**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| Clerde PIERRE,<br><br>Plaintiff/Petitioner,<br><br>v.<br><br>U.S. DEPARTMENT OF HOMELAND SECURITY; Michael AYTES, Acting Deputy Director, United States Citizenship and Immigration Services; Frances HOLMES, District Director, District 2, United States Citizenship and Immigration Services; Ethan ENZER, Field Office Director, Hartford Field Office, United States Citizenship and Immigration Services; Janet NAPOLITANO, Secretary of Homeland Security; John MORTON, Assistant Secretary, United States Immigration and Customs Enforcement; George SULLIVAN, Assistant Field Office Director, Hartford Office of Detention and Removal Operations, Bureau of Immigration and Customs Enforcement; Bruce CHADBOURNE, Field Office Director, Boston Office of Detention and Removal Operations, Bureau of Immigration and Customs Enforcement; Eric HOLDER, Attorney General of the United States; Frederick B. MACDONALD, Sheriff, Franklin County, MA; David LANOIE, Superintendent, Franklin County Jail & House of Correction,<br><br>Defendants/ Respondents. | ) | Case No. 09-1230-JBA<br>LEAD<br><br>**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRITS OF MANDAMUS AND HABEAS CORPUS**<br><br>DHS No. A043-682-665<br><br>December 23, 2009 |

## INTRODUCTION

1. Plaintiff Clerde Pierre ("Mr. Pierre") is a U.S. citizen who has been unlawfully detained in civil immigration custody for over eleven months. Defendants' refusal to acknowledge Mr. Pierre's U.S. citizenship under former 8 U.S.C. § 1432(a)(3) (repealed 2000), despite his

having applied for a certificate of citizenship, has violated Mr. Pierre's Fifth Amendment right to equal protection under the law, and resulted in both Mr. Pierre's wrongful prolonged detention and in violations of the Administrative Procedure Act ("APA").

2. Mr. Pierre is a U.S. citizen through the naturalization of his father, under former 8 U.S.C. § 1432(a)(3), interpreted in light of the Constitution.

3. In failing to adjudicate and approve the application for citizenship filed on Mr. Pierre's behalf, Defendants U.S. Department of Homeland Security ("DHS"), Aytes, Holmes, Enzer, and Napolitano (hereinafter "USCIS Defendants") have violated Mr. Pierre's right under the APA, 5 U.S.C. § 706 (2006), to be free of agency actions that are "contrary to constitutional right," "unwarranted by the facts," "arbitrary, capricious . . . or otherwise not in accordance with law" and "without observance of procedure required by law."

4. In detaining Mr. Pierre, a U.S. citizen, Defendants Napolitano, Holder, Morton, Sullivan, Chadbourne, MacDonald, and Lanoie (hereinafter "Habeas Defendants") have violated the Non-Detention Act, 18 U.S.C. § 4001(a) (2006), and acted outside their jurisdiction and authority under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq. (2006), which applies only to "aliens." Furthermore, Habeas Defendants' prolonged, no-bond detention of Mr. Pierre, without opportunity to demonstrate that he is neither dangerous nor a flight risk, exceeds any and all detention authority of Habeas Defendants, and violates Mr. Pierre's substantive and procedural due process rights under the Fifth Amendment to the Constitution and his rights under the Excessive Bail Clause of the Eighth Amendment. If found to be a U.S. citizen, every day of Mr. Pierre's more than eleven months of immigration detention will have been unlawful.

5. Mr. Pierre therefore respectfully applies to this Court for a declaratory judgment proclaiming him a United States citizen, an order setting aside and holding unlawful the USCIS Defendants' failure to adjudicate and approve the application for citizenship filed on his behalf, a writ of mandamus ordering the USCIS Defendants to approve or adjudicate Mr. Pierre's application *nunc pro tunc*, an injunction against his continued unlawful detention, and a writ of habeas corpus.

## JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1361, 1447, 2241, and the Constitution. Authority to grant a declaratory judgment is conferred by 28 U.S.C. §§ 2201-02.

7. Venue lies within the District of Connecticut pursuant to 5 U.S.C. § 703, and 28 U.S.C. §§ 1391(e)(2) and (e)(3). Mr. Pierre resides in this district, as does his father from whom Mr. Pierre's citizenship was derived. No real property is involved in this action. Furthermore, a substantial part of the events giving rise to the claim occurred in Connecticut. The Hartford Field Office of the Immigration and Naturalization Services ("INS"), now part of DHS, received and wrongfully failed to grant an application for citizenship from Mr. Pierre. Mr. Pierre was also arrested and charged in Connecticut by the Bureau of Immigration and Customs Enforcement ("ICE"), and his removal proceedings are pending before the Immigration Judge in Hartford, Connecticut.

## PARTIES

8. Mr. Pierre is a citizen of the United States currently being unlawfully detained by ICE at the Franklin County Jail and House of Correction in Greenfield, Massachusetts.

