IN THE UNITED STATES DISTRICT COURt  
for THE [District]

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| [client] [client],  Petitioner,  v.  [Warden of facility]; [ICE District Director]; John F. Kelly, in his capacity as Secretary of Homeland Security; Jefferson Beauregard Sessions III in his capacity as Attorney General of the United States,  Respondents. | ))))  )  )  ))))))))))) | Case No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

petition for writ of habeas corpus

**PRELIMINARY STATEMENT**

1. This case challenges the government’s authority to indefinitely detain a noncitizen without any finding of dangerousness or flight risk. It asks this Court to grant the petitioner release from prolonged immigration detention or a bond hearing before a neutral arbiter.
2. Petitioner [has a credible fear of persecution as determined by Department of Homeland Security (“DHS”) officials]” DHS has therefore granted petitioner the opportunity to present to an immigration judge a claim for asylum.
3. As of the date of this petition, petitioner has been detained by Immigration and Customs Enforcement (“ICE”) for nearly [time] months, with no end to her detention in the reasonably foreseeable future. Cite to record.Petitioner was originally detained by ICE on or about [time], after voluntarily presenting to immigration officials at the US-Mexico border in order to request asylum. Cite to record.
4. ICE claims the authority to indefinitely detain petitioner without a bond hearing under the Immigration and Nationality Act (“INA”) § 235(b), 8 U.S.C. § 1225(b). In separate subsections, that statute provides for the detention, before initiation of removal proceedings, of asylum seekers who pass a credible fear interview “for further consideration of the application for asylum,” id. § 1225(b)(1)(B)(ii), as well as noncitizens whom an immigration official believes are not “clearly and beyond a doubt entitled to admission . . . .” id. § 1225(b)(2)(A). Collectively, DHS refers to these noncitizens as “arriving aliens.” 8 C.F.R. § 1.2.
5. The government interprets § 1225(b) to require mandatory detention without a bond hearing of all arriving aliens, for the indefinite length of time necessary to complete removal proceedings, even if that time becomes unreasonably prolonged. See Matter of X-K-, 23 I. & N. Dec. 731, 732 (BIA 2005) (“There is no question that Immigration Judges lack jurisdiction [for a bond hearing] over arriving aliens who have been placed in . . . removal proceedings . . . .”); 8 C.F.R. § 1003.19(h)(2)(i)(B) (stating that an immigration judge may not conduct a custody determination of an “arriving alien”).
6. Petitioner’s prolonged, indefinite detention pending removal proceedings violates the U.S. Constitution’s Fifth Amendment because it deprives petitioner of liberty without due process of law and the Immigration and Nationality Act because it is not authorized by the statute.
7. Petitioner therefore respectfully requests that this Court issue a writ of habeas corpus and order petitioner’s release from custody, with appropriate conditions of supervision if necessary. In the alternative, petitioner requests that this Court conduct or order an immigration judge to conduct a bond hearing at which (1) the government bears the burden of proving flight risk and dangerousness by clear and convincing evidence and (2) the reviewing court considers alternatives to detention that could mitigate risk of flight.

**PARTIES**

1. Petitioner is presently detained at the direction of Respondents at [detention center name and address].
2. Respondent **[wardern of facility]** is named in his official capacity as the warden of the facility where petitioner is held. In this capacity, he is a legal custodian of petitioner. Respondent’s address is [address].
3. Respondent **[District Director]** is named in his official capacity as the ICE District Director of [region]. In this capacity, he is a legal custodian of petitioner. Respondent’s address is [address].
4. Respondent John F. Kelly is named in his official capacity as the Secretary of DHS. He is responsible for the administration of the immigration laws. 8 U.S.C. § 1103(a). He routinely transacts business in the [district where habeas is filed] and is legally responsible for Petitioner’s detention. As such, he is a legal custodian of Petitioner. Respondent Kelly’s address is United States Department of Homeland Security, 3801 Nebraska Ave NW, Washington, DC 20016.
5. Respondent Jefferson Beauregard Sessions III is named in his official capacity as the Attorney General of the United States. He is responsible for the administration of the immigration laws as exercised by the Executive Office for Immigration Review. 8 U.S.C. § 1103(g). He routinely transacts business in the [district where habeas is filed] is legally responsible for Petitioner’s detention. As such, he is a legal custodian of Petitioner. Respondent Sessions’s address is United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

**JURISDICTION**

1. Petitioner is detained in the custody of Respondents at [address].
2. This Court has subject matter jurisdiction over this Petition under 28 U.S.C. § 2241 (power to grant habeas corpus) and 28 U.S.C. § 1331 (federal question jurisdiction); the All Writs Act, 28 U.S.C. § 1651; and the Administrative Procedure Act, 5 U.S.C. § 701.
3. Federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness or constitutionality of their detention by ICE. Demore v. Kim, 538 U.S. 510, 516-17 (2003).

**VENUE**

1. Under 28 U.S.C. § 2241(d), venue properly lies in the [district where habeas is filed] because Petitioner is physically present and in the custody of Respondents within the district. In addition, Petitioner’s pending removal proceedings are taking place within the district at the immigration court located at [court address].

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

1. “It is no longer the law of this circuit that exhaustion of administrative remedies is a jurisdictional requirement in a § 2241 proceeding.” Santiago-Lugo v. Warden, 785 F.3d 467, 474–75, n.5 (11th Cir. 2015) (abrogating Boz v. United States, 248 F.3d 1299, 1300 (11th Cir.2001)).
2. Further, there is no statutory exhaustion of administrative remedies where a noncitizen challenges the lawfulness of her detention. Cf. 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies only where requesting review of a final order of removal).
3. “‘[W]here Congress has not clearly required exhaustion, sound judicial discretion governs.” Jones v. Zenk, 495 F. Supp. 2d 1289, 1297 (N.D. Ga. 2007) (citing McCarthy v. Madigan*,* 503 U.S. 140, 144 (1992)). As a matter of discretion, exhaustion of administrative remedies should therefore be waived “(1) where prejudice to the prisoner’s subsequent court action ‘may result, for example, from an unreasonable or indefinite timeframe for administrative action’; (2) where the administrative agency may not have the authority ‘to grant effective relief’; or (3) ‘where the administrative body is shown to be biased or has otherwise predetermined the issue before it.’” Jones, 495 F. Supp. 2d at 1297 (citing McCarthy, 503 U.S. at 146-48). See also Woodford v. Ngo, 548 U.S. 81, 103 (2006) (Breyer, J. concurring) (noting “well-established exceptions to exhaustion” that include constitutional claims, futility, hardship to the petitioner, and where administrative remedies are inadequate or unavailable) (citations omitted)).
4. In making its discretionary decision, the Court should consider the urgency of the need for immediate review. “Where a person is detained by executive order . . . the need for collateral review is most pressing. . . . In this context the need for habeas corpus is more urgent.” Boumediene v. Bush, 553 U.S. 723, 783 (2008) (waiving administrative exhaustion for executive detainees).
5. Petitioner’s constitutional challenge to indefinite detention is exempt from administrative exhaustion requirements. See Woodford v. Ngo, 548 U.S. 81, 103 (Breyer, J. concurring) (constitutional claims are exempt from administrative exhaustion); see also Khan v. Atty. Gen. of U.S., 448 F.3d 226, 236 n.8 (3d Cir. 2006) (internal alterations and quotations removed) (“[D]ue process claims generally are exempt from the exhaustion requirement because the BIA does not have jurisdiction to adjudicate constitutional issues.”); United States v. Gonzalez-Roque, 301 F.3d 39, 48 (2d Cir. 2002) (“‘[T]he BIA does not have jurisdiction to adjudicate constitutional issues . . . .’” (quoting Vargas v. U.S. Dep’t of Immigration & Naturalization, 831 F.2d 906, 908 (9th Cir. 1987)).
6. Further, administrative exhaustion before the BIA would be futile. Exhaustion is futile where the agency has “predetermined the issue before it.” McCarthy, 503 U.S. at 148. The BIA has predetermined the issue here: whether an individual detained under § 1225(b) is eligible for a bond hearing. The BIA interprets § 1225(b) to mandate detention of arriving aliens pending removal proceedings, without exception. See Matter of X-K-, 23 I. & N. Dec. at 732 (“There is no question that Immigration Judges lack jurisdiction [for a bond hearing] over arriving aliens who have been placed in . . . removal proceedings . . . .”). Because exhaustion of petitioner’s claims before the BIA would be futile, the Court should waive its requirement as a matter of discretion.
7. A request for release on humanitarian parole under 8 U.S.C. 1182(d)(5)(A) would also be futile. Parole review is conducted informally by DHS officers—the jailing authority—by checking a box on a form that contains no factual findings, no specific explanation, and no evidence of deliberation. There is no hearing, no record, and no administrative appeal from a negative parole decision, even to correct manifest errors. See Rodriguez v. Robbins, 804 F.3d 1060, 1081 (9th Cir. 2015), cert. granted sub nom. Jennings v. Rodriguez, 136 S. Ct. 2489, 195 L. Ed. 2d 821 (2016) (identifying denials of parole “based on blatant errors: In two separate cases . . . officers apparently denied parole because they had confused Ethiopia with Somalia. And in a third case, an officer denied parole because he had mixed up two detainees’ files.”); Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (9th Cir. 2006) (finding that DHS abused its authority by denying parole). In the absence of administratively enforceable standards, grants of parole have decreased sharply in recent years. See Human Rights First, Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers 13 (2016) (relying on government data to document a one-third decrease in parole grants between 2012 and 2015).
8. President Trump has further restricted the already limited use of parole by ordering DHS officials to “end the abuse of parole and asylum provisions” in a January 2017 executive order. See Exec. Order. No. 13,767: Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).
9. Nonetheless, petitioner submitted a humanitarian parole request seeking release from respondents on [date]. Cite to record. Respondents denied that request on **[date of parole denial]**. Cite to record. Petitioner has therefore exhausted all available administrative remedies.

**STATEMENT OF FACTS**

1. [Facts outlining the asylum claim, procedural history of the case, any delays that may be attributable to EOIR/ICE (missed or delayed hearings), why this is a good case for appeal (including any citations to circuit law), location of detention and its resemblance to a jail (could be a declaration). Relevant factors include the overall length of detention, the promptness of proceedings, the complexity of the case, the reasonable foreseeability of continued, lengthy litigation, and the conditions of confinement. Any facts that go to these issues.]

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

**VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. Petitioner’s prolonged detention under § 1225(b) without any individualized assessment of the need for detention deprives petitioner of due process of law. The Court should therefore order release from unconstitutional detention.
3. The Due Process Clause of the Fifth Amendment forbids the government from depriving any “person” of liberty “without due process of law.” U.S. Const. amend. V.
4. “[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” Zadvydas v. Davis, 533 U.S. 678, 693 (2001). For this reason, even “removable and inadmissible aliens are entitled to be free from detention that is arbitrary and capricious,” id. at 721 (Kennedy, J., dissenting). That constitutional protection is unaffected by the government’s authority to make rules for “admission” that regulate the immigration status of noncitizens. See 8 U.S.C. § 1101(a)(13)(A) (defining admission as “the lawful entry of the alien”).
5. “A statute permitting indefinite detention of an alien would raise a serious constitutional problem” under the Fifth Amendment’s Due Process Clause. Id. at 690. That serious constitutional problem is raised by the government’s reading of § 1225(b). It interprets the statute to permit the indefinite detention of a noncitizen whom the government has not found to be removable or inadmissible, but instead granted the right to remain in the United States pending removal proceedings after demonstrating a credible fear of persecution to an asylum officer.
6. In Zadvydas v. Davis, the Supreme Court rejected the government’s argument that its immigration powers permit it to indefinitely detain noncitizens after the conclusion of removal proceedings. Id. at 695. Since then, the government has repeated that same argument to justify prolonged, indefinite detention pending removal proceedings.
7. Each time, federal courts have roundly rejected it. Every Court of Appeals to consider prolonged detention under INA § 236(c), 8 U.S.C. § 1226(c)—a statute that, like § 1225(b) mandates detention of inadmissible noncitizens pending removal proceedings—holds it limited to a reasonable period by the Due Process Clause. See Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir.2011); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003). None of these decisions distinguishes between previously admitted and inadmissible noncitizens. Instead, they find that due process limits the period that any noncitizen may be held in prolonged mandatory detention pending removal proceedings.
8. In doing so, they follow Demore v. Kim, 538 U.S. 510, 518 (2003). Demore identified mandatory detention pending removal proceedings as a “brief period,” lasting “roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.” Id.
9. Thus, in the Second and Ninth Circuits, the reasonable period of § 1226(c) mandatory detention pending removal proceedings ends at six months. Lora, 804 F.3d at 613; Rodriguez, 804 F.3d at 1065. In the Eleventh Circuit, “[t]he need for a bond inquiry is likely to arise in the six-month to one-year window . . . .” Sopo v. U.S. Attorney Gen., 825 F.3d 1199, 1217 (11th Cir. 2016). In determining that timeframe, Sopo cited the Third Circuit’s similar decision in Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469 (3d Cir. 2015), which held that a reasonable period of detention pending removal proceedings ends sometime after six months, depending on the facts and circumstances of the case, with nine months “straining any common-sense definition of a limited or brief civil detention.” Id. at 477.
10. The only Court of Appeals to consider prolonged detention under § 1225(b) holds that “to avoid serious constitutional concerns, mandatory detention under § 1225(b) . . . must be construed as implicitly time-limited.” Rodriguez, 804 F.3d 1060.
11. Following Sopo and other Courts of Appeals, numerous district courts have held that due process limits mandatory detention under § 1225(b) to a reasonable period. See e.g., Marquez Diaz v. Moore, 16-cv-23684-UU (S.D. Fla. March 6, 2017) (adopting report and recommendation of Mag. Otazo-Reyes); Ahad v. Lowe, 2017 WL 66829 (M.D. Pa. Jan. 6, 2017); Ricketts v. Simonse, 2016 WL 7335675 (S.D.N.Y. Dec. 16, 2016); Gregorio-Chacon v. Lynch, 2016 WL 6208264 (D.N.J. Oct. 24, 2016); Damus v. Tsoukaris, 2016 WL 4203816 (D.N.J. Aug. 8, 2016); Saleem v. Shanahan, 2016 WL 4435246 (S.D.N.Y. Aug. 22, 2016); Arias v. Aviles, 2016 WL 3906738 (S.D.N.Y. July 14, 2016); Maldonado v. Macias, 150 F.Supp.3d 788 (W.D. Tex. 2015); Bautista v. Sabol, 862 F. Supp. 2d 375, 377 (M.D. Pa. 2012).
12. The ability to apply for humanitarian parole under 8 U.S.C. 1182(d)(5)(A) does not provide due process for noncitizens detained under § 1225(b). Parole does not provide a neutral forum to contest the necessity of ongoing detention. Instead it is a purely discretionary process, administered by the jailer. Neither the detained noncitizen nor counsel are provided an in-person hearing to contest facts leading to the parole decision. And no review of that decision is available. See Rodriguez v. Robbins, 715 F.3d 1127, 1144 (9th Cir. 2013) (describing parole process).
13. Moreover, release on parole is only available for “urgent humanitarian reasons or significant public benefit,” 8 U.S.C. § 1182(d)(5)(A); see also 8 C.F.R. § 212.5(b). Neither of those criteria evaluate the constitutionally permissible rationales for continued, prolonged detention during removal proceedings: whether the detained noncitizen is a flight risk or danger to her community. See R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 188 (D.D.C. 2015) (“The Zadvydas Court clearly identified a pair of interests that can, under certain circumstances, suffice to justify the detention of noncitizens awaiting immigration proceedings: ‘preventing flight’ and ‘protecting the community’ from aliens found to be ‘specially dangerous.’”) (citing Zadvydas v. Davis, 533 U.S. at 690–92)).
14. Finally, parole was also available to inadmissible noncitizens who challenged prolonged detention under § 1226(c). Yet every Court of Appeals to consider § 1226(c) has nonetheless ruled it limited to a reasonable period by the Due Process Clause. The ability to apply for parole is therefore an inadequate substitute for due process.
15. Petitioner’s prolonged, indefinite detention under § 1225(b) violates the Fifth Amendment by depriving petitioner of liberty without due process of law. This Court should therefore order petitioner’s release, with appropriate conditions of supervision if necessary. See, e.g., Nadarajah v. Gonzales, 443 F.3d 1069, 1084 (9th Cir. 2006); Madrane v. Hogan, 520 F.Supp.2d 654 (M.D. Pa. 2007); Victor v. Mukasey, 2008 WL 5061810 (M.D. Pa. Nov. 25, 2008); Nunez–Pimentel v. U.S. Dep’t of Homeland Security, 2008 WL 2593806 (M.D. Pa. June 27, 2008) (ordering release from prolonged detention pending removal proceedings).

**SECOND CLAIM FOR RELIEF**

**VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT § 235(b), 8 U.S.C. § 1225(b)**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. Under the statutory interpretation doctrine of constitutional avoidance, the Court should construe § 1225(b) as limited to a reasonably brief period, extendable only if the government shows individualized justification for detention at a bond hearing.
3. Though the government’s interpretation of § 1225(b) as permitting indefinite mandatory detention is unconstitutional, “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Crowell v. Benson, 285 U.S. 22, 62 (1932); see also Zadvydas, 533 U.S. 678 at 689 (citing Crowell). This doctrine of statutory interpretation is known as constitutional avoidance.
4. “[T]he Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance.” Rodriguez v. Robbins, 715 F.3d 1127, 1141 (citing Clark v. Martinez, 543 U.S. 371, 380 (2005)). “Thus, the dispositive question is not whether the government’s reading of § 1225(b) is permissible in some (or even most) cases, but rather whether there is any single application of the statute that calls for a limiting construction.” Id.
5. In Martinez, the Court analyzed 8 U.S.C. § 1231(a)(6), a statute it had previously read as a matter of constitutional avoidance to limit mandatory detention after the conclusion of removal proceedings to a presumptively reasonable period of six months. Zadvydas v. Davis, 533 U.S. 678. The same statute applied to both admitted and inadmissible noncitizens, but the government argued that the same limit on detention did not apply to inadmissible noncitizens because they were not entitled to the same constitutional protections. Martinez, 543 U.S. at 380.
6. The text of the statute did not distinguish between the two classes, however, and “[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one.” Id. at 378. Because the same statutory text applied to both groups, and detention for more than six months raised constitutional concerns for at least the admitted noncitizens, every noncitizen subject to the statute was entitled to the same reading limiting mandatory detention. “The lowest common denominator, as it were, must govern.” Id. at 380.
7. The government reads § 1225(b) to permit the prolonged detention without a bond hearing of all “arriving aliens,” 8 C.F.R. § 1.2., including both asylum seekers and certain lawful permanent residents (“LPR”) who depart the country and seek admission upon their return. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (identifying LPRs classified as arriving aliens when returning to the United States after travel abroad); 8 C.F.R. § 1003.19(h)(2)(i)(B) (depriving an immigration judge of jurisdiction over a bond hearing for arriving aliens in removal proceedings).
8. As explained above in the First Claim for Relief, arriving asylum seekers are entitled to be free from arbitrary and capricious detention under the Due Process Clause. Even assuming *arguendo* they were not, however, LPRs are entitled to due process in prolonged detention because “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.” Landon v. Plasencia, 459 U.S. 21, 32 (1982).
9. In Plasencia, the Supreme Court ruled that an LPR seeking readmission after a trip abroad and charged as “excludable” (the former term of art for “inadmissible” under then-current immigration laws), could nonetheless “invoke the Due Process Clause on returning to this country . . . .” Id. Because an LPR’s due process right is constitutional in nature, it may not be stripped by mere statutory designation as an “arriving alien.” See Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) (in the case of a returning LPR, holding that “[f]rom a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien”).
10. Section 1225(b) would therefore “raise a serious constitutional problem,” Zadvydas, 533 U.S. at 690, if read to deny a bond hearing to LPRs held as arriving aliens in prolonged detention. Thus, as a matter of constitutional avoidance, the statute must be read to require a bond hearing when detention becomes unreasonably prolonged. Ricketts v. Simonse,2016 WL 7335675; Arias v. Aviles, 2016 WL 3906738 \*4-\*10.
11. Moreover, because the text of § 1225(b) does not distinguish between LPRs and other noncitizens charged as arriving aliens, LPRs are the statute’s “lowest common denominator.” Martinez, 543 U.S. at 380. Section 1225(b) must therefore be read to grant all noncitizens held as arriving aliens the same due process protections afforded to LPRs in unreasonably prolonged detention. Rodriguez v. Robbins, 715 F.3d 1127, 1142-43, at \*1; Saleem v. Shanahan, 2016 WL 4435246, at \*3-\*5.
12. “[O]nce the duration of an alien’s detention is determined to be unreasonable, the government must provide an opportunity for the alien to obtain release on bond . . . .” Sopo, 825 F.3d at 1223 (Pryor, J., concurring in part and dissenting in part).
13. The only Court of Appeals to address detention under § 1225(b) holds that it becomes unreasonably prolonged at six months. Rodriguez, 715 F.3d at 1144. Such a bright-line limit follows the Supreme Court’s practice of limiting mandatory immigration detention to the presumptively reasonable period of six months. Zadvydas, 533 U.S. at 701 (“We do have reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months.”). Because petitioner’s mandatory detention exceeds six months, this Court should find that petitioner is entitled to a bond hearing.
14. Petitioner’s detention is also unreasonably prolonged based on the facts and circumstances of petitioner’s case, including the amount of time spent in detention without a bond hearing, the reasonable foreseeability of continued, lengthy litigation, the likelihood that proceedings will culminate in a final removal order, whether it would be possible to remove petitioner after a hypothetical order of removal, and the penal conditions of petitioner’s confinement. Sopo, 825 F.3d at 1217-19 (outlining factors that govern when mandatory detention becomes prolonged).
15. “The need for a bond inquiry is likely to arise in the six-month to one-year window . . . .” Id. at 1217.
16. Moreover, the causes of prolonged detention, including “[e]rrors by the immigration court or the BIA that cause unnecessary delay[,] are also relevant” when considering whether detention has become unreasonable. Id. at 1218
17. “Courts should consider whether the government or [habeas petitioner] have failed to participate actively in the removal proceedings or sought continuances and filing extensions that delayed the case’s progress.” Id. But a habeas petitioner “should [not] be punished for pursuing avenues of relief and appeals.” Id. Instead, the question is whether the petitioner “sought repeated or unnecessary continuances, or filed frivolous claims and appeals.” Id.
18. The “foreseeability of proceedings concluding in the near future (or the likely duration of future detention)[,]” as well as whether “it will be possible to remove the [habeas petitioner] after there is a final order of removal[,]” are also relevant to whether petitioner’s current detention is constitutional. Id. at 1218.
19. Finally, this Court “cannot ignore the conditions of confinement.” Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 476 (3d Cir. 2015). Where “the facility for the civil immigration detention is [not] meaningfully different from a penal institution for criminal detention[,]” prolonged immigration detention is more likely to be unreasonable. Sopo, 825 F.3d at 1218 (citing Chavez-Alvarez, 783 F.3d at 478; Ly v. Hansen, 351 F.3d 263, 272 (6th Cir. 2003)).
20. Petitioner’s prolonged detention raises all of these concerns. [Apply facts to law].
21. Under either a bright-line rule or the facts and circumstances of this case, petitioner’s continued detention is unreasonably prolonged. This Court should therefore conduct a bond hearing at which (1) the government bears the burden of proving flight risk and dangerousness by clear and convincing evidence and (2) the Court considers alternatives to detention that could mitigate flight risk. See Leslie v. Attorney Gen. of U.S., 678 F.3d 265, 271 (3d Cir. 2012) (stating that “Leslie’s appeal will be remanded to the District Court with instructions to conduct an individualized bond hearing as required by [Diop](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025995710&originatingDoc=Ie8aacc0d71f111e1b71fa7764cbfcb47&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))”); Rodriguez, 804 F.3d 1060, 1086-89 (outlining constitutionally adequate procedural protections at a prolonged detention bond hearing). In the alternative, the Court should order an immigration judge to conduct the bond hearing.
22. The burden to establish dangerousness and flight risk in a prolonged detention bond hearing should rest with the government, rather than the petitioner, because of the severe injury to the petitioner’s liberty interest under the Fifth Amendment. See Rodriguez v. Robbins, 804 F.3d 1060, 1069 (“When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound.”). For the same reason, that hearing must consider alternatives to detention that could mitigate flight risk.
23. In Sopo, the Eleventh Circuit relied on three factors to place the burden at an 8 U.S.C. § 1226(c) prolonged bond hearing on noncitizens: (1) that § 1226(c), which requires mandatory detention of noncitizens convicted of predicate crimes, was a subsection to § 1226(a) detention authority, (2) that deference should be given to DHS regulations that place the burden on noncitizens at § 1226(a) bond hearings, and (3) that placing the burden on the government would give to noncitizens convicted of a crime a benefit denied to those not convicted of a crime and detained under § 1226(a).
24. Those factors lack force in the detention at issue here, under 8 U.S.C. § 1225(a). First, § 1225(a) is not a subsection of § 1226, so the same bond regulations should not be mechanically applied in a § 1225(a) prolonged detention bond hearing.
25. Second, the Sopo court deferred to the § 1226 regulations in part because the petitioner did not question the constitutionality of those regulations. Sopo, 825 F.3d at 1219 n.10. As a preliminary matter, the Sopo court mistakenly believed that the regulation at 8 C.F.R. § 1236.1(c)(8) was binding on immigration judges in the Executive Office of Immigration Review. On its face, the regulation applies only to DHS custody determinations. See 8 C.F.R. § 1236.1(c)(8) (“Any officer authorized to issue a warrant of arrest may . . . release an alien not described in section 236(c)(1) of the Act . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding).
26. The BIA has separately held that a detainee also bears the burden of persuasion at her immigration court bond hearing. See Matter of Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006) (“An alien in a custody determination under that section must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”).
27. In doing so, it cited to Matter of Adeniji, 22 I. & N. Dec. 1102, 1111-1112 (BIA 1999), a case that did not decide who bore the burden, but instead simply assumed the noncitizen did so based on the parties’ own agreement (“The parties further agree that the respondent must show that he is not likely to abscond, is not a threat to the national security, and is not a threat to the community.”) In addition, Adeniji erroneously labeled 8 C.F.R. § 1236.1(c)(8) as “binding” on immigration judges. Id. at 1113. But the standard an enforcement agency uses to regulate its own discretionary release decisions should have no bearing on the standard a neutral adjudicator uses to assess whether a deprivation of liberty is justified. Due process demands a meaningful separation of jailer from judge. Cf. Johnson v. United States, 333 U.S. 10, 14 (1948) (Constitution requires that “inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime”).
28. Guerra reversed a longstanding presumption against detention based only on the above flawed reasoning. See Matter of Patel, 15 I. & N. Dec. 666 (BIA 1976). “One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.” Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). “Agencies are free to change their existing policies as long as they provide a *reasoned explanation* for the change.” Id. (emphasis added). “It follows that an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice . . . .” Id. at 2126.
29. The BIA’s reversal of its longstanding rule placing the burden in bond hearings on the government is not supported by adequate reasoning, relying only on a party’s concession and a separate regulation that governs immigration enforcement rather than adjudication. Accordingly, its reversal is not entitled to deference.
30. Further, preventive detention is only constitutional when “subject to strong procedural protections.” Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (citing Foucha v. Louisiana, 504 U.S. 71 (1992) (striking down civil commitment statute for placing the burden on the detainee)). The BIA’s assignment of the burden to detainees in Matter of Guerra is therefore unconstitutional.
31. Finally, the Sopo court’s concern with providing a windfall to noncitizens with criminal convictions is inapposite in the case of § 1225(a) detention, which pertains cheifly to individuals who lack required documentation to enter the United States, many of whom are the victims of persecution or other unlawful behavior.
32. For these reasons, this Court should conduct a bond hearing at which the government bears the burden of proving flight risk and dangerousness by clear and convincing evidence and the Court considers alternatives to detention that could mitigate flight risk. In the alternative, the Court should order an immigration judge to conduct that hearing.

**THIRD CLAIM FOR RELIEF**

**VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT § 236(a), 8 U.S.C. § 1226(a)**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. As a matter of statutory interpretation, this Court should hold that § 1225(b) is limited to the period between a noncitizen’s arrest as an arriving alien and the commencement of her removal proceedings before an immigration judge. Such an interpretation is supported by the text, purpose, and overall construction of the statute, the doctrine of constitutional avoidance, and the government’s own practice of limiting mandatory detention of other recently arrived noncitizens to the period before removal proceedings commence. The Court should therefore find that petitioner’s detention pending removal proceedings is authorized not by § 1225(b), but by the discretionary detention statute at § 1226(a), entitling petitioner to an immediate bond hearing before an immigration judge where the government bears the burden of proving dangerousness or flight risk.
3. The plain text of § 1225(b) mandates detention of arriving aliens only for the period between their arrest and before they are referred to an immigration judge for removal proceedings. The two subsections of § 1225(b) at issue here permit detention only “*for* further consideration of the application for asylum,” 8 U.S.C. § 1225(b)(1)(B)(ii) and “*for* a proceeding . . . .” Id. § 1225(b)(2)(a). Neither provision governs detention beyond that point, much less pending completion of removal proceedings. See Webster’s Third New International Dictionary886 (1993) (defining “for” to mean “as a preparation toward . . . or in view of”). Pending removal proceedings, detention is authorized by section 1226(a), entitling petitioner to a bond hearing. See Matter of X-K-, 23 I. & N. Dec. at 731 (“Immigration Judges have custody jurisdiction over aliens in . . . removal proceedings . . . .”)
4. Where Congress intended to authorize detention pending completion of an administrative proceeding, it unambiguously said so. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (stating that a noncitizen “shall be detained *pending* a final determination of credible fear of persecution and, if found not to have such a fear, until removed”); id. § 1226(a) (“an alien may be arrested and detained *pending* a decision on whether the alien is to be removed from the United States). (emphases added). Cf. Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”).
5. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Nken v. Holder, 556 U.S. 418, 430 (2009) (internal citations and alterations omitted). This is “particularly true here” where the provisions at issue were “enacted as part of a unified overhaul” of the statute under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Id. at 430-31.
6. The overall construction of the statute also supports a reading that limits § 1225(b) detention to the period before removal proceedings commence. Cf. United States v. Witkovich, 353 U.S. 194, 199 (1957) (“A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole . . . .”). Section 1225 is titled “Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.” Section 1225(b) is titled “Inspection of Applicants for Admission.” The subsections at issue here are titled “Asylum Interviews: Referral of certain aliens,” 8 U.S.C. § 1225(b)(1)(B)(ii), and “Inspection of other aliens: In general,” id. § 1225(b)(2)(A). By their plain language, none of these sections address detention authority pending removal proceedings. Rather, they address only detention pending inspection and referral to subsequent removal proceedings. Authority for mandatory detention pending removal proceedings appears instead in 8 U.S.C. § 1226, in a section appropriately titled “Apprehension and detention of aliens.” That section does not authorize mandatory detention pending removal proceedings for arriving aliens.
7. Where Congress intended to authorize mandatory detention of arriving aliens past the inspection and referral process, it provided specific statutory authority to do so. In § 1225(b)(1)(B)(iii)(IV), titled “Mandatory Detention,” Congress provided for the detention of a noncitizen “pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.” If Congress had intended to subject all arriving aliens to mandatory detention beyond the inspection and referral process, the specific mandate in § 1225(b)(1)(B)(iii)(IV) would be superfluous. “It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotations omitted).
8. Moreover, as explained above in the Second Claim for Relief, the doctrine of constitutional avoidance requires this Court to “first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” Crowell v. Benson, 285 U.S. 22, 62. In light of the text and overall construction of § 1225(b), as discussed in ¶¶ 91-95, the statute may be fairly construed to limit mandatory detention to the period before removal proceedings commence. The Court must do so in order to avoid the constitutional question raised by the government’s reading.
9. Petitioner’s interpretation of § 1225(b) also accords with the government’s own practice of detaining other recent arrivals under § 1226(a) once they pass a credible fear interview and their removal proceedings have commenced. Both noncitizens who present themselves at the border and those who enter without inspection and are subsequently arrested near the border are initially detained under § 1225(b)(1)(B)(ii) for expedited removal proceedings. See Matter of X-K-, 23 I. & N. Dec. 731, 734.
10. Once the government determines that either arriving aliens or entrants without inspection have a credible fear of persecution, it refers them to nonexpedited removal proceedings for adjudication of an asylum claim. Yet for entrants without inspection alone, the government detains under § 1226(a) once removal proceedings commence. Id. This entitles entrants without inspection, but not those who present themselves to an officer to seek asylum, to an immediate bond hearing.
11. The text of § 1225(b) does not distinguish between entrants without inspection and those who, like Ms. Tesfaslassie, present themselves at the border. It therefore must be construed consistently to be limited to the period before removal proceedings commence. Clark v. Martinez, 543 U.S. at 378 (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).
12. Finally, a construction of § 1225(b) as limited to before commencement of removal proceedings avoids the absurd result of incentivizing entry without inspection. According to the government’s reading of § 1225(b), Congress incentivized asylum seekers to enter without inspection rather than present themselves at the border by providing access to bond hearings during removal proceedings for only the first class. It is improbable that Congress intended such a result with § 1225(b), because the purpose of mandatory detention is “preventing . . . aliens from fleeing prior to . . . their removal proceedings[,]” Demore v. Kim, 538 U.S. 510, 527–28, not avoiding removal proceedings altogether by entering without inspection.
13. This Court should therefore hold that petitioner’s detention pending removal proceedings is governed by § 1226(a), entitling petitioner to a bond hearing upon request before an immigration judge. At that hearing, the government should bear the burden of establishing the need for continued detention, both because petitioner’s detention is prolonged and because the BIA’s practice of placing the burden on the detainee is unconstitutional.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully requests that this Court:

1. Assume jurisdiction over this matter;
2. Issue a Writ of Habeas Corpus ordering respondents to release petitioner immediately, on reasonable conditions of supervision if necessary;
3. In the alternative, conduct a bond hearing or remand to the immigration judge for a bond hearing at which (1) the government bears the burden of proving flight risk and dangerousness by clear and convincing evidence and (2) alternatives to detention that could mitigate flight risk are considered;
4. In the alternative, hold that petitioner’s detention is governed by 8 U.S.C. § 1226(a), entitling her to a bond hearing where the government bears the burden upon request before an immigration judge;
5. Award petitioner costs and reasonable attorneys’ fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, other statute; and
6. Grant such further relief as the Court deems just and proper.

[Identifying information]

[Attorney for Petitioner]

Dated: