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**Application for Pro Hac Vice Forthcoming*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE,[1] *Petitioner*, vs. MOISES BECERRA, in his official capacity, Director for the San Francisco ICE Field Office; ALEJANDRO MAYORKAS, in his official capacity, Secretary of the Department of Homeland Security; PATRICK LECHLEITNER, in his official capacity, Deputy Director for U.S. Immigration and Customs Enforcement; and Merrick GARLAND, in his official capacity, Attorney General of the United States, *Respondents*.	**VERIFIED PETITION FOR WRIT OF HABEAS CORPUS** **IMMIGRATION HABEAS CASE**

[1] Mr. Doe has filed a motion to proceed using a pseudonym or, alternatively, to proceed under initials concurrently with this Petition.

INTRODUCTION

1. Petitioner John Doe respectfully asks this Court to issue a writ of habeas corpus to remedy his unjustifiably prolonged detention. Since September 30, 2021, Respondents have detained Mr. Doe under 8 U.S.C. § 1226(c) without providing him a hearing before a neutral arbiter to justify continued detention. That's nearly two years of detention without a hearing for this long-time resident of the United States and former prison firefighter with a demonstrated record of rehabilitation and strong community ties, has languished in immigration detention. Mr. Doe's continued detention for the pendency of his removal proceedings violates substantive due process and procedural due process.

2. Immigration detention, a form of civil custody, cannot constitute punishment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Instead, the purpose of immigration detention under § 1226(c) is to effectuate expeditious removal while safeguarding the community. *See id*; *see also Reid* v. *Donelan*, 17 F.4th 1, 8 (1st Cir. 2021). "Where detention's goal is no longer practically attainable, detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (cleaned up). Thus, when the duration and nature of civil immigration detention exceed its purpose, as in Mr. Doe's case, continued detention violates substantive due process under the Fifth Amendment's Due Process Clause. *See Jackson,* 406 U.S. at 738; *see also United States v. Salerno*, 481 U.S. 739, 747 (1987).

3. Mr. Doe's detention is excessively prolonged, through no fault of his own. Despite nearly two years of detention in ICE custody, Mr. Doe has yet to receive a meaningful opportunity to be heard in his removal proceedings. Mr. Doe learned in April 2023 that the attorney who had been representing him in his removal proceedings failed to adequately investigate and present his defenses to deportation before the immigration judge ("IJ"), and

misled Mr. Doe and the immigration court about her suspension from the bar. The state bar has opened an investigation of the attorney that remains pending. Counsel's ineffective assistance unjustifiably added months to Mr. Doe's detention and led to the IJ issuing an order of removal against Mr. Doe in November 2022. The Board of Immigration Appeals ("BIA") affirmed the IJ's decision on May 4, 2023, and denied Mr. Doe's motion to reopen on September 5, 2023. Through new counsel, Mr. Doe has exercised his right to judicial review of the BIA's decisions and filed petitions for review with the Ninth Circuit. The petitions are pending. Should Mr. Doe prevail at the Ninth Circuit, proceedings will be remanded to the BIA and possibly, the immigration court; there, they will take months if not years to fully adjudicate. The Ninth Circuit has issued a temporary stay in Mr. Doe's case.

4. Given this procedural posture, the date of resolution of Mr. Doe's case – and thus, either removal or release – is unforeseeable and uncertain. After nearly two years of detention, and with no end in sight, the duration of Mr. Doe's detention under § 1226(c) is excessively prolonged in relation to the government's purpose of effectuating his removal.

5. The nature of Mr. Doe's confinement also is excessive in relation to the purpose of immigration detention. Respondents detain Mr. Doe at Golden State Annex ("GSA"), a for-profit immigration prison that offers few services and no meaningful work or educational programming. Languishing idly in detention with no release date in sight, Mr. Doe's health has deteriorated since Respondents took him into custody. He has received a preliminary diagnosis of Minor Neurocognitive Disorder, post-traumatic stress disorder ("PTSD"), and Major Depressive Disorder, with anxious distress. *See* Exh. C at ¶¶ 3, 23. Since arriving to ICE custody, Mr. Doe also battles excessively high blood pressure, high cholesterol, and a high risk of diabetes, which require him to take daily medication that he previously did not need.

6. Because the prolonged duration and harsh nature of Mr. Doe's civil detention are excessive in relation to the government's purpose, his detention violates substantive due process. Mr. Doe therefore asks this Court to issue a writ and order Mr. Doe's release.

7. Alternatively, this Court should find a procedural due process violation because Mr. Doe has not received any individualized evaluation of whether Respondents' asserted justification for confinement outweighs his constitutionally protected interest in avoiding restraint. *See Zadvydas*, 533 U.S. at 693 (citations omitted). Mr. Doe has never had a hearing to review his detention before a neutral arbiter in his nearly two years of civil detention. He respectfully requests that this Court hold a prompt hearing at which Respondents must bear the burden of justifying his continued detention. Alternatively, Mr. Doe requests that this Court order Respondents to provide Mr. Doe with a bond hearing before an immigration judge within fourteen days of this Court's order.

JURISDICTION AND HABEAS AUTHORITY

8. This action arises as a writ of habeas corpus under the Due Process Clause of the Fifth Amendment. Congress has preserved judicial review of constitutional challenges to prolonged immigration detention. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 839–41 (2018).

9. This Court has jurisdiction to hear Mr. Doe's detention challenge under Article 1, Section 9, clause 2 of the Constitution (the Suspension Clause), as well as under 28 U.S.C. §§ 2241 and 1331. This Court may grant relief under the habeas corpus statutes, 28 U.S.C. § 2241 *et seq*., the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

10. The federal habeas statute establishes this Court's power to decide the legality of Mr. Doe's detention and directs courts to "hear and determine the facts" of a habeas petition and to "dispose of the matter as law and justice require." 28 U.S.C. § 2243; *see also Hilton v. Braunskill*, 481 U.S. 775 (1987) (explaining that as far back as the nineteenth century, "the Court

interpreted the predecessor of [the habeas statute] as vesting a federal court with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus") (internal quotation marks and citation omitted).

11. The Supreme Court, moreover, has held that the federal habeas statute codifies the common law writ of habeas corpus as it existed in 1789. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). The common law gave courts power to release a petitioner to bail even absent a statute contemplating such release. *See Wright v. Henkel*, 190 U.S. 40, 63 (1903) ("[T]he Queen's Bench had, 'independently of statute, by the common law, jurisdiction to admit to bail.'") (quoting *Queen v. Spilsbury*, 2 Q.B. 615 (1898)).

12. "Federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas cases." *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001). In *Zadvydas v. Davis*, the Supreme Court confirmed a district court's habeas authority to review whether the government can justify continued immigration detention. *See* 533 U.S. 678, 699 (2001) (explaining that determining whether immigration detention is lawful fulfills the "historic purpose of the writ," *i.e.*, "to relieve detention by executive authorities without judicial trial") (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)).

13. This Court also has authority to conduct the fact-finding necessary to evaluate the constitutionality of Mr. Doe's prolonged detention. *See* 28 U.S.C. § 2243 (instructing federal habeas courts to "summarily hear and determine the facts"). District courts regularly exercise this authority in cases involving immigration detention. Indeed, courts have held that "the authority to conduct . . . bail proceedings in habeas proceedings brought by immigration detainees . . . has long been recognized as an essential ancillary aspect of our federal habeas

corpus jurisdiction." *Leslie v. Holder*, 865 F. Supp. 2d 627, 633 (M.D. Penn. 2012) (collecting cases).

VENUE

14. Venue in this District is proper under 28 U.S.C. § 1391. Courts in this District have recognized that "the federal agent charged with overseeing the non-federal detention facility in which the noncitizen is held should be sued." *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1185 (N.D. Cal. 2017) (holding that petitioner held in a privately contracted jail seeking a habeas writ properly sued the ICE field office director as he was "the federal official most directly responsible for overseeing that contract facility"); *see also Zabadi v. Chertoff*, No. C 05-01796 WHA, 2005 WL 1514122, at *3 (N.D. Cal. June 17, 2005) (noting that ICE field office director was proper respondent as they could direct the county warden to release noncitizen petitioner); *accord Roman v. Ashcroft*, 340 F.3d 314, 320 (6th Cir. 2003) (holding that INS district director for area including detention center was proper respondent).

15. Here, venue is proper because the federal agent charged with overseeing Golden State Annex performs his official duties and resides in this District. Respondent Moises Becerra is the director of the San Francisco Field Office for ICE Enforcement and Removal Operations ("ERO"). He ensures that Golden State Annex complies with its federal contract, and he adjudicates requests for release by individuals, like Mr. Doe, whom ICE detains at that facility.

16. Additionally, privately contracted immigration jails "lack[] any actual authority over immigrant detainees." *Henriquez v. Garland*, No. 5:22-cv-00869-EJD, 2022 WL 2132919, at *4 (N.D. Cal. June 14, 2022) (finding venue was proper when noncitizen detained at a privately run immigration jail in Bakersfield, California filed habeas in the Northern District of California, where the acting director of San Francisco ICE Field Office performs official duties) (citing

cases), *appeal dismissed*, No. 22-16205, 2022 WL 18587903 (9th Cir. Dec. 28, 2022); *accord Saravia*, 280 F. Supp. 3d at 1185 (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004)). Thus, Respondent Becerra has authority over Mr. Doe's detention.