9. Defendant DHS is the federal agency responsible for enforcing immigration laws. DHS is responsible for the timely processing and accurate adjudication of applications for immigration and citizenship benefits. DHS includes as components the United States Citizenship and Immigration Services ("USCIS") and ICE, which are the legal successors of the former INS, previously part of the Department of Justice.
10. Defendant Michael Aytes is the Acting Deputy Director of USCIS, the arm of DHS responsible for adjudications of applications for immigration and citizenship benefits. He has supervisory authority over the processing and approval of citizenship applications. He is sued in his official capacity.
11. Defendant Frances Holmes is the District Director for USCIS in District 2, the district that encompasses the Hartford Field Office. She has supervisory authority over the processing and approval of citizenship applications. She is sued in her official capacity.
12. Defendant Ethan Enzer is the Field Office Director for the Hartford Field Office of USCIS. He has supervisory authority over the processing and approval of citizenship applications. He is sued in his official capacity.
13. Defendant Janet Napolitano is the Secretary of DHS. She has legal custody of Mr. Pierre. She is sued in her official capacity.
14. Defendant John Morton is the Assistant Secretary of DHS for ICE, the arm of DHS responsible for detaining and removing individuals according to immigration law. Mr. Morton has legal custody of Mr. Pierre. He is sued in his official capacity.
15. Defendant George Sullivan is the Assistant Field Office Director for the ICE Office of Detention and Removal Operations ("DRO") in the Hartford sub-office, which is part of the Boston Field Office. That office has day-to-day responsibility for Mr. Pierre's detention.

16. Defendant Bruce Chadbourne is the Field Office Director for the ICE DRO in the Boston Field Office. Mr. Chadbourne has legal custody of Mr. Pierre. He is sued in his official capacity.

17. Defendant Eric Holder is the Attorney General of the United States and the head of the U.S. Department of Justice. Mr. Holder has legal custody of Mr. Pierre. He is sued in his official capacity.

18. Defendant Frederick B. MacDonald is the Sheriff of Franklin County, Massachusetts. Mr. MacDonald has legal custody of Mr. Pierre. He is sued in his official capacity.

19. Defendant David Lanoie is the Superintendent of Franklin County Jail and House of Correction. Mr. Lanoie has legal custody of Mr. Pierre. He is sued in his official capacity.

## FACTS AND PROCEDURAL BACKGROUND

### I. Deriving Citizenship

20. Mr. Pierre was born out-of-wedlock on November 29, 1978, in Petite Riviere de L'Artibonite, Haiti. His mother, whose current whereabouts are unknown, abandoned Mr. Pierre soon after his birth, and has never been a part of his life. Mr. Pierre's father, Lavaud Pierre, has been responsible for Mr. Pierre's care since birth, and acknowledged and legitimated him on August 31, 1980.

21. Lavaud Pierre immigrated to the United States in or around 1981, and Mr. Pierre was raised by his great grandmother until he was six years old. After Mr. Pierre's great grandmother died, Lavaud Pierre made the decision to send Mr. Pierre to live with his paternal aunt and her family in Port-au-Prince, Haiti.

22. Although Lavaud Pierre was in the United States, he maintained regular communications with Mr. Pierre, including letters on a weekly or biweekly basis and monthly phone calls despite the considerable expense, and flew back to visit Mr. Pierre in Port-au-Prince several times. Lavaud Pierre retained custody of Mr. Pierre and was responsible for decisions regarding Mr. Pierre's education and medical care. He also provided financial support for Mr. Pierre's upbringing, including money for schooling, clothes, and toys.

23. Lavaud Pierre naturalized and became a U.S. citizen in February of 1992. He immediately made plans to petition for his son to join him in the United States. In connection with the petition, Lavaud Pierre submitted a blood test to the INS to prove his paternity of Mr. Pierre.

24. The INS recognized that Lavaud Pierre had legitimated his son, and granted his petition for lawful permanent residence for Mr. Pierre. On December 4, 1993, while still a minor, Mr. Pierre entered the country as a lawful permanent resident and went to live in the custody of his father in Connecticut.

25. Once Mr. Pierre began to reside permanently in the United States, Mr. Pierre automatically derived U.S. citizenship under former 8 U.S.C. § 1432(a)(3), interpreted in light of the Constitution.

26. In 1994, Lavaud Pierre filed an application for citizenship on behalf of Mr. Pierre. For reasons unknown to the Pierres, the application was either not adjudicated or not approved.

27. Upon information and belief, the Pierres never received a written decision regarding the disposition of the application, and thus had neither a decision to appeal nor notice of their right to do so. Lavaud Pierre did not have trouble receiving mail at the P.O. box that served as his permanent mailing address.

