**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NEW YORK**

**OSVALDO HODGE,**

***Petitioner,***

**v.**

**MERRICK GARLAND,**

**in his official capacity as Attorney General, U.S. Department of Justice;**

**ALEJANDRO MAYORKAS,**

**in his official capacity as Secretary, U.S. Department of Homeland Security;**

**THOMAS BROPHY,**

**in his official capacity as Acting Field Office Director, Buffalo Field Office, U.S. Immigration and Customs Enforcement; and**

**JEFFREY SEARLS,**

**in his official capacity as Officer-in-Charge, Buffalo Federal Detention Facility.**

***Respondents.***

**Civil Action No.:**

**Verified Petition for Writ of Habeas Corpus**

## INTRODUCTION

1. Mr. Osvaldo Hodge ("Petitioner" or "Mr. Hodge") is a 47-year-old native of the Dominican Republic. Mr. Hodge suffers from a mental health related health condition that requires him to take medication. He is a lawful permanent resident ("LPR") of the United States who was lawfully admitted on August 4, 1990. *See* Exh. 1, Visa Face Sheet.

2. In October 2021 the U.S. Department of Homeland Security ("Department" or "DHS"), Immigration and Customs Enforcement ("ICE")("DHS" or "ICE" or "government") took Mr. Hodge into custody at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York. He has remained in the DHS's custody since October 2021. During the entirety of his detention, Mr. Hodge has not been afforded an impartial review of his continued civil confinement by ICE. Upon information and belief, ICE is detaining Mr. Hodge pursuant to 8 U.S.C. § 1226(c) because of his past criminal conviction-a conviction for which he has successful completed his criminal sentence.

3. As of the date of his Petition, Mr. Hodge remains detained at BFDF where he is subjected to prolonged periods of confinement in his cell that is not based upon an individualized review but rather, upon information and belief, a blanket policy and practice that has been adopted and implemented by ICE. Mr. Hodge's confinement in the A-2 dorm and classification have never, upon information and belief, been subject to either an impartial review or subject to a process by which an individualized determination is made regarding classification level and restraints on movement in the BFDF.

4. Upon information and belief, Mr. Hodge has *never been subjected* to any disciplinary proceeding during the entirety of his civil detention by ICE at the BFDF.

5. Mr. Hodge petitions this court to challenge the constitutionality of the statutory provision that mandates his detention and the conditions of his detention. He asserts, *inter alia*, that the Department's detention of him has become unreasonably prolonged and subjected him to excessively punitive conditions in relation to available alternatives, such that its continued application to him violates his due process rights under the U.S. Constitution.
6. To remedy this alleged violation, Mr. Hodge respectfully requests this Court order the Department to either immediately release him from custody or, in line with growing jurisprudence in this field, afford him a meaningful custody redetermination hearing at which the Department must bear the burden of proving his detention is justified.

**PARTIES**

7. Mr. Osvaldo Hodge is a 47-year-old native of the Dominican Republic. DHS initially took him into custody and detained him at the BFDF in Batavia, New York in October 2021.
8. Respondent Merrick Garland is sued in his official capacity as Attorney General of the United States. As head of the U.S. Department of Justice, he oversees the operation of the Executive Office of Immigration Review, which encompasses the immigration courts and the Board of Immigration Appeals ("Board" or "BIA").
9. Respondent Alejandro Mayorkas is sued in his official capacity as the Secretary of the DHS, the agency responsible for Petitioner's continued detention.
10. Respondent Thomas Brophy is sued in his official capacity as the Acting Field Office Director of the Buffalo Field Office of ICE, Enforcement and Removal Operations ("ERO"), the agency which exercises ultimate authority over whether and where Petitioner is to be detained during the pendency of his removal proceedings.

11. Respondent Jeffrey Searls is sued in his official capacity as the Officer-in-Charge of the BFDF, the ICE facility at which Petitioner is currently detained.

**JURISDICTION AND VENUE**

12. This Court has jurisdiction under the U.S. Constitution. U.S. Const. art. I § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require.").

13. This Court also has jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2241 (habeas corpus); and 28 U.S.C. § 1651 (All Writs Act).

