UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[redacted]

Petitioner,

v. Case No:

MARC J. MOORE, in his official capacity as Field Office Director for the ICE Miami Office of Enforcement & Removal Operations; PAUL CANDEMERES, in his official capacity as Assistant Field Office Director of the ICE Miami Field Office and Officer in Charge, Krome Service Processing Center, Miami, Florida; JOHN T. MORTON, in his official capacity as Assistant Secretary of United States Immigration and Customs Enforcement; JANET NAPOLITANO, in her official capacity as the Secretary of the United States Department of Homeland Security; and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States Department of Justice,

Respondents.
_____/

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, [redacted], alleges as follows:

INTRODUCTION

1. This habeas corpus action challenges the prolonged and continuing detention of [redacted]. Ms. [redacted] is a lawful permanent resident who has been detained by immigration authorities for nearly one year, since July 11, 2012, even though she poses no danger or flight risk, and even though her removal proceedings are likely to continue for many months and

indeed years into the future. Ms. [redacted] has applied for relief from deportation in the forms of asylum and withholding of removal. Her claims are based upon her transgender identity and imputed sexual orientation. She has experienced persecution on these grounds as a child and teenager in Haiti, and country conditions materials on the immigration court record confirm that she would face future persecution on these grounds if forced to return to Haiti. She has a petition for review of her removal order pending before the U.S. Court of Appeals for the Eleventh Circuit, which recently took the unusual step of issuing an emergency stay of removal. Ms. [redacted] has never had a hearing to determine whether her detention is justified because the immigration judge incorrectly held that she was subject to mandatory detention under 8 U.S.C. § 1226(c).

2. Ms. [redacted]'s prolonged, open-ended detention, without a hearing to determine if such detention is justified, violates both the Immigration and Nationality Act ("INA") and the United States Constitution. Ms. [redacted]'s detention violates the INA for two reasons. First, her detention violated the INA regardless of its duration because she was not taken into ICE custody "when . . . released" from criminal custody as required for detention under the mandatory detention provision. 8 U.S.C. § 1226(c). She was detained by ICE while living in the community, several months after her release from state custody. Second her detention violates the INA because Congress has not authorized such prolonged and indefinite detention, at least in the absence of adequate procedural safeguards. Ms. [redacted]'s detention violates due process because it is not reasonably related to a legitimate regulatory purpose, and because it has been accomplished without the kinds of procedural safeguards that are necessary to justify such a significant deprivation of liberty. This Court, however, need not – and should not – reach the serious constitutional questions posed by Ms. [redacted]s prolonged detention without a bond

hearing. Rather, principles of constitutional avoidance, in addition to other principles of statutory construction, require that the statutory language of the detention statute 8 U.S.C. § 1226 be construed as not authorizing Ms. [redacted]'s continued detention, at least in the absence of a constitutionally adequate custody hearing.

3. In this petition, Ms. [redacted] seeks a constitutionally adequate bond hearing before an impartial adjudicator.

CUSTODY

4. Ms. [redacted] is in the physical custody of Respondents and U.S. Immigration and Customs Enforcement ("ICE"). Ms. [redacted] is detained at Krome Service Processing Center ("Krome") in Miami, Florida. Ms. [redacted] is under the direct control of Respondents and their agents.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-02 (declaratory relief); and the U.S. Const., art. I, § 9, cl. 2 (Suspension Clause).

6. While the courts of appeals have jurisdiction to review removal orders directly through petitions for review, *see* 8 U.S.C. § 1252(a)(1), (b), the federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas claims by non-citizens challenging the lawfulness or constitutionality of their detention by ICE. *See*, *e.g.*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

7. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 2241(d) because Ms. [redacted] is detained at Krome in Miami, Florida.

PARTIES

8. Ms. [redacted] is a native and citizen of Haiti who has been detained for nearly one year pending completion of removal proceedings. Ms. [redacted] was first taken into ICE custody on July 11, 2012, and has remained in ICE custody continuously since then.

9. Respondent Marc J. Moore is the Field Office Director for the ICE Miami Office of Enforcement and Removal Operations (ERO). In this capacity, he has jurisdiction over the detention facility in which Ms. [redacted] is held, is authorized to release Ms. [redacted], and is a legal custodian of Ms. [redacted]. Mr. Moore is sued in his official capacity.

10. Respondent Paul Candemeres is Assistant Field Office Director for the ICE Miami Field Office. Officer Candemeres is the facility director of Krome and is Ms. [redacted]'s immediate custodian. He is sued in his official capacity. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004).

11. Respondent John T. Morton is the Director of Immigration and Customs Enforcement. In this capacity, he has responsibility for the enforcement of the immigration laws, including immigration detention. As such, he is a legal custodian of Ms. [redacted]. Mr. Morton is sued in his official capacity.

12. Respondent Janet Napolitano is the Secretary of Homeland Security and heads the Department of Homeland Security ("DHS"), the arm of the U.S. government responsible for enforcement of immigration laws. ICE is a subdivision of DHS. Ms. Napolitano is the ultimate legal custodian of Ms. [redacted]. Ms. Napolitano is sued in her official capacity.

13. Respondent Eric H. Holder, Jr. is the Attorney General of the United States and the head of the Department of Justice, which encompasses the Board of Immigration Appeals ("BIA") and the Immigration Judges ("IJs") as subunits of the Executive Office of Immigration

Review. Mr. Holder shares responsibility for the implementation and enforcement of immigration laws along with Respondent Napolitano. Mr. Holder is a legal custodian of Ms. [redacted]. He is sued in his official capacity.