28. On May 29, 2009, Mr. Pierre filed a Freedom of Information Act request to obtain documents from USCIS relating to the citizenship application filed on his behalf by his father. Having received no response from USCIS within the time allowed by statute, Mr. Pierre commenced an action in this Court, Pierre v. DHS, No. 3:09-cv-01230 (JBA), on July 31, 2009, under the Freedom of Information Act, 5 U.S.C. § 552 (2006), in an attempt to compel DHS and its component, USCIS, to release documents relating to the citizenship application. By letter dated November 4, 2009, USCIS partially released some documents responsive to Mr. Pierre's request.

29. The FOIA documents revealed that in 1994, Mr. Pierre's father filed an N-400 application for naturalization on Mr. Pierre's behalf. Mr. Pierre attended an initial examination and took an oath of allegiance. The Pierres also responded promptly to all requests for further information. Mr. Pierre's father submitted a notarized letter from Mr. Pierre's mother that affirmatively ceded all parental rights over her son to Mr. Pierre's father. Upon information and belief, Mr. Pierre met all of the eligibility requirements for naturalization under 8 U.S.C. § 1433. Upon information and belief, this 1994 N-400 application was never adjudicated or was improperly denied.

30. Because the agency never provided any response or decision regarding his 1994 application, Mr. Pierre followed up in 1998 by filing a second N-400 application for naturalization on his own behalf. In 2000, INS represented that the second N-400 application would be denied due to failure to appear for fingerprinting.

## II. Mr. Pierre's Mental Illness and Criminal History

31. In July of 2009, psychiatric evaluations revealed that Mr. Pierre suffers from a previously undiagnosed and serious mental illness—paranoid-type schizophrenia.

32. Medication and mental health counseling have helped Mr. Pierre to cope with the effects of his mental illness.

33. Mr. Pierre's criminal history, described below, likely resulted from his then-undiagnosed and untreated mental illness.

34. On February 15, 2001, Mr. Pierre was convicted on two counts of robbery in the third degree. For each count, Mr. Pierre received a sentence of five years imprisonment, execution suspended after two years, with three years probation, to be served concurrently, resulting in a total effective sentence of two years imprisonment and three years probation. Mr. Pierre served his jail sentence and was released.

35. On July 7, 2006, Mr. Pierre was convicted of sale of a controlled substance, criminal possession of a weapon, and criminal possession of a pistol/revolver. For each count, Mr. Pierre received a split sentence of five years imprisonment, to be suspended after thirty months, plus five years of probation.

36. Mr. Pierre served his jail sentence until November 7, 2008, at which time he was released from the custody of the Connecticut Department of Corrections and transferred into the custody of ICE.

37. Upon information and belief, Mr. Pierre's criminal history is the result of his then-undiagnosed and untreated psychiatric disorder.

38. The foregoing criminal history resulted in Mr. Pierre being placed in immigration detention pending removal proceedings on November 7, 2008.

**III. Mr. Pierre's Prolonged Detention**

39. Despite his U.S. citizenship, Mr. Pierre has been unlawfully held in immigration detention for over eleven months—since November 7, 2008—without the opportunity for an individualized bond hearing.

40. Upon information and belief, DHS claims that Mr. Pierre's detention is pursuant to INA § 236(c), 8 U.S.C. § 1226(c) (2006). However, no such authority exists with respect to Mr. Pierre, as he is a U.S. citizen. To the extent that statutory authority to detain does exist, it does not extend to the prolonged, no-bond detention of Mr. Pierre.

41. Mr. Pierre's mental health has deteriorated during his detention. Mr. Pierre's paranoid-type schizophrenia is exacerbated by incarceration. Even with medication and therapy, incarceration negatively affects Mr. Pierre's mental health.

42. Mr. Pierre does not pose a flight risk and is not a danger to the community. Mr. Pierre has strong family ties in Connecticut, a state where he has lived since 1993. Mr. Pierre's father, a U.S. citizen who lives in Stratford, Connecticut, is willing to provide Mr. Pierre with financial assistance upon his release.

## IV. Mr. Pierre's Removal Proceedings

43. ICE issued a Notice to Appear on May 15, 2008, charging Mr. Pierre with removability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). Despite his best efforts, Mr. Pierre was unable to find pro bono counsel to represent him.

44. Proceeding *pro se* in front of Immigration Judge ("IJ") Michael Straus, Mr. Pierre argued that he was a citizen of the United States, but the IJ summarily told him that he could not be a citizen unless he could prove that his mother was dead. Thus, Mr. Pierre applied *pro se* for relief from removal in the form of deferral of removal under the Convention Against Torture ("CAT").

45. IJ Thomas Janas presided over Mr. Pierre's merits hearing, and denied Mr. Pierre's application for deferral of removal under CAT on February 25, 2009. The IJ did not consider Mr. Pierre's colorable claim to U.S. citizenship in his merits hearing.

46. Mr. Pierre timely appealed his removal order *pro se* to the Board of Immigration Appeals ("BIA"). In his appeal brief, Mr. Pierre argued that under the Equal Protection Clause, he had derived citizenship through the naturalization of his father. In the alternative, Mr. Pierre argued that he was eligible for CAT relief. The BIA affirmed the IJ's order of removal on May 13, 2009. With respect to Mr. Pierre's citizenship claim, the BIA stated that it lacked jurisdiction to consider constitutional questions, and cited to Matter of Yanez, 23 I. & N. Dec. 390 (BIA 2002), for this proposition.

47. After finally obtaining legal representation from undersigned counsel, Mr. Pierre timely filed a petition for review and motion for stay of removal on May 20, 2009, in the U.S. Court of Appeals for the Second Circuit (No. 09-2124-ag). Mr. Pierre's petition sought to address his claim to U.S. citizenship.

48. Counsel for Mr. Pierre also timely filed a motion to reopen his final order of removal with the BIA on August 11, 2009, based on previously unavailable material evidence that Mr. Pierre suffers from a serious mental illness which, in combination with the dreadlocks he wears as a matter of religious conviction and his lack of family members in Haiti, would make him a target for torture in a Haitian prison.

49. The BIA granted Mr. Pierre's motion to reopen on September 15, 2009, and remanded the matter to the IJ for further proceedings to consider Mr. Pierre's eligibility for CAT relief.

50. On October 7, 2009, Mr. Pierre appeared before IJ Straus for a Master Calendar Hearing following the BIA's remand to consider his application for CAT relief. IJ Straus scheduled Mr. Pierre's individual merits hearing for December 9, 2009.

51. On October 22, 2009, in light of the BIA's granting of the motion to reopen, Mr. Pierre agreed to a joint stipulation to withdraw Mr. Pierre's petition for review in the U.S. Court of Appeals for the Second Circuit (No. 09-2124-ag).

52. On December 11, 2009, IJ Straus denied Mr. Pierre's application for CAT relief. Mr. Pierre is appealing the decision to the BIA. If he is denied relief by the BIA, he may file a petition for review with the U.S. Court of Appeals for the Second Circuit. Thus, removal proceedings against Mr. Pierre will likely not be completed for a year or even years.

## CAUSES OF ACTION

### FIRST CAUSE OF ACTION: DEFENDANTS' REFUSAL TO RECOGNIZE MR. PIERRE'S U.S. CITIZENSHIP VIOLATES FORMER 8 U.S.C. § 1432(a)(3), INTERPRETED IN LIGHT OF THE EQUAL PROTECTION CLAUSE

**(All Defendants)**

53. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

54. Mr. Pierre is a U.S. citizen through his father's naturalization, under former 8 U.S.C. § 1432(a)(3) (2000), repealed by Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631, interpreted in light of the Constitution.

55. The latter part of former 8 U.S.C. § 1432(a)(3) grants derivative citizenship to children upon the "naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." This differential treatment for fathers of out-of-wedlock children (barring them from bestowing derivative citizenship upon their children simply because of their gender) raises serious Equal Protection Clause concerns, as the Second Circuit recently recognized.

56. In Grant v. DHS, 534 F.3d 102 (2d Cir. 2008), the Second Circuit interpreted former 8 U.S.C. § 1432(a)(3) to allow out-of-wedlock children to derive citizenship from a naturalized

father, not just a naturalized mother. The Second Circuit "assume[d], without deciding, that naturalization of the father and legitimation of the child before the child reached the age of eighteen would create derivative citizenship." Id. at 106.

57. These circumstances are identical to Mr. Pierre's case: his father naturalized and legitimated him before he turned eighteen. Thus, under the Second Circuit's interpretation of the statute, Mr. Pierre automatically derived U.S. citizenship through the naturalization of his father.

58. To deny citizenship to Mr. Pierre based on a contrary interpretation of the statute would, in the words of the Second Circuit, create a "serious constitutional problem," because it would be impossible for a legitimated child to derive citizenship from his father. Grant v. DHS, 534 F.2d at 106. In order to avoid that serious constitutional problem, the statute as applied to Mr. Pierre must be interpreted so as to grant him U.S. citizenship.

59. Mr. Pierre seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02, declaring that he is a citizen of the United States. Mr. Pierre also seeks an order pursuant to 28 U.S.C. § 2241 releasing him from immigration detention because he is U.S. citizen. See Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008) (recognizing that district courts have jurisdiction to adjudicate habeas petitions based on citizenship claims for petitioners in removal proceedings).

**SECOND CAUSE OF ACTION: DEFENDANTS' REFUSAL TO RECOGNIZE MR. PIERRE'S U.S. CITIZENSHIP VIOLATES HIS FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION**

**(All Defendants)**

60. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

61. Defendants' interpretation of former 8 U.S.C. § 1432(a)(3) as precluding citizenship for Mr. Pierre violates his Fifth Amendment right to equal protection under the law.

62. The Equal Protection Clause of the Fourteenth Amendment, applicable to the federal government through the Due Process Clause of the Fifth Amendment, prohibits the government from denying the "equal protection of the laws" to any person. U.S. Const. amend. XIV. When the government treats people differently based on their gender, the government's action must pass the intermediate scrutiny test—"[t]he State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." United States v. Virginia, 518 U.S. 515, 533 (1996) (internal citations and quotations omitted); accord Craig v. Boren, 429 U.S. 190, 197 (1976).

