District Judge Marsha J. Pechman
Magistrate Judge Gary L. Leupold

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Alfredo PARADA CALDERON,

Petitioner,

v.

Drew BOSTOCK, Field Office Director of Enforcement and Removal Operations, Seattle Field Office, Immigration and Customs Enforcement; Alejandro MAYORKAS, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Merrick GARLAND, U.S. Attorney General; Bruce SCOTT, Warden of Northwest ICE Processing Center,

Respondents.

Case No. 2:24-cv-01619-MJP-GJL

PETITIONER'S TRAVERSE AND RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Note on Motion Calendar: December 26, 2024

Oral Argument Requested

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INTRODUCTION

Petitioner Alfredo Parada Calderon (Mr. Parada) has been in the custody of U.S. Immigration and Customs Enforcement (ICE) for over 14 months without any hearing before a neutral decisionmaker as to the necessity of his continued detention. Prior to Mr. Parada's transfer to ICE custody, the California Board of Parole Hearings (CBPH) determined that, over 30 years after he committed murder as a teenager, Mr. Parada is no longer a danger to the community. The CBPH's conclusion was based on a voluminous record showing Mr. Parada has demonstrated sincere remorse and rehabilitation. Notably, Respondents do not contest any aspect of Mr. Parada's parole proceedings, and in particular, that the CBPH found he no longer presents a danger to the community, notwithstanding his criminal history.

Nevertheless, ICE continues to detain Mr. Parada without providing any individualized custody determination, and Respondents argue here that this Court should not even consider his case, much less provide him with a bond hearing. However, it is well-established that a court's habeas jurisdiction is established at the *time of filing*, and not later. This commonsense rule prevents a custodian from simply avoiding a court's inquiry into the legality of detention by transferring an individual and is consistent with decades of precedent. Moreover, just because the Court no longer has jurisdiction over Mr. Parada's *immediate* custodian, it does not follow that the Court lacks all jurisdiction. Instead, longstanding precedent shows that so long as any official within the court's jurisdiction can order release following transfer, the district court retains the power to order a habeas remedy. Here, such officials remain within the Court's jurisdiction.

On the merits, Ninth Circuit case law, this Court's case law, and case law from around the country demonstrate that Mr. Parada warrants a bond hearing. Indeed, as courts in this district have repeatedly recognized, once an individual has been detained for a prolonged period, the

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government must justify detention by clear and convincing evidence. *See, e.g.*, *Banda v. McAleenan*, 385 F. Supp. 3d 1099 (W.D. Wash. 2019); *Diaz Reyes v. Wolf*, No. C20-0377-JLR-MAT, 2020 WL 6820903 (W.D. Wash. Aug. 7, 2020), *R&R adopted as modified*, No. C20-0377JLR, 2020 WL 6820822 (W.D. Wash. Nov. 20, 2020). Accordingly, this Court should order Mr. Parada's release unless the government provides him a bond hearing within 14 days where it justifies his continued detention by clear and convincing evidence.

FACTUAL DEVELOPMENTS

As Respondents explained in their motion to dismiss, after Mr. Parada filed this case, Respondents transferred him back to the Golden State Annex (GSA). Dkt. 9 ¶ 30. In addition, since the filing of this case, the Board of Immigration Appeals denied Mr. Parada's appeal in his removal proceedings. *Id.* ¶ 31. He has since filed a petition for review with the Ninth Circuit Court of Appeals. *Id.* Mr. Parada has a stay of removal in place. *See* 9th Cir. Gen. Order 6.4(c).

ARGUMENT

ICE has detained Mr. Parada for well over a year. Respondents assert that this Court entirely lacks jurisdiction to consider whether this lengthy detention warrants a bond hearing, citing the recent Ninth Circuit decision in *Doe v. Garland*, 109 F.4th 1188 (9th Cir. 2024). But nothing in *Doe* overturned the longstanding rule that jurisdiction vests at the time of filing in habeas cases, and that a court may issue a writ of habeas corpus to any individual with custodial authority over a detained person if that person is later transferred and the immediate custodian is no longer subject to the court's jurisdiction.

On the merits, the Due Process Clause requires a bond hearing. Mr. Parada's continued detention violates the Due Process Clause in the specific circumstances of his case because he has been detained well over a year without any hearing to justify his continued detention. This is

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particularly true here, where neutral and objective state authorities acting upon a voluminous record have already determined Mr. Parada is unlikely to reoffend or pose a danger to the community. The Court should accordingly require a custody redetermination hearing here, or, in the alternative, hold a hearing itself and determine Mr. Parada should be released.

I. The Court Has Jurisdiction to Order a Habeas Remedy.

Respondents first assert that this Court lacks personal jurisdiction. Specifically, according to Respondents, the Ninth Circuit's decision in *Doe* requires that a detained person sue their immediate custodian, and here, that person is the Warden of the Golden State Annex. Dkt. 8 at 4–5. As a result, in Respondents' view, because Mr. Parada sued the Northwest ICE Processing Center (NWIPC) Warden (among others), and because of Mr. Parada's subsequent transfer to the Golden State Annex, the Court "cannot grant any injunctive relief." *Id.* at 6.