14. Additionally, this Court has the jurisdiction to grant injunctive relief pursuant to the Declaratory Judgement Act, 28 U.S.C. § 2201.

15. Although only the federal circuit courts have jurisdiction to review removal order through petitions for review, see 8 U.S.C. § 1252(a), federal district courts have jurisdiction to hear habeas corpus petitions brought by noncitizens to challenge the lawfulness of their detention by the DHS. *See e.g.*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

16. Furthermore, while 8 U.S.C. § 1226(e) bars judicial review of the discretionary denial of bond, it does not bar constitutional challenges to the bond hearing process. *See Aparicio-Villatoro v. Barr*, No. 6:19-CV-06294-MAT, 2019 WL 3859013, at *5 (W.D.N.Y. Aug. 16, 2019) ("Here, [the petitioner] is not challenging the IJ's discretionary decision to keep him in detention. Instead, he is arguing that the Immigration bond system . . . violates the Due Process Clause of the Fifth Amendment. This type of constitutional claim falls outside the scope of § 1226(e) because it is not a matter of the IJ's discretionary judgment.") (internal citation and quotation marks omitted).

17. Venue is proper in the U.S. District Court for the Western District of New York because Mr. Hodge is detained at the BFDF in Batavia, New York, which is located within the geographic jurisdiction of the Western District of New York. See 28 U.S.C. § 1391(e).

**STATUTORY FRAMEWORK**

18. Congress authorizes the DHS to detain noncitizens during their removal proceedings. *See generally, Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (discussing the DHS's authority to detain noncitizens under 8 U.S.C. §§ 1225(b), 1226(a), 1226(c)).

19. 8 U.S.C. § 1226(c) requires the detention of noncitizens who have been convicted of certain crimes. Specifically, 8 U.S.C. § 1226(c)(1) states:

20. The Attorney General shall take into custody any alien who —

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, . . .

**EXHAUSTION OR REMEDIES**

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

22. While courts may discretionarily require administrative exhaustion for prudential reasons - "[t]he general rule is that a party may not seek federal judicial review of an adverse administration determination until the party has first sought all possible relief with the agency

itself," *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003) (internal citations and quotation marks omitted)— it should not require Mr. Hodge to do so in the instant matter because his detention, by the plain text of the statute and the Immigration Judge's findings, is mandatory. *See* 8 U.S.C. § 1226(c). Mr. Hodge therefore does not possess any meaningful administrative options with which to challenge his detention. *See Cave v. East Meadow Union Free School Dist.*, 514 F.3d 240, 249 (2d Cir. 2008) ("The exhaustion requirement is excused when exhaustion would be futile because the administrative procedures do not provide an adequate remedy.").

23. Furthermore, excusal of administrative exhaustion is generally warranted in cases where the petitioner "has raised a substantial constitutional question." *Blandon v. Barr*, 434 F. Supp. 3d 30, 37 (W.D.N.Y. 2020); *see also United States v. Gonzalez-Roque*, 301 F.3d 39, 48 (2d Cir. 2002) ("[T]he BIA does not have jurisdiction to adjudicate constitutional issues."). Here, Mr. Hodge's petition raises the substantial constitutional question of whether his continued detention pursuant to 8 U.S.C. § 1226(c) comports with due process. Accordingly, he should not be expected to pursue administrative exhaustion before proceeding with this petition.

## RELEVANT FACTS AND PROCEDURAL HISTORY

24. Mr. Osvaldo Hodge entered the United States on August 4, 1990, as a LPR at the age of fifteen (15). *See* Exh. 1, Visa Face Sheet.

25. He has lived in the United States since that date and visited his birth country, the Dominican Republic, once in 1999 briefly to spend time with family. Mr. Hodge is the father of three daughters: Natashia, age twenty-six (26), Angelique, age twenty-three (23), and Alissa, age seven (7). *Id.* Natashia, Angelique, and Alissa are United States citizens and live in New Haven, CT. *Id.*

26. Mr. Hodge suffers from a mental health related health condition that requires him to take medication. *See* Exh. 2, Board of Immigration Appeals (BIA) Decision dated September 6, 2022, Remanding Case to the Immigration Judge ("September 6, 2022, BIA Remand Decision"). He also has struggled with the use of alcohol and drugs. *Id.* He has received various mental health diagnosis and been prescribed medication and parallel treatment for his use of alcohol and drugs. *Id.*

27. Mr. Hodge was placed in immigration removal proceedings by ICE following his conviction on October 1, 2020, in United States District Court of Connecticut pursuant to 21 U.S.C.§§ 846, 841(a)(1) and 841(b)(1)(C)2, conspiracy to distribute and possess with intent to distribute heroin and cocaine. Mr. Hodge was sentence to twelve (12) months and one day.

