VASUDHA TALLA (SBN 316219)
vtalla@aclunc.org
MICHELLE (MINJU) Y. CHO (SBN 321939)
mcho@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO 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-05657-RS

PETITIONER'S TRAVERSE IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

IMMIGRATION HABEAS CASE

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Since December 2019, Respondents have detained Petitioner Leonel Sanchez Lagunas ("Petitioner" or "Mr. Sanchez") in a county jail without making any showing that his detention is warranted by risk of flight or danger to the community. Respondents' continued detention of Mr. Sanchez without the most basic due process protections defies the constitutional principle that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The Ninth Circuit's holding in *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008) ("*Casas*")—that individuals seeking judicial review of an administratively final removal order with a judicial stay of removal are entitled to a custody hearing if their detention is prolonged—remains binding law. Since the Supreme Court decided *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), an overwhelming majority of courts to consider the question, including the Ninth Circuit, have concluded *Jennings* and *Casas* can be harmonized.

Respondents fail to address any of this case law. Nor do they acknowledge that *Casas* and *Jennings* addressed distinct aspects of the mandatory detention statute, 8 U.S.C. § 1226(c). While *Jennings* decided whether § 1226(c) could fairly be read to require periodic bond hearings and other protections, *Casas* decided *who* fell into § 1226(c)'s scope. Nothing in *Jennings* precludes *Casas*'s reasoning that, as a person pursues relief from removal and judicial review, the statute authorizing his detention may shift from § 1226(c) to the discretionary detention statute, 8 U.S.C. § 1226(a). As *Jennings* and *Casas* are not "clearly irreconcilable," *Casas* remains good law. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

But even apart from *Casas*, Mr. Sanchez warrants habeas relief under any relevant due process inquiry: an application of *Mathews v. Eldridge*, 424 U.S. 319 (1976), a reasonableness analysis, or a six-month bright line rule. Respondents barely engage with Mr. Sanchez's due process arguments, instead focusing on whether his detention serves their purposes. But the weight of the law is on Mr. Sanchez's side: his no-bond detention has now stretched to nearly 20 months—by any measure, well beyond the period most courts will tolerate before due process requires the government to justify continued detention before a neutral decisionmaker.

STATEMENT OF FACTS

Over 40 years ago, Mr. Sanchez arrived in the United States as a 10-year-old child, traveling to California from Mexico to reunite with his mother. Petition ¶ 24. For many years, Mr. Sanchez struggled with the lasting psychological effects of childhood abuse and extensive violence in his environment, as well as trauma arising from numerous incidents where he was attacked without reason or justification. *See id.* ¶¶ 25–26, 28–29.

Mr. Sanchez has been convicted of several crimes. Petition ¶¶ 30–32.[1] In 2016, Mr. Sanchez pleaded guilty to convictions arising from an incident where, carrying weapons, he confronted a group of people whom he believed had brutally and without provocation attacked him weeks earlier. *Id.* ¶¶ 33–34. Mr. Sanchez was sentenced to 3 years in prison, plus a 3-year firearms enhancement. *Id.* ¶ 34. In prison, Mr. Sanchez participated in Alcoholics Anonymous, Bible study, and other classes. *Id.* ¶ 37. He committed to staying sober, reading the Bible every day, and seeking redemption by being a better person. *Id.* In 2018, Mr. Sanchez was selected to serve California as a firefighter, a job for which only "minimum custody" inmates with sustained good behavior qualify. *Id.* ¶ 38. Working as a firefighter gave Mr. Sanchez a sense of purpose and he found great meaning in helping to save people and their homes from fires. *Id.* ¶ 38.

On December 23, 2019, Mr. Sanchez was transferred from the custody of California Department of Corrections and Rehabilitation to Immigration and Customs Enforcement ("ICE"). *See* Petition ¶¶ 1, 41. He has been detained in Yuba County Jail ever since, fighting for his right to remain in the United States, where his entire family—including four children, two grandchildren, and his elderly mother, all U.S. citizens—reside. *Id.* ¶¶ 1, 24. For much of his 20-month detention, Mr. Sanchez was mandatorily detained under 8 U.S.C. § 1226(c) and ineligible for a bond hearing. *Id.* ¶ 47. Therefore, he has never had an opportunity to assert before a neutral

