Judge James L. Robart
Magistrate Judge Mary Alice Theiler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

E[redacted] D[redacted] R[redacted],

Petitioner,

v.

CHAD WOLF, et al.,

Respondents.

Case No. 2:20-cv-377-JLR-MAT

TRAVERSE IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO MOTION TO DISMISS

Note on Motions Calendar:
May 8, 2020

ORAL ARGUMENT REQUESTED

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

INTRODUCTION

Petitioner [redacted] (Ms. [redacted]) is a noncitizen who Respondents have detained at the Northwest Detention Center (NWDC) for over twenty months, without ever providing her a hearing before a neutral decisionmaker to judge whether her continued detention is warranted. In their response to Ms. [redacted]'s petition for a writ of habeas corpus, Respondents rely primarily on Ms. [redacted]'s statutorily-mandated detention to contend that her continued incarceration is justified. But federal courts in this district and around the country have made clear that the Constitution requires a bond hearing for those subject to mandatory detention under 8 U.S.C. § 1226(c) once their detention becomes prolonged. That is especially true here, given the length of Ms. [redacted]'s detention, the many additional months she will likely remain detained, and the conditions of her detention, among other factors. Moreover, in their motion to dismiss, Respondents ignore the many mitigating factors regarding Ms. [redacted]'s single criminal offense that demonstrate she is neither a flight risk nor dangerous. As a result, like the many other courts that have addressed this issue—including this one—this Court should grant Ms. [redacted]'s request for a bond hearing and order that government justify her continued detention at a bond hearing by clear and convincing evidence.

ARGUMENT

In their response, Respondents agree that a multi-factor test should govern whether Ms. [redacted] is entitled to a bond hearing. However, parts of the test they propose are better-suited to consideration in a bond hearing, and not as factors to assess whether a bond hearing is appropriate in the first instance. As to the factors this Court considers when asking whether a bond hearing is warranted, they favor Ms. [redacted], especially in light of her lengthy detention. Finally, as to the burden at a bond hearing, Respondents' argument is that as a *statutory* matter,

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

the burden should not be placed on the government. But Ms. [redacted]'s claim is a constitutional one, and the case law as to the constitutional issue—including the case law from this Court—makes clear that the government must bear the burden to justify Ms. [redacted]'s continued detention by clear and convincing evidence. Ms. [redacted] addresses each of these points below.

I. This Court's Six Factor Test from *Banda v. McAleenan* Should Govern the Question of Whether the Constitution Affords Ms. [redacted] the Right to a Bond Hearing.

As an initial matter, Respondents do not contest that the Due Process Clause of the Fifth Amendment may require them to provide Ms. [redacted] with a bond hearing, notwithstanding her mandatory detention. *See* Dkt. 8 at 4-5. "Indeed, essentially all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, 'will—at some point—violate the right to due process.'" *Martinez v. Clark*, No. 18-cv-1669-RAJ-MAT, 2019 WL 5968089, at *6 (W.D. Wash. May 23, 2019) (quoting *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018), *report and recommendation adopted*, No. 18-cv-01669-RAJ, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019). Respondents instead largely agree with Petitioner's allegations in her habeas petition that a multi-factor test should govern whether due process affords her a bond hearing. *See* Dkt. 1 ¶ 55; Dkt. 8 at 4-5.

Respondent first briefly suggests that the three-factor due process test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), should dictate whether Ms. [redacted] is entitled to a hearing. Dkt. 8 at 5-6. But as Respondents acknowledge, and as this Court has explained, "the *Mathews* test is not particularly probative of whether prolonged mandatory detention has become unreasonable in a particular case." *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1107 (W.D. Wash. 2019). That is true, explained this Court, because *Mathews* "does not resolve the more fundamental issue of whether any procedure—such as a bond hearing—must be provided." *Id.* at 1106-07. Instead, it