63. Different from the statute upheld in Nguyen v. INS, 533 U.S. 53 (2001), which merely imposed greater requirements on fathers than on mothers, the gender-based classification in former 8 U.S.C. § 1432(a)(3) makes it virtually impossible for fathers to confer citizenship on out-of-wedlock children, and does not serve any important governmental objectives. The government has no legitimate interest in respecting the parental rights of an alien mother *more* than the rights of an alien father, particularly where, as in Mr. Pierre's case, the father has legitimated, lived with, and cared for his son and the mother has abandoned her child at birth.

64. Because the gender-based classification of former 8 U.S.C. § 1432(a)(3) serves no legitimate government interest, its application to Mr. Pierre is in violation of his right to equal protection under the Constitution.

65. Mr. Pierre seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02, declaring that he is a citizen of the United States. Mr. Pierre also seeks an order pursuant to 28 U.S.C. § 2241

releasing him from immigration detention because he is U.S. citizen. See Flores-Torres v. Mukasey, 548 F.3d at 710.

**THIRD CAUSE OF ACTION: DEFENDANTS' FAILURE TO PROPERLY ADJUDICATE AND APPROVE MR. PIERRE'S APPLICATION FOR CITIZENSHIP VIOLATES THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C § 706**

**(USCIS Defendants)**

66. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

67. By failing to find that Mr. Pierre automatically derived citizenship upon his father's naturalization and by failing to approve the citizenship application that Mr. Pierre's father filed on his behalf, USCIS Defendants denied Mr. Pierre his constitutional right to equal protection and acted in a manner "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). Under 5 U.S.C. § 706(2) of the APA, this Court must hold this action unlawful and set it aside as contrary to constitutional right.

68. By failing to issue Mr. Pierre a certificate of citizenship, USCIS Defendants also committed an agency action "unwarranted by the facts." Under 5 U.S.C. § 706(2)(F), this Court must hold unlawful and set aside agency action, findings, and conclusions found to be "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Constitutional and jurisdictional facts, such as whether Mr. Pierre is a U.S. citizen, are always subject to *de novo* judicial review. See, e.g., St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 52 (1936); Crowell v. Benson, 285 U.S. 22, 60 (1932); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

69. USCIS Defendants' failure to send the Pierres any written decision regarding the disposition of the citizenship application violated its clear duty to do so under 8 C.F.R. §§ 336.1, 335.3. As such, this Court must hold unlawful this agency action as "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

70. In the alternative, USCIS Defendants' failure to adjudicate Mr. Pierre's citizenship application constitutes an unreasonably delayed agency action, as the Pierres have waited in excess of a decade for a written decision regarding the application. Under 8 U.S.C. § 1447(b), this Court should either adjudicate the application *nunc pro tunc* or remand, with appropriate instructions, to USCIS Defendants to approve or adjudicate the application *nunc pro tunc*. Alternatively, under 5 U.S.C. § 706(1), this Court should compel adjudication of the application.

**FOURTH CAUSE OF ACTION: MR. PIERRE IS ENTITLED TO A WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. § 1361**

**(USCIS Defendants)**

71. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

72. The Defendants' failure to discharge their non-discretionary, ministerial duty to adjudicate within a reasonable time Mr. Pierre's citizenship application violates the APA.

73. If this Court declines to provide Mr. Pierre with the other forms of relief requested, then 28 U.S.C. § 1361 would provide the only avenue of relief available to Mr. Pierre from the grave deprivations that follow from Defendants' failure to recognize his U.S. citizenship.

74. Therefore, if this Court declines to provide Mr. Pierre with the other forms of relief requested, this Court should issue a Writ of Mandamus compelling USCIS Defendants to approve or adjudicate Mr. Pierre's application *nunc pro tunc* and provide a written copy of the decision.

**FIFTH CAUSE OF ACTION: DEFENDANTS' DETENTION OF MR. PIERRE, A U.S. CITIZEN, IS WITHOUT STATUTORY AUTHORITY AND VIOLATES THE NON-DETENTION ACT, 18 U.S.C. § 4001(a)**

**(Habeas Defendants)**

75. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

76. The Non-Detention Act provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Congress intended the Non-Detention Act to protect citizens from "arbitrary executive action, with no clear demarcation of the limits of executive authority." H.R. Rep. No. 92-116, reprinted in 1971 U.S.C.C.A.N. 1435, 1438. The Act carries out this purpose by requiring that imprisonment of U.S. citizens be "limited to situations in which a statutory authorization, an Act of Congress, exists." Id. The Supreme Court has interpreted the Non-Detention Act to prohibit detention "*of any kind* by the United States, absent a Congressional grant of authority to detain." Howe v. Smith, 452 U.S. 473, 480 n.3 (1981) (emphasis in original). Such a broad prohibition includes immigration detention by the executive.

