UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

VINCENT FREDRICS BANDA,

Petitioner,

v.

KIRSTJEN NIELSEN, Secretary of the United States Department of Homeland Security; the DEPARTMENT OF HOMELAND SECURITY; MATTHEW WHITAKER, Acting Attorney General of the United States; ELIZABETH GODFREY, Acting Director of Enforcement and Removal Operations, Seattle Field Office, Immigration and Customs Enforcement; STEVEN LANGFORD, the Geo Group Inc., Warden of Northwest Detention Center,

Respondents.

Case No. 3:18-cv-6031

Agency No. A 213-076-035

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

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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 a year. Despite actively participating in his removal case and seeking immigration relief *pro se*, Mr. Banda has languished in detention due to Respondents' failure to locate and identify proper translation or interpretation services for his immigration proceedings. The Due Process Clause of the Fifth Amendment forbids such arbitrary and prolonged detention. Indeed, Mr. Banda's detention was presumptively unconstitutional after six months, yet Respondents have not justified his continued detention at a hearing before a neutral decision maker where the government bears the burden to demonstrate why Mr. Banda poses a danger or flight risk. Accordingly, Mr. Banda petitions this Court for a writ of habeas corpus to vindicate his right to due process and to seek relief from continued arbitrary detention.

JURISDICTION & CUSTODY

1. Petitioner Vincent Fredrics Banda is in the physical custody of Respondents and Immigration and Customs Enforcement, an agency within the Department of Homeland Security. Mr. Banda is detained at the Northwest Detention Center in Tacoma, Washington and is under the direct control of Respondents and their agents.

2. This action arises under the Constitution of the United States and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*

3. This Court has jurisdiction under 28 U.S.C. § 2241, Art. I § 9, cl. 2 of the United States Constitution (Suspension Clause), 28 U.S.C. § 1331, and the common law. This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

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4. Nothing in the INA deprives this Court of jurisdiction, including 8 U.S.C. §§ 1252(b)(9), 1252(f)(1), or 1226(e). Congress has preserved judicial review of challenges to prolonged immigration detention. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 839–41 (2018) (holding that 8 U.S.C. §§ 1226(e) and 1252(b)(9) do not bar review of challenges to prolonged immigration detention).

5. Section 1252(f)(1) does not repeal this Court's authority to grant the relief Petitioner seeks because, *inter alia*, Mr. Banda is in removal proceedings. *See* 8 U.S.C. § 1252(f)(1) (exempting claims by "an individual alien against whom proceedings . . . have been initiated"); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (observing that § 1252(f) "does not extend to individual cases").

6. If Section 1252(f)(1) did bar the relief Mr. Banda seeks, it would violate the Suspension Clause.

7. Even if otherwise applicable, Section 1252(f)(1) does not bar declaratory relief regarding Mr. Banda's detention.

8. Mr. Banda has exhausted any and all administrative remedies to the extent feasible.

VENUE

9. Pursuant to *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493-500 (1973), venue lies in the United States District Court for the Western District of Washington, the judicial district in which Mr. Banda currently is in custody.

10. Venue is also properly in this Court pursuant to 18 U.S.C. § 1391(e) because Respondents are employees, officers, and agencies of the United States, and because a

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substantial part of the events or omissions giving rise to the claims occurred in the Western District of Washington.

PARTIES

11. Petitioner Vincent Fredrics Banda is a citizen of Malawi who arrived in the United States in November 2017 at SeaTac International Airport. Respondents have detained him at the Northwest Detention Center since his arrival. Mr. Banda has been placed in removal proceedings under 8 U.S.C. § 1229a and is seeking asylum, withholding of removal, and relief under the Convention Against Torture.

12. Respondent Kirstjen Nielsen is the Secretary of the Department of Homeland Security. She is responsible for the implementation and enforcement of the INA. She also oversees U.S. Immigration and Customs Enforcement (ICE), which is responsible for Mr. Banda's detention. Ms. Nielsen has ultimate custodial authority over Mr. Banda and is named in her official capacity.

13. Respondent Department of Homeland Security (DHS) is the federal agency responsible for implementing and enforcing the INA, including the detention of noncitizens.

