UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE,

Petitioner,

v.

MOISES BECERRA,

Respondent.

Case No. 23-cv-04767-PCP

ORDER RE: HABEAS PETITION

Re: Dkt. Nos. 1, 29

Petitioner John Doe has been detained by U.S. Immigration and Customs Enforcement (ICE) at a private detention facility since September 2021. Mr. Doe is not a U.S. citizen. In November 2022 an immigration judge ordered Mr. Doe removed to Mexico. On appeal, the Board of Immigration Appeals (BIA) affirmed the immigration judge's removal decision. The BIA also denied a motion by Mr. Doe to reopen proceedings. Mr. Doe petitioned the Ninth Circuit for review of both of those decisions. The Ninth Circuit remanded the motion to reopen to the BIA, and Mr. Doe's removal is stayed indefinitely while the matter is before the BIA on remand.

After nearly two years of detention without an individualized bond hearing to consider whether that detention was justified, Mr. Doe petitioned this Court for a writ of habeas corpus. He argued that his detention violated both procedural and substantive due process. The Court concluded that procedural due process required the government to provide Mr. Doe with a bond hearing before an immigration judge. Dkt. No. 29, --- F.3d ----, 2023 WL 8307557 (Dec. 1, 2023). An immigration judge then held a bond hearing and denied Mr. Doe's request for custody redetermination. The immigration judge concluded that the government had established by clear and convincing evidence that Mr. Doe's "ongoing detention was justified because his release would pose a danger to the community and a significant risk of flight." Dkt. No. 42, at 9.

The Court held Mr. Doe's substantive due process challenge in abeyance while the government provided procedural due process in the form of a bond hearing. Now that the bond hearing has concluded, the Court addresses Mr. Doe's substantive due process challenge.

* * *

Mr. Doe is detained pursuant to 28 U.S.C. § 1226(c). Detention under this statute is mandatory. The statute provides that the Attorney General "shall take into custody" inadmissible or deportable noncitizens who have committed certain criminal offenses, and only authorizes release in narrow circumstances not applicable here. Mandatory detention under Section 1226(c) "for the brief period necessary for … removal proceedings" is, at least on its face, "a constitutionally permissible part of that process." *Demore v. Kim*, 538 U.S. 510, 513, 531 (2003). Mr. Doe does not dispute that he falls within the scope of Section 1226(c). Instead, he maintains that his detention is unconstitutional even though required by statute.

"It is undisputed that at some point, … detention can 'become excessively prolonged, and therefore punitive,' resulting in a due process violation." *United States v. Torres*, 995 F.3d 695, 708 (9th Cir. 2021) (quoting *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987)). Both *Torres* and *Salerno* were due process challenges to pretrial detention of people accused of crimes. But the constitutional principles applicable to civil immigration detainees are the same, even if the statutes and circumstances may differ. Indeed, the Ninth Circuit has suggested that the substantive due process protections afforded to pretrial criminal defendants set a floor rather than a ceiling:

> As civil detainees retain greater liberty protections than individuals detained under criminal process, … it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections … at least as great as those afforded to an individual accused but not convicted of a crime. …
>
> At a bare minimum, … an individual detained under civil process—like an individual accused but not convicted of a crime—cannot be subjected to conditions that amount to punishment.

Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004) (cleaned up).

Salerno was a facial due process challenge to the Bail Reform Act of 1984, which required that if "the judicial officer finds that no … conditions will reasonably assure the appearance of the

person [charged with an offense] as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 481 U.S. at 742 (quoting 18 U.S.C. § 3142(e)(1)). Salerno argued that this law violated substantive due process because its pretrial detention provisions resulted in impermissible punishment before trial. *Id.* at 746. But the Supreme Court determined that the Bail Reform Act was regulatory rather than punitive:

> As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.
>
> We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal.
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> Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. Moreover, … the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government.… [T]he statute at issue here requires that detainees be housed in a facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

481 U.S. at 746–48 (1987) (cleaned up). Although it upheld the Bail Reform Act against this facial challenge, the Supreme Court specifically noted that it expressed "no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in

relation to Congress' regulatory goal." *Id.* at 748 n.4. Accordingly, even when a statute that requires detention is regulatory in nature, the question of whether a particular person's detention remains warranted over time always requires balancing the burden on their liberty imposed by detention with the regulatory goals of the statute.

