Honorable James L. Robart
Honorable Mary Alice Theiler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VINCENT FREDRICS BANDA, Petitioner, v. KIRSTJEN NIELSEN, Secretary of the United States Department of Homeland Security, et al., Respondents.	Case No. C18-1841 JLR-MAT Agency No. A 213-076-035 **TRAVERSE AND OPPOSITION TO RESPONDENTS' MOTION TO DISMISS** NOTED ON MOTION CALENDAR: February 22, 2019 ORAL ARGUMENT REQUESTED

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INTRODUCTION

Petitioner Vincent Fredrics Banda is an asylum seeker from Malawi who Respondents have detained at the Northwest Detention Center for over 15 months. During that time, Respondents have repeatedly continued Mr. Banda's immigration proceedings while attempting to locate a translator, further lengthening his detention by several months, without providing any opportunity to appear before an immigration judge (IJ) for an individualized custody hearing to determine if his prolonged detention is justified. And indeed, unless Mr. Banda prevails on his application for relief before the immigration court on February 26, and unless the government waives appeal of that decision, he is likely to face at least *another year* in detention.

In their return memorandum, Respondents point to their statutory authority to *initially* hold Mr. Banda without a custody hearing, as well as a recent Supreme Court case interpreting that statute. Dkt. 6 at 7-10; *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). But they ignore the voluminous precedent that makes clear that Mr. Banda's prolonged detention violates the Constitution. Indeed, since *Jennings*, the Ninth Circuit has expressed "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). Consistent with those "grave doubts," several federal courts have granted petitions for writs of habeas corpus from arriving noncitizens like Mr. Banda suffering prolonged detention, and ordered the government to justify those noncitizens' continued detention in a hearing before a neutral decision maker where it bears the burden of proof. *See infra* p. 8 (citing cases).

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Mr. Banda respectfully requests that this Court, too, vindicate his constitutional rights to due process and freedom from arbitrary detention, grant his petition for a writ of habeas corpus, and order that he be released or receive a bond hearing within two weeks of this Court's order.

STATEMENT OF FACTS

Vincent Frederics Banda is an asylum seeker from Malawi who arrived in the United States on November 8, 2017, at the SeaTac International Airport with a B1/B2 visa. Dkt. 8-2, Form I-213 at 2. After reviewing an invitation letter that Mr. Banda brought with him, a Customs and Border Protection (CBP) official referred Mr. Banda to secondary inspection. *Id.* A CBP officer then determined that Mr. Banda was inadmissible to the United States under 8 U.S.C. § 1182(a)(7)(A)(i)(I) as an arriving noncitizen without a valid visa. *Id.*

During the secondary inspection, Mr. Banda expressed a fear of returning to Malawi based on deadly attacks that he had suffered there. *Id.* at 2-3; Dkt. 1¶¶ 18, 22. After determining he was inadmissible, CBP transferred Mr. Banda to the custody of Immigration and Customs Enforcement (ICE) for proceedings under 8 U.S.C. § 1225, which guarantees noncitizens an opportunity to demonstrate that they have a credible fear of returning to their country of origin before an asylum officer. Dkt. 8-2, Form I-213 at 2-3; *see also* Dkt. 7, Carranza Decl. ¶ 7. ICE referred the claim to U.S. Citizenship and Immigration Services (USCIS) so that an asylum officer could assess whether Mr. Banda had a credible fear of return to Malawi. Dkt. 7, Carranza Decl. ¶ 7; *see also* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(i). USCIS scheduled Mr. Banda for a credible fear interview on November 22, 2017. Dkt. 7, Carranza Decl. ¶¶ 8-9. However, at the interview, the asylum officer was unable to locate a translator, and instead issued Mr. Banda a Notice to Appear in immigration court so that he could pursue his asylum claim. Dkt. 8-8, Notice to Appear; Dkt. 8-9, USCIS Memorandum.

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The government's difficulties in locating adequate and competent translation for Mr. Banda have continued throughout his immigration proceedings. At Mr. Banda's first appearance before the immigration court on January 9, 2018, at a master calendar hearing (MCH),[1] Mr. Banda indicated that he wished to proceed in his native language, Chichewa. Dkt. 7, Carranza Decl. ¶ 11. The immigration court continued the hearing until February 20, 2018, to locate an interpreter. *Id.* ¶¶ 11, 13. At the second MCH, the immigration court provided a telephonic Nyanja interpreter that Mr. Banda was unable to understand. *Id.* ¶ 13. As a result, the immigration court again continued Mr. Banda's hearing until April 9, 2018. *Id.*

While waiting for his April hearing, Mr. Banda requested a bond hearing. Dkt. 8-11, Motion for Bond Hearing. That request was denied after the immigration court determined that it lacked jurisdiction because Mr. Banda was an arriving noncitizen subject to mandatory detention. Dkt. 8-12, IJ Custody Order. Then, at Mr. Banda's third MCH on April 9, 2018, ICE requested a continuance "to determine if it wished to amend the NTA, provide additional evidence, or set a contested removal hearing." Dkt. 7, Carranza Decl. ¶ 16. The immigration court continued the case until April 23, 2018. *Id.* At the fourth MCH on April 23, 2018, the court scheduled another hearing for May 29, 2018. *Id.* At both hearings in April, Mr. Banda proceeded with the assistance of a translator despite having difficulties understanding the translators the government provided. *Id.* ¶¶ 16-17; Dkt. 1 at 6.

On May 29, 2018—over six months after being detained—Mr. Banda attended his fifth hearing before the immigration court. Dkt. 7, Carranza Decl. ¶ 20. However, this hearing could not proceed because an interpreter was unavailable. *Id.* The immigration court continued the case

[1] Immigration proceedings involve two types of hearings. Master calendar hearings address scheduling, pleadings, and other administrative matters, while individual hearings concern the merits of a noncitizen's application for relief from removal. *See* Imm. Ct. Prac. Manual §§ 4.15-4.16.

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for *another five months*, scheduling the merits hearing on his asylum application for October 31, 2018. *Id.* All the while, Mr. Banda remained in detention. However, at that October hearing, the immigration court was again unable to secure an interpreter to proceed with the hearing. *Id.* ¶ 21. As a result, the court again continued Mr. Banda's case for several more months, until February 2019. Mr. Banda has remained in detention throughout the entirety of this process, which has now lasted well over a year. At no point during his 15 months of detention has Mr. Banda had the opportunity to contest his continued detention in a bond hearing.

ARGUMENT

Respondents have detained Mr. Banda for well over a year without ever justifying that continued detention before a neutral decision maker. The government defends their actions by pointing to the Supreme Court's recent holding in *Jennings* and the text of 8 U.S.C. § 1225(b), which governs Mr. Banda's detention. But that decision does not address the constitutional concerns that Mr. Banda's prolonged detention presents. Those constitutional concerns—which the Supreme Court and the Ninth Circuit have repeatedly expressed—demonstrate that (1) *Jennings* does not preclude the relief sought by Mr. Banda, (2) that his prolonged detention is no longer reasonably related to its purpose, and accordingly, (3) that he is entitled to a bond hearing where the government bears the burden to justify his continued detention. Moreover, the Supreme Court's framework for assessing due process claims from *Mathews v. Eldridge*, 424 U.S. 319 (1976), also dictates that Mr. Banda is entitled to a hearing. As a result, Mr. Banda respectfully requests that Court grant his petition.

I. The Constitution Prohibits Prolonged Detention Without Adequate Procedural Protections, Even After *Jennings*.

In his petition for a writ of habeas corpus, Mr. Banda details at length the constitutional framework that guarantees his right to a hearing before a neutral decision maker where the

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government must justify his continued detention by clear and convincing evidence. Dkt. 1 at 8-16. Respondents do not address this constitutional framework in their return memorandum. In justifying Mr. Banda's prolonged detention, Respondents primarily point to 8 U.S.C. § 1225(b) and *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which interprets that statute. Dkt. 6 at 7-10. But as Mr. Banda details in his habeas petition and below, *Jennings* explicitly refrained from addressing whether prolonged immigration detention without a bond hearing violates due process, while the Ninth Circuit—as well as other Supreme Court precedent—has repeatedly indicated that it does. This conclusion is further underscored by a series of recent district court decisions granting habeas petitions to arriving noncitizens like Mr. Banda. As a result, there should be little doubt that Mr. Banda's continued detention without adequate procedural protections violates the Constitution.

As Respondents note, Dkt. 6 at 7-8, they have detained Mr. Banda under 8 U.S.C. § 1225(b)(1)(B)(ii), which mandates detention of those who pass a credible fear interview during "further consideration of the application for asylum." In *Jennings*, the Supreme Court rejected the Ninth Circuit's statutory interpretation, holding that the language of § 1225(b) does not contain an implicit six-month limitation after which a bond hearing is required to justify continued detention. 138 S. Ct. at 843-46. However, the Court added that "it had no occasion to consider [the detainees'] constitutional arguments on their merits." *Id.* at 851. In other words, the Court left it for lower courts to address in the first instance whether prolonged detention without adequate procedural protections past six months violates the Constitution, even if the text of the Immigration and Nationality Act (INA) would otherwise authorize such detention.

A long line of cases leaves little doubt that the Constitution indeed prohibits such prolonged detention. First, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court

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examined the constitutionality of prolonged detention following the removal period as defined by 8 U.S.C. § 1231(a)(6). The Court made clear that the detention runs afoul of the Constitution where it is no longer reasonably related to its purpose of ensuring that an individual is available for removal. 533 U.S. at 690. Thus, the Court held that the government must demonstrate that a noncitizen's removal is reasonably likely to occur in the foreseeable future in order to continue detaining that noncitizen after six months beyond § 1231(a)(6)'s removal period. 533 U.S. at 701. The *Zadvydas* court also established that continued detention after six months is no longer "presumptively reasonable," creating an important benchmark for courts to assess the constitutionality of long-term immigration detention. *Id.*

Next, in *Demore v. Kim*, 538 U.S. 510 (2003), the Court applied similar principles to immigration detention taking place *during* removal proceedings, as is the case here. There, the Court upheld the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) "for the brief period necessary for . . . removal proceedings." 538 U.S. at 523. The Court distinguished *Zadvydas* on the basis that the detention at issue in *Demore* was "of much shorter duration" than that at issue in *Zadvydas*, and that most cases lasted only 47 days, or in cases where the noncitizen appeals, an additional four months. *Id.* at 528-29. As a result, the Court concluded that the same constitutional infirmities that existed in *Zadvydas* were not present because the detention in *Demore* lasted for only a "brief period." *Id.* at 513.

Since *Zadvydas* and *Demore*, the Ninth Circuit has recognized that detention during removal proceedings continues to present constitutional problems when it extends beyond six months. As the Court of Appeals has observed, "[r]eferences to the brevity of mandatory detention . . . run throughout *Demore*," making clear that "prolonged detention without adequate procedural protections . . . raise[s] serious constitutional concerns." *Casas-Castrillon v. Dep't of*

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Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008). Given those concerns, every court of appeals to confront the issue since *Demore* has found either that the INA or due process require a hearing or release for noncitizens subject to unreasonably prolonged detention pending removal proceedings. *See, e.g.*, *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060, 1074 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003).[2]

Jennings has not altered the constitutional concerns these cases expressed. On remand from *Jennings*, the Ninth Circuit noted that it continues to harbor "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional." *Marin*, 909 F.3d at 256. Respondents do not cite *Marin*, respond to its concerns, or otherwise explain why constitutional problems with prolonged detention dissipated after *Jennings*. Similarly, *Jennings* did nothing to overrule the constitutional presumption that detention following six months is unconstitutional and requires that the government justify continued detention. *See Zadvydas*, 533 U.S. at 701; *see also McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 250-52 (1972) (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment).

Several federal courts have recognized that *Jennings* did not erase the constitutional problems prolonged immigration detention presents, including for arriving noncitizens detained under 8 U.S.C. § 1225(b), like Mr. Banda. *See, e.g.*, *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794, at *9 (S.D.N.Y. Dec. 27, 2018) (R. & R.) ("*Jennings* did not reach the

[2] *Jennings* abrogated the statutory rulings in these cases. However, the constitutional concerns these cases expressed remain informative for habeas petitions like Mr. Banda's.

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constitutional questions animating this lawsuit, such as whether the mandatory detention provisions of § 1225(b) and § 1226(c) violate the Due Process Clause, either facially or as applied to [noncitizens] whose detention has become unusually prolonged."). Indeed, faced with such prolonged detention of arriving noncitizens, these courts have ordered bond hearings before a neutral decision maker where the government bears the burden of proof. *See, e.g.*, *id.* at *15; *De Ming Wang v. Brophy*, No. 17-cv-6263-FPG, 2019 WL 112346, at *3 (W.D.N.Y. Jan. 4, 2019) (granting habeas petition for arriving noncitizen detained under 8 U.S.C. § 1225(b) and ordering that noncitizen receive bond hearing); *Kouadio v. Decker*, --- F. Supp. 3d ---, 2018 WL 6807439, at *5 (S.D.N.Y. Dec. 27, 2018) (same); *Lett v. Decker*, 346 F. Supp. 3d 379, 388 (S.D.N.Y. 2018) (same); *Pierre v. Doll*, --- F. Supp. 3d ---, 2018 WL 5315203, at *4 (M.D. Penn. Oct. 26, 2018) (same); *Perez v. Decker*, No. 18-cv-5279, 2018 WL 3991497, at *6 (S.D.N.Y. Aug. 20, 2018) (same); *Destine v. Doll*, No. 3:17-cv-1340, 2018 WL 3584695, at *5 (M.D. Penn. July 26, 2018) (same). These cases underscore that the relief that Mr. Banda seeks remains viable after *Jennings*, and the constitutional concerns courts expressed prior to that case continue to govern cases like Mr. Banda's.

II. Mr. Banda's Detention Is Prolonged and He Is Therefore Entitled to a Hearing Before a Neutral Decision Maker Where the Government Must Justify His Continued Detention.

As Mr. Banda details below, applying these principles makes clear his continued detention violates the Constitution. First, his detention became "prolonged" at six months and is unreasonable even under a case-by-case approach. Second, because his detention is prolonged, the Due Process Clause requires that Mr. Banda receive an individualized hearing before a neutral decision maker where the government bears the burden of proof to justify his continued detention. Finally, the *Mathews* due process framework also supports providing Mr. Banda a bond hearing.

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A. Mr. Banda's Detention Is "Prolonged."

First, as Mr. Banda noted above, six months marks the point at which Mr. Banda's detention became "prolonged." *Zadvydas* and Court of Appeals decisions interpreting the INA's detention statutes prior to *Jennings* used the six-month mark to shift the burden to the government to justify detention, or to require bond hearings where the government must do the same. *Zadvydas*, 533 U.S. at 701; *Rodriguez III*, 804 F.3d at 1077 ("Prior decisions have also clarified that detention becomes 'prolonged' at the six-month mark."); *Lora*, 804 F.3d at 606. Moreover, the Supreme Court has used six months as a benchmark to limit imprisonment without a jury and to limit civil commitment. *See Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (jury required to impose sentence over six months); *McNeil*, 407 U.S. at 249, 250-52 (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment).

Even if the six-month mark does not make detention "prolonged" in every case, a case-by-case "reasonableness" approach demonstrates that Mr. Banda's 15-month detention is unreasonably prolonged. Courts using "reasonableness" factors to determine whether detention is prolonged usually assess (1) whether the noncitizen has raised a "good faith" challenge to removal—that is, the challenge is "legitimately raised" and presents "real issues," *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015), (2) the length of detention, *id.* at 477-78, and (3) the likelihood that detention will continue during the noncitizen's remaining immigration proceedings, *id.*, 783 F.3d at 478; *see also Reid*, 819 F.3d at 500; *accord Sopo*, 825 F.3d at 1217-18.

Each of these factors supports Mr. Banda's petition. As Respondents note, Mr. Banda expressed a fear of returning to Malawi when he arrived in the United States and later submitted

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an application for asylum. Dkt. 6 at 4, 6; *see also* Dkt. 7, Carranza Decl. ¶ 19. Congress established the right to apply for asylum for those who would otherwise be subject to expedited removal, 8 U.S.C. §§ 1225(b), 1158, reinforcing that this form of relief is critical to the removal process. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1230 (9th Cir. 2018). Notably, the government has not argued that Mr. Banda's application is frivolous or raised in bad faith. Indeed, Mr. Banda previously fled Malawi to escape deadly attacks. Dkt. 1 ¶ 18. As a result, it is clear that Mr. Banda has raised a good faith challenge to the removal process.

