

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

TUMAINE UTOLITI,

Petitioner,

v.

DAWN CEJA, in her official capacity as
warden of the Aurora Contract Detention
Facility;

ROBERT GUADIAN, in his official
capacity as Field Office Director, Denver,
U.S. Immigration and Customs Enforcement;

BENJAMINE HUFFMAN, in his official
capacity as Acting Secretary, U.S.
Department of Homeland Security;

CALEB VITELLO, in his official capacity
as Acting Director of Immigration and
Customs Enforcement;

JAMES MCHENRY, in his official capacity
as Acting Attorney General of the United
States,

Respondents.

Case No. XXX

**VERIFIED PETITION FOR WRIT
OF HABEAS CORPUS**

INTRODUCTION

1. Petitioner Tumaine Utoliti (“Mr. Utoliti”) is a stateless, 25-year-old man who was born in a Ugandan refugee camp to Congolese parents. In 2016, Mr. Utoliti was admitted to the United States as a refugee fleeing persecution and torture, and in 2019, was granted lawful permanent residence. Mr. Utoliti has been detained by Immigration and Customs Enforcement (ICE) for over 21 months without ever receiving an individualized bond hearing to determine whether his continued detention is justified. This prolonged detention without a bond hearing where a neutral arbiter assesses his risk of flight or danger violates Mr. Utoliti’s constitutional rights.
2. The Department of Homeland Security (DHS) has detained Mr. Utoliti since approximately April 15, 2023. Respondents determined that Mr. Utoliti is statutorily ineligible for bond under 8 U.S.C. § 1226(c) and have thus never afforded him an individualized bond hearing. Absent this Court’s intervention, there is no end in sight to Mr. Utoliti’s detention. His already-prolonged detention is certain to continue for many months, if not years, while the Ninth Circuit adjudicates his immigration case, as well as pending any further remands and appeals.
3. Through this petition, Mr. Utoliti challenges his unreasonably prolonged detention without individualized review as violative of the Due Process Clause of the Fifth Amendment.
4. Mr. Utoliti seeks a writ of habeas corpus ordering his release unless he immediately receives a bond hearing before an immigration judge at which DHS bears the burden of justifying his continued detention by clear and convincing evidence and where the immigration judge, *inter alia*, considers his ability to pay any bond amount and alternatives to detention.

PARTIES

5. Petitioner Tumaine Utoliti is a stateless man who came to the United States as a refugee in 2016. DHS detained Mr. Utoliti on or around April 15, 2023 and he remains under the direct custody of Respondents and their agents. Mr. Utoliti is currently detained by Respondents at the Aurora facility located at 3130 N. Oakland Street, Aurora, CO 80010. Mr. Utoliti has been detained in ICE custody pursuant to 8 U.S.C. § 1226(c) since approximately April 15, 2023. Respondents determined that he is statutorily ineligible for bond under § 1226(c); thus, he has never received an individualized bond hearing to determine whether his continued detention is justified.
6. Respondent Dawn Ceja is named in her official capacity as the warden of the Aurora facility, where Mr. Utoliti is detained, and is therefore his legal custodian.
7. Respondent Robert Guadian is named in his official capacity as the Acting ICE Denver Field Office Director. The Denver Field Office is responsible for carrying out ICE's immigration detention operations at all of Colorado's detention centers. Respondent Guadian is a legal custodian of Mr. Utoliti.
8. Respondent Benjamine Huffman is named in his official capacity as the Acting Secretary of DHS. He is responsible for the administration of U.S. immigration law, supervises Respondent Walker and is legally responsible for the process of Mr. Utoliti's detention and removal. As such, he is a legal custodian of Mr. Utoliti.
9. Respondent Caleb Vitello is named in his official capacity as Acting Director of ICE. As the head of ICE, he is responsible for decisions related to the detention and removal of certain noncitizens, including Mr. Utoliti. As such, he is the legal custodian of Mr. Utoliti.

10. Respondent James McHenry is named in his official capacity as the Acting Attorney General of the United the Executive Office for Immigration Review (“EOIR”), pursuant to 8 U.S.C. § 1103(g). He routinely transacts business in the District of Colorado and is legally responsible for administering Mr. Utoliti’s removal and bond proceedings as well as the procedural standards used in those proceedings. He is therefore a legal custodian of Mr. Utoliti.

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to U.S. Const. Art. I, § 9, cl. 2 (Suspension Clause); 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201–2202 (Declaratory Judgment Act). This case arises under the Constitution and laws of the United States, including the Due Process Clause, U.S. Const. Amend. V; the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; and 28 U.S.C. § 2241 *et seq.* (habeas corpus).

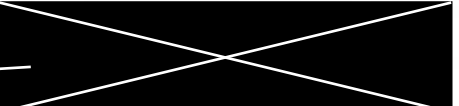
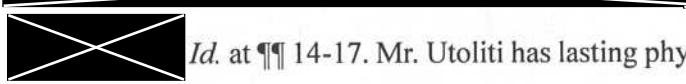
12. This Court may grant declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*; the All Writs Act, 28 U.S.C. § 1651; 28 U.S.C. § 2241(a); Fed. R. Civ. P. 57, 65; as well based on its inherent authority to grant equitable relief. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

13. Venue is proper under 28 U.S.C. §§ 1391(b)(2) and (c) because at least one of the Respondents is a resident of this District, and a substantial part of the events giving rise to the claims in this action took place within this District. 28 U.S.C. § 1391. *See Braden v. 30th Judicial Circuit*, 410 U.S. 484, 493–94 (1973).

STATEMENT OF FACTS

14. Mr. Utoliti is a stateless, 25-year-old man who was born and raised in a Ugandan refugee camp to Congolese parents. Exh. A at ¶ 12. His parents fled the Democratic Republic of Congo in 1996 and have since lost communication with family in the region. *Id.*

15. Mr. Utoliti spent most of his childhood and adolescence moving through life precariously as a refugee. Exh. A at ¶ 12. As a child, he was a victim


 *Id.* at ¶¶ 14-17. Mr. Utoliti has lasting physical and psychological scars from

the abuse he experienced from Ugandan police officers. *Id.* at ¶¶ 25-26.

16. After around seventeen years in Uganda, Mr. Utoliti, along with his parents and nine younger siblings, was admitted to the United States as a refugee on or around August 25, 2016. *See* Exh. B at 13. Mr. Utoliti became a lawful permanent resident on or around January 31, 2019. *Id.* at 7.