This formalistic view of habeas jurisdiction is at odds with Ninth Circuit and Supreme Court precedent. Both courts have long held that while a detained person is required to name the immediate custodian when filing a habeas petition, subsequent transfer of the detained person does not destroy subject matter jurisdiction. Instead, it only affects personal jurisdiction over the immediate custodian. Thus, in the event of transfer, the court "may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004). This is a commonsense rule, as otherwise a detaining authority could simply transfer an individual to avoid any judicial review, defeating the purpose of the one of the few powers the Constitution specifically grants to federal courts. *See Ex part Endo*, 323 U.S. 283, 307 (1944); *see also infra* p. 6. Indeed,

> [t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .' U.S. Const., art. I, § 9, cl. 2. The

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> scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.

Harris v. Nelson, 394 U.S. 286, 290–91 (1969) *see also Nguyen v. Kissinger*, 528 F.2d 1194, 1202 (9th Cir. 1975) ("The traditional function of the Great Writ has been to afford a swift and imperative remedy in all cases of illegal restraint or confinement . . . ." (internal quotation marks omitted)).

Doe, the primary authority for the immediate custodian rule on which Respondents rely, does not hold otherwise or stop courts from "cut[ting] through barriers of form and procedural mazes." *Harris*, 394 U.S. at 291. In *Doe*, the Ninth Circuit addressed whether the District Court for the Northern District of California could exercise habeas jurisdiction over petitions filed by noncitizens detained in the Eastern District of California. This question arose because the ICE Field Office Director in San Francisco (in the Northern District) exercises legal custody of those detained at the Golden State Annex (in the Eastern District). 109 F.4th at 1190. The Court of Appeals held that 28 U.S.C. § 2241 requires habeas petitioners "challenging their present physical confinement to name their immediate custodian, the warden of the facility where they are detained, as the respondent to their petition." *Id.* at 1197. Because the petitioner did not do so in *Doe*, the court of appeals held the district court lacked jurisdiction. *Id.* The court also went on to hold that the Northern District of California lacked jurisdiction because the petitioner was detained outside the district at the time that he filed. *Id.* at 1198 ("[A] federal court that can properly entertain a habeas petition is one located in the 'district in which the applicant is held,' in other words, the district of confinement." (quoting 28 U.S.C. § 2242)).

However, *Doe*'s rules do not determine the jurisdictional question here. That is because the case does not disturb the longstanding rule that "jurisdiction attaches on the initial filing for habeas corpus relief, and it is not destroyed by a transfer of the petitioner and the

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accompanying custodial change." *Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990) (citation omitted). This has long been the rule in the Ninth Circuit. *See Johnson v. Gill*, 883 F.3d 756, 761 (9th Cir. 2018) ("[A habeas petitioner's] subsequent transfer does not destroy the jurisdiction established at the time of filing."). Nothing in *Doe* purports to disturb this rule. Nor could the decision do so, as it is well-established that "in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel" of the Ninth Circuit. *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003) (alteration and citation omitted). That principle is particularly true here, as there is no intervening case law since *Johnson v. Gill* (or much less *Francis v. Rison*) that "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable" with Supreme Court precedent. *AGK Sierra De Montserrat, L.P. v. Comerica Bank*, 109 F.4th 1132, 1136 (9th Cir. 2024) (alteration in original) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). Indeed, since *Doe*, this Court has continued to apply the transfer rule cited here. *See Jackson v. Warden of Fed. Det. Facility at SeaTac*, No. 2:24-CV-00547-TMC-GJL, 2024 WL 4227765, at *2 (W.D. Wash. Sept. 13, 2024) (citing *Doe* and concluding that jurisdiction still vests at the time of filing, even if a transfer occurs later), *R&R adopted*, No. 2:24-CV-00547-TMC, 2024 WL 4710679 (W.D. Wash. Nov. 7, 2024).[1] Notably, this principle makes even more sense with respect to immigration detention, where the immediate custodian is not even empowered to order the detention or release of an individual in its custody, but instead contracts with immigration officials who determine whether the noncitizens should be released, or alternatively, provided a bond hearing.

[1] While Respondents claim that "[m]any courts have found that post-petition transfer of the petitioner moots a Section 2241 petition," the cases they cite are unpublished out-of-circuit decisions and do not apply here. Dkt. 8 at 6. In any event, as described below, these cases also overlook or misunderstand *Padilla* and *Endo* or do not present a circumstance where their holdings might apply. *Infra* pp. 6–7 (discussing *Padilla* and *Endo*).

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The Supreme Court's decisions in *Padilla* and *Ex parte Endo* similarly compel this conclusion. *Endo* concerned "a Japanese-American citizen interned in California by the War Relocation Authority (WRA)[, who] sought relief by filing a § 2241 petition in the Northern District of California, naming as a respondent her immediate custodian." *Padilla*, 542 U.S. at 440. After filing her petition, the detained U.S. citizen was transferred to Utah. *Endo*, 323 U.S. at 285. On appeal, the Supreme Court addressed whether it could issue a writ of habeas notwithstanding the transfer. The Court held that the case was not "moot" because "if the writ issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus of appellant will be produced and the court's order complied with in all respects." *Id.* at 304–05; *see also Jones v. Cunningham*, 371 U.S. 236, 243–44 (1963) (applying *Endo* and holding that the "District Court d[oes] not lose its jurisdiction when a habeas corpus petitioner [is] removed from the district so long as an appropriate respondent with custody remain[s]") The *Endo* Court then went on to grant the writ. In doing so, the Court explicitly explained that because a federal court's habeas jurisdiction provides the power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty," it must be that this "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court." *Endo*, 323 U.S. at 306–07. Accordingly, the purpose of the habeas statute is "served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun." *Id.* at 307.