The second factor also weighs in Mr. Banda's favor. Respondents have detained him over 15 months—nearly 2.5 times the "presumptively reasonable" period of detention in *Zadvydas*. 533 U.S. at 701; *see also, e.g.*, *Garcia Gonzalez v. Bonnar*, No. 3:18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal. Jan. 25, 2019) (finding that immigration detention that "will last at least 15-17 months in total . . . is four times the 'brief' detention approved in *Demore*," thus supporting petitioner's due process claim (footnote omitted)). Moreover, Mr. Banda is not responsible for the lengthy delays in his proceedings, which have resulted from the government's difficulties in identifying and securing an adequate translator. Respondents attempt to avoid blame for the interpreter problems by pointing to the Executive Office of Immigration Review as the delay culprit. Dkt 6 at 11-12. But as the *Sopo* court made clear, "[e]rrors by the immigration court or the [Board of Immigration Appeals (BIA)] that cause unnecessary delay are also relevant" to determining whether continued detention is reasonable. 825 F.3d at 1218; *see also Reid*, 819 F.3d at 500 (stating that the "promptness (or delay) of the immigration authorities" bears on the reasonableness of "continued categorical detention"); *Diop*, 656 F.3d at 234 (weighing "immigration judge's numerous errors" against government in assessing reasonableness of detention). Furthermore, EOIR has had several opportunities to realize that

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translation will present a difficulty in this case, and has nevertheless failed to address that problem by finding an adequate translator. *See supra* pp. 3-4.[3] Finally, regardless of who caused the delay here, the length of time itself is well-within the period that other courts have deemed unreasonable. Indeed, courts facing similar lengths of detention have ordered the government to provide bond hearings, further supporting the conclusion that Mr. Banda's detention has become unreasonably prolonged. *See Bermudez Paiz*, 2018 WL 6928794, at *1 (recommending bond hearing for arriving noncitizen detained for 16 months); *Lett*, 2018 WL 4931544, at *5 (ordering bond hearing for arriving noncitizen detained for 10 months); *Destine*, 2018 WL 3584695, at *5 (ordering bond hearing for arriving noncitizen detained 21 months); *cf. Demore*, 538 U.S. at 528-29 (contrasting the detention in *Zadvydas* with the "much shorter duration[s]" of "47 days" and "four months"); *Garcia Gonzalez*, 2019 WL 330906 at *5, 7 (ordering bond hearing for individual detained over one year, where both the petitioner and government each contributed to delay in removal proceedings).

Finally, the length of Mr. Banda's future detention weighs strongly in his favor, as it likely to continue from six months to two years. *See Garcia Gonzalez*, 2019 WL 330906, at *5 ("The Court thus concludes, as have nearly all the other courts to consider this issue, that the starting point of the analysis is the length of detention—both how long the petitioner has been detained and how long the detention is likely to last."). Even assuming Mr. Banda's merits

[3] Respondents also appear to cast blame on Mr. Banda for the translation problems, since he chose to proceed in his native language. For example, Respondents note that "English is an official language of Malawi," that Mr. Banda "elec[ted] to proceed in English at times," and that Mr. Banda is "fairly proficient in English." Dkt. 6 at 11. Given the high stakes involved in immigration proceedings—especially asylum proceedings—Respondents' efforts to minimize the need for interpretation is completely without merit. Both the statute and the Due Process Clause require that he be afforded appropriate interpretation services. 8 U.S.C. § 1229a(b)(4); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2001) ("[A] competent translation is fundamental to a full and fair hearing."); *see also, e.g.*, *He v. Ashcroft*, 328 F.3d 593, 599 (9th Cir. 2003) (criticizing immigration judge for failing to secure an interpreter in that spoke the noncitizen's dialect).

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hearing proceeds as planned in late February and the IJ grant him relief, the Department of Homeland Security (DHS) may appeal, and Mr. Banda will remain in custody throughout the administrative appeal. Alternatively, if relief is denied by the IJ, Mr. Banda, who fears for his life, will exercise his statutory right to seek administrative and judicial review if necessary. He may first seek review of that decision from the BIA, 8 C.F.R. § 1003.3(a)(1), and later, appeal to the Ninth Circuit Court of Appeals, *see* 8 U.S.C. § 1252(a)-(b). Any order of removal Mr. Banda might receive from the IJ would not become enforceable until the conclusion of his BIA appeal. 8 C.F.R. § 1003.6(a).