17. Mr. Utoliti and his family resettled in Phoenix, Arizona. He initially attended high school, but his father pressured him to get a job to help support himself and his younger siblings. Exh. A at ¶¶ 18-20. Feeling resentful of the role he played in his family, Mr. Utoliti sought outside friendships. *Id.* It was those friends who introduced Mr. Utoliti to alcohol use and a lifestyle where people would unwind by drinking together. *Id.* at ¶ 20. This shift away from the family caused a deep rift between Mr. Utoliti and his father, who would often kick Mr. Utoliti out of the house. *Id.* As a result, Mr. Utoliti spent many nights sleeping on the street or seeking refuge at friends' homes. *Id.*

18. Peer relationships became the center of Mr. Utoliti's world because he relied heavily on friends to provide him with housing. Exh. A at ¶¶ 19-20. Simultaneously, he became more

immersed in a drinking culture. *Id.* He realized that if he drank alcohol, it helped to numb the negative feelings he lived with related to the past harm he endured in Uganda. *Id.* Despite grappling with challenging emotions stemming from the scarcity and abuse Mr. Utoliti suffered as a boy, he did not access mental health care in the United States.

19. On June 10, 2020, Mr. Utoliti, was out drinking with a group of people and offered to drive his friend home. Exh. A at ¶ 21. While under the influence of alcohol, Mr. Utoliti panicked when he saw a police car and immediately worried that they would target him for harm, much like his experiences as a boy in Uganda *Id.* His immediate response was to flee. *Id.* In the process, Mr. Utoliti allegedly drove his car close to the officers as he passed them, however no one was injured in the incident. *Id.*

20. Mr. Utoliti pled guilty to one count of attempt to commit aggravated assault on law enforcement under A.R.S. § 13-1304(a)(2), and one count of unlawful flight from a law enforcement vehicle under A.R.S. § 28-622.01. Exh F. Both charges were designated non-dangerous and non-repetitive. *Id.* This is Mr. Utoliti's sole criminal conviction. *Id.*

21. On March 29, 2021, Mr. Utoliti was sentenced to three years probation. Exh. A at ¶ 22; Exh. F. Mr. Utoliti understood that he was required to check in with his probation officer over the phone each month. Exh. A at ¶ 22. One month, while speaking to his probation officer, Mr. Utoliti revealed that he was not in Arizona. *Id.* What he did not realize at the time was that one of the requirements of his probation was that he must not leave the state. *Id.* His confusion was due, at least in part, to the fact that his probation requirements were provided to him in English. *Id.* Mr. Utoliti's best language is Swahili. *Id.* Following a probation violation, the state court reinstated probation for three years and ordered that he serve four months in jail. *Id.*

Mr. Utoliti's Removal Proceedings and Prior Requests for Bond

22. On April 15, 2023, DHS detained Mr. Utoliti and served him with a Notice to Appear charging him as removable due to his assault conviction allegedly constituting a crime involving moral turpitude committed within five years of entry under 8 U.S.C. § 1227(a)(2)(A)(i).
23. On May 17, 2023, an Immigration Judge denied Mr. Utoliti's first request for bond, finding that he was subject to mandatory detention pursuant to 8 U.S.C. § 1226(c). Mr. Utoliti, *pro se*, did not appeal the decision.
24. On June 9, 2023, Mr. Utoliti appeared *pro se* before the Florence Immigration Court and testified in support of his applications for relief. Exh. B. At the end of the hearing, the immigration judge concluded that Mr. Utoliti's assault conviction constituted an aggravated felony, a crime involving moral turpitude, and a particularly serious crime, which rendered him ineligible for asylum or withholding of removal. *Id.* The immigration judge denied Mr. Utoliti's claims for asylum, withholding of removal, and relief under the Convention Against Torture, and ordered him removed to Uganda, or in the alternative, the Democratic Republic of the Congo. *Id.*
25. On June 10, 2023, Mr. Utoliti filed a *pro se* Notice of Appeal with the Board of Immigration Appeals (BIA). He subsequently obtained pro bono legal counsel to support him in his appeal to the BIA. However, on appeal, Mr. Utoliti's attorney failed to challenge the immigration judge's finding that Mr. Utoliti's criminal conviction of aggravated assault constituted an aggravated felony, a crime involving moral turpitude, or a particularly serious crime. *See generally* Exh. D.

26. On September 21, 2023, the BIA affirmed the immigration judge's decision. Exh C. On October 13, 2023, Mr. Utoliti filed a *pro se* petition for review before the Ninth Circuit. *Utoliti v. Garland*, Case No. 23-2767 (9th Cir. 2023). On January 19, 2024, the Ninth Circuit granted Mr. Utoliti's motion for a stay of removal, finding that Mr. Utoliti satisfied his burden of demonstrating that a stay is warranted, including demonstrating a likelihood of success on the merits. *Id.* at Dkt. 12 (citing *Nken v. Holder*, 556 U.S. 418 (2009)). The Ninth Circuit also granted a motion for appointment of *pro bono* counsel and appointed the Santa Clara Legal Clinic (SCLA) to represent Mr. Utoliti. *Id.*
27. While his case was pending before the Ninth Circuit, Mr. Utoliti once again requested bond *pro se*. Exh. G. On March 19, 2024, an immigration judge denied bond, finding that, because Mr. Utoliti has a conviction designated to be an aggravated felony, he is subject to mandatory detention under § 1226(c) and the immigration judge lacked jurisdiction to consider bond in his case. *Id.* After finding that the court lacked jurisdiction, the immigration judge noted briefly in the alternative that, if Mr. Utoliti were eligible, the court would nonetheless deny bond based on Mr. Utoliti's criminal history. *Id.*
28. Mr. Utoliti filed a *pro se* appeal of the bond decision to the BIA. On June 13, 2024, the BIA affirmed the immigration judge's decision solely on the basis that "authority does not exist to reconsider" his custody status because he is subject to mandatory detention under § 1226(c). Exh. G. The BIA did not address the immigration judge's alternative finding because it affirmed the immigration judge's determination that Mr. Utoliti is statutorily ineligible for bond. *Id.*
29. On April 19, 2024, SCLA filed an opening brief raising numerous challenges that private counsel had not presented to the BIA, including the critical, threshold issues that Mr. Utoliti

is not removable as charged and that the immigration judge erred in finding that his conviction constituted an aggravated felony, a crime involving moral turpitude, and a particularly serious crime. Exh D. These arguments impact the very basis for Mr. Utoliti's removal proceedings, as well as his mandatory detention under 8 U.S.C. § 1226(c). *Id.*

30. On June 3, 2024, the government filed its answering brief, alleging that the Ninth Circuit could not consider the above arguments because they had not been exhausted before the BIA. *Utoliti v. Garland*, Case No. 23-2767, Dkt. 26 (9th Cir. 2023).