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Padilla merely reaffirms this rule. In that case, the Supreme Court addressed the question of whether the U.S. District Court for the Southern District of New York could exercise habeas jurisdiction over a petition filed by a U.S. citizen deemed an enemy combatant who was detained at a military brig in South Carolina at the time the habeas petition was filed. 542 U.S. at 430–32. The Court explained that the immediate custodian and place of confinement rules discussed above barred jurisdiction. *See generally id.* at 434–51. However, the Court observed that in *Endo*, the "the District Court initially acquired jurisdiction" because "Endo properly named her immediate custodian and filed in the district of confinement." *Id.* at 441. As a result, "*Endo* stands for the important but limited proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." *Id.*

Respondents have no answer to these longstanding, commonsense rules. Indeed, they acknowledge *Endo*'s holding, *Padilla*'s language, and the Ninth Circuit's decision regarding transfer in *Johnson*, but simply assert that the Ninth Circuit has failed to explain why, "*post-Padilla*, a court retains jurisdiction to consider a habeas petition that names someone other than the current custodian as respondent." Dkt. 8 at 8. They also state that *Johnson v. Gill* fails to explain its rule regarding the "district court's authority over that respondent after the petitioner's transfer." *Id*. This attempt to sow confusion disregards *Padilla*'s and *Endo*'s holdings. Together, those decisions demonstrate that habeas courts may issue a writ of habeas corpus to supervisory officials in cases where a detained person is transferred. Indeed, *Endo* explicitly envisioned that high-level officials (like the Secretary of the Interior) would be required to abide by such writs. 323 U.S. at 304–05. Thus, here, the Court's ability to issue the writ to any of the supervisory

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officials or agencies within the Court's jurisdiction, such as Secretary Mayorkas, Attorney General Garland, or the Department of Homeland Security itself is well-established. *See* Dkt. 1 ¶¶ 19–21. None of the controlling authorities—i.e., those from the Ninth Circuit or Supreme Court—that Respondents cite suggest otherwise.

II. The Court Should Not Transfer This Case.

Respondents also make a short, one paragraph argument that this Court may transfer this case to the Eastern District of California under 28 U.S.C. § 1404(a). Dkt. 8 at 9. This argument is premised entirely on the fact the Eastern District "has personal jurisdiction over Parada's immediate custodian if any habeas relief is granted." *Id*. But as explained above, that is not a reason to transfer this case or to restart lengthy habeas proceedings before an entirely new court.

Respondents do not make any argument that the transfer factors under § 1404(a), such as the private and public interests, warrant transfer. They have therefore forfeited any such argument. *See, e.g., Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1023 (9th Cir. 2023) (a party must "specifically and distinctly raise an argument and support it with citations to the record" to avoid forfeiture (internal quotation marks omitted)); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) ("[A]n issue will generally be deemed waived . . . if the argument was not raised sufficiently for the trial court to rule on it." (citation omitted)); *Manor v. Astrue*, No. C10-5944-JLR, 2011 WL 3563687, at *12 (W.D. Wash. July 28, 2011) ("It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work—framing the argument and putting flesh on its bones through a discussion of the applicable law and facts."), *R&R adopted*, No. C10-5944-JLR, 2011 WL 3567421 (W.D. Wash. Aug. 12, 2011). In any event, "[t]he defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum," showing why "private and public interest factors affect[] the

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convenience of the forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). Respondents have made no effort to make that showing here or carry their burden, and the Court should therefore reject this request.

III. Mr. Parada Is Entitled to Habeas Relief.

Mr. Parada does not dispute that he is detained under 8 U.S.C. § 1226(c). Dkt. 8 at 9–10. This remains true even though Mr. Parada is now seeking judicial review. *See Hernandez Avilez v. Garland*, 69 F.4th 525, 537 (9th Cir. 2023) (holding that, under circuit precedent, § 1226(c) "authorizes detention during the judicial review phase of removal proceedings").

However, the Due Process Clause protects Mr. Parada as a person subject to mandatory detention and demonstrates that a bond hearing is required in his case to justify any further detention. In response to this claim, Respondents make several arguments, including that (1) no due process violation occurs here because detention is not "indefinite," Dkt. 8 at 11; (2) there is no bright-line rule to determine a due process violation, *id.* at 11–12; (3) Mr. Parada's petition cites the wrong test for determining a due process violation, *id.* at 12–13; (4) under the test Respondents urge, Mr. Parada is not entitled to a bond hearing, *id.* at 13–15; and (5) even if a hearing is ordered, Mr. Parada should bear the burden, *id.* at 15–16. These arguments misconstrue Mr. Parada's arguments and disregard binding case law. Binding precedent demonstrates that the Due Process Clause requires a bond hearing for Mr. Parada before a neutral decisionmaker where the government must justify his continued detention by clear and convincing evidence.

