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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO–OAKLAND DIVISION

LEONEL SANCHEZ LAGUNAS,

Petitioner,

v.

DAVID W. JENNINGS, Field Office Director of the San Francisco Field Office of U.S. Immigration and Customs Enforcement; TAE D. JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; ALEJANDRO MAYORKAS, Secretary of the U.S. Department of Homeland Security; MERRICK B. GARLAND, Attorney General of the United States,

Respondents.

Case No. 3:21-cv-5657

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

IMMIGRATION HABEAS CASE

INTRODUCTION

1. Petitioner Leonel Sanchez Lagunas ("Petitioner" or "Mr. Sanchez") has been civilly imprisoned by U.S. Immigration and Customs Enforcement ("ICE") at Yuba County Jail ("Yuba") since December 2019—about 19 months. Not once during that time has Mr. Sanchez received a bond hearing before a neutral adjudicator to evaluate whether his prolonged detention remains justified. Yet ICE cannot currently remove Mr. Sanchez from the United States, as the Ninth Circuit has stayed his removal while it considers his pending petition for review. Thus, Mr. Sanchez faces months longer in civil detention while judicial review is pending, and potentially years more if his case is remanded to the agency for further proceedings.

2. This exceedingly long detention has exacted a high toll. Mr. Sanchez is 51 years old and has lived in the United States since he was 10. California is his only home, and he is a beloved member of a large family of U.S. citizens. Because of his detention by ICE, he has been unable to provide companionship and support to his children, grandchildren, mother, and other family members these past several years. His youngest child, still a minor, is growing up without his father by his side—repeating a painful pattern from Mr. Sanchez's own past.

3. Mr. Sanchez's detention may be permitted under the Constitution and the Immigration and Nationality Act ("INA") only if Respondents can demonstrate before a neutral decision-maker that he is a danger or flight risk, or if his removal is imminent. Mr. Sanchez, who has served his sentence and who bravely fought fires as an inmate firefighter for the state of California, is not dangerous. In light of his extensive ties to the U.S., he is not a flight risk. As his removal has been stayed pending further judicial order, his removal is not imminent.

4. Mr. Sanchez's continued detention without a bond hearing before a neutral decisionmaker violates his rights under the Immigration and Nationality Act. *See Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008) ("*Casas*").

5. His continued detention without a bond hearing also violates the Due Process Clause of the Fifth Amendment.

6. This Court should issue a writ of habeas corpus and determine that Mr. Sanchez is entitled to immediate release under reasonable conditions and pending further order of the Court.

7. Alternatively, this Court should order Mr. Sanchez's release unless he receives a bond hearing before a neutral arbiter where: (1) to justify his continued detention, the government bears the burden to establish by clear and convincing evidence that Mr. Sanchez is a danger or flight risk, even after consideration of alternatives to detention that could mitigate any risk his release would present; and (2) if the government cannot meet its burden, Mr. Sanchez must be ordered released on reasonable conditions, taking into account his ability to pay bond.

CUSTODY

8. Mr. Sanchez is detained in the legal and physical custody of Respondents at the Yuba County Jail, where he is under the direct control of Respondents and their agents.

JURISDICTION

9. This action arises under the Constitution of the United States and the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

10. Jurisdiction is proper under 28 U.S.C § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); U.S. Const. art. I, § 9, cl. 2 (the Suspension Clause); and 5 U.S.C. § 702 (Administrative Procedure Act).

VENUE

11. Venue is proper in this district under 28 U.S.C. § 1391(b) and (e) because at least one Respondent—Respondent David W. Jennings, the legal custodian of Mr. Sanchez—is in this District, and a substantial part of the events giving rise to the claims in this action took place in this District. All material decisions about Mr. Sanchez's detention have been made at the San Francisco Field Office of ICE, which is located within San Francisco, California.

12. This case is properly assigned to the San Francisco or Oakland Division of this Court because a substantial part of the events and omissions giving rise to these claims occurred in San Francisco County. *See* Civil L.R. 3-2(d).

EXHAUSTION

13. Mr. Sanchez is not required to exhaust administrative remedies. Exhaustion for habeas claims is prudential, not jurisdictional. *See Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004). The prudential exhaustion requirement may be waived if "'administrative remedies are

inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, [or] irreparable injury will result.'" *Id.* at 1000.

14. Administrative remedies would be futile, inadequate, and not efficacious for Mr. Sanchez. Exhausting his constitutional claim would be futile because the agency does not have the authority to rule on constitutional questions. *See Wang v. Reno*, 81 F.3d 808, 815–16 (9th Cir. 1996) (per curiam) ("the inability of the INS to adjudicate the constitutional claim completely undermines most, if not all, of the purposes underlying exhaustion").

15. Exhausting his statutory claim would be futile because the immigration judge ("IJ") who adjudicated Mr. Sanchez's merits case and to whom his *Casas* bond hearing request will likely be assigned, IJ Julie Nelson, has already incorrectly concluded that she lacks jurisdiction to provide individuals in Mr. Sanchez's procedural posture with a *Casas* bond hearing. *See* Declaration of Barbara Plantiko ("Plantiko Decl.") ¶ 22; Declaration of Jillian Wagman ¶¶ 6–9.

16. Even if exhaustion were not futile, waiver is warranted because Mr. Sanchez's claim presents purely legal issues and no purpose is served by requiring an administrative appeal. *See Hernandez v. Sessions*, 872 F.3d 976, 988–89 (9th Cir. 2017).

17. Requiring exhaustion at the Board of Immigration Appeals ("BIA") will cause Mr. Sanchez irreparable harm in the form of additional detention and continued separation from his family, including his minor son. *See Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1139 (N.D. Cal. 2018) (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'").

PARTIES

18. Petitioner Leonel Sanchez Lagunas is a native and citizen of Mexico who has resided in the United States since he was 10 years old. He is currently detained at Yuba County Jail in Marysville, California, under Respondents' legal custody.

19. Respondent David W. Jennings is the Field Office Director for the San Francisco Field Office of U.S. Immigration and Customs Enforcement, a component of the Department of Homeland Security ("DHS"), and maintains his office in San Francisco, California, within this

judicial district. The San Francisco Field Office is responsible for carrying out ICE's immigration detention operations at Yuba County Jail. Respondent Jennings is a legal custodian of Petitioner. He is sued in his official capacity.