31. To redress this issue, on July 22, 2024, Mr. Utoliti filed a motion to reopen before the BIA with the pro bono assistance of an immigration nonprofit organization, the Florence Immigrant & Refugee Rights Project. This motion raised a claim of ineffective assistance of appellate counsel for failure to contest the immigration court's erroneous findings regarding Mr. Utoliti's conviction and charge of removability, and sought to reopen his case to present those critical arguments.

32. On September 30, 2024, the Board denied the motion to reopen.

33. On October 1, 2024, Mr. Utoliti filed a second petition for review appealing the BIA's denial of the motion to reopen. *Utoliti v. Garland*, Case No. 24-5970 (9th Cir. 2024). On October 8, 2024, the Ninth Circuit consolidated Mr. Utoliti's two petitions for review, which remain pending as of the date of this filing. Exh. E. The Ninth Circuit set a briefing schedule for spring 2025 and will hear oral argument on the consolidated petitions in October 2025. *Id.*

The Aurora Facility

34. The Aurora facility, where DHS is detaining Mr. Utoliti, is a for-profit facility operated by GEO Group, Inc., located in Aurora, Colorado.

35. People detained at the Aurora facility are subjected to punitive conditions akin to penal confinement, including being forced to wear government-issued clothing, having their access to the outdoors and recreation either denied or severely limited, and being forbidden from engaging in contact visitation with loved ones. Further, they are “subject to ‘daily outbursts of violence and threats.’” *Daley v. Choate*, 22-cv-03043-RM, 2023 WL 2336052 at *4 (D. Colo. Jan. 6, 2023).

36. The Aurora facility is notorious for deplorable conditions and systemic failures jeopardizing the health and safety of those in its custody, placing detained persons like Mr. Utoliti in danger of harm and death. In 2017, a man named Kamyar Samimi died while imprisoned in the Aurora facility. An investigation revealed that his “death resulted from egregious violations of medical standards and that these violations were part of systemic issues at the Aurora facility.”¹ Subsequently, in a June 2019 investigation, the DHS Office of Inspector General (“OIG”) found the Aurora facility in violation of ICE detention standards.² The OIG report revealed that individuals subjected to segregation in Aurora “were not treated with the care required under ICE detention standards” and determined that the absence of outside recreation may have a detrimental effect on the mental health and welfare of people held there. *Id.* On October 13, 2022, a healthy 39-year-old man, Melvin Calero Mendoza, died after experiencing a medical emergency

¹ Committee on Oversight and Reform and Subcommittee on Civil Rights and Civil Liberties, U.S. House of Representatives Report at 15 (2020), *available at*: <https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf>.

² Office of Inspector General, “Concerns about ICE Detainee Treatment and Care at Four Detention Facilities”, (June 3, 2019) *available at*: <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>

while in ICE custody in the Aurora facility.³ An investigation of the underlying circumstances and whether staff members complied with the appropriate standard of care remains ongoing, and a wrongful death suit has been filed in Mr. Calero Mendoza's death.⁴

37. Respondents are on notice of the inadequate medical and mental health care available at the Aurora facility yet fail to mitigate numerous known violations of DHS's own detention standards.⁵ The Aurora facility's likeness to a penal institution is further reinforced by the deplorable conditions for those imprisoned there, including the excessive use of solitary confinement.⁶

³ Congressional Letter to Inspector General Cuffari and Acting Director Johnson from Rep. Jason Crow, Senator Michael Bennet, and Senator John Hickenlooper (Oct. 21, 2022) *available at*: https://crow.house.gov/sites/evo-subsites/crow.house.gov/files/evo-media-document/2022.10.21-final-icedhs-letter_0.pdf.

⁴ *Peralta Rivera v. The Geo Group Inc. et al.*, Case No. 2024CV31540, Adams County (Colorado) District Court (filed Oct. 11, 2024).

⁵ American Immigration Council (AIC) 2022 Complaint, "Re: Violations of ICE COVID-19 Guidance, PBNDS 2011, and Rehabilitation Act of 1973 at the Denver Contract Detention Facility," (Feb. 11, 2022) *available at*:

https://www.americanimmigrationcouncil.org/sites/default/files/research/complaint_against_ice_medical_neglect_people_sick_covid_19_colorado_facility_complaint1.pdf; AIC 2019 Complaint, "Supplement—Failure to Provide Adequate Medical and Mental Health Care to Individuals Detained in the Denver Contract Detention Facility," (Jun. 11, 2019) *available at*: https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_supplement_failure_to_provide_adequate_medical_and_mental_health_care.pdf; AIC 2018 Complaint, "Failure to Provide Adequate Medical and Mental Health Care to Individuals Detained in the Denver Contract Detention Facility," (Jun. 4, 2018) *available at*: https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_demands_investigation_into_inadequate_medical_and_mental_health_care_condition_in_immigration_detention_center.pdf.

⁶ AIC, National Immigration Project (NIPNLG), Rocky Mountain Immigrant Advocacy Network (RMIAN) 2024 Complaint, "Complaint Underscoring Why People Who Are Transgender and Nonbinary Should Not be Detained in Civil Immigration Detention," (Apr. 9, 2024) *available at*: https://nipnlg.org/sites/default/files/2024-04/CRCL_complaint-transgender-care.pdf.

Mr. Utoliti's Detention in ICE Custody

38. To date, Mr. Utoliti has been detained by DHS for over 21 months, including over 8 months at the Aurora Detention Facility. According to GEO Medical Reports, Mr. Utoliti is diagnosed with depression and post-traumatic stress disorder (PTSD). Exh. A at ¶ 35. Prior to detention, he had not seen a mental health provider and his conditions were unidentified and untreated. *Id.* Although he is now able to access basic medication, it has not completely alleviated the symptoms he experiences. *Id.* at ¶ 35. Mr. Utoliti described the diminished efficacy of the medication, stating, "I now wake up feeling the same... it is the routine of being here that negatively affects me." *Id.* His social worker identified a culturally competent nonprofit organization that could connect him with mental health support if he is released. *Id.* at ¶ 45.

39. Mr. Utoliti reports that being detained for almost two years has caused his mental health to deteriorate significantly. Exh. A at ¶ 10. He regularly experiences the following symptoms: "nightmares, sweating, tunnel vision, flashbacks, hyperarousal, diminished mood, and feeling extreme nervousness." *Id.* at ¶ 35.