A. Mr. Parada Has Due Process Rights as to His Lengthy Detention.

Respondents first assert that the Court cannot even inquire into whether Mr. Parada must be afforded a bond hearing because he is a "criminal noncitizen" who is not experiencing

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"indefinite detention." Dkt. 8 at 11–12. This argument misconstrues controlling case law. The Ninth Circuit and this Court have repeatedly held that noncitizens facing prolonged detention in removal proceedings—including those detained because of a criminal conviction that subjects them to § 1226(c) detention—are entitled to bond hearings to test the necessity of their continued detention. First, Respondents disregard that in *Demore v. Kim*—which held that no detention hearing is required at the *outset* of § 1226(c) detention—Justice Kennedy (who provided the fifth vote for the majority on the constitutional issue) emphasized that detention may eventually become sufficiently lengthy that a hearing to justify continued detention is constitutionally required. 538 U.S. at 532–33 (Kennedy, J., concurring). Since then, the Ninth Circuit has expressed "grave doubt" that "any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). To guard against such arbitrary detention and to guarantee the right to liberty, due process requires "adequate procedural protections" that ensure the government's asserted justification for a noncitizen's physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (internal quotation marks omitted). The Ninth Circuit has similarly held that "[i]n the context of immigration detention, it is well-settled that due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Hernandez v. Sessions*, 872 F.3d 976, 990–91 (9th Cir. 2017).

Courts have repeatedly recognized that the due process principles cited by *Zadvydas* do not apply only with respect to detention under § 1231. Indeed, a long litany of cases tests the

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legality of ongoing detention for people subjected to mandatory detention statutes and finds that their lengthy proceedings warrant a bond hearing. *See generally* Dkt. 1 ¶¶ 80–81, 84 (citing cases). In fact, the principles cited above have "[o]verwhelmingly[] [led the] district courts that have considered the constitutionality of prolonged mandatory detention—including . . . other judges in this District[ ] [to] agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process." *Diaz Reyes*, 2020 WL 6820903, at *3 (internal quotation marks omitted).

Respondents fault Mr. Parada for citing Supreme Court precedent that relies on six months as a marker of prolonged detention. Dkt. 8 at 11–12. But Mr. Parada is not arguing for a "bright-line rule" that any detention above six months *automatically* requires a bond hearing. Instead, he cites this law in support of his argument that he has faced prolonged detention that, when applying a multi-factor due process test, shows he warrants a bond hearing. Notably, in addition to the case law that Mr. Parada cited regarding six months, *see* Dkt. 1 ¶¶ 77–78, he also invoked the Supreme Court's and Ninth Circuit's more general rule that lengthy detention provides a reason to test the legality of detention. As the Ninth Circuit has explained in the pretrial detention context—which, like here, involves civil detention—"[i]t is undisputed that at some point, [civil] detention can 'become excessively prolonged, and therefore punitive,' resulting in a due process violation." *United States v. Torres*, 995 F.3d 695, 708 (9th Cir. 2021) (quoting *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987)). That is especially true where the initial detention decision lacks significant (or any) safeguards, as is the case here. *See O'Connor v. Donaldson*, 422 U.S. 563, 574–75 (1975) ("Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not

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constitutionally continue after that basis no longer existed."); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249–50 (1972) (explaining that as the length of civil detention increases, more substantial safeguards are required). Respondents do not contest these principles or even respond to these cases, let alone claim that Mr. Parada has received any meaningful review of his detention to date.

B. The Court Should Assess Mr. Parada's Right to Due Process Using the Test in *Banda* and *Djelassi*.

Respondents next assert that rather than applying the multi-factor test from *Banda* or *Djelassi v. ICE Field Off. Dir.*, 434 F. Supp. 3d 917, 929 (W.D. Wash. 2020), this Court should apply the test from *Martinez v. Clark*, No. C18-1669-RAJ-MAT, 2019 WL 5968089 (W.D. Wash. May 23, 2019), *R&R adopted*, No. 18-CV-01669-RAJ, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019), which incorporates factors on a noncitizen's past criminal conduct. While Mr. Parada prevails under either test, the *Martinez* test misconceives the due process inquiry at this stage. Notably, Respondents do not explain why the additional factors from *Martinez* are relevant to whether an individual is entitled to the due process that a bond hearing provides. And *Martinez*, the decision Respondents point to, also provides no justification for inclusion of these factors. While Mr. Parada's past criminal conduct is relevant to determine whether he is a danger to the community *in a bond hearing*, the past commission of those crimes is not a relevant factor to determine whether he has due process rights entitling him to a hearing in the first instance.

