the time needed for individuals to litigate their cases. *See Liban M.J.*, 367 F. Supp. 3d

[5] Even if Mr. [redacted] succeeds on the merits, if the government petitions for rehearing or petitions for review from the Supreme Court, the government can continue to detain him until the rehearing or appeal is adjudicated. Fed. R. App. P. 35, 40.

at 965 ("Petitioner is entitled to raise legitimate defenses to removal . . . "); *see also Sopo v. U.S. Att'y Gen.*, 825 F.3d at 1218, *vacated* 890 F.3d 952 (11th Cir. 2018); *Ly v. Hansen*, 351 F.3d at 272. Therefore, this factor is neutral.

49. The fifth factor considered is any delay caused by the government. *Muse*, 2018 WL 4466052, at *5; *Liban M.J.*, 2019 WL 1238834, at *3. The government has not engaged in dilatory tactics in Mr. [redacted] removal proceedings. This factor is neutral.

50. Finally, although Mr. [redacted] in no way asks this Court to engage the merits of his pending petition for review before the Eighth Circuit, the last factor—the likelihood that Mr. [redacted] will ultimately be removed—also favors Mr. [redacted] considering that the Eighth Circuit has just stayed his removal pending a final decision on the merits of his petition for review. *Muse*, 2018 WL 4466052, at *6; *Liban M.J.*, 367 F. Supp. 3d at 963; *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

51. In total, the majority of factors to determine the reasonableness of detention from *Mus*e and *Liban M.J.* weigh in favor of Mr. [redacted] Mr. [redacted] has already been detained for almost 22 months; his future detention is likely to last for several more months; he is currently being detained in civil detention alongside those serving criminal sentences to severe detriment, and his prolonged detention continues despite a likelihood he will succeed in his Eighth Circuit petition for review. The remaining two factors are neutral as neither the government or Mr. [redacted] engaged in dilatory tactics to delay removal proceedings. Without habeas relief, ICE will continue to detain Mr. [redacted] for at least months beyond the unreasonably prolonged period of almost two years he has

already been imprisoned. Mr. [redacted] is entitled to immediate release. Alternatively, Mr. [redacted] must be granted an immediate bond hearing at which the government bears the burden of proving by clear and convincing evidence that Mr. [redacted] ongoing detention is justified, and any bond that is set accounts for his ability to pay.

BOND HEARING STANDARDS

52. Some courts have held that where bond hearings become required due to the length of detention, due process places the burden of proof on the government to establish by clear and convincing evidence that continued detention is justified. *See, e.g.*, *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (holding that due process requires that the government bear the burden of justifying continued detention by clear and convincing evidence at a prolonged detention hearing); *see also Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (ordering a bond hearing in the context of prolonged § 1226(c) detention where the government would be required to "produce individualized evidence" that the respondent's continued detention was necessary); *Diop*, 656 F.3d at 233 (stating that when detention becomes unreasonable, due process demands a hearing at which the government bears the burden of proving continued detention is necessary "to fulfill the purposes of the detention statute.").

53. Additionally, when the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (holding that in a full-blown adversary hearing, the government must, under clear and convincing evidence, demonstrate to a neutral decision-maker that no alternatives to

detention could assure the safety of the community); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. 678, 692 (finding post-final-order custody review procedures deficient because, inter alia, they placed burden on detainee).

54. The Supreme Court has further articulated that due process mandates a heightened standard of proof in civil cases when the individual interests at stake are both "particularly important" and "more substantial than mere loss of money." *See Singh v. Holder*, 638 F.3d at 1204; Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting *Addington v. Texas*, 441 U.S. at 424).

55. As a result of the above, Mr. [redacted] must be immediately released, but in the alternative and at a minimum he must afforded a bond hearing: "[t]he Due Process Clause foresees eligibility for bail as part of due process" because "[bail] is basic to our system of law." *Jennings*, 138 S.Ct. at 862 (Breyer, J., dissenting) (internal quotations and citations omitted). Where a noncitizen has been detained for a prolonged period or is pursuing a substantial defense to removal or claim to relief, due process requires an individualized determination that continued detention is warranted. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("Individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified.").