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

addresses only "the question of whether the administrative procedures provided . . . are constitutionally sufficient." *Id.* at 1106 (quoting *Mathews*, 424 U.S. at 334). Here, as Respondents acknowledge, they have provided no administrative procedures whatsoever to Ms. [redacted]. Instead, they admit she is subject to detention under 8 U.S.C. § 1226(c), and as such, no procedures exist to guard again unconstitutional detention. *See also Djelassi v. ICE Field Office Dir.*, --- F. Supp. 3d ---, 2020 WL 263670, at *2-*3 (W.D. Wash. Jan. 17, 2020) (adopting *Banda*'s reasoning that the *Mathews* test does not apply to determine whether due process requires an initial bond hearing). Moreover, prior to *Jennings*, those courts that did not interpret § 1226(c) to require a bond hearing after six months adopted multi-factor tests to determine whether a bond hearing was necessary. *See, e.g.*, *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 474-78 (3d Cir. 2015); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003).[1]

This Court should apply the six-factor test from *Banda* and other cases to determine whether continued detention is appropriate for individuals detained under § 1226(c). As this Court explained in *Banda*, that test looks to "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Banda*, 385 F. Supp. 3d at 1106. However, instead of applying this test, Respondent urges consideration of two additional factors: "the nature of the crimes the petitioner committed" and "whether the detention will exceed the time the petitioner spent in prison." Dkt. 8 at 5 (quoting *Martinez*, 2019 WL 5968089, at *7).

[1] *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), abrogated the statutory holdings in these cases. However, their use of different factors to determine when detention becomes unreasonable still provides useful guidance to assess whether due process requires a bond hearing.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

Respondents' suggestion is misguided, as those factors are more appropriately considered in the context of a bond hearing where the government must demonstrate that the petitioner presents such a danger to the community or a flight risk such that her continued, prolonged detention is warranted. By contrast, these factors are not appropriate to determine whether a bond hearing is appropriate in the first instance. Respondents do not explain why these factors are relevant to whether an individual is entitled to the due process that a bond hearing provides. And *Martinez*, the decision Respondents point to, also provides no justification for inclusion of these factors. Ms. [redacted]s federal trafficking offense is of course relevant to her release, but only in the context of assessing whether she is a danger or flight risk to the community. In other words, an immigration judge conducting a bond hearing should be the one to consider the government's arguments as to how Ms. [redacted]'s crime affects her request for release. By contrast, here, this Court should not rest Ms. [redacted]'s entitlement to due process on the fact that she committed a crime.

Case law supports this conclusion. The Supreme Court has long held that individuals subjected to civil detention must be afforded due process to challenge the justification for their detention. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 684, 700-01 (2001) (due process required government to justify ongoing detention of detained immigrant ordered removed despite past serious crimes); *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992) (noting that due process requires adequate procedures to determine if a "convicted felon" may be transferred and detained at a mental health facility because of the alleged danger that person presents); *Jackson v. Indiana*, 406 U.S. 715, 724 (1972) ("If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protections against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

suffice."); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) (state violated due process by holding man convicted of two assaults to a facility for observation regarding his mental health without ever providing the opportunity to challenge that detention). As the descriptions of these cases make clear, the Court's reasoning regarding the right to due process did not depend on whether an individual has committed a crime, but instead on other factors, such as the length of time an individual had spent in detention. Moreover, many courts analyzing whether an individual's continued detention under § 1226(c) is authorized do not analyze the factors that Respondent asks this Court to consider. *See, e.g.*, *Bolus A.D. v. Sec'y of Homeland Sec.*, 376 F. Supp. 3d 959, 961 (D. Minn. 2019) (using same six factors as *Banda* in case involving § 1226(c) detention); *Liban M.J. v. Sec'y of Dep't of Homeland Sec.*, 367 F. Supp. 3d 959, 963 (D. Minn. 2019) (same); *Baez-Sanchez v. Kolitwenzew*, 360 F. Supp. 3d 808, 815-16 (C.D. Ill. 2018) (similar).

Finally, *Demore v. Kim* is not to the contrary. There, the Supreme Court held that Congress could authorize the detention of certain noncitizens who committed statutorily-enumerated crimes for the "brief period necessary for their removal proceedings." 538 U.S. 510, 513 (2003). Such detention, the Court held, does not deprive these noncitizens of due process. But as courts have repeatedly held—and as *Demore* itself should make clear—once detention becomes prolonged, then due process demands something more, and an individual's criminal history can no longer justify mandatorily detaining them without some form of process. *See, e.g.*, *Demore*, 538 U.S. at 531-32 (Kennedy, J., concurring) (stating that, notwithstanding the Court's decision, the Due Process Clause may require an individualized determination to test the government's justification for continued detention).