Case law strongly supports that conclusion. The Supreme Court has long held that individuals subjected to civil detention must be afforded due process to challenge the justification for their detention. Thus, in *Zadvydas*, the Court held that due process required the government to justify ongoing detention of detained immigrants ordered removed despite those noncitizens' past serious crimes. 533 U.S. at 684–85, 700–01. And in *Foucha v. Louisiana*, 504

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U.S. 71, 78–79 (1992), the Court noted that due process required adequate procedures to determine if a "convicted felon" may be transferred and detained at a mental health facility because of alleged mental illness. In doing so, the Court explained that such persons have a "liberty interest, not extinguished by . . . confinement as a criminal." *Id.* at 78. Similarly, in *Jackson v. Indiana*, the Court rejected the notion that criminal history factors heavily, if at all, in this due process analysis, observing that "[i]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protections against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." 406 U.S. 715, 724 (1972); *see also McNeil*, 407 U.S. at 246, 249–50 (state violated due process by holding man convicted of two assaults in a facility for observation regarding his mental health without ever providing the opportunity to challenge that detention).

As these cases demonstrate, the Supreme Court's reasoning regarding the right to due process in civil detention cases does not depend on whether an individual has committed a crime, but instead on other factors, such as the length of time an individual has spent in detention and the procedural protections in place. Notably, many courts analyzing whether an individual's continued detention under § 1226(c) is authorized do not analyze the criminal history factors that Respondents ask this Court to consider. *See, e.g.*, *Bolus A.D. v. Sec'y of Homeland Sec.*, 376 F. Supp. 3d 959, 961 (D. Minn. 2019) (using same six factors as *Banda* in case involving § 1226(c) detention); *Liban M.J. v. Sec'y of Dep't of Homeland Sec.*, 367 F. Supp. 3d 959, 963 (D. Minn. 2019) (same); *Baez-Sanchez v. Kolitwenzew*, 360 F. Supp. 3d 808, 815–16 (C.D. Ill. 2018) (similar).

Finally, *Demore v. Kim* is not to the contrary. There, the Supreme Court held that

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

C. Under Any Test the Court Uses, Mr. Parada Is Entitled to a Bond Hearing.

In any event, Mr. Parada satisfies either the *Banda/Djelassi* test or *Martinez* test. The *Banda/Djelassi* test that Mr. Parada asserts is appropriate examines "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Banda*, 385 F. Supp. 3d at 1106 (citation omitted). These factors strongly weigh in Mr. Parada's favor, and thus a bond hearing is warranted. This is true even if the Court also analyzes the additional factors from *Martinez*: "the length of detention compared to petitioner's criminal sentence and the nature of his crimes." 2019 WL 5968089, at *9.

First, the length of Mr. Parada's detention—14 months—strongly supports affording him a hearing. Initially, this Court should apply a strong presumption that detention greater than six months—and certainly detention lasting beyond a year—violates due process. While *Jennings v. Rodriguez*, 583 U.S. 281 (2018), abrogated the Ninth Circuit's holding in *Rodriguez v. Robbins*,

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804 F.3d 1060 (9th Cir. 2015), that § 1226(c) requires bond hearings after six months as a matter of *statutory* interpretation, it did not undermine other decisions that look to six months as a benchmark when deciding whether the government must justify continued detention or incarceration. *See, e.g.*, *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months."); *McNeil*, 407 U.S. at 250 (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment); *see also Duncan v. Louisiana*, 391 U.S. 145, 161 & n.34 (1968) ("[I]n the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term . . . ."); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (finding six months to be the limit of confinement for a criminal offense that a federal court may impose without the protection afforded by a jury trial). Indeed, in *Demore*, the Supreme Court authorized mandatory detention without a hearing under § 1226(c) only for the "brief period necessary for removal proceedings," 538 U.S. at 513, which at the time, was "roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases" where the noncitizen appealed to the Board of Immigration Appeals, *id.* at 530. Thus, even *Demore* supported drawing a line presumptively in Mr. Parada's favor around the six-month mark.[2]

Furthermore, courts have made clear that Mr. Parada's 14 months of detention requires providing him with a bond hearing where the government bears the burden of proof. *See, e.g.*,

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

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Banda, 385 F. Supp. 3d at 1118 (noting that 17 months of detention was a "very long time" that "strongly favor[ed] granting a bond hearing); *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022) ("Petitioner has been in immigration detention since September 10, 2021—approximately one year. District courts have found shorter lengths of detention pursuant to § 1226(c) without a bond hearing to be unreasonable."); *Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal. Jan. 25, 2019) (detention under § 1226(c) of "just over a year" that would last several more months favored granting bond hearing); *Martinez*, 2019 WL 5968089, at *1 (detention of 13 months of individual detained under § 1226(c) favored granting bond hearing); *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018) (same, for 7 months); *Liban M.J.*, 367 F. Supp. 3d at 963–64 (same, for 12 months); *see also, e.g., Velasco Lopez v. Decker*, 978 F.3d 842, 846, 857 (2d Cir. 2020) (affirming district court order requiring government to justify § 1226(a) detainee's continued detention by clear and convincing evidence because, inter alia, he was detained for 15 months); *De Paz Sales v. Barr*, No. 19-CV-04148-KAW, 2019 WL 4751894, at *5 (N.D. Cal. Sept. 30, 2019) (detention of 14 months and likelihood of "several" more months of detention required second bond hearing for individual in § 1226(a) detention). Significantly, the "length of detention" is the "most important factor," and thus it "strongly favors granting . . . a bond hearing." *Banda*, 385 F. Supp. 3d at 1118–19. Respondents do not meaningfully contest that this "most important factor" favors Mr. Parada. Rather, they simply assert in a conclusory manner that his detention "has not become unreasonably prolonged." Dkt. 8 at 13.