28. Upon information and belief, on September 10, 2021, DHS served Mr. Hodge with a Notice to Appear ("NTA") that charged him as removable based on his criminal conviction.

29. At the conclusion of the sentence related to his criminal conviction, ICE detained Mr. Hodge at the BFDF.

30. In removal proceedings, Mr. Hodge applied for relief from removal to the Dominican Republic pursuant to the United Nations Convention Against Torture (CAT). *See* Exh. 2, September 6, 2022, BIA Remand Decision.

31. Mr. Hodge was scheduled for a final hearing-an Individual Hearing-before the Immigration Judge on his application for CAT on December 15, 2021, but he was not able to attend due to the fact that he tested positive for COVID-19. *See id.*

32. Due to COVID-19 precautions that were imposed at the BFDF, Mr. Hodge's immigration attorney sought a continuance of the December 15, 2021, Individual Hearing date so that he could meet with his client in person. *Id.* The Individual Hearing was adjourned to January 5,

2022, but Mr. Hodge's immigration attorney again had to seek a continuance due to the COVID-19 pandemic. *Id.* The Individual Hearing was adjourned to January 28, 2022. *Id.*

33. However, Mr. Hodge's immigration attorney had to again request a continuance of the January 28, 2022, Individual Hearing date due to the fact that Petitioner was released from COVID-19 isolation for less than one day before being returned to COVID-19 isolation. Therefore, Mr. Hodge's immigration attorney was not able to meet with him and thus requested a continuance of the January 28, 2022, Individual Hearing date. The Immigration Judge denied the continuance request on January 28, 2022, and thereafter proceeded to deny Mr. Hodge's application for protection under CAT. *Id.*

34. Mr. Hodge filed a timely appeal of the Immigration Judge's decision and on September 6, 2022-approximately six (6) months later-the BIA granted the appeal and remanded the matter to the Immigration Judge for further proceedings and to determine whether any accommodations should be provided pursuant to the BIA's decision in *Matter of M-A-M-,* 25 I&N Dec. 474 (BIA 2011).[1]

35. On December 12, 2022, Mr. Hodge had his first post-remand *Matter of M-A-M-* hearing before the Immigration Judge. *See* Exh. 3, Petitioner's BIA Brief on Appeal dated May 2, 2023. ("Petitioner's BIA Brief 05/0/2023"). The Immigration Judge then scheduled Mr. Hodge for a post-remand individual hearing on his application under CAT for January 5, 2023, with an evidence call-up date of December 22, 2022.

[1] Prior to 2011, the BIA rarely engaged with issues relating to noncitizens with mental disabilities. Aside *from Matter of Sinclitico*, 15 I&N Dec. 320 (BIA. 1975), in which the BIA decided that a respondent who attempted to relinquish his U.S. citizenship had not done so voluntarily because of his schizophrenia, there was a dearth of guidance from the BIA on how immigration courts should assess competency. In 2011, however, the BIA published *Matter of M-A-M-*, and it was an attempt to correct this void and define the test for competency in immigration court.

36. . On December 22, 2022, he Court *sua sponte* adjourned the Individual Hearing to January 26, 2023, and on January 12, 2023 the Immigration Judge *sua sponte* ordered that Mr. Hodge's right to submit any additional evidence or an expert report in his case had been waived. Mr. Hodge-through counsel-requested a continuance of the hearing for completion of a necessary medical evaluation, and further requested that the record be held open to allow for the submission of the medical evaluation and report that undersigned counsel had alerted the Court to at the *Matter of M-A-M-* hearing on December 12, 2022. However, the request was denied by the Immigration Judge and a final hearing on Mr. Hodge's application under CAT proceeded on January 26, 2023. As is set forth in Petitioner's BIA Brief 05/02/2023, Mr. Hodge is appealing the Immigration Judge's decision on the basis that Petitioner's due process rights were violated because he was precluded from submitting evidence, that the Immigration Judge failed to properly apply the BIA decision in *Matter of M-A-M-* and that the Immigration Judge erred in denying relief under CAT. *See id.*

