

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

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).

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

4 STATEMENT OF FACTS

5 Vincent Frederics Banda is an asylum seeker from Malawi who arrived in the United
 6 States on November 8, 2017, at the SeaTac International Airport with a B1/B2 visa. Dkt. 8-2,
 7 Form I-213 at 2. After reviewing an invitation letter that Mr. Banda brought with him, a Customs
 8 and Border Protection (CBP) official referred Mr. Banda to secondary inspection. *Id.* A CBP
 9 officer then determined that Mr. Banda was inadmissible to the United States under 8 U.S.C. §
 10 1182(a)(7)(A)(i)(I) as an arriving noncitizen without a valid visa. *Id.*

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

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

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

19 On May 29, 2018—over six months after being detained—Mr. Banda attended his fifth
 20 hearing before the immigration court. Dkt. 7, Carranza Decl. ¶ 20. However, this hearing could
 21 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.

1 for *another five months*, scheduling the merits hearing on his asylum application for October 31,
 2 2018. *Id.* All the while, Mr. Banda remained in detention. However, at that October hearing, the
 3 immigration court was again unable to secure an interpreter to proceed with the hearing. *Id.* ¶ 21.
 4 As a result, the court again continued Mr. Banda's case for several more months, until February
 5 2019. Mr. Banda has remained in detention throughout the entirety of this process, which has
 6 now lasted well over a year. At no point during his 15 months of detention has Mr. Banda had
 7 the opportunity to contest his continued detention in a bond hearing.

8 ARGUMENT

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

21 I. The Constitution Prohibits Prolonged Detention Without Adequate Procedural 22 Protections, Even After *Jennings*.

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

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

12 As Respondents note, Dkt. 6 at 7-8, they have detained Mr. Banda under 8 U.S.C.
13 § 1225(b)(1)(B)(ii), which mandates detention of those who pass a credible fear interview during
14 “further consideration of the application for asylum.” In *Jennings*, the Supreme Court rejected
15 the Ninth Circuit’s statutory interpretation, holding that the language of § 1225(b) does not
16 contain an implicit six-month limitation after which a bond hearing is required to justify
17 continued detention. 138 S. Ct. at 843-46. However, the Court added that “it had no occasion to
18 consider [the detainees’] constitutional arguments on their merits.” *Id.* at 851. In other words, the
19 Court left it for lower courts to address in the first instance whether prolonged detention without
20 adequate procedural protections past six months violates the Constitution, even if the text of the
21 Immigration and Nationality Act (INA) would otherwise authorize such detention.

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

1 examined the constitutionality of prolonged detention following the removal period as defined by
 2 8 U.S.C. § 1231(a)(6). The Court made clear that the detention runs afoul of the Constitution
 3 where it is no longer reasonably related to its purpose of ensuring that an individual is available
 4 for removal. 533 U.S. at 690. Thus, the Court held that the government must demonstrate that a
 5 noncitizen's removal is reasonably likely to occur in the foreseeable future in order to continue
 6 detaining that noncitizen after six months beyond § 1231(a)(6)'s removal period. 533 U.S. at
 7 701. The *Zadvydas* court also established that continued detention after six months is no longer
 8 "presumptively reasonable," creating an important benchmark for courts to assess the
 9 constitutionality of long-term immigration detention. *Id.*

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

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

1 *Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008). Given those concerns, every court of appeals
 2 to confront the issue since *Demore* has found either that the INA or due process require a hearing
 3 or release for noncitizens subject to unreasonably prolonged detention pending removal
 4 proceedings. *See, e.g., Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016), *vacated as*
 5 *moot*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016); *Lora v.*
 6 *Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d
 7 1060, 1074 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011); *Ly v.*
 8 *Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003).²

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

19 Several federal courts have recognized that *Jennings* did not erase the constitutional
 20 problems prolonged immigration detention presents, including for arriving noncitizens detained
 21 under 8 U.S.C. § 1225(b), like Mr. Banda. *See, e.g., Bermudez Paiz v. Decker*, No. 18-cv-4759,
 22 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.

1 constitutional questions animating this lawsuit, such as whether the mandatory detention
 2 provisions of § 1225(b) and § 1226(c) violate the Due Process Clause, either facially or as
 3 applied to [noncitizens] whose detention has become unusually prolonged.”). Indeed, faced with
 4 such prolonged detention of arriving noncitizens, these courts have ordered bond hearings before
 5 a neutral decision maker where the government bears the burden of proof. *See, e.g., id.* at *15;
 6 *De Ming Wang v. Brophy*, No. 17-cv-6263-FPG, 2019 WL 112346, at *3 (W.D.N.Y. Jan. 4,
 7 2019) (granting habeas petition for arriving noncitizen detained under 8 U.S.C. § 1225(b) and
 8 ordering that noncitizen receive bond hearing); *Kouadio v. Decker*, --- F. Supp. 3d ---, 2018 WL
 9 6807439, at *5 (S.D.N.Y. Dec. 27, 2018) (same); *Lett v. Decker*, 346 F. Supp. 3d 379, 388
 10 (S.D.N.Y. 2018) (same); *Pierre v. Doll*, --- F. Supp. 3d ---, 2018 WL 5315203, at *4 (M.D. Penn.
 11 Oct. 26, 2018) (same); *Perez v. Decker*, No. 18-cv-5279, 2018 WL 3991497, at *6 (S.D.N.Y.
 12 Aug. 20, 2018) (same); *Destine v. Doll*, No. 3:17-cv-1340, 2018 WL 3584695, at *5 (M.D. Penn.
 13 July 26, 2018) (same). These cases underscore that the relief that Mr. Banda seeks remains viable
 14 after *Jennings*, and the constitutional concerns courts expressed prior to that case continue to
 15 govern cases like Mr. Banda’s.

