UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Mark Anthony REID, on behalf of himself and others similarly situated, *Petitioner/Plaintiff*, v. Christopher DONELAN, Sheriff, Franklin County, Mass; David A. LANOIE, Superintendent, Franklin County Jail & House Of Correction; Janet NAPOLITANO, Secretary of the Department of Homeland Security; John MORTON, Director of Immigration and Customs Enforcement; Dorothy HERRERA-NILES, Director, Immigration and Customs Enforcement Boston Field Office; Thomas HODGSON, Sheriff, Bristol County, Mass, Joseph McDONALD, Jr., Sheriff, Plymouth County, Mass, Steven TOMPKINS, Sheriff, Suffolk County, Mass.; Eric HOLDER, Attorney General of the United States; Juan OSUNA, Director of the Executive Office for Immigration Review; and THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Respondents/Defendants*.	)	Case No. July 1, 2013

MEMORANDUM OF LAW IN SUPPORT OF MARK REID'S PETITION FOR WRIT OF HABEAS CORPUS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2009, this Court ordered the government to provide an immigration detainee named Bristout Bourguignon with a bond hearing, rejecting the government's argument that 8 U.S.C. § 1226(c) authorized the government to detain him for a prolonged period of time without any individualized inquiry into his dangerousness or flight risk. Bourguignon v. MacDonald, 667 F. Supp. 2d 175, 184 (D. Mass 2009). The government chose not to appeal, and the Hartford Immigration Court subsequently held the bond hearing ordered by this Court. Other judges in the District of Massachusetts have rejected the government's interpretation of § 1226 in favor of the reasoning of Bourguignon. The government has also declined to appeal these decisions. And yet government attorneys continue to argue, and immigration judges adjudicating bond motions from immigration detainees confined in Massachusetts continue to adhere to, the same unlawful statutory interpretation that this Court has rejected. The government's repeated disregard of the rulings of this Court and of other judges in the District has resulted in the unlawful confinement of all but those few indigent detainees able to muster the resources to file a writ of habeas corpus.

Petitioner Mark A. Reid is one such detainee. Mr. Reid is a longtime lawful permanent resident of the United States and the father of two U.S. citizen children. Mr. Reid has lived in New Haven, Connecticut for more than thirty years and served honorably in the United States Army Reserve. For nearly eight months, he has been held in immigration detention without an individualized bond hearing, an amount of time that is unlawful and unconstitutional. In November 2012, U.S. Immigration and Customs Enforcement ("ICE"), a component of the Department of Homeland Security ("DHS"), took custody of Mr. Reid, initiated removal

proceedings against him, refused to set any bond, and has since subjected Mr. Reid to prolonged no-bond detention.

Mr. Reid has a strong claim for deferral of removal under the Convention Against Torture ("CAT") because of the high likelihood that he will be tortured if deported to Jamaica.[1] Through counsel, he requested that ICE set bond administratively. ICE has ignored and therefore constructively denied this request.

Mr. Reid also requested a bond hearing in the Hartford Immigration Court. When he appeared with counsel for the hearing, Mr. Reid was fully shackled. Through counsel he requested that his hands be unshackled, but the ICE attorney objected on the ground that there allegedly had been "an incident" involving another, unnamed immigration court respondent that resulted in an ICE policy of shackling all detainees during court proceedings. The Immigration Judge then held that he lacked power to order ICE to unshackle Mr. Reid. When the Immigration Judge proceeded to consider Mr. Reid's request for an individualized bond hearing, ICE counsel again objected. The Immigration Judge accepted ICE's counsel's invalid interpretation, holding that he had no authority to set bond in Mr. Reid's case by virtue of § 1226(c). Thus, both DHS and the Department of Justice have refused to provide Mr. Reid with an individualized bond hearing.

As this Court has already decided, these agency decisions denying Mr. Reid a bond hearing violate the U.S. Constitution as well as the Immigration and Nationality Act ("INA"). The Fifth Amendment's Due Process Clause prohibits the government from arbitrarily detaining any person or from refusing to provide a detained person a meaningful method to challenge his

[1] In this brief, Mr. Reid does not discuss the details of his pending application for relief under the Convention Against Torture ("CAT") due to the sensitive nature of the information contained therein. See 8 C.F.R. § 1208.6(a) (protecting records related to asylum proceedings from disclosure without consent of the applicant); *id.* § 1208.1(a) (applying confidentiality protection of § 1208.6(a) to applications for withholding of removal under CAT).

detention, and the Eighth Amendment's Excessive Bail Clause prohibits the government from setting excessive conditions of release or detention. Against this backdrop, federal courts around the country, including three U.S. Courts of Appeals and numerous district courts, have read the INA to include limits on the government's power to detain noncitizens without an individualized bond hearing. These courts have ordered bond hearings for individuals situated similarly to Mr. Reid. Mr. Reid's nearly eight-month detention has exceeded the limits imposed by multiple U.S. Courts of Appeals and federal courts in the First Circuit.

At a bond hearing, Mr. Reid will be able to show that he is neither a flight risk nor a danger to the community, and therefore that reasonable bond should be set in his case. Mr. Reid will demonstrate that he has strong community ties and a support network in New Haven that will help him with housing, provide necessary mental health treatment for his Post-Traumatic Stress Disorder ("PTSD") and depression, and help him to once again be a productive member of society. As the government refuses to provide him with such a hearing, Mr. Reid respectfully applies to this Court for a writ of habeas corpus to remedy his prolonged, no-bond detention by ICE, and for an order that during any such bond hearing, Mr. Reid not be shackled absent an individualized showing of dangerousness.

ORAL ARGUMENT REQUESTED

Mr. Reid respectfully requests oral argument on his petition and motion. Because he is a longtime lawful permanent resident subject to prolonged, no-bond detention based on the government's adherence to a statutory interpretation that this Court has already rejected, Mr. Reid requests that a hearing be scheduled at the Court's earliest convenience.

FACTS AND PROCEEDINGS

I. PERSONAL BACKGROUND

Mark Anthony Reid was born in 1964 in Kingston, Jamaica to Beverly Pryce and Reginald Reid. Declaration of Tassity Johnson dated July 1, 2013 ("Johnson Decl."), Exh. A ¶¶ 2, 4-5.[2] When Mr. Reid was two years old, his mother immigrated to the United States, leaving Mr. Reid in the care of his maternal grandmother. Id. ¶¶ 9, 11. Mr. Reid subsequently suffered several severely traumatic events as a child.

When Mr. Reid was fourteen years old, his mother sponsored him to come to the United States to live with her. Id. ¶¶ 28-29. Mr. Reid entered the United States as a lawful permanent resident, and has lived in the United States ever since. Id. ¶ 29. Mr. Reid initially had trouble adjusting to his new life in the United States. He attended multiple high schools because his mother moved several times. Id. ¶ 30. He also felt significant anger toward his mother for not protecting him from the traumas he experienced in Jamaica. Id. ¶ 32. Ultimately, Mr. Reid dropped out of high school. Id. ¶ 37.

Despite his initial difficulties, Mr. Reid soon sought opportunities to support and better himself. He earned his GED from the Tomlinson Adult Learning Center in St. Petersburg, Florida. See id. ¶¶ 36-37. Soon thereafter, Mr. Reid moved to New Haven, Connecticut to work for his uncle's construction business. Id. ¶¶ 43. Wanting to serve his country, Mr. Reid joined the United States Army Reserve in 1984. Id. ¶¶ 46-48. He served for six years, stationed in Springfield, Massachusetts, and was honorably discharged in 1990. Id. ¶¶ 46, 50; Johnson Decl., Exh. U.

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[2] To avoid disclosure of sensitive information, Mr. Reid is filing a redacted version of Exhibits A, C, D, and T to the Johnson Declaration on the public docket. See footnote 1, above. ICE has already received an unredacted copy of each of these exhibits in Mr. Reid's immigration proceedings. Mr. Reid will provide an unredacted copy of each of these exhibits to the Court under seal if requested.

In the following decades, Mr. Reid went back to school, worked hard at various jobs, and became a property owner. Id. ¶ 51. While in the Army Reserve, Mr. Reid worked in construction and at a Wendy's restaurant. After his discharge, he worked in construction, asbestos removal, and as a loan originator. Id. Mr. Reid was able to save enough money to allow him to purchase several rental properties in New Haven. Id. He also took post-secondary courses in business administration, paralegal skills, and criminalistics, and he earned a certificate as a loan originator from a financial services firm in New Haven. Id. ¶ 44.