14. Respondent Matthew Whitaker is the Acting Attorney General of the United States and the senior official of the Department of Justice (DOJ). In that capacity, he has the authority to interpret the immigration laws and adjudicate removal cases. He also oversees the Executive Office for Immigration Review (EOIR), which administers the immigration courts and the Board of Immigration Appeals ("BIA"). He is named in his official capacity.

15. Respondent Elizabeth Godfrey is the Acting Director of the Seattle Field Office of Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Department

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of Homeland Security. As such, Ms. Godfrey is Mr. Banda's immediate custodian. She is named in her official capacity.

16. Respondent Steven Langford is, on information and belief, an employee of the Geo Group Inc., the private corporation which runs the Northwest Detention Center contract facility where Mr. Banda is detained. On information and belief, Mr. Langford's job title is Warden of the Northwest Detention Center.

STATEMENT OF FACTS

17. Petitioner Vincent Fredrics Banda is a citizen of Malawi seeking asylum, withholding of removal, and protection under the Convention against Torture in the United States. He is currently detained at the Northwest Detention Center, where Respondents have been holding him since November 8, 2017. His primary language is a form of Chichewa that is spoken in southern Malawi.

18. After suffering deadly attacks in Malawi, Mr. Banda fled to South Africa, where he held no lawful immigration status.

19. In 2017, Mr. Banda returned to Malawi for a brief period and obtained a B-1 visitor visa to the United States.

20. After receiving the visa, Mr. Banda travelled to the United States. He arrived on November 8, 2017, at SeaTac International Airport.

21. During inspection, an officer with Customs and Border Protection (CBP) referred Mr. Banda to secondary inspection for further questioning. CBP officers were unable to locate to locate a Chichewa interpreter, but ultimately determined that Mr. Banda did not possess a valid visa for entry to the United States.

22. During the inspection process, Mr. Banda expressed a fear of returning to Malawi.

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23. As a result, CBP transferred Mr. Banda to the custody of ICE. ICE then detained Mr. Banda at the Northwest Detention Center in Tacoma, Washington.

24. DHS scheduled Mr. Banda for a credible fear interview on November 24, 2017. An asylum officer with United States Citizenship and Immigration Services administers a credible fear interview to determine whether there is a "significant possibility" that an individual is eligible for protection under the INA or Convention against Torture. 8 U.S.C. § 1225(b)(i)(B)(V).

25. The asylum officer found Mr. Banda's credible fear interview inconclusive because the officer could not locate an interpreter.

26. DHS then served Mr. Banda with a Notice to Appear for removal proceedings under 8 U.S.C. § 1229a.

27. Removal hearings under § 1229a typically involve two types of hearings: master calendar hearings (MCH) and individual calendar hearings (ICH). At MCHs, the immigration judge (IJ) and parties resolve preliminary matters and the noncitizen may submit applications in anticipation of the ICH. At the ICH, also referred to as the merits hearing, the noncitizen presents evidence to support the claims and defenses that would permit that noncitizen to remain in the United States.

28. Noncitizens in removal proceedings are entitled to due process. A key component of due process in removal proceedings is "competent translation." *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000); *see also* Imm. Ct. Prac. Manual § 4.11 (stating that the "Immigration Court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing").

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29. Respondents' delays in providing Mr. Banda's competent translation have significantly prolonged his time in detention.

30. Mr. Banda's first MCH took place on January 9, 2018, around two months after he was detained. At that hearing, the IJ asked Mr. Banda what language he spoke. Mr. Banda informed the court that he spoke Chichewa. The court was unable to locate an interpreter that spoke that language.

31. The IJ then rescheduled Petitioner's MCH for February 20, 2018, in order to secure a proper interpreter.

32. Prior to his second MCH, Mr. Banda filled out a form for ICE and the immigration court to again reiterate that he needed a Chichewa interpreter at his immigration court hearing.

33. However, at Mr. Banda's second MCH on February 20, there was no Chichewa interpreter. As a result, the IJ again rescheduled Mr. Banda's MCH, continuing his proceedings to April 9, 2018.

34. At Mr. Banda's MCH on April 9, 2018, the IJ called a phone interpreter. However, confusion about whether the interpreter spoke the correct language prevented the hearing from proceeding. As a result, the IJ rescheduled Petitioner's MCH yet again, for April 24, 2018.

35. The IJ again called a phone interpreter at the April 24, 2018, hearing, Mr. Banda's fourth MCH. The IJ attempted to move forward with the hearing, but Mr. Banda and the interpreter could not understand each other. The IJ nevertheless scheduled an ICH for May 29, 2018.