40. Mr. Utoliti's struggle with uncontrolled mental health symptoms in detention was exacerbated by the sudden loss of his brother, who tragically died by suicide in 2023 while Mr. Utoliti was detained. Exh. A at ¶¶ 3-9. The loss has been particularly difficult for him, made worse by ICE's refusal to allow him to attend his brother's funeral and fulfill the cultural ritual of placing a rock on his brother's tombstone. *Id.* This ritual holds profound significance in Ugandan culture, symbolizing the preservation of familial peace and the proper honoring of the deceased, and failing to observe such practices can lead to severe psychological distress. *Id.* Mr. Utoliti reports experiencing disassociation and numbing

following the loss of his brother as well as hallucinations where he sees intrusive images of his brother. *Id.*

41. While detained, Mr. Utoliti has also faced severe risk to his safety. Exh. A at ¶¶ 32. He has been physically assaulted on two separate occasions that resulted in his placement in restrictive housing units. *Id.* During his detention in Arizona, he was assaulted by an individual who was detained with him. *Id.*

42. After Mr. Utoliti was transferred to Aurora, he was assaulted a second time by another individual, suffering ten blows to the head. Exh. A at ¶ 32; Exh. H. Due to the severity of the attack, Mr. Utoliti was transported to a hospital where he was treated for a facial contusion and soft tissue injuries. *Id.*

43. As a result of these incidents, Mr. Utoliti remains in constant fear for his safety and is deeply concerned that he will be subjected to further violence by other detained individuals. Exh. A at ¶ 34. This fear is reminiscent of the way he felt growing up in the refugee camps in Uganda, which triggers an increase in his PTSD symptoms. *Id.* This ongoing distress, compounded by the profound grief that Mr. Utoliti experiences over the loss of his younger brother, makes his continued detention particularly damaging to his mental health. *Id.*

44. Additionally, Mr. Utoliti has robust family support in Arizona. Exh. A at ¶¶ 34-46. His father is a lawful permanent resident, and his mother is a U.S. citizen. *Id.* at ¶ 42. His 8 surviving siblings are all lawful permanent residents. *Id.* He also has 3 cousins (1 U.S. citizen and 2 lawful permanent residents) and a U.S. citizen grandmother who all live in Arizona. *Id.* During his time in detention he has mended fences with his father, and they are closer than ever before. *Id.* Mr. Utoliti recognizes the mistakes that he made as a

younger man by focusing his attention on validation from peers rather than on his family. *Id.* If released, he will be able to resume his life in Arizona and have immediate support from healthy relationships. *Id.*

EXHAUSTION OF REMEDIES

45. Exhaustion is not required because Congress did not codify a requirement that petitioners seeking a writ of habeas corpus exhaust administrative remedies. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required... But where Congress has not clearly required exhaustion, sound judicial discretion governs.”) (citation omitted).
46. While inapplicable here, some situations require a petitioner to exhaust administrative remedies prior to seeking a writ under § 2241. *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1259 (D. Colo. 2013) (citing *Williams v. O'Brien*, 792 F.2d 986, 987 (10th Cir. 1986) (per curiam)) *abrogated on different grounds by Nielsen v. Preap*, 139 S.Ct. 954 (2019). However, exhaustion is unnecessary if futile. *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010); *Goodwin v. State of Okl.*, 923 F.2d 156, 157 (10th Cir. 1991) (finding that exhaustion is not required due to futility where binding precedent resolved the issue raised in the habeas petition).
47. Here, exhaustion is futile because the detention statute does not provide for a bond hearing for individuals incarcerated pursuant to 8 U.S.C. § 1226(c) and immigration judge’s lack jurisdiction to render an individualized custody determination. 8 U.S.C. § 1226(c); *Valerga v. Holder*, No. 13-CV-03014-PAB, 2014 WL 103551, at *3 (D. Colo. Jan. 9, 2014) (determining exhaustion to be futile for persons in immigration detention whose cases are determined to be subject to mandatory detention under 8 U.S.C. § 1226(c)).

48. Further, EOIR lacks authority to rule on the constitutionality of the immigration statutes, and both the immigration courts and BIA lack jurisdiction to interpret issues beyond the scope of the INA and its corresponding regulations. *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 n.2 (BIA 2020) (“[W]e do not have the authority to entertain constitutional challenges to the statutes and regulations we administer.”); *Matter of G-K-*, 26 I. & N. Dec. 88 (BIA 2013) (same); *Matter of Valdovinos*, 18 I. & N. Dec. 343, 345–46 (BIA 1982) (disclaiming jurisdiction to rule on the constitutionality of an immigration statute). Requesting EOIR to review the constitutionality of Mr. Utoliti’s detention therefore “would be to demand a futile act.” *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (finding that requiring the petitioner to exhaust administrative remedies was futile because the Attorney General already decided that the rules were appropriately applied to the petitioner). No administrative mechanisms exist through which Mr. Utoliti can seek a neutral review of whether his ongoing and prolonged detention is justified. Further exhaustion is not required.

49. Moreover, EOIR, the agency housing the nation’s immigration courts and appellate body, already decided against Mr. Utoliti’s argument that DHS must shoulder the burden by clear and convincing evidence to justify further detention in bond hearings. *Matter of R-A-V-P-*, 27 I. & N. at 803 (concluding that the noncitizen’s “assertion that the DHS should bear the burden . . . lacks merit because we have *clearly* held that [the statute] places the burden of proof on the [noncitizen] to show that he merits release on bond”) (emphasis added) (citations omitted); *Matter of Fatahi*, 26 I. & N. Dec. 791, 795 n. 3 (BIA 2016) (finding that the BIA has “consistently held that [noncitizens] have the burden to establish eligibility for bond while proceedings are pending”).

50. Even if meaningful administrative remedies were available, Mr. Utoliti is not required to exhaust those remedies under 8 U.S.C. § 2241. *Shirkhani v. Greene*, 790 F. Supp. 1065,

1067 (D. Colo. 1992) (examining the language of the INA, stating that “Congress did not intend to require exhaustion” in order to pursue habeas corpus relief) (citing *National Center for Immigrants' Rights v. INS*, 791 F.2d 1351, 1354 (9th Cir. 1986), *cert. granted, judgment vacated sub nom. Immigr. & Naturalization Serv. v. Nat'l Ctr. For Immigrants' Rts.*, 481 U.S. 1009, 107 S. Ct. 1881, 95 L. Ed. 2d 489 (1987) (INA does not require exhaustion for suits challenging pre-deportation detention)).

51. Though petitions under 28 U.S.C. § 2241 are not subject to statutory exhaustion requirements, Mr. Utoliti has exhausted all possible remedies available to him. Mr. Utoliti twice requested bond before EOIR, and both the immigration court and the BIA denied his request on the basis that he is statutorily ineligible for bond under § 1226(c). Exh. G.
52. There are no further remedies for Mr. Utoliti to exhaust. Because DHS has charged Mr. Utoliti as removable due to a conviction for an aggravated felony, he is subject to mandatory detention under 8 U.S.C. § 1226(c).⁷ Mr. Utoliti has therefore never been afforded an individualized custody determination before an immigration judge.