FACTS AND PROCEDURAL HISTORY

Persecution in Haiti and Immigration to the United States

14. [redacted] is 25 years old. Although her family viewed her as male from birth, Ms. [redacted] identifies as female. She dresses as a woman and uses a female name. Ms. [redacted] has been in ICE custody since July 11, 2012, for a period of nearly one year.

15. Ms. [redacted] was born in Haiti. She left Haiti at the age of 16 and has not returned since. She was paroled into the United States in 2004 and became a lawful permanent resident of the United States in 2006.

16. As a child growing up in Haiti, Ms. [redacted] survived constant physical and verbal abuse from her family, classmates, and neighbors based upon her transgender identity and perceived homosexual orientation. Her uncle physically abused her and threatened her – for example, he threatened to tie her to his truck with a rope and drag her behind it if she did not change. Other children in her school beat her and taunted her with anti-gay slurs, and one student threatened to kill her because she was gay. Teachers refused to protect [redacted], telling her that if she would "change" she would not be bothered. People on the streets would also yell anti-gay slurs at her, throw rocks at her, and threaten her with violence.

17. Ms. [redacted] left Haiti for the United States at the age of 16. Ms. [redacted] has not returned to Haiti because based on her prior experiences, she fears she will be injured and killed if she returns to Haiti.

18. Ms. [redacted] suffers from depression, for which she is prescribed medication. Her

prolonged detention has exacerbated her depression. She has strong family ties in Florida, including her two sisters and her mother, who are all lawful permanent residents. Ms. [redacted]'s mother has health problems and almost passed away while being hospitalized in 2012 during Ms. [redacted]'s detention.

19. Ms. [redacted] was convicted in 2012 for simple possession of cocaine and unlawful possession of a firearm. Ms. [redacted] carried the firearm because she was afraid of violence based on her transgender identity and sexual orientation. Ms. [redacted] has no other convictions.

20. Ms. [redacted] was sentenced to 6 months of probation, with no imprisonment for the drug possession charge and credit time served for the firearm possession charge. She was thus released from jail right after the sentence was handed down. Nevertheless, the immigration judge subsequently held that her drug conviction subjects her to mandatory immigration detention. *See* Ex. E, Transcript of Hearing, August 7, 2012, at 3.

Procedural History: Ms. [redacted]'s Removal Proceedings and Detention

21. Ms. [redacted] was not taken into immigration custody immediately upon being released from state custody on March 7, 2012. ICE did not take her into custody until 4 months later, on July 11, 2012. On this date, ICE arrested her when she reported for a probation appointment. ICE then commenced removal proceedings, alleging that Ms. [redacted] was removable based on her above convictions. *See* Ex. C, Notice to Appear. The Department of Homeland (DHS) issued a "Notice of Custody Determination" that denied bond but also indicated Ms [redacted] "may request a review of this determination by an immigration judge," demonstrating that Ms. [redacted] was eligible to request a custody redetermination before an IJ. *See* Ex. D, Notice of Custody Determination. However, when Ms. [redacted] requested a bond hearing at her initial hearing on August 7, 2012, the Immigration Judge (IJ) held that Ms. [redacted] was subject

to mandatory detention and denied her a bond hearing. *See* Ex. E, Transcript of Hearing, August 7, 2012, at 3. *See also* 8 U.S.C. § 1226(c) (mandatory detention of non-citizens in removal proceedings when they are released from confinement stemming from convictions for certain crimes). Ms. [redacted] has now been detained without a bond hearing for nearly one year.

22. Ms. [redacted]e applied for relief in the forms of asylum, withholding of removal, and relief under the United Nations Convention Against Torture ("CAT"). Her claims for relief are based upon the persecution and torture she would face in Haiti on account of her transgender identity and perceived homosexual orientation. In support of her claim, she described the abuse she suffered in Haiti and also submitted country conditions materials documenting widespread persecution and torture of transgender people and abuse and violence against homosexual men in Haiti and personal photgraphs.

23. The IJ found Ms. [redacted] credible and did not "doubt that respondent is gay." *See* Ex. F, Oral Decision and Orders of the Immigration Judge, at 7. The IJ nonetheless denied her asylum application as a matter of discretion and denied her applications for withholding of removal and relief under the Convention Against Torture, holding that [redacted] had not established past persecution or a well-founded fear of future persecution. *See id.* at 7-12. The BIA sustained the IJ's ruling. *See* Ex. G, Decision of the Board of Immigration Appeals.

24. With the assistance of new counsel, who also represent her on the present Petition, Ms. [redacted] appealed the BIA's ruling to the U.S. Court of Appeals for the Eleventh Circuit and moved for an emergency stay of removal. The brief in support of this motion explains that the IJ and BIA erred in (1) ignoring the most egregious instances of abuse that Ms. [redacted] described, despite finding her testimony credible; (2) failing to consider the fact that Ms. [redacted] was a child at the time of the persecution or the aggregate effect of the incidents described

in her testimony; (3) failing to analyze whether Ms. [redacted] faces a risk of persecution or torture on account of her transgender identity; (4) ignoring key country conditions evidence and failing to consider the cumulative likelihood of future persecution; and (5) applying an incorrect legal standard to the question of whether Ms. [redacted] could reasonably be expected to avoid persecution by relocating within Haiti. *See* Ex. B, Emergency Motion for Stay of Removal Pending Review (Brief).

25. On May 16, 2013, the Eleventh Circuit took the unusual step of issuing an emergency stay of removal while Ms. [redacted] appeals her administrative removal order ([redacted]. *See* Ex. A, Order Granting Emergency Stay of Removal Pending Review. The fact that a stay was granted indicates that Ms. [redacted] "has made a strong showing that [s]he is likely to succeed on the merits" of her appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Because the issues raised in this appeal go to the heart of the claims for relief, the Eleventh Circuit's decision to grant the emergency stay indicates a strong likelihood of ultimately winning relief from removal. Moreover, a briefing schedule has not yet been set for the petition for review. Obtaining a decision on the petition for review will take many months and may take over a year, and it will likely be followed by further administrative proceedings.

26. Ms. [redacted] has never received a bond hearing. Because the IJ has held that she is detained pursuant to the mandatory detention provision § 1226(c), she will not receive a bond hearing in the future unless this Court orders it, regardless of how many months or years her petition for review and any future administrative proceedings may last.

27. Ms. [redacted] poses no danger to the community and no flight risk. She is eligible for relief and has family ties in the United States. The criminal court judge who heard her case had previously determined that no sentence of further confinement was appropriate, and Ms. [redacted]

complied with the terms of her probation.

LEGAL FRAMEWORK

I. Detention Statute

28. Section § 1226 governs the detention of a noncitizen "pending a decision" as to removal. In general such detention is discretionary. *See* 8 U.S.C. §1226(a) ("an alien *may be* arrested and *detained* pending a decision on whether the alien is to be removed from the United States . . . . [P]ending such decision, the Attorney General *may continue to detain* that arrested alien" or "*may release*" the alien [on bond or parole] (emphasis added). Under certain specific circumstances, however, detention is mandatory. *See* 8 U.S.C. §1226(c) (stating that the Attorney General "*shall take into custody* any alien who . . .[is removable on specified criminal grounds or specified security grounds] . . . *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may arrested again or imprisoned for the same offense") (emphasis added).

29. Whereas § 1226 governs detention "pending a decision on whether the alien is to be removed," another provision, 8 U.S.C. § 1231, governs detention of "aliens ordered removed." Section 1231(a)(2) authorizes detention "[d]uring the [initial, 90-day] removal period." 8 U.S.C. § 1231(a)(2). Section 1231(a)(6) authorizes discretionary detention "beyond the removal period."

II. Ms. [redacted]'s Detention Is Governed by the INA's Pre-Removal Detention Statute.

30. Ms. [redacted]'s detention continues to be governed by the pre-final order detention statute, § 1226, because § 1231 states that when a Court of Appeals issues a stay of removal, the post-final order "removal period" has not yet begun. 8 U.S.C. § 1231(a)(1)(B) provides that the "removal period begins on the latest of the following:

> (i) The date the order of removal becomes administratively final.
>
> (ii) *If the order is judicially reviewed and if a court issues a stay of the removal of the alien, the date of the court's final order.*
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement."

8 U.S.C. § 1231(a)(1)(B) (emphasis added). Based on this clear statutory language, all circuit courts to have expressly considered this issue have held that § 1226, not § 1231, governs detention when a BIA removal order has been issued and where the order has been stayed pending judicial review in a U.S. Court of Appeals. *See Leslie v. Att'y Gen. of the U.S.*, 678 F.3d 265, 270 (3d Cir. 2012) (collecting cases); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1062 (9th Cir. 2008); *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001) (abrogated on other grounds by *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006)).

31. The U.S. Court of Appeals for the Eleventh Circuit has not yet ruled on this issue. In *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002), the court assumed in a footnote that detention of an individual who has a stay of removal from the Court of Appeals would be governed by § 1231. However, this footnote is dicta because the Court denied the petition on the grounds that detention had not yet become prolonged — reasoning that would apply regardless of which statute governed detention. *See id.* at 1051-52. Moreover, because the argument that § 1226 governed the petitioner's detention was not before the *Akinwale* court, the court did not reference the key statutory language quoted above and assumed without analysis that § 1231 governed. *Id.* at 1052 n.4. The statutory language that the *Akinwale* footnote does cite – providing that the removal period "shall be extended" where an individual "acts to prevent the alien's removal

subject to an order of removal," *id.* at 1052 (citing 8 U.S.C. § 1231(a)(1)(C)) – does not change the meaning of the statute's plain language defining the beginning of the removal period.[1] Where, as in Ms. [redacted]'s case, the removal period has not yet begun, it cannot be extended. Therefore, Ms. [redacted] continues to be detained pursuant to § 1226.

III. Ms. [redacted] was Never Properly Subject to Mandatory Detention, Because Section 1226(c) Only Authorizes Mandatory Detention of Non-Citizens Who Are Detained Immediately Upon Release From Criminal Custody.

32. First, Ms. [redacted] is entitled to an immediate bond hearing because even at the outset of her immigration detention, she was not subject to mandatory detention according to the plain terms of § 1226(c). This section provides in relevant part that the Attorney General "shall take into custody an alien who is deportable by reason of having committed any offense covered [inter alia] in section [1227(a)(2)(C)] . . . *when the alien is released* . . . . for the same offense." 8 U.S.C. § 1226(c) (emphasis added).

33. The phrase "when the alien is released . . ." limits mandatory detention to individuals taken into ICE custody directly from criminal custody for an enumerated offense. If § 1226(c) were interpreted to extend mandatory detention to all non-citizens with an enumerated offense in their past, "'without regard to the time of that alien's release from custody, then the phrase 'when the alien is released' becomes meaningless surplusage.'" *Pujalt-Leon v. Holder*, No. 3:CV-12-1749, 2013 WL 1207989, at *17 (M.D. Pa. Mar. 25, 2013) (citing *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1265 (D.N.M.2012)); *accord, e.g.*, *Khodr v. Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010). The Supreme Court has emphasized the "cardinal principle of statutory construction that a statute should, upon the whole, be construed so that, if possible, no clause,

[1] *See In re Tennyson*, 611 F.3d 873, 877 (11th Cir. 2010) ("When the plain reading of a statute produces an unambiguous and reasonable definition of a term, we will not look past that plain reading and read into the text of the statute an unstated purpose.").

sentence or word is rendered superfluous, void or insignificant." *TRW v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

34. Had "Congress intended that certain aliens be arrested and detained 'in the event of' release, any number of more obvious terms would have accomplished that result, including 'once,' 'after,' or 'if.'" *Nieto Baquera v. Longshore*, --- F. Supp. 2d. ---, No. 13–cv–00543–RM–MEH, 2013 WL 2423178, at *4 (D. Colo. June 4, 2013); *see Khodr*, 697 F. Supp. 2d at 778-79; *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) (citing *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004)).