20. Respondent Tae D. Johnson is the Acting Director of U.S. Immigration and Customs Enforcement. Respondent Johnson is responsible for ICE's policies, practices, and procedures, including those relating to the detention of noncitizens. Respondent Johnson is a legal custodian of Petitioner. He is sued in his official capacity.

21. Respondent Immigration and Customs Enforcement is a federal law enforcement agency within the Department of Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of noncitizens. Enforcement and Removal Operations, a division of ICE, manages and oversees the immigration detention system. Respondent ICE is a legal custodian of Petitioner.

22. Respondent Alejandro Mayorkas is the Secretary of the U.S. Department of Homeland Security, an agency of the United States. He is responsible for the administration and enforcement of the immigration laws. *See* 8 U.S.C. § 1103(a). Respondent Mayorkas is a legal custodian of Petitioner. He is sued in his official capacity.

23. Respondent Merrick B. Garland is the Attorney General of the United States. As Attorney General, Respondent Garland has the authority to interpret the immigration laws and adjudicate removal cases and bond hearings. *See* 8 U.S.C. § 1103(g). The Attorney General delegates this responsibility to the Executive Office for Immigration Review, which administers the immigration courts and the BIA. Respondent Garland is a legal custodian of Petitioner. He is sued in his official capacity.

FACTUAL ALLEGATIONS

24. Mr. Sanchez is a 51-year-old native and citizen of Mexico. *See* Declaration of Leonel Sanchez Lagunas ("Sanchez Decl.") ¶ 2. He has lived in the United States since he was 10 years old. *Id.* ¶ 7. Today, his entire family lives in this country, including his 4 children, 2 grandchildren, mother, father, and 5 siblings. *Id.* ¶¶ 11, 26, 74. All are U.S. citizens, except for his father, who is a Lawful Permanent Resident. *Id*. He has no ties to friends or family in

Mexico, having left the country as a young child. *Id.* ¶ 70. *Cf.* Plantiko Decl. ¶ 19, Exh. H (Letters of support from Mr. Sanchez's family).

25. Mr. Sanchez grew up in Mexico in the care of his grandparents, who were impoverished and physically abusive. Sanchez Decl. ¶ 6. Mr. Sanchez's mother, who worked in a different city and whose meager salary supported the entire family, only saw her children on weekends. *Id.* ¶¶ 5–6. Mr. Sanchez recalls his childhood as very lonely. *Id.* ¶ 6.

26. Mr. Sanchez left Mexico when he was 10 years old to join his mother, who had moved to Santa Ana a few years earlier. *Id.* ¶ 7. He was very happy to be reunited with his mother, but their living conditions were difficult. *Id*. His mother's partner mistreated Mr. Sanchez and his several siblings, who lived together in a one-bedroom apartment. *Id.* ¶¶ 7, 9. On at least a few occasions, his mother came home from work around midnight to find the children sleeping outside because her partner had refused to let them inside. *Id.* ¶ 9.

27. Mr. Sanchez struggled in school. *Id.* ¶ 12. From an early age, he worked part-time jobs and helped his mother with household expenses. *Id.* ¶ 13. In 1997, he was hired full-time at Danny's Auto Service, where he worked as a mechanic until his arrest in 2016. *Id.* ¶ 15. His former boss is willing to re-hire him immediately. *See* Plantiko Decl. ¶ 19, Exh. I (Letter from Mr. Sanchez's former employer).

28. Mr. Sanchez was exposed to extensive violence in his neighborhood. Sanchez Decl. ¶ 19. He never joined a gang because he "saw how much violence they caused." *Id.* ¶ 20. Sadly, several of his childhood friends died from gang violence, and he witnessed people being "gunned down" on multiple occasions. *Id.* ¶¶ 20–21.

29. Mr. Sanchez has been the victim of numerous violent crimes. *Id.* ¶ 22. He was shot at by strangers in his teens and early 20s; he still has shot pellets embedded in this finger, ear, and neck from those attacks. *Id*. At 18, he was violently mugged by a group of men who threatened to kill him. *Id.* ¶ 24. These experiences left Mr. Sanchez feeling "terrified to leave the house" and with recurring nightmares. *Id.* ¶ 25. A clinical psychologist who evaluated him, Dr. Jane Christmas, PsyD, concluded that his mental state "was as if he had grown up in a war zone." Plantiko Decl. ¶ 8, Exh. D (Psychological evaluation) ¶ 51.

30. When Mr. Sanchez reached young adulthood, he began having contact with law enforcement. In May 1989, he was convicted of buying or selling an article with identification removed after unknowingly purchasing a car with a stereo whose serial numbers had been removed; he received probation and 10 days' jail. Sanchez Decl. ¶ 39; Plantiko Decl. ¶ 7, Exh. B (Criminal history chart) at p. 1. In October 1989, he was convicted of receiving stolen property, after a friend left office supplies in Mr. Sanchez's car; he received probation and 120 days' jail. Sanchez Decl. ¶ 40; Plantiko Decl. ¶ 7, Exh. B at p. 1. In 1990, he was convicted of shooting at an inhabited vehicle, Sanchez Decl. ¶¶ 41–43; Plantiko Decl. ¶ 7, Exh. B at p. 1, after he shot at the tires of a car which he believed "was going to run me over and kill me." Sanchez Decl. ¶ 41. He was "careful not to aim anywhere near the driver;" he "didn't want to hurt him, only scare him away." *Id*. He received probation and 1 year in jail. *Id.* at ¶ 43; Plantiko Decl. ¶ 7, Exh. B at p. 1. In 1997, he was convicted of possession of a firearm with a prior felony conviction, for which he received probation and 360 days in jail. Sanchez Decl. ¶¶ 45–46; Plantiko Decl. ¶ 7, Exh. B at pp. 1–2. He was released about 4 months early for good behavior. Sanchez Decl. ¶ 46.