Next, the likely duration of future detention in this case is significant. Mr. Parada has only recently filed his petition for review, and thus he faces at least another year in detention (if not more), especially if his case is remanded. Courts in this district regularly conclude that a

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bond hearing is warranted when an individual faces similar additional time in detention. *See, e.g.*, *Diaz Reyes*, 2020 WL 6820903, at *6 (finding 9–12-month Ninth Circuit appeal process favors a bond hearing); *Martinez*, 2019 WL 5968089, at *9 (finding that a 6-month BIA appeal process and 12–20-month Ninth Circuit appeal process supported granting the petitioner's request for a bond hearing); *see also* Admin. Off. of U.S. Courts, U.S. Court of Appeals - Judicial Caseload Profile (Dec. 31, 2023), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile1231.2023.pdf (reflecting that the Ninth Circuit averaged over 13.5 months to resolve appeals during 2023). While Respondents claim that this factor is "neutral because this Court would have to speculate as to how long detention is likely to continue at this time," Dkt. 8 at 13, relying on court data or other case law is not speculation. This factor thus also favors Mr. Parada.

Next, the conditions of detention also strongly favor Mr. Parada. Respondents claim this factor is neutral because Mr. Parada is now detained at the GSA and the declaration he submitted regarding NWIPC is no longer relevant. But Respondents are wrong in several respects. First, Mr. Parada has demonstrated that for several months, he was detained in NWIPC's abysmal settings. There, he spent 22 hours a day inside his dorm room, had far worse food than state prison, was allowed one hour a day outside, had no access to classes or other support opportunities, and was separated from any meaningful contact with his family. As Mr. Parada explained, these settings are far worse than those in the state prison from which he was transferred, a point Respondents do not contest. *See* Dkt. 3 ¶¶ 3–12. In short, the conditions at the NWIPC, like most immigration detention facilities, "are similar . . . to those in many prisons and jails." *Rodriguez*, 583 U.S. at 329 (Breyer, J., dissenting); *see also Diaz Reyes*, 2020 WL 6820903, at *6 (reaching the same conclusion as to the NWIPC). Even though Mr. Parada has

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now been transferred, this evidence was relevant at the time he filed the petition challenging his detention, and he was detained in those settings for several months.

In any event, Mr. Parada submits with this traverse a declaration that addresses the conditions at the GSA. *See* Decl. of Priya Patel. This declaration shows that his current conditions are also penal in nature and similar to those in state prison. Indeed, as the declarant explains, GSA *is a former prison*, underscoring just how much detention there is like a carceral setting. *Id*. ¶ 4. Moreover, individuals detained at GSA suffer from appalling conditions: maggots, insects, and cockroaches in their food, *id.* ¶¶ 11, 23, days and weeks without footwear, *id.* ¶¶ 6, 11, unprovoked harassment by guards (e.g., use of pepper spray), *id.* ¶ 8, humilitating strip searches, *id.*, lack of meaningful access to counsel, *id.* ¶¶ 14–17, and other degrading and dehumanizing treatment, *see generally* Patel Decl. ¶¶ 4–24. Ultimately, as Justice Breyer recognized in *Rodriguez*, there is little question that Respondents treat Mr. Parada similar to a criminal defendant, despite the ostensibly "civil" nature of his detention. This third factor thus strongly favors him.

The fourth factor—delay—is neutral. Mr. Parada has timely filed and pursued applications in his removal proceedings, and Respondents do not claim otherwise.

Under the *Banda/Djelassi* test, the last factor is the likelihood that that the removal proceedings will result in a final removal order. This factor is also neutral. Mr. Parada made a good faith defense to his removal based on the harm he is likely to face in El Salvador as a former gang member. As courts have repeatedly recognized, a petitioner "is entitled to raise legitimate defenses to removal, . . . and such challenges to . . . removal cannot undermine [the] claim that detention has become unreasonable." *Liban M.J.*, 367 F. Supp. 3d at 965.

Moreover, here, government documents indicate Mr. Parada has a strong claim to relief

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from removal. The Department of State's official reports admit that El Salvador now engages in indefinite detention without judicial review for any perceived gang members, that the conditions in those facilities can amount to torture against such people, and the country's prisons are grossly overcrowded. *See, e.g.*, U.S. Dep't of State, El Salvador 2023 Human Rights Report 1 (Apr. 22, 2024), https://www.state.gov/wp-content/uploads/2024/02/528267_EL-SALVADOR-2023-HUMAN-RIGHTS-REPORT.pdf ("Significant human rights issues included credible reports of: unlawful or arbitrary killings; enforced disappearance; torture or cruel, inhuman, or degrading treatment or punishment by security forces; harsh and life threatening prison conditions; arbitrary arrest or detention . . . ."); *id.* at 7 ("Prisons were severely overcrowded, as the number of detainees increased and only a limited number were released. As of July, the government reported that 71,776 persons were detained under the state of exception. In 2021, the prison system had a capacity of 30,000 and was already overcrowded."); *id.* at 19 ("Lengthy pretrial detention was a significant problem."). Moreover, although the BIA has now affirmed Mr. Parada's removal order, the BIA's initial decision to remand for further consideration of the record underscores the fact that he as a strong claim.