35. This reading is consistent with the immigration detention scheme as a whole. As the First Circuit has explained in a related context, "[t]he mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). If Ms. [redacted] is not subject to the specific terms of the mandatory detention statute, ICE retains the discretion to detain her or set bond, subject to review at an immigration court bond hearing. *See* § 1226(a).

36. Likewise, although the court need not look beyond the plain language of the statute, this reading is consistent with legislative history. This section of the statute reflects Congress's concern for ensuring that potentially removable individuals are immediately taken into immigration custody upon release from criminal custody rather than being released into the community. "In *Saysana*, the First Circuit . . . noted that the manner in which the legislature adopted the 1996 amendments to 8 U.S.C. § 1226(c) indicates Congress did not intend 'when' to mean 'after.'" *Snegirev v. Asher*, No. C12-1606MJP, 2013 WL 942607, at *3 (W.D. Wash. Mar. 11, 2013) (slip op.) (citing 590 F.3d at 17 n. 6.). "'Although Congress clearly expressed concern

about aliens who had committed qualifying offenses, it declined to begin immediately prospective application of the detention provisions to aliens with releases after enactment, let alone retrospective application to aliens with prior releases.'" *Id.* The First Circuit also noted that, in amending § 1226(c) in 1996, "Congress was no doubt aware that, under some circumstances, aliens with criminal histories that predate the passage of [the amendments] remain eligible for forms of relief not available to aliens with more recent criminal convictions." *Id.* at 17. Thus, Congress chose to create a "limited system of mandatory detention," not a broad system that would sweep in individuals who have been living peacefully in their communities for months or years. *Id*.

37. For these reasons, the "'vast majority of federal courts that have addressed this issue'" have concluded that § 1226(c) unambiguously does not apply to an individual who was not taken into immigration custody immediately upon release from criminal custody for an enumerated offense. *Pujalt-Leon v. Holder*, No. 3:CV-12-1749, 2013 WL 1207989, at *17 (M.D. Pa. Mar. 25, 2013) (citing *Ortiz v. Holder*, No. 11–1146, 2012 WL 893154, at *3 (D. Utah Mar.14, 2012)); *see Bumanlag v. Durfor*, No. 2:12-CV-2824 DAD P, 2013 WL 1091635, at *7 (E.D. Cal. Mar. 15, 2013) ("The court agrees with the reasoning of the decisions of the majority of courts to have considered this issue, including all other district courts in this Circuit, that 8 U.S.C. § 1226(c) requires that an alien be taken into custody immediately or shortly after release from custody on the removable offense."); *Nabi v. Terry*, No. CV 12-0259 MV/LAM, 2012 WL 7808091, at *2 (D.N.M. Oct. 29, 2012) ("[B]oth this Court and the majority of other federal district courts to have ruled on the issue have found that the term 'when the alien is released' *unambiguously* means immediately upon release"); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778-79 (E.D. Mich. 2010) (holding that "the phrase 'when the alien is released' clearly and

unambiguously requires that the Attorney General take the alien into custody immediately upon the alien's release from criminal custody" and explaining that "[n]umerous district courts across the country have reached the same result the Court reaches here"); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) ("For over a decade, courts analyzing section 1226(c) have consistently interpreted the statute to authorize the government to take an alien into custody on or about the time he is released from custody for the offense that renders him removable.") (quoting *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 180-81 (S.D.N.Y. 2009)); *see, e.g.*, *Nieto Baquera*, 2013 WL 2423178, at *4; *Espinoza v. Aitken*, No. 5:13-CV-00512 EJD, 2013 WL 1087492, at *6 (N.D. Cal. Mar. 13, 2013) ("Analyzing the plain meaning of the statute to find that "the temporal reference of the 'when released' clause must mean exactly what is states: the time when the alien is actually released from state custody."); *Snegirev*, 2013 WL 942607, at *4; *Bogarin-Flores v. Napolitano*, No. 12CV0399 JAH WMC, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012); *Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1238 (W.D. Wash. 2012); *Ortiz v. Holder*, No. 2:11CV1146 DAK, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012); *Rosario v. Prindle*, No. 11–217, 2011 WL 6942560, at *3 (E.D. Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D. Ky. Jan. 4, 2012); *Rianto v. Holder*, No. CV–11–0137–PHX–FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010); *Scarlett v. DHS*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009). Indeed, in *Scarlett*, a court awarded attorney's fees to a petitioner, holding that the government's position to the contrary was not even "substantially justified." No. 08-CV-534A, 2010 WL 55929, at *2 (W.D.N.Y. Jan. 5, 2010).

38. The BIA has held that individuals may be subject to mandatory detention even if they are not taken into ICE custody when released from criminal custody. *In re Rojas*, 23 I. &

N. Dec. 117 (BIA 2001). The *Rojas* majority conceded that the "when . . . released" clause "does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement." *Id.* at 122. Nevertheless, it described this as a "statutory command" rather than a "description of an alien who is subject to detention" and that mandatory detention could apply months or even years after release from criminal custody. *Id.* at 121. Seven Board members issued a rare dissenting opinion, pointing out that this approach to statutory construction was not supported and concluding that the plain language of the statute limited mandatory detention to individuals taken into ICE custody at the time of release from criminal custody for an enumerated defense. *Id.* at 130-39.