[1] A few inconsistencies exist between Mr. Sanchez's and Respondents' summaries of his criminal history. One date of arrest in Deportation Officer Reyes's declaration, ECF 21-1 ¶ 35 (9/9/89), is inconsistent with Petitioner's criminal history chart, ECF 1-5 at 1 (3/28/89). The Reyes declaration lists four California Penal Code (CPC) sections as "charges" (§§ 245(b), 30305(a)(1), 417(b), and 417(a)(1)), but they were actually convictions. *Compare* ECF 21-1 ¶ 40, with criminal history chart, ECF 1-5 at 2, and RAP sheet, Exh. G to Reyes Decl., ECF 21-8 at 9–10. Finally, the Reyes declaration, ECF 21-1 ¶ 40, states that Mr. Sanchez was convicted of CPC § 25850(a)/(c)(3), but Petitioner's criminal history chart, ECF 1-5 at 2, and his RAP sheet, Exh. G to Reyes Decl., ECF 21-8 at 10, state the conviction was for CPC § 25850(a)/(c)(4).

magistrate that his continued detention is unwarranted because (1) he is rehabilitated and not a danger to anyone around him; and (2) he will appear for hearings or meetings with immigration officials as required and will report to be deported if he exhausts all options for immigration relief. *Id.* ¶¶ 1, 82–83. At the same time, ICE cannot deport Mr. Sanchez, as the Ninth Circuit has temporarily stayed his removal while it considers his petition for review. *Id.* ¶ 1.

Under binding Ninth Circuit law, Mr. Sanchez is now detained pursuant to 8 U.S.C. § 1226(a), which entitles him to a bond hearing to assess whether his detention is justified. *See Casas*, 535 F.3d at 947–48. On July 20, 2021, Mr. Sanchez requested a *Casas* hearing before the Immigration Judge ("IJ"). Petition ¶ 44. On July 30, 2021, the IJ issued a written decision denying his motion based on her belief that *Casas* is no longer good law. *See* ECF 21-7.

ARGUMENT

I. *Jennings* Did Not Abrogate *Casas* As It Applies To Petitioner's Claims

Respondents fail to explain why *Casas* is "clearly irreconcilable" with *Jennings*. *See Miller*, 335 F.3d at 893 (Ninth Circuit authority has been "effectively overruled" only when it is "clearly irreconcilable" with intervening higher authority). Nor do they address any of the cases in this Circuit and District holding that *Casas*'s core holdings survive *Jennings*. *See, e.g.*, *Aleman Gonzalez v. Barr*, 955 F.3d 762, 785–86 (9th Cir. 2020); *Avilez v. Barr*, No. 19-cv-08296-CRB, 2020 WL 1704456, at *2–*3 (N.D. Cal. Apr. 8, 2020); *Birru v. Barr*, No. 20-cv-01285-LHK, 2020 WL 1905581, at *7–*8 (N.D. Cal. Apr. 17, 2020). These courts rejected Respondents' recycled arguments for good reason: Respondents' position requires leaps of logic that go beyond what the text of *Jennings* can reasonably support. Ultimately, *Casas* and *Jennings* are reconcilable, and because courts can apply *Casas* "consistently with that of the higher authority, [they] must do so." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019).

A. *Jennings* Is Not Irreconcilable With *Casas*'s Binding Holding That Petitioner's Detention Is Governed By § 1226(a)

In *Casas*, the Ninth Circuit held that when a removal order has become administratively final, the noncitizen has petitioned for judicial review, and a judicial stay of removal has issued, that person's detention is governed by the discretionary detention statute, 8 U.S.C. § 1226(a). *Casas*, 535 F.3d at 947–48. *Casas* reasoned that 8 U.S.C. § 1231(a) could not govern the

noncitizen's detention because that statute could not apply until after the Court of Appeals denied the petition for review and withdrew the stay of removal, events which had not yet taken place. *Id.* at 947. It next reasoned that—in light of the Supreme Court's opinion in *Demore v. Kim*, 538 U.S. 510 (2003), and the agency's own regulations—8 U.S.C. § 1226(c)'s mandatory detention authority must expire "upon the dismissal of the [noncitizen's] appeal by" the Board of Immigration Appeals ("BIA"). *Casas*, 535 F.3d at 948. Thus, it concluded the noncitizen's detention must be authorized by § 1226(a). *Id.*

Respondents do not contest that if this Court holds that *Casas* applies, then Mr. Sanchez is detained under § 1226(a) and entitled to a bond hearing. Instead, they claim that *Casas* is abrogated for four reasons. None persuades.

First, Respondents argue *Casas* is abrogated because it "is directly tied to the *Rodriguez* line of cases," which *Jennings* overruled. Return at 6. That is a logical fallacy. Essentially, they contend that because *Jennings* overruled the *Rodriguez* line, every authority which *Rodriguez* invoked—like *Casas*—was invalidated, too. But the Supreme Court's reversals of cases do not automatically overrule all precedents on which those cases relied. A reversal may suggest the lower court misapplied a prior case, but hardly requires concluding the prior case was incorrect. *See Aleman Gonzalez*, 955 F.3d at 785 (rejecting the government's argument that *Jennings* invalidated *Casas*, in part because "*Casas-Castrillon* did not construe § 1226(a) in the manner that the Court rejected in *Jennings*.").

Second, Respondents assume far too much of *Jennings*'s reach. While *Jennings* rejected applying the canon of constitutional avoidance to § 1226(c), it made no holding about *who* falls within § 1226(c)'s scope. Thus, it did nothing to disturb *Casas*'s holding that persons like Mr. Sanchez fall outside § 1226(c); indeed, it had no occasion to consider such a question at all. *See id.* at 789 (noting *Jennings*'s "limited focus" on the questions before the *Casas* court). As one court in this District explained, "*Casas-Castrillon* narrowed the scope of noncitizens who are subject to detention under 8 U.S.C. § 1226(c); and . . . *Jennings* then explained the statutory consequences for the noncitizens who continue to fall within the scope of 8 U.S.C. § 1226(c)." *Birru*, 2020 WL 1905581, at *7; *see Singh v. Barr*, No. 20-cv-02346-VKD, 2020 WL 1929366,

at *7 (N.D. Cal. Apr. 20, 2020) (adopting *Birru*'s reasoning).

Third, Respondents argue that *Casas* is abrogated because it "was based on a misreading of section 1226(c) that originated in the Ninth Circuit's decision in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)." Return at 6. But in arguing that *Tijani*'s discussion of the "temporal scope" of 1226(c) was overruled by *Jennings*, Respondents ultimately take the same position as Petitioner: *Jennings* confirms that 1226(c) has a "'definite termination point,'" *i.e.*, the end of administrative removal proceedings. *Id.* at 6 (quoting *Jennings*, 138 U.S. at 846); *see* Petition ¶ 52. Moreover, *Casas*'s interpretation of § 1226(c) was based not only on *Tijani* but also—and arguably primarily—on two sources of law that remain indisputably valid today: (1) *Demore*, 538 U.S. at 527–28, which recognized that § 1226(c)'s mandatory detention provision "was intended only to 'govern[] detention of deportable criminal [noncitizens] *pending their removal proceedings*,'" *Casas*, 535 F.3d at 948 (quoting *Demore*, 538 U.S. at 527–28); and (2) the Department of Homeland Security's ("DHS") regulations interpreting § 1226(c) to apply only "'during removal proceedings,'" which conclude upon "the dismissal of the [noncitizen's] appeal by the BIA," *id.* (quoting 8 C.F.R § 236.1(c)(1)(i)).[2] Where a legal holding rests on numerous authorities, the invalidation of one of those authorities does not undercut entirely the legal holding itself. *Aleman Gonzalez*, 955 F.3d at 786.

Finally, Respondents claim *Jennings* forecloses *Casas*'s holding that detention authority may shift from § 1226(c) to § 1226(a) because, in their view, *Jennings* suggested the two statutory sections apply to "mutually exclusive" groups of noncitizens during the same time period, which they assert goes beyond the conclusion of administrative removal proceedings. Return at 7–8. Again, Respondents' reading of *Jennings* is unsupported by its text. While *Jennings* treats those detained under § 1226(c) as distinct from those detained under § 1226(a) for certain purposes, *Jennings* does not preclude the government's detention authority from shifting among different provisions of the Immigration and Nationality Act ("INA") as an individual's proceedings unfold. Indeed, it is well accepted that different detention statutes

[2] *Cf. Rodriguez v. Robbins*, 804 F.3d 1060, 1068 (9th Cir. 2015), *rev'd sub nom. Jennings*, 138 S. Ct. at 830 (characterizing *Casas*'s interpretation of § 1226(c) as flowing directly from *Demore*, not *Tijani*).

"'apply at different stages of a[] [noncitizen's] detention.'" *Aleman Gonzalez*, 955 F.3d at 788.

Nor do Respondents' citations to *Jennings* and *Nielsen v. Preap*, 139 S. Ct. 954 (2019), save their argument. Respondents highlight *Jennings*'s line, "[T]ogether with § 1226(a), § 1226(c) makes clear that detention of [noncitizens] within its scope *must* continue 'pending a decision on whether the [noncitizen] is to be removed from the United States.'" *See* Return at 7. But, as a court in this District has noted: "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 *3 (internal citation omitted). As the *Casas* court found, the statutory text of § 1226 differs between subsections (a) and (c): the text "pending a decision on whether the [noncitizen] is to be removed from the United States"—appears only in § 1226(a) and not in § 1226(c). *Casas*, 535 F.3d at 947. This suggests the phrase applies to subsection (a) only—not to both, as Respondents claim. *See* Return at 7. Respondents also ignore that *Jennings*, in emphasizing that detention under § 1226(c) "has 'a definite termination point': the conclusion of removal proceedings," left plenty of room for *Casas*'s holding that when removal proceedings conclude, so does a person's mandatory detention under that statute. *Jennings*, 138 S. Ct. at 846; *see* 8 C.F.R. § 1241.1 ("the conclusion of [removal] proceedings . . . shall become final . . . [u]pon dismissal of an appeal by the [BIA]").

Moreover, *Preap* has nothing to say about the end point of detention under § 1226(c), nor about whether the authority for a person's detention may shift from § 1226(c) during agency removal proceedings to § 1226(a) during judicial review. *Preap* addresses the government's initial authority to arrest noncitizens pending removal proceedings, and its discussion of sections 1226(a) and (c) simply repeats its statement in *Jennings* that subsection (c) carves out a category of persons who may not be released under subsection (a). *Preap*, 139 S. Ct. at 966–67; *see id.* at 973 (Kavanaugh, J., concurring) (emphasizing "the narrowness of the issue before us," namely, whether mandatory detention authority "remains mandatory if the Executive Branch fails to

immediately detain the noncitizen when the noncitizen is released from criminal custody"). Nothing in *Jennings* or *Preap* addresses whether, or when, the statute authorizing a person's detention may shift from § 1226(c) to § 1226(a). Likewise, nothing in either case requires concluding that *Casas*'s core holding is irreconcilable with those later authorities.

B. *Jennings* Is Not Irreconcilable With *Casas*'s Holding That § 1226(a) Requires Petitioner Receive A Bond Hearing

Casas further held that when a noncitizen's detention becomes prolonged, § 1226(a) "*requir[es]* the Attorney General to provide the [noncitizen] with . . . a hearing" including "an individualized determination of his dangerousness or flight risk." *Casas*, 535 F.3d at 951. Respondents do not dispute this holding is not irreconcilable with *Jennings*. As the Ninth Circuit recently explained, *Jennings* overruled the Ninth Circuit's holding that § 1226(a) could be interpreted to require (1) a hearing after six months of detention, as well as (2) periodic bond hearings every six months thereafter, because the text of § 1226(a) did not support *those* requirements. *Aleman Gonzalez*, 955 F.3d at 775, 785. But *Jennings* "did not invalidate construing § 1226(a) to authorize a bond hearing at all," such as when "a[] [noncitizen] is subject to prolonged detention." *Id.* at 785. While *Jennings* rejected the premise that § 1226(a) can be interpreted to mandate bond hearings at six months, it did not eliminate the possibility that the statute could require a hearing at *some* point when an individual's detention becomes indisputably prolonged—for instance, at or before 20 months, the length of time Mr. Sanchez has been detained by ICE without a bond hearing. Thus, *Casas*'s holding that § 1226(a) requires a hearing after detention becomes prolonged is not irreconcilable with *Jennings*. *See id.* at 782, 785–86; *Birru*, 2020 WL 1905581, at *8 (applying *Casas* after *Jennings* to conclude that "under 8 U.S.C. § 1226(a), Petitioner is automatically entitled to a bond hearing").[3]

C. Respondents' Remaining Arguments Against *Casas*'s Application Fail

Respondents' other arguments for why *Casas* should not apply fail on the merits.

[3] Even if this Court finds *Jennings* forecloses *Casas*'s requirement of a bond hearing when detention is prolonged, it would still be proper to order a bond hearing here. On July 20, 2021, Mr. Sanchez filed a motion for a bond hearing because, under *Casas*, he is detained under § 1226(a). There is no dispute that an individual detained under § 1226(a) may be released on bond. *See Jennings*, 138 S. Ct. at 837; *Aleman Gonzalez*, 955 F.3d at 781–82 (recognizing *Jennings* left untouched the fact that § 1226(a) can be read to authorize a bond hearing).