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36. Prior to Mr. Banda's first scheduled ICH, he wrote a letter to the court requesting a Chichewa interpreter.

37. At Petitioner's ICH on May 29, 2018, the Court confirmed receipt of Banda's letter requesting a Chichewa interpreter, and informed him that the court had not been able to secure one. As a result, the IJ reset the ICH for October 31, 2018—over five months later.

38. Mr. Banda's ICH on October 31, 2018, suffered a similar fate as his first ICH. At the hearing, the IJ was unable to secure a phone interpreter in Mr. Banda's language. After attempting to locate an interpreter for roughly 30 minutes with no success, the IJ reset the ICH for February 25, 2019.

39. Mr. Banda has requested parole, but was informed by a pod officer at the Northwest Detention Center that he could not obtain parole because the asylum officer issued an inconclusive finding in his credible fear interview.

40. When Mr. Banda arrived in the United States, he had roughly $800.00 USD in his possession. Since arriving, he has spent all of this money on phone calls to his family in Malawi. As a result, he is now able to contact his family about every three months when a friend lends him money for phone calls.

41. Mr. Banda has no known criminal history in the United States or in Malawi.

42. Upon information and belief, if released from detention, Mr. Banda will be able to secure housing locally. Specifically, Advocates for Immigrants in Detention Northwest (AID NW), a local non-profit organization, intends to provide assistance to Mr. Banda if he is released.

43. Mr. Banda has now been detained for over thirteen months without a decision on his case. The delays in his case are almost entirely attributable to Respondents' failure to secure

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proper translation, and despite Mr. Banda's repeated efforts to inform the court what language he speaks.

44. During Mr. Banda's time in detention, Respondents have not provided a bond hearing before a neutral decision maker to determine whether his prolonged detention is justified based on danger or flight risk.

LEGAL FRAMEWORK

45. "'It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.'" *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

46. This fundamental due process protection applies to all noncitizens, including both removable and inadmissible noncitizens. *See id.* at 721 (Kennedy, J., dissenting) ("[B]oth removable and inadmissible [noncitizens] are entitled to be free from detention that is arbitrary or capricious"). It also protects noncitizens who have been ordered removed from the United States and who face continuing detention, *Diouf v. Napolitano*, 634 F.3d 1081, 1086-87 (9th Cir. 2011), as well as those noncitizens deemed "arriving" under the INA, *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting) (stating that "arriving" noncitizens enjoy due process protections against prolonged detention because they are "are held within the territory of the United States at an immigration detention facility" (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 973-74 (9th Cir. 2004) (concluding that the "entry fiction" does not preclude substantive constitutional protection for noncitizens considered "arriving").

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47. Due process therefore requires that the government provide bond hearings to noncitizens facing prolonged detention. Indeed, "[t]he Due Process Clause foresees eligibility for bail as part of due process" because "[b]ail is basic to our system of law." *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting) (internal quotations and citations omitted).

48. The Supreme Court has addressed several challenges to the immigration detention scheme in the last two decades. First, in *Zadvydas*, the Supreme Court held that the government must demonstrate that a noncitizen's removal is reasonably likely to occur if the noncitizen remains detained for six months after the removal period specified in 8 U.S.C. § 1231(a)(6). 533 U.S. at 701. In doing so, the Court recognized a presumption that detention longer than six months following a noncitizen's removal period violates that noncitizen's due process right to liberty. *Id.*

49. Second, in *Demore* the Court upheld the mandatory detention of a noncitizen under 8 U.S.C. § 1226(c) based on the petitioner's concession of deportability and the Court's understanding that detention under § 1226(c) is typically "brief." *Demore*, 538 U.S. at 522 n.6, 528. Nevertheless, the Supreme Court's decision in *Demore* did not foreclose a noncitizen's right to challenge prolonged detention that does not provide protections that permit a noncitizen to challenge continued confinement.

50. Following *Zadvydas* and *Demore*, every circuit court of appeals to confront the issue 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. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015);

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Rodriguez v. Robbins (Rodriguez III), 804 F.3d 1060 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

51. Recently, the Supreme Court held that the Ninth Circuit erred by interpreting 8 U.S.C. §§ 1226(c) and 1225(b) to require bond hearings as a matter of statutory construction. *Jennings*, 138 S. Ct. at 842–48. Because the Ninth Circuit had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court remanded for the Ninth Circuit to address the issue. *Id*. at 851. The Court's majority opinion did not express any views on the constitutional question and left it to the lower courts to address the issue in the first instance.