39. The Fourth Circuit recently deferred to *In re Rojas*, and the Third Circuit reached the same outcome as *Rojas* by drawing on an entirely different line of cases. *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012); *Sylvain v Att'y Gen. of U.S.*, 714 F.3d 150, 156-60 (3d Cir. 2013).

40. Contrary to the holding in *Hosh*, *Rojas* is not entitled to *Chevron* deference because the "when . . . released" language of § 1226(c) is unambiguous. *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1307 (11th Cir. 2011) ("[W]here Congress has spoken clearly, we do not defer to an agency's interpretation of the statute, as we 'must give effect to the unambiguously expressed intent of Congress.'") (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *see also Nieto Baquera*, --- F. Supp. 2d. ---, 2013 WL 2423178, at *5 ("*Chevron* requires deference to an agency's interpretation of *specific* ambiguous terms"). In fact, the BIA *agreed* that the term "when" plainly indicated immediacy, before briefly citing legislative history documents and the INA as a

whole and concluding that individuals not taken into custody "when . . . released" from criminal custody could be subject to mandatory detention.. *In re Rojas*, 23 I. & N. at Dec. 122.

41. Second, in determining whether the statutory language was clear, *Hosh* declined to address basic principles of statutory construction, including the fact that the BIA's interpretation would render the phrase "when . . . released" meaningless. *See* 680 F.3d at 381 n.7.

42. Additionally, both *Hosh* and *Sylvain* rely heavily on a line of cases that involved a very different type of statutory scheme. In *United States v. Montalvo-Murillo*, the Supreme Court held that the government's violation of a provision of the Bail Reform Act which required a prompt detention hearing did not mandate outright release. 495 U.S. 711 (1990). *Montalvo-Murillo* involved a law "containing a time sensitive directive to government officials in the context of a statute that was silent as to the consequence of a failure to adhere to the time requirements established by Congress." *Nieto Barquera*, 2013 WL 2423178, at *6. Unlike the present case, construing the provision in *Montalvo-Murillo* to require release would have required imposing a judicially-created "coercive sanction," *Hosh*, 680 F.3d at 381 (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)), *see Montalvo-Murillo*, 495 U.S. at 721 (declining to "invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits"). In contrast, reading § 1226(c) as applying to individuals arrested upon release from criminal custody gives effect to the statutory text itself. Section 1226, not a judicially-created remedy, requires a bond hearing. *See Nieto Barquera*, 2013 WL 2423178, at *6-7.

43. Moreover, contrary to *Sylvain's* holding, § 1226 does not "strip[] the Government of all authority" to detain a non-citizen if the temporal limits of §1226(c) are not followed. *Montalvo-Murillo*, 495 U.S. at 721; *Sylvain*, 714 F.3d at 158-61. Given the structure of the §

1226 – which differs markedly from the Bail Reform Act — the Attorney General's more generalized discretionary authority under §1226(a) allows for a non-citizen who represents a flight risk or danger to the community to be detained without bond, subject to immigration court review. *See, e.g.*, *Nieto Baquera*, 2013 WL 2423178, at *6; *Deluis-Morelos v. ICE Field Office Dir.*, No. 12CV-1905JLR, 2013 WL 1914390, at *5 (W.D. Wash. May 8, 2013) (citation omitted) (holding that *Sylvain*'s reasoning is not persuasive).

44. Finally, *Hosh* and *Sylvain* fail to apply the longstanding immigration rule of lenity. *See INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

45. Because ICE did not take Ms. [redacted] into custody when she was released from state custody, but rather after she had been living in the community and complying with her probation order for four months, she is not subject to detention under § 1226(c) and is entitled to a bond hearing under § 1226(a).

IV. Section 1226(c) Does Not Authorize Prolonged Detention without a Constitutionally Adequate Bond Hearing.

46. Even if Ms. [redacted] had been initially subject to mandatory detention, the doctrine of constitutional avoidance requires construing the language of § 1226(c) as not authorizing prolonged civil detention in the absence of a constitutionally adequate bond hearing. The statute does not expressly authorize prolonged mandatory detention, and construing it to permit such detention would violate due process.

A. Section 1226(c) Does Not Expressly Authorize Prolonged Detention Without a Bond Hearing.

47. Section 1226(c) is silent with regard to the duration of mandatory detention authorized and the procedures required if such detention becomes prolonged. It does not

expressly authorize prolonged mandatory detention. As discussed below, the Supreme Court has also described this statute as authorizing mandatory detention for the "brief" period necessary to complete removal proceedings. *Demore v. Kim*, 538 U.S. 510, 513 (2003).

48. Notably, as the Supreme Court has recognized, the existence of distinct statutory provisions that do expressly authorize prolonged detention – namely, the national security detention provisions at 8 U.S.C. §§ 1537(b)(1) and 1226A(a)(2))[2] – demonstrates that Congress did not intend for a general detention statute that is silent as to the duration of detention to implicitly authorize prolonged detention. *See Zadvydas*, 533 U.S. 678, 697 (2001); *Clark v. Martinez*, 543 U.S. 371, 379 n.4, 386 (2005); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006) ("Our conclusion that the general detention statutes cannot be read as authorizing indefinite detention is bolstered by considering the immigration statutes as a whole. In fact, Congress has enacted provisions that allow the Attorney General to detain certain aliens for lengthy periods, but certain defined categories of aliens, and only with procedural safeguards."). Where Congress intended to authorize prolonged detention, it did so explicitly. *See Sarmiento Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277, 1282 (11th Cir. 2004) ("[A]s a matter of statutory construction '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'. . . .") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

[2] Unlike § 1226, these specialized national security detention statutes explicitly authorize detention for potentially lengthy periods: "until the completion of any appeal, 8 U.S.C. § 1537(b)(1), and "until the alien is removed from the United States," 8 U.S.C. § 1226A(a)(2).