37. During the entirety of his civil detention, Mr. Hodge has only met with a mental health professional at BFDF three (3) times for a maximum time of fifteen minutes. Mr. Hodge has continuously requested that BFDF provide him with different medication because the medication that he is being prescribed for his mental health condition is not sufficient. However, Mr. Hodge's repeated requests have gone unanswered and therefore he filed a complaint with the Office of Civil Rights and Civil Liberties (CRCL) that is currently pending. Upon information and belief, as of the date of his Petition, Mr. Hodge has not received a response from CRCL.

38. Mr. Hodge's detention at BFDF that is for civil immigration detention exceeds the period that he was sentenced to confinement for his federal criminal conviction. Specifically, Mr. Hodge

has now spent approximately one (1) year and seven (7) months in civil immigration detention. Upon information and belief, Mr. Hodge-during his time in criminal custody- was not confined to a cell for long period of time throughout the day and was not subjected to arbitrary application of an "lock-in" policy and practice.

39. Mr. Hodge is currently pursuing his right to defend against removal from the United States and, if he does not succeed at the BIA, he will continue to appeal his case to the United States Court of Appeals for the Second Circuit.

40. Mr. Hodge's detention has already become prolonged and will continue to be prolonged without any impartial review of his custody absent this Court's intervention.

**LEGAL ARGUMENT**

41. In *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)., the Supreme Court emphasized, "[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." (citing *Foucha v. Louisiana*, 504 11U.S. 71, 80 (1992)). The Court noted, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id*.

42. Due process demands "adequate procedural protections" to ensure that the Government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* This is especially apparent in civil detention settings. *See Addington v. Texas,* 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purposes constitutes a significant deprivation of liberty that requires due process protection.") (internal citations omitted).

43. In the immigration context, the only two valid purposes for detention are to mitigate the risks of danger to the community and to prevent flight. *See Kim*, 538 U.S. at 531 (Kennedy, J.,

concurring) ("[T]he justification for 8 U.S.C. § 1226(c) is based upon the Government's concerns over the risk of flight and danger to the community."). Both, however, must be carefully scrutinized to ensure that detention is necessary to achieve those aims. *See Zadvydas*, 533 U.S. at 690 ("[W]here detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed.") (internal citation, quotation marks, and alterations omitted); *Kim*, 538 U.S. at 532 ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

44. Furthermore, determinations must be made in regard to the noncitizen's current risk of flight or danger to the community, rather than past risks or the risks presented when the noncitizen was initially taken into custody. *See Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999), amended (Dec. 30, 1999) ("The process due even to excludable aliens requires an opportunity for an evaluation of the individual's *current* threat to the community and his risk of flight.") (emphasis added); *see also Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011) ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purpose[.]").

45. Given the gravity of the liberty deprivation involved, due process requires that the government bears the burden of proof for detaining an individual, particularly after that detention has become prolonged. *See e.g., Rodriguez v. Garland*, No. 21-CV-373-LJV, 2021 WL 5495397, at *8 (W.D.N.Y. Nov. 23, 2021) ("To sustain the prolonged detention of a noncitizen subject

to removal proceedings based on its general interests in immigration detention, the government is required, in a full-blown adversary hearing, to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, . . . or that the noncitizen will appear for any future proceeding.")(internal citations, quotation marks, and alterations omitted); *see also United States v. Salerno*, 481 U.S. 739, 751 (1987) (stressing that only "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" can the Government continue to hold that individual in detention); *cf. Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020) (stating, for an 8 U.S.C. § 1226(a), prolonged detention claim: "[w]e believe that it is improper to allocate the risk of error evenly between the individual and the Government when the potential injury is as significant as the individual's liberty. Accordingly, we conclude that a clear and convincing standard of proof provides the appropriate level of procedural protection.").