17. Because Golden State Annex falls within the area of responsibility of the San Francisco Field Office and because Respondent Becerra has ultimate control of and responsibility for that office, venue is proper in this District. *See* 28 U.S.C. § 1391(b)(2) & (e)(1). Indeed, courts in this District addressing the issue of venue in immigration habeas petitions have overwhelmingly held that the San Francisco Field Office Director is a proper respondent for individuals detained under the jurisdiction of the San Francisco Field Office.[2]

18. Moreover, venue is proper in this District because Respondent Becerra resides in this District for venue purposes. *See* 28 U.S.C. § 1391(b)(1) & (e)(1). "Where a public official is a party to an action in his official capacity, he resides in the judicial district . . . where he performs his official duties." 1 Moore's Federal Practice 1487–88; *see also Ernst v. Sec'y of Interior*, 244 F.2d 345 (9th Cir. 1957) (applying rule to hold that federal agency secretaries' "official

[2] *See, e.g., Perera v. Jennings*, No. 21-cv-04136-BLF, 2021 WL 2400981, at *2 (N.D. Cal. June 11, 2021) (holding that venue is proper in this District for noncitizen detained at Golden State Annex because facility falls within the area of responsibility of the San Francisco Field Office); *Ameen v. Jennings*, No. 22-cv-00140-WHO, 2022 WL 1157900, at *2-5 (N.D. Cal. Apr. 19, 2022) (holding that venue is proper in this District because San Francisco ICE Acting Director has "ultimate control" over Golden State Annex); *Z.R. v. Kaiser*, No. 4:22-01712-YGR (N.D. Cal. May 27, 2022) (same); *see also Doe v. Garland*, No. 3:22-cv-03759-JD, ECF 24 (N.D. Cal. Jan. 10, 2023) (finding that the Northern District is the "appropriate jurisdiction for petitions filed by [noncitizens] detained by the Director of the San Francisco ICE Field Office" and finding that the government's motion to dismiss cited no "intervening, controlling authority that would compel a different outcome") (citing *Menses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *1 (N.D. Cal. Oct. 14, 2021), and *Ahn v. Barr*, No. 20-cv-02604-JD, 2020 WL 2113678, at *2 (N.D. Cal. May 4, 2020)); *Salesh P. v. Kaiser*, No. 22-CV-03018-DMR, 2022 WL 17082375, at *5 (N.D. Cal. Nov. 18, 2022) (holding the Northern District is the proper forum for habeas petition filed by noncitizen detained at Golden State Annex); *Ameen v. Jennings*, No. 22-CV-00140-WHO, 2022 WL 1157900, at *4-5 (N.D. Cal. Apr. 19, 2022) (collecting cases) (same); *Zepeda-Rivas v. Jennings*, 445 F. Supp. 3d 36, 39 (N.D. Cal. Apr. 29, 2020) (finding that venue was proper in the Northern District of California for a habeas class action where plaintiffs were detained at the Mesa Verde ICE facility).

residence" was in Washington, D.C.); *Trout v. Cnty. of Madera*, No. 21-cv-06061-PJH, 2022 WL 2479156, at *7 (N.D. Cal. July 6, 2022) (holding that a state official who was working from home during the pandemic "resided" for venue purposes where his office was located because that is where official duties are performed).

19. Mr. Becerra is a federal official who performs his official duties in the Northern District of California. He therefore is deemed to reside in this District and, thus, venue is proper in this District.

EXHAUSTION

20. The federal habeas statute "does not specifically require petitioners to exhaust direct appeals before filing petitions for habeas corpus." *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004). As a prudential matter, habeas petitioners must exhaust available administrative remedies before seeking habeas relief, but courts may waive this requirement when administrative remedies are inadequate or ineffective, the pursuit of administrative remedies would be futile, irreparable harm will result from requiring exhaustion, or the administrative proceedings would be void. *See id*. at 1000–01.

21. Administrative remedies would be futile, inadequate, and ineffective for Mr. Doe. As an initial matter, Section 1226(c) does not provide individualized custody hearings before the immigration court for people detained under its terms, which means Mr. Doe has no administrative remedy to exhaust. *See Jennings*, 138 S. Ct. at 847. And while ICE does provide a "post-order custody review" process, *see* 8 C.F.R. § 241.4, the process has been truncated, ineffective, and unreviewable in Mr. Doe's case.

22. In August 2023, Mr. Doe submitted a request for release as part of the post-order custody review process explaining in detail that he satisfies the criteria for release; ICE responded with a cursory, three-line email denying the release one day later. Mr. Doe has no recourse for review of

ICE's unexplained decision within the post-order custody review process. This further underscores the need for custody review by a neutral arbiter.

23. Even if Mr. Doe had an administrative avenue to pursue, exhausting his constitutional claim would be futile because immigration officers, the immigration court, and Board of Immigration Appeals do not have the authority to rule on constitutional questions. *See Wang v. Reno*, 81 F.3d 808, 815–16 (9th Cir. 1996) (per curiam) ("[T]he inability of the INS to adjudicate the constitutional claim completely undermines most, if not all, of the purposes underlying exhaustion.").

24. Moreover, requiring exhaustion before ICE, the immigration court, and BIA would cause Mr. Doe irreparable harm by prolonging his unjustified detention. *See Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1139 (N.D. Cal. 2018) (recognizing that habeas petitioner "suffers potentially irreparable harm every day that he remains in custody without a hearing, which could ultimately result in his release from detention" (internal quotation omitted)).

PARTIES

25. Mr. Doe has lived in the United States nearly his entire life. Respondents have detained him since September 2021 without any individualized inquiry into ICE's justification for his detention. His detention has been prolonged through no fault of his own. Mr. Doe seeks to pursue applications for lawful permanent residence and deferral of removal under the Convention Against Torture ("CAT"). The immigration agency has denied his applications and a motion to reopen, and Mr. Doe has exercised his right to judicial review of the agency's decisions.

26. Respondent Moises Becerra is the field office director for the San Francisco Field Office of ICE ERO. As such, Respondent Becerra is the federal official most directly responsible for overseeing Golden State Annex. He is the local ICE official who has legal and immediate

custody of Mr. Doe. Respondent Becerra is a legal custodian of Mr. Doe. He is named in his official capacity.

27. Respondent Patrick Lechleitner is ICE's acting director. Respondent Lechleitner is responsible for implementing ICE policies, practices, and procedures, including those relating to the detention of noncitizens. Respondent Lechleitner is a legal custodian of Mr. Doe. He is named in his official capacity.

28. Respondent Alejandro Mayorkas is the secretary of DHS. He is responsible for overseeing DHS and its sub-agency, ICE, and has ultimate responsibility for the detention of noncitizens in ICE custody. Secretary Mayorkas is a legal custodian of Mr. Doe. He is named in his official capacity.

29. Respondent Merrick Garland is the attorney general of the United States and the head of the Department of Justice, which encompasses the BIA and IJs as part of its sub-agency, the Executive Office for Immigration Review. He is empowered to oversee the adjudication of removal and bond hearings and by regulation has delegated that power to the IJs and the BIA. He is named in his official capacity.

STATEMENT OF FACTS

I. Mr. Doe's difficult childhood.

30. Mr. Doe was born in Mexico on August 10, 1974. *See* Exh. A at ¶ 2.[3] His biological father violently abused his mother. *See id.* To escape the abuse, Mr. Doe's mother—pregnant with her second child from her abuser—fled to the United States with the infant Mr. Doe in tow. *See id.* Mr. Doe's maternal grandfather helped them make the journey. *See id*.

31. In the United States, Mr. Doe's family settled in the South Los Angeles area. *See* Exh. A at ¶ 3. In early 1980, Mr. Doe's mother met and married a new partner. *See id*. Mr. Doe's

[3] All exhibit references refer to the exhibits contained in the addendum filed under motion to seal in conjunction with this petition.

stepfather became the only father that Mr. Doe has ever known. *See id*. Shortly after he married Mr. Doe's mother, Mr. Doe's stepfather developed a neurological tumor that left him unable to care for himself or his family. *See id.* ¶ 4.

32. Mr. Doe's mother worked two jobs consistently throughout his childhood and adolescence to provide for her children, husband, and father. *See* Exh. A at ¶ 5. Even as a young boy, Mr. Doe helped his mother care for his disabled stepfather as well as for his aging grandfather. *See id*. at ¶ 4. Mr. Doe was also the primary caregiver to his little sister during her formative years. *See id*. at ¶ 8.

33. Mr. Doe's stepfather's disability and his mother's unavailability, though no fault of theirs, meant that Mr. Doe often lacked parental structure and oversight. *See* Exh. A at ¶ 6. A recent psychological evaluation uncovered a history of physical abuse and neglect of Mr. Doe as a child by another family member. *See* Exh. B at ¶ 43; Exh. C at ¶ 11.

34. Young, traumatized, and unsupervised, Mr. Doe became drawn to the gang presence that was rampant in his neighborhood in his pre-teen years. *See* Exh. A at ¶ 6. Mr. Doe joined the gang Florencia 13 at around the age of twelve or thirteen. *See id*. Mr. Doe later obtained multiple gang-related tattoos, including on his head, which is now bald and unable to grow hair, and his neck. *See id.* at ¶ 26.

35. In 1994, Mr. Doe and his then-partner had a baby girl, Priscilla. *See* Exh. A at ¶ 7. Prior to and during his incarceration, Mr. Doe has been a loving and involved father. *See id.* at ¶ 8. He and his daughter continue to have a strong relationship into the present despite his incarceration. *See id.* at ¶ 7. Mr. Doe also served as a father figure to his younger sister, Monique. *See id.* at ¶ 8.[4]

[4] Mr. Doe's daughter and sister, along with his mother, step-father, brother, and partner, are all U.S. citizens and reside in the United States. *See* Exh. A at ¶ 39.

II. Mr. Doe's 2000 conviction and sentence.

36. Mr. Doe has two convictions. His first conviction occurred in 1997, when he pleaded guilty to assault with great bodily injury and received a sentence of five years joint suspension. *See* Exh. A at ¶ 9; Exh. B at ¶ 5. Mr. Doe was successfully complying with the terms of his supervision and had one year left, when he and a friend were arrested in November of 2000. *See* Exh. A at ¶ 9.

37. This arrest led to Mr. Doe's second conviction in 2001. *See* Exh. A at ¶ 10, Exh. B at ¶ 3. Mr. Doe was charged with attempted robbery, robbery, and carjacking. *See* Exh. A at ¶ 10, Exh. B at ¶ 3. Mr. Doe was accused of throwing a bicycle at a car occupied by three young men, trying to break the car window, and trying to get in the car, while his co-defendant was accused of stealing a gold chain from one of the occupants. *See id*.; Exh. B at ¶¶ 3–4.

38. Mr. Doe pleaded not guilty and proceeded to a jury trial. *See* Exh. A at ¶ 10; Exh. B at ¶ 5. The jury found Mr. Doe guilty of the robbery and attempted robbery counts but acquitted him of the carjacking count. *See* Exh. A at ¶ 10; Exh. B at ¶ 5. The judge sentenced Mr. Doe to twenty-nine years and eight months in prison after applying sentencing enhancements based on his 1997 conviction and alleged gang involvement. *See* Exh. A at ¶ 10; Exh. B at ¶ 5.

39. Mr. Doe, who maintains his innocence of these charges, appealed his conviction and prevailed in challenging one of the gang enhancements, thereby reducing his sentence by slightly over three years. *See* Exh. A at ¶ 10; Exh. B at ¶ 6. He was ultimately unsuccessful in a direct appeal and in a federal habeas petition that was denied by the district court and affirmed by the Ninth Circuit. *See* Exh. A at ¶ 10; Exh. B at ¶ 6. Mr. Doe recently filed a *pro se* habeas petition under the California Racial Justice Act ("CRJA"), for which the court appointed an attorney. *See*

Exh. A at ¶ 11; Exh. B at ¶ 7.[5] His next scheduled hearing is on November 3, 2023. *See* Exh. A at ¶ 11; Exh. B at ¶ 7.

III. Mr. Doe's rehabilitation and service as a firefighter while incarcerated.

40. In his more than twenty years in prison, Mr. Doe refrained from gang-related or criminal conduct and maintained an exemplary record. *See* Exh. A at ¶ 15; Exh. B at ¶ 8. Given Mr. Doe's good record, the warden recommended that he participate in the California Department of Corrections and Rehabilitation ("CDCR") Fire Camp program, and CDCR accepted him into the program in 2018. *See* Exh. A at ¶ 15; Exh. B at ¶ 8.

41. Initially, Mr. Doe was concerned because joining the program would send a signal that he had rejected the gang, because the program mixed inmates from both general and protective populations, violating an order issued by the gang that its members not be transferred to the mixed yards. *See* Exh. A at ¶ 16; Exh. B at ¶ 9. However, Mr. Doe's desire to make a change in his life overrode his fear of gang reprisals. *See id*. at ¶¶ 16–17; Exh. B at ¶ 9. He accepted placement in the Fire Camp. *See id.* at ¶ 17; Exh. B at ¶ 9.

42. After completing the initial program, Mr. Doe challenged himself to become a sawyer, a front-line firefighter in a fire. *See* Exh. A at ¶ 18. Mr. Doe fought California wildfires, saving homes, animals, and human lives, at the risk of his own life. *See id*. As he recently described in a psychological evaluation, serving as a firefighter was "the most meaningful and satisfying experience he ever had: it moved him that residents who lived in the path of wildfires shook his

[5] The California legislature passed the "far-reaching" CRJA in 2000. Am. Bar Ass'n, *California Legislature Confronts Racial Discrimination in New Criminal Justice Reform Package* (Oct. 28, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/california-criminal-justice-reform-package/. The CRJA allows defendants to challenge their conviction or sentence upon demonstrating that racial discrimination played a role in their prosecution, including by showing "statistical evidence that people of one race are disproportionately charged or convicted of a specific crime or enhancement" or by showing "statistical evidence that people of one race receive longer or more severe sentences." *Id*.

hand in gratitude for saving their homes. For the first time in his life he felt useful and was able to demonstrate to himself and others that he was a responsible and productive person." Exh. C at ¶ 16.

43. Mr. Doe thrived in the roughly three years he spent in the Fire Camp. *See* Exh. A at ¶ 18. One of his Fire Captains, Brandon Williams, submitted a letter in support of Mr. Doe while Mr. Doe was in ICE custody, praising his "very strong work ethic and positive attitude while performing arduous work on fire assignments," and noting that Mr. Doe "can be successful outside of" incarceration. *See* Exh. D.

44. Mr. Doe is unable to continue the Fire Camp program while in ICE custody. *See* Exh. A at ¶ 40; Exh. B at ¶ 10. But he hopes to return to firefighter work if he can remain in the United States. *See id*. at ¶ 39. Recently, Governor Newsom signed legislation that permits individuals who, like Mr. Doe, participated in the CDCR Fire Camp to become professional firefighters outside of prison.[6]

45. Mr. Doe successfully completed his criminal sentence around September 30, 2021. *See* Exh. A at ¶ 22. He will remain on state parole until approximately September 2024. *See id*. at ¶ 44.

IV. Mr. Doe's removal proceedings and ineffective assistance of former immigration counsel.

46. When Mr. Doe completed his criminal sentence, ICE issued a Notice to Appear charging him with being removable under 8 U.S.C. § 1182(a)(6)(A)(i) and detained him under 8 U.S.C. § 1226(c). *See* Exh. A at ¶ 22; Exh. B at ¶ 11. ICE has detained him continuously since approximately September 2021. *See* Exh. A at ¶ 22; Exh. B at ¶ 11.

[6] Manny Otiko, *Change to Penal Code Allows Hiring Firefighters with Criminal Records*, Sacramento Observer (Sept. 1, 2022), https://sacobserver.com/2022/09/change-to-penal-code-allows-hiring-firefighters-with-criminal-records/.

47. During the nearly two years that Respondents have detained him, Mr. Doe has never received a bond hearing from an immigration judge. *See* Exh. B at ¶ 2.

48. ICE has held Mr. Doe at GSA throughout his administrative detention. *See* Exh. A at ¶ 1; Exh. B at ¶ 2. GSA is owned and operated for profit by GEO Group, Inc. *See* Ex. B at ¶ 2. In the last two years, immigrants detained at GSA have decried the facility's unlivable and unsanitary housing conditions.[7]

49. Mr. Doe's partner, A.B., retained an attorney, E.R., to represent Mr. Doe in his removal proceedings. *See* Exh. A at ¶ 23; Exh. B at ¶ 12. E.R. told A.B. that she was married to an immigration judge. *See id*. A.B. was impressed by this fact and felt hopeful about E.R.'s representation. *See id*.

50. Mr. Doe did not speak directly with E.R. when she was hired. *See* Exh. A at ¶ 24. In fact, E.R. rarely communicated with Mr. Doe throughout the time that she represented him. *See id*. Instead, A.B. served as the main liaison with E.R. *See id*.

51. Mr. Doe and his family conveyed to E.R. that they wanted to do everything possible to fight his removal. *See* Exh. A at ¶ 23. Initially, Mr. Doe and A.B. believed that Mr. Doe could seek a waiver through his U.S. citizen daughter. *See id*. at ¶ 25. However, E.R. and her assistant informed A.B. that Mr. Doe did not qualify for the waiver due to his criminal convictions. *See id*. at ¶¶ 25–26. She also informed A.B. that Mr. Doe could not apply for "re-adjustment." *See id*. at ¶ 26. In her communications, E.R. appeared to conflate the process of adjustment through Mr. Doe's daughter (for which Mr. Doe was eligible) with a different process, known as readjustment (for which he was ineligible). *See* Exh. B at ¶¶ 14, 20. E.R. never informed

[7] ACLU, *First Amendment Retaliation Against Individuals in Immigration Detention in California* (Aug. 2021), https://www.aclunc.org/sites/default/files/OCRCL%20complaint.08.26.21%20_0.pdf.

Mr. Doe directly of her assessment and did not explain her assessment further to the family. *See* Exh. A at ¶ 26; *see also* Exh. B at ¶ 20.

52. In fact, Mr. Doe was eligible to apply for his lawful permanent residence status under 8 U.S.C. § 1255(i) in conjunction with a waiver under 8 U.S.C. § 1182(h) despite his criminal convictions. *See* Exh. B at ¶ 14. This potential defense would put Mr. Doe on a path to stable immigration status. *See id*.

53. Ultimately, E.R. agreed to represent Mr. Doe in a claim for deferral of removal under CAT. *See* Exh. A at ¶ 28. Deferral of removal under CAT is a limited type of protection in the United States. Exh. B at ¶ 15. An applicant must demonstrate that he or she faces a likely risk of torture in the country of removal. *See* 8 C.F.R. § 1208.17. If the applicant meets the required showing, an immigration judge must grant the application. *See id*. If granted CAT deferral, the individual resides in the United States under an order of removal that is "deferred" and cannot adjust their status to permanent resident or naturalize. *See id*. § 1208.17(b). E.R. submitted only scant evidence to support Mr. Doe's CAT claim. *See* Exh. B at ¶ 15.

54. During the time that E.R. represented Mr. Doe, the State Bar of California issued an order suspending E.R.'s license for a period of one year, suspended the sentence, and placed E.R. on probation for thirty days. *See* Exh. A at ¶ 33; Exh. B at ¶ 16. The BIA thereafter issued an order suspending E.R. from practicing before the Executive Office for Immigration Review ("EOIR") for thirty days. *See* Exh. A at ¶ 33; Exh. B at ¶ 16. The BIA ordered E.R. to promptly notify, in writing, any clients with cases pending before the agency about her suspension. *See* Exh. B at ¶ 16.

55. But E.R. never informed Mr. Doe of her suspension by the State of California or before EOIR. *See* Exh. A at 33; Exh. B at ¶ 16. Instead of notifying Mr. Doe of her suspension, E.R. filed a motion for a four-month continuance of Mr. Doe's merits hearing, originally scheduled on

March 2, 2022. *See* Exh. A at 33; Exh. B at ¶ 16. In her motion, E.R. falsely stated that Mr. Doe agreed with the request for a continuance and wanted E.R. to continue representing him. *See* Exh. B at ¶ 16. In fact, E.R. did not obtain Mr. Doe's consent to seek a continuance. *See* Exh. A at 33; Exh. B at ¶ 16. The IJ granted the motion and continued Mr. Doe's merits hearing for three months.

56. On the eve of Mr. Doe's final hearing, counsel for DHS filed a voluminous pre-hearing brief and evidence seeking to limit the scope and weight of the country conditions expert testimony. *See* Exh. B at ¶ 17. On E.R.'s motion, the IJ granted a six-week continuance, re-scheduling Mr. Doe's final hearing to July 12, 2022. *See id*.