31. In September 2010, Mr. Sanchez was convicted of misdemeanor battery and child endangerment. Sanchez Decl. ¶ 33; Plantiko Decl. ¶ 7, Exh. B at p. 2. He and his ex-wife were arguing when Mr. Sanchez—upset their marriage was dissolving—lashed out in front of their children. Sanchez Decl. ¶ 33. He grabbed his ex-wife near her shoulders and said things he sincerely regrets. *Id*. Mr. Sanchez received 4 years' probation and was ordered to attend classes. *Id*. The classes taught him "techniques for talking to my kids and wife about my feelings" calmly. *Id.* ¶ 34. Mr. Sanchez has apologized to his ex-wife, and she has accepted his apologies. *Id.* ¶ 35. They remain great friends and co-parents. *Id.* She has supported him throughout his immigration case and helped him stay in touch with their children. *Id*.; Plantiko Decl. ¶ 19, Exh. H at pp. 2, 14–19. Since this incident, he and ex-wife have raised their children peacefully. *Id.*

32. In June 2012, Mr. Sanchez was convicted of a DUI after a family function. Sanchez Decl. ¶ 47; Plantiko Decl. ¶ 7, Exh. B at p. 2. He had not had a drink for several hours and believed he was sober enough to drive. Sanchez Decl. ¶ 47. At a sobriety checkpoint, he blew over the legal limit. *Id*. He received probation and 10 days in jail, and was required to

complete classes. *Id*. This was his first and only DUI. *Id.* ¶¶ 47–48.

33. In January 2016, Mr. Sanchez was "jumped" by a group of unfamiliar men who said they were from a gang. *Id.* ¶ 49. They beat and kicked him, including in his head, where a bump remains. *Id.* The attack left him "very scared." *Id.* ¶ 50. He felt deeply demoralized: "Somehow it really affected me that people would still want to jump me at my age. I felt a lot more vulnerable, and just exhausted from always having to watch my back, even though I am now a grandfather." *Id.*

34. A few months later, Mr. Sanchez saw a group of men near his home doing drugs. *Id.* ¶ 51. He believed they were the same people who had "jumped" him in January. *Id.* Affected by "untreated PTSD," Plantiko Decl. ¶ 8, Exh. D ¶ 54, Mr. Sanchez "confront[ed]" the group and told them to leave. Sanchez Decl. ¶ 51. He took a tree-trimming machete from his car and waved it at them. *Id.* ¶ 52. He went home and returned with a gun, which he waved to try to "scare them into leaving." *Id*. He never fired it and never intended to. *Id.* Mr. Sanchez was arrested almost immediately and convicted of assault with a firearm, as well as other convictions related to possessing and carrying the firearm. Plantiko Decl. ¶ 7, Exh. B at p. 2. The court imposed the low term for each of his convictions, and he received 3 years' imprisonment and 10 days' jail for the charges, plus a 3-year firearms enhancement. Plantiko Decl. ¶ 7, Exh. C (Court records for 2016 conviction) at pp. 12–13.

35. Mr. Sanchez is extremely remorseful for his actions. Sanchez Decl. ¶ 55. He now understands that after he was "jumped," he "felt humiliated and had a lot of bottled-up feelings." *Id.* ¶ 54. He realizes how "very wrong and stupid" his actions were. *Id.* ¶ 55.

36. Mr. Sanchez has used his time behind bars to reflect on and address his prior trauma. A psychological expert found "he has developed an impressive capacity to think about the impacts on his psychological being of his childhood and adolescent experiences, the behaviors it mobilized in him and consequences of the choices he made that resulted in his arrests." Plantiko Decl. ¶ 8, Exh. D ¶ 43.

37. Mr. Sanchez's transformation was guided by classes and programs like Alcoholics Anonymous, parenting classes, and Bible study. Sanchez Decl. ¶¶ 56–59. He has not

had alcohol since 2016 and intends to stay sober if he is released. *Id.* ¶ 57. Even after COVID-19 ended in-person Bible study meetings, Mr. Sanchez has been studying the Bible every day on his own. *Id.* ¶ 56. The Bible helps him think about how to be a better person if he is released and gives him guidance for how to live. *Id.*

38. In 2018, Mr. Sanchez served as an inmate firefighter for the state of California. *Id.* ¶ 63. Only "minimum custody" inmates may qualify to be firefighters. *See Conservation (Fire Camps)*, Cal. Dep't of Corr. and Rehab., https://www.cdcr.ca.gov/facility-locator/conservation-camps/ (last visited July 22, 2021) (inmate firefighters "must have 'minimum custody' status, or the lowest classification for inmates based on their sustained good behavior in prison, their confirming to rules within the prison and participation in rehabilitative programming"). He fought numerous major fires. Sanchez Decl. ¶ 63. He felt gratified to "be able to help save someone's family, their house, and their animals" from fires. *Id.* ¶ 65. After the firefighting season, Mr. Sanchez volunteered his skills as a mechanic to help repair the fire trucks. *Id.* ¶ 66.

39. Mr. Sanchez is a devoted father of 4 U.S. citizen children. *Id.* ¶ 26. Before his arrest, he used to pick up his two younger children from school every day. *Id.* ¶ 29. He loved spending time with them and buying them what they needed for school and their hobbies. *Id.* ¶ 30. Even while incarcerated, Mr. Sanchez remains an active parent over the phone. *Id.* ¶ 72. His ex-wife relies on him to talk to their kids and encourage them to do the right thing. *Id.*

40. Mr. Sanchez is not a violent person. He has had no disciplinary issues in jail, prison, or ICE custody. *Id.* ¶ 68. If released, Mr. Sanchez hopes to learn more about repairing and maintaining hybrid and electric cars. *Id.* ¶ 18. If permitted one day, he hopes to serve the state of California with his firefighting skills. *Id.* ¶ 73. A psychological expert who examined him concluded Mr. Sanchez is "highly unlikely to reoffend." Plantiko Decl. ¶ 8, Exh. D ¶ 85.

41. On December 23, 2019, Mr. Sanchez received a Notice To Appear. Plantiko Decl. ¶ 6, Exh. A (Notice To Appear). He appeared in immigration court and applied for asylum, withholding, and protection under the Convention Against Torture ("CAT"); as well as adjustment of status under Immigration and Nationality Act ("INA") § 245(i) (8 U.S.C. § 1255(i)) with a waiver of inadmissibility under INA § 212(h) (8 U.S.C. § 1182(h)). *See*

Plantiko Decl. ¶ 10, Exh. E (BIA Decision) p. 1.