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

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

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

2 First, as Mr. Banda noted above, six months marks the point at which Mr. Banda's
3 detention became "prolonged." *Zadvydas* and Court of Appeals decisions interpreting the INA's
4 detention statutes prior to *Jennings* used the six-month mark to shift the burden to the
5 government to justify detention, or to require bond hearings where the government must do the
6 same. *Zadvydas*, 533 U.S. at 701; *Rodriguez III*, 804 F.3d at 1077 ("Prior decisions have also
7 clarified that detention becomes 'prolonged' at the six-month mark."); *Lora*, 804 F.3d at 606.
8 Moreover, the Supreme Court has used six months as a benchmark to limit imprisonment
9 without a jury and to limit civil commitment. *See Cheff v. Schnackenberg*, 384 U.S. 373, 380
10 (1966) (plurality opinion) (jury required to impose sentence over six months); *McNeil*, 407 U.S.
11 at 249, 250-52 (recognizing six months as an outer limit for confinement without individualized
12 inquiry for civil commitment).

13 Even if the six-month mark does not make detention "prolonged" in every case, a case-
14 by-case "reasonableness" approach demonstrates that Mr. Banda's 15-month detention is
15 unreasonably prolonged. Courts using "reasonableness" factors to determine whether detention is
16 prolonged usually assess (1) whether the noncitizen has raised a "good faith" challenge to
17 removal—that is, the challenge is "legitimately raised" and presents "real issues," *Chavez-*
18 *Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015), (2) the length of
19 detention, *id.* at 477-78, and (3) the likelihood that detention will continue during the
20 noncitizen's remaining immigration proceedings, *id.*, 783 F.3d at 478; *see also Reid*, 819 F.3d at
21 500; *accord Sopo*, 825 F.3d at 1217-18.

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

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

8 The second factor also weighs in Mr. Banda’s favor. Respondents have detained him over
 9 15 months—nearly 2.5 times the “presumptively reasonable” period of detention in *Zadvydas*.
 10 533 U.S. at 701; *see also, e.g., Garcia Gonzalez v. Bonnar*, No. 3:18-cv-05321-JSC, 2019 WL
 11 330906, at *5 (N.D. Cal. Jan. 25, 2019) (finding that immigration detention that “will last at least
 12 15-17 months in total . . . is four times the ‘brief’ detention approved in *Demore*,” thus
 13 supporting petitioner’s due process claim (footnote omitted)). Moreover, Mr. Banda is not
 14 responsible for the lengthy delays in his proceedings, which have resulted from the government’s
 15 difficulties in identifying and securing an adequate translator. Respondents attempt to avoid
 16 blame for the interpreter problems by pointing to the Executive Office of Immigration Review as
 17 the delay culprit. Dkt 6 at 11-12. But as the *Sopo* court made clear, “[e]rrors by the immigration
 18 court or the [Board of Immigration Appeals (BIA)] that cause unnecessary delay are also
 19 relevant” to determining whether continued detention is reasonable. 825 F.3d at 1218; *see also*
 20 *Reid*, 819 F.3d at 500 (stating that the “promptness (or delay) of the immigration authorities”
 21 bears on the reasonableness of “continued categorical detention”); *Diop*, 656 F.3d at 234
 22 (weighing “immigration judge’s numerous errors” against government in assessing
 23 reasonableness of detention). Furthermore, EOIR has had several opportunities to realize that

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).

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

9 The appeals process is lengthy. Administrative appeals for detainees like Mr. Banda
 10 typically takes around six months. *See, e.g.*, 8 C.F.R. § 1003.1. Once Mr. Banda finishes the
 11 administrative appeals process, he may remain in detention for up to two additional years while
 12 appealing to the Ninth Circuit. *See* U.S. Court of Appeals for the Ninth Circuit, Frequently
 13 Asked Questions, <https://www.ca9.uscourts.gov/content/faq.php> (Dec. 2018); *see also Rodriguez*
 14 *III*, 804 F.3d at 1072 (noting that Ninth Circuit appeals on average add eleven months of
 15 confinement). While ICE may seek to remove Mr. Banda during this period, he is entitled to seek
 16 a stay of removal, and the Court of Appeals provides for an automatic stay while it adjudicates
 17 the merits of the motion. Ninth Circuit General Order 6.4(c)(1). Such removal is far from
 18 guaranteed: the agency may either choose not to execute the removal order, or the Ninth Circuit
 19 could issue a stay of removal pending the case's outcome. *See Nken v. Holder*, 556 U.S. 418, 422
 20 (2009). As a result, Mr. Banda's removal is not foreseeable in the near future.