57. Testimony in Mr. Doe's case began on July 12, 2022, and was completed at a second hearing two weeks later. *See* Exh. B at ¶ 17. At the second hearing, DHS again late-filed evidence intended to impeach the expert witness, and the IJ again granted a continuance. *See id*. The hearing ultimately concluded on August 11, 2022. *See id*.

58. The IJ issued a decision approximately three-and-a-half months after the hearing, on November 22, 2022, denying Mr. Doe's CAT application. *See* Exh. A at ¶ 31; Exh. B at ¶ 18. The IJ found that Mr. Doe was credible. *See* Exh. B at ¶ 18. However, the IJ determined that there was insufficient particularized evidence in support of Mr. Doe's claim given the scant country conditions evidence E.R. submitted. *See* Exh. B at ¶ 16; Exh. B at ¶ 18.

59. E.R. did not inform Mr. Doe of the IJ's decision. *See* Exh. A at ¶ 31. Instead, Mr. Doe learned of it from A.B. *See id*.

60. Mr. Doe consulted a legal services attorney to inquire about pro bono appellate assistance. *See* Exh. A at ¶¶ 31–32. The attorney he met with reviewed the IJ's decision with Mr. Doe, flagged errors and evidentiary deficiencies in the hearing, and informed Mr. Doe and A.B. that E.R. had been suspended during her representation of him. *See id*. at ¶ 32–33.

61. Mr. Doe attempted to fire E.R., but E.R. convinced him to keep her as his attorney. *See* Exh. A at ¶ 34. She told him that the nonprofit attorney he had consulted with did not know what she was talking about, assured him that she (E.R.) could prevail in an appeal before the Ninth Circuit, and informed him that her suspension occurred while she was going through a divorce. *See id*. She also told Mr. Doe that she would refer him to an attorney who could file a habeas petition on his behalf, given that he had been detained for so long. *See id*. at ¶ 35. E.R. then referred his case to undersigned counsel Claudia Valenzuela for assessment of a habeas petition. *See id*. Mr. Doe agreed to have E.R. continue to represent him. *See id*. at ¶ 34.

62. Subsequently, undersigned counsel discovered that Mr. Doe had been eligible to apply for adjustment of status to lawful permanent residence under 8 U.S.C. § 1255(i) all along, based on a previously approved immigration petition filed by his mother in 1992. *See* Exh. B at ¶¶ 14, 20. Counsel communicated this to Mr. Doe. *See* Exh. A at ¶ 36.

63. When Mr. Doe learned in April 2023 that he had been eligible to apply for lawful permanent residence but that E.R. had failed to explain or discuss this defense to removal with him, he informed E.R. that he no longer wished for her to represent him. *See* Exh. A at ¶ 37. At that time, E.R. told Mr. Doe for the first time that she had not pursued this defense because Mr. Doe's family had not wanted to assist him with this application, which was untrue. *See id*.

64. After Mr. Doe terminated E.R.'s representation and retained undersigned counsel, counsel separately filed a motion with the BIA to hold Mr. Doe's then-pending appeal in abeyance. The BIA dismissed his appeal on May 4, 2023, also denying his motion for abeyance. *See* Exh. B at ¶ 22. Counsel filed a petition for review of the BIA's denial, which is pending before the Ninth Circuit. The Ninth Circuit also issued a temporary stay of Mr. Doe's removal. *See id*.

65. Mr. Doe filed a complaint with the State Bar of California against E.R., which has opened an investigation of the matter. *See* Exh. A at ¶ 37; Exh. B at ¶ 21. The investigation is pending. *See* Exh. A at ¶ 37; Exh. B at ¶ 21.

66. Mr. Doe moved to reopen his removal proceedings based on ineffective assistance of counsel, in which he included evidence of his eligibility for adjustment of status, as well as evidence supporting his particularized risk of torture if deported to Mexico. *See* Exh. A at ¶ 38; Exh. B at ¶¶ 23–26.[8] The BIA denied the motion to reopen on September 5, 2023. *See* Exh. A at ¶ 38; Exh. B at ¶ 27. Applying an incorrect prejudice standard, the BIA concluded that Mr. Doe was not prejudiced by E.R.'s representation. *See* Exh. B at ¶ 27–28. The BIA compounded its legal error by applying an erroneous standard for motions to reopen. *See id*. Mr. Doe filed a petition for review of the BIA's decision, which is pending in the Ninth Circuit Court of Appeals. *See* Exh. A at ¶ 38; Exh. B at ¶ 29. The petitions for review will likely be pending for more than a year. *See* Exh. B at ¶ 30–31.

V. Mr. Doe's prolonged detention in ICE custody under 8 U.S.C. § 1226(c).

67. ICE has detained Mr. Doe under 8 U.S.C. § 1226(c) since the inception of his removal proceedings in September 2021. *See* Exh. A at ¶ 1; Exh. B at ¶ 2. As stated above, he has never had a bond hearing before an immigration judge. *See* Exh. B at ¶ 2.

68. On or about June 2022, ICE notified Mr. Doe that it intended to conduct a post-order custody review ("POCR") of his detention. *See* Exh. B at ¶ 33; *see also* 8 C.F.R. § 214.4.

[8] The evidence included declarations from three experts who opined that Mr. Doe is more likely than not to be kidnapped or killed by Mexican gangs or cartels with ties to U.S. gangs because of his renunciation of the gang by defying the gang's orders in prison. *See* Exh. B at ¶¶ 9, 26–27. The experts also concur that his life is further at risk at the hands of Mexican police or military who are likely to attribute gang membership to him because of his physical appearance. *See id*. The expert opinions were reflected in additional evidence submitted about country conditions evidence on Mexico. *See id*. at ¶¶ 26–27.

Counsel requested a copy of the POCR notice from ICE but did not receive one. *See* Exh. B at ¶ 34.

69. Counsel submitted a request that Mr. Doe be released on an order of supervision. Counsel's request explained that release is warranted under the regulations because Mr. Doe is unlikely to be removed in the foreseeable future and because he is not a flight risk or danger to the community. *See* Exh. B at ¶ 35; *see also* 8 C.F.R. § 214.4. Counsel further requested Mr. Doe's release because his detention does not constitute a priority under DHS enforcement priorities. *See* Exh. B at ¶ 35.[9]

70. The day after counsel submitted the release request, ICE issued a three-sentence email that denied the request. *See* Exh. B at ¶ 36. The regulations do not permit appeal of this decision. *See id*.

VI. The medical and mental-health impact of Mr. Doe's prolonged detention.

71. Mr. Doe's prolonged detention has been detrimental to his health. *See* Exh. A at ¶¶ 41–42; Exh. B at ¶¶ 39–44. While in ICE custody, Mr. Doe has developed chronic medical issues including high blood pressure, high cholesterol, and diabetes. *See* Exh. A at ¶¶ 41–42; Exh. B at ¶ 39. Mr. Doe takes seven different types of medication and submits to routine monitoring to manage his myriad illnesses. *See* Exh. A at ¶ 41; Exh. B at ¶ 39

72. Mr. Doe also suffers from Minor Neurocognitive Disorder, PTSD, and Major Depressive Disorder, with anxious distress. *See* Exh. C at ¶¶ 3, 23. This is in part due to the neglect and severe physical and emotional abuse he experienced as a child, the physical harm and emotional abuse he suffered as a young adult, and the trauma of witnessing violence in prison. *See id.* at ¶ 11; *see also* Exh. B at ¶ 43.

[9] *See* Alejandro Mayorkas, Dept. of Homeland Sec., *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

73. The nearly two years that Mr. Doe has spent languishing in immigration detention without meaningful programming have triggered a decline in his mental health. *See* Exh. A at ¶ 41; *see also* Exh. B at ¶¶ 40–44. In his two decades in CDCR custody, Mr. Doe enjoyed good health and did not require medication. *See id*; Exh. B at ¶ 39, 44. Now, Mr. Doe is depressed "most of the day, nearly every day," resulting in decreased appetite, daily insomnia, fatigue, and feelings of worthlessness. Exh. C at ¶ 32. He experiences severe distress due to persistent re-experiencing of past traumatic events. *See id.* at ¶¶ 25–29. According to the psychological expert he recently evaluated Mr. Doe, "he needs mental health treatment." *Id.* at ¶ 40.

74. Mr. Doe has a strong release plan. He intends to live with his U.S.-citizen partner, in her home of four years. *See* Exh. A at ¶ 44. He will reconnect with his family, all of whom are U.S. citizens and live in the United States. *See id*. at ¶ 39. He will reap the benefits of the structure and support that his state parole conditions provide. *See id*. at ¶ 44. And, with his training and experience, he hopes to follow his passion for firefighting. *See id*. at ¶ 44.

75. But Mr. Doe's inability to predict if or when he can ever realize this plan have significantly amplified his stress and anxiety. Not knowing whether his detention will endure for months or years to come, Mr. Doe feels he "ha[s] no control." Exh. A at ¶ 39.

ARGUMENT

76. Mr. Doe has a substantive due process right to be free from civil detention that is effectively punitive based on its duration and nature. As explained below, Mr. Doe's prolonged detention violates his right to substantive due process. He respectfully asks this Court to remedy that violation by issuing a writ of habeas corpus ordering release, consistent with the longstanding common-law tradition of habeas corpus, the habeas statute, and the practice of courts in this circuit and nationwide. Mr. Doe urges that this is the only remedy to cure the ongoing substantive due process violation that he endures.

77. Mr. Doe also establishes below that his nearly two-year detention without any review violates his right to procedural due process. Therefore, should this Court decline to release him to remedy the violation of his substantive due process right, he asks this Court to hold a bond hearing at which Respondents bear the burden of justifying his continued detention. Alternatively, Mr. Doe asks this Court to order that Respondents provide him with a bond hearing before an immigration court within fourteen days of the order.

I. Mr. Doe's continued detention violates substantive due process.

78. Respondents' detention of Mr. Doe violates substantive due process because its prolonged duration and nature render it unduly punitive in relation to the government's purpose in effectuating removal. This Court should therefore order Mr. Doe's release.