46. The Court has further limited the imposition of potentially indefinite detention to rare circumstances involving the "most serious of crimes." *Zadvydas*, 533 U.S. at 691; *see also id*. ("In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.") (internal citation omitted) (emphasis in original).

**Mr. Hodge's Detention Has Become Unreasonably Prolonged**

47. The initial question for a habeas court is whether a person's civil detention has become unjustified or has reached an unreasonable length. In *Rodriguez*, the Supreme Court held that 8 U.S.C. § 1226(c) does not afford noncitizens a statutory right to periodic bond hearings every

six months. 138 S. Ct. at 846-47. In so holding, the Supreme Court overturned the Second Circuit's previous decision, *Lora v. Shanahan*, which had set such a rule. 804 F.3d 601, 606 (2d Cir. 2015). Deciding the case only on statutory grounds, the Supreme Court notably left open the question of what protections are constitutionally required for 8 U.S.C. § 1226(c) detention. *See Rodriguez*, 138 S. Ct. at 851 ("Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as 'a court of review, not of first view,' . . . we do not reach those arguments.") (internal citation omitted).

48. Following the Supreme Court's remand, the Ninth Circuit further remanded the case to District Court for a review of the constitutional question. In its order, the Ninth Circuit highlighted their view that they held "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018).

49. In the wake of *Rodriguez* and the vacation of *Lora*, district courts in this circuit have generally adopted a multi-factor test to assess, on a case-by-case basis, whether detention has become unjustified or unreasonable. The factors for consideration are:

> (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) whether the petitioner has asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner's detention is near conclusion.

*Ranchinskiy v. Barr*, 422 F. Supp. 3d 789, 797 (W.D.N.Y. 2019) (quoting *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018)).

50. Here, all seven factors favor Mr. Hodge.

51. The first factor – the length of time a noncitizen has been detained – represents the most important factor and weighs heavily in Mr. Hodge's favor. *See id.* (citing *Bermudez Paiz v. Decker*, No. 18-CV-4759 (GHW) (BCM), 2018 WL 6928794, at *13 (S.D.N.Y. Dec. 27, 2018)). Even after *Rodriguez*, "'[c]ourts in this Circuit have generally been skeptical of prolonged detention of removable immigrants, without process, lasting over six months.'" *Id*. (quoting *Lett v. Decker*, 346 F. Supp. 3d 379, 387 (S.D.N.Y. 2018)); *see also Rosado Valerio v. Barr*, No. 19-CV-519, 2019 WL 3017412, at *4 (W.D.N.Y. July 10, 2019) ("[C]ourts have found detention shorter than a year to be unreasonably prolonged as part of procedural due process analysis[.]"). Here, Mr. Hodge's detention – nearly 18 months at the BFDF - has reached a threshold that raises constitutional concerns. *Cf. Zadvydas*, 533 U.S. at 701 ("We . . . have reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months.").

52. The second factor – which party is responsible for the delay – favors Mr. Hodge. Judges in this District have identified that such a factor should only weigh against the noncitizen if the noncitizen has engaged in dilatory tactics to prolong his case. *See Hechavarria v. Sessions*, 891 F.3d 49, 56, n.6 (2d Cir. 2018) (distinguishing between a noncitizen who has "substantially prolonged his stay by abusing the processes provided to him from "an immigrant who simply made use of the statutorily permitted appeals process.") (internal citations and quotation marks omitted); *cf, Falodun v. Sessions*, No. 6:18-CV-06133-MAT, 2019 WL 6522855, at *10 (W.D.N.Y. Dec. 4, 2019) ("The Court declines to penalize [Petitioner] for the delays occasioned due to his pursuit of a good-faith, colorable legal and factual challenge . . ."). Here, Mr. Hodge has complied with the filing deadlines set for him at each stage of proceedings and

has only pursued the reasonable avenues of relief that the law makes available to him and sought to ensure his right to a constitutionally adequate process which the BIA granted when his first appeal of the Immigration Judge's decision was granted on September 6, 2022. *See* Exh. 2, September 6, 2022, BIA Remand Decision. Following remand by the BIA, Mr. Hodge has and continues to pursue meritorious challenges to his removal from the United States and to ensure that he is afforded a full, fair, and individualized hearing before the Immigration Court on his application for relief. Mr. Hodge has the right to pursue an appeal of the Immigration Judge's decision and has done so on a timely basis. Far from delaying his proceedings, Mr. Hodge has sought to vindicate his rights while being detained during the COVID-19 pandemic and before an Immigration Judge who was reversed on appeal due to his failure to afford Mr. Hodge his constitutional right to a full, fair, and individualized hearing and to apply BIA precedent in the case of people who suffer from a mental health related condition. *See id.*

53. The third factor – whether the noncitizen has raised defenses to removal – weighs in Mr. Hodge's favor. Mr. Hodge has applied relief from removal under CAT. The mere presence of Mr. Hodge's defense to removal is sufficient to tip in his favor. *See Ranchinskiy*, 422 F. Supp. 3d at 799 ("[T]he Court need not inquire into the strength of Petitioner's defenses—it is sufficient to note their existence and the resulting possibility that the Petitioner will ultimately not be removed, which diminishes the ultimate purpose of detaining the Petitioner pending a final determination as to whether he is removable.") (internal citation and quotation marks omitted).

54. The fourth factor – whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable – weighs heavily in Mr. Hodge's favor. Mr. Hodge was

sentenced to a prison term of 12 months and one day. Mr. Hodge has now been detained in excess of 12 months and 1 day in civil immigration detention. Since he continues to pursue meritorious relief from removal, it is reasonable to expect that is civil detention will extend even further beyond the time he spent in prison for the crime that makes him arguably removable.

55. The fifth factor – whether the detention facility is meaningfully different from a penal institution for criminal incarceration – further weighs in Mr. Hodge's favor. Detention at the BFDF is not meaningfully different from detention at a penal institution because it comprises many of the same restrictions that often accompany penal detention, including restrictions on movement and expectations to follow the orders of presiding facility officers. *See Ranchinskiy*, 422 F. Supp. 3d at 799 (finding, absent rebuttal from the government, that detention at the BFDF is akin to criminal incarceration); *Gonzales Garcia v. Barr*, No. 6:19-CV-6327-EAW, 2020 WL 525377, at *15 (W.D.N.Y. Feb. 3, 2020) ("[T]he reality is that the [BFDF] houses aliens against their will with various restrictions on their freedom of movement. Thus, while perhaps not akin to a maximum-security prison, . . . the facility does not seem meaningfully different from at least a low-security penal institution for criminal detention.").

56. The sixth factor also weighs in Mr. Hodge's favor because it has long been held that once someone has been convicted and sentenced to a term of imprisonment they shall forever be confined. *Foucha v. Louisiana,* 504 U.S. 71, 82-83 (1992) The Supreme Court rejected the argument presented by Respondents and adopted by IJ Driscoll in this case. That once someone has been convicted and sentenced to a term of imprisonment they shall forever be confined. As the Supreme Court explained, this is not constitutionally permissible within the context of civil detention. The Court explained the State's argument for indefinite civil

confinement "would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term." *See also, Hechavarria v. Sessions*, No. 6:15-CV-1058-LJV, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018), enforcement granted sub nom, *Hechavarria* v. Whitaker, 658 F. Supp. 3d 227 (W.D.N.Y. 2019) ("[The government] . . . has a regulatory interest in [Petitioner's] detention pending removal based on his serious criminal history and risk of flight. . . . But those are the very interests that would be addressed at a detention hearing.")

57. Finally, the seventh factor – whether the petitioner's detention is near conclusion – also weighs in favor of Mr. Hodge. Mr. Hodge is pursuing his right to defend against removal from the United States and as is demonstrated from the procedural history of his case thus far-the first appeal to the BIA took approximately 6 months-he is facing a continued prolonged period of detention and may have to seek an additional appeal before the United States Court of Appeals for the Second Circuit.

**Because Mr. Hodge's Detention Has been Unreasonably Prolonged and He is Being Deprived of a Liberty interest, Due Process Requires His Release or, at Minimum, that He Receives a Constitutionally Adequate Bond Hearing.**

58. Following a determination that detention has become unjustified, the remaining question, then, is what process is due to the noncitizen. Courts in this circuit have repeatedly concluded that once detention has become prolonged, even those noncitizens statutorily subjected to mandatory detention are constitutionally entitled to a bond hearing at which the government must justify any further detention. *See e.g.*, *Ranchinskiy*, 422 F. Supp. 3d. at 800 ("It is well established within this Circuit that when a court determines the length of a petitioner's detention pursuant to § 1226(c) is unjustified, due process requires that he be given a bond

hearing where an individualized determination can be made as to whether he should remain confined for the duration of his immigration proceedings."); *Cabral*, 331 F. Supp. 3d at 261-63 (stating same).

59. In *Mathews v. Eldridge*, the Supreme Court provided a three-factor test to weigh the constitutionality of administrative procedures: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335 (1976). Each of the *Mathews* factors weighs heavily in favor of requiring a bond hearing once detention under 8 U.S.C. § 1226(c) has become prolonged.

60. First, the "importance and fundamental nature" of an individual's liberty interest is well-established. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of [] liberty."); *cf. Hechavarria*, 2018 WL 5776421 at *8 ("[T]his Court finds little difference between Hechavarria's detention and other instances where the government seeks the civil detention of an individual to effectuate a regulatory purpose."). This first factor thus weighs in favor of Mr. Hodge.

61. Second, the risk that a noncitizen's freedom will be erroneously deprived is significant. Critically, there is no opportunity for detainees like Mr. Hodge to challenge their detention because the statute mandates detention regardless of whether he is or has ceased to be a flight risk or danger to the community. *See Jennings*, 138 S.Ct. at 844 (discussing the use of "may [detain]" and "shall [detain]" in the context of 8 U.S.C. § 1226 and the requirement of detention when the statute uses "shall.").

62. Furthermore, any internal process to demonstrate to the ICE that release is warranted is not subject to review or challenge. Thus, there is a significant risk of erroneous, unwarranted detention, and the deprivation of Mr. Hodge's liberty interests. *See e.g.*, *Hechavarria*, 2018 WL 5776421, at *8 ("[G]iven that the statute precludes any pre- or post-deprivation procedure to challenge the government's assumption that an immigrant is a danger to the community or a flight risk, it presents a significant risk of erroneously depriving [Petitioner] of life and liberty interests."); *see also Chi Thon Ngo*, 192 F.3d at 398 ("To presume dangerousness to the community and risk of flight based solely on his past record does not satisfy due process. . . . [P]resenting danger to the community at one point by committing crime does not place [a petitioner] forever beyond redemption.").

63. Finally, the proposed procedure – namely requiring that the ICE prove Mr. Hodge's continued detention is justified – does not meaningfully prejudice the government's interest in detaining dangerous noncitizens during removal proceedings. *See e.g.*, *Hechavarria*, 2018 WL 5776421 at *8 ("The government . . . contends that it has a regulatory interest in [petitioner's] detention pending removal based on his serious criminal history and risk of flight. This Court agrees that both of these interests may well be 'legitimate and compelling.' But those are the very interests that would be addressed at a detention hearing. So, the government's continued assertion that [the petitioner] must be detained because he is dangerous simply begs the question and suggests exactly why a hearing is necessary.") (internal citations omitted, emphasis added).

64. As the Second Circuit articulated in *Velasco Lopez*, once detention has become prolonged, it is in everyone's – the petitioner, the Government, and the public's – interest for the petitioner to receive a custody redetermination hearing. *See* 978 F.3d at 857 ("The irony in this case is

that, in the end, all interested parties prevailed. The Government has prevailed because it has no interest in the continued incarceration of an individual who it cannot show to be either a flight risk or a danger to his community. [The petitioner] has prevailed because he is no longer incarcerated. And the public's interest in seeing that individuals who need not be jailed are not incarcerated has been vindicated.").

65. Ultimately, the Constitution cannot abide a process by which the Government can detain someone for months-on-end without review by any neutral arbiter. To avoid the unconstitutional indefinite detention warned of in *Zadvydas*, this Court should order that Mr. Hodge is entitled to a constitutionally adequate bond hearing at which the Government must justify his continued detention.