77. The INA provides no authority to detain either U.S. citizens or persons with colorable claims to U.S. citizenship.

78. INA § 236(c), 8 U.S.C. § 1226(c), only authorizes the detention of "aliens" and cannot be expanded to include individuals who are either citizens or have a non-frivolous claim of citizenship.

79. The detention authority of 8 U.S.C. § 1226(c) applies only to a subgroup of criminal aliens, and would not be acceptable if applied to citizens or persons with a substantial claim of citizenship. See Demore v. Kim, 538 U.S. 510, 531 (2003) (upholding detention under 8 U.S.C. § 1226(c) as applied only to criminal aliens who have conceded that they are

deportable). A central part of the Kim Court's rationale is that the statute's constitutionality hinges on the distinction between aliens and citizens. See id. at 521 ("Congress regularly makes rules that would be unacceptable if applied to citizens.").

80. Since Kim, the Ninth Circuit has limited the applicability of § 1226(c) to a subgroup of aliens. See Tijani v. Willis, 430 F. 3d 1241, 1242 (9th Cir. 2005) ("we interpret the authority conferred by § 1226(c) as applying to *expedited* removal of *criminal aliens*") (emphasis added); see id. at 1247 (Tashima, J., concurring) (limiting application of § 1226(c) to "those immigrants who could not raise a 'substantial' argument against their removability").

81. Courts have repeatedly held that the requirements applying to "aliens" under the INA do not similarly apply to persons with colorable citizenship claims. For example, in Theagene v. Gonzales, the Ninth Circuit held that exhaustion requirements applicable to aliens under 8 U.S.C. § 1252(d)(1) do not apply to persons with citizenship claims. See Theagene v. Gonzales, 411 F.3d 1107, 1110 (9th Cir. 2005); see also Minasyan v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005) (holding that INA term "alien" in 8 U.S.C. § 1252(d)(1) does not apply to persons with nationality claims and thus that administrative exhaustion requirements do not apply to such persons); Rivera v. Ashcroft, 394 F.3d 1129, 1140 (9th Cir 2004) (holding that statutory exhaustion requirement for aliens does not apply in cases of putative citizens); Moussa v. INS, 302 F.3d 823, 825 (8th Cir. 2002) ("[T]he exhaustion provisions of § 1252(d)(1) do not apply to 'any person' challenging a final order of removal, only to an 'alien'—precisely what [petitioner] claims not to be.").

82. Because he is a U.S. citizen, or at the very least has a substantial claim of U.S. citizenship, Mr. Pierre's detention is unauthorized by any statute, and therefore in violation of the Non-Detention Act.

**SIXTH CAUSE OF ACTION: DEFENDANTS' DETENTION OF MR. PIERRE VIOLATES INA § 236(c), 8 U.S.C. § 1226(c), INTERPRETED IN LIGHT OF MR. PIERRE'S CONSTITUTIONAL RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS**

**(Habeas Defendants)**

83. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

84. Even assuming, *arguendo*, that Mr. Pierre is an "alien" within the meaning of the INA, ICE's prolonged detention of Mr. Pierre for more than eleven months violates 8 U.S.C. § 1226(c), interpreted in light of the Fifth Amendment.

85. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Freedom from physical restraint is a fundamental interest protected by the Due Process Clause. This liberty interest is threatened when an individual is subjected to unreasonable detention.

86. The Due Process Clause of the Fifth Amendment protects all persons residing in the United States. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

87. A foundational canon of statutory interpretation requires courts to interpret statutes in such a way that constitutional questions are avoided whenever possible.

88. To avoid violating the constitutional requirements of substantive due process under the Fifth Amendment to the Constitution, this Court must interpret INA § 236(c), 8 U.S.C. § 1226(c) as authorizing detention without an individualized hearing only where detention is of reasonable duration and where removal is reasonably foreseeable.

89. The more than eleven-month detention of Mr. Pierre without an individualized bond hearing is unreasonable in its duration. In Demore v. Kim, 538 U.S. 510 (2003), the Supreme Court

held that pre-final order detention without an individualized bond hearing was constitutionally permissible *only* when the period of detention was for a limited period of time. Id. at 526.

90. Both U.S. Courts of Appeals to issue published decisions considering the length of no-bond detention since Kim have held that 8 U.S.C. § 1226(c) authorizes detention without bond only for a reasonable amount of time. See Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (two years and eight month detention not expeditious and so not authorized by 8 U.S.C. § 1226(c)); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003) (eighteen-month no-bond detention not authorized by 8 U.S.C. § 1226(c)); cf. Casas-Castrillon v. DHS, 535 F.3d 942, 948 (9th Cir. 2008) (recognizing that 8 U.S.C. § 1226(c) was only meant to apply to "expeditious" proceedings).