A. Immigration detention violates substantive due process when the length and nature of the detention becomes punitive.

79. The Due Process Clause protects "all 'persons'"—including all noncitizens—against arbitrary prolonged detention. *See Zadvydas*, 533 U.S. at 693. "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. *Id.* at 690.

80. Substantive due process prohibits civil detention that is punitive in purpose or in effect, including civil detention that is excessively prolonged in relation to its purpose. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Put otherwise, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"; otherwise, their commitment amounts to punishment. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (quoting *Jackson*, 406 U.S. at 738).

81. Even when the Constitution permits confinement that is brief, the Supreme Court has recognized that such confinement becomes punitive when it is "excessively prolonged." *United States v. Salerno*, 481 U.S. 739, 474 n.4 (1987). Moreover, as a detained person's time in

custody increases, so too does their liberty interest. *See Zadvydas*, 533 U.S. at 691. "[F]or detention to remain reasonable," greater justification is needed "as the period of confinement grows." *Id*.

82. Accordingly, "at some point, regardless of the risks, due process will require that [a person subject to prolonged civil confinement] be released." *United States. v. Torres*, 995 F.3d 695, 709–10 (9th Cir. 2021) (noting that federal government had conceded this point); *see also United States v. Briggs*, 697 F.3d 98, 103 (2d Cir. 2012) (stating that "for every set of circumstances, due process does impose some limit" on civil confinement).

83. Applying these principles, the Ninth Circuit has held that civil detention violates substantive due process (1) when it is "expressly intended to punish," or (2) when "the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, . . . or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Jones*, 393 F.3d at 932 (internal quotation marks and citations omitted). Mr. Doe's detention is punitive for both reasons.

84. These principles apply to civil immigration detention. *See, e.g.*, *Zadvydas*, 533 U.S. 678, 690; *Reid*, 17 F.4th at 8; *see also Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018) ("[T]he Court's conclusion is essentially conceded by the Government: that prolonged detention under § 1226(c) without providing an alien with a bond hearing will—at some point—violate the right to due process."). Because the purpose of immigration detention under § 1226(c) is to effectuate expeditious removal and safeguard the community, prolonged immigration detention that does not "bear some reasonable relation" to that purpose in duration or nature amounts to punishment and violates the Due Process Clause. *Jones*, 393 F.3d at 931.

85. Although the Supreme Court has held that "brief" detention during removal proceedings under § 1226(c) does not violate the Constitution, it did not disturb the longstanding principle

that otherwise-acceptable civil detention is unconstitutionally punitive once it becomes prolonged. *Demore v. Kim*, 538 U.S. 510, 513, 529 (2003).[10]

86. Accordingly, courts continue to consider constitutional challenges to prolonged immigration detention pursuant to § 1226(c). *See Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (registering "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional"); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020) (holding that "§ 1226(c) is unconstitutional when applied to detain an alien unreasonably long without a bond hearing").[11]

87. Thus, when a person subject to prolonged immigration detention poses no flight risk or danger to the community, or when restrictions short of physical custody are sufficient to mitigate any risk a detained person poses, the Constitution requires release on appropriate conditions.

B. The duration and nature of Mr. Doe's confinement are unduly punitive because removal is unlikely in the foreseeable future, his release will not disrupt any future removal efforts, and his stellar record of rehabilitation shows that he is not a danger to the community.

1. The duration of Mr. Doe's detention is prolonged.

88. The duration of Mr. Doe's detention far exceeds the length that courts have considered unconstitutional. Mr. Doe has been detained for nearly two years—four times the duration of detention without review that the Supreme Court permitted in *Demore*. Mr. Doe's nearly two years of confinement also far exceeds the duration of civil confinement that three courts of

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[10] In holding that the six-month detention at issue in *Demore* did not violate due process, the Court explicitly relied on statistics cited by the government—later proved incorrect—that detention of noncitizens under § 1226(c) lasts "an average . . . of 47 days" in the "vast majority" of cases and otherwise rarely exceeds five months. *Demore*, 538 U.S. at 567 (Souter, J., concurring). After the Court issued its decision based on the government's erroneous statistics, the government admitted that it had submitted falsely abbreviated estimates of detention duration. *See* Letter from Ian H. Gershengorn, Acting Solic. Gen., to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 26, 2016).

[11] *Jennings v. Rodriguez* explicitly refrained from addressing the constitutional challenge to § 1226(c) detention, remanding the case for further development on the constitutional claims. *See* 138 S. Ct. at 851.

appeals—including the Ninth Circuit—held is the outer limit of confinement that the Constitution could withstand, even when *no* conditions of release could accomplish the government's non-punitive objectives (which is not the case here).

89. For example, applying *Salerno*, the Ninth Circuit recently held that twenty-one months of pre-trial detention "approach[es] the limits of what due process can tolerate," even for a defendant awaiting trial who had multiple prior convictions for violent offenses and a history of failing to appear in court. *Torres*, 995 F.3d at 709–10.

90. Other circuits have held that far shorter periods of pre-trial or civil confinement violate the Constitution. *See, e.g.*, *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (holding four months of pretrial detention "too long" and ordering release within thirty days if trial did not commence); *United States. v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986) (holding fourteen-month detention unconstitutional and recognizing that "[d]etention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process"); *United States v. Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (denying release on unique facts of case but "assum[ing] that in many, perhaps most, cases, sixteen months would be found to exceed the due process limitations on the duration of pretrial confinement"). And several courts have ruled that detention of at least six months is unconstitutional. *See United States v. Chen*, 820 F. Supp. 1205, 1210 (N.D. Cal. 1992) (one-year detention unconstitutional); *United States v. Lofranco*, 620 F. Supp. 1324, 1326 (N.D.N.Y. 1985) (six-month detention unconstitutional).

91. Mr. Doe's detention of almost two years far exceeds the periods of confinement found unconstitutional in these cases. *See Torres*, 995 F.3d at 700 (referring to provisions of Bail Reform Act at 18 U.S.C. § 3142(e)). Importantly, the petitioners in *Torres* and other post-*Salerno* jurisprudence had received a bail hearing. But Mr. Doe has never had a bond

hearing before an immigration judge. *See* Exh. B at ¶ 2. Moreover, the unreviewable administrative mechanisms for custody review that Mr. Doe has pursued before ICE have proven fruitless. *See* Exh. B at ¶¶ 33–37.

92. Absent this Court's intervention, Mr. Doe's detention is likely to continue for months or years. There is no telling when Mr. Doe's petitions for review will be decided by the Ninth Circuit. *See* Exh. B at ¶¶ 29–31. If his petitions for review are granted, Mr. Doe's case will be remanded to the immigration agency with no clear timeline for resolution. If the Ninth Circuit finds that Mr. Doe should receive a hearing on his defenses to removal, he will have an opportunity to present his claims before an immigration judge. Even if the immigration judge grants his case, counsel for DHS may choose to appeal any grant, which will further prolong Mr. Doe's case. If an immigration judge denies Mr. Doe's claims, Mr. Doe will exercise his right to appeal administratively; if the BIA affirms, he will exercise his right to judicial review.

93. This cycle can repeat itself more than once before a noncitizen is able to finally either win relief or pursue judicial review of an adverse decision before a federal court of appeals.

2. The nature of Mr. Doe's detention is harsh.

94. The nature of Mr. Doe's confinement is unduly harsh. Mr. Doe completed his criminal sentence and demonstrated rehabilitation while serving his sentence. A CDCR warden recommended him for the CDCR Fire Camp program and Mr. Doe excelled in the program, earning praise from his CDCR Fire Camp captains. *See* Exh. A at ¶ 15; Exh. B at ¶ 8. One of the difficulties for Mr. Doe during his confinement in immigration custody is that he is not allowed to participate in the CDCR Fire Camp. *See* Exh. A at ¶ 40; Exh. B at ¶ 10.

95. Furthermore, unlike criminal confinement, Mr. Doe's civil confinement has no known end date and lacks programming, educational, and vocational opportunities. *See King v. Cnty. of Los Angeles*, 885 F.3d 548, 556–57 (9th Cir. 2018) (holding that due process requires

civil-detention conditions not be same as or worse than criminal custody); *Jones*, 393 F.3d at 934 (same). Mr. Doe's inability to control his time or daily life activities in detention, his seemingly indefinite separation from loved ones, and the possibility of being harmed or killed if returned to Mexico cause him anguish and affects his physical well-being. *See* Exh. A at ¶¶ 39–42; Exh. B at ¶¶ 39–44.

96. Without the opportunity to live a purposeful life and victimized by ineffective assistance of counsel, Mr. Doe has battled high anxiety and other medical and mental-health issues while Respondents have detained him. *See* Exh. A at ¶¶ 41–42; Exh. B at ¶¶ 39–44; Exh. C at ¶¶ 2, 23, 25–37. This is consistent with research showing that "immigration detention is marked by extensive uncertainty because detention can extend indefinitely[,] and detained individuals do not know what will happen to them at the end of their deportation proceedings."[12] This uncertainty causes "anticipatory stress," which "contribute[s] to increased stress and poor health during detention."[13]

3. Respondents are unlikely to effectuate removal in the foreseeable future, and Mr. Doe does not present a flight risk or danger.

97. Civil immigration detention is constitutionally justified only to the extent that it effectuates removal and safeguards the community. *See Zadvydas*, 533 U.S. at 690. Neither purpose is satisfied here.

98. Respondents are unlikely to effectuate his removal in the foreseeable future. Given the procedural posture and merits of his case as set forth *supra*, it likely will be months, if not years, before his claims are resolved. Absent this Court's intervention, he is likely to be detained for months or years to come.

[12] *See, e.g.*, Caitlin Patler et al., *Release from US Immigration Detention May Improve Physical and Psychological Stress and Health: Results from a Two-Wave Panel Study in California*, SSM – Mental Health (2021), https://www.sciencedirect.com/science/article/pii/S2666560321000359?via%3Dihub.
[13] *Id.*

99. Moreover, Mr. Doe's release would not impede the government's ability to effectuate removal if he is ultimately denied relief because he is not a flight risk.

100. First, Mr. Doe has strong community ties. He has lived in the United States since infancy. *See* Exh. A at ¶ 2. His immediate family members, including his mother, daughter, stepfather, siblings, and partner, reside in the United States and are U.S. citizens. *See* Exh. A at ¶¶ 39.

101. Second, upon release, he intends to reside with his partner, A.B., who has a stable residence and employment. *See* Exh. A at ¶ 44. Mr. Doe is also required to be on parole with the State of California through September 2024, requiring accountability to a parole officer and ensuring reentry resources through the state parole system. *See id*.

102. Third, Mr. Doe has fully served his criminal sentence and demonstrated rehabilitation. He maintained an excellent record during his more than two decades in CDCR custody and was selected by the warden for the CDCR Fire Camp based on his record. *See* Exh. A at ¶ 15; Exh. B at ¶ 8. He excelled in the Fire Camp program for nearly three years. He earned the praise of his supervisors, *see* Exh. D, and eventually took on the highly dangerous position of a frontline firefighter, *see* Exh. A at ¶ 18. His community service changed his life; "for the first time in his life he felt useful and was able to demonstrate to himself and others that he was a responsible and productive person." Exh. C at ¶ 16. It was "the most meaningful and satisfying experience he ever had." *Id*.

103. Fourth, Mr. Doe has a strong interest in attending future court appearances. He is eligible to seek lawful permanent resident status. *See* Exh. B at ¶¶ 14, 20. He also has a meritorious CAT claim. Three experts concurred that he is likely to be harmed by Mexican gangs, cartels, police, or military. *See id.* at ¶¶ 9, 26–27. Their conclusions are supported by country conditions evidence. *See id*. at ¶¶ 26–27.

104. Finally, Mr. Doe, who has been fighting his 2001 conviction for more than twenty years, has presented a petition for relief under the California Racial Justice Act and has a hearing on his petition on November 3, 2023. *See* Exh. A at ¶ 11; Exh. B at ¶ 7.

105. Individually and collectively, these facts show that Mr. Doe is not a flight risk and is committed to complying with his immigration and parole obligations.

106. Further, Mr. Doe is not a danger to the community. He has demonstrated rehabilitation through his excellent prison record and participation in the Fire Camp program. His strong family ties and release plan, including his parole obligations, assure that he will maintain the record of positive conduct and community service that he has demonstrated over the past two decades.

4. Given that the duration and nature of confinement are excessive in relation to the government's detention purposes, continued confinement would violate Mr. Doe's right to substantive due process.

107. The duration and nature of Mr. Doe's detention are thus excessive in relation to the government's detention purpose. Indeed, the liberty interest of a person subjected to prolonged civil confinement eventually becomes dispositive, such that *no* degree of government interest, however legitimate, can outweigh it. *See Torres*, 995 F.3d at 709–10 (noting government conceded that "at some point, regardless of the risks . . . due process will require that [a person subject to prolonged civil confinement] be released").

108. While Mr. Doe maintains that his prolonged detention has crossed that threshold, this Court need not decide that issue. The punitive duration and nature of his detention outweigh the government's non-existent justification for continuing his detention. Given the procedural posture of Mr. Doe's case and the merits of his claims, Respondents are unlikely to effectuate Mr. Doe's removal in the foreseeable future. His release would not create a flight risk or danger to the community.

109. In short, the government's objectives here—effectuating removal and preventing danger—"could be accomplished in . . . alternative and less harsh methods," namely, release. *Jones*, 393 F.3d at 932. Consequently, continued detention violates Mr. Doe's right to substantive due process. *See id*.

C. This Court should release Mr. Doe to remedy the substantive due process violation.

110. Because continued detention violates substantive due process in this case, this Court should issue the writ and order Mr. Doe's release. Courts in this circuit regularly issue writs of habeas corpus releasing immigrants whose ongoing custody violates the Constitution when the government cannot justify their prolonged detention. *See, e.g.*, *Jimenez v. Wolf*, No. 19-cv-07996-NC, 2020 WL 1082648, at *4 (N.D. Cal. Mar. 6, 2020) (ordering petitioner's release on a motion to enforce a habeas order after an IJ denied bond at a prolonged detention hearing); *Ramos v. Sessions*, 293 F. Supp. 3d 1021, 1038 (N.D. Cal. 2018) (same), *appeal filed*, *Ramos v. Whitaker*, No. 18-15884; *Sales v. Johnson*, No. 16-cv-01745-EDL, 2017 WL 6855827, at *7 (N.D. Cal. Sept. 20, 2017) (same); *Judulang v. Chertoff*, 562 F. Supp. 2d 1119, 1127 (S.D. Cal. 2008) (same); *Mau v. Chertoff*, 562 F. Supp. 2d 1107, 1118–19 (S.D. Cal. 2008) (same); *see also Ekeh v. Gonzales*, 197 F. App'x 637, 638 (9th Cir. 2006) (ordering supervised release pursuant to *Zadvydas*); *Nguyen v. Fasano*, 84 F. Supp. 2d 1099, 1113 (S.D. Cal. 2000) (issuing order to show cause why petitioner should not be released pursuant to *Zadvydas*). Courts in sister circuits have done the same. *See, e.g., Madrane v. Hogan*, 520 F. Supp. 2d 654, 667 (M.D. Pa. 2007) (finding "extended detention" under § 1226(c) violates due process and granting habeas writ); *Bah v. Cangemi*, 489 F. Supp. 2d 905, 919 (D. Minn. 2007) (same); *Lawson v. Gerlinski*, 332 F. Supp. 2d. 735, 744–45 (M.D. Pa. 2004) (concluding that petitioner's prolonged immigration detention violated substantive due process and ordering release).

111. Courts also issue writs of habeas corpus releasing detained noncitizens when conditions of confinement are excessive in relation to the person's flight risk or danger to the community. *See, e.g.*, *Bent v. Barr*, 445 F. Supp. 3d 408, 414–15, 421 (N.D. Cal. 2020); *Doe v. Barr*, No. 20-cv-02141-LB, 2020 WL 1820667, at *8–10 (N.D. Cal. Apr. 12, 2020); *Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at *3–5 (N.D. Cal. Apr. 8, 2020); *Doe v. Barr*, No. 20-cv-02263-RMI, 2020 WL 1984266, at *6–7 (N.D. Cal. Apr. 27, 2020).

112. While this Court may tailor conditions of release to manage the individualized governmental interests at stake, restrictive conditions are unnecessary here given Mr. Doe's strong community ties, demonstrated rehabilitation, secure reentry plan, and incentives to pursue immigration and post-conviction relief.

II. Mr. Doe's prolonged detention without an individualized bond hearing violates procedural due process.

113. The procedural due process component of the Fifth Amendment's Due Process Clause requires "adequate procedural protections" to ensure that the government's justification for confinement "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 693 (citations omitted).

114. When the government has committed a deprivation of liberty that violates substantive due process, a court need not consider whether the deprivation also violates procedural due process. *See Zinermon v. Burch*, 494 U.S. 113, 126 (1990) (procedural due process challenges do not challenge the deprivation itself, only the process that accompanied it). "[O]nly when a restriction on liberty survives substantive due process scrutiny does the further question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration." *Huynh v. Reno*, 56 F. Supp. 2d 1160, 1162 (W.D. Wash. 1999) (citing *Salerno*, 481 U.S. at 746).

115. While Mr. Doe maintains that his detention violates substantive due process and warrants release on that ground, he can also establish violation of his right to procedural due process. Specifically, Mr. Doe's prolonged detention without any individualized evaluation of whether the government's asserted justification for confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint" violates procedural due process. *Zadvydas*, 533 U.S. at 693 (internal quotations omitted). Mr. Doe asks this Court to conduct a prompt, individualized evaluation of the justification for his custody. Alternatively, he requests that this Court order the immigration judge with instructions to hold a bond hearing.

A. Mr. Doe's continued detention violates procedural due process because it has lasted more than six months without individualized review.

116. Civil immigration detention without individualized review becomes presumptively prolonged at six months. *See Zadvydas*, 533 U.S. at 701. Courts have long recognized that six months is a substantial period of confinement, after which additional process is required for the government to justify continued incarceration. *See Duncan v. Louisiana*, 391 U.S. 145, 161 (1968); *United States v. Nachtigal*, 507 U.S. 1, 5 (1993); *Blanton v. N. Las Vegas*, 489 U.S. 538, 542 (1989); *Taylor v. Hayes*, 418 U.S. 488, 495–96 (1974).

117. The Supreme Court extended this six-month line to the civil context in a case setting out procedural requirements for civil commitments related to mental health. *See McNeil*, 407 U.S. at 249, 250–52. In *McNeil*, the Court held that due process requires procedural safeguards for civil confinements that are not "strictly limited" in length, noting that the six-month limit for civil commitments without an individualized inquiry originally laid out by the relevant statute "provides a useful benchmark." *Id.*

118. The Ninth Circuit applied the six-month benchmark to immigration detention, holding that when "detention crosses the six-month threshold and release or removal is not imminent," "a

hearing before a neutral decision maker" is a "reasonable" procedural safeguard. *Diouf*, 634 F.3d at 1092.

119. Although *Diouf* specifically addressed the legality of prolonged detention under 8 U.S.C. § 1231(a)(6), its reasoning applies equally to immigration detention under 1226(c). *See id.* at 1087 (reasoning that individuals detained under § 1231(a)(6) have comparable interests as those detained under § 1226(a) and, by logical extension, individuals detained under § 1226(c)—that is, an interest in freedom from prolonged detention); *see also Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1202 (9th Cir. 2022).

120. Relying on this reasoning, a court in this District applied the six-month line to immigration detention under § 1226(c) as a constitutional matter, holding that "detention becomes prolonged after six months" and, without access to a bond hearing, such prolonged detention violated the petitioner's due process rights. *Rodriguez v. Nielsen*, No. 18-cv-04187-TSH, 2019 WL 7491555, at *6 (N.D. Cal. Jan. 7, 2019).