First, Respondents cite out-of-circuit, non-binding authority to contend that *Casas* incorrectly construed § 1226(a) as governing the detention of individuals like Petitioner. *See* Return at 7. But whether a circuit split exists is irrelevant to this Court, which is bound by *Casas* and not presented with the issue of whether to adopt a *Casas*-type rule in the first instance. Even if a circuit split were relevant to this Court's consideration, none of the cases Respondents cite actually considered and rejected *Casas*'s holding that § 1226(a) authorizes detention when a noncitizen is seeking judicial review of a stayed removal order.

In *Hechavarria v. Sessions*, 891 F.3d 49 (2d Cir. 2018), the Second Circuit "appointed amicus curiae counsel to address whether [the pro se noncitizen's] detention was governed by 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a)." *Hechavarria*, at 53. That court did not consider whether the noncitizen's detention might be governed by § 1226(a). In *Leslie v. Att'y Gen.*, 678 F.3d 265 (3d Cir. 2012), the Third Circuit held that when a noncitizen has petitioned for review of a removal order with a stay in place, the operative detention statute is § 1226, not § 1231—but it did not address which subsection of § 1226(a) applies. Contrary to Respondents' placement of *reverts* in quotation marks, Return at 7, the word does not appear in *Leslie*, and *Leslie* does not conclude that detention during a stay of removal *reverts* to the provision that applied in agency proceedings. *Compare id.* at 7 with *Leslie*, 678 F.3d at 270. Finally, *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam), assumed without deciding that § 1231 applied to a noncitizen with a pending petition for review with a stay of removal. *See Akinwale*, at 1051–52, 1052 n.4. *Akinwale* did not consider whether § 1226 could govern the noncitizen's detention.

Second, Respondents improperly urge this Court to follow an imaginary alternative rule to *Casas*, claiming that pursuant to *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), the issuance of Mr. Sanchez's stay caused his detention authority to "revert[] back to that of his pre-final order detention statute, which remains § 1226(c)." Return at 12 n.4. *Prieto-Romero* said nothing of the sort. Rather, it held that when a "removal order is administratively final, but [the] removal has been stayed by a court of appeals pending its disposition of his petition for review," a noncitizen "may be detained . . . pursuant to *§ 1226(a)*." *Prieto-Romero*, at 1059 (emphasis added). If anything, *Prieto-Romero* supports Mr. Sanchez's position that the statute authorizing

his detention is now *§ 1226(a)*. It does not hold the detention authority "reverts" to the statute that applied previously. *See id.* And obviously, such a holding would flatly contradict *Casas*.

Prieto-Romero cannot be interpreted in isolation from *Casas*. The oral arguments for *Prieto-Romero* and *Casas* were consolidated; they were heard by the same panel; the decisions were published on the same day; and the (unanimous) opinions were authored by the same judge. *See id.* at 1055, n.**; *Casas*, 535 F.3d at 942. Thus, where *Casas explicitly* held that § 1226(c) detention shifts to § 1226(a) detention once a detained person petitions for review and receives a stay of removal, *Casas*, at 948, *Prieto-Romero* cannot stand for the contradictory proposition that § 1226(c) detention "revert[s] back" to § 1226(c) after a petition for review and issuance of a stay. Return at 12 n.4. Rather, *Prieto-Romero*'s holding is *consistent* with *Casas*: when a petition for review is pending with a stay in place, the statute authorizing detention is § 1226(a).

II. Even if Petitioner's Detention Is Governed By § 1226(c), His Prolonged Detention Without a Custody Hearing Has Become Unconstitutional

A. A Presumption That After Six Months Detention Is Unconstitutional Without a Custody Hearing Is Not Inconsistent With Governing Authority

Respondents object to Mr. Sanchez's argument that detention beyond six months without a bond hearing is unconstitutional, because no Supreme Court authority has so held. *See* Return at 9. But nor is a bright-line rule foreclosed by governing authority.

Respondents argue that *Demore* precludes the application of a bright-line six-month rule in the context of § 1226(c) detention, but the Ninth Circuit has already held that *Demore* did not consider the question of prolonged detention. *See Casas*, 535 F.3d at 950 (*Demore* upheld § 1226(c)'s mandatory detention provision "only for the 'limited period of [the noncitizen's] removal proceedings'"). And as Respondents concede, this precise issue "is currently on remand to the district court" following *Jennings*'s remand to the Ninth Circuit. Return at 10; *see Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018) (remanding the constitutional question to the district court to decide in the first instance). If *Demore* had already resolved the constitutