UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALEXANDER ALLI (A 074 983 378) ELLIOT GRENADE (A 36 479 546), on behalf of themselves and all others similarly situated,	:	ELECTRONICALLY FILED
Petitioners- Plaintiffs	:	
vs.	:	Civil Action No: 4:09-cv-00698-JEJ-SF
THOMAS R. DECKER, his official capacity as Philadelphia Field Office Director for Detention JOHN P. TORRES, in his official capacity as Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security; ERIC HOLDER, in his official capacity as Attorney General of the U.S. Department of Justice; WILLIAM CAMPBELL, in his official capacity as Warden, Columbia County Prison, Bloomsburg, Pennsylvania; JANINE DONATE, in her official capacity as Warden, Lackawanna County Prison, Scranton, Pennsylvania; THOMAS V. DURAN, in his official capacity as Warden, Clinton County Correctional Facility, McElhattan, Pennyslvania; WILLIAM F. JURACKA, in his official capacity as Warden, Carbon County Correctional Facility, Nesquehonin, Pennsylvania; CRAIG A. LOWE, in his official capacity as Warden, Pike County Correctional Facility, Lords Valley,	:	THE HONORABLE JOHN E. JONES, III CLASS ACTION

Pennsylvania; RUTH RUSH, in her official capacity as Warden, Snyder County Prison, Selinsgrove, Pennsylvania; MARY E. SABOL, in her official capacity as Warden, York County Prison, York, Pennsylvania; MICHAEL ZENK, in his official capacity as Warden, CI Moshannon Valley Correctional Institution, Philipsburg, Pennsylvania; JERRY C. MARTINEZ, in his official capacity as Warden, FCI Allenwood (Low), Allenwood, Pennsylvania; DAVID EBBERT, in his official capacity as Warden, FCI Allenwood (Medium), Allenwood, Pennsylvania; and R. MARTINEZ, in his official capacity as Warden, FCI Allenwood (High), Allenwood, Pennsylvania	:
Respondents- Defendants	:

AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. This class action habeas petition and complaint for declaratory relief is brought on behalf of lawful permanent residents who are being imprisoned for prolonged periods of time in Pennsylvania facilities without receiving the most basic element of Due Process—a custody hearing to determine if their prolonged detention is justified.

2. Petitioners and named plaintiffs Alexander Alli and Elliot Grenade (hereafter "Petitioners") are longtime lawful pemanent residents of the United States who are challenging efforts by the Department of Homeland Security ("DHS") to remove them from the United States. Both have substantial ties to this country, including children who are U.S. citizens. And both have substantial challenges to removal. Yet, each has been subject to prolonged detention—in Mr. Alli's case for nearly nine months, and in Mr. Grenade's case, for more than one and a half years—without any hearing to determine whether such detention is justified.

3. Petitioners are not alone. On any given day—DHS detains more than one thousand noncitizens in jails across the Commonwealth of Pennsylvania, particularly in the Middle District of Pennsylvania. Like Petitioners, many are lawful permanent residents who are detained for months, if not years, while the immigration courts and federal courts resolve their cases. Yet they never receive a

custody hearing to determine whether their prolonged detention is even necessary. Indeed, many choose to abandon their meritorious cases because they cannot endure the prospect of being locked up indefinitely.

4. Petitioners bring this action on their own behalf, and on behalf of similarly-situated individuals, to obtain the custody hearing to which they are statutorily and constitutionally entitled. As set forth below, the Immigration and Nationality Act ("INA") does not authorize prolonged, pre-final order detention of the kind Petitioners are suffering. Indeed, if it did, it would raise serious constitutional problems. The Supreme Court has repeatedly held that immigration detention violates Due Process unless it is reasonably related to its purpose. Moreover, where detention is prolonged, Due Process requires a "sufficiently strong special justification" to outweigh the significant deprivation of liberty, as well as strong procedural protections to ensure that an individual's detention is actually serving legitimate governmental aims, *see Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). At a minimum, these procedural protections include a hearing before an impartial adjudicator where the government bears the burden of justifying prolonged detention. Yet the government has failed to provide the Petitioners, and the class they seek to represent, with any custody hearing that would even approach what is constitutionally required.

5. Instead, pursuant to its unlawful policy and practice, the government

has imprisoned Petitioners, and the similarly-situated persons they seek to represent, for prolonged periods of six months or more—and, in the case of Mr. Grenade, over one and a half years—without affording them a hearing to determine whether their prolonged detention is justified. This policy and practice violates both the INA and the Due Process Clause. To remedy this ongoing violation, Petitioners bring this action seeking declaratory and injunctive relief on behalf of themselves and declaratory relief on behalf of a class of similarly-situated persons. Petitioners do not seek an order granting their release, but merely a hearing where the government bears the burden of demonstrating that their prolonged detention is justified.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-02 (declaratory relief); 28 U.S.C. § 2241 (habeas corpus); 5 U.S.C. § 702 (Administrative Procedures Act); 28 U.S.C. § 1651 (All Writs Act); the Due Process Clause of the U.S. Constitution; and the Suspension Clause of U.S. Constitution.

7. Venue is proper in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims occurred in this District. In the alternative, venue is proper in the District pursuant

to 28 U.S.C. § 2241(d) because Petitioners and proposed class members are detained at facilities within this District.

PARTIES

8. Petitioner Alexander Alli is a citizen of Ghana and a longtime lawful permanent resident of the United States. He has been detained for nearly nine months while litigating his removal case. He has never been afforded a hearing to determine whether his prolonged detention is justified. He is currently detained at the York County Prison in York, Pennsylvania.

9. Petitioner Elliot Grenade is a citizen of Trinidad and Tobago and a longtime lawful permanent resident of the United States. He has been detained for 20 months while litigating his removal case. He has never been afforded a hearing to determine whether his prolonged detention is justified. He is currently detained at the Pike County Correctional Facility in Lords Valley, Pennsylvania.

10. Respondent Thomas R. Decker is the Field Office Director for Deportation and Removal in the Philadelphia Field Office of U.S. Immigration and Customs Enforcement. In this capacity, he has jurisdiction over the detention facilities in which Petitioners are held, is authorized to release Petitioners, and is a legal custodian of Petitioners. Mr. Decker is sued in his official capacity.

11. Respondent John T. Morton is the Assistant Secretary of U.S. Immigration and Customs Enforcement. In this capacity, he has responsibility for

the enforcement of the immigration laws. As such, he is a legal custodian of Petitioners. Mr. Morton is sued in his official capacity.

12. Respondent Janet Napolitano is the Secretary of Homeland Security and heads the DHS, the arm of the federal government responsible for enforcement of immigration laws. Ms. Napolitano is the ultimate legal custodian of Petitioners. Ms. Napolitano is sued in her official capacity.

13. Respondent Eric Holder is the Attorney General of the United States and the head of the U.S. Department of Justice, which encompasses the Board of Immigration Appeals and immigration courts as a subunit known as the Executive Office of Immigration Review. Mr. Holder shares responsibility for the implementation and enforcement of immigration laws along with Respondent Napolitano. Mr. Holder is sued in his official capacity.

14. Respondent William Campbell is the Warden of the Columbia County Prison in Bloomsburg, Pennsylvania. He is the legal custodian of those detained at the Columbia County Prison. Mr. Campbell is sued in his official capacity.

15. Respondent Janine Donate is the Warden of the Lackawanna County Prison in Scranton, Pennsylvania. She is the legal custodian of those detained at the Lackawanna County Prison. Ms. Donate is sued in her official capacity.

16. Respondent Thomas V. Duran is the Warden of the Clinton County Correctional Facility in McElhattan, Pennsylvania. He is the legal custodian of

those detained at the Clinton County Correctional Facility. Mr. Duran is sued in his official capacity.

17. Respondent William F. Juracka is the Warden of the Carbon County Correctional Facility in Nesquehonin, Pennsylvania. He is the legal custodian of those detained at the Carbon County Correctional Facility. Mr. Juracka is sued in his official capacity.

18. Respondent Craig A. Lowe is the Warden of the Pike County Correctional Facility in Lords Valley, Pennsylvania. He is the legal custodian of those detained at the Pike County Correctional Facility. Mr. Lowe is sued in his official capacity.

19. Respondent Ruth Rush is the Warden of the Snyder County Prison in Selinsgrove, Pennsylvania. She is the legal custodian of those detained at the Snyder County Prison. Ms. Rush is sued in her official capacity.

20. Respondent Mary E. Sabol is the Warden of the York County Prison in York, Pennsylvania. She is the legal custodian of those detained at the York County Prison. Ms. Sabol is sued in her official capacity.

21. Respondent Michael Zenk is the Warden of the CI Moshannon Valley Correctional Institution in Philipsburg, Pennsylvania. He is the legal custodian of those detained at the CI Moshannon Valley Correctional Institution. Mr. Zenk is sued in his official capacity.

22. Respondent Jerry C. Martinez is the Warden of FCI Allenwood (Low) in Allenwood, Pennsylvania. He is the legal custodian of those detained at FCI Allenwood (Low). Mr. Martinez is sued in his official capacity.

23. Respondent David Ebbert is the Warden of FCI Allenwood (Medium) in Allenwood, Pennsylvania. He is the legal custodian of those detained at FCI Allenwood (Medium). Mr. Ebbert is sued in his official capacity.

24. Respondent R. Martinez is the Warden of FCI Allenwood (High) in Allenwood, Pennsylvania. He is the legal custodian of those detained at FCI Allenwood (High). Mr. Martinez is sued in his official capacity.

FACTS AND PROCEDURAL HISTORY

Alexander Alli

25. Petitioner Alexander Alli, a longtime lawful permanent resident, has been detained for nearly nine months while challenging the Government's efforts to remove him to Ghana, a country he left nearly 20 years ago. Moreover, as recognized by an Immigration Judge ("IJ"), Mr. Alli faces an indeterminate period of future detention while his immediate relative visa petition is pending at U.S. Immigration and Customs Enforcement ("USCIS"). *See In the Matter of Alli*, A 074-983-378, dated Jan. 29, 2009 ("IJ decision"), at 4, attached as Ex. A.

26. Mr. Alli came to the United States in 1990 and adjusted to lawful permanent resident status in 1996. *See* Notice to Appear, dated Feb. 29, 2008, and

Additional Charges of Inadmissibility/Deportability, dated July 2, 2008, attached as Ex. B. He and his wife Rachel, a U.S. citizen, have been together for over twenty years and were married in the United States in 2006. They have three children together, all of whom are U.S. citizens. Mr. Alli has been licensed as a real estate broker and owns his own real estate business, Bambos Property Corporation, which employs 10 to 15 agents at any given time. Mr. Alli is also a devout Christian and belongs to two different congregations of the Redeemed Christian Church of God, where Mrs. Alli is an ordained Deaconess. Declaration of Alexander Alli ("Alli Decl.") ¶¶ 12-33.

27. In June 2006, Mr. Alli was convicted for conspiracy to commit wire fraud, identity fraud, and access device fraud under 18 U.S.C. §§ 371, 1028, and 1029, respectively, and was sentenced to two years of incarceration. *See* Ex. B. Mr. Alli self-surrendered in January 2007 and completed his sentence in August 2008. *See* Bond Order, dated Mar. 9, 2005, attached as Ex. C. Mr. Alli has no other criminal history. *See* Alli Decl. ¶ 6.

28. U.S. Immigration and Customs Enforcement ("ICE") took custody of Mr. Alli upon completion of his sentence on August 29, 2008. At that time, ICE served Mr. Alli with a Notice of Custody Determination informing him that he was subject to mandatory detention and therefore ineligible for a bond hearing. He has remained in ICE custody since that time—a period of nearly nine months. He is

currently being held at the York County Prison in York, Pennsylvania.

29. In his removal proceedings, Mr. Alli is seeking an INA § 212(h) waiver of inadmissibility for his convictions so that he may re-apply for lawful permanent resident status based on his marriage to his U.S. citizen wife. On January 29, 2009, the IJ held that Mr. Alli was eligible to seek such relief. *See In the Matter of Alli*, Ex. A, at 1. However, Mr. Alli will not receive a hearing on his application until his wife's pending Form I-130 immediate relative visa petition is approved by USCIS. As the IJ specifically noted, "several months, and sometimes more than a year, is required" to process such visa petitions and Mr. Alli is therefore "looking at potential long-term mandatory detention." *Id*. at 4.

30. During the entire length of his detention, Mr. Alli has received no custody hearing to determine whether his imprisonment is justified. Moreover, because the government asserts that he is subject to mandatory detention, *see* Ex. C, it maintains that it need never provide him with a custody hearing, regardless of how long his detention extends.

31. Mr. Alli is neither a flight risk nor a danger to the community. He has no violent criminal history and shows genuine evidence of rehabilitation. *See* Alli Decl. ¶¶ 6-11, 34-36. He has a history of appearing for legal proceedings, having self-surrendered for his criminal sentence after having been released on bond. *See* Ex. C; Alli Decl. ¶ 6. He has strong ties to family, church, and community and a

colorable claim to relief that gives him a strong incentive to appear for his removal proceedings. Moreover, he has agreed to submit to supervision during the pendency of his case, including electronic monitoring if necessary. *See* Alli Decl. ¶¶ 34-36.

Elliot Grenade

32. Petitioner Elliot Grenade, a longtime lawful permanent resident, has spent 20 months in detention while challenging the government's efforts to remove him to Trinidad and Tobago, a country he left nearly 28 years ago. Moreover, over eighteen months of that detention is attributable to the government's failure to send Mr. Grenade's Board of Immigration Appeals ("BIA") briefing schedule to the proper address.

33. Mr. Grenade entered the United States as a lawful permanent resident on or about August 6, 1981 when he was 21 years old. *See* Notice to Appear, dated Jan. 12, 2007, attached as Ex. D. He has a domestic partner and two children—Starquasia (age 11) and Elijah (age nine), who are all U.S. citizens, as well as an elderly mother who is a U.S. citizen. He has no family ties outside the United States. *See* Declaration of Elliot Grenade "Grenade Decl.") ¶¶ 1, 6-9.

34. On April 27, 1995, Mr. Grenade pled guilty to criminal sale of a controlled substance in the fifth degree, in violation of N.Y. Penal Law § 220.31. At that time, his sentence date was deferred so that he could enter a drug treatment

program. Mr. Grenade did not complete the program and on September 28, 2006 he was re-sentenced for the same offense to two to four years of jail time. He completed serving his sentence on September 28, 2007. *See* Grenade Decl. ¶ 4.

35. While Mr. Grenade was still serving his sentence, DHS commenced removal proceedings against him based on his drug offense. Ex. E. Litigating his removal case *pro se*, Mr. Grenade applied for relief from removal under former INA § 212(c) based on, *inter alia*, his long residence in the United States and his strong family ties. Nevertheless, the IJ ordered his removal to Trindad and Tobago on August 2, 2007. *See Grenade v. Holder*, No. 07-4953-ag (2d Cir. Apr. 29, 2009), at *2, attached as Ex. E. Mr. Grenade, still representing himself *pro se*, timely appealed the IJ's decision to the BIA.

36. On September 18, 2007, upon completion of his criminal sentence and while his BIA appeal was pending, Mr. Grenade was taken into ICE custody and served with a Notice of Custody Determination indicating that he was subject to mandatory detention and therefore not eligible for a bond hearing. *See* Notice of Custody Determination, dated Dec. 28, 2006, attached as Ex. F. Since that time, Mr. Grenade has remained in ICE custody—a period of 20 months. He is currently being held at the Pike County Correctional Facility in Lords Valley, Pennsylvania.

37. On October 15, 2007, the BIA summarily dismissed Mr. Grenade's appeal, based, in part, on his failure to submit a timely brief. *See Grenade v.*

Holder, Ex. E, at *2. With the assistance of newly appointed *pro bono* counsel, Mr. Grenade appealed the BIA's order to the U.S. Court of Appeals for the Second Circuit based, *inter alia*, on the fact that the Board had sent the briefing schedule to a non-existent address. *Id.* at *3. Ultimately, in April 2009—more than a year and a half after the BIA's summary dismissal—the Second Circuit granted Mr. Grenade's appeal and remanded his case to the Board for further proceedings. *See id*. at 4.

38. On remand, Mr. Grenade will raise a number of colorable challenges to the IJ's denial of INA § 212(c) relief. These include the IJ's failure to advise him of the availability of free legal services at trial which therefore prejudiced him in his ability to build his case for relief, *see* 8 C.F.R. § 1240.10, and the IJ's error in weighing the strong equities in his case, such as the significant hardship his removal would cause his family, including his eighty-two year old mother, two children, and his domestic partner, all of whom are U.S. citizens; his 28 years of legal residence in the United States; his ties to the community, including his work with religious communities; and evidence of his rehabilitation. *See generally*, Grenade Decl.

39. To date, Mr. Grenade has received no hearing as to whether his detention is justified. Instead, the only process he has received consists of a number of perfunctory administrative custody reviews that, on information and

belief, deemed him a danger and flight risk based on his criminal history alone. *See* Notice of File Custody Review, dated Dec. 3, 2007, attached as Ex. G; Decision to Continue Detention-Stay, dated Jan. 16, 2009, attached as Ex. H.

40. Moreover, because the government maintains that Mr. Grenade is subject to mandatory detention, *see* Ex. F, Mr. Grenade will receive no hearing regarding his imprisonment for as long as his removal proceedings remain pending. This is so regardless of how long it takes for the Board to decide his appeal or, should he win a remand, for the IJ to decide the merits of his claim for INA § 212(c) relief.

41. Mr. Grenade poses no danger or flight risk. If released, Mr. Grenade intends to join his mother and children in Danville, Virginia and help support his family. He has no violent criminal history, strong family ties, and a colorable claim to relief that gives him a strong incentive to appear for his removal proceedings. Moreover, he has agreed to submit to supervision during the pendency of his case, including electronic monitoring if necessary. Grenade Decl. ¶ 27.

CLASSWIDE ALLEGATIONS

42. Petitioners are among dozens of detainees in the State of Pennsylvania—and the Middle District of Pennsylvania in particular—who have been held for six months or more without a hearing to determine whether their

prolonged detention is justified. Indeed, it is the government's policy or practice to detain non-citizens for prolonged periods of time pending completion of their removal proceedings without providing them with hearings to determine whether such detention is justified.

43. Petitioners bring this action on behalf of themselves and all other similarly-situated persons in Pennsylvania pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) or, in the alternative, as a representative habeas class action for similarly-situated persons in the Middle District of Pennsylvania pursuant to a procedure analogous to Rules 23(a) and 23(b)(2). *See Ali v. Ashcroft*, 346 F.3d 873, 890-91 (9th Cir 2003), *overruled on other grounds*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005) (allowing class action habeas petition); *Bijeol v. Benson*, 513 F.2d 965, 969 (7th Cir. 1975) (same); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126-27 (2d Cir. 1974) (same). *See also Geraghty v. U.S. Parole Commission*, 429 F. Supp. 737, 740 (M.D. Pa. 1977) (noting that "procedures analogous to a class action have been fashioned in habeas corpus actions where necessary and appropriate").

44. Petitioners propose to represent a class of all lawful permanent residents in Pennsylvania or, in the alternative, within this District who (1) are or will be detained for prolonged periods of six months or more under the pre-final-order detention statute, 8 U.S.C. § 1226, pending completion of their removal

proceedings, inclusive of judicial review where the removal order has been stayed; (2) have not been afforded a hearing to determine whether their prolonged detention is justified; (3) are not detained pursuant to one of the detention statutes that specifically authorizes prolonged detention in excess of six months on national security grounds, *see* 8 U.S.C. § 1226A; 8 U.S.C. §§ 1531-37 (authorizing prolonged detention of, *inter alia*, suspected terrorists); and (4) are not detained pursuant to 8 U.S.C. § 1225, the statute that governs pre-final-order detention of noncitizens who have not yet been admitted to the United States.

45. The proposed class meets the requirements of Federal Rules of Civil Procedure 23(a)(1). At any given time, Petitioners' counsel have been aware of roughly 40 other potential class members in this District alone who, like Petitioners, have been detained for six months or more pending completion of removal proceedings and have never been given a hearing to determine whether their prolonged detention is justified. Declaration of Michael Tan ¶ 2. Indeed, ICE's own length of stay report for January 25, 2009 suggests that, on that date, dozens and possibly more similarly-situated non-citizens in removal proceedings had been detained in this District and in Pennsylvania as a whole for six months or longer without a hearing. *Id*. at ¶¶ 11-17. In addition, other persons will be subject to the government's detention policy or general practice in the future. Joinder of all members of this class is therefore impracticable.

46. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(2). There are several common questions of law and fact in this action. These include: (1) whether the government has a policy or general practice of detaining non-citizens for six months or more pending completion of removal proceedings without providing a hearing to determine whether such detention is justified; (2) whether this detention policy or practice is authorized by statute; and (3) whether this detention policy or practice violates the Due Process Clause.

47. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(3). The claims of the named Petitioners are typical of the claims of the proposed class. Like all the proposed class members, the named Petitioners are lawful permanent residents who have been detained, pursuant to the government's policy and practice, pending completion of removal proceedings, inclusive of judicial review where the removal order has been stayed, but have never been afforded a hearing to determine whether their prolonged detention is justified.

48. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(4). The named Petitioners will fairly and adequately represent the interests of all members of the proposed class because they seek relief identical to the relief sought by all class members, and because they have no interests adverse to other class members. Moreover, the named Petitioners are represented by *pro*

bono counsel from the ACLU Immigrants' Rights Project, the ACLU of Pennsylvania, and the law firm of Pepper Hamilton LLP. The organizations and attorneys working for the named Petitioners have extensive experience litigating on behalf of detained immigrants and litigating class actions.

49. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(b)(2). Respondents have acted on grounds generally applicable to the class through their policy and practice of detaining non-citizens for six months or longer pending completion of removal proceedings without providing them a hearing to determine whether such prolonged detention is justified, making classwide declaratory relief appropriate.

LEGAL BACKGROUND

50. Petitioners request only one form of relief: a constitutionally adequate hearing to determine whether their prolonged detention is justified. Petitioners argue here that: (1) the Immigration and Nationality Act (INA) does not authorize their prolonged detention without such a hearing, and (2) if it does, their prolonged detention without adequate review violates the Due Process Clause.

51. In *Demore v. Kim*, the Supreme Court upheld the constitutionality of mandatory, pre-final order detention only where the non-citizen had conceded removability and was held for the "*brief* period necessary for [completing] removal proceedings." 538 U.S. 510, 513 (2003) (emphasis added). The *Demore* Court,

however, did not address the permissibility of detention where that detention is *prolonged* in nature, and especially in cases where, as here, the individuals being detained are pursuing a colorable challenge to removal.

52. As set forth below, the INA does not authorize prolonged, pre-final order detention of the kind Petitioners have suffered and, indeed, would raise serious constitutional problems if it did. The Supreme Court has repeatedly held that immigration detention violates due process unless it is reasonably related to its purpose. Moreover, where detention is prolonged, due process requires a "sufficiently strong special justification" to outweigh the significant deprivation of liberty, as well as strong procedural protections to ensure that an individual's detention is actually serving those governmental aims. *See Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Yet the government has failed to provide review that even approaches constitutional minimums.

53. This Court need not—and should not—decide the serious constitutional questions raised by Petitioners' prolonged, pre-final order detention. Principles of statutory construction require that, where possible, courts should construe statutes so as to avoid serious constitutional problems. Indeed, the Supreme Court applied this canon in *Zadvydas,* construing the post-final-order detention statute as authorizing detention only for the period of time reasonably necessary to effectuate removal, and designating six months as the presumptively

reasonable period, even though the statute itself placed no limit on the length of detention. *See id*. at 701. Likewise here, the pre-final-order statute is silent with respect to both the length of detention authorized and the procedures necessary to impose such detention. In the absence of any evidence that Congress intended to authorize prolonged detention without a constitutionally adequate hearing, this Court should construe the statute as authorizing prolonged, pre-final order detention only when accompanied by adequate procedural safeguards. Thus, on statutory grounds alone, this Court should order the government to provide Petitioners and the class they seek to represent with a constitutionally adequate custody hearing.

I. The INA Does Not Authorize Petitioners' Prolonged Detention Without Constitutionally Adequate Procedural Protections.

54. The rule of constitutional avoidance requires construing the pre-final order detention statute not to authorize Petitioners' prolonged detention in the absence of an adequate bond hearing. The avoidance canon dictates reading a statute as not authorizing unconstitutional action unless no other construction is even "fairly possible." *Zadvydas*, 533 U.S. at 689; *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932). This canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see also Sandoval v. Reno*,

166 F.3d 225, 237 (3d Cir. 1999).

55. The Supreme Court has consistently applied the canon of constitutional avoidance to immigration statutes. Thus, in *Zadvydas*, the Court held that the general detention statute governing post-final order detention, 8 U.S.C. § 1231(a)(6), is insufficiently clear to authorize prolonged and indefinite detention. *Zadvydas*, 533 U.S. at 697 ("if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms"); *see also id*. at 689, 699.

56. Applying the same rule here, the pre-final order detention statute should be construed as not authorizing prolonged detention without a constitutionally adequate hearing so long as another construction is "fairly possible." *See id*. at 689.

A. The Pre-Final Order Detention Statute Does Not Expressly Authorize Prolonged Detention.

57. Petitioners and the detainees they seek to represent are detained under 8 U.S.C. § 1226, the statute that governs the pre-final order detention of most non-citizens who have been admitted to the United States and whom the government is trying to remove. 8 U.S.C. § 1226(a) authorizes discretionary detention of such non-citizens "pending a decision" as to removal, except for certain non-citizens removable on criminal or terrorism-related grounds who are subject to mandatory pre-final order detention under 8 U.S.C. § 1226(c).

58. None of the Petitioners nor any other person they seek to represent are detained pursuant to one of the detention statutes that specifically authorizes prolonged detention on national security grounds. *See* 8 U.S.C. § 1226a; 8 U.S.C. §§ 1531-37 (authorizing prolonged detention of, *inter alia*, suspected terrorists).

59. Nothing in the plain language of § 1226 states that it authorizes prolonged detention. Nor is there any other evidence that Congress intended to authorize prolonged detention.