42. On October 30, 2020, the IJ denied Mr. Sanchez's applications for relief. Plantiko *See* Plantiko Decl. ¶ 10, Exh. E at p. 1. The IJ denied asylum based on a finding that he had been convicted an aggravated felony; withholding based on a finding that he had been sentenced to over 5 years' imprisonment for the aggravated felony; protection under the CAT for lack of evidence that he would be tortured if removed; and the waiver of admissibility for failure to meet the hardship requirements and as a matter of discretion. Plantiko Decl. ¶ 10, Exh. E at pp. 2–4. The IJ found both Mr. Sanchez and his in-court expert witness credible. Plantiko Decl. ¶ 9.

43. Mr. Sanchez timely appealed. Plantiko Decl. ¶ 10. On May 26, 2021, the BIA dismissed the appeal. Plantiko Decl. ¶ 10 & Exh. E at p. 4. On June 7, 2021, Mr. Sanchez timely petitioned for review of his removal order to the Ninth Circuit Court of Appeals and moved for a stay of removal. Plantiko Decl. ¶ 11 & Exh. F (9th Cir. docket). He received a temporary stay of his removal from the Ninth Circuit. Plantiko Decl. ¶ 12 & Exh. F. The government's response to the stay motion is due on August 2, 2021. Plantiko Decl. ¶ 13. Mr. Sanchez's opening brief is due on September 10, 2021. *Id*. ¶ 14.

44. On July 20, 2021, Mr. Sanchez requested a *Casas* bond hearing from the immigration court. Plantiko Decl. ¶ 22. The request remains pending. *Id.*

LEGAL ARGUMENT

I. Petitioner Is Statutorily Entitled To A Bond Hearing

45. Under binding Ninth Circuit law, Mr. Sanchez is detained under 8 U.S.C. § 1226(a). *See Casas*, 535 F.3d at 947–48. As a person detained under § 1226(a) whose detention has become prolonged, Mr. Sanchez is entitled to a bond hearing, and Respondents' refusal to provide him with one violates controlling law.

46. In *Casas*, the Ninth Circuit held that 8 U.S.C. § 1226(a), the discretionary detention statute, governs the detention of a noncitizen, like Mr. Sanchez, whose order of removal is final and who has a pending petition for review and a judicial stay of removal in place. *See* 535 F.3d at 947–48.

47. When Mr. Sanchez was initially taken into custody by ICE, his detention by

Respondents was authorized under 8 U.S.C. § 1226(c), a provision of the INA that requires Respondents to detain an individual pending their removal proceedings without the possibility of release on bond or parole (subject to narrow exceptions not at issue here).

48. However, in *Casas*, the Ninth Circuit held that once an individual's removal proceedings concludes before the agency, Section 1226(c) no longer authorizes the individual's continued detention: "[Section] 1226(c) was intended only to 'govern[] detention of deportable criminal aliens *pending their removal proceedings*,' which the [Supreme] Court emphasized typically 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the [noncitizen] chooses to appeal.'" *Id.* at 947–48 (quoting *Demore v. Kim*, 538 U.S. 510, 527–28, 530 (2003)). *Casas* observed that Respondents' own regulations interpret Section 1226(c) to apply only "during removal proceedings," 8 C.F.R. § 236.1(c)(1)(i), and that those regulations provide "the conclusion of proceedings . . . become final . . . [u]pon dismissal of an appeal by the Board of Immigration Appeals," *id.* § 1241.1(a).

49. Drawing from the statutory text and the regulations, the *Casas* court explained that Section 1226(c) authorizes mandatory detention for "only a limited time": until, but not beyond, the BIA affirms a detained person's order of removal. *Casas*, 535 F.3d at 948. After that point, for individuals in Mr. Sanchez's procedural posture, Respondents' authority to detain "rests with § 1226(a)." *Id.* Later, when the individual "enters his 'removal period,' which occurs only after [a Court of Appeals] ha[s] rejected his final petition for review or his time to seek such review expires," detention authority then shifts to 8 U.S.C. § 1231. *Id.*

50. Applying this construction of the INA, the *Casas* court held that individuals in Mr. Sanchez's procedural posture are entitled to a bond hearing once their detention becomes prolonged. First, the court observed that Section 1226(a) can be construed as providing "authority for the Attorney General to conduct a bond hearing and release the [noncitizen] on bond or detain him if necessary to secure his presence at removal." *Casas*, 535 F.3d at 951; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 837, 847 (2018) (section 1226(a) and regulations authorizes release on bond or conditional parole); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Second,

due to constitutional limits on prolonged detention, "§ 1226(a) must be construed as *requiring* the Attorney General to provide the [noncitizen] with such a hearing," who "is entitled to release on bond unless the 'government establishes that he is a flight risk or will be a danger to the community.'" *Casas*, 535 F.3d at 951.

51. *Casas*'s holding that Section 1226(a) governs the detention of persons with pending petitions for review and a stay of removal remains good law. Though the Supreme Court restricted the availability of bond hearings in *Jennings v. Rodriguez*, it did not overrule *Casas*.

52. First, *Jennings*'s discussion of Section 1226(c) is fully congruent with *Casas*'s holding that Section 1226(c) authorizes detention only up to, but not after, the conclusion of administrative removal proceedings. *Jennings* noted, "[D]etention under § 1226(c) has 'a definite termination point': the *conclusion of removal proceedings*. . . . [T]hat 'definite termination point' . . . marks the end of the Government's detention authority under § 1226(c)." 138 S. Ct. at 846 (emphasis added); *see Casas*, 535 F.3d at 948 (same). And "the conclusion of proceedings . . . become[s] final . . . [u]pon dismissal of an appeal by the Board of Immigration Appeals"—that is, *before* a noncitizen petitions for review. 8 C.F.R. § 1241.1(a). Nothing in *Jennings* disturbs *Casas*'s reasoning; rather, *Jennings* confirms it: section 1226(c) governs during removal proceedings, but not during judicial review of a removal order with a pending stay.