The appeals process is lengthy. Administrative appeals for detainees like Mr. Banda typically takes around six months. *See, e.g.*, 8 C.F.R. § 1003.1. Once Mr. Banda finishes the administrative appeals process, he may remain in detention for up to two additional years while appealing to the Ninth Circuit. *See* U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions, https://www.ca9.uscourts.gov/content/faq.php (Dec. 2018); *see also Rodriguez III*, 804 F.3d at 1072 (noting that Ninth Circuit appeals on average add eleven months of confinement). While ICE may seek to remove Mr. Banda during this period, he is entitled to seek a stay of removal, and the Court of Appeals provides for an automatic stay while it adjudicates the merits of the motion. Ninth Circuit General Order 6.4(c)(1). Such removal is far from guaranteed: the agency may either choose not to execute the removal order, or the Ninth Circuit could issue a stay of removal pending the case's outcome. *See Nken v. Holder*, 556 U.S. 418, 422 (2009). As a result, Mr. Banda's removal is not foreseeable in the near future.

B. The Constitution Requires Respondents to Justify Mr. Banda's Continued Detention by Clear and Convincing Evidence before a Neutral Decisionmaker.

Due process requires that Respondents provide Mr. Banda with a bond hearing before an IJ where they bear to burden to justify continued detention. It is well-established that once

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immigration detention becomes prolonged—and thus constitutional concerns arise—due process requires that a noncitizen "receiv[e] an individualized determination of the necessity of detention before a neutral decision maker," *Casas-Castrillon*, 535 F.3d at 950, where the government must justify such detention by "clear and convincing evidence," *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011).

To satisfy this "individual hearing" requirement, the Ninth Circuit has repeatedly required the government to justify its continued detention of noncitizens at bond hearings before IJs. *See Rodriguez III*, 804 F.3d at 1087; *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011); *Casas-Castrillon*, 535 F.3d at 952. As noted above, several federal courts since *Jennings* have employed the same practice to remedy individual cases of noncitizens facing prolonged detention. *See supra* p. 8. Indeed, this Court has done the same, recognizing that "[t]o detain a noncitizen for a prolonged period of time while removal proceedings are pending, due process requires the government to show by clear and convincing evidence that the detainee presents a flight risk or a danger to the community at the time of the bond hearing." *Calderon-Rodriguez v. Wilcox*, No. C18-1373-JLR-MAT, 2019 WL 487709, at *6 (W.D. Wash. Jan. 9, 2019) (R. & R.); *see also Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1147 (N.D. Cal. 2018) (holding that noncitizen facing prolonged detention has the right to "a bond hearing at which DHS must justify his continued detention"). The Court should reach the same conclusion here.

In addition, at these hearings, the government must prove by clear and convincing evidence that the noncitizen represents a danger to the community or presents a flight risk. *Singh*, 638 F.3d at 1204-05; *see also Bermudez Paiz*, 2018 WL 6928794, at *15 ("[T]he overwhelming consensus of judges in this District—both before and after *Jennings*—is that once a[] [noncitizen's] immigration detention has become unreasonably prolonged, he or she is entitled to

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a bond hearing at which the government bears the burden . . . ."); *Calderon-Rodriguez*, 2019 WL 487709, at *6 (in case involving detention under 8 U.S.C. § 1226(a), ordering petitioner receive a bond hearing where government bears the burden by clear and convincing evidence); *De Ming Wang*, 2019 WL 112346, at *3 (ordering bond hearing in which the government must justify arriving noncitizen's continued detention by clear and convincing evidence); *Lett*, 346 F. Supp. 3d at 389 (ordering the same); *Kouadio*, 2018 WL 6807439, at *5 (same). That requirement is consistent with a long line of Supreme Court precedent requiring the government bear the burden of proof in civil detention schemes. Dkt. 1 at 13; *see also United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pre-trial detention where the detainee was afforded a "full-blown adversary hearing," requiring "clear and convincing evidence" before a "neutral decisionmaker"); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding administrative custody review procedures deficient because, inter alia, they placed burden of proof on detainee). Nor did *Jennings* alter the holding of Court of Appeals cases concluding the government bears the burden to justify continued detention. *Garcia Gonzalez*, 2019 WL 330906, at *6 (citing cases). Respondents do not address this conclusion in their return memorandum, and instead argue Mr. Banda is entitled to no bond hearing whatsoever. Dkt. 6 at 10-12. But case law makes clear Mr. Banda is entitled to a bond hearing, and the government must shoulder the burden of proof to justify his continued detention.