Throughout his early adulthood, Mr. Reid continued to experience anger and confusion related to the childhood trauma he experienced, and he turned to illegal drugs for relief. Id. ¶ 55. He began to use illegal drugs in the 1980s and was first arrested for drug possession in 1986.[3] Id.; Johnson Decl., Exh. B. In 2000, Mr. Reid was stabbed in the abdomen by a relative of a tenant he was evicting from one of his rental properties, requiring multiple surgeries, and began using heroin to manage the pain he experienced. Johnson Decl., Exh. A ¶¶ 56- 57. He sought treatment for substance abuse, but he continued to suffer from pain and returned to using heroin. See id. ¶¶ 57-58. Mr. Reid was arrested in 2009 for drug sale and burglary in the third degree.

[3] This was the first of various criminal convictions: Drug sale; burglary in the third degree; failure to appear (sentenced on July 7, 2010 to 12 years suspended after 5 years in custody; 5 years of conditional discharge); Drug possession; drug sale (sentenced on Aug. 25, 2004 to 7 years suspended after 4 years in custody; 3 years of conditional discharge); Failure to appear (sentenced on May 28, 2004 to unconditional discharge); Probation violation (two counts) (sentenced on April 15, 2004 to 30 months in custody); Drug possession (sentenced on June 6, 2002 to 5 years suspended after 1 year in custody; 3 years of probation); Assault in the third degree; failure to appear in the second degree (two counts) (sentenced on March 29, 2000 to 1 year suspended sentence; 2 years of probation); Operating a car with a suspended license; failure to appear in the second degree (sentenced on July 28, 1999 to a 30-day suspended sentence; 1 year conditional discharge); Weapon in a vehicle (sentenced on Feb. 20, 1998 to $350 fine); Reckless endangerment (sentenced on Feb. 20, 1998 to 6 month suspended sentence; 2 years of probation); Failure to appear in the second degree (sentenced on Dec. 23, 1997 to unconditional discharge); Threatening (sentenced on June 11, 1997 to 6 month suspended sentence; 1 year of conditional discharge); Interfering with a police officer (sentenced on Aug. 31, 1995 to 6 month suspended sentence; 1 year of conditional discharge); Carrying dangerous weapon (sentenced on Dec. 21, 1993 to 1 year suspended sentence; 1 year of conditional discharge); Assault in the third degree (sentenced on Nov. 4, 1992 to 6 month suspended sentence; 1 year of conditional discharge); Drug possession; larceny in the second degree (sentenced on Dec. 14, 1988 to 2 year suspended sentence; 3 years of probation); Drug possession (sentenced on Feb. 19, 1986 to 2 year suspended sentence, 4 years of probation).

He was sentenced to twelve years suspended after five years, of which he served approximately two years.[4] He was paroled to ICE custody on November 13, 2012.

For the past few years, Mr. Reid has worked diligently to confront his substance addiction and mental health issues. Mr. Reid has recently been diagnosed with PTSD, which can be traced to the traumatic events of his childhood in Jamaica. He has sought the assistance of a clinical psychologist and has begun taking medicine to ameliorate his condition. See Johnson Decl., Exh. C. According to his psychologist, Dr. Baranoski, Mr. Reid has "expressed a willingness to seek treatment at the Connecticut Mental Health Center" if he is released, and "[h]is openness to accepting treatment provides a strong foundation for his successful return to the community." Id. Dr. Baranoski has also concluded that Mr. Reid "appreciates his need to remain abstinent from substances," and has "expressed a genuine desire to lead a productive and law-abiding life, becoming a role model for his daughter." Id.

Mr. Reid is the father of two children. Johnson Decl., Exh. A ¶ 53-54. Both of Mr. Reid's children are U.S. citizens. Mr. Reid's son graduated from the University of Maryland. Id. ¶ 53. His daughter is high school student in New Haven. Id. ¶ 54. Mr. Reid's children "love their father deeply, and would be devastated if they didn't have constant access to their father." Johnson Decl., Exh. T. He regrets the poor choices he has made, and he wants to return to work and to continue his education. See id. ¶¶ 60-61; Johnson Decl., Exh. D ("[Mr. Reid] expects to become a productive member of society again. He . . . hopes he can find work in the mortgage industry . . . [and] is also pursuing his education as a paralegal."). During his most recent incarceration, Mr. Reid took courses that helped him to understand the consequences of his choices for himself and for others, and which examined the impact of crime on victims. Johnson Decl., Exh. A ¶ 59; id. Exh. E. Mr. Reid has also sought spiritual guidance from Reverend

[4] While he was incarcerated, Mr. Reid lost his New Haven properties to foreclosure. Johnson Decl., Exh. A ¶ 51.

Joshua Pawelek of the Unitarian Universalist Society. Johnson Decl., Exh. A ¶ 62; id., Exh. D. Finally, Keith Thomas, a manager of two New Haven halfway houses, has confirmed that that Mr. Reid will have housing if released from custody. See id., Exh. F.

II. REMOVAL PROCEEDINGS

On November 13, 2012, Mr. Reid was released on parole from the custody of the Connecticut Department of Correction and taken into custody by ICE. Johnson Decl., Exh. G. ICE has maintained custody of Mr. Reid since November 13, 2012, detaining him in different facilities in Massachusetts. ICE presently holds Mr. Reid in the Franklin County Jail in Greenfield, Massachusetts.

Also on November 13, 2012, ICE filed a Notice to Appear ("NTA") with the Hartford Immigration Court, commencing removal proceedings. The NTA charged Mr. Reid with violations of 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1227(a)(2)(B)(i)[5] on the basis of four nonviolent state controlled substances convictions. Johnson Decl., Exh. H. At an initial hearing in the Hartford Immigration Court on December 3, 2012, Mr. Reid, through undersigned counsel, conceded the factual allegations and charges in the NTA and stated his intention to apply for relief under CAT and to file a motion to terminate the proceedings on the ground that removal would be disproportionate. Id., Exh. I. Immigration Judge ("IJ") Philip Verrillo set a merits hearing for February 13, 2013 and ordered briefing on CAT relief and the proportionality motion. Id., Exh. J.

[5] 8 U.S.C. §§ 1227(a)(2)(A)(iii) states: "Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." 1227(a)(2)(B)(i) states: "Any alien who at any time after admission has been convicted of a violation of (of a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

At the February 13, 2013 hearing, Mr. Reid submitted his Form I-589 application for relief under CAT, and his motion for termination. The hearing ultimately lasted twenty hours spread over four days, concluding on March 11, 2013. Mr. Reid was unshackled for the entire hearing. In all, five witnesses testified, including Mr. Reid and two expert witnesses. IJ Verrillo issued his decision on April 5, 2013, in which he denied CAT relief on the ground that Mr. Reid had not met his burden of proof; he did not, however, make an adverse credibility finding. IJ Verrillo also denied on jurisdictional grounds the motion to terminate because removal would be disproportionate.

Mr. Reid timely filed a Notice of Appeal with the Board of Immigration Appeals ("BIA"), the administrative body that reviews the decisions of immigration judges. In it he alleges that the IJ made several errors requiring reversal and/or termination. Johnson Decl., Exh. L. Simultaneous briefing was originally due on June 20, 2013, but Mr. Reid's request for an extension was granted to July 11, 2013.

III. BOND PROCEEDINGS

Upon taking custody of an individual, ICE must make an initial custody determination, in which the agency may release the person on his own recognizance, set bond, or hold the person without bond. See 8 C.F.R. § 236.1. On November 13, 2012, ICE completed its initial custody determination and refused to set bond for Mr. Reid. Johnson Decl., Exh. M. ICE advised Mr. Reid that he could request review of its no-bond decision from an Immigration Judge, and he checked boxes on his Notice of Custody Determination for requesting this review. Id.

On June 10, 2013, Mr. Reid filed a motion in the Hartford Immigration Court requesting that IJ Verrillo conduct a bond redetermination hearing and set bond.[6] Johnson Decl., Exh. O.

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[6] On the same date, Mr. Reid, through undersigned counsel, also formally requested that DHS set bond. Johnson Decl., Exh. N. To date, ICE has not responded to this administrative request.