53. Second, under controlling Circuit law, "unless *Casas* is 'clearly irreconcilable' with *Jennings* the Court must apply *Casas*." *Avilez v. Barr*, No. 19-cv-08296-CRB, 2020 WL 1704456, at *2 (N.D. Cal. Apr. 8, 2020) (citing *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). *Casas* and *Jennings* are reconcilable. As the *Avilez* court reasoned:

> In *Jennings*, the Supreme Court held that 'together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope *must* continue "pending a decision on whether the [noncitizen] is to be removed from the United States."' . . . [this] language . . . does not foreclose *Casas*'s holding that the authority for detention switches from § 1226(c) to § 1226(a) once a final removal order is issued. One could reasonably interpret the language 'together with § 1226(a), § 1226(c)' to mean that the two statutory sections work together to ensure that a noncitizen remains in custody pending judicial review of a final order of removal, because § 1226(c) applies before the order of removal becomes final, and § 1226(a) applies after the order of removal becomes final. This interpretation is consistent with the holding in *Casas*.

Avilez, 2020 WL 1704456, at *2–*3 (citations omitted). That is, *Jennings*'s analysis of Section

1226 leaves room for *Casas*'s holding that the authority for detention shifts from § 1226(c) to § 1226(a) when a detained person concludes administrative proceedings and seeks judicial review of a removal order. *See also FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[W]e have emphasized that the 'clearly irreconcilable' requirement is a 'high standard.' . . . [I]f we can apply our precedent consistently with that of the higher authority, we must do so."). And "[b]ecause there is a reasonable interpretation of *Jennings* that leaves *Casas* intact, the Court remains bound by the Ninth Circuit's decision in *Casas*." *Avilez*, 2020 WL 1704456, at *3.

54. Nor is *Casas*'s application of the canon of constitutional avoidance to hold that Section 1226(a) must be construed as *requiring* a prolonged detention bond hearing "clearly irreconcilable" with *Jennings*. The Ninth Circuit recently held that after *Jennings*, *Casas*'s holding that Section 1226(a) requires a bond hearing after detention becomes prolonged remains good law. *See Aleman Gonzalez v. Barr*, 955 F.3d 762, 785–86 (9th Cir. 2020) ("*Casas-Castrillon* did not construe § 1226(a) in the manner that the Court rejected in *Jennings*. [Our later precedent] transformed *Casas-Castrillon*'s bond hearing requirement into a six-month bond hearing requirement. By its terms, *Jennings* invalidates *that* aspect of our case law construing § 1226(a), but does not go further.").

55. Even if there were tension between this part of *Casas* and *Jennings*, "some tension" with an intervening higher authority does not leave a panel "free to overrule the prior decision of a three-judge panel." *Id.* at 789 (quoting *FTC*, 926 F.3d at 1213) ("[M]ere tension between the cases does not meet the higher standard of irreconcilable conflict."). *See Avilez*, 2020 WL 1704456, at *3 ("Because there is a reasonable interpretation of *Jennings* that leaves *Casas* intact, the Court remains bound by the Ninth Circuit's decision in *Casas*.").

II. In The Alternative, Due Process Requires Mr. Sanchez Receive A Bond Hearing Because His Detention Has Become Prolonged

56. Even if *Casas* did not control, due process requires Mr. Sanchez receive a bond hearing because he has been detained for over six months; as such, his detention is prolonged.

57. The Fifth Amendment provides that "[n]o person" shall "be deprived of life, liberty, or property, without due process of law," including in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). "Freedom from imprisonment—from government custody,

detention, or other forms of physical restraint—lies at the heart of the liberty th[e Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Thus, "adequate procedural protections" are required to ensure detention "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.*

58. When detention becomes prolonged, due process requires an individualized determination by a neutral magistrate that such a significant deprivation of liberty is justified. *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) ("[A]n individualized determination as to [a detained person's] risk of flight and dangerousness" may be necessary "if the continued detention bec[omes] unreasonable or unjustified"); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of a[] [noncitizen] would raise a serious constitutional problem"); *see also McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249–50 (1972) ("lesser safeguards may be appropriate" for "short-term confinement with a limited purpose;" however, "by the same token, the duration of the confinement must be strictly limited" to adhere with due process); *Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (expressing "substantial doubt" that statutes authorizing pretrial detention of incompetent criminal defendants "could survive constitutional scrutiny if interpreted to authorize indefinite commitment").

59. In the Eighth Amendment context, "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards," *Hutto v. Finney*, 437 U.S. 678, 686 (1978); the same applies to Mr. Sanchez's civil detention under the Fifth Amendment. *See Jones v. Blanas*, 393 F.3d 918, 932 (2004) (an individual civilly detained "is entitled to 'more considerate treatment' than his criminally detained counterparts"). While the Supreme Court upheld the mandatory detention of a noncitizen under § 1226(c) without a custody hearing, it did so based on the Court's understanding that detentions under that statute are typically brief—a matter of weeks or, in the case of an appeal, a few months. *Demore*, 538 U.S. at 528.

60. *Jennings* did not alter the constitutional analysis. While *Jennings* rejected the application of the constitutional avoidance canon to Sections 1226(c) and 1225(b), the Court found that "the Court of Appeals . . . had no occasion to consider [the] constitutional arguments on their merits," and remanded the case for further development. 138 S. Ct. at 851.

61. The Ninth Circuit in turn remanded *Jennings* to the district court, but noted, "We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional . . . ." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018); *see also German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020) ("[E]ven though the [*Jennings*] Court foreclosed reading the statutory text [of the detention statutes] as guaranteeing periodic bond hearings, it reserved the [noncitizens'] constitutional claims for remand. . . . We are thus bound by [our precedents] that § 1226(c) is unconstitutional when applied to a detain a[] [noncitizen] unreasonably long without a bond hearing.").

62. Courts in this District have overwhelmingly concluded that due process requires a bond hearing when detention becomes prolonged. *See, e.g.*, *Romero Romero v. Wolf*, No. 20-cv-08031-TSH, 2021 WL 254435 (N.D. Cal. Jan. 26, 2021) (hearing necessary after 13 months of § 1226(c) detention); *Jimenez v. Wolf*, No. 19-cv-07996-NC, 2020 WL 510347 (N.D. Cal. Jan. 30, 2020) (hearing necessary after nearly 1 year of § 1226(c) detention); *Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2019 WL 330906 (N.D. Cal. Jan. 25, 2019) (hearing necessary after 13 months of § 1226(c) detention). These decisions are based on the Due Process Clause, not on the constitutional avoidance canon of statutory interpretation, and are thus untouched by *Jennings*.