Respondents cannot seriously contend Mr. Banda "did receive a bond hearing before an IJ" and is thus not entitled to a periodic bond hearing. Dkt. 6 at 9-10. As Respondents acknowledge, the immigration court never held a hearing on the *merits* of whether Mr. Banda was entitled to bond. Instead, the court did not proceed with the hearing on the ground that it

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lacked jurisdiction. *See id.*; Dkt. 8-12, Imm. Ct. Bond Order. Respondents also suggest Mr. Banda did not exhaust his administrative remedies by appealing the IJ's conclusion regarding jurisdiction, but then immediately concede doing so would futile. Dkt. 6 at 10. Indeed, Respondents' entire argument depends on a statute the government reads as prohibiting Mr. Banda from receiving a bond hearing under *Jennings*, underscoring the futility of any such administrative appeal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); *see also Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541-42 (9th Cir. 2004) (futility provides reason to waive exhaustion requirement). As a result, this Court should reject Respondents' efforts to confuse the issue.

C. The *Mathews* Due Process Analysis Also Demonstrates Mr. Banda Is Entitled to a Bond Hearing.

Lastly, Respondents also argue Mr. Banda is not entitled to a hearing under the due process framework provided in *Mathews v. Eldridge*. The three-part test articulated in that case looks to (1) Mr. Banda's private interests, (2) the government's interest, and (3) the value added by additional safeguards to assess whether due process requires a bond hearing. 424 U.S. at 335. The application of the test tilts decidedly in Mr. Banda's favor.

First, Mr. Banda possesses a strong interest in personal liberty—and more to the point, procedures that guarantee Respondents do not arbitrarily deprive him of that liberty. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690; *see also Marin*, 909 F.3d at 256 (expressing "grave doubts" a mandatory detention system that provides no process to noncitizens to protect against arbitrary detention satisfies due process). Thus, "[i]n the context of immigration detention, it is well-settled that 'due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding

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physical restraint.'" *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Singh*, 638 F.3d at 1203)). As a result, and as the Ninth Circuit has repeatedly made clear, Mr. Banda's interests in receiving a bond hearing are "profound," *Diouf*, 634 F.3d at 1092, and "unquestionably substantial," *Singh*, 638 F.3d at 1208.

Respondents ignore this well-established law, and instead attempt to diminish Mr. Banda's interest and obfuscate the matter by (1) claiming Mr. Banda "has been afforded many opportunities to be heard" because of the hearings that have taken place in his removal proceedings, Dkt. 6 at 10, (2) by again shifting blame to EOIR regarding the translation problems, *id.* at 11, (3) by asserting that Mr. Banda's case will soon be over, *id.*, and (4) by resorting once more to *Jennings* and the statutory language authorizing Mr. Banda's detention, *id.* at 11-12. None of these rationales regarding Mr. Banda's interest withstand scrutiny.

As to the government's first argument, it is disingenuous for Respondents to point to Mr. Banda's preliminary removal hearings, as they provide no individualized custody determinations and no opportunity to challenge his continued detention. Only individualized custody hearings, i.e., bond hearings, test whether Respondents' interest in securing Mr. Banda's presence at removal proceedings is reasonably related to his continued detention. But at no point has Mr. Banda ever received a bond hearing where Respondents must justify his continuing detention on that basis—a fact Respondents do not contest. As Mr. Banda described above, the preliminary removal hearings he received addressed only administrative matters related to his immigration case or the merits of his immigration application. *See supra* pp. 3-4. This Court should strongly reject Respondents' invitation to erroneously conflate Mr. Banda's *immigration* hearings with a *bond* hearing. As Mr. Banda detailed above, courts have repeatedly ordered bond hearings to

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protect the "profound" interest noncitizens like Mr. Banda have in their liberty. *See supra* pp. 8, 14.

The government's remaining arguments regarding Mr. Banda's interests are also unavailing. This Court should not excuse EOIR's obligation to provide Mr. Banda with adequate interpretation. Respondents cannot diminish Mr. Banda's liberty interests by simply shifting blame to another agency, or by citing to the general "scarcity of available and competent [Chichewa] interpreters." Dkt. 6 at 12. Courts have repeatedly made clear EOIR's errors and delays only make continued detention more unreasonable. *See supra* pp. 10-11. Mr. Banda has also demonstrated that his immigration case—and therefore his detention—is unlikely to end soon if the IJ were to deny his asylum application. *See supra* pp. 11-12. Finally, as Mr. Banda explained above, his detention is not cured by a statute that *initially* authorizes mandatory detention. *See supra* pp. 13-15. Indeed, that statute is precisely why Mr. Banda seeks habeas relief, by presenting constitutional questions the Supreme Court reserved for lower courts. *Id.* Resolving those questions requires applying the constitutional analysis Mr. Banda has outlined here—and that analysis demonstrates he has a strong interest in receiving a bond hearing.