The motion argued that Mr. Reid was entitled to a bond hearing, despite ICE's position that an individual with an aggravated felony conviction is ineligible for bond per 8 U.S.C. § 1226(c) even when subjected to prolonged detention, because courts across the country, including this Court, have overwhelmingly rejected ICE's construction of 8 U.S.C. § 1226(c). Id. Mr. Reid also explained in his motion that this Court, in Bourguignon, had previously held that 8 U.S.C. § 1226(c) required the only other IJ in Hartford Immigration Court to conduct a bond hearing for a person detained for a prolonged period pursuant to the statute, and ordered the IJ to do so. Id. The Immigration Court scheduled a bond hearing for June 13, 2013. Johnson Decl., Exh. P. On the morning of June 13, 2013, ICE requested a continuance, which was granted to June 17, 2013 without Mr. Reid's consent. Id., Exhs. K, Q.

The bond hearing was rescheduled for June 17, 2013, and conducted by IJ Verrillo at the Hartford Immigration Court. Id., Exh. R. Mr. Reid was escorted into the hearing by two law enforcement officers with shackles around his hands, waist, and feet. Declaration of Matthew Vogel dated July 1, 2013("Vogel Decl."), ¶ 4. Counsel for Mr. Reid requested that his hands be unshackled for the duration of the hearing. Declaration of Maureen Furtak dated July 1, 2013, Ex. A at 2:23. IJ Verrillo refused to consider this request, deferring instead to ICE counsel, who insisted that the IJ lacked the authority to order Mr. Reid unshackled. Id. 3:1; 4:14-18. ICE offered no evidence that Mr. Reid might be dangerous or a flight risk, but stated only that he would be shackled pursuant to a "discretionary" ICE policy to shackle all detainees recently adopted because of an alleged incident "somewhere in the [same] building." Id. 3:7-8; 3:20-23.

During the hearing, Mr. Reid challenged ICE's adherence to a statutory interpretation of 8 U.S.C. § 1226(c) this Court had previously ordered unauthorized in Bourguignon. In response, ICE counsel argued that the IJ was not required to follow Bourguignon. Id. 7:12-19; 25:18-19. IJ

Verrillo determined that ICE was detaining Mr. Reid pursuant to 8 U.S.C. § 1226(c), and at the end of the hearing, denied Mr. Reid's motion for bond redetermination from the bench. IJ Verrillo reasoned that, under 8 U.S.C. § 1226(c), he lacked jurisdiction to make a bond redetermination in Mr. Reid's case, notwithstanding this Court's decision in Bourguignon and the many other judicial opinions that have rejected this interpretation of the statute. Johnson Decl., Exh. S; Furtak Decl., Exh. A at 30:2-3.

ARGUMENT

I. AS THIS COURT HAS HELD, § 1226(c) REQUIRES AN INDIVIDUALIZED BOND HEARING WHEN DETENTION IS "UNREASONABLE."

To avoid a statutory construction of 8 U.S.C. § 1226 that would violate the Due Process Clause of the Fifth Amendment, this Court interpreted § 1226(c) as prohibiting no-bond detention once an immigration detainee's detention becomes "unreasonable" and there is "no reasonable likelihood . . . that the issue of his removal will be finally resolved in the foreseeable future." Bourguignon v. MacDonald, 667 F. Supp. 2d 175, 184 (D. Mass 2009). Mr. Reid "has been held for an unreasonable period of time" under any definition of the term. Id. Moreover, "no reasonable likelihood exists that the issue of [Mr. Reid's] removal will be resolved in the foreseeable future." Id. Accordingly, this Court should order a bond hearing for Mr. Reid.

A. 8 U.S.C. § 1226 Must Be Construed To Avoid Constitutional Infirmities.

The Due Process Clause "forbids the government to infringe certain 'fundamental' interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (original emphasis). Freedom from detention is unquestionably a liberty interest of the highest order and one protected by the Due Process Clause. In Zadvydas v. Davis, the Supreme Court held that a noncitizen's "[f]reedom 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," and thus concluded that, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." 533 U.S. 678, 690 (2001). Therefore, in order to hold a person in prolonged detention, the government must have "special justification . . . [that] outweighs the individual's constitutionally protected interest in avoiding physical restraint." Id. at 690 (internal citations omitted). Because an interpretation of 8 U.S.C. § 1226(c) that authorizes mandatory, indefinite detention, without an opportunity for an individualized bond determination would raise serious a question as to the statute's constitutional validity, this Court should read 8 U.S.C. § 1226(c) to preclude such prolonged, no-bond detention, just as it did in Bourguignon, 667 F. Supp. 2d at 184; see also Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 478 (D. Mass. 2010) (Wolf, J.) (ordering bond hearing where "the period of detention has violated the implicit statutory reasonableness requirement of § 1226(c)").

Unreasonably prolonged detention of persons is unconstitutional under the Fifth Amendment's Due Process Clause. In Zadvydas, the Supreme Court interpreted the detention statute at issue to authorize post-removal period, no-bond detention only if removal was "reasonably foreseeable." 533 U.S. at 699. The Court held that six months of post-removal period detention was presumptively valid, but that after six months, if a person "provides good reason to believe that there is no significant likelihood of removal," continued detention becomes presumptively invalid. Id. at 680; see Bourguignon, 667 F. Supp. 2d at 181 ("the majority in Zadvydas . . . . noted that a law 'permitting indefinite detention of an alien would raise a serious constitutional problem.'") (quoting Zadvydas, 533 U.S. at 690); see also Flores-Powell, 677 F. Supp. 2d at 469 (applying Zadyvdas in habeas petition challenging detention purportedly

authorized by § 1226(c)); Sengkeo v. Horgan, 670 F. Supp. 2d 116, 123 (D. Mass. 2009) (Gertner, J.) (same).

Similarly, when the Supreme Court affirmed the facial constitutionality of the very detention statute at issue in this case, 8 U.S.C. § 1226(c), in Demore v. Kim, the majority's holding rested upon the conclusion that no-bond detention under the statute was limited to the "brief period necessary for . . . removal proceedings." 538 U.S. 510, 513 (2003); see Bourguignon, 667 F. Supp. 2d at 182 ("Nothing in the majority opinion in Demore suggested that detentions under § 1226(c), whatever its language, could be protracted or indefinite.").

Furthermore, Justice Kennedy's concurring opinion in Demore, which provided the crucial fifth vote for the majority, sets further limits on the type of detention § 1226(c) may authorize. Bourguignon, 667 F. Supp. 2d at 182 n.9 (noting that "[a]part from making explicit the 'unreasonable or unjustified' qualification implicit in the Chief Justice's opinion, however, it is hard to [know] why Justice Kennedy took the trouble to pen his separate opinion."); see id. at 182. Justice Kennedy explicitly interpreted § 1226(c) to include a reasonableness limitation on the duration of detention, so as to avoid an interpretation of the statute that would violate the Due Process Clause; without such a reasonableness requirement, the statute would not comport with the requirements of substantive due process. Id.; see Demore, 538 U.S. at 532 (Kennedy, J., concurring) ("a lawful permanent resident . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."). Justice Kennedy's decision to join the Demore majority was predicated on his "[f]inding no unreasonableness on the facts before the court in Demore." Bourguignon, 667 F. Supp. 2d at 182.

Both the Demore majority and Justice Kennedy's concurrence implicitly apply the canon of constitutional avoidance to read § 1226 in light of the fact that the "Due Process Clause prohibits arbitrary deprivations of liberty." Demore, 538 U.S. 532 (Kennedy, J., concurring); see also Zadvydas, 533 U.S. at 689 (discussing application of canon of constitutional avoidance to immigration statutes). The federal courts "are obligated to follow the doctrine of constitutional avoidance, under which federal courts are not to reach constitutional issues where alternative grounds for resolution are available." Am. Civil Liberties Union of Mass. v. U.S. Conf. of Catholic Bishops, 705 F.3d 44, 52 (1st Cir. 2013). In light of the constitutional infirmities of § 1226, this Court must construe § 1226 so as to allow Mr. Reid a bond hearing.

Indeed, this Court has concluded that "the clear import of the Demore decision is not that an alien can be detained indefinitely under § 1226(c) while deportation proceedings are pending, without the right to a bond hearing, but merely that an alien can be detained without a hearing so long as the detention is reasonable, by which the [Supreme] Court meant (among other things perhaps) of limited duration." Bourguignon, 667 F. Supp. 2d at 182. Moreover, Bourguignon is consistent with the interpretation of other courts within this District as to § 1226(c). "[D]istrict courts in this circuit have concluded that § 1226(c) includes an implicit requirement that 'removal proceedings, and the detention that accompanies them, be concluded within a reasonable time.'" Flores-Powell, 677 F. Supp. 2d at 470 (citing Sengko, 670 F. Supp. 2d at 126); see also Ortega v. Hodgson, No. 11-cv-10358-MBB, 2011 WL 4103138, at *7 (D. Mass. Sept. 13, 2011) (Bowler, Mag. J.) (noting that prolonged immigration detention purportedly authorized by § 1226(c) "appears unconstitutional"); cf. Winkler v. Horgan, 629 F. Supp. 2d 159, 161 (D. Mass. 2009) (Saris, J.) (denying the government's motion to dismiss where "the length of detention in these circumstances—where the detention is not brief and removability is not

clear—raises colorable due process concerns"). Just as in Bourguignon, Flores-Powell, Sengkeo, Ortega, and Winkler, this Court should follow the Supreme Court in both Zadvydas and Demore, and reject Mr. Reid's prolonged no-bond detention by interpreting 8 U.S.C. § 1226(c) to authorize mandatory detention only for a reasonable period.

B. § 1226 Cannot Authorize Mr. Reid's Prolonged, No-Bond Detention.

In construing 8 U.S.C. § 1226(c) to avoid "reach[ing] constitutional issues where alternative grounds for resolution are available," Am. Civil Liberties Union of Mass., 705 F.3d at 52, federal courts have interpreted Demore's requirement that no-bond detention be "reasonable" in two different ways.

In Rodriguez v. Robbins, the U.S. Court of Appeals for the Ninth Circuit read § 1226(c) to contain "an implicit reasonable time limitation," -- F.3d --, 2013 WL 1607706, at *6 (9th Cir. Apr. 16, 2013) (quoting Zadvydas, 533 U.S. at 682). Following the logic of Zadvydas, Rodriguez holds that the government's ability to detain an individual under § 1226(c) is limited to six months. Id. at 6-7. Under Rodriguez, after six months the government's detention authority shifts to § 1226(a), requiring the government to provide the detainee with an individualized bond determination. Id.; see 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1) (providing for individualized bond determinations under § 1226(a).

Rodriguez's bright-line, six-month rule comports with a consensus among the federal courts that six months marks the outer boundary of the "brief period necessary for . . . removal proceedings." Demore, 538 U.S. at 513, 523. In Bourguignon, this Court stated that a "seven-month detention period still exceeds the brief time frame contemplated by Chief Justice Rehnquist in Demore." Bourguignon, 667 F. Supp 2d at 183; see also Sengkeo, 670 F. Supp 2d at 127 (comparing habeas petitioner's length of detention to the statement in Demore that the

"average time for detention with BIA appeals is just under six months"). Other courts have granted bond hearings shortly after detention passes the six-month mark. See Parlak v. Baker, 374 F. Supp.2d 551, 561-62 (E.D. Mich. 2005) (eight months) vacated as moot, No 05-2003, 2006 WL 3634385 (6th Cir. 2006); Alli v. Decker, 644 F. Supp.2d 535, 537-38 (M.D. Pa. 2009) (nine months); see also Diop v. ICE/Homeland Security, 656 F.3d 221, 234 (3d Cir. 2011) (noting, while declining to establish a bright-line, six-month rule, that the "constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past th[e] thresholds" established in Demore).

The Third and Sixth Circuits have declined to adopt a bright-line time limitation and instead construed § 1226(c) to permit only "reasonable" detention. See Diop, 656 at 231 ("[W]e conclude that [§ 1226(c)] implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community."); Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003) ("when actual removal is not reasonably foreseeable, criminal aliens may not be detained beyond a reasonable period . . ."). These opinions stress that courts must conduct a "fact-dependent inquiry requiring an assessment of all the circumstances of any given case" when considering a habeas challenge to detention purportedly authorized by § 1226(c). Diop, 656 F.3d at 234.

While the First Circuit has not addressed the reasonableness of prolonged detention under § 1226(c), every district court in the First Circuit to have issued a published decision on the permissible length of prolonged, no-bond detention under § 1226(c) has interpreted the statute to require limitations on the duration of detention, including this Court. See Flores-Powell (holding

22-month detention violated implicit reasonableness requirement in § 1226(c)); Sengkeo (20-month detention unreasonable); Bourguignon (27-month detention unreasonable); see also Ortega (20-month detention "appeared unconstitutional"); Winkler, 629 F. Supp. 2d at 160 (denying government's motion to dismiss where petitioner had been detained for 10 months—"more than twice" the amount of time found to be "brief" in Demore).

At bottom, the Ninth Circuit approach in Rodriguez and the fact-dependent approach as exemplified by Diop articulate the same principle: § 1226, as a matter of statutory construction, requires that immigration detainees be afforded a bond hearing once their detention becomes prolonged. For the purposes of the instant petition, it is irrelevant whether this Court defines "prolonged" as exceeding six months, as in Rodriguez, or as consisting of "unreasonabl[y]" long detention in a case where there is "no reasonable likelihood" of removal, as in Bourguignon. Mr. Reid prevails under either theory and accordingly should receive an individualized bond hearing.

C. Under Any Construction of § 1226, Mr. Reid Has A Right To A Bond Hearing.

Under the Ninth Circuit's bright-line construction of § 1226 in Rodriguez, Mr. Reid is entitled to a bond hearing. As of the filing of this petition, the government has detained Mr. Reid pursuant to § 1226 for nearly eight months, exceeding the six-month limitation established in Rodriguez. See Rodriguez, slip op. at *8. Mr. Reid is thus entitled to a bond hearing under this construction of § 1226.

Mr. Reid also prevails under the fact-dependent reasonableness test. The inquiry begins by comparison of Mr. Reid's facts to those in Demore. See Diop, 656 F.3d at 234 (comparing length of detainee's detention to the "month and a half, and five months at maximum . . . thresholds" in Demore); Bourguignon, 667 F. Supp. 2d at 182 (noting Demore majority's "repeat[ed]" references to "limited duration" of detention during pendency of immigration

proceedings). The statistics in Demore refer to "an average time of 47 days and a median of 30 days" that Supreme Court stated were necessary for the government to process a case before the IJ and "the minority of cases in which the alien chooses to appeal," an average of an additional four months. Demore, 538 U.S. at 529-30. By comparison, Mr. Reid's proceedings before the IJ lasted 114 days, more than three times the median length of an IJ proceeding according to Demore. Moreover, Mr. Reid's appeal to the BIA will not be fully briefed until 98 days have elapsed from the entry of the IJ's decision, nearly carrying his detention during his appeal to the four month mark cited in Demore. Furthermore, unlike the petitioner in Demore, whose deportability the majority assumed was "uncontested," see Bourguignon, 667 F. Supp. 2d at 181, Mr. Reid is vigorously contesting his removal from the United States.[7] By reference to Demore itself, Mr. Reid's detention is clearly prolonged and thus unreasonable.

Beyond direct comparison to Demore, district courts in the First Circuit have repeatedly looked to the anticipated length of further removal proceedings. These courts have held that actual removal was not foreseeable when either the petitioner or the government had appealed to the BIA and further appeals to the circuit court were anticipated. See e.g., Bourguignon, 667 F. Supp. 2d at 183-84 ("Reckoning the possibility of an appeal to the Second Circuit by whichever party may be unhappy with the eventual outcome of the appeal now pending before the BIA, whenever that happens, a final decision may be many months away"); Sengko, 670 F. Supp. 2d at 128-29 ("[Petitioner's] experience with the appellate process indicates that it could be many more months or even years before her case is fully resolved"); Ortega, 2011 WL 4103138, at *7 ("Here, although there will be an end point when the BIA renders a decision, it is unclear

[7] Mr. Reid does not dispute that he has been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43). Rather, he asserts that he cannot be removed because he is entitled to CAT relief. As in Bourguignon, "[t]his distinction does not affect the instant analysis, however, because it is the fact that [Mr. Reid's] claim casts doubt on the likelihood he *can* be deported to [Jamaica]—not the claim's specific underpinnings—that provides the basis for distinguishing this case from Demore." Bourguignon, 667 F. Supp. 2d at 183 n.10.

whether or when that will take place. It is also unclear if petitioner will appeal the decision if unfavorable."). As in these cases, there is "no end in sight" to the resolution of Mr. Reid's appeal to the BIA. Bourguignon, 667 F. Supp.2d at 184.

Further, resolution of the BIA appeal is no guarantee of the end of Mr. Reid's immigration case. If the BIA remands the case to the IJ for further proceedings, those proceedings could stretch on even longer. Should the BIA affirm the IJ's adverse decision, Mr. Reid will have thirty days to file a Petition for Review ("PFR") with the Second Circuit. As of October 2012, there were "more than a thousand" Petitions for Review of BIA orders pending in the Second Circuit. In re Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit, 702 F.3d 160, 160 (2d Cir. 2012). Moreover, all immigration PFRs filed in the Second Circuit are currently subject to an automatic mandatory 90-day tolling order before a briefing schedule is even issued to the litigants. See id. at 162. Thus, while forecasting the precise length of future proceedings before the Second Circuit is not possible, it appears that, as in Sengkeo, resolution of Mr. Reid's entire case will require "many more months or even years." Sengkeo, 670 F. Supp.2d at 128-29.

II. ABSENT A CONSTITUTIONAL INTERPRETATION OF § 1226(c) AFFORDING HIM AN INDIVIDUALIZED BOND HEARING, MR. REID'S PROLONGED DETENTION VIOLATES THE FIFTH AMENDMENT.

Absent an interpretation of 8 U.S.C. § 1226(c) that avoids constitutional problems, Mr. Reid's prolonged, no-bond detention violates his due process rights. The First Circuit has held that "aliens are . . . entitled to due process." Aguilar v. U.S. Customs and Enforcement Div. of the Dep't of Homeland Sec., 510 F.3d 1, 13 (1st Cir. 2007); see also Saakian v. INS, 252 F.3d 21, 24 (1st Cir. 2001) (same). Substantive due process prohibits government infringement upon a fundamental liberty interest unless such infringement is "narrowly tailored to serve a

compelling government interest." Reno v. Flores, 507 U.S. 292, 302 (1993). Freedom from physical restraint is one such fundamental liberty interest that falls within the ambit of substantive due process protection. See Zadvydas, 533 U.S. at 690.

Under Demore, the government's interest in prolonged no-bond detention is limited to the detention of a narrow group of noncitizens for a reasonable duration of time and where removal is not contested. See 538 U.S. at 526, 527. However, the government's interest in prolonged no-bond detention that was found acceptable in Demore does not authorize detention of an unreasonable duration where removal is not foreseeable. See Sengkeo, 670 F. Supp. 2d at 126 ("In light of the language in Demore [and] Justice Kennedy's concurrence . . . the Court cannot accept the government's position that pre-removal detention is exempt from the bedrock due process principles relied upon in Zadvydas."). This is especially true of Mr. Reid, a longtime legal permanent resident honorably discharged from the U.S. Army Reserve, who is vigorously pursuing a meritorious claim for relief from removal, and who is experiencing acute mental health issues while detained. Although Mr. Reid has been detained for nearly eight months, he has not received an individualized bond hearing to determine whether he should be released from detention. Consequently, Mr. Reid's continued detention impermissibly infringes upon his fundamental substantive due process rights.

Furthermore, if the Court does not interpret 8 U.S.C. § 1226(c) to require that no-bond mandatory detention be only for a reasonable period of time, Mr. Reid's continued detention under this statute violates his right to procedural due process as well. In assessing a procedural due process challenge, this Court must consider the private and government interests at stake, and the risk of an erroneous deprivation of the private interest under the challenged procedures,

together with the probable value, if any, of additional or substitute procedural safeguards. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Mr. Reid has a substantial and fundamental interest in his own liberty. Furthermore, because Mr. Reid is neither dangerous nor a flight risk, see infra, Section V, the risk of erroneous deprivation of liberty without the additional procedural safeguard of an individualized bond hearing is extremely high in his case. By contrast, the fiscal and administrative burden to the government in providing Mr. Reid with a bond hearing is slight. Citing EOIR statistics, the Supreme Court in Demore noted that in 85% of the cases in which persons are detained pursuant to § 1226(c), removal proceedings are completed in a median time of one month and an average time of less than two months. Demore, 538 U.S. at 529. In the remaining 15% of cases that are appealed to the BIA, proceedings are concluded in an average of four months. Id. Mr. Reid's detention of nearly eight months falls within the minority of cases that involve detention for periods significantly longer than the 47-day period cited by the Demore court, and therefore courts will only infrequently have to expend resources in such instances, relative to the overall number of individuals subject to such detention. Moreover, bond hearings themselves are typically very brief events in Immigration Court, and any additional governmental cost in holding such hearings will likely be more than offset by government savings in the expense of detention for those respondents released on bond.

Because of this, Mr. Reid's fundamental interest in liberty greatly outweighs the slight burden to the government of holding bond hearings in the cases of those persons detained pursuant to 8 U.S.C. § 1226(c) past the "limited period" approved in Demore. In addition, the risk of erroneous deprivation of Mr. Reid's liberty interest without the additional procedural safeguard of a bond hearing is very high. Thus, continued detention under § 1226(c) violates Mr.

Reid's procedural due process rights absent a constitutional interpretation of the statute affording him an individualized bond hearing.

III. TO AVOID VIOLATING THE EIGHTH AMENDMENT, § 1226(c) MUST BE CONSTRUED AS AUTHORIZING PROLONGED NO-BOND DETENTION ONLY TO ADVANCE A COMPELLING STATE INTEREST OTHER THAN PREVENTION OF FLIGHT.

This Court must interpret 8 U.S.C. § 1226(c) to avoid constitutional difficulties arising not only under the Due Process Clause, but under the Excessive Bail Clause of the Eighth Amendment as well. This clause prohibits the government from setting conditions of release or detention that are "'excessive' in light of the perceived evil." United States v. Salerno, 481 U.S. 739, 754 (1987); see U.S. Const. amend. VIII. To avoid conflict with the guarantees of the Eighth Amendment, § 1226(c) must be construed as authorizing no-bond detention only when there exists a compelling government interest *other than* the prevention of flight, and further, where such detention is limited in length and is preceded by sufficient procedural safeguards. Because the government has no compelling interest in the no-bond detention of Mr. Reid, his continued detention, without opportunity for an individualized bond hearing, is not authorized by 28 U.S.C. § 1226(c). See generally Bolante v. Keisler, 506 F.3d 618, 619 (7th Cir. 2007) (Posner, J.) ("[T]he Supreme Court has suggested that the bail clause requires that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil from releasing the person. Otherwise the government could circumvent the bail clause simply by refusing to release detainees on any condition.") (internal citations omitted).

To avoid Eighth Amendment Excessive Bail Clause concerns, 8 U.S.C. § 1226(c) must be construed to authorize mandatory no-bond detention only when the Government demonstrates a compelling interest other than the prevention of flight, and only pursuant to procedures comporting with minimum guarantees of fundamental fairness and due process. Because the

government cannot make such a showing in Mr. Reid's case, it would violate the Eighth Amendment to construe § 1226(c) as requiring mandatory no-bond detention.

The Excessive Bail Clause states that "excessive bail shall not be required." U.S. Const. amend. VIII. The provision is fully applicable in removal proceedings. As the Supreme Court has explained, bail is implicated "when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding. The potential for governmental abuse which the Bail Clause guards against is present in both instances . . . ." Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989); see also U.S. ex rel. Potash v. Dist. Dir. of Immigration and Naturalization at Port of New York, 169 F.2d 747, 751 (2d Cir. 1948) ("[T]he general spirit of our institutions make it improbable that Congress intended to give the Attorney General unlimited power over the admission to bail of aliens against whom deportation proceedings are brought"); U.S. ex rel. Klig v. Shaughnessy, 94 F. Supp. 157, 160 (S.D.N.Y. 1950) ("It is not unappropriate [sic] to refer here to the Eighth Amendment . . . , which prohibits the imposition of excessive bail. Certainly, the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fail [sic] within its scope."); see also Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in Removal Proceedings*, 4 Am. Univ. Crim. Law Brief 35 (2009) (arguing that § 1226(c) violates Eighth Amendment because mandatory detention without individualized findings of dangerousness or risk of flight is "clearly unreasonable" means of advancing government interests in ensuring non-citizens appear for proceedings and protecting community from danger).

The Supreme Court has interpreted the Excessive Bail Clause as requiring that the government's proposed conditions of release or detention not be "'excessive' in light of the

perceived evil." Salerno, 481 U.S. at 754. The Court held in Salerno that, "[t]o determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." Id. Specifically, the Court concluded, "[t]hus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, *and no more*." Id. (emphasis added). Only "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight . . . [does] the Eighth Amendment . . . not require release on bail." Id. at 754-55. Applying Salerno to the instant case, § 1226(c) must be construed to require a compelling governmental interest in detention other than the prevention of flight.

Comparison between § 1226(c) and the statute at issue in Salerno is instructive. In Salerno, the Supreme Court upheld the Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., against an Eighth Amendment challenge only upon finding that the Act was narrowly focused on a particular set of circumstances in which the government's interests are "overwhelming," id. at 750, and moreover, that the statute's substantive reach was circumscribed by "numerous procedural safeguards," id. at 755. The Bail Reform Act authorizes pre-trial detention only if the government demonstrates by *clear and convincing evidence* at an *adversary hearing* that no conditions of release "will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(e); Salerno, 481 U.S. at 741 (emphasis added). There is no comparable detention hearing, adversarial or otherwise, under 8 U.S.C. § 1226(c).[8]

[8] The hearing available to a noncitizen under Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999), is for the sole purpose of determining whether an individual is properly included within the class of individuals subject to mandatory detention pursuant to 8 U.S.C. § 1226(c). See Demore, 538 U.S. at 532 (Kennedy, J., concurring) (citing *Joseph*). If an individual is found to be subject to mandatory detention, there is no further determination in the Joseph hearing of whether the individual may be released on bond. Therefore, the Joseph hearing is not the type of detention hearing contemplated in Salerno, in which the government must show that no conditions of release would reasonably assure the safety of any other person and the community. A few district courts have rejected Eighth Amendment challenges to 8 U.S.C. §1226(c), but they typically have done so without careful examination of the crucial differences between the Bail Reform Act and 8 U.S.C. § 1226(c). See, e.g., Ozah v. Holder, No. 3:12-CV-

The Bail Reform Act goes on to provide additional procedural protections. For instance, at the mandatory adversarial hearing, the defendant is accorded the right to counsel at government expense, to testify and present witnesses and evidence, and to cross-examine the government's witnesses. 18 U.S.C. § 3142(f); Salerno, 481 U.S. at 742. After evidence is presented, the court determines what pretrial conditions the court can order. 18 U.S.C. § 3142(a); Salerno, 481 U.S. at 742. Furthermore, the court may order no-bond detention only when it concludes that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community or any other person." 18 U.S.C. § 3142(e); Salerno, 481 U.S. at 742. In making this determination the court is obligated to consider, inter alia, the nature and seriousness of the charges, the substantiality of the government's evidence, the nature and seriousness of the danger posed by defendant's release, as well as the defendant's "background and characteristics." 18 U.S.C. § 3142(g); Salerno, 481 U.S. at 742-43. The court's findings must be supported by "clear and convincing evidence," 18 U.S.C. § 3142(f), in the form of written findings of fact and a statement of reasons, 18 U.S.C. § 3142(j); Salerno, 481 U.S. at 742.

The Bail Reform Act also contains statutory time limitations on the maximum length of pretrial detention. Salerno emphasized that "the maximum length of pretrial [no-bond] detention is limited by the stringent time limitations of the Speedy Trial Act." 481 U.S. at 747; see Speedy Trial Act, 18 U.S.C. § 3161 et seq. This statutory time limitation on the maximum length of permissible pretrial detention, which has no analogue in the immigration detention context, is yet another critical constraint on pretrial detention authorized by the Bail Reform Act, in addition to

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337, 2013 WL 709192 (E.D. Va. Feb. 26, 2013); Martinez v. Aviles, No. 10-5083, 2010 WL 4064797, at *7 (D.N.J. Oct. 14, 2010); Arriola-Arenas v. Ridge, No. A. 04-1490, 2004 WL 1175823, at * 1 (E.D.Pa. May 26, 2004); Avramenkov v. INS, 99 F.Supp.2d 210 (D. Conn. 2000); Marogi v. Jenifer, 126 F. Supp. 2d 1056 (E.D. Mich. 2000); Reyes v. Underdown, 73 F.Supp.2d 653 (W.D. La. 1999).

the narrow set of circumstances under which no-bond detention can be ordered under the Act, and the attendant procedural safeguards the Act requires.

The Supreme Court has not yet ruled on the conformity of 8 U.S.C. § 1226(c) with the Eighth Amendment.[9] Nonetheless, in applying the constitutional reasoning of Salerno to the context of civil deportation proceedings, which equally deprive individuals of their fundamental liberty interests, see Browning-Ferris Indus. of Vermont, 492 U.S. at 263 n.3, this Court should hold that the scope of mandatory no-bond detention authorized under § 1226(c) be constrained by similar constitutional requirements. This Court should thus interpret § 1226(c) to provide for (1) an adversary detention hearing; (2) stringent time limitations; and (3) a narrowed class of persons rebuttably presumed dangerous. The canon of constitutional avoidance requires such an interpretation of § 1226(c), as any interpretation to the contrary would raise serious Eighth Amendment concerns.

IV. MR. REID'S CONTINUED DETENTION, ABSENT A COMPELLING GOVERNMENT INTEREST OTHER THAN THE PREVENTION OF FLIGHT, VIOLATES THE EIGHTH AMENDMENT.

Absent a statutory construction of 8 U.S.C. § 1226(c) requiring a compelling government interest in detention other than merely the prevention of flight, Mr. Reid's further detention under this statute violates the Eighth Amendment's Excessive Bail Clause. Salerno, 481 U.S. at 754. Mr. Reid's prolonged, no-bond detention violates the Eighth Amendment's protection against excessive bail because he has been detained for nearly eight months without being afforded an individualized bond hearing for determination of his potential flight risk and dangerousness to the community.

V. THIS COURT SHOULD ORDER MR. REID TO BE RELEASED ON BOND.

[9] In Demore, the Supreme Court did not consider claims arising out of violations of the Eighth Amendment violations. *See* 538 U.S. at 522-23.

In Flores-Powell, then-Chief Judge Wolf concluded that he had the authority to exercise equitable discretion to conduct a bond hearing after finding that a petitioner's prolonged, no-bond detention under § 1226(c) was unreasonable. Reviewing the different remedies ordered by circuit and district courts in similar cases, the court found that "[t]he diversity in the remedies ordered suggests that, without articulating the rationale, judges have understood that they were exercising their equitable habeas power rather than responding to a statutory mandate." Flores-Powell, 677 F.Supp.2d at 476. Flores-Powell found that the decision by this Court in Bourguignon to order an IJ to conduct a bond hearing, in which the detainee bears the burden of proof rather than the government, and the indication that the habeas court would conduct the hearing if the IJ failed to do so, supported the conclusion that courts understood themselves to be exercising their equitable habeas powers. Id. at 476-77.

To determine how to exercise its equitable power, the court in Flores-Powell looked to the reasoning of a Pennsylvania district court in Alli v. Decker, 644 F. Supp. 2d 535 (M.D. Pa. 2009). Alli described a series of factors that weigh in favor of the bail proceeding being conducted by the district court. These include consideration of the "circuitous and potentially lengthy" process that would result if the court ordered an IJ to conduct the bond hearing. As the Alli court reasoned, if it ordered a hearing before the IJ:

> [A]n alien who has already demonstrated that his detention is no longer reasonable would remain detained pending an initial custody determination by the DHS district director, a hearing before an immigration judge, the IJ's decision, and a potential appeal to the BIA. In addition, . . . the only recourse for an alien dissatisfied with the outcome of his bond hearing would be to return to court again and file another habeas action.

Alli, 644 F. Supp. 2d at 541-42 (internal citations omitted). Alli also noted that a bond hearing conducted by the district court would serve the historic purpose of the writ, namely "to relieve detention by executive authorities without judicial trial," id. (citing Zadvydas, 533 U.S. at 699),

and would "address[] Congress's concern that release decisions be based on traditional bail considerations such as risk of flight and danger to the community." Id. at 541-42. In exercising its equitable discretion to conduct the bond hearing, the court in Flores-Powell determined that the potential for delay and the other Alli factors were "especially compelling" where proceedings in the Immigration Court had already been marked by "substantial and unnecessary delay." Flores-Powell, 677 F. Supp. 2d at 478.

In Mr. Reid's case, the Alli factors are also "especially compelling," given the refusal of executive branch officials to recognize this Court's opinion in Bourguignon and the published opinions by every other district court in Massachusetts to address the reasonableness of prolonged, no-bond detention under § 1226(c). While the government declined to appeal this Court's opinion in Bourguignon, ICE attorneys in Mr. Reid's case and other cases have returned to the Immigration Courts in Hartford and Boston to renew the argument rejected by this Court. In response, IJs, including IJ Verrillo in Mr. Reid's case, have refused to hold bond hearings. Where ICE attorneys and the IJ in this case have already been the cause of "substantial and unnecessary delay," and ordering the IJ to conduct a bond hearing would result in even more unnecessary delay, this Court should exercise its equitable discretion to conduct the bond hearing in Mr. Reid's case.

The government cannot meet its burden to prove that traditional bail considerations require Mr. Reid's continued detention. Rather, Mr. Reid, a lawful permanent resident and 30-year-resident of New Haven, Connecticut, must be released on bail. Mr. Reid has significant community ties in New Haven, as well as a substantial support network. He has two U.S. citizen children, and his minor daughter lives in New Haven. As the mother of his daughter relates, Mark's children "love their father deeply, and would be devastated if they didn't have constant

access to their father." Johnson Decl., Exh. T. Mr. Reid has been offered housing in a sober housing facility in the New Haven area if he is released. See id., Exh. F. Rev. Pawelek, with whom Mr. Reid has been in contact while in custody, has said that he "expect[s] to continue supporting Mr. Reid as he readjusts to life outside prison," including with financial support, connections with social services providers, and spiritual support. Id., Exh. D. If released, Mr. Reid plans to seek work in the mortgage industry, id., in which he worked prior to his incarceration. See id., Exh. A ¶ 51. Mr. Reid also plans to resume his paralegal studies to increase his options for gainful employment. Id., Exh. D.

Moreover, in addition to any conditions of supervision that this Court might place on him, Mr. Reid will remain under the supervision of the Connecticut Department of Pardons and Paroles for the foreseeable future. The State of Connecticut has stated its intention to place Mr. Reid in a "full parole program" with electronic monitoring. Id., Exh. G. Mr. Reid has accepted and will obey these conditions. Id.

In addition, while in custody, Mr. Reid has sought treatment for his mental health issues. Id., Exh. C. He has been diagnosed with PTSD, resulting from his traumatic experiences as a child in Jamaica, and depression. Id. Mr. Reid has begun treatment under the care of Dr. Baranoski of the Yale School of Medicine, Department of Psychiatry. Id. Dr. Baranoski has stated that Mr. Reid has expressed his willingness to seek treatment at the Connecticut Mental Health Center, if he is released, and "[h]is openness to accepting treatment provides a strong foundation for his successful return to the community." Id. Dr. Baranoski stated that Mr. Reid "appreciates his need to remain abstinent from substances," and has "expressed a genuine desire to lead a productive and law-abiding life, becoming a role model for his daughter." Id. Based on Dr. Baranoski's professional assessment of Mr. Reid, and that of Dr. Taiye Ogundipe, a

psychiatrist and fellow in the Yale Law and Psychiatry Program, Dr. Baranoski believes that "Mr. Reid will not pose a danger to others if released from detention" and "he does not present a current danger to himself." Id. Dr. Baranoski suggested that the current conditions of Mr. Reid's confinement have "greatly exacerbated his mental health issues," and, if released, he will benefit from access to high-quality mental health treatment and counseling free of charge at the Connecticut Mental Health Center. Id.

VI. MR. REID IS ENTITLED TO SUMMARY JUDGMENT ON HIS SHACKLING CLAIM.

Mr. Reid challenges Defendants' blanket policy and practice of shackling him with metal shackles about his wrists, ankles, and waist during his appearance in the Hartford Immigration Court, without an individualized showing of need. Forcing Mr. Reid to appear, confront witnesses, testify, and otherwise participate in the proceedings in chains violates his right to substantive and procedural due process under the Fifth Amendment. See Abadia-Peixoto v. U.S. Dep't. of Homeland Sec., 277 F.R.D. 572 (N.D. Cal. 2011) (denying government motion to dismiss class action challenge to mandatory shackling of respondents in immigration proceedings). As detailed *supra*, Mr. Reid continues to be detained by DHS, his removal proceedings have not yet ended, and Mr. Reid seeks a bond hearing. At a minimum, if this Court grants Mr. Reid's habeas petition and orders a bond hearing in Immigration Court, Mr. Reid will be shackled by ICE before an immigration judge who disclaims all authority to order their removal. But see id. at 574-75 (rejecting government argument that challenge to shackling not ripe because immigration had not yet appeared for future hearing). Mr. Reid has suffered and—unless the practice is enjoined—will continue to suffer physical and mental injuries, dignitary harms, and interference with his ability to participate fully and fairly in his potentially life-

altering immigration proceedings. The facts of Mr. Reid's shackling are uncontestable.[10] for the reasons below, Mr. Reid is entitled to summary judgment in his favor.

Rule 56(a) provides that summary judgment shall be granted where "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party has shown that no genuine issue of material fact exists, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986). In so doing, the non-moving party "cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." McCarthy v. Nw. Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). A dispute is "genuine" if "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party," and a fact is "material" if "it is one that might affect the outcome of the suit under the governing law." Velez-Rivera v. Agosto-Alicea, 437 F.3d 145, 150 (1st Cir. 2006) (quotation omitted).

At base, Defendants' indiscriminate shackling of Mr. Reid violates both procedural and substantive due process. Mr. Reid has an undeniable interest in freedom from physical restraint, such as that imposed by "shackles, chains, or barred cells," which has "always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Flores, 507 U.S. at 302. Defendants' shackling practice violated procedural due process because it deprived Mr. Reid of liberty without any individualized determination. Mr. Reid challenges Defendants' shackling practice on substantive due process grounds because his shackling, absent a showing that he posed a risk of escape or threat to security, is not "narrowly tailored to serve a compelling state interest." Id.

[10] Mr. Reid has simultaneously filed a Motion for Summary Judgment containing a Statement of Undisputed Facts pursuant to L.R. 56.1.

A. The Presumption Against Shackling During Criminal Trials Applies in the Immigration Court Context.

In the criminal context, it is well-settled that shackling a defendant during trial is a "severe remedy" warranted only for "extreme cases." Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982). Indeed, the Supreme Court has long held that "no person should be tried while shackled . . . except as a last resort." Illinois v. Allen, 397 U.S. 337, 344 (1970). More recently, the Supreme Court explained that shackling a defendant is inherently prejudicial because it implicates three "fundamental legal principles": 1) the presumption of innocence, because shackles may prejudice the jury; 2) access to counsel, including the right to participate in one's defense and the right to testify; and 3) judicial responsibility for the dignity that preserves the judicial process. Deck v. Missouri, 544 U.S. 622, 630-31 (2005). Shackles and other physical restraints may be necessary in some circumstances for safety or to prevent escape, but "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest *specific* to a particular trial." Id. at 629 (emphasis added). In making such a determination, "a judge should consider less restrictive measures before deciding that a defendant should be shackled." Woodard, 692 F.2d at 221.

Shackling in the Immigration Court context also implicates these fundamental legal principles. The second and third Deck principles – access to counsel (including the right to participate in one's defense and to testify) and the dignity of the judicial process – are identical in immigration proceedings. Additionally, at least one U.S. Court of Appeals has acknowledged that the impact of restraints on the ability to fully participate in trial can be sufficiently prejudicial even *absent* jury exposure. In Gonzalez v. Pliler, the Ninth Circuit analyzed the use of a stun belt as a physical restraint on a criminal defendant and recognized that, even though the

stun belt was *not* visible to the jury, it could have unconstitutionally prejudiced the defendant's ability to participate fully in his defense, communicate with counsel, and "concentrate adequately on his testimony because of the stress, confusion and frustration over wearing the belt." 341 F.3d 897, 903-05 (9th Cir. 2003). These reasons apply with equal force to the Immigration Court context.

Indeed, specifically in the Immigration Court context, at least one court has observed that the absence of a jury is not necessarily dispositive of the question of whether a blanket policy of shackling immigration detainees is justified. In denying the government's motion to dismiss in Abadia-Peixoto, a case which concerns precisely the same shackling allegations as Mr. Reid brings here, Judge Seeborg of the Northern District of California refused to adopt the government's position that a blanket shackling policy is automatically permissible when, as in Immigration Court, no jury is present. Relevant Ninth Circuit case law, Judge Seeborg held, "reveals that the permissibility of a blanket shackling policy turns on a number of factors, of which the absence of a jury is only one." Abadia-Peixoto, 277 F.R.D. at 576; see also United States v. Brandau, 578 F.3d 1064, 1065 (9th Cir. Cal. 2009) ("We have not, however, fully defined the parameters of a pretrial detainee's liberty interest in being free from shackles at his initial appearance, or the precise circumstances under which courts may legitimately infringe upon that interest in order to achieve other aims, such as courtroom safety.").