66. In evaluating Mr. Hodge's custody, Respondents should be required to prove by clear and convincing before a neutral arbiter (this Court or, in the alternative, an Immigration Judge) Mr. Hodge's continued detention is justified and order that Respondents must consider alternatives to detention and his ability to pay when setting monetary bond. *See Mathon v. Searls*, No. 1:20-cv-07105-FPG, 2022 WL 3699435 (W.D.N.Y. Aug. 26, 2022); *Quituizaca v. Barr*, No. 6:20-cv-00403-LJV, 2021 WL 6797494, at *8 (W.D.N.Y. Jan. 5, 2021) and *Hechavarria*, 358 F. Supp. at 241-42. *See also, Velasco Lopez*, 978 F.3d at 856 ("We believe that it is improper to allocate the risk of error evenly between the individual and the Government when the potential injury is as significant as the individual's liberty. . . . We therefore conclude that the district court's order requiring the Government to prove that [Petitioner] is a danger to the community or a flight risk by clear and convincing evidence to justify his continued detention 'strikes a fair balance between the rights of the individual and the legitimate concerns of the state.'") (quoting *Addington*, 441 U.S. at 431).

67. ICE would not be prejudiced to bear the burden of proof, should there be any, of Mr. Hodge's alleged dangerousness or risk of flight because it can easily obtain any records they require from other federal agencies and local law enforcement. ICE can further procure any disciplinary records they have of Mr. Hodge during his more than one year and 7 months in civil immigration detention.

68. Lastly, any evaluation of Mr. Hodge's flight risk, if any exists, should include proof from Respondents that no amount of bond or conditions of release would secure his compliance with future immigration orders. *See e.g.*, *Ranchinskiy*, 422 F. Supp. 3d at 800 ("[T]he Court finds that both due process and BIA precedent require the IJ to consider ability to pay and alternative conditions of release in setting bond."); *Lett*, 346 F. Supp. 3d at 389 ("The Court agrees with Petitioner that an immigration bond hearing that fails to consider ability to pay or alternative conditions of release is constitutionally inadequate."); *cf. Onosamba-Ohindo v. Barr*, No. 1:20-CV-00290-EAW, 2020 WL 5226495, at *23 (W.D.N.Y. Sept. 2, 2020) (ordering consideration of "non-bond alternatives to detention or, if setting a bond, ability to pay" in 8 U.S.C. § 1226(a) bond hearings).

## CLAIMS FOR RELIEF

### COUNT ONE:

### MR. HODGE'S DETENTION VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

69. Mr. Hodge re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

70. As repeatedly affirmed by the Supreme Court, civil immigration detention must be temporary and nonpunitive in nature. *Zadvydas*, 533 U.S. at 691.

71. Mr. Hodge's detention has become unreasonably prolonged and continued detention without a constitutionally adequate bond proceeding will erroneously deprive him of his "strong interest in liberty." *Salerno*, 481 U.S. at 750.

72. Continuing to detain Mr. Hodge pursuant to 8 U.S.C. § 1226(c) without an adequate process for review violates his right to procedural due process.

73. As a result of this violation, Mr. Hodge has suffered, and is at risk of suffering additional, actual, and substantial hardship, and irreparable injury.

74. Affording Mr. Hodge, a constitutionally adequate custody redetermination hearing at which the Government must justify Mr. Hodge's continued detention would not prejudice the Government's interest.

75. Mr. Hodge has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays that this Court grants the following relief:

1. Assume jurisdiction over this matter;

2. Issue a conditional writ of habeas corpus requiring Respondents to provide Petitioner with a constitutionally adequate, individualized hearing before an impartial adjudicator at which Respondents bear the burden of establishing by clear and convincing evidence that the Petitioner is a danger to the community or a flight risk that no alternatives to detention could reasonably secure his future compliance with the orders of immigration officials;

3. Award Petitioner his costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412; and

4. Grant any other and further relief that this Court deems just and proper.

Respectfully Submitted,

*/s/ Sarah T. Gillman*

DATED: May 19, 2023
New York, New York

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**28 U.S.C. § 2242 VERIFICATION STATEMENT**

I am submitting this verification on behalf of the Petitioner because I am one of the Petitioner's attorneys. I have discussed with the Petitioner the events described in this Petition. On the basis of those discussions, I hereby verify that the statements made in this Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

//

DATED:

May 19, 2023
New York, New York

/s/ Sarah T. Gillman

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