56. At a bond hearing, in addition to placing the burden on the government to prove by clear and convincing evidence that continued detention is justified,[6] the noncitizen's ability to pay a bond must be considered in determining the appropriate conditions of release.

57. This court could order the IJ to give Mr. [redacted] a bond hearing at which the government would have to bear the burden of proof and the court should be required to consider Mr. [redacted] ability to pay, however, here we respectfully submit a bond hearing by this court is the more appropriate step, if immediate release is not granted, because this court is in the position to provide Mr. [redacted] a truly neutral arbiter.

58. As a result of the above, Mr. [redacted] must be granted release, or in the alternative a hearing before this court to determine whether continued detention is necessary and unless the government can prove by clear or convincing evidence that it is indeed needed, Mr. [redacted] prayers for relief must be granted.

CAUSES OF ACTION

COUNT I: MR. [redacted] MANDATORY DETENTION VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

59. Mr. [redacted] realleges and incorporates by reference the paragraphs above.

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[6] To do this the government would need to establish by clear and convincing evidence that Mr. [redacted] 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. See *Bell v. Wolfish*, 441 U.S. 520, 538 (1979); *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at *12(S.D.N.Y. May 23, 2018); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018); *Haughton v. Crawford*, 221 F. Supp. 3d 712, 713-17 (E.D. Va. 2016); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 690-93 (D. Mass. 2018); *Linares Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *3 (S.D.N.Y. Oct. 17, 2018).

60. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law," unless such detention is reasonably related to its purpose. *Demore*, 538 U.S. at 513 (2003); *Zadvydas*, 533 U.S. at 690–91 (2001). Moreover, as detention becomes prolonged, the Due Process Clause requires a sufficiently strong justification to outweigh the significant deprivation of liberty, as well as strong procedural protections. *Tindi*, 2018 WL 704314, at *4; *See Zadvydas*, 533 U.S. at 690–91.

61. Mr. [redacted] is detained pursuant to 8 U.S.C. § 1226(c) and has been detained for almost 22 months. Mr. [redacted] prolonged detention, lacks sufficient justification and indeed bears no reasonable relation to the government's purpose. Here, Mr. [redacted] has a strong petition for review and a stay that was already granted in the Eighth Circuit—making the prospect of future removal all the more unlikely and unforeseeable. Thus, Mr. [redacted] continued mandatory detention serves no justifiable purpose and is unlawful. *See Zadvydas*, 533 U.S. at 690 (explaining that government detention violates the Due Process Clause absent a special justification that outweighs the individual's constitutionally protected interest in avoiding physical restraint).

62. Therefore, application of 8 U.S.C. § 1226(c) or any other statute, including 8 U.S.C. § 1231, to Mr. [redacted] does and would violate the Due Process Clause of the Fifth Amendment as such detention has become prolonged and indefinite and the legal justification for continuing to detain Mr. [redacted] has disappeared. He is entitled to release or an immediate bond hearing with the burden on the government and due consideration of his ability to pay.

COUNT II: MR. [redacted] PROLONGED DETENTION VIOLATES THE EIGHTH AMENDMENT

63. Mr. [redacted] realleges and incorporates by reference the paragraphs above.

64. The Eighth Amendment prohibits "[e]xcessive bail." U.S. Const. amend. VIII.

65. 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).

66. For these reasons, Mr. [redacted] ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Mr. [redacted] respectfully requests that this Court:

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 and declare his detention unconstitutional;
5. Direct the Respondents to release Petitioner from custody immediately; alternatively, the Court should either hold a bond hearing or order the government to provide Petitioner a bond hearing immediately, before a neutral arbiter, and with the burden upon the government to prove by clear and convincing evidence

that Petitioner is a danger to the community and flight risk, and taking into account his ability to pay any bond;

6. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

7. Grant such further relief as the Court deems just and proper.

Dated: November 27, 2019

Respectfully submitted,

s/ *Benjamin Casper Sanchez*

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