Here, the denial of counsel's request that Mr. Reid's shackles be removed during the June 17 hearing was in no way specific to Mr. Reid, nor did it have anything to do with the specific circumstances of his hearing. When undersigned counsel requested that IJ Verrillo have Mr. Reid's shackles removed, the IJ deferred to ICE. Rule 56.1 Statement of Undisputed Facts ("Rule 56.1 Statement"), at ¶ 4. John P. Marley, DHS Counsel at the hearing, objected that the IJ

did not have the authority to direct the law enforcement officers accompanying Mr. Reid to remove his shackles, and refused to order them to do so himself. Id. at ¶ 5. Through Mr. Marley, ICE asserted that its decision whether or not to remove shackles is "discretionary" and refused to remove Mr. Reid's shackles. Id. at ¶¶ 6-7. As justification, ICE cited an alleged prior and unspecified security issue concerning *another detainee* – not Mr. Reid – stating that, "[a]pparently there was an incident recently somewhere in the building and the full detention procedures are going to stay in place for *all* people in ICE custody. . . . [I]t is an ERO policy. They are making it very clear that they're not going to change the policy for *any particular case*." Id. at ¶¶ 7-8 (emphasis added). ICE had apparently adopted a policy or practice of mandating shackling for *all* detainees appearing in the Hartford Immigration Court because of this prior security issue: "it is ERO policy that *all detainees* who are detained will remain shackled while in the courtroom." Id. at ¶ 7 (emphasis added).

Such a policy harmed Mr. Reid and prejudiced his ability fully to participate in his own defense and his fundamental right to counsel. Mr. Reid was unable to read or write without great difficulty and physical strain while shackled; he was not able to bring his hands to counsel table to write, nor was he able to put his reading glasses on himself. Id. at ¶¶ 9-10; Vogel Decl. at ¶¶ 7-8.. In fact, because of the shackles, he required the assistance of two members of his legal team to put on and take off his reading glasses, just so that he could read legal papers supplied by his counsel. Id. at ¶ 8. Such assistance not only greatly interferes with his ability to fully participate in his own defense and to adequately communicate with counsel, it is also thoroughly demeaning and dehumanizing for an otherwise capable adult to require such assistance merely to put on eyeglasses to read.

B. Mr. Reid's Shackling Violated Procedural Due Process.

The balance of the familiar three-pronged Mathews v. Eldridge procedural due process analysis weighs heavily in favor of an individualized determination of risk before immigration detainees should be shackled in court. That analysis evaluates the individual's interests affected by the government action, the risk of an erroneous deprivation of those interests under the challenged procedures together with the probable value added by additional or alternative process, and the government's interest in its own procedures. Mathews, 424 U.S. at 335; see Starr v. Knierman, 474 Fed. App'x. 785, 786 (1st Cir. 2012).

Mr. Reid has an undeniably strong liberty interest in being free from physical restraints, see Zadvydas, 533 U.S. at 690, and that interest is not diluted by the fact that he is currently in immigration detention. See Youngberg v. Romeo, 457 U.S. 307, 321-23 (1982) (due process required for imposition of bodily restraints on person committed to mental institution). Second, Mr. Reid has strong interests in participating fully in his defense in his removal proceedings and in his access to counsel during those proceedings, interests severely limited by shackling, as detailed above.

The risk of erroneous deprivation of these interests under the challenged shackling practice is great, in part because of the complete lack of process, and this is evident in Mr. Reid's case. First, as detailed supra, Mr. Reid is detained pursuant to 8 U.S.C. § 1226(c) on account of non-violent drug convictions, and not because he has been determined to pose a danger or flight risk. Second, during the course of his prior immigration proceedings, spanning 20 hours over four days, Mr. Reid's shackles were removed so that he could participate in trial, testify, and communicate with counsel, and there were no incidents warranting reapplication of the shackles. Rule 56.1 Statement at ¶ 11. Third, two law enforcement officers accompanied Mr. Reid into the courtroom, stood near counsel table during the duration of the hearing, and escorted him out,

thereby ensuring courtroom security. Id. at ¶ 2. At his June 17 hearing, however, none of this was considered; as explained by ICE, Mr. Reid was shackled under a blanket shackling policy, without regard to his circumstances or to less restrictive measures. Id., at ¶¶ 7-8. Indeed, at the June 17, 2013 hearing, Mr. Reid was afforded no process whatsoever – he was not given an opportunity to be heard in support of his request, nor was he able to contest the government's denial of his request before a neutral decision maker. This lack of process only heightens the risk of erroneous deprivation.

These factors clearly outweigh the government's interest in its blanket shackling practice and any minimal burden imposed by additional procedures. While the government has a legitimate interest in maintaining courtroom safety, satisfaction of that interest does not require indiscriminate shackling without process. Particularly at the Hartford Immigration Court, the addition of individualized consideration and even minimal procedural safeguards prior to shackling during immigration proceedings would not burden the government, as there are only two Immigration Judges there, see http://www.justice.gov/eoir/sibpages/har/harmain.htm, minimizing the number of detainees in hearings at any given time.

Further, ICE's own 2011 Performance-Based National Detention Standards require detention facilities to employ an individualized "Custody Classification System." ICE is already making related individualized security assessments – adding procedures regarding shackling would not burden the agency. See ICE, 2011 Performance-Based National Detention Standards § 2.2, available at http://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf.

Consequently, due process requires at least some individualized procedure prior to the imposition of shackles during immigration court proceedings, and the denial of those procedures to Mr. Reid violated his due process rights.

C. Mr. Reid's Shackling Violated Substantive Due Process.

Mr. Reid also challenges his shackling on substantive due process grounds. Just as in the indefinite no-bond detention context, due process "forbids the government to infringe certain 'fundamental' interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno, 507 U.S. at 302 (original emphasis). Freedom from "physical restraint" is one of the interests that, the Supreme Court has held, "lies at the heart of the liberty that [the Due Process] Clause protects," Zadvydas, 533 U.S. at 690. Thus, shackling must be "narrowly tailored to serve a compelling state interest." Reno, 507 U.S. at 203; cf. Doe by Roe v. Gaughan, 617 F. Supp. 2d 1477, 1487 (D. Mass. 1985) (upholding use of shackling only because detainee found to be extremely assaultive). While ensuring courtroom safety and preventing flight are compelling state interests, per ICE's own explanation for its refusal to remove Mr. Reid's shackles, there was nothing narrowly tailored at all about Defendants' policy of *blanket* shackling that led to Mr. Reid being shackled during his June 17 hearing.

Moreover, the Supreme Court has held that "government detention violates [the Due Process Clause] unless the detention is ordered in . . . certain special and narrow nonpunitive circumstances, where a *special justification*, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." Reno, 507 U.S. at 203 (internal citations and quotations omitted) (emphasis added). Thus, Defendants' interest in courtroom security notwithstanding, Defendants still need a "special justification" in order to shackle. There can be no such special justification in Mr. Reid's case; he has already demonstrated that he poses no security threat if he appears in immigration court unshackled. For these reasons, regardless of any process Defendants might use, Mr. Reid, who poses no threat of

dangerousness or escape, was arbitrarily deprived of his liberty in violation of substantive due process.

There can be no genuine dispute as to the material facts surrounding Mr. Reid's shackling at the June 17 hearing, nor can there be that such blanket shackling, without individualized consideration, violates both procedural and substantive due process. See Abadia-Peixoto, 277 F.R.D. at 576 (denying government motion to dismiss challenge to mandatory shackling policy in immigration court). If this Court grants Mr. Reid's habeas petition and orders the Immigration Court to hold a bond hearing, Mr. Reid's motion for summary judgment should also be granted, and his future shackling during his immigration proceedings should be enjoined absent an individualized showing of need.

CONCLUSION

Because his continued detention without an individualized bond hearing is not authorized by 8 U.S.C. § 1226(c) and violates the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment, Mr. Reid respectfully requests that this Court grant his petition for a writ of habeas corpus and order his release upon reasonable bond.

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Respectfully submitted,

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** Motion for admission pro hac vice forthcoming*