IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-1002-RMR

DAYANA MUNOZ RAMIREZ, also known as Alfredo Munoz Ramirez,

Petitioner,

v.

PAMELA BONDI, in her official capacity as Attorney General of the United States,
ROBERT GUADIAN, in his official capacity as Field Office Director, Denver, U.S. Immigration and Customs Enforcement,
KRISTI NOEM, in her official capacity as Secretary, U.S. Department of Homeland Security,
TODD LYONS, in his official capacity as Acting Director of Immigration and Customs Enforcement, and
DAWN CEJA, in her official capacity as warden of the Aurora Contract Detention Facility,

Respondents.

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER (ECF No. 2)

Respondents respond to Petitioner's Motion for Temporary Restraining Order filed on March 28, 2025. *See* ECF No. 2.

The Court should deny Petitioner's Motion. Petitioner contends that her continued detention by U.S. Immigration and Customs Enforcement (ICE) for roughly 500 days following her final order of removal from the United States violates the Constitution. She, however, is lawfully detained under federal immigration law, 8 U.S.C. § 1231, and the Constitution because her removal is reasonably foreseeable, depending solely on the completion of her pending withholding-only proceedings. Petitioner thus has not strongly shown that she is substantially likely to succeed on the

merits, she will suffer irreparable injury if the Court denies her Motion, the balance of harms strongly weighs in her favor, or granting her Motion is in the public interest.

BACKGROUND

I. Factual background

Petitioner is a native and citizen of El Salvador. *See* Respondents' Appendix, ¶ 3 – Kinsey Declaration ("R. Appx.").[1]

Petitioner's history in the United States has been, at best, troubled. In her immigration proceedings, Petitioner was found to be affiliated with two gangs, bearing two gang-affiliated tattoos: "M 13" (*i.e.*, Mara Salvatrucha or MS-13) and "Locos" (*i.e.*, "the West Side Locos gang"). ECF No. 1-1 at 422-23, 433. Her criminal record in the United States is also extensive, including thirteen separate convictions:

1. In 2000, she was convicted of battery with serious bodily injury and sentenced to 10 days in jail.
2. In 2001, she was convicted of driving under the influence and sentenced to 30 days in jail.
3. Also in 2001, she was convicted of battery with serious bodily injury and sentenced to 60 days in jail.
4. In 2006, she was convicted of disturbing the peace and sentenced to 180 days in jail.
5. In 2007, she was convicted of possession of a controlled substance and sentenced to 90 days in jail.
6. Also in 2007, she was convicted of felony vehicle theft and sentenced to 32 months in prison.
7. In 2010, she was convicted of use/under the influence of a controlled substance and sentenced to 90 days in jail.
8. In 2011, she was convicted of driving under the influence and sentenced to 35 days in jail.
9. In 2014, she was convicted of driving without a license and sentenced to 10 days in jail.

[1] Respondents' citations use paragraph numbers and do not again reference exhibit names because the Appendix consists only of the Mark Kinsey declaration.

10. In 2016, she was convicted of theft and sentenced to 15 days in jail.
11. In 2019, she was convicted of obstruction and sentenced to probation.
12. In 2023, she was convicted of battery on a peace officer and sentenced to 50 days in jail.
13. Also in 2023, she was convicted of two felony counts of vehicle theft and evading and sentenced to two years in prison.

R. Appx., ¶ 9.

Between her 2016 conviction for theft and her 2019 conviction for obstruction, Petitioner was removed from the country. *See id.*, ¶ 6. In December 2017, Petitioner was ordered to be removed and denied relief and protection from removal. *See id.*, ¶ 4. After the dismissal of her appeal of the denial of relief and protection from removal, Petitioner was removed to El Salvador on December 12, 2018. *See id.*, ¶¶ 5-6.

II. Petitioner's current removal proceedings

Less than a year after her removal and in violation of her removal order, Petitioner illegally reentered the country. *See id.*, ¶ 9 (2019 conviction). In September 2021, ICE encountered Petitioner and determined that she had illegally reentered the United States after being removed. *See id.*, ¶ 7. ICE placed her on an order of supervision, but Petitioner failed to comply and absconded from supervision. *See id.*

In June 2022, ICE learned that Petitioner was in custody in a California jail and determined that she had illegally reentered the United States after being removed. *See id.*, ¶ 8. ICE then issued an immigration detainer for Petitioner. *See id.*

On November 9, 2023, when she was released from jail, ICE took custody of Petitioner and detained her under 8 U.S.C. § 1231. *See id.*, ¶ 10. That same day, ICE reinstated Petitioner's prior removal order under 8 U.S.C. § 1231(a)(5). *See id.*, ¶ 11.