For these reasons, consideration of Ms. [redacted]'s underlying crime is not particularly

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

relevant when considering whether the Due Process Clause mandates that she now receive a bond hearing after being subjected to prolonged detention. However, as she explains below, even if the Court considers her criminal history, due process requires that she receive a hearing where the government must justify her continued detention.

II. The Due Process Clause Affords Ms. [redacted] the Right to a Bond Hearing.

The factors from *Banda*, as well as the additional ones from *Martinez*—if this Court chooses to consider them—demonstrate that a bond hearing is appropriate here. First, Ms. [redacted]'s 20+ months of detention strongly weighs in favor of a bond hearing. Initially, this Court should apply a strong presumption that detention greater than six months – and certainly detention lasting beyond a year—violates due process. While *Jennings* abrogated the Ninth Circuit's holding in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) as a matter of *statutory* interpretation, it did not undermine other decisions that look to six months as a benchmark when deciding whether the government must justify continued detention or incarceration. *See, e.g.*, *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months."); *McNeil*, 407 U.S. at 250 (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment). *Aleman Gonzalez v. Barr*, 955 F.3d 762, 775-89 (9th Cir. 2020) (upholding a prior decision requiring a bond hearing for individuals detained for six months under 8 U.S.C. § 1231(a)(6) post *Jennings*); *Flores Tejada v. Godfrey*, 954 F.3d 1245, 1249 (9th Cir. 2020) (same). Indeed, in *Demore*, the Supreme Court authorized mandatory detention without a hearing under § 1226(c) only for the "brief period necessary for removal proceedings," 538 U.S. at 513, which at the time, was "roughly a month an half in the vast majority of cases" and "five months in the minority of cases" where the noncitizen appealed to the Board of Immigration Appeals, *id.* at 530. Thus, even *Demore*

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

supports drawing a line presumptively in Ms. [redacted]'s favor around the six-month mark. *See Chavez-Alvarez*, 783 F.3d at 478 ("For all of these reasons, we are convinced that, beginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time Chavez-Alvarez had been detained for one year, the burdens to Chavez-Alvarez's liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute.).[2]

Furthermore, courts have made clear that even periods of detention far less than 20 months favor providing a detained noncitizen with a bond hearing. *See, e.g.*, *Banda*, 385 F. Supp. 3d at 1118-19 (noting that 17 months of detention was a "very long time" that "strongly favor[ed] granting a bond hearing); *Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal., Jan. 25, 2019) (detention under § 1226(c) of just over a year that would last several more months favored granting bond hearing); *Martinez*, 2019 WL 5968089, at *9 (detention of 13 months of individual detained under § 1226(c) favored granting bond hearing); *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y 2018) (detention of 7 months under § 1226(c) favored granting bond hearing); *Liban M.J.*, 367 F. Supp. 3d at 963-64 (12 months detention under § 1226(c) favored granting bond hearing). Indeed, Respondent does not contest that this first factor favors Ms. [redacted], and instead simply announces the length of detention when arguing that a bond hearing is not warranted here. Dkt. 8 at 6. But as this Court held in *Banda*, the "length of detention" is the "most important factor," and thus it "strongly favors granting . . . a bond hearing." 385 F. Supp. 3d at 1118-19.

[2] Ms. [redacted] is *not* asking for the "bright-line rule" that judges in this district have rejected in other cases. *See, e.g.*, *Banda*, 385 F. Supp. 3d at 1117; *Martinez*, 2019 WL 5968089, at *7. Instead, consistent with *Zadvydas*, *Demore*, and other cases, Ms. [redacted] asks the Court to consider the period of detention over six months, and certainly detention over a year, to strongly weigh in her favor when analyzing the length of detention in conducting the multi-factor analysis.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