A. Detention Beyond Six Months Without A Bond Hearing Is Unconstitutional

63. After six months without a bond hearing, detention becomes unconstitutionally prolonged. *See Diouf v. Napolitano*, 634 F.3d 1081, 1091–92 (9th Cir. 2011) ("*Diouf II*") ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound."); *Zadvydas*, 533 U.S. at 701 (noting, "Congress . . . doubted the constitutionality of detention for more than six months"). Although *Diouf II* specifically addressed the legality of prolonged detention under 8 U.S.C. § 1231(a)(6), its reasoning applies equally to immigration detention at other stages of proceedings.

64. The recognition that six months is a substantial period of confinement, after which additional process is required to justify continued incarceration, is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan v.*

Louisiana, 391 U.S. 145, 161, 88 S. Ct. 1444, 1454 (1968). Consistent with this tradition, the Supreme Court has recognized that six months is a meaningful benchmark in various contexts where a person's liberty is deprived or at stake. *See, e.g., United States v. Nachtigal*, 507 U.S. 1, 5 (1993) (characterizing as "severe" the "loss of liberty caused by imprisonment for more than six months"); *Blanton v. North Las Vegas, Nev.*, 489 U.S. 538, 542 (1989) (because "the loss of liberty" is so severe, it is "an 'intrinsically different' form of punishment" necessitating additional procedural safeguards after six months); *Taylor v. Hayes*, 418 U.S. 488, 495–96) (1974) (holding that states may not impose sentences exceeding six months without a jury trial).

65. Prior to *Jennings*, both the Ninth Circuit and the Second Circuit adopted a bright-line approach to hold that detention becomes prolonged at six months. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013); *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015).

66. Since *Jennings*, at least one court in the Northern District has imposed a six-month bright-line rule for determining when detention under § 1226(c) becomes unreasonably prolonged, concluding that such a bright-line rule is consistent with the Supreme Court's decisions in *Zadvydas* and *Demore*, and with the Ninth Circuit's constitutional reasoning in its prolonged detention cases. *Rodriguez*, 2019 WL 7491555, at *6 (the "six-month mark the [Ninth Circuit] ultimately arrived at in *Diouf* is consistent with the Supreme Court's decisions in *Zadvydas* . . . and *Demore*[.]"). This Court should, as well.

B. Even Absent A Bright-Line Six-Month Rule, Petitioner's Detention Has Become Unreasonably Prolonged And A Bond Hearing Is Required

67. Even if a bright-line six-month test were inapplicable, Mr. Sanchez's detention since December 2019—19 months—is unreasonable, and his continued detention without a bond hearing is unconstitutional.

68. The Third Circuit has developed a reasonableness test for evaluating post-*Jennings* as-applied challenges to prolonged detention under § 1226(c), involving "a nonexhaustive list of four factors to consider in assessing whether a[] [noncitizen's] detention has grown unreasonable." *German Santos*, 965 F.3d at 211. Those factors are: (a) duration of detention; (b) whether detention is likely to continue; (c) reasons for the delay, including whether delay was "unnecessary" due to either party's "careless or bad-faith" errors; and (d) whether

conditions of confinement are meaningfully different from criminal punishment. *Id.* at 211. "The most important factor is the duration of detention." *Id*.

69. Numerous district courts outside the Third Circuit either have adopted its four-factor reasonableness test or applied similar factors in weighing individual as-applied challenges to the constitutionality of ongoing prolonged detention without a bond hearing.

70. There are many examples in the Northern District of California. For instance, in *Romero Romero*, the habeas court found that the petitioner "has been detained for over a year, and there is no remotely certain end in sight as to his custody." 2021 WL 254435, at *4 (footnote omitted). The court further found, "Petitioner's [appeals are] perfectly legitimate . . . 'and it ill suits the United States to suggest that he could shorten his detention by giving up these rights and abandoning his [appeal].'" *Id*. Similarly, in *Rodriguez Diaz v. Barr*, the court found petitioner's detention unconstitutionally prolonged because "he has been in custody for approximately 16 months and his last bond hearing was nearly 14 months ago," "he is being detained at Yuba County Jail, a penal institution," and to the extent petitioner was responsible for his detention because he was appealing his removal order, "'the Court will not require that a petitioner who pursues his available legal remedies must forego any challenge to the reasonableness of his detention in the interim.'" 2020 WL 1984301, at *7.

71. Applying these factors to Mr. Sanchez's case leaves little doubt his detention has become unconstitutionally prolonged, and that he is constitutionally entitled to a bond hearing. First, Mr. Sanchez has been detained by ICE since December 2019—*i.e.*, for 19 months. The duration of detention is "[t]he most important factor," *German Santos*, 965 F.3d at 211, and here, the length of Mr. Sanchez's detention is well beyond the six months to one year that most courts find presumptively unconstitutional without a bond hearing. *See Gonzalez*, 2019 WL 330906, at *3 ("In general, as detention continues past a year, courts become extremely wary of permitting continued custody absent a bond hearing," and collecting cases) (alteration and internal quotation marks omitted). In one case in this district where a habeas petitioner had been detained for "just over a year"—less time than Mr. Sanchez has been detained—the court found that this factor "weigh[ed] *strongly* in his favor." *Gonzalez*, 2019 WL 330906, at *5 (emphasis added).

72. Second, because Mr. Sanchez's petition for review is pending at the Court of Appeals, the opening brief is not due until September 10, 2021, and his removal has been stayed pending further order of the court, "there is no remotely certain end in sight as to his custody." *Romero Romero*, 2021 WL 254435, at *4. As the Ninth Circuit has noted, "When . . . this court grants a stay of removal in connection with a[] [noncitizen's] petition for review . . ., prolonged detention becomes a near certainty." *Diouf II*, 634 F.3d at 1092, n.13.

73. Third, the blame for Mr. Sanchez's prolonged detention cannot be laid at his feet. While Mr. Sanchez is challenging his removal order, he does so in good faith. 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. At stake is his right to live in the country where he has lived for over 40 years, and where his entire family lives. *See id.* ("Petitioner's [appeals are] perfectly legitimate; if his removal becomes final, he loses the right to live in the country he's lived in since he was an infant (he's over 40 now)").