91. Similarly, in Hyppolite v. Enzer, 2007 WL 1794096, No. 3:07cv729, at *1 (D. Conn. June 19, 2007), this Court held, "In order for 8 U.S.C. § 1226(c) to comport with the requirements of the Due Process Clause of the Fifth Amendment, its provisions for pre-removal no-bond detention without individualized bond hearing must be construed as limited to detention for a reasonable time period, including consideration of the length of petitioner's detention to date and the likelihood of petitioner actually being removed."

92. Removal must also be reasonably foreseeable for prolonged pre-final order detention to be constitutionally permissible. See Ly v. Hansen, 351 F.3d. at 273; Hyppolite v. Enzer, 2007 WL 179406 at *1. Even if Mr. Pierre were not a U.S. citizen, Mr. Pierre is eligible for and likely to receive deferral of removal under CAT, as evident from the BIA's prompt granting of his Motion to Reopen. Mr. Pierre is entitled to relief under CAT based upon the significant likelihood that he will be singled out for torture in a Haitian holding cell because

of his severe mental illness, stigmatized dreadlocks, and lack of family members. Therefore, his removal is not reasonably foreseeable.

93. Because he has been detained for more than eleven months and his eventual removal is unlikely, Mr. Pierre's continued no-bond detention is not authorized by 8 U.S.C. § 1226(c), interpreted in light of substantive due process concerns.

94. In addition, "procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' . . . interests within the meaning of the Due Process Clause." See Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The necessity of specific procedural protections under the Due Process Clause is assessed through a balancing of the following three factors: the private interest affected by official action; the risk of erroneous deprivation of that interest and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail. See id. at 335.

95. To avoid constitutional doubt, this Court must interpret INA § 236(c), 8 U.S.C. § 1226(c) as authorizing an individualized bond hearing when the private interest affected and the risk of erroneous deprivation of the private interest outweigh the government's interest in minimizing the burden of additional procedural requirements.

96. Mr. Pierre's liberty interest, the private interest affected by Habeas Defendants' actions, is overwhelming. Mr. Pierre has been detained by immigration authorities outside of his home state of Connecticut for over eleven months. Mr. Pierre is neither a flight risk nor a danger to the community.

97. In Mr. Pierre's case, the risk of erroneous deprivation of liberty is high and the value of an individualized bond hearing would be significant. Without a bond hearing, Mr. Pierre would

be subject to continued detention under Habeas Defendants' interpretation of 8 U.S.C. § 1226(c) for the duration of his newly reopened removal proceedings. However, given the opportunity for an individualized bond hearing, as required by a constitutionally valid interpretation of 8 U.S.C. § 1226(c), Mr. Pierre would present evidence that demonstrates he is neither a flight risk nor a danger to the community and is therefore eligible for release on bond.

98. The additional procedural safeguard of a bond hearing would provide Mr. Pierre protection from unjust incarceration. Individual assessment of the factors relevant to bond determination—flight risk and danger to the community—would provide Mr. Pierre with the opportunity to contest his continued detention.

99. The government's interest in the prolonged detention of an individual who is neither a flight risk nor a danger to the community and whose deportation is not reasonably foreseeable is minimal. Furthermore, the government has an interest in not wrongfully detaining a U.S. citizen—or someone with a colorable citizenship claim—in immigration detention.

100. Balancing Mr. Pierre's private liberty interest, the high risk of erroneous deprivation of liberty, the value of additional procedural safeguards, and the government's minimal interest in prolonged detention, Mr. Pierre's continued no-bond detention is not authorized by 8 U.S.C. § 1226(c).

**SEVENTH CAUSE OF ACTION: DEFENDANTS' DETENTION OF MR. PIERRE VIOLATES INA § 236(c), 8 U.S.C. § 1226(c), INTERPRETED IN LIGHT OF THE EIGHTH AMENDMENT**

**(Habeas Defendants)**

101. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

102. The Excessive Bail Clause of the Eighth Amendment prohibits the Government from setting conditions of release or detention that are "'excessive' in light of the perceived evil." United States v. Salerno, 481 U.S. 739, 754 (1987); see U.S. Const. amend. VIII. The Eighth Amendment authorizes pretrial detention without bail only when the government demonstrates a compelling interest other than the prevention of flight, and even then only if such detention is of limited duration.

103. A bedrock canon of statutory interpretation requires this Court to interpret statutes such that constitutional questions may be avoided when possible.

104. To avoid constitutional doubt, 8 U.S.C. § 1226(c) must be construed as authorizing no-bond detention only when there exists a compelling governmental interest other than the prevention of flight, and further, where the length of detention is limited.

105. Mr. Pierre does not pose a flight risk and is not a danger to the community.

106. Habeas Defendants do not have a compelling interest in Mr. Pierre's continued detention without an individualized bond hearing.

107. The more than eleven months of Mr. Pierre's detention exceed the constitutional limitations on the duration of no-bond pretrial detention.