60. Indeed, in upholding the constitutionality of § 1226(c), the Supreme Court specifically described that statute as authorizing mandatory detention only "during the brief period necessary for . . . removal proceedings," *Demore*, 538 U.S. at 513—a period that typically "lasts roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the BIA]." *Id*. at 530; *see also Madrane v. Hogan*, 520 F. Supp. 2d 654, 664 (M.D. Pa. 2007) (noting that "[t]he emphasis in *Demore* on the anticipated limited duration of the detention period is unmistakable, and the Court explicitly anchored its holding by noting a brief period.") (internal citations omitted). *Cf. Nadarajah v. Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006) (holding that where Congress intended to authorize prolonged and indefinite detention, *i.e.*, in cases involving specific types of national security risks, it did so clearly and that "general detention statutes" authorize detention only for "brief and

reasonable" time periods).

61. The existence of distinct statutory provisions—namely, 8 U.S.C. § 1537(b)(1), 1226A(a)(2)—that do expressly authorize the prolonged detention of terrorists further demonstrates that Congress did not intend for a general detention statute such as § 1226 to serve this purpose. Notably, the Supreme Court specifically referenced these provisions in concluding that statutes that do not expressly authorize prolonged and indefinite detention should not be read to do so. *See Zadvydas*, 533 U.S. at 697; *Martinez*, 543 U.S. at 379 n.4, 386. Unlike § 1226, these special statutes clearly address the question of how long a non-citizen subject to their provisions may be detained: "until the completion of any appeal" in the case of the Alien Terrorist Removal provisions, 8 U.S.C. § 1537(b)(1), and "until the alien is removed from the United States" in the case of the Patriot Act. 8 U.S.C. § 1226A(a)(2).

B. Prolonged Detention Without Adequate Procedural Safeguards Raises Serious Constitutional Concerns.

62. The Supreme Court has held that due process requires a "sufficiently strong special justification" to "outweigh[]" detention's significant deprivation of liberty, as well as strong procedural protections. *See Zadvydas*, 533 U.S. at 690-91. As detention becomes prolonged, the deprivation of liberty becomes greater, requiring an even stronger justification and more rigorous procedural protections. *See Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil

commitment for periods of one year at a time, subject to "strict procedural safeguards" including right to jury trial before state court and imposition of burden of proof beyond a reasonable doubt on the government).

63. Similarly, the Third Circuit has emphasized, even with respect to "excludable" non-citizens, that "when detention is prolonged, special care must be exercised . . . . The stakes are high and we emphasize that grudging and perfunctory review is not enough to satisfy the due process right to liberty . . . ." *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999).

64. Notably, unlike the Petitioners here and the class they seek to represent, *Zadvydas* and *Ngo* involved individuals who had been finally ordered removed—*i.e.*, who had exhausted all administrative and judicial challenges to removal and whose removal order could have been effectuated if a country had been willing to take them back. In contrast, individuals like Petitioners and proposed class members are pursuing colorable challenges to removal on which they may well prevail.

65. In addition, *Ngo* involved an "excludable alien." As the Third Circuit has recognized, "excludable aliens traditionally have been afforded less constitutional protection than deportable [*i.e.*, admitted] aliens." *Patel*, 275 F. 3d at 310. Non-citizens who have been admitted to the country, moreover as lawful permanent residents, hold even greater due process rights, *see Zadvydas*, 533 U.S.

at 693; *see also Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), and thus even greater care must be exercised with respect to their prolonged confinement.

66. As previously noted, in *Demore*, the Supreme Court upheld pre-final order mandatory detention for the *brief* period of time necessary to complete removal proceedings. Since *Demore*, the circuit courts considering the issue have acknowledged the serious constitutional concerns raised by prolonged, pre-final order detention. *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (finding that petitioner's prolonged mandatory detention while pursuing administrative and judicial review of his removal order raised serious constitutional problems and construing statute to require IJ bond hearing where Government bore burden of justifying imprisonment); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 948 (9th Cir. 2008) (finding that "mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time"); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing pre-final-order detention statute, § 1226, as authorizing detention only for "a time reasonably required to complete removal proceedings in a timely manner," and finding prolonged detention to be "especially unreasonable" where no chance of actual removal existed); *Cf. Demore*, 538 U.S. at 532-33 (Kennedy, J. concurring) (noting that, at some point, prolonged mandatory detention is not reasonably related to removal); *Tijani*, 430 F. 3d at 1249 (Tashima, J., concurring) (noting that the "sheer length"

of petitioner's detention violates the Constitution). *See also Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, pre-*Demore*, prolonged detention of "a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible); *Hussain v. Mukasey*, 510 F.3d 739, 743 (7th Cir. 2007) (acknowledging that "[i]nordinate delay before [a removal] order was entered might well justify relief" from mandatory detention but declining to decide the issue on mootness grounds).

67. Several judges within the Middle District of Pennsylvania have recently held the same. *See, e.g., Madrane*, 520 F. Supp. at 666 (expressing "concern over what appears to be an extraordinarily lengthy deprivation of liberty" under § 1226(c)); *Nunez-Pimentel v. U.S. Dep't of Homeland Security*, No. 07-1915, 2008 WL 2593806 (M.D. Pa. June 27, 2008) (same); *Victor v. Mukasey*, No. 08-1914, 2008 WL 5061810, at *3 (M.D. Pa. Nov. 25, 2008) (same); *Wilks v. U.S. Dep't Homeland Security*, No. 07-2171, 2008 WL 4820654, at *2 (M.D. Pa. Nov. 3, 2008) (construing § 1226(c) to not authorize mandatory detention "beyond the period typically required for removal proceedings").

68. Thus, even if § 1226(c) was properly applied to Petitioners at the beginning of their detention, it does not authorize their mandatory detention now. The excessive length of Petitioners' detention—which has reached beyond the average five-month period recognized by the Supreme Court in *Demore* for cases

involving administrative appeals, 538 U.S. at 530—is patently unreasonable, at least in the absence of a constitutionally adequate custody hearing.

69. Indeed, the unreasonableness of Petitioners' detention is further demonstrated not only by the length of detention they have already endured, but also by the indeterminate, potentially lengthy, future detention they face. *See, e.g., Ly*, 351 F.3d at 271-72; *Tijani*, 430 F.3d at 1242.

70. For example, if Mr. Grenade prevails on his appeal at the BIA, his case will be remanded back to the IJ for further proceedings, which itself could take a significant amount of time. Mr. Alli will not even have his individualized merits hearing on his adjustment claim before the IJ until his immediate relative visa petition is approved. *See, e.g., Ly*, 351 F.3d at 265 (noting that the petitioner's case was pending before the IJ for more than 18 months, most of this time waiting for a merits hearing and a decision); *Madrane*, 520 F. Supp. 2d at 667 (expressing concern that "the administrative and appellate process that has yet to be exhausted may be considerably time-consuming"); *Nunez-Pimentel*, 2008 WL 2592806 at *5 (same); *Victor*, 2008 WL 5061810, at *4-5 (same).

71. Likewise, if Messrs. Alli or Grenade were to lose before the IJ or the BIA, they would almost certainly seek further review from the Court of Appeals. There is thus simply no way to predict how long it will take before Petitioners' removal challenges will finally be resolved. Such resolution could take months or

even years, during which time Petitioners will be needlessly forced to endure further detention.

C. The Pre-Final Order Detention Statute Should Be Construed as Requiring a Constitutionally Adequate Bond Hearing Whenever Detention Extends Six Months or Beyond.

72. Once mandatory detention exceeds the brief period of time contemplated by *Demore,* the only authority for continuing such detention is § 1226(a). *See* 8 U.S.C. § 1226(a) (generally providing for discretionary detention of arrested non-citizens "[e]xcept as provided in subsection (c) of this section"); *cf. Casas-Castrillon*, 535 F.3d at 948-49 (holding that § 1226(c) provides no authority for mandatory detention of individuals beyond the brief period contemplated in *Demore* and that § 1226(a) therefore applies).

73. In order to address the serious due process concerns raised by prolonged, pre-final order detention without adequate review, and in the absence of any evidence that Congress intended to authorize such detention, this Court should construe § 1226(a) to require a bond hearing whenever detention has extended to six months or longer. Moreover, in order for that hearing to be constitutionally adequate, the government should bear the burden of proof of showing a sufficiently strong justification to outweigh the deprivation of liberty caused by continued detention.

74. In the civil detention context, the Supreme Court has repeatedly emphasized the importance of placing the burden of proof on the government to justify continued detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 692 (criticizing the regulations governing prolonged immigration detention for placing the burden of proof on the non-citizen); *Tijani*, 430 F.3d at 1242, 1244-45 (Tashima, J. concurring) (noting that when the right to individual liberty is at stake, Supreme Court precedent rejects laws that place on the individual the burden of protecting that right); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (striking civil commitment statute because individual was denied an ‘‘adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community’’); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pre-trial detention under Bail Reform Act where Act provided for “a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person”); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding that state must justify civil commitment by clear and convincing evidence of mental illness and dangerousness and rejecting preponderance standard); *Hendricks*, 521 U.S. at 353 (noting that state statute providing for civil detention of “sexually violent predators” required prosecutor to prove beyond a reasonable doubt whether detention was justified during a trial at

which the individual had the right to counsel and right to present evidence and cross-examine witnesses).

75. In recognition of these concerns, both the Ninth Circuit and this Court have construed § 1226 to require a bond hearing where the Government bears the burden of demonstrating that prolonged detention is justified. *See Casas-Castrillon*, 535 F.3d at 950 (construing § 1226(a) as requiring such a hearing); *Tijani*, 430 F.3d at 1242 (finding that mandatory detention does not apply when proceedings are not "expeditious," and ordering the petitioner's release unless the Government established at a hearing before an IJ that his prolonged detention was justified); *Wilks*, 2008 WL 4820654 at *2 (same). Thus, this Court should likewise construe § 1226(a) to require a constitutionally adequate custody hearing where, as here, detention has become prolonged in nature.

76. Detention should be deemed "prolonged" in nature whenever it extends six months or longer. *See Zadvydas*, 533 U.S. at 701; *Demore*, 538 U.S. at 513; *Nadarajah*, 443 F.3d at 1079.

77. Moreover, as set forth above, the reasonableness of detention is defined by both the length of detention to date and length of future detention. *See supra*. Consequently, the government must be required to justify continued detention in light of both the length of past detention and the prospective length of detention in the future.

II. The Due Process Clause Requires that Petitioners Be Afforded a Hearing as to Whether Their Prolonged Detention is Justified.

78. Assuming *arguendo* that the INA did authorize Petitioners' prolonged detention without a constitutionally adequate hearing, such detention would violate the Due Process Clause. As the Supreme Court has recognized, "[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." *Zadvydas*, 533 U.S. at 690. Moreover, as previously set forth, non-citizens—even those, who unlike Petitioners have exhausted all their challenges to removal and are simply waiting to be removed—have a liberty interest threatened by immigration detention. *Id.* at 690-91; *see also Patel v. Zemski*, 275 F.3d 299, 309 (3d Cir. 2001), *overruled on other grounds*, *Demore v. Kim*, 538 U.S. 510 (2003) (recognizing "the critical liberty interest implicated by immigration detention").

79. For this reason, the Supreme Court has held that detention violates due process without a "sufficiently strong special justification" to "outweigh[]" the significant deprivation of liberty. *Zadvydas*, 533 U.S. at 690-91; *see also Ngo*, 192 F.3d at 398.

80. Moreover, due process requires "strong procedural protections" to ensure that detention is justified. *See Zadvydas*, 533 U.S. at 690-91; *see also Ngo*, 162 F.3d at 398. As the Supreme Court has held, to be constitutionally adequate, such review must allocate the burden of proof to the government to demonstrate a

sufficiently strong special justification for continued detention. *See supra*. ¶ 73. Because Petitioners in this case and the class they seek to represent have not received *any* hearing regarding their prolonged detention, much less review that even approaches these constitutional minimums, their continued detention violates the Due Process Clause.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION
VIOLATION OF IMMIGRATION AND NATIONALITY ACT— PROLONGED DETENTION IN THE ABSENCE OF A HEARING WHERE THE GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH PROLONGED DETENTION IS JUSTIFIED

81. The foregoing allegations are realleged and incorporated herein.

82. 8 U.S.C. § 1226—the provision of the Immigration and Nationality Act (INA) under which Petitioners and other proposed class members are detained—is silent with regard to the procedures required if such detention becomes prolonged. Because of the serious constitutional problems that would be posed if the statute authorized prolonged detention without the kind of strong justification and procedural safeguards that such detention would require—and in the absence of any indication that Congress intended this result—this Court must construe the statute as requiring a constitutionally adequate hearing where the government bears the burden of showing that prolonged detention is justified.

83. Because Petitioners and other proposed class members have been

detained for a prolonged period of time without a constitutionally adequate custody hearing, their detention violates the INA.

SECOND CAUSE OF ACTION

VIOLATION OF IMMIGRATION AND NATIONALITY ACT AND THE ADMINISTRATIVE PROCEDURES ACT—PROLONGED DETENTION IN THE ABSENCE OF A HEARING WHERE THE GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH PROLONGED DETENTION IS JUSTIFIED

84. The foregoing allegations are realleged and incorporated herein.

85. Pursuant to the Administrative Procedures Act, 5 U.S.C. § 702, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

86. Petitioners and the members of the proposed class have been so aggrieved.

87. 8 U.S.C. § 1226—the provision of the Immigration and Nationality Act (INA) under which Petitioners and other proposed class members are detained—is silent with regard to the procedures required if such detention becomes prolonged. Because of the serious constitutional problems that would be posed if the statute authorized prolonged detention without the kind of strong justification and procedural safeguards that such detention would require—and in the absence of any indication that Congress intended this result—this Court must construe the statute as requiring a constitutionally adequate hearing where the

government bears the burden of showing that prolonged detention is justified.

88. Because Petitioners and other proposed class members have been detained for a prolonged period of time without a constitutionally adequate custody hearing, their detention violates the INA and the Administrative Procedures Act.

THIRD CAUSE OF ACTION
VIOLATION OF DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT—PROLONGED DETENTION WITHOUT A CONSTITUTIONALLY ADEQUATE HEARING WHERE THE GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH DETENTION IS JUSTIFIED

89. The foregoing allegations are realleged and incorporated herein.

90. Prolonged detention violates Due Process unless it is accompanied by strong procedural protections to protect against the erroneous deprivation of liberty. *Zadvydas*, 533 U.S. at 690-91; *Ngo*, 192 F.3d at 398. Moreover, when the government deprives an individual of a significant liberty interest, the burden of justifying such a deprivation should be placed on the government. *See Tijani*, 430 F.3d at 1242; *Casas-Castrillon*, 535 F.3d at 950.

91. During their detention, Petitioners and other proposed class members have never had a custody hearing where the government bore the burden of demonstrating that their prolonged detention is justified.

92. Petitioners' and other proposed class members' prolonged detention has not been accompanied by the kind of procedural protections that such a significant deprivation of liberty requires.

93. For the foregoing reasons, Petitioners' and other proposed class members' continued detention violates Due Process.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court grant the following relief:

(a) Appoint Petitioners' Counsel as Class Counsel;

(b) Order a constitutionally-adequate hearing where the government must demonstrate that Petitioners' continued detention is justified;

(c) Declare that Respondents' failure to provide Petitioners and all proposed class members a constitutionally adequate hearing, where the government must demonstrate that Petitioners' and each proposed class member's continued detention is justified, violates the Immigration and Nationality Act, the Administrative Procedures Act and the Due Process Clause of the Fifth Amendment;

(d) Grant Petitioners' reasonable attorneys' fees, costs, and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

(e) Grant any other and further relief that this Court deems just and proper, including appropriate relief to all class members upon consideration of Petitioners' forthcoming motion for class certification.

Dated: May 27, 2009

s/ Frederick Alcaro

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CERTIFICATE OF SERVICE

I certify that on May 27, 2009, I caused a copy of the foregoing Amended Petition For Writ Of Habeas Corpus And Complaint For Declaratory Relief to be served on counsel listed below by the Middle District ECFS:

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