LEGAL FRAMEWORK

53. Respondents are subjecting Mr. Utoliti to prolonged detention without an individualized bond hearing based on an unconstitutional application of the mandatory detention scheme, 8 U.S.C. § 1226(c). ICE detained Mr. Utoliti over 21 months ago and a neutral authority has never meaningfully reviewed that custody determination.

⁷ As argued in his opening brief and Motion to Reopen, Mr. Utoliti maintains that his classification under 8 U.S.C. § 1226(c) is erroneous, as his conviction does not constitute an aggravated felony under the statutory definition. Exh. D. However, DHS maintains that he is properly charged with an aggravated felony, and the immigration judge and the BIA have consistently affirmed the same in response to Mr. Utoliti's requests for bond and in his removal proceedings. Exhs. B, C, G. In light of these rulings, any further litigation on this issue before the agency would be futile absent a contrary ruling from the Ninth Circuit.

A. Mr. Utoliti's Prolonged Mandatory Detention Without an Individualized Bond Hearing Violates Due Process.

54. The statute under which Mr. Utoliti is detained, 8 U.S.C. § 1226(c), mandates detention for certain noncitizens during the pendency of the removal process. Respondents rely on the language of this statute to deny individualized bond hearings to Mr. Utoliti and others similarly situated.

55. Although the U.S. Supreme Court has not yet ruled on whether § 1226(c), as applied to noncitizens like Mr. Utoliti who find themselves subjected to prolonged detention, violates the Due Process Clause, it has held under analogous circumstances that noncitizens held indefinitely after an order of removal are entitled under certain circumstances to individualized bond hearings. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). The length of detention is a critical component of the procedural due process analysis given that “as the period of . . . confinement grows,” so do the required procedural protections, no matter what level of due process may have been sufficient at the moment of initial detention. *Zadvydas*, 533 U.S. at 701. The Supreme Court has upheld only “brief” detentions which last “roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the [noncitizen] chooses to appeal.” *Demore v. Kim*, 538 U.S. 510, 529–30 (Kennedy, J., concurring).

56. In 2016, the Solicitor General revealed that the statistical information provided by the government and relied upon by the Supreme Court in *Demore* was inaccurate, and the average length of immigration detention was much longer. *Jennings v. Rodriguez*, 583 U.S. 281, 343 (2018) (Breyer, J., dissenting) (“The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the

Government then said it did . . . thousands of people here are held for considerably longer than six months without an opportunity to seek bail.”).

57. The Second and Third Circuit Courts of Appeals, and many federal district courts, including in the District of Colorado, have held that the Due Process Clause prohibits the prolonged detention of noncitizens in removal proceedings like Mr. Utoliti without an individualized bond hearing. *See e.g., Black v. Decker*, 103 F.4th 133, 149 (2d Cir. 2024); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 208 (3d Cir. 2020); *Daley*, 2023 WL 2336052 at *2 (collecting cases). In *Black*, the Second Circuit recognized that although “*Demore* upheld the government’s authority under section 1226(c) to detain noncitizens without an initial bond hearing ‘for the brief period necessary for their removal proceedings,’ It said nothing about whether due process may eventually require a hearing.” *Black*, 103 F.4th at 149 (citing *Demore*, 538 U.S. at 513). The court noted that, “*Demore* and *Jennings* leave open the question whether prolonged detention under section 1226(c) without a bond hearing will at some point violate an individual [noncitizen’s] due process rights.” *Black*, 103 F.4th at 142.

58. Recently, a split panel of the Eighth Circuit reached a contrary conclusion and announced an unprecedented, sweeping holding that mandatory detention without a hearing is constitutionally permissible no matter how long it lasts. *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024). The Eighth Circuit’s outlier decision cannot be squared with *Demore* or the cases after it. *Demore* upheld the government’s authority under § 1226(c) to detain certain noncitizens without an initial bond hearing “for the brief period necessary for their removal proceedings.” *Demore*, 538 U.S. at 513-14. *Banyee*’s extreme characterization that *Demore* sanctions mandatory detention no matter how long it lasts, “remove[s] the Court’s holding

from its factual context.” *Villaescusa-Rios v. Choate*, No. 20-cv-03187-CMA, 2021 WL 269766, at *2 (D. Colo. 2021), and is contradicted by Supreme Court cases since *Demore* acknowledging that as-applied constitutional challenges remain viable. *See Jennings*, 583 U.S. at 312; *Nielsen v. Preap*, 586 U.S. 392, 420 (2019).

59. This Court already rejected *Banyee*’s sweeping interpretation. In *Martinez v. Ceja*, this Court declined to follow *Banyee* and instead reaffirmed the six-factor test in prolonged mandatory detention challenges in this District. No. 24-CV-03056-PAB, 2024 WL 5168143 (D. Colo. Dec. 19, 2024).

60. Consistent with *Martinez*, courts in this District apply a six-factor test when analyzing whether a noncitizen’s detention has become unconstitutionally prolonged. These factors include:

- (1) the total length of detention to date;
- (2) the likely duration of future duration;
- (3) the conditions of detention;
- (4) delays in removal proceedings caused by the detained person;
- (5) delays in the removal proceedings caused by the government;
- (6) the likelihood that removal proceedings will result in a final order of removal.

See Daley, 2023 WL 2336052 at *2 (collecting cases) and *3 (setting out elements).

61. On balance, the six elements weigh in favor of a grant of relief to Mr. Utoliti.

62. *First*, Mr. Utoliti has already been detained for over 21 months.⁸ “[C]ourts have found detention for approximately a year or more constitutionally unreasonable.” *Singh v. Choate*, 19-cv-0909-KLM, 2019 WL 3943960 (D. Colo. Aug. 21, 2019) (detention for over twenty months strongly favors granting a bond hearing); *Viruel Arias v. Choate*, 22-cv-2238-CNS,

⁸ Mr. Utoliti’s current detention has already far exceeded the jail time imposed in his criminal proceedings. After his probation violation, he was sentenced to only four months of jail time in 2022. He has now been detained in immigration custody over 21 months, a duration more than 5 times his criminal sentence.

2022 WL 4467245 (D. Colo. Sept. 26, 2022) (finding that the first factor favored the petitioner when detention lasted over fourteen months); *Sheikh v. Choate*, 22-cv-1627-RMR, 2022 WL 17075894 (D. Colo. July 27, 2022) (finding that the first factor strongly favored the petitioner whose detention lasted nearly thirteen months); *Villaescusa-Rios*, 2021 WL 269766, at *3 (collecting cases). Thus, the first factor weighs strongly in Mr. Utoliti's favor. *Id.*

63. *Second*, Mr. Utoliti will remain detained for many more months, or potentially years, while he awaits adjudication of his fear-based applications. “Courts examine the anticipated duration of all removal proceedings—including administrative and judicial appeals—when estimating how long detention will last.” *Villaescusa-Rios*, 2021 WL 269766, at *3 (quotation omitted). The “important constitutional limitations” to the length of confinement contemplated in *Zadvydas* addressed whether immigration officials could condemn noncitizens to an “indefinite term of imprisonment within the United States” if they could not be deported. 533 U.S. at 695. Subsequently, *Demore* relied on the false reality that detention lasts for a “limited period” and has a foreseeable endpoint prior to a final order of removal when determining whether respondent’s length of detention was constitutionally valid. 538 U.S. at 531.

64. There is no definite end in sight for Mr. Utoliti’s detention, and his already-prolonged detention is certain to continue for many months, if not years, while the Ninth Circuit adjudicates his case. The Ninth Circuit has announced that it will hear argument on his petitions in October 2025. Exh. E. Thus, absent this Court’s intervention, Mr. Utoliti is certain to remain detained *at least* an additional 10 months, not counting however long it takes for the Ninth Circuit to issue a decision in his case. *See, e.g., German Santos*, 965

F.3d at 211 (finding that likelihood of continued detention pending appeal “strongly supports a finding of unreasonableness”); *Pedro O. v. Garland*, 543 F. Supp. 3d 733, 739 (D. Minn. 2021) (noting that circuit court review could last a year). Moreover, as long as Mr. Utoliti is classified as detained under § 1226(c), he will remain detained without an individualized bond hearing for the duration of any remands to the immigration judge, future appeals to the Board, or returns to the Ninth Circuit.

65. Mr. Utoliti’s mandatory detention is already significantly prolonged and is certain to continue for months if not years absent this Court’s intervention. Accordingly, this factor weighs heavily in his favor.

66. *Third*, DHS detains Mr. Utoliti at the Aurora facility, and the evidence overwhelmingly establishes poor conditions of confinement, akin to punitive settings, which are further exacerbated by Mr. Utoliti’s mental health diagnoses. For this factor, courts consider whether “the facility for the civil immigration detention is *meaningfully* different from a penal institution for criminal detention.” *Villaescusa-Rios*, 2021 WL 269766, at *3 (emphasis added) (quoting *Sajous*, 2018 WL 2357266, at *11); *King v. Cty. of Los Angeles*, 885 F.3d 548, 556–57 (9th Cir. 2018) (finding that due process requires that conditions in civil detention facilities may not be the same as or worse than those in a prison). This Court has noted that “whether [an individual] is detained in a luxurious hotel, a detention facility, or some other building, he is being deprived of his liberty—thus, this factor seems somewhat beside the point.” *Singh*, 2019 WL 3943960, at *6. Nevertheless, this Court has repeatedly held that detention at the Aurora facility weighs in a noncitizen’s favor because the facility is akin to a penal institution. *Viruel Arias*, 2022 WL 4467245, at *2 (determining Respondents provided insufficient evidence “to explain how the conditions

of [petitioner's] confinement differ from the conditions of penal confinement"); *Sheikh*, 2022 WL 17075894, at *4 (same); *Singh*, 2021 WL 2290712, at *3–4 (same); *Villaescusa-Rios*, 2021 WL 269766, at *4 (determining that "conditions of Petitioner's confinement weigh strongly in favor of a bond hearing"); *cf. de Jesus de Jesus v. Wolf*, No. 20-cv-03637 (RBJ), 2021 WL 603056, at *3 (D. Colo. Feb. 16, 2021) (declining to reach the constitutional issue but noting that the District Court is "aware from multiple cases that [people] in the Aurora Contract Detention Center have experienced serious health and safety issues."); *Martinez*, 2024 WL 5168143, at *5 ("... the Aurora facility is more akin to incarceration than a civil confinement."); *Daley*, 2023 WL 2336052 at *2.

67. As described in detail *supra* ¶¶ 35-37, the Aurora facility exhibits deeply rooted flaws in the care it provides to people within its custody, placing detained individuals in danger of harm and death.

68. A comparison of Mr. Utoliti's civil incarceration to that of a penal institution weighs heavily in his favor. *See King*, 885 F.3d at 556–57 (9th Cir. 2018) (finding that due process requires that conditions in civil detention facilities may not be the same as or worse than those in a prison). The objective evidence further supports Mr. Utoliti's claim, as he is detained in a facility where he is forced to wear government-issued clothing, he cannot access the outdoors, and he does not have access to contact visitation with loved ones.

69. *Fourth*, Mr. Utoliti has not engaged in any dilatory tactics and he continues to diligently defend himself against removal. Under this factor, courts ask whether the reasons for delays are due to "careless or bad-faith errors in the proceedings." *German Santos*, 965 F.3d at 212 (internal quotations omitted); *Sheikh*, 2022 WL 17075894, at * 3; *Villaescusa-Rios*, 2021 WL 269766, at * 3.

70. Before the immigration judge and while appearing *pro se*, Mr. Utoliti diligently prepared his applications for relief. After the immigration judge issued an order denying relief, Mr. Utoliti timely filed a Notice of Appeal and secured *pro bono* counsel to assist him with his appeal before the Board. However, he received deficient representation from appellate counsel who failed to raise critical, threshold arguments in his case, including whether the immigration judge properly found that his prior criminal conviction constitutes an aggravated felony, particularly serious crime, or crime involving moral turpitude. *See* Exh. D. These issues directly impact whether Mr. Utoliti is removable at all, as well as his eligibility for asylum and withholding of removal. *Id.* Due to counsel's ineffective assistance, Mr. Utoliti's favorable defenses to removal have never been fully presented in immigration court *Id.* Despite these obstacles, Mr. Utoliti has remained diligent in pursuing his claims for relief, including timely filing his petition for review in the Ninth Circuit and in pursuing a motion to reopen based on ineffective assistance before the Board.