52. Since the Supreme Court's *Jennings* decision, 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).

53. Due process thus requires "adequate procedural protections" to ensure that the government's asserted justification for a noncitizen's physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (internal quotation marks omitted).

54. In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention: to mitigate the risks of danger to the community and to prevent flight. *Id*.; *Demore*, 538 U.S. at 528. The government may not detain a noncitizen based on any other justification.

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55. Thus, where the government detains a noncitizen for a prolonged period or where the noncitizen pursues a substantial defense to removal or claim to relief, due process requires an individualized hearing before a neutral decisionmaker to determine whether such a significant deprivation of liberty is reasonably related to its purpose. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (stating that an "individualized determination as to [a noncitizen's] risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"); *cf. Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the "initial commitment" requires additional safeguards); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) (noting that "lesser safeguards may be appropriate" for "short-term confinement"); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (observing, in Eighth Amendment context, that "the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

56. At a minimum, detention without a bond hearing is unconstitutional when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detentions under 8 U.S.C. § 1226(c) that last "roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal"); *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months.").

57. The recognition that six months constitutes a substantial period of confinement—after which additional process is required to support continued detention—is deeply rooted in our legal tradition. With only a few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan v. Louisiana*, 391 U.S. 145, 161 & n.34 (1968). Consistent with this tradition, the

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Supreme Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose without the protection afforded by a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion). The Court has also looked to six months as a benchmark in other contexts involving civil detention. *See McNeil*, 407 U.S. at 249, 250-52 (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment).

58. While due process may not require bond hearing after six months in every case, at a minimum, due process demands a bond hearing after detention has become unreasonably prolonged. *See Diop*, 656 F.3d at 234. Courts that apply a reasonableness test have considered three main factors in determining whether prolonged detention is reasonable. First, courts have evaluated 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). Second, reasonableness is a "function of the length of the detention," with detention presumptively unreasonable if it lasts six months to a year. *Id*. at 477-78; *accord Sopo*, 825 F.3d at 1217-18. In assessing the length of detention, delay attributable to the government weighs against finding the detention reasonable. *Sopo*, 825 F.3d at 1218. Third, courts consider the likelihood that detention will continue pending future proceedings. *Chavez-Alvarez*, 783 F.3d at 478 (finding detention unreasonable after ninth months of detention, when the parties could "have reasonably predicted that Chavez-Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500.

59. Due process also requires certain minimal bond hearing procedures. First, the government must bear the burden of proof by clear and convincing evidence to justify continued

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detention. Second, the decisionmaker must consider available alternatives to detention. Finally, if the government cannot meet its burden, a decisionmaker must assess a noncitizen's ability to pay a bond must when determining the appropriate conditions of release.

60. To justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that the noncitizen is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011). The same is true for other contexts in which the Supreme Court has permitted civil detention; in those cases, the Court has relied on the fact that the government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750, 752 (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 post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

61. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

62. First, prolonged incarceration deprives noncitizens of a "profound" liberty interest—one that always requires some form of procedural protections. *Diouf*, 634 F.3d at 1091-92; *see also Foucha*, 504 U.S. at 80 ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (citation omitted)).

63. Second, the risk of error is great where the government is represented by trained attorneys and detained noncitizens are often unrepresented and frequently lack English

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proficiency. *See Santosky v. Kramer*, 455 U.S. 745, 762-63 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested"). Moreover, Respondents detain noncitizens in prison-like conditions that severely hamper their ability to obtain legal assistance, gather evidence, and prepare for a bond hearing. *See infra* ¶ 71.

64. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to the noncitizen's immigration records and other information that it can use to make its case for continued detention.

65. In light of these considerations, "[t]he overwhelming majority of courts to consider the question . . . have concluded that imposing a clear and convincing standard would be most consistent with due process." *Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018) (internal quotation marks omitted).

66. Due process also requires that a neutral decisionmaker consider alternatives to detention. A primary purpose of immigration detention is to ensure a noncitizen's appearance during removal proceedings. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979). ICE's alternatives to detention program—the Intensive Supervision Appearance Program (ISAP)—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP "resulted in a 99% attendance rate at all

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EOIR hearings and a 95% attendance rate at final hearings"). It follows that alternatives to detention must be considered in determining whether prolonged incarceration is warranted.