121. In *Rodriguez*, the court looked to *Demore*'s reliance on the "brief" period of detention and differentiated it from "the kind of prolonged detention at issue in the present case." *Id.* at *3. The court in *Rodriguez* relied on *Zadvydas* and Ninth Circuit case law in determining that courts have used the six-month mark as a measure for "prolonged" detention. *Id.* at *3–*4 (citing *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), and *Zadvydas*, 533 U.S. at 690). Relying on this analytical framework, the court accordingly concluded that the petitioner's prolonged detention without a bond hearing violated due process on purely constitutional grounds. *Id.* at *6. This Court should do the same.

122. Due process requires that Mr. Doe receive a prompt, individualized inquiry into the justification for his detention by a neutral arbiter. ICE has already detained Mr. Doe for nearly two years without any individualized inquiry into the justification for his detention. His

detention will likely continue for many more months, if not years, as set forth above. The Constitution demands that a neutral arbiter like this Court hold a hearing to determine whether Respondents can present any justification to continue Mr. Doe's detention. *See Diouf*, 634 F.3d at 1092 n.13; *Rodriguez*, 2019 WL 7491555, at *6.

1. Mr. Doe prevails under the applicable procedural due process balancing tests.

123. Mr. Doe's detention since September 2021—nearly two years—without any individualized review, is unreasonable. This is not a controversial proposition. Since the Supreme Court's decision in *Jennings*, the government has conceded that prolonged immigration detention without review violates due process. *See, e.g., Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018).

124. Courts evaluate procedural due process claims under the Supreme Court's longstanding *Mathews v. Eldridge* test, which balances (1) the private interest threatened by governmental action; (2) the risk of erroneous deprivation of such interest and the probable value of additional procedural safeguards; and (3) the government interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see Jimenez*, 2020 WL 510347, at *2–3 (N.D. Cal. Jan. 30, 2020) (applying the *Mathews* test where the noncitizen had been detained under § 1226(c) for over a year without a bond hearing); *Perera*, 2022 WL 1128719, at *4–7 (N.D. Cal. Apr. 15, 2022) (applying the *Mathews* test where the noncitizen was at risk of being re-detained under § 1226(c)); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 963 (N.D. Cal. 2019), *appeal dismissed sub nom. Ambriz v. Barr*, No. 19-17559, 2020 WL 3429471 (9th Cir. Mar. 25, 2020) (applying the *Mathews* test where the noncitizen was detained under § 1226(a) and had been detained for over a year since his last bond hearing); *Ameen*, 2022 WL 1157900, at *6 (same).

125. Other courts, including courts in this district, apply a multi-factor reasonableness test that the Third Circuit adopted to evaluate post-*Jennings* as-applied challenges to prolonged detention under § 1226(c). The test encompasses "a nonexhaustive list of four factors to consider in assessing whether a[] [noncitizen's] detention has grown unreasonable," where "[t]he most important factor is the duration of detention." *German Santos v. Warden Pike Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020). These factors include (1) whether detention is likely to continue; (2) reasons for the delay, including whether delay was "unnecessary" due to either party's "careless or bad-faith" errors; and (3) whether conditions of confinement are meaningfully different from criminal punishment. *Id.*; *see Marroquin Ambriz*, 420 F. Supp. 3d at 963; *Gonzalez*, 2019 WL 330906, at *5; *Romero*, 2021 WL 254435, at *4; *see also Rodriguez Diaz*, 53 F.4th at 1205 n.5, 1210.

126. Under both the *Mathews* and the *German Santos* standards, Mr. Doe's ongoing detention violates procedural due process. He therefore asks this Court to conduct a hearing.

a. Mr. Doe prevails under the *Mathews* balancing test.

127. Here, where Mr. Doe has *never* received any individualized hearing on the justification for detention, the *Mathews* factors weigh in his favor and require that this Court promptly evaluate whether Respondents can justify his ongoing detention.

128. The first prong of the *Mathews* balancing test, the private interest threatened by governmental action, weighs strongly in his favor. *See* 424 U.S. at 335. Mr. Doe "has an overwhelming interest here—regardless of the length of his immigration detention—because 'any length of detention implicates the same' fundamental rights." *Perera v. Jennings*, No. 21-cv-04136-BLF, 2021 WL 2400981, at *4 (N.D. Cal. June 11, 2021).

129. Mr. Doe's private interest is weighty given the length of his detention. ICE has already imprisoned Mr. Doe for nearly two years. Neither release nor removal is likely in the reasonably

foreseeable future, as Mr. Doe has two pending petitions for review. Whether the petitions are granted or denied, he faces detention without a clear end in sight.

130. Mr. Doe's time in civil detention is now three-and-a-half times the length of the "brief" six-week detention contemplated by the Supreme Court in *Demore*. *See* 538 U.S. at 530. Mr. Doe's liberty interest increases as his detention becomes more prolonged. *See Zadvydas*, 533 U.S. at 690, 691; *Diouf*, 634 F.3d at 1091–92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound.").

131. Moreover, the conditions of Mr. Doe's confinement at GSA are decidedly more restrictive of his liberty than those he experienced during his time serving a criminal sentence in a penal institution. *See Gonzalez*, 2019 WL 330906, at *5 ("[C]ourts consider the conditions of the [noncitizen's detention because noncitizens] held under § 1226(c) are subject to civil detention rather than criminal incarceration."); *Martinez*, 2109 WL 5968089, at *9 (holding that the more that "conditions under which the [noncitizen] is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing"). Given these circumstances, it is unsurprising that Mr. Doe's health has declined precipitously. *See* Exh. A at ¶¶ 41–42; Exh. B at ¶¶ 39–44; Exh. C at ¶¶ 3, 23, 25–37.

132. Finally, Mr. Doe's liberty interest is particularly profound because of his firm ties to the United States, which must be afforded weight under the *Mathews* test. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (in applying the first *Mathews* factor, the right to "rejoin [one's] immediate family" "ranks high among the interests of" a detained individual with longstanding ties to the United States). Mr. Doe has lived in the United States since he was a child. His long-term partner and entire immediate family—all of whom support and stand by him—are U.S. citizens and reside in the United States. His extensive ties to the United States heighten his

interest in being at liberty, in the company of his family and community, while his immigration proceedings continue.

133. Importantly, "the weight on this side of the *Mathews* scale" is not "offset" by the circumstances of Mr. Doe's criminal conviction, nor the fact that he is in removal proceedings. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality op.). This is because "commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection, and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual." *Id.* (cleaned up).

134. In short, the first prong of the *Mathews* test weighs heavily in Mr. Doe's favor.

135. The second prong of the *Mathews* balancing test requires that this Court assess the erroneous risk of deprivation under the procedural protections available and the probable value of additional or substitute procedural safeguards. *See Mathews*, 424 U.S. at 335.

136. The risk of erroneous deprivation of Mr. Doe's liberty is high, as he has been detained since September 2021 without a hearing before a neutral arbiter as to whether the government can justify detention under his individualized circumstances. *See Zadvydas*, 533 U.S. at 690 (holding prolonged detention permissible only when detained person poses risk of flight or danger to the community). "[T]he risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Diouf*, 634 F.3d at 1092.

137. Conversely, "the probable value of additional procedural safeguards—an individualized evaluation of the justification for his detention—is high, because Respondents have provided virtually no procedural safeguards at all." *Jimenez*, 2020 WL 510347, at *3 (granting habeas petition for person who had been detained for one year without a bond hearing); *see also Hogarth v. Giles*, No. 5:22-cv-01809-DSF-MAR, Dkt. No. 20 (C.D. Cal. Jan. 11, 2023)), report and recommendation adopted in relevant part Dkt. No. 24 (C.D. Cal. Feb. 23, 2023) ("Section

1226(c) provides no opportunity for any further bond determinations for the duration of Petitioner's detention. . . . It cannot be that due process authorizes infinite detention without any opportunity for reconsideration.").

138. Third, Respondents' interest in continuing to detain Mr. Doe without providing any neutral review of whether detention is justified is weak. *See Mathews*, 424 U.S. at 335. The specific interest at stake here, where the detention statute does not extend *any* individualized process, is not the government's ability to continue to detain Mr. Doe, but rather the government's ability to continue to detain him for two years *without any individualized review*. *See Marroquin Ambriz*, 420 F. Supp. 3d at 964; *Doe*, 2022 WL 2132919, at *5.

139. The cost of providing an individualized inquiry is minimal. *See Doe*, 2022 WL 2132919, at *5. The government has repeatedly conceded this fact. *See Singh v. Barr*, No. 18-cv-2471-GPC-MSB, 2019 WL 4168901, at *12 (N.D. Cal. Aug. 30, 2019) ("The government has not offered any indication that a second bond hearing would have outside effects on its coffers."); *see also Marroquin Ambriz*, 420 F. Supp. 3d at 964; *Lopez Reyez v. Bonnar*, 362 F. Supp. 3d 762, 777 (N.D. Cal. 2019).

140. In any event, it is "always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)); *see Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (holding that the government "suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented").

141. Applying these standards, courts in this District and Circuit have repeatedly held that continued arbitrary detention violates due process for individuals who were held under the same detention statute and for similar lengths of times as Mr. Doe. *See, e.g.*, *Romero*, 2021 WL

254435, at *2, *5 (holding that the petitioner's detention under § 1226(c) of just over one year without a custody hearing was "not compatible with due process" and granting habeas); *Jimenez*, 2020 WL 510347, at *1, *2, *4 (same); *Gonzalez*, 2019 WL 330906, at *1, *2 (same); *Martinez*, 2019 WL 5968089, at *1, *2 (same). This Court should so hold as well.

142. The Ninth Circuit's recent decision in *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022), does not disturb this result. There, the court applied the *Mathews* test to hold that the detention of a noncitizen detained under another detention statute, 8 U.S.C. § 1226(a), did not violate procedural due process. *See id.* at 1195.