B. Prolonged Civil Detention Without a Bond Hearing Raises Serious Due Process Concerns, and the Doctrine of Constitutional Avoidance Requires Construing § 1226(c) to Not Authorize Prolonged Mandatory Detention.

49. "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*, 533 U.S. at 690. Due process requires "a sufficiently strong special justification" and strong procedural protections to outweigh the significant deprivation of liberty inherent in civil detention. *See id.* at 690-91. As detention becomes prolonged, the increasing deprivation of liberty requires an even stronger substantive justification and stronger procedural protections. *See Kansas v. Hendricks*, 521 U.S. 346, 364-69 (1997) (upholding involuntary civil commitment for periods of one year at a time, in light of "strict procedural safeguards" such as right to jury trial and the government's burden of proof beyond a reasonable doubt).

50. The Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), recognized that the Court's body of precedent recognizing due process limits on civil detention governs immigration detention. In that case, the Court construed the post-final order detention statute, § 1231(a)(6), as authorizing detention only for the period of time "reasonably necessary to secure removal," presumptively six months. *Id.* at 699. The Court adopted this construction in order to avoid the serious constitutional problem that would be posed by prolonged and indefinite detention without adequate procedural safeguards. *Id.* Thus, although the statute (like § 1226(c)) does not expressly set temporal limits on detention, the Court construed the statute to imply a presumptive limit. *See also Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (applying *Zadvydas's* principles to construe § 1226(c) as containing an "implicit 'reasonable time' limitation") (quoting *Zadvydas*, 533 U.S. at 682)); *Rodriguez*, 715 F.3d at 1139 (holding

that immigration detention under any authorizing statute becomes prolonged at the six-month mark, at which point an adequate custody hearing is required).

51. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld the constitutionality of mandatory detention under § 1226(c) "for the brief period necessary" to complete removal proceedings" as applied to an in individual who had conceded deportability. *Id.* at 513, 531. *See also, e.g., Rodriguez,* 715 F.3d at 1135 (emphasizing that "*Demore's* holding hinged on the brevity of mandatory detention"); *Madrane v. Hogan*, 520 F. Supp. 2d 654, 664 (M.D. Pa. 2007) (noting that "[t]he emphasis in *Demore* on the anticipated limited duration of the detention period is unmistakable, and the Court explicitly anchored its holding by noting a brief period") (internal citations omitted). The Court emphasized that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore,* 538 U.S. at 530. In his concurring opinion, which provided the decisive fifth vote, Justice Kennedy emphasized that detention that is reasonable at the outset can violate due process if it becomes unreasonably prolonged. *Id. at* 532 (Kennedy, J., concurring). *See also, e.g., Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011) ("Justice Kennedy's opinion provides helpful guidance on how to interpret the *Demore* opinion.").

52. Since *Demore,* three circuit courts and numerous district courts have construed § 1226(c) as only authorizing mandatory detention for a limited period of time, in light of the serious constitutional problems that would be posed by prolonged detention without a meaningful custody hearing. *See, e.g., Rodriguez,* 715 F.3d 1127 (9th Cir. 2013); *Casas-Castrillon v. Dep't of Homeland Security,* 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis,* 430 F.3d 1241 (9th Cir. 2005), *Leslie v. Att'y Gen. of the U.S.,* 678 F.3d 265 (3d Cir. 2012); *Diop v.*

ICE/Homeland Security, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455 (D. Mass 2010); *Monestime v. Reilly*, 404 F. Supp. 2d 453 (S.D.N.Y. 2010). Other courts have held that prolonged mandatory detention violates due process and have ordered bond hearings for noncitizens whose mandatory detention has become unconstitutionally prolonged. *See, e.g.*, *Madrane v. Hogan*, 520 F. Supp. 2d 654 (M.D. Pa. 2007); *Fuller v. Gonzales*, 2005 WL 818614 (D. Conn. Apr. 8, 2005).

53. Like the petitioner in *Zadvydas*, Ms. [redacted] had lawful permanent residency in the United States and therefore is entitled to heightened due process protections. Indeed, she is potentially entitled to even greater due process rights than Zadvydas because she has not yet exhausted her judicial remedies and may ultimately be granted permission to remain in the United States. *See Zadvydas*, 533 U.S. at 693; *Demore*, 538 U.S. at 532 ("[A] lawful permanent resident alien. . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (Kennedy, J. concurring).

54. Because of the serious constitutional problems that would arise if the statute authorized prolonged detention without the strong justification and procedural safeguards that such detention would require – and in the absence of any indication that Congress intended this result – this Court must construe the statute as authorizing detention for only a brief period of time, or in the alternative as requiring a constitutionally adequate hearing where the government bears the burden of showing that such prolonged detention is justified. *See, e.g.*, *Rodriguez*, 715 F.3d at 1138 ("§ 1226(c)'s mandatory language must be construed 'to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review.'") (quoting *Zadvydas*, 533 U.S. at 682); *Leslie v. Att'y Gen. of U.S.*, 678, F.3d 265 (3d Cir. 2012);

Diop v. ICE/DHS, 656 F.3d 221, 232 (3d Cir. 2011) ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Nadarajah v. Gonzalez*, 443 F.3d 1069, 1078 (9th Cir. 2006) (applying *Zadvydas* principle of constitutional avoidance to construe generalimmigration detention statutes – except those that specifically authorize prolonged detention on national security grounds – as authorizing detention only for a brief and reasonable period of time); *Lee v. Stone*, No. 2:11-CV-00014-RWS, 2011 WL 4553147 at *7 (N.D. Ga. Aug. 25, 2011) *report and recommendation adopted*, No. 2:11-CV-00014-RWS, 2011 WL 4553134 (N.D. Ga. Sept. 29, 2011) (detention under § 1226(c) may at some point become unreasonable).