67. Due process likewise requires consideration of a noncitizen's ability to pay a bond. "Detention of an indigent 'for inability to post money bail' is impermissible if the individual's 'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Id.* at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). As a result, in determining the appropriate conditions of release for immigration detainees, due process requires "consideration of financial circumstances and alternative conditions of release" to prevent against detention based on poverty. *Id*.

68. Evidence about immigration detention and the adjudication of removal cases provide further support for the due process right to a bond hearing in cases of prolonged detention.

69. Each year, thousands of noncitizens are incarcerated for lengthy periods pending the resolution of their removal proceedings. *See Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting). Among a class of immigration detainees in the Central District of California held for at least six months (the "*Rodriguez* class"), the average length of detention was over a year, with many people held far longer. *Id.* In numerous cases, Respondents detain noncitizens for years until those noncitizens win their immigration cases. *Id*. (identifying cases of noncitizens detained for 813, 608, and 561 days until winning their cases). For noncitizens who have some criminal history, their immigration detention often dwarfs the time spent in criminal custody, if any. *Id.* (noting that "between one-half and two-thirds of the class served sentences less than six months").

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70. Noncitizens are detained for lengthy periods because they pursue meritorious claims. Among the *Rodriguez* class, two-thirds of asylum seekers subject to detention under § 1225—like Mr. Banda—won asylum. *See id*. Detained noncitizens are able to succeed at these dramatically high rates despite the challenges of litigating in detention, particularly for the majority of detainees who lack counsel. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 (2015) (reporting government data showing that 86% of immigration detainees lack counsel).

71. Immigration detainees face severe hardships while incarcerated. Immigration detainees are held in lock-down facilities, with limited freedom of movement and access to their families: "the circumstances of their 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); *accord Chavez-Alvarez*, 783 F.3d at 478; *Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999); *Sopo*, 825 F.3d at 1218, 1221. "And in some cases[,] the conditions of their confinement are inappropriately poor." *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting) (citing Dept. of Homeland Security (DHS), Office of Inspector General (OIG), *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) (reporting instances 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 lock down for sharing a cup of coffee with another detainee)).

72. These conditions and obstacles only further underscore the serious due process concerns that prolonged immigration detention pose for noncitizen like Mr. Banda, and reflect the need for a decision before a neutral decisionmaker regarding continued detention.

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CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Due Process

73. Mr. Banda re-alleges and incorporates by reference the paragraphs above.

74. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. Const. amend. V.

75. Mr. Banda's detention—which has lasted well over a year—constitutes prolonged detention.

76. To justify Mr. Banda's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Petitioner's detention is justified by clear and convincing evidence of flight risk or danger, even after considering whether alternatives to detention could sufficiently mitigate that risk.

77. For these reasons, Mr. Banda's ongoing prolonged detention without a hearing violates the Due Process Clause of the Fifth Amendment.

SECOND CLAIM FOR RELIEF

Violation of Eighth Amendment Right to Bail

78. Mr. Banda re-alleges and incorporates by reference the paragraphs above.

79. The Eighth Amendment prohibits "[e]xcessive bail." U.S. Const. amend. VIII.

80. The government's categorical denial of bail to certain noncitizens violates the right to bail encompassed by the Eighth Amendment.

81. For these reasons, Mr. Banda's ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

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PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

a. Assume jurisdiction over this matter;

b. Issue a Writ of Habeas Corpus; hold a hearing before this Court if warranted; determine that Mr. Banda's detention is not justified because the government has not established by clear and convincing evidence that Mr. Banda presents a risk of flight or danger in light of available alternatives to detention; and order Mr. Banda's release, with appropriate conditions of supervision if necessary, taking into account Mr. Banda's ability to pay a bond;

c. In the alternative, issue a Writ of Habeas Corpus and order Mr. Banda's release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge order Mr. Banda's release on appropriate conditions of supervision, taking into account Mr. Banda's ability to pay a bond.

d. Issue a declaration that Petitioner's ongoing prolonged detention violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment;

e. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

f. Grant any other and further relief that this Court deems just and proper.

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Dated this 18th day of December, 2018.

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