Finally, if the Court uses the *Martinez* test, it must additionally look to "the length of detention compared to petitioner's criminal sentence and the nature of his crimes." 2019 WL 5968089, at *9. Mr. Parada concedes that these factors likely favor Respondents, given his lengthy time in state prison and the nature of his crime.

However, if the Court does consider these factors, it should *also* view them in light of the voluminous evidence Mr. Parada submitted showing rehabilitation and the California Board of Parole Hearing's conclusion that he is no longer a danger to the community. As Mr. Parada detailed in his petition, he has changed dramatically over the years. The evidence he submitted in

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support of parole shows that during his time in prison, he completed his GED, attended dozens of other classes, participated in counseling programs, and developed skills to make him employable upon release. Dkt. 2-1 at at 52–102. Moreover, counselors, prison officials, correctional officers, and program administrators at the prison and in programs for released people recognized his transformation. This recognition was reflected in the dozens of letters such individuals submitted in support of Mr. Parada's most recent parole application in 2023. *Id.* at 2–40, 52, 70, 77, 81, 88, 90, 98, 102. Mr. Parada also demonstrated sincere remorse for his crimes. *Id.* at 127–150. In addition, it is noteworthy that Mr. Parada's family stood by him throughout his time in prison. In 2023, as he prepared to apply for parole, his siblings, mother, and niece provided letters of support, promising to help him once released. *Id.* at 105, 107, 109–10, 122. They also submitted additional materials in support of Mr. Parada in his removal proceedings. *Id.* at 159–226. Finally, Mr. Parada also submitted a detailed release plan with his parole application, explaining his day to day, week to week, and month to month goals, his methods to avoid recidivism, and other plans to maintain a healthy and stable emotional life. *Id.* at 229–69.

This evidence made an impact on the adjudicators considering Mr. Parada's parole. Under California's parole system, "the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety and thus may not be released on parole." *In re Lawrence*, 190 P.3d 535, 552 (Cal. 2008). Applying this standard, the CBPH concluded in 2023 that Mr. Parada "does not pose an unreasonable risk of danger if released." Dkt. 2-2 at 2:9–10. In reaching that conclusion, the panel noted the "genuine" change that had come over him, and that "the overwhelming mitigating factors outweigh the aggravating" factors. *Id.* at 6:8–12. Notably, it is not just the parole board that has seen this rehabilitation: the IJ saw it too. As Mr. Parada explained before,

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during his removal proceedings, the IJ remarked that, "You have spoken really, really eloquently during these proceedings here in immigration court. I really sincerely believe that you have been rehabilitated. And I truly mean that, sir. So, I really do thank you for what you have shared with the court, because I can tell that it comes from a place of great sincerity – and really, truly from your heart." Dkt. 2-4 at 10:15–19.

In sum, even if the Court considers the additional *Martinez* factors, their import is limited here, notwithstanding the nature of Mr. Parada's crime. That is because of the voluminous evidence and findings by multiple adjudicatory bodies that Mr. Parada is a thoroughly rehabilitated man who no longer poses a threat to the community.

For all these reasons, the Due Process Clause requires affording Mr. Parada with a bond hearing before a neutral decisionmaker to test the legality of his ongoing detention.

D. The Court Should Require a Bond Hearing Where Respondents Must Bear the Burden to Justify Continued Detention and Consider Alternatives to Detention.

Respondents' final argument is that, if a bond hearing is ordered, the Court should require Mr. Parada to bear the burden. Dkt. 8 at 15–16. This argument runs afoul of binding Ninth Circuit precedent. The Ninth Circuit's decision in *Singh v. Holder* holds *as a constitutional matter* that the Due Process Clause requires the government to justify continued detention by clear and convincing evidence after it has become prolonged. 638 F.3d 1196, 1203–05 (9th Cir. 2011); *accord Kashem v. Barr*, 941 F.3d 358, 380 (9th Cir. 2019) (noting that *Singh*'s clear and convincing evidence burden is a procedural due process standard that "applies in a range of civil proceedings involving substantial deprivations of liberty").