74. Finally, Mr. Sanchez's conditions of confinement are not meaningfully different from criminal punishment, *German Santos*, 965 F.3d at 211, because he is "being held at Yuba County Jail, a penal institution," *De Paz Sales v. Barr*, No. 19-cv-04148-KAW, 2019 WL 4751894, at *6 (N.D. Cal. Sept. 30, 2019). This factor weighs decisively in Mr. Sanchez'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*, at *6. (internal quotation marks omitted)

C. Alternatively, Under The *Mathews v. Eldridge* Balancing Test, Petitioner's Prolonged Detention Requires A Bond Hearing

75. Courts may evaluate as-applied constitutional challenges to prolonged detention by applying the three-factor balancing test laid forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Several habeas courts in this District have opted for this approach after *Jennings*. *See, e.g.*, *Rajnish v. Jennings*, No. 3:20-cv-07819-WHO, 2020 WL 7626414, at *8 (N.D. Cal. Dec. 22, 2020); *Montoya Echeverria v. Barr*, No. 20-cv-02917-JSC, 2020 WL 5106848, at *3 (N.D.

Cal. Aug. 31, 2020); *Jimenez*, 2020 WL 510347, at *3.

76. "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Under *Mathews*, the "specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 335. Here, the *Mathews* factors clearly weigh in Mr. Sanchez's favor and require that Respondents provide him with a bond hearing within a reasonable amount of time.

77. First: it is beyond dispute that Mr. Sanchez has a weighty interest in his liberty, the main private interest at stake here. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process Clause] protects." *Zadvydas*, 533 U.S. at 690. Mr. Sanchez "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).

78. Mr. Sanchez's liberty interest is particularly profound because of the depth of his ties to the United States, which must be afforded weight under the *Mathews* test. The U.S. is the only place Mr. Sanchez has lived for more than 40 years, and it has been his home since he was only 10. Four generations of his immediate family live in the U.S., mostly in southern California, and he has worked for the same employer since 1997. His extensive ties to the U.S. heighten his interest in being at liberty, in the company of his family and community, while his immigration proceedings continue. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (in applying the first *Mathews* factor, the right to live in the U.S. and "rejoin [one's] immediate family" "ranks high among the interests of" a detained individual with longstanding ties to the U.S.).

79. Importantly, "the weight on this side of the *Mathews* scale" is not "offset" by the

circumstances of Mr. Sanchez's involvement with the criminal justice system, nor the fact that he is in removal proceedings. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opn.). 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.* (alterations, citations, and internal quotation marks omitted).

80. Second: the risk of erroneous deprivation of Mr. Sanchez's liberty is high, as he has been detained since December 2019 without a bond hearing. "[T]he risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Diouf II*, 634 F.3d at 1092. Conversely, "the probable value of additional procedural safeguards—a bond hearing—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).

81. The only permissible justifications for continuing to detain a bond-eligible individual are if he is "a flight risk or a danger to the community." *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Mr. Sanchez has never had access to a neutral decisionmaker for an assessment of whether he is either. "A neutral judge is one of the most basic due process protections." *Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1049 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). Unless this court grants him a bond hearing, he will likely never receive that "most basic" protection.

82. But Mr. Sanchez is not dangerous. He has extensive evidence of his rehabilitation, including his experience working as an inmate firefighter. He has worked consistently while in custody and taken many classes on effective parenting, anger management, offender corrections, substance abuse, attitudes for success, and other topics. *See* Plantiko Decl. ¶ 20, Exhs. J & K (Documents related to work assignments and certificates for classes taken while in custody). Even when classes halted due to the risks of meeting in-person during the COVID-19 pandemic, Mr. Sanchez has continued to study the Bible on his own nearly every day. He has demonstrated consistent determination to improve himself using whatever resources are available to him. He

stays in close touch with his children and empathizes with them about their feelings and problems. *See generally* Plantiko Decl. ¶ 17, Exh. G (Johnson memo release request).

83. Further, Mr. Sanchez is not a flight risk. His ties to the U.S. are extensive, and his closest family members are concentrated in southern California, where he intends to return if he is granted bail pending his immigration proceedings. He has pledged under penalty of perjury that if he is released from detention, he will meet with immigration officials as ordered; appear for any immigration court hearing where his presence is required; and will report to be deported if he exhausts available options for immigration relief.

84. Third: the government's interest in continuing to detain Mr. Sanchez without a bond hearing is very low, because "the governmental issue at stake in this motion is the ability to detain Petitioner *without providing him with [a] bond hearing*, not whether the government may continue to detain him." *Lopez Reyes v. Bonnar*, 362 F. Supp. 3d 762, 777 (N.D. Cal. 2019). "[T]he government's interest is not seriously undermined [by a bond hearing], including because the relief requested will give the government ample opportunity to demonstrate that the detention is justified." *Rajnish*, 2020 WL 7626414, at *10. The same holds true here.

85. The process Mr. Sanchez requests is a routine process the government provides to detained individuals every day and will impose minimal costs on Respondents. The government has conceded as much in similar cases. *See, e.g.*, *De Paz Sales*, 2019 WL 4751894, at *7 ("the Government does not argue there are any costs to providing a bond hearing"). Even if a bond hearing did impose a fractional burden on the government, that is "easily outweighed by the reduction in the risk of erroneous deprivation of liberty that would result from the additional safeguard" Mr. Sanchez seeks. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017).

III. Procedural Protections Due Process Requires At A Bond Hearing

86. Under binding Ninth Circuit precedent, Respondents must bear the burden of proof to justify Mr. Sanchez's continued detention without bond by clear and convincing evidence of flight risk or danger to the community. *See Singh*, 638 F.3d at 1203.

87. *Singh*'s holding that the government bears the burden of proof at a prolonged detention custody hearing survived *Jennings*. *See Aleman Gonzalez*, 955 F.3d at 781. In *Singh*,

the Ninth Circuit "determined that constitutional procedural due process required the government to meet the clear and convincing burden of proof standard." *Id.* Thus, while *Jennings* "reject[ed] . . . layering such a burden onto § 1226(a) *as a matter of statutory construction*," it did *not* "undercut our constitutional due process holding in *Singh*." *Id.*; *cf. Jimenez*, 2020 WL 510347, at *4 ("*Jennings* explicitly left open the constitutional question and the Ninth Circuit's opinion in *Singh* rests largely on constitutional considerations. Thus, the Court must continue to follow *Singh*.") (citations omitted).