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

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

1 immigration detention becomes prolonged—and thus constitutional concerns arise—due process
 2 requires that a noncitizen “receiv[e] an individualized determination of the necessity of detention
 3 before a neutral decision maker,” *Casas-Castrillon*, 535 F.3d at 950, where the government must
 4 justify such detention by “clear and convincing evidence,” *Singh v. Holder*, 638 F.3d 1196, 1205
 5 (9th Cir. 2011).

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

19 In addition, at these hearings, the government must prove by clear and convincing
 20 evidence that the noncitizen represents a danger to the community or presents a flight risk. *Singh*,
 21 638 F.3d at 1204-05; *see also Bermudez Paiz*, 2018 WL 6928794, at *15 (“[T]he overwhelming
 22 consensus of judges in this District—both before and after *Jennings*—is that once a[]
 23 [noncitizen’s] immigration detention has become unreasonably prolonged, he or she is entitled to

1 a bond hearing at which the government bears the burden”); *Calderon-Rodriguez*, 2019 WL
 2 487709, at *6 (in case involving detention under 8 U.S.C. § 1226(a), ordering petitioner receive a
 3 bond hearing where government bears the burden by clear and convincing evidence); *De Ming*
 4 *Wang*, 2019 WL 112346, at *3 (ordering bond hearing in which the government must justify
 5 arriving noncitizen’s continued detention by clear and convincing evidence); *Lett*, 346 F. Supp.
 6 3d at 389 (ordering the same); *Kouadio*, 2018 WL 6807439, at *5 (same). That requirement is
 7 consistent with a long line of Supreme Court precedent requiring the government bear the burden
 8 of proof in civil detention schemes. Dkt. 1 at 13; *see also United States v. Salerno*, 481 U.S. 739,
 9 750 (1987) (upholding pre-trial detention where the detainee was afforded a “full-blown
 10 adversary hearing,” requiring “clear and convincing evidence” before a “neutral
 11 decisionmaker”); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention
 12 scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding administrative
 13 custody review procedures deficient because, inter alia, they placed burden of proof on detainee).
 14 Nor did *Jennings* alter the holding of Court of Appeals cases concluding the government bears
 15 the burden to justify continued detention. *Garcia Gonzalez*, 2019 WL 330906, at *6 (citing
 16 cases). Respondents do not address this conclusion in their return memorandum, and instead
 17 argue Mr. Banda is entitled to no bond hearing whatsoever. Dkt. 6 at 10-12. But case law makes
 18 clear Mr. Banda is entitled to a bond hearing, and the government must shoulder the burden of
 19 proof to justify his continued detention.

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

1 lacked jurisdiction. *See id.*; Dkt. 8-12, Imm. Ct. Bond Order. Respondents also suggest Mr.
 2 Banda did not exhaust his administrative remedies by appealing the IJ’s conclusion regarding
 3 jurisdiction, but then immediately concede doing so would futile. Dkt. 6 at 10. Indeed,
 4 Respondents’ entire argument depends on a statute the government reads as prohibiting Mr.
 5 Banda from receiving a bond hearing under *Jennings*, underscoring the futility of any such
 6 administrative appeal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); *see also Acevedo-Carranza v. Ashcroft*,
 7 371 F.3d 539, 541-42 (9th Cir. 2004) (futility provides reason to waive exhaustion requirement).
 8 As a result, this Court should reject Respondents’ efforts to confuse the issue.

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

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

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

1 physical restraint.’” *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Singh*,
 2 638 F.3d at 1203)). As a result, and as the Ninth Circuit has repeatedly made clear, Mr. Banda’s
 3 interests in receiving a bond hearing are “profound,” *Diouf*, 634 F.3d at 1092, and
 4 “unquestionably substantial,” *Singh*, 638 F.3d at 1208.

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

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

1 protect the “profound” interest noncitizens like Mr. Banda have in their liberty. *See supra* pp. 8,
2 14.

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

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

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

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

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

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

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

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

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

21 CONCLUSION

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

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

Dated this 18th day of February, 2019.

s/ Matt Adams

Matt Adams
Northwest Immigrant Rights Project
615 Second Ave., Ste 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org

s/ Leila Kang

Leila Kang
Northwest Immigrant Rights Project
615 Second Ave., Ste 400
Seattle, WA 98104
Tel: (206) 957-8608
leila@nwirp.org

s/ Aaron Korthuis

Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Ave., Ste 400
Seattle, WA 98104
Tel: (206) 816-3872
aaron@nwirp.org

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.

s/ Leila Kang

Leila Kang
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8608
(206) 587-4025 (fax)