In Westlaw, *Singh* is flagged as having been abrogated as "[r]ecognized by *Rodriguez Diaz v. Garland*," 53 F.4th 1189 (9th Cir. 2022). But *Rodriguez Diaz* leaves open the question of whether *Singh* remains good law outside the context of the statutorily-implied hearings where it

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held the clear and convincing evidence standard applied (hearings that no longer exist after subsequent Supreme Court and circuit cases)). 53 F.4th at 1202. Moreover, as noted, cases like *Kashem* recognize that the burden of proof requirement in *Singh* is a constitutional holding. *See* 941 F.3d at 380. *Singh*'s constitutional holding therefore continues to apply in cases like this one that do not rest on a statutorily-implied right to a hearing. Indeed, "[a]bsent controlling authority to the contrary, the reasoning of *Singh* and its holding remain applicable to § 1226(c) cases, like this one, where there is a substantial liberty interest at stake." *J.P. v. Garland*, 685 F. Supp. 3d 943, 949 (N.D. Cal. 2023) (alteration in original) (internal quotation marks omitted) (quoting *Pham v. Becerra*, No. 23-cv-01288-CRB, 2023 WL 2744397, at *7 (N.D. Cal. Mar. 31, 2023)). And in any event, "the [Ninth] Circuit Court [of Appeals] has signaled that the clear and convincing evidence standard remains good law for immigration detainees subject to prolonged detention." *Anyanwu v. U.S. Immigr. & Customs Enf't Field Off. Dir.*, No. 2:24-CV-00964-LK-GJL, 2024 WL 4627343, at *8 (W.D. Wash. Sept. 17, 2024), *R&R adopted*, No. C24-0964 TSZ, 2024 WL 4626381 (W.D. Wash. Oct. 30, 2024).

Finally, the clear and convincing evidence requirement is consistent with a long line of Supreme Court precedent requiring the government to bear the burden of proof in civil detention schemes. *See Salerno*, 481 at 750 (upholding pre-trial detention where the detainee was afforded a "full-blown adversary hearing," requiring the government to justify detention with "clear and convincing evidence" before a "neutral decisionmaker"); *Foucha*, 504 U.S. at 81–83 (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 683–84, 692 (finding administrative custody review procedures deficient because, inter alia, they placed burden of proof on detainee); *see also Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005)

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(Tashima, J., concurring) ("[T]he Supreme Court has time and again rejected laws that place on the individual the burden of protecting his or her fundamental rights.").

Respondents never explain why these principles do not apply here. But other district courts have recognized that they do. Indeed, in light of these considerations, "[t]he overwhelming majority of courts to consider the question . . . have concluded that imposing a clear and convincing standard would be most consistent with due process." *Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018) (internal quotation marks and citation omitted). Consistent with that statement, courts in this district regularly impose the clear and convincing evidence requirement. *See, e.g.*, *Diaz Reyes*, 2020 WL 6820903, at *9, *Djelassi*, 434 F. Supp. 3d at 929; *Banda*, 385 F. Supp. 3d 1120–21.

Respondents claim otherwise by pointing to *Demore* and *Rodriguez Diaz*. Dkt. 8 at 15. But *Demore* did not address the question of what standard applies once detention becomes prolonged and the Due Process Clause requires a bond hearing. And *Rodriguez Diaz* is distinguishable: that case involved a *second* bond hearing under § 1226(a). 53 F.4th at 1213–14. Here, Mr. Parada has never received *any* process, much less an initial bond hearing. *Singh* and Supreme Court precedent demonstrate that in that situation, the applicable standard is one of clear and convincing evidence.

The last issue is that of alternatives to detention, and here too, the law supports Mr. Parada. Respondents assert that in a bond hearing, the immigration court need not consider whether alternatives to detention might mitigate any danger or flight risks associated with release. In support of their argument, Respondents cite only a vacated Ninth Circuit opinion. *See* Dkt. 8 at 16. However, Supreme Court precedent demonstrates that detention is not reasonably related to its purpose of mitigating flight risk or danger where there are alternative conditions of

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release that could mitigate those risks. *See Bell v. Wolfish*, 441 U.S. 520, 538–40 (1979). Notably, ICE itself operates the Intensive Supervision Appearance Program (ISAP), an alternatives-to-detention program that offers varying levels of monitoring to address such risks. *See, e.g.*, *Hernandez*, 872 F.3d at 991 (observing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"). It follows that alternatives to detention must be considered in determining whether prolonged incarceration is warranted.

In sum, the Court should hold that the government must justify Mr. Parada's continued detention by clear and convincing evidence at a hearing before a neutral decisionmaker.

CONCLUSION

In light of the above, the Court should hold the that the Due Process Clause requires a bond hearing before a neutral decisionmaker where Respondents must justify Petitioner's detention by clear and convincing evidence if they wish to continue to detain him. Accordingly, the Court should order Mr. Parada's release unless Respondents provide such a hearing within 14 days.[3]

Dated this 18th day of December, 2024.

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[3] Such "conditional writs" of habeas corpus—where the Court provides an accommodation under a strict timeline, and release in the alternative if compliance does not occur—are appropriate in situations like this one. *See, e.g.*, *Dept't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 137 (2020) ("[R]elease is the habeas remedy though not the 'exclusive' result of every writ given that it is often 'appropriate' to allow the executive to cure defects in a detention." (citation omitted)); *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("[A] court has broad discretion in conditioning a judgment granting habeas relief."); *Harvest v. Castro*, 531 F.3d 737, 741–42 (9th Cir. 2008) ("In modern practice . . . courts employ a conditional order of release in appropriate circumstances, which orders the State to release the petitioner unless the State takes some remedial action . . . .").

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WORD COUNT CERTIFICATION

Pursuant to Local Civil Rule 7, I certify that the foregoing response has 7,980 words and complies with the word limit requirements of Local Civil Rule 7(e).

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