55. Because Ms. [redacted]'s detention has become prolonged, 8 U.S.C. § 1226(c) no longer provides authority for her detention without a bond hearing, even assuming for the sake of argument that her detention was once authorized by that statute. The three Courts of Appeals to have addressed this issue agree that a custody hearing is required once detention becomes prolonged or unreasonably prolonged, although they have taken slightly different approaches. The Ninth Circuit has held that once detention under § 1226(c) becomes prolonged, authority for any continued detention shifts to the discretionary detention provision of § 1226(a) and requires specific procedural protections as discussed below. *See Rodriguez*, 715 F.3d at 1138 ("[W]hen detention becomes prolonged, § 1226(c) becomes inapplicable."); *Casas-Castrillon*, 535 F.3d at 948 (holding that once detention becomes prolonged, "the Attorney General's detention authority rests with § 1226(a) until the alien enters his 'removal period,' which occurs only after [the

Court of Appeals has] rejected his final petition for review or his time to seek such review expires.") (citation omitted). The Sixth Circuit has "constru[ed] the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time." *Ly*, 351 F.3d at 270. The Third Circuit has held that when "detention [pursuant to § 1226(c)] becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute." *Diop*, 656 F.3d at 233.

56. Ms. [redacted]'s mandatory detention is impermissibly prolonged because she has now been detained for nearly a year. Pursuant to *Zadvydas* and consistent with *Demore*, mandatory detention becomes unreasonably prolonged at the six-month mark. *Rodriguez*, 715 F.3d at 1139 (holding that "[i]mmigration detention becomes prolonged at the six-month mark regardless of the authorizing statute" and applying rule to § 1226(c)); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011) ("As a general matter, [immigration] detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months."). In *Zadvydas*, the Supreme Court avoided a due process problem by construing the post-final-order detention statute, § 1231, as creating a presumption that release was required after six months. 533 U.S. at 633. The Supreme Court explained the importance of setting clear temporal limits on detention, holding that "it is practically necessary to recognize a presumptively reasonable period of detention" and that "for the sake of uniform administration in the federal courts, six months is the appropriate period." *Zadvydas*, 533 U.S. at 680; *see Rodriguez*, 715 F.3d at 1136-39. *Demore* is consistent with a recognition that detention becomes prolonged at six months. As discussed above, the Supreme Court majority emphasized that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority

of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal," 538 U.S. at 530, and Justice Kennedy explained that the brevity of Kim's detention was critical to his fifth vote, *id.* at 532 (Kennedy, J., concurring). Moreover, "[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound." *Diouf*, 634 F.3d at 1091-92. Even the national security statutes, which permit prolonged detention, require additional procedural protections after six months.[3] For all of these reasons, detention becomes prolonged, and a bond hearing required, after six months.

57. Alternatively, even if this Court were to adopt the "unreasonably prolonged" standard recognized by the Third and Sixth Circuits, Ms. [redacted] is entitled to a bond hearing because her detention of nearly one year has become unreasonably prolonged under the particular facts of her case and because her immigration proceedings are likely to continue for a year or more. Ms. [redacted]s almost one-year period in detention exceeds what can be considered a limited, reasonable amount of time, and is significantly longer than the average periods recognized in *Demore*. Future detention will likely be prolonged in the absence of a bond hearing. The Eleventh Circuit may take up to a year to rule on Ms. [redacted]'s petition for review, and if she prevails, proceedings will return to the agency. For the reasons explained above, she also has a substantial likelihood of prevailing on her immigration case, as evidenced by the Eleventh Circuit's decision to issue a rare emergency stay of removal. Her prolonged detention will therefore likely serve no immigration purpose.

[3] *See Nadarajah*, 443 F.3d at 1079 ("Further, the structure of the immigration statutes, with specific attention given to potential detentions of over six months in carefully defined categories, indicates that the period of detention allowed under the general detention statutes must be construed as being brief and reasonable, as the Supreme Court has determined in construing similar provisions.").

V. Ms. [redacted] Is Entitled to a Constitutionally Adequate Bond Hearing in Order to Determine the Propriety of Her Continued Detention.

58. Ms. [redacted] seeks an individualized, constitutionally adequate bond hearing before a neutral adjudicator to determine whether her continued detention is necessary. Because the brief period for § 1226(c) mandatory detention contemplated by the Supreme Court *Demore* has expired, the only provision under which Ms. [redacted] can be detained is § 1226(a), the discretionary provision. *See Demore*, 538 U.S. at 530 ("[T]he detention at stake under § 1226(c) lasts roughly a month and half in the vast majority of cases. . . and about five months in the minority of cases in which the alien chooses to appeal."); *Casas-Castrillon*, 535 F.3d at 948-49 (holding that § 1226(c) provides no authority for mandatory detention of individuals beyond the brief period contemplated in *Demore* and that § 1226(a) therefore applies). Regardless of whether she may ultimately be detained pursuant to this discretionary statute or released, Ms [redacted] is entitled to an individualized hearing in order to determine whether her continued detention is justified. *See Zadvydas*, 533 U.S. at 679-80.