The second factor—the length of future detention—also favors Ms. [redacted]. Since Ms. [redacted] filed this petition, United States Citizenship and Immigration Services (USCIS) issued an initial decision denying her application for a T visa. Recinos Decl. ¶ 4; *see also id.* Ex. A. However, as her attorney outlines in the attached declaration, that decision was flawed for several reasons. *Id.* ¶¶ 8-9. Specifically, in its decision, USCIS concluded that Ms. [redacted] was not present in the United States on account of her trafficking, and thus was not eligible for a T visa. But as Ms. [redacted] will make clear in her appeal, the agency disregarded the evidence that she submitted and erred as a matter of law by narrowly construing the "on account of" requirement. *See id.* (describing the basis for Ms. [redacted]s T visa appeal). This T visa application process alone will last for at least several more months. And even if Ms. [redacted] does not obtain a T visa—for which she has a strong case—then she also will still have the opportunity to pursue her Ninth Circuit petition for a review. The Ninth Circuit previously stayed the briefing in her case pending final adjudication of her T visa. *See* Dkt. 2-10. The petition for review process could well mean that Ms. [redacted] remains detained for up to two additional years. *See* U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions, https://www.ca9.uscourts.gov/content/faq.php (last updated Dec. 1, 2019) (noting that civil appeals last 12-20 months on average); *see also Rodriguez*, 804 F.3d at 1072 (noting that Ninth Circuit appeals on average add eleven months of confinement).

In their motion, Respondents do not address the lengthy petition for review process or the fact that this process will almost certainly last at least a year. But likely continued detention of a year or more demonstrates this factor strongly weighs in Ms. [redacted]'s favor. This is especially true given that the case law above makes clear that even detention lengths of 12 months or less favor granting a bond hearing. Thus, like in *Banda* and *Martinez*, this factor also favors Ms. [redacted]. *See*

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

Banda, 385 F. Supp. 3d at 1119; *Martinez*, 2019 WL 5968089, at *9.

Next, the conditions of detention also strongly favor Ms. [redacted]. The conditions at the Northwest Detention Center, like most immigration detention facilities, "are similar . . . to those in many prisons and jails." *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting); *see also Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 860 (D. Minn. 2019) ("The more that the conditions under which the [noncitizen] is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing." (citation omitted)) As Ms. [redacted] describes in her declaration, while detained at the Northwest Detention Center, she has been housed in a group cell setting, crowded together with "many other women." [redacted] Decl. ¶ 6. She shares space, equipment, toilets, showers, and other daily necessities with dozens of other detained persons. *Id.* ¶¶ 7-8. Like other prisons, detainees are limited to just one hour a day outside the barred facility, in a small paved space with "one basket hoop and metal roof, so that you can only see little bits of the sky." *Id.* ¶ 9. In short, detention at the Northwest Detention Center differs little from most other jails.

In addition, a recent report from the University of Washington has highlighted significant shortcomings and persistent complaints regarding cleaning, hygiene, and medical care at the Northwest Detention Center. *See* Recinos Decl. Ex. B. Ms. [redacted]'s own experience at the detention center strongly supports the concerns these reports detail. As she explains in her declaration, she recently broke her ankle. [redacted] Decl. ¶ 10. But only after insisting for days that she could not walk and that she was in significant pain did the medical personnel at the facility pay her the attention she required—a week after she broke her ankle. *Id.* Following surgery, guards at the detention center then placed Ms. [redacted] in a dirty, segregated area that is used to punish detainees, despite her medical operation. *Id.* ¶ 11. Thus, this factor—which shows that

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

Ms. [redacted] is treated similarly to a convicted criminal and has been subjected to appalling living conditions—also favors granting her a bond hearing.

The current COVID-19 pandemic only further underscores the dangerous conditions at the detention center and the need to release detainees like Ms. [redacted] who do not present a flight risk or danger to the community. As Chief Judge Martinez recently explained, "[i]n almost all aspects, life among detainees is a shared experience that does not allow for social distancing." *Pimentel-Estrada v. Barr*, --- F. Supp. 3d ---, 2020 WL 2092430, at *3 (W.D. Wash. Apr. 28, 2020). "[T]oilets, sinks, and showers are shared, food preparation and service is communal, and detainees share common areas." *Id.* at *3. This is critical, as "[e]very possible information source, including those that [the government] create[s] and circulate[s], indicate that hygiene *and* social distancing are critical to avoiding the spread of infection." *Id.* at *13. As a result, Ms. [redacted] is without protection from the COVID-19 virus should it enter the detention center. Thus, while the jail-like conditions of NWDC are sufficient to make clear this factor strongly supports her claim for a bond hearing, the unique nature of current pandemic only further demonstrates this factor weighs in her favor.