88. *Singh* imposes upon Respondents the burden of proof both in a custody hearing ordered under *Casas* as well as in a custody hearing ordered as a matter of due process. As one Northern District of California court recently explained, "While *Singh* addressed *Casas* hearings on its facts, there is nothing in its reasoning *about burdens of proof* that supports restricting its holding to that class of bond hearings." *Rajnish*, 2020 WL 7626414, at *6; *cf. Perera*, 2021 WL 2400981, at *6 (same, as to as-applied individual constitutional challenge to § 1226(c)); *Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1147 (N.D. Cal. 2018) (same, as to detention under § 1231(a)(6)); *Ixchop Perez v. McAleenan*, 435 F. Supp. 3d 1055, 1062 (N.D. Cal. 2020) (collecting post-*Jennings* cases); *Gonzalez*, 2019 WL 330906, at *7 ("Notably, nearly all the courts that have granted habeas petitions in 1226(c) cases post-*Jennings* have held that the government bears the burden of proof by clear and convincing evidence," and collecting cases).

89. Further, due process requires two additional procedural protections in the bond hearing this court should order or conduct: that the adjudicator consider alternatives to detention, and that he or she likewise consider the noncitizen's ability to pay bond.

90. First, due process and binding Ninth Circuit law require that a judge consider alternatives to detention, including conditions of release. The primary purpose of immigration detention is to ensure a noncitizen's appearance at future immigration proceedings. *See Zadvydas*, 533 U.S. at 690, 697. Detention is not reasonably related to this purpose if there are alternatives to detention that can mitigate a risk of flight. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979) (noting that the constitutionality of punitive measures such as civil detention depends in part on whether "it appears excessive in relation to the alternative purpose assigned");

Hernandez, 872 F.3d at 991 ("Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings").

91. This is particularly so in light of the extraordinary success of ICE's Intensive Supervision Appearance Program ("ISAP"), which has received compliance rates close to perfect. *See Hernandez*, 872 F.3d at 991 (ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"). Thus, alternatives to detention must be considered in determining whether Mr. Sanchez's prolonged incarceration is warranted.

92. Second, due process and binding Ninth Circuit law likewise require that a noncitizen's ability to pay bond be taken into consideration when setting a bond amount. Otherwise, "the government risks detention that accomplishes 'little more than punishing a person for his poverty.'" *Hernandez*, 872 F.3d at 992 (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 (1983)). The failure to consider "factors so central to the purported interest . . . results in detention without adequate procedural protections and hence violates due process." *Id.* at 992 n.21. *See Bearden*, 461 U.S. at 672 (holding that due process requires states to first consider alternatives to imprisonment and the reasons for a probationer's failure to pay, including his or her financial circumstances, before revoking probation). It follows that to provide due process, adjudicators must consider a prisoner's ability to pay a bond that is set: indeed, "the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance." *Hernandez*, 872 F.3d at 991.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Immigration and Nationality Act

93. Section 1226(a) of 8 U.S.C. governs Petitioner's detention because he has a petition for review pending before the Ninth Circuit Court of Appeals and a judicial stay of removal. *See Casas*, 535 F.3d at 947–48.

94. Petitioner's detention has become prolonged as he has been detained for 19

months and faces months, if not years, of continued detention while his petition for review is adjudicated and potentially remanded to the agency for further proceedings.

95. Pursuant to the Ninth Circuit's decision in *Casas*, Mr. Sanchez is entitled to a bond hearing pursuant to 8 U.S.C. 1226(a).

96. Petitioner's continued detention under Section 1226(a) without a bond hearing violates the Immigration and Nationality Act.

SECOND CLAIM FOR RELIEF

Violation of the Fifth Amendment

97. 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.

98. The Due Process Clause requires the government to establish, at an individualized hearing before a neutral decisionmaker, that Petitioner's prolonged detention is justified by clear and convincing evidence of flight risk or danger, even after consideration of whether alternatives to detention could sufficiently mitigate that risk.

99. Petitioner's detention has become prolonged as he has been detained for 19 months and faces months, if not years, of continued detention while his petition for review is adjudicated and potentially remanded to the agency for further proceedings.

100. Petitioner's ongoing prolonged detention without an individualized bond hearing violates the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays this Court grant the following relief:

1) Assume jurisdiction over this matter;

2) Grant the Order to Show Cause as requested in the application filed concurrently;

3) Declare that Petitioner's ongoing prolonged detention violates 8 U.S.C. § 1226(a) and the Due Process Clause of the Fifth Amendment;

4) Issue a Writ of Habeas Corpus and order Respondents to immediately release Petitioner from DHS custody under reasonable conditions and enjoin Respondents from re-arresting him without a pre-deprivation hearing before this Court;

5) Alternatively, order that Petitioner be released within 14 days unless Respondents schedule a hearing to take place before a neutral arbiter where to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a danger or flight risk, and address why available conditions of supervision cannot mitigate any such risks; and if (a) the government fails to meet this burden, the neutral arbiter orders Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond; or (b) the government meets this burden, the neutral arbiter issue a reasoned decision explaining why the government has met its burden of proof and why alternatives to detention are inadequate;

6) Enjoin Respondents from causing Petitioner any greater harm during the pendency of this litigation and immigration court case, such as by transferring him farther away from his legal Counsel or placing him into solitary confinement;

7) Award reasonable costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, or on any other basis justified under law; and

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

Respectfully submitted,

Date: July 23, 2021

/s/ Michelle (Minju) Y. Cho
Michelle (Minju) Y. Cho

ACLU FOUNDATION OF NORTHERN CALIFORNIA

Attorney for Petitioner

VERIFICATION BY SOMEONE ACTING ON PETITIONER'S BEHALF

PURSUANT TO 28 U.S.C. § 2242

I am submitting this verification on behalf of the Petitioner because I am one of the Petitioner's attorneys. I have discussed with the Petitioner the events described in this Petition. Based on those discussions, I hereby verify that the statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Date: July 23, 2021

/s/ Michelle (Minju) Y. Cho
Michelle (Minju) Y. Cho