In the context of detention before criminal trial, the Ninth Circuit weights several factors in considering whether detention has crossed the line from regulatory to punitive. These include "(1) the length of the defendant's pretrial detention; (2) the prosecution's contribution to the delay; and (3) the evidence supporting detention under the Bail Reform Act." *Torres*, 995 F.3d at 708. In the context of detention before involuntary civil commitment proceedings, the Ninth Circuit has explained that even if not intended to punish, detention is punitive and violates substantive due process "where it is excessive in relation to its non-punitive purpose, or is employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Jones*, 393 F.3d at 934 (cleaned up). Moreover, "a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held." *Id.*[1]

Obviously the circumstances in this case do not involve detention before a criminal trial or a civil commitment proceeding. Mr. Doe is not accused of a crime and awaiting a trial. He is detained under the Illegal Immigration Reform and Immigrant Responsibility Act rather than the Bail Reform Act or a civil commitment statute. Still, these statutes are analogous and the constitutional principles that limit them are similar. Like the Bail Reform Act, Section 1226(c) limits mandatory detention to people accused or convicted of certain serious crimes. Like the Bail

[1] The government briefly argues that challenges to conditions of confinement cannot be remedied through a habeas petition. Response, Dkt. No. 18, at 26. It cites *Pinson v. Carvajal*, 69 F.4th 1059 (9th Cir. 2023), for this proposition. But *Pinson* involved a habeas challenge to conditions of confinement brought by prisoners who had already been convicted of crimes. *Id.* at 1062. The Ninth Circuit determined that challenges to the conditions of their confinement, as opposed to the fact or duration of confinement, did not sound in habeas and were therefore properly dismissed for lack of jurisdiction. *Id.* Here, by contrast, Mr. Doe is not being punished for a crime and is not arguing, like petitioner in *Pinson*, that "the terms and conditions of his incarceration constitute cruel and unusual punishment." *See* 69 F.4th at 1065. For civil detainees like Mr. Doe, the Ninth Circuit has held that conditions of confinement are a relevant factor in determining whether civil detention remains civil rather than punitive (and therefore permissible).

Reform Act, Section 1226(c) has twin aims of ensuring a potential detainee's appearance at subsequent proceedings and ensuring public safety. And like the Bail Reform Act, Section 1226(c) has been upheld as facially constitutional.

Accordingly, drawing from the Ninth Circuit's cases regarding detention before criminal trial and civil commitment proceedings, the following factors are relevant in determining whether Mr. Doe's detention has become so prolonged that it violates substantive due process:

(1) the length of detention and whether it is excessive in relation to its regulatory purpose, *see Torres*, 995 F.3d at 708;

(2) the government's contribution to any delay, *see id.*;

(3) the evidence supporting the determination that detention is warranted to prevent flight risk or community danger, *see id.*;

(4) whether the government interests in ensuring appearance at future proceedings and protecting the community could be protected through alternatives to detention that are less harsh, *see Jones*, 393 F.3d at 934; and

(5) the conditions of detention and how they compare to conductions under which pretrial criminal detainees or people convicted of crimes are held, *see id.*

Evidence regarding several of these factors is already before the Court. But to enable the Court to fully consider the relevant circumstances, the parties are ordered to submit copies of the evidence provided to the immigration judge in Mr. Doe's bond hearing, as well as any other evidence either party believes is relevant. The government is also ordered to provide a supplemental brief of up to 10 pages addressing whether any of ICE's Alternatives to Detention programs (or other potential alternatives to custodial detention) would adequately protect the government's interests in protecting the public and ensuring that Mr. Doe appears at future proceedings.

The parties' evidentiary submissions and the government's brief shall be due by March 29, 2024. Mr. Doe may file a response of up to 10 pages to the government's brief by April 12, 2024.

IT IS SO ORDERED.

Dated: March 15, 2024

P. Casey Pitts
United States District Judge

United States District Court
Northern District of California