The fourth and fifth *Banda* factors look to whether the habeas petitioner or the government has caused delay in the removal proceedings. Significantly, a petitioner "is entitled to raise legitimate defenses to removal, . . . and such challenges to . . . removal cannot undermine [the] claim that detention has become unreasonable." *Liban M.J.*, 367 F. Supp. 3d at 965; *see also Martinez*, 2019 WL 5968089, at *9 (same); *Hernandez v. Decker*, No. 18-CV-5026 (ALC), 2018 WL 3579108, at *9 (S.D.N.Y. July 25, 2018) ("[T]he mere fact that a noncitizen opposes his removal is insufficient to defeat a finding of unreasonably prolonged detention, especially where the Government fails to distinguish between bona fide and frivolous arguments in

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

opposition"). According to Respondents, Ms. [redacted]'s application for a T visa and a request to hold her case in abeyance at the Ninth Circuit have caused "unnecessary delay." Dkt. 8 at 9. But Respondents cite no authority for their assertion that an application to USCIS for relief from removal can constitute delay attributable to the Petitioner. The case law above makes clear that it should not. Indeed, other courts to have considered similar questions—like whether applying for a U-visa can constitute delay—have rejected this notion. *See Baez-Sanchez*, 360 F. Supp. 3d at 816.

The sixth factor—the likelihood that proceedings will end in a final removal order—is neutral. While the BIA has affirmed the immigration judge's removal order, Ms. [redacted] has a strong alternative route to status through her T visa application. In addition, her Ninth Circuit appeal remains pending, which may result in vacatur of the final order of removal. Thus, two viable options remain that provide pathways to her continued residence in this country.

Finally, even if the Court were to consider the factors regarding Ms. [redacted]'s criminal history, these factors too either favor her or are neutral. As to the nature of Ms. [redacted]'s crime, Respondents repeatedly assert that Ms. [redacted] was convicted of a "serious and dangerous offense" and that this factor favors the government. Dkt. 8 at 7. But Respondents address none of the particularized evidence or statements regarding Ms. [redacted]'s crime, and instead claim in conclusory fashion that the particular circumstances of her crime do not matter. *Id.* But as Ms. [redacted] explained in her petition, she acted under duress when she participated in some drug sales and was in "lethal danger from [her trafficker] should she have refused to follow his orders." Ex. 2-1 at 15. As a result, the district judge who sentenced her rejected a proposed sentencing range above the mandatory minimum. Dkt. 2-2. Instead, he sentenced Ms. [redacted] to the minimum that Congress required, while also concluding that "even the sentence I'm required by Congress to

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

give . . . is overly harsh." Dkt. 2-4. Moreover, Ms. [redacted]'s sealed evidence provides additional, self-evident reasons to conclude that the nature of her crime should not factor against her, or that if it does, it should be accorded little weight. *See* Dkt. 1 ¶ 21; Dkt. 2-5 (sealed document). Respondents address none of these statements or this evidence in their motion. And in any event, Ms. [redacted] has "paid [her] debt to society" and is a civil, not criminal detainee. *Pimentel-Estrada*, 2020 WL 2092430, at *18. As a result, at worst, this factor is neutral for Ms. [redacted].

Nor is the length of Ms. [redacted]s prison sentence a reason to justify her continued civil detention. Simply because Ms. [redacted] spent several years in prison does not mean that Respondents are justified in detaining her for civil proceedings for several additional years. As Ms. [redacted] explained above, her criminal history should not affect whether she is entitled to due process. Instead, an immigration judge can consider questions of whether she is a flight risk or danger to the community at a bond hearing, and then weigh the length of her sentence as a possible factor. *See Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) ("In 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 physical restraint." (internal quotation marks omitted)). Ms. [redacted]'s rights should not hinge on whether she was sentenced to several years in prison, given that she has "paid her debt to society." *Pimentel-Estrada v. Barr*, 2020 WL 2092430, at *18. Again, Respondents do not explain why this factor should have any bearing, much less a significant bearing, on whether the Due Process Clause entitles Ms. [redacted] to a hearing after 20+ months of civil detention.