143. Unlike § 1226(c), § 1226(a) mandates that detained individuals receive an individualized bond hearing at the outset of detention and guarantees further bond hearings upon a material change in circumstances. *See* 8 C.F.R. § 1003.19(e). The panel's decision in *Rodriguez Diaz*—and its evaluation of the underlying *Mathews* factors—was predicated on the immediate and ongoing availability of this administrative bond process under 1226(a). *See Rodriguez Diaz*, 53 F.4th at 1202. The court noted that the "extensive procedural protections" of § 1226(a) reduced petitioner's private interest and the risk of erroneous deprivation. *See id.* at 1202, 1207, 1209.

144. Section 1226(c), under which Mr. Doe is detained, does not provide the same process as § 1226(a), the section analyzed in *Rodriguez Diaz*. Indeed, it does not provide any process at all. Thus, if anything, *Rodriguez Diaz* suggests that the first two prongs of the *Mathews* analysis should weigh more heavily in Mr. Doe's § 1226(c) detention case. Unlike the petitioner in *Rodriguez Diaz*, Mr. Doe has no statutory access to individualized review of his detention.

b. Mr. Doe prevails under the *German Santos* multi-factor reasonableness test.

145. Mr. Doe also prevails under the multi-factor reasonableness test set forth in *German Santos*. These factors include (1) whether detention is likely to continue; (2) reasons for the delay, including whether delay was "unnecessary" due to either party's "careless or bad-faith" errors; and (3) whether conditions of confinement are meaningfully different from criminal punishment. *German Santos*, 965 F.3d at 211. The duration of detention is "[t]he most important factor." *Id*.

146. First, the length of Mr. Doe's detention—nearly two years—is well beyond the six months to one year that most courts find presumptively constitutional without a bond hearing. *See Gonzalez*, 2019 WL 330906, at *3 (collecting cases).

147. In one case in this District where a habeas petitioner had been detained for "just over a year"—less time than Mr. Doe has been detained—the court found that this factor "weigh[ed] *strongly* in his favor." *Gonzalez*, 2019 WL 330906, at *5 (emphasis added). Moreover, "there is no remotely certain end in sight as to his custody." *Romero Romero*, 2021 WL 254435, at *4. As described *supra*, Mr. Doe's case is likely to take months if not years to resolve.

148. Second, Mr. Doe is not responsible for his prolonged detention. While Mr. Doe is asserting a defense to removal, he does so in good faith. Mr. Doe received ineffective assistance from his prior attorney, who failed to competently present Mr. Doe's defenses to removal. Upon learning of prior counsel's ineffectiveness, Mr. Doe pursued new representation and has diligently sought to exercise his due process right to relief as a long-term resident of the United States with viable defenses to removal. His petitions for review are meritorious given the significant constitutional, legal, and factual errors in the agency's decisions in his case. *See* Exh. A at ¶¶ 37–38, 40; Exh. B at ¶¶ 16–17, 21, 28.

149. It is "[in]compatible with our system of government that Petitioner should simply have to forfeit his due process rights because he is choosing (if one can really call it a choice) to pursue

the rights provided to him by our laws." *Romero Romero*, 2021 WL 254435, at *4; *see also Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him."). Mr. Doe's efforts to seek such relief are "perfectly legitimate; if his removal becomes final, he loses the right to live in the country he's lived in" for almost his entire life. *Romero Romero*, 2021 WL 254435, at *4.

150. Finally, as described in detail above, Mr. Doe's conditions of confinement are appreciably worse than the conditions of criminal punishment he endured. *See German Santos*, 965 F.3d at 211. While serving his criminal sentence, Mr. Doe enjoyed programming that is simply not available to him while in ICE custody. *See* Exh. A at ¶ 40; Exh. B at ¶ 10. Importantly, while Mr. Doe was serving his criminal sentence, the CDCR offered him the opportunity to participate in its Fire Camp program. *See* Exh. A at ¶ 15; Exh. B at ¶ 8. Mr. Doe thrived in this program. *See* Exh. A at ¶ 18; Exh. C at ¶ 16. Among the many emotional and mental challenges that he has endured while in immigration detention, he counts the inability to participate in the Fire Camp program as a substantial deprivation. *See* Exh. A at ¶ 40.

151. Mr. Doe has developed anxiety, depression, and worsening medical ailments while in immigration detention due to prior counsel's ineffective assistance as well as the uncertainty of his fate. *See* Exh. A at ¶¶ 41–42; Exh. B at ¶¶ 39–44; Exh. C at ¶¶ 3, 23.

152. These factors weigh decisively in Mr. Doe's favor. Persons detained under the immigration statutes "are subject to civil detention rather than criminal incarceration. The more that the conditions under which the [noncitizen] is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing." *De Paz Sales v. Barr*, 2019 WL 4751894, at *6 (N.D. Cal. Sept. 30, 2019) (internal quotation marks omitted).

153. In sum, under both the *Mathews* balancing test and the *German Santos* reasonableness test, this Court should conclude that Mr. Doe's nearly two years of detention without a bond hearing violates his right to procedural due process.

B. This Court should conduct a hearing at which Respondents must justify Mr. Doe's ongoing detention by clear and convincing evidence, or, alternatively, should order that the immigration judge do so.

154. "[T]he federal habeas statute provides for a swift, flexible, and summary determination of [a petitioner's] claim." *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973). The Supreme Court has instructed district courts addressing habeas claims "to cut through barriers of form and procedural mazes" and has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist., Santa Clara Cnty.*, 411 U.S. 345, 350 (1973) (internal quotation marks and citation omitted). The need for a swift, straightforward path to due process for Mr. Doe favors a hearing before this Court. Doing so would eliminate "barriers of form and procedural mazes" that a remand to the immigration court for a bond hearing would entail. *Id.*

155. The immigration courts, including the BIA, do not regularly apply constitutional principles. If an immigration judge were to deny Mr. Doe bond, it would implicate an erroneous risk of deprivation of liberty and may require Mr. Doe to seek this Court's intervention anew. That, in turn, would delay the due process that the Constitution requires given his prolonged detention. *See Martinez v. Clark*, 36 F.4th 1219, 1223 (9th Cir. 2022).

156. Mr. Doe therefore respectfully requests that this Court conduct a hearing to inquire into the justification for his detention. In the alternative, Mr. Doe requests that this Court order the immigration judge to hold a bond hearing.

157. In either case, because a custody hearing is warranted as a procedural safeguard against unreasonably prolonged detention, Respondents must bear the burden of justifying continued confinement by clear and convincing evidence. *See Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011); *see also Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (holding that "due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both particularly important and more substantial than mere loss of money") (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (requiring clear and convincing evidence to justify civil commitment because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause").

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Fifth Amendment: Substantive Due Process

158. Mr. Doe re-alleges and incorporates by reference the paragraphs above.

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

160. The government's interest in civil immigration detention is to effectuate removal and safeguard the community.

161. Due process prohibits the government from punishing people through civil detention. Civil detention becomes punitive when its duration or nature is unreasonable relative to the purpose for which the individual is detained—in this case, effectuating removal and safeguarding the community.

162. When a civil restriction is excessive in relation to a governmental interest, or the government could accomplish its interests through less restrictive means, the punitive detention violates the person's right to substantive due process.

163. Mr. Doe's detention is excessive—both in duration and nature—in relation to the government's interest in continuing to detain him. The government's interest could be amply satisfied by Mr. Doe's release on appropriate conditions.

164. For these reasons, Mr. Doe's prolonged detention violates substantive due process.

SECOND CLAIM FOR RELIEF

Violation of the Fifth Amendment: Procedural Due Process

165. Mr. Doe re-alleges and incorporates by reference the paragraphs above.

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

167. The Due Process Clause requires the government to establish, at an individualized hearing before a neutral decision maker, that Mr. Doe's prolonged detention is justified by clear and convincing evidence of flight risk or danger.

168. Mr. Doe's detention has become prolonged as he has been detained for almost two years and faces additional months, if not years, of continued detention while his petition for review and subsequent proceedings are adjudicated.

169. Mr. Doe's prolonged detention without an individualized bond hearing violates the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Mr. Doe respectfully requests that this Court:

1) Assume jurisdiction over this matter;

2) Declare that Mr. Doe's ongoing prolonged detention violates the Due Process Clause of the Fifth Amendment;

3) Issue a writ of habeas corpus and order Respondents to immediately release Mr. Doe from DHS' physical custody.

4) In the alternative, issue a writ of habeas corpus and order a prompt hearing as described in 28 U.S.C. § 2243, at which Respondents must establish the necessity of further detention by clear and convincing evidence, evaluate Mr. Doe's ability to pay in setting bond, and consider the necessity of any conditions of release that reasonably assure the safety of the community and Mr. Doe's future appearances.

5) In the further alternative, issue a writ of habeas corpus and order Respondents to provide a prompt hearing before an immigration judge within fourteen days of this Court's order, at which hearing Respondents must establish the necessity of further detention by clear and convincing evidence, evaluate Mr. Doe's ability to pay in setting bond, and consider the

necessity of any alternative conditions of release that reasonably assure the safety of the community and Mr. Doe's future appearances.

6) This Court must grant the petition for writ of habeas corpus or issue an order to show cause to the Respondents "forthwith," unless Mr. Doe is not entitled to relief. 28 U.S.C. § 2243. If this Court issues an order to show cause, it must require Respondents to file a return "within *three days* unless for good cause additional time, not exceeding twenty days, is allowed." *Id*. (emphasis added).

7) Award Mr. Doe reasonable attorneys' fees, costs, and other disbursements in this action permitted under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law;

8) Grant such further relief as the Court deems just and proper.

Respectfully submitted on September 15, 2023,

/s/ *Alison Pennington*

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Verification Pursuant to 28 U.S.C. § 2242

I am submitting this verification on behalf of Mr. Doe because I am one of Mr. Doe's attorneys. As Mr. Doe attorney, I hereby verify that the factual statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: September 15, 2023

/s/ *Alison Pennington*

Alison Pennington
Counsel for Mr. Doe

Attestation Pursuant to Civil L.R. 5-1(h)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatory.

Dated: September 15, 2023

/s/ *Alison Pennington*

Alison Pennington

Attorney for Mr. Doe