71. Mr. Utoliti cannot be prejudiced by exercising his right to non-frivolously litigate his case and ensure his proceedings are fundamentally fair. *de Zarate v. Choate*, 23-cv-571-PAB, 2023 WL 2574370 (D. Colo. Mar. 20, 2023) (“[T]he Court will not hold her efforts to seek relief through the available legal channels against [a noncitizen].”); *Villaescusa-Rios*, 2021 WL 269766, at *4; *Singh*, 2019 WL 3943960 at *6; *see also German Santos*, 965 F.3d at 211 (noting that doing so would “effectively punish” a petitioner for “pursuing applicable legal remedies”) (cleaned up); *Martinez v. Ceja*, No. 24-CV-03056-PAB, 2024 WL

5168143, at *6 (D. Colo. Dec. 19, 2024) (“[T]he Court will not hold [Petitioner’s] efforts to seek relief through the available legal channels against him.”).⁹

72. *Finally*, Mr. Utoliti has a strong chance of ultimately receiving relief from removal in the form of termination of his removal proceedings, or alternatively, asylum, withholding of removal, or protection under the Convention Against Torture. Mr. Utoliti initially came to the United States as a refugee based on the past persecution and torture he faced in Uganda. As argued before the Ninth Circuit, Mr. Utoliti’s removal order is legally defective for multiple reasons. *See* Exh. D. First and foremost, the immigration judge erroneously concluded that he is removable as charged, because his conviction does not properly constitute a crime involving moral turpitude under 8 U.S.C § 1227. *Id.* If he prevails on this claim at the Ninth Circuit, his removal order would be vacated, and his proceedings would be remanded for termination. *Id.*

73. Second, the immigration judge erroneously held that Mr. Utoliti was convicted of an aggravated felony crime of violence under 8 U.S.C. § 1101(a)(43)(F). Exh. D. Based on this finding, the immigration judge erred when finding that Mr. Utoliti is statutorily barred from asylum and withholding of removal.¹⁰ There are several issues with this threshold determination, most importantly that Mr. Utoliti was *not* sentenced to a “term of imprisonment of at least a year” as is required under 8 U.S.C. § 1101(a)(43)(F). *Id.* Mr.

⁹ Regarding the fifth factor, counsel is not aware of any unreasonable delays caused by the government in this case.

¹⁰ Mr. Utoliti’s prolonged detention of 21 months without an individualized bond hearing is especially egregious because his mandatory detention under § 1226(c) is premised on this same erroneous finding that his conviction constitutes an aggravated felony. Exh. G. If the Ninth Circuit determines that the immigration judge and BIA erred as to this finding, Respondents would lack any basis for detaining Mr. Utoliti under § 1226(c), and Mr. Utoliti necessarily should have been deemed eligible for bond the entire time he has been detained without an individualized hearing.

Utoliti was sentenced to 121 days imprisonment and 3 years' probation. *Id.* However, because Mr. Utoliti was *pro se* before the Immigration Judge, and later represented by ineffective appellate counsel before the BIA, this critical error—which erroneously foreclosed Mr. Utoliti's eligibility for asylum and withholding for removal—has never been fully addressed by the immigration court. *Id.*

74. Finally, Mr. Utoliti has presented multiple additional arguments to the Ninth Circuit on the merits of his fear-based defenses to removal, including that he has established eligibility for protection under the Convention Against Torture due to the physical violence and rape he suffered at the hands of government officials in Uganda. Exh. D.

75. Accordingly, there are multiple critical errors in Mr. Utoliti's removal case that have not been properly adjudicated due to his having received ineffective assistance of counsel. With these issues now pending before the Ninth Circuit, it is unlikely that Mr. Utoliti's immigration case will end in a final order of removal, and this factor weighs in his favor.¹¹

76. In sum, all of the factors weigh in favor of finding that Mr. Utoliti's prolonged detention without an individualized bond hearing is an unconstitutional denial of his procedural due process rights.

B. The Appropriate Remedy for This Due Process Violation Is Immediate Release; in the Alternative, the Court Should Order a Custody Hearing Where the Government Bears the Burden of Justifying Mr. Utoliti's Continued Detention.

¹¹ Notably, because Mr. Utoliti is stateless, even if he were to receive a final order of removal in the future, the government will face significant challenges in obtaining the necessary travel documents to facilitate his removal. In *Sheikh v. Choate*, this Court held that the government's inability to ultimately remove a noncitizen weighed in his favor. 2022 WL 17075894, at *4 (D. Colo. 2022). Here, Mr. Utoliti has presented robust arguments both that he is not in fact removable, and even if he were, he has strong claims for multiple forms of relief from deportation. Thus, further tipping the balance in his favor.

77. Mr. Utoliti's prolonged detention violates due process, and the appropriate remedy is release. *See Malam v. Adducci*, 452 F. Supp. 3d 643, 661 (E.D. Mich. 2020) (citing *Swann*, 402 U.S. at 15–16 (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”)). Immediate release is contemplated when immigration detention becomes unlawful. *Zadvydas*, 533 U.S. at 701; *Mapp v. Reno*, 241 F.3d 221, 229 (2d Cir. 2001) (recognizing court’s inherent power to order release of habeas petitioners from immigration detention).
78. In the alternative and at a minimum, due process requires an individualized bond hearing for Mr. Utoliti. *See Juarez v. Choate*, 2024 WL 1012912 (D. Colo. March 8, 2024) at *8 (“continued detention requires an individualized bond hearing before an immigration judge in order to comport with due process.”); *Daley*, 2023 WL 2336052, at *5; *Viruel Arias*, 2022 WL 4467245, at *3; *Sheikh*, 2022 WL 17075894, at *4.
79. At that bond hearing, the government must justify Mr. Utoliti’s ongoing detention by clear and convincing evidence because “placing the burden of proof on the government comports with due process requirements.” *Juarez*, 2024 WL 1012912, at *8 (citation omitted). When the government seeks to deprive someone of liberty, it bears the burden of proving that such deprivation is justified. Because “civil commitment for any purpose constitutes a significant deprivation of liberty,” *Addington v. Texas*, 441 U.S. 418, 425 (1979), Mr. Utoliti’s ongoing detention constitutes a serious deprivation. *See Foucha v. Louisiana*, 504 U.S. 71, 75–76 (1992).
80. “[T]he overwhelming majority of courts” have “held that the government must bear the burden by clear and convincing evidence” when there is a due process violation stemming

from prolonged detention. *Pedro O.*, 543 F. Supp. 3d at 742 (citing *German Santos*, 965 F.3d at 212) (explaining that the government bears the burden of proof by clear and convincing evidence because the noncitizen’s “potential loss of liberty is so severe” in the § 1226 context). Courts in this District agree. *L.G. v. Choate*, No. 1:24-CV-01200-RMR, 2024 WL 5054918, at *10 (D. Colo. July 19, 2024); *Juarez*, 2024 WL 1012912, at *8; *Daley*, 2023 WL 2336052, at *5; *Viruel Arias*, 2022 WL 4467245, at *3; *Sheikh*, 2022 WL 17075894, at *4; *Villaescusa-Rios*, 2021 WL 269766, at *5; *Singh*, 2019 WL 3943960, at *7. Although most courts in this District have found that the government bears the burden by clear and convincing evidence, a single judge in the District of Colorado has disagreed. *See de Zarate*, 2023 WL 2574370, at *5 (finding a due process violation and ordering a bond hearing but declining to place the burden of proof on the government); *see also Martinez*, 2024 WL 5168143, at *7 (same).