Upon her detention, Petitioner claimed fear of returning to El Salvador. *See id.*, ¶ 12. In December 2023, she was interviewed, found to have a reasonable fear of persecution or torture, and referred to an immigration judge. *See id.*, ¶¶ 13-14.

In January 2024, Petitioner requested time to file an application for protection, which was granted. *See id.*, ¶ 16. After she filed her application, the immigration judge scheduled a merits hearing. *See id.*, ¶ 17. Petitioner, however, requested a continuance of the hearing, which was granted. *See id.*, ¶ 19.

In February 2024, ICE performed a Post Order Custody Review (POCR) of Petitioner's case under 8 C.F.R. § 241.4 and determined that she was a public safety concern given her criminal convictions and that there was a significant likelihood of removal in the reasonably foreseeable future *See id.*, ¶ 18.

Petitioner's merits hearing was then held on April 2024, and the immigration judge issued a decision in May 2024, denying all applications for relief and finding that Petitioner's testimony was permeated with "[t]he odor of mendacity." ECF No. 1-1 at 422 (noting Petitioner's explanation for her "M 13" tattoo was that she was "a fan of Friday the Thirteenth"); *see also* R. Appx., ¶¶ 20-21.

In May 2024, ICE performed a second POCR under 8 C.F.R. § 241.4. *See id.*, ¶ 22. It again determined that Petitioner should remain detained under § 1231. *See id.*

In June 2024, Petitioned appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). *See id.*, ¶ 23. After the BIA set a briefing schedule, Petitioner requested an extension, which was granted. *See id.*, ¶¶ 24-26.

In August 2024, ICE performed a third POCR under 8 C.F.R. § 241.4. *See id.*,

¶ 27. It again determined that Petitioner should remain detained under § 1231. *See id.*

In October 2024, the BIA dismissed Petitioner's appeal. *See id.*, ¶ 28. Petitioner then filed motions to reopen and to stay removal before the BIA. *See id.*, ¶ 29. She also filed a Petition for Review (PFR) as to the BIA's dismissal of her appeal in the Tenth Circuit. *See id.*, ¶ 30. In the Tenth Circuit, she moved to stay removal as well. *See id.*, ¶ 31. In December 2024, the BIA and the Tenth Circuit granted Petitioner's respective motions to stay removal. *See id.*, ¶¶ 32-33. In March 2025, the BIA denied Petitioner's motion to reopen, and Petitioner subsequently filed a PFR with the Tenth Circuit regarding that denial. *See id.*, ¶¶ 36-37.

LEGAL STANDARD

A temporary restraining order "is an extraordinary remedy, the exception rather the rule." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (citation omitted). A court may only enter injunctive relief if the moving party proves "(1) that she's 'substantially likely to succeed on the merits,' (2) that she'll 'suffer irreparable injury' if the court denies the injunction, (3) that her 'threatened injury' (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't 'adverse to the public interest.'" *Id.* (citation omitted). The showing for some of those factors must also meet a heightened standard in cases involving "[d]isfavored" injunctive relief. *Id.* A temporary restraining order is disfavored when "(1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Id.* When seeking such an order, the moving party must make a "strong showing" as to the

likelihood-of-success-on-the-merits and the balance-of-harms factors. *Id.*

Here, because Petitioner demands ICE release her or, in the alternative, provide her a bond hearing, she seeks a disfavored temporary restraining order and must make a "strong showing" that she is entitled to that relief.

ARGUMENT

I. Petitioner is not entitled to the extraordinary injunctive relief sought in her Motion for Temporary Restraining Order.