Mr. Banda's interests also extend beyond his "unquestionably substantial" liberty interests. Respondents ignore that immigration detainees face severe hardships while incarcerated by ICE. Indeed, "the circumstances of [detainees'] detention are similar, so far as we can tell, to those in many prisons and jails." *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting); *see also Rodriguez III*, 804 F.3d at 1073 ("Civil immigration detainees are treated much like criminals serving time."); *accord Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999). "And in some cases the conditions of their confinement are inappropriately poor." *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting) (citing DHS Office of Inspector General report on instances

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of invasive procedures, substandard care, and mistreatment, *e.g.*, indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lockdown for sharing a cup of coffee with another detainee).

Respondents treat the last two *Mathews* factors—their interest in continuing to detain Mr. Banda for over 15 months and the value of additional safeguards—together. In short, Respondents assert that they have an interest in "securing [Mr. Banda's] presence for removal." Dkt. 6 at 12. But Respondents fail to address that his removal has not occurred for over 15 months, and will not occur in the reasonably foreseeable future. Moreover, Respondents fail to engage with the alternatives to detention that achieve the same purpose, and which Mr. Banda cited in his petition. Dkt 1 ¶ 66; *see also Hernandez*, 872 F.3d at 991. Instead they claim "[t]here are no alternative procedural safeguards that are necessary other than what has already been provided in this case." Dkt. 6 at 12.

This Court should reject Respondents' unsupported assertions. Respondents have not conducted any analysis to consider alternative safeguards, either through requiring a bond, or requiring Mr. Banda report in person on a periodic basis. Instead, they rest only on their position that he is subject to mandatory detention under the 8 U.S.C. § 1225(b). However, a bond hearing is the only procedural safeguard that will meaningfully protect Mr. Banda's liberty interest. Notably, at a bond hearing, a neutral immigration judge will also consider the government's interests in continuing to detain Mr. Banda. The IJ—and not the agency seeking to detain and remove Mr. Banda—can then decide whether continued detention is needed, or whether alternatives are appropriate.

Furthermore, providing Mr. Banda with a bond hearing will entail virtually no "fiscal and administrative burdens" for the government. *Mathews*, 424 U.S. at 335. For example, in *Singh*,

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the Ninth Circuit concluded additional safeguards in bond proceedings created only "a minimal additional burden" on the government where the infrastructure to provide those safeguards already existed. 638 F.3d at 1209. Respondents do not claim they would experience fiscal or administrative burdens by providing Mr. Banda with a bond hearing; nor can they, since bond hearings already regularly occur in immigration court. As a result, this Court should follow the Ninth Circuit's lead in *Singh* and require the government to provide Mr. Banda with adequate procedural protections.

Lastly, alternatives to detention, such as post-release supervision programs, demonstrate that detention is largely unnecessary and diminish Respondents' interest in continuing to detain Mr. Banda. As the Ninth Circuit recently observed, Respondents have at their disposal tools which virtually ensure Mr. Banda's continued appearance for immigration proceedings, and, if necessary, his removal. For example, "the Intensive Supervision Appearance Program [(ISAP)]—which relies on various alternative release conditions—resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings." *Hernandez*, 872 F.3d at 991. Alternatives to detention like ISAP use in-person appointments, phone calls, and other tools to ensure released noncitizens attend required court hearings and other meetings. *See* Am. Immigration Lawyers' Ass'n et al., *The Real Alternatives to Detention*, https://www.aila.org/File/DownloadEmbeddedFile/72314 (June 27, 2017).

Accordingly, application of the *Mathews* factors weighs strongly in favor of providing Mr. Banda with a bond hearing.

CONCLUSION

For the foregoing reasons, Mr. Banda respectfully request that this Court grant his petition for a writ of habeas corpus and order he receive a hearing before a neutral decision

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maker where the government bears the burden by clear and convincing evidence, or in the alternative, order his immediate release.

Dated this 18th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2019, I electronically filed the foregoing, along with the supporting declarations and exhibits, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 18th day of February, 2019.

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