59. In light of the substantial deprivation of liberty she has already experienced, due process requires that Ms [redacted] be afforded certain procedural protections at this hearing. *See Zadvydas*, 533 U.S. at 690-91 (stressing the importance under the Due Process Clause of procedural protections for persons subject to preventative confinement). For example, the government must bear the burden of proving that Ms. [redacted]'s continued detention is necessary. The Supreme Court has repeatedly emphasized the importance of placing the burden of proof on the government to justify continued civil detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 692 (criticizing the regulations governing prolonged immigration detention for placing the burden of proof on the non-citizen); *see Tijani*, 430 F.3d at 1242, 1244-45 (Tashima, J., concurring) (noting that when the right to individual liberty is at stake, Supreme Court precedent rejects laws that

place on the individual the burden of protecting that right); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (striking civil commitment statute because individual was denied an ‘‘adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community’’); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pre-trial detention under Bail Reform Act where Act provided for "a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person"); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding that state must justify civil commitment by clear and convincing evidence of mental illness and dangerousness and rejecting preponderance standard); *Kansas v. Hendricks*, 521 U.S. 346, 353 (noting that state statute providing for civil detention of "sexually violent predators" required prosecutor to prove beyond a reasonable doubt whether detention was justified during a trial at which the individual had the right to counsel and right to present evidence and cross-examine witnesses). The government must meet this burden by clear and convincing evidence. *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Moreover, due process requires a contemporaneous record of a bond hearing for non-citizens subject to prolonged detention. *Id.* at 1208.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION: VIOLATION OF IMMIGRATION AND NATIONALITY ACT – MANDATORY DETENTION OF A NON-CITIZEN WHO IS NOT TAKEN INTO IMMIGRATION CUSTODY WHEN RELEASED FROM CRIMINAL INCARCERATION.

60. The allegations in 1-45 and 58-59 are realleged and incorporated herein.

61. Section 1226(c), the statute under which ICE contends Ms. [redacted] was originally detained, provides in relevant part that the Attorney General "shall take into custody an alien

who is deportable by reason of having committed any offense covered [inter alia] in section [1227(a)(2)(C)] . . . *when the alien is released* . . . . for the same offense." 8 U.S.C. § 1226(c) (emphasis added)

62. Immigration authorities did not take Ms. [redacted] into custody when she was released from criminal custody. Rather, the immigration authorities apprehended her on July 11, 2012, after she was on probation for four months and while she was in compliance with the terms of her probation.

63. Because Ms. [redacted] was not taken into ICE custody "when released" for her offense, her mandatory detention is not and was not authorized by § 1226(c). *See supra*, ¶¶ 32-45.

SECOND CAUSE OF ACTION:
VIOLATION OF IMMIGRATION AND NATIONALITY ACT – PROLONGED DETENTION BEYOND THE BRIEF AND REASONABLE PERIOD OF TIME AUTHORIZED BY THE STATUTE, IN THE ABSENCE OF A HEARING WHERE THE GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH PROLONGED DETENTION IS JUSTIFIED

64. The allegations contained in paragraphs 1-31 and 46-59 are realleged and incorporated herein.

65. The statute under which the IJ held that Ms. [redacted] was initially detained, § 1226(c), is silent with regard to the length of detention authorized and the procedures required if such detention becomes prolonged. Because Ms. [redacted]'s detention became prolonged at the six-month mark, she can no longer be considered detained mandatorily under 8 U.S.C. § 1226(c). She is now detained subject to the Attorney General's discretion under § 1226(a) and is entitled to a constitutionally adequate bond hearing.

66. Alternatively, even if this Court were to adopt the "unreasonably prolonged" standard recognized by the Third and Sixth Circuits, Ms. [redacted] is entitled to a bond hearing

because her nearly year-long detention has become unreasonable and her immigration proceedings are likely to continue for another year or more.

THIRD CAUSE OF ACTION:
VIOLATION OF DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

67. The allegations contained in paragraphs 1-31 and 46-59 are realleged and incorporated herein.

68. Prolonged detention violates due process unless it is accompanied by strong procedural protections to protect against the erroneous deprivation of liberty. *See Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) (citing *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232-33 (3d Cir. 2011); *Ngo. v. INS*, 192 F.3d 390, 398 (3rd Cir. 1999).

69. During the past year, Ms. [redacted] has never received any individualized custody hearing, let alone a hearing that meets the constitutional requirements to justify prolonged civil detention. Ms. [redacted]'s prolonged detention has not been accompanied by the basic procedural protections that such a significant deprivation of liberty requires.

70. Moreover, immigration detention violates due process unless such detention is reasonably related to its purpose. *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding brief period of mandatory detention because it was necessary to purpose); *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Moreover, as detention becomes prolonged, the Due Process Clause requires a sufficiently strong justification to outweigh the significant deprivation of liberty as well as strong procedural protections. *See Zadvydas*, 533 U.S. at 690-91.

71. Ms. [redacted]'s prolonged detention, when she poses no significant danger or flight risk and has a judicial stay of removal, lacks sufficient justification and indeed bears no reasonable relation to the government's purpose.

72. For the foregoing reasons, Ms. [redacted]'s continued detention violates due process under the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Ms. [redacted] prays that this Court grant the following relief:

(a) Assume jurisdiction over this matter;

(b) Grant the writ of habeas corpus and order that Ms. [redacted] be released unless she is immediately afforded a constitutionally adequate custody hearing wherein Respondents must demonstrate by clear and convincing evidence that Ms. [redacted]'s continued detention is justified.

(c) Grant any other and further relief that this Court deems just and proper.

Dated: July 1, 2013

Respectfully submitted,

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[4] Law Student [redacted] and attorney Farrin Anello, both of the University of Miami School of Law Immigration Clinic, assisted with the drafting of this Petition.