A. Petitioner has not shown a likelihood of success on the merits.

1. Due-process challenges to prolonged detention under § 1231 should be addressed only under *Zadvydas v. Davis*.

In her Motion, Petitioner contends that this Court should apply "a six-factor test when analyzing whether a noncitizen's detention has become unconstitutionally prolonged." ECF No. 2 at 14. First adopted in *Singh v. Choate*, that test assesses claims of prolonged detention prior to a final order of removal under 8 U.S.C. § 1226 and requires consideration of factors like the detention's length, the length of future detention, delays in the proceedings, and the likelihood of a final removal order. No. 19-cv-00909-KLM, 2019 WL 3943960, at *5 (D. Colo. Aug. 21, 2019). When considering an alien's detention under § 1226, this Court suggested in a footnote that the six-factor test "would have been applicable" had the alien been "detained under 8 U.S.C. § 1231." *L.G. v. Choate*, 744 F. Supp. 3d 1172, 1181 n.14 (D. Colo. 2024) (Rodriguez, J.).

This Court, however, should not adopt and apply the six-factor test to assess Petitioner's due-process challenge to continued § 1231detention. Instead, the Court should analyze Petitioner's § 1231 detention only under the standard set forth by the

Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001): whether there is "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. "That standard provides the sole recourse available to a § 1231 detainee challenging his detention on due process grounds." *Castaneda v. Perry*, 95 F.4th 750, 760 (4th Cir. 2024).

In *Zadvydas*, the Supreme Court addressed a challenge to an alien's continued detention under § 1231. It observed that "a serious constitutional problem" would arise under the Fifth Amendment's Due Process Clause should § 1231 permit "indefinite detention of an alien." 533 U.S. at 690. To avoid that due-process problem in the context of § 1231 detentions, the Court held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by" § 1231. *Id.* at 699. That is, "the Court applied the canon of constitutional avoidance" to § 1231 so that continued detentions under § 1231 satisfied the Due Process Clause. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022).

In reading § 1231 to avoid a due process problem, the Court in *Zadvydas* "offered [courts] a standard through which to judge indefinite-detention cases" under § 1231. *Martinez v. Larose*, 968 F.3d 555, 566 (6th Cir. 2020). Put simply, "***the* Zadvydas *standard* is *due process***: a § 1231 detainee who fails the *Zadvydas* test fails to prove a due process violation." *Castaneda*, 95 F.4th at 760 (emphasis added).

For this Court to hold otherwise would create a conflict with a growing consensus of courts. In *Martinez v. Larose*, the Sixth Circuit rejected a petitioner's request for a bond hearing during his two-year detention under § 1231, concluding that the proper standard to apply to the request was "the *Zadvydas* standard." *Martinez*, 968 F.3d at

565-566. Similarly, in *Castaneda v. Perry*, a petitioner requested a bond hearing during his § 1231 detention "even if his *Zadvydas* claim fails." 95 F.4th at 760. The Fourth Circuit, though, rejected that request, concluding that the Supreme Court's standard under *Zadvydas* "provides ***the sole recourse available*** to a § 1231 detainee challenging his detention on due process grounds." *Id.* (emphasis added). It reasoned that, if the petitioner's continued detention did "not offend the Due Process Clause" under *Zadvydas*, "then the unavailability of … [a] bond hearing before an IJ, the very purpose of which is to seek release from detention, does not either." *Id.* Finally, in *G.P. v. Garland*, the First Circuit applied *Zadvydas* to a challenge to continued § 1231 detention, expressly rejecting a petitioner's request to consider the six factors identified in *Singh*. *G.P. v. Garland*, 103 F.4th 898, 903-04 (1st Cir. 2024).[2] This Court should follow that persuasive case law and apply *Zadvydas* to Petitioner's challenge to her continued § 1231 detention, not the six-factor test in *Singh*.

Finally, several of the factors identified by *Singh* in the context of a § 1226 detention are inapposite in the context of a § 1231 detention. For one, while two of the *Singh* factors address length of detention and future detention, the *Zadvydas* standard already directly accounts for the due-process implications of extended detention under § 1231. Similarly, although the *Singh* factors require consideration of delays in immigration proceedings, any delays would also be captured under the *Zadvydas* inquiry. Finally, consideration of the *Singh* factor on the likelihood of a final removal order is redundant in the context of § 1231 detention: a final removal order always

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[2] The origin of *Singh*'s six-factor test is the First Circuit's decision in *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016), which the First Circuit in *G.P.* again refused to apply.

exists in a § 1231 detention. *Cf. G.P.*, 103 F.4th at 904-05 (rejecting consideration of "the likelihood" of "a final removal order" (citation omitted)).

In sum, the Court should assess Petitioner's continued § 1231 detention only under the *Zadvydas* standard, not the inapposite *Singh* factors.

2. Under *Zadvydas*, Petitioner's continued detention satisfies due process because her removal is reasonably foreseeable.

As Petitioner acknowledges, her detention is governed by 8 U.S.C. § 1231. Section 1231(a) authorizes post-removal-order detention of certain categories of aliens. Petitioner contends that her § 1231 detention has become prolonged in violation of the Due Process Clause. *See* ECF No. 1, ¶¶ 99-103. As noted, however, the Supreme Court in *Zadvydas* has held that an alien's detention under § 1231 remains lawful—thus, avoiding due-process concerns—so long as there is a "significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Petitioner's continued § 1231 detention satisfies due process here because her removal (or release) will occur at a definitive termination point—the end of her withholding-only proceedings. As a result, she fails to make a strong showing of a likelihood of success on the merits.

a. Detention standards under Section 1231 and *Zadvydas*

Under § 1231(a), ICE "shall detain" an alien during a 90-day "removal period" that begins once a removal order becomes final. 8 U.S.C. § 1231(a)(1)-(2). Here, Petitioner's order of removal became final on November 9, 2023, when ICE reinstated her prior removal order under 8 U.S.C. § 1231(a)(5). *See* R. Appx., ¶ 11.

Once the 90-day removal period ends, ICE may continue to detain an alien under § 1231(a)(6). That is, after expiration of the 90-day removal period, continued detention

of an alien is entrusted to ICE's discretion. *See* 8 U.S.C. § 1231(a)(6).

Continued detention beyond the 90-day removal period, though, is safeguarded by the constitutional standard set forth by the Supreme Court in *Zadvydas.* As noted, the Supreme Court in *Zadvydas* held that § 1231(a)(6) authorizes post-removal-order detention "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. The Court held that post-removal-period detention lasting six months or less is presumptively reasonable. *See id.* Detention beyond six months, however, does not mean that the alien must be released. *See id.* "To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* The alien bears the burden of making that showing. *See id.* Thus, under *Zadvydas*, a significant likelihood of removal in the reasonably foreseeable future must exist for continued § 1231 detention to satisfy the Due Process Clause.

b. A significant likelihood of Petitioner's removal in the reasonably foreseeable future exists.

In the Tenth Circuit, when an alien's detention is "directly associated with a judicial review process that has a definite and evidently impending termination point, and, thus, is more akin to detention during the administrative review process," the detention "is clearly neither indefinite nor potentially permanent like the detention held improper in *Zadvydas*." *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004).

Here, Petitioner's continued detention satisfies due process under *Zadvydas* because her detention has a definitive termination point—the conclusion of her pending withholding-only proceedings. Petitioner's situation is "readily distinguishable from

Zadvydas." *G.P.*, 103 F.4th at 901. Her detention during withholding-only proceedings "simply is not the type of 'indefinite and potentially permanent' detention at issue in *Zadvydas*" because "withholding-only proceedings are *finite*." *Castaneda*, 95 F.4th at 757. Petitioner is simply awaiting the conclusion of her withholding-only proceedings. If her request for relief is denied, she will be removed back to El Salvador. If she prevails, the government will have to begin the process of finding a different country to accept her. "In either case, however, the withholding-only proceedings *end*." *Id.* Her detention during withholding-only proceedings will, therefore, have a termination point and is not indefinite. *See Juarez v. Choate*, No. 1:24-cv-00419-CNS, 2024 WL 1012912, at *4 (D. Colo. Mar. 8, 2024) (holding that removal of an alien under § 1231 "is reasonably foreseeable, as it depends solely on her pending withholding-only proceedings").

Thus, under *Zadvydas*, a significant likelihood of Petitioner's removal in the reasonably foreseeable future exists given that her detention during withholding-only proceedings has a definite end point. *Cf. Perez v. Berg*, No. 24-cv-3251-PAM-SGE, 2025 WL 566884, at *4 (D. Minn. Jan. 6, 2025) (an alien's detention during withholding-only proceedings satisfied due process under *Zadvydas*), *report and recommendation adopted*, No. 24-cv-3251-PAM-SGE, 2025 WL 566321 (D. Minn. Feb. 20, 2025).

3. Even if the Court does not assess due process only under the *Zadvydas* standard, Petitioner's continued detention still satisfies due process.

a. Petitioner has been provided ample process while her withholding-only proceedings are pending.

Adequate due process has been afforded to Petitioner at each stage of her detention during her withholding-only proceedings. *See Mathews v. Eldridge*, 424 U.S.

335, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)).

Consistent with the Supreme Court's ruling in *Zadvydas*, the government has promulgated regulations providing for periodic custody reviews of aliens who remain in detention beyond the 90-day removal period. *See* 8 C.F.R. Part 241. Those regulations require a custody review by the field office at the end of the removal period, a review by a panel at ICE headquarters after six months, and additional reviews by the panel annually thereafter. *See* 8 C.F.R. § 241.4(k)(1)-(2). During those reviews, ICE officials must consider both favorable and unfavorable factors, including the likelihood that the alien is a significant flight risk or may abscond to avoid removal. *See id.* § 241.4(f). For these reviews, the alien has the right to an attorney or other representative and submit evidence. *See id.* § 241.4(h)(2), (i).

Here, Petitioner received several reviews under those regulations since her withholding-only proceedings began. *See* R. Appx., ¶¶ 18, 22, 27. Each time, review officials found that Petitioner was not entitled to release given her extensive criminal history and likelihood of removal in the foreseeable future. *See id.* Petitioner's periodic reviews during withholding-only proceedings have thus afforded her "ample process." *Castaneda*, 95 F.4th at 761-62 (holding that an alien detained during withholding-only proceedings "received ample process" having received numerous custody reviews).

b. Even under the six-factor test, Petitioner has not shown a due-process violation.

The six-factor test for aliens detained under § 1226 examines: (1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of

detention; (4) delays by the detainee; (5) delays by the government; and (6) the likelihood of a final order of removal. *See Singh*, 2019 WL 3943960, at *5.

Even if that six-factor test applied here—which it does not—the test does not suggest a violation of due process in Petitioner's case because her detention pending removal has a definite termination date.

First and second factors: As to the length and likely future duration of detention, those factors collectively weigh in the government's favor. Petitioner's 16-month detention is not unreasonable given that her detention has a definite end point. *See Soberanes*, 388 F.3d at 1311. Indeed, courts assessing the length and future duration of § 1231 detention for aliens held during withholding-only proceedings have found similar periods of detention reasonable. *See Perez*, 2025 WL 566884, at *4 (collecting cases). Thus, the first and second factors favor the government.

Third factor: The Court should not consider Petitioner's conditions of detention because conditions of confinement should be challenged through a civil action, not a habeas petition. *Cf. Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012).

Fourth and fifth factors: As to delays caused by the parties, these factors favor the government. In the § 1231(a)(5) context, an alien "finds [herself] in continued detention … because [she] voluntarily initiated withholding-only proceedings, blocking [her] prompt removal from the United States." *Castaneda*, 95 F.4th at 761. When detained under § 1231, she "cannot request that proceedings be delayed … and then complain" that she has been detained too long. *Perez*, 2025 WL 566884, at *4. Here, Petitioner has caused most—if not all—of the delays in her withholding-only

proceedings. She requested additional time to file an application of protection, a continuance of a merits hearing, and an extension of her briefing schedule. *See* R. Appx., ¶¶ 16, 19, 25. Petitioner also sought and received several stays of her removal. *See id.*, ¶¶ 29-33. Those extensions, continuances, and stays prevented Petitioner's removal and extended her detention. The fourth factor thus favors the government.

With respect to the delays caused by the government, ICE has been diligent in pursuing withholding-only proceedings. No delays in Petitioner's proceedings are attributable to the government. The fifth factor favors the government.

Sixth factor: As to the likelihood of a final removal order, this factor favors the government because a final removal order already exists. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 534 (2021). And, even if Petitioner is granted withholding-only relief, she still may be removed at any time to another country. *See id.* at 537.

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Accordingly, Petitioner has not made the strong showing that her detention has become constitutionally unreasonable for lack of due process. At bottom, no due-process violation occurs when an individual is detained pending withholding-only proceedings under § 1231(a)(5). Such limited remaining detention has a definite termination point, falling well within constitutional bounds.

B. Petitioner has not met the remaining factors for entry of a temporary restraining order.

Because Petitioner is seeking a disfavored temporary restraining order and has not made a strong showing as to the likelihood of success on the merits, the Court should deny her Motion on that ground alone. But even if the Court considers the

remaining temporary restraining order factors, it should deny Petitioner's Motion.