81. DHS cannot use unauthenticated evidence to meet its clear and convincing evidence burden to justify continued detention. *See Ruiz-Giel v. Holder*, 576 F. App’x. 738, 740– 41, n.1 (10th Cir. 2014) (concluding that criminal records were properly admitted and met DHS’s clear and convincing evidence burden because they were authenticated with a stamp by the state court of Nevada and included a certification from DHS); *Woldemeskel v. I.N.S.*, 257 F.3d 1185, 1192 (10th Cir. 2001) (noting favorably that the immigration judge and the BIA did not consider a document because it was not authenticated according to 8 C.F.R. § 287.6(a)–(b)); *Luna v. INS*, 53 F.3d 338, at *2 (9th Cir. 1995) (“[d]ue process requires that government forms admitted in deportation proceedings be authenticated”); 8 C.F.R. § 287.6(a) (“an official record or entry therein, when admissible for any purpose, shall be

evidenced by an official publication thereof, or by copy attested by the official having legal custody of the record or by an authorized deputy) (emphasis added).

82. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen's appearance during removal proceedings. *Zadvydas*, 533 U.S. at 690. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See Bell*, 441 U.S. at 538.

83. Further, Mr. Utoliti's release plan and conditions of parole will mitigate any risk of flight. *See* Exh. A. Upon his release from immigration custody, he must immediately report to his assigned probation officer in Arizona. *Id.* at ¶ 43. His probation conditions require him to refrain from alcohol use and comply with supervision, including checking in with his probation officer, understanding and following all probation terms, and permitting any monitoring as needed. *Id.* Beyond these requirements, Mr. Utoliti's release plan includes comprehensive support to ensure his successful reintegration. He is committed to completing substance abuse and mental health treatment. *Id.* at ¶ 37. He will have access to stable housing with his family in Arizona, as well as assistance from local organizations such as Arizona Immigrant and Refugee Services and Lutheran Social Services of the Southwest. *Id.* at ¶¶ 41-42.

84. Further, if a bond is granted, due process requires consideration of Mr. Utoliti's ability to pay the bond. *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) (concluding that due process likely requires "consideration of the detained noncitizens' financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in

ensuring their appearance at future hearings”); *cf. Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (“We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.”).

85. Finally, immigration judges issue written decisions on a request for release on bond only if either party appeals the decision. *See* Immigration Court Practice Manual § 9.3(e)(vi). However, due process requires that a denial of release on bond be accompanied by a contemporaneous set of written findings justifying the denial. *See De la Lana-Castellon v. INS*, 16 F.3d 1093, 1096, 1098 (10th Cir. 1994) (holding that due process requires a “decision maker to actually consider the evidence and argument that a party presents” and issue a non-boilerplate decision); Judge Henry J. Friendly, *Some Kind of Hearing*, 123 Penn. L. Rev. 1267, 1292 (1975) (calling a “written statement of reasons” an essential element of a constitutionally fair hearing and a “powerful preventive of wrong decisions”). A contemporaneous written account of findings fact and conclusions of law should be required if bond is denied.

CLAIM FOR RELIEF

Violation of Fifth Amendment Rights to Due Process

(Unreasonably Prolonged Detention)

86. Mr. Utoliti re-alleges and incorporates by reference the paragraphs above.

87. The Fifth Amendment’s Due Process Clause forbids the government from depriving any person of liberty “without due process of law.”

88. As applied to Mr. Utoliti, his prolonged mandatory detention without an individualized bond hearing under 8 U.S.C. § 1226(c) is unconstitutional because ICE detained him 21

months ago and has never demonstrated that his ongoing detention is justified; his detention is certain to continue for many more months, if not years, while his case is pending at the Ninth Circuit, and has no end in sight absent intervention from this Court; his detention at the Aurora facility is indistinguishable from criminal confinement; he has diligently pursued his claims to relief from removal, and did not cause significant delay in his immigration proceedings; and Mr. Utoliti is not likely to be removed because he has substantial claims against deportation.

PRAYER FOR RELIEF

WHEREFORE, Mr. Utoliti prays that this Court grant the following relief:

- (1) Assume jurisdiction over this matter;
- (2) Enjoin Respondents from transferring Mr. Utoliti outside the jurisdiction of the District of Colorado pending the resolution of this case;
- (3) Issue a writ of habeas corpus directing Respondents to release Mr. Utoliti on his own recognizance or, in the alternative, provide him, within seven days of this Court's order, a constitutionally adequate, individualized bond hearing before an impartial adjudicator where, to continue detention, the government must establish by clear and convincing evidence that Mr. Utoliti presents a flight risk or danger to the community, and that any risk posed by his release cannot be mitigated by conditions of release; and the immigration judge must order Mr. Utoliti's release on appropriate conditions of release, taking into account his ability to pay a bond, unless the immigration judge issues a contemporaneous written decision stating the reasons for finding that Mr. Utoliti presents such a risk;
- (4) Award Mr. Utoliti attorney's fees and costs under the Equal Access to Justice Act as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

(5) Grant any further relief as this Court deems just and proper.

Dated: February 7, 2025

s/ Laura Lunn
Director of Advocacy & Litigation
Laura Lunn (OR 141480)
Rocky Mountain Immigrant Advocacy Network
7301 Federal Boulevard, Suite 300
Westminster, Colorado 80030
Tel: (720) 370-9100
llunn@rmian.org

VERIFICATION

I, s/ Laura Lunn, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that, on information and belief, the factual statements in the foregoing Petition for Writ of Habeas Corpus are true and correct.

Dated: February 7, 2025

CERTIFICATE OF SERVICE

I, Laura Lunn, hereby certify that on February 7, 2025, I filed the foregoing with the Clerk of Court using the CM/ECF system. I, Laura Lunn, hereby certify that I have mailed a hard copy of the document to the individuals identified below pursuant to Fed.R.Civ.P. 4 via certified mail on February 7, 2025.

Kevin Traskos
Chief, Civil Division
U.S. Attorney's Office
District of Colorado
1801 California Street, Ste. 1600
Denver, CO 80202

James McHenry
Acting Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

And to: Benjamine Huffman and Caleb Vitello, DHS/ICE, c/o:

Office of the General Counsel
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave., SE
Washington, D.C. 20528

And to:

Dawn Ceja
GEO Group, Inc.
3130 N. Oakland Street
Aurora, CO 80010

And to:

Robert Guadian
Denver ICE Field Office
12445 E. Caley Ave.
Centennial, CO 80111

s/ Laura Lunn
Director of Advocacy & Litigation
Rocky Mountain Immigrant Advocacy Network
Pro Bono Counsel for Petitioner