In sum several of the most important factors in this case, like the length of detention and conditions of detention favor Ms. [redacted]. Most other factors are neutral or also favor Ms. [redacted].

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

Accordingly, due process requires that the government justify her continued detention before a neutral decisionmaker on an individualized basis.

III. The Due Process Clause Requires Respondents to Justify Ms. [redacted]s Continued Detention by Clear and Convincing Evidence.

Finally, as the Ninth Circuit has recently reaffirmed and as judges in this district have recognized, the Due Process Clause requires Respondents to justify Ms. [redacted]'s continued prolonged detention by clear and convincing evidence. This requirement is well-grounded in this Court's precedents and those of the Ninth Circuit. *See Banda*, 385 F. Supp. 3d at 1120-21 (requiring immigration judge to apply the procedural requirements of *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), including the requirement that the government justify continued detention by clear and convincing evidence); *Martinez*, 2019 WL 5968089, at *11 (same); *Djelassi*, 2020 WL 263670, at *11 (agreeing with *Banda*'s analysis on this issue). Recent Ninth Circuit precedent reaffirms that *Singh* remains binding law as a constitutional holding, *Aleman Gonzalez*, 955 F.3d at 781; *Flores Tejada*, 954 F.3d at 1249. Moreover, the clear and convincing evidence requirement is consistent with a long line of Supreme Court precedent requiring the government to bear the burden of proof in civil detention schemes. *See 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*, 504 U.S. at 81-83 (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).

According to Respondents, any bond hearing that the Court orders should place the burden on Ms. [redacted] to bear the burden of proof to show she is not a danger or a flight risk. Dkt. 8 at 11. In support of this argument, Respondents point to *Jennings*. But of course, as Respondents

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

themselves acknowledge, *Jennings* involved only questions of statutory interpretation and expressly left open the question of whether the Constitution requires more. *See* 138 S. Ct. at 851. The Ninth Circuit recognized this fact on remand, noting that the Court of Appeals continued to harbor "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). Thus, *Jennings* provides Respondents with no support.

Respondents then go on to criticize this Court for "continu[ing] to rely on *Casas Castrillon*[, *v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008)], in placing the burden on the government when [the Court] finds that mandatory detention has become unreasonably prolonged." Dkt. 8 at 12. Respondents' argument appears to assume that the clear and convincing evidence standard rests on *Casas*. But Ninth Circuit precedent directly forecloses this argument and makes clear that Respondents have no basis to make this claim. As the Court of Appeals recently explained, *Singh*—the decision this Court has relied on to apply the burden of proof—"determined that *constitutional* procedural due process required the government to meet the clear and convincing evidence standard." *Aleman Gonzalez*, 955 F.3d at 781 (emphasis added); *Flores Tejada*, 954 F.3d at 1249 (same). Indeed, the Ninth Circuit has made this fact clear for a long time. *See Kashem v. Barr*, 941 F.3d 358, 380 (9th Cir. 2019) (noting that *Singh*'s clear and convincing evidence burden is a procedural due process standard that "applies in a range of civil proceedings involving substantial deprivations of liberty"). Moreover, *Singh* itself relies on the Supreme Court's civil commitment case law cited above. 638 F.3d at 1204. Thus, Respondents' critique of this Court's decisions lacks any merit, and is in fact foreclosed by binding appellate precedent.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

CONCLUSION

For the foregoing reasons, Ms. [redacted] respectfully requests that the Court order her release or that she be granted a bond hearing where the government must justify her continued detention by clear and convincing evidence.

Respectfully submitted on this 4th day of May, 2020.

s/ Matt Adams
Matt Adams, WSBA No. 28287
matt@nwirp.org

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974
aaron@nwirp.org

Northwest Immigrant Rights Project
615 Second Ave., Suite 400
Seattle, WA 98104
Tel: (206) 957-8611

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2020, I electronically filed the foregoing 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.

DATED this 4th day of May, 2020.

s/ Aaron Korthuis
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 816-3872
(206) 587-4025 (fax)