1. Petitioner has not shown that she faces irreparable harm.

Petitioner's irreparable harm argument is based on the same premise as her argument on the merits—that is, she argues that she is suffering irreparable harm because her detention is unlawful under the Constitution. *See* ECF No. 2 at 10-14. Because her Motion fails to establish a likelihood of success on the merits, *see* Section I, Petitioner also fails to show irreparable harm.

2. Petitioner fails to make a strong showing that the balance of harms weighs in her favor.

As with her irreparable-harm argument, Petitioner contends that the balance of harms weighs favors her given that her detention is unlawful. *See* ECF No. 2 at 18-22. Because she again has not proved a likelihood of success on the merits, she has not strongly shown that the balance of harms favors her. *Cf. Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1208 (9th Cir. 2022) (an alien's interest in release should be weighed against the fact that she is "subject to an order of removal from the United States").

3. The public interest is in enforcing 8 U.S.C. § 1231 and not in releasing a gang-affiliated convicted felon before removal.

As to the public interest, Petitioner argues that her release is in the public interest because she is receiving inadequate medical care and can be monitored upon release. *See* ECF No. 2 at 20-21. That Petitioner is purportedly receiving inadequate medical care and could be monitored if released does not show that her release is in the public interest here. Rather, the public interest favors Petitioner's continued detention.

First, Petitioner's continued detention furthers the public interest because her

detention comports with Congress's determination in 8 U.S.C. § 1231 that aliens awaiting removal should remain in detention. In legislating, Congress considers the public interest and determines as to how to address it. *See, e.g., United States v. Diapulse*, 457 F.2d 25, 28 (2d Cir. 1972) ("The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained."). Here, because Petitioner's continued detention adheres to 8 U.S.C. § 1231, *see* Section I, that continued lawful detention advances the public interest.

Second, Petitioner's allegedly inadequate medical care does not militate in favor of her release. As noted *supra*, Petitioner's conditions of confinement are not properly considered in a habeas petition. Moreover, even if her conditions were considered, the remedy for any inadequate care would be better medical care, not release.

Finally, Petitioner's release is not in the public interest given her impending removal combined with her criminal history. Petitioner has multiple serious convictions, including felonies for vehicle theft, is affiliated with two gangs, and has previously absconded from supervision. As demonstrated above, her detention has a definite end point. *See supra.* The public interest does not favor releasing a gang-affiliated felon into the community when her removal from the United States is approaching.

The public interest thus weighs in favor of the government because § 1231 and the Constitution allows for Petitioner's continued detention given her pending removal.

II. Should the Court find unconstitutionally prolonged detention under *Zadvydas*, the appropriate remedy would be release, not a bond hearing.

To remedy her allegedly unconstitutionally prolonged detention, Petitioner's Motion seeks her immediate release or a bond hearing. *See* ECF No. 2 at 9.

Petitioner, however, is not entitled to a bond hearing if no significant likelihood of removal in the reasonably foreseeable future exists. Instead, release with appropriate conditions determined by ICE is the appropriate remedy under *Zadvydas*.

A. If the Court concludes that no significant likelihood of removal in the reasonably foreseeable future exists, the proper remedy is release.

"[A]n alien may be held in confinement" under § 1231 only "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. The Supreme Court thus instructed that, "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by" § 1231. *Id.* at 699-700. Thus, as the Supreme Court recently summarized in *Guzman Chavez*, "if the alien 'provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,' the Government must either rebut that showing or release the alien." 594 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 701).

As explained *supra*, Petitioner should not be released because a significant likelihood of her removal in the reasonably foreseeable future exists. If this Court disagrees, however, the required remedy under *Zadvydas* is release.

B. If the Court orders Petitioner's release (which it should not), her release should be subject to conditions determined by ICE.

Section 1231(a)(3) provides the Attorney General with the authority to issue regulations on terms of supervision for an alien released pending removal. *See* 8 U.S.C. § 1231(a)(3). ICE has issued those regulations governing the release of aliens pending removal. *See* 8 C.F.R. § 241.13(h). Thus, an "alien's release may and should

be conditioned on any of the various forms of supervised release that are appropriate in the circumstances." *Zadvydas*, 533 U.S. at 700. In short, if Petitioner is released, her release should be governed by conditions of supervised release set by ICE.