108. Considering the government's lack of a compelling interest in Mr. Pierre's continued no-bond detention and the excessive length of time Mr. Pierre has already spent in detention, his continued no-bond detention is not authorized by 8 U.S.C. § 1226(c) when read in light of the Excessive Bail Clause.

**EIGHTH CAUSE OF ACTION: DEFENDANTS' DETENTION OF MR. PIERRE VIOLATES HIS FIFTH AMENDMENT RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS**

**(Habeas Defendants)**

109. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

110. Interpreting INA § 236(c), 8 U.S.C. § 1226(c) as authorizing prolonged no-bond detention when the likelihood of ultimate removal is low would violate the requirements of both substantive and procedural due process. This is especially true in light of the fact that Mr. Pierre is a U.S. citizen, or at the very least an individual with a colorable claim to U.S. citizenship.

**Substantive Due Process**

111. Substantive due process principles forbid the infringement of fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling government interest.

112. Freedom from physical restraint is a liberty interest protected by substantive due process. See Zadvydas v. Davis, 533 U.S. 678, 690 (2001). Mr. Pierre's interest in liberty after more than eleven months of detention is a fundamental liberty interest.

113. The continued no-bond detention of an individual who, like Mr. Pierre, at the very least has a colorable claim to U.S. citizenship, and does not pose a danger to the community or a flight risk, is not narrowly tailored to serve a compelling government interest. Interpreting 8 U.S.C. § 1226(c) as authorizing Mr. Pierre's continued detention without a bond hearing violates his substantive due process rights.

**Procedural Due Process**

114. In addition, procedural due process requires that the government be constrained before it acts in a way that deprives individuals of "liberty" interests protected under the Due Process Clause of the Fifth Amendment. See Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

115. Under the Mathews balancing test, Mr. Pierre's private liberty interest is overwhelming, particularly given his U.S. citizenship. The risk that he has been deprived of his liberty erroneously is high due to the fact that no court of law has adjudicated Mr. Pierre's colorable claim to U.S. citizenship, and due to the failure of the IJ to provide Mr. Pierre with an individualized bond hearing, in which Mr. Pierre would present evidence that demonstrates he is neither a flight risk nor a danger to the community.

116. The government's interest in the continued detention of Mr. Pierre without an individualized bond hearing is slight, considering that he is neither a flight risk nor a danger to the community. Furthermore, the government has an interest in not wrongfully incarcerating a U.S. citizen in immigration detention.

117. Interpreting 8 U.S.C. § 1226(c) as authorizing Mr. Pierre's continued detention without an individualized bond hearing violates his procedural due process rights.

**NINTH CAUSE OF ACTION: DEFENDANTS' DETENTION OF MR. PIERRE VIOLATES THE EIGHTH AMENDMENT EXCESSIVE BAIL CLAUSE**

**(Habeas Defendants)**

118. Mr. Pierre repeats and realleges each and every allegation contained in the preceding paragraphs as though fully set forth herein.

119. The Excessive Bail Clause of the Eighth Amendment prevents prolonged detention without a bond hearing when there is no compelling government interest other than the prevention of flight.

120. Interpreting 8 U.S.C. § 1226(c) as authorizing prolonged no-bond detention when there is no compelling government interest other than the prevention of flight violates the requirements of the Excessive Bail Clause of the Eighth Amendment. The close to year-long, no-bond detention of Mr. Pierre, who is neither a flight risk nor a danger to the community, serves no compelling government interest.

121. Thus, interpreting 8 U.S.C. § 1226(c) as authorizing Mr. Pierre's continued detention without a bond hearing violates his rights under the Excessive Bail Clause of the Eighth Amendment.

**PRAYER FOR RELIEF**

**WHEREFORE**, Mr. Pierre prays that this Court assume jurisdiction over this matter and grant the following relief:

a. Enter a judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, declaring that Mr. Pierre automatically derived citizenship under former 8 U.S.C. § 1432(a)(3), interpreted in light of the Constitution.

b. Issue a Writ of Habeas Corpus requiring Habeas Defendants to release Mr. Pierre immediately. In the alternative, enter a judgment declaring that Habeas

Defendants' prolonged detention of Mr. Pierre is unauthorized by statute, contrary to law, and unconstitutional, and issue an order requiring Habeas Defendants to hold a constitutionally valid individualized bond hearing.

c. Hold unlawful and set aside USCIS Defendants' failure to approve Mr. Pierre's application for naturalization, and either approve Mr. Pierre's application *nunc pro tunc* or make a prima facie determination of eligibility for naturalization *nunc pro tunc*. In the alternative, issue an order pursuant to 5 U.S.C. § 706(1), and a Writ of Mandamus pursuant to 28 U.S.C. § 1361, compelling USCIS Defendants to approve or adjudicate the application *nunc pro tunc* and provide a written copy of the decision.

d. Award Mr. Pierre his reasonable costs and attorneys' fees; and

e. Grant any other and further relief that this Court may deem fit and proper.

DATED: December 23, 2009

Respectfully submitted,

/s/

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