III. If a bond hearing is nonetheless ordered, due process does not require that the government bear the burden of proof at the bond hearing.

Petitioner contends that, at a bond hearing, the government should bear the burden of proof to establish by clear and convincing evidence that she is a danger to the community or a flight risk. *See* ECF No. 2 at 20. Due process, though, does not require that allocation of the burden of proof.

A. The relevant statutory and regulatory provisions do not support placing the burden of proof on the government at a bond hearing.

The statute relevant to Petitioner's detention, § 1231, nowhere suggests that the government should bear the burden of proof at a bond hearing. Section 1231 requires detention during the 90-day removal period and, once that period ends, gives ICE the discretion to continue to detain an alien. 8 U.S.C. § 1231(a)(2)(A), (a)(6). In sum, § 1231 cannot be plausibly read to "require[] the Government to provide bond hearings before immigration judges after six months of detention, with the Government bearing the burden of proving by clear and convincing evidence that a detained noncitizen poses a flight risk or a danger to the community." *Arteaga-Martinez*, 596 U.S. at 581.

The applicable regulations similarly give the government discretion in deciding when to release an alien detained under § 1231 after the 90-day removal period and again nowhere place the burden on the government to show why an alien should not be released, let alone by clear and convincing evidence. *See* 8 C.F.R. § 241.4(h)(3), (i)(6).

Finally, the basis for Petitioner's detention, § 1231(a)(5), only serves to further demonstrate why the government should not bear the burden at a bond hearing. Petitioner is detained via a removal order reinstated under § 1231(a)(5), which provides for the reinstatement of removal orders for aliens who have "reentered the United States illegally after having been removed." 8 U.S.C. § 1231(a)(5). The government should not have the burden of showing why individuals *detained for violating a removal order by reentering the country* are a flight risk. *Cf. Guzman Chavez*, 594 U.S. at 544 ("[A]liens who reentered the country illegally after removal have demonstrated a willingness to violate the terms of a removal order, and they therefore may be less likely to comply with the reinstated order."). Petitioner's requested allocation of the burden of proof simply cannot be squared with the statutory basis for her detention.

B. Supreme Court precedent does not support Petitioner's argument that the government must bear the burden at a bond hearing.

For decades, the Supreme Court has affirmed the constitutionality of detention of aliens pending removal proceedings, despite the fact that the government has not been required to bear the burden of proof to justify detention in those proceedings. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 531 (2003); *Reno v. Flores*, 507 U.S. 292, 306 (1993).

Indeed, "[t]he Supreme Court has been clear and consistent that the Constitution requires lesser procedural protections for aliens subject to removal, and a concomitantly lesser role for judicial intervention in the detention process." *Basri v. Barr*, 469 F. Supp. 3d 1063, 1074 (D. Colo. 2020). For example, the Court in *Zadvydas* placed the burden on the alien to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Likewise, in *Demore*,

the Court rejected a due-process challenge to § 1226(c) detention, even though § 1226(c) does not allow for *any* bond hearings. *See* 538 U.S. at 531. Finally, in *Jennings v. Rodriguez*, the Court recently reiterated that placing the burden of proof on the government at immigration bond hearings—even when those hearings are provided for by statute—does not comport with congressional intent. 583 U.S. 281, 306 (2018).

Given that precedent, at least two courts of appeals have concluded that the Constitution does not require the government to bear the burden of proof at immigration bond hearings. *See Miranda v. Garland*, 34 F.4th 338, 365-66 (4th Cir. 2022); *Borbot v. Warden*, 906 F.3d 274, 279 (3d Cir. 2018). Courts in this District have likewise held that due process does not require the government to bear the burden to justify detention at a bond hearing. *See de Zarate v. Choate*, No. 23-cv-00571-PAB, 2023 WL 2574370, at *5 (D. Colo. Mar. 20, 2023); *Basri*, 469 F. Supp. 3d at 1073-74.

In sum, Supreme Court precedent—properly interpreted by multiple courts of appeals and district courts—does not support the conclusion that the government should bear the burden to justify detention at an immigration bond hearing.

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Taken together, the relevant statute, applicable regulations, and Supreme Court precedent establish that the government should not have the burden of proof at any bond hearing. Instead, the burden of proof should appropriately fall to Petitioner.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's Motion for Temporary Restraining Order.

Dated: April 11, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 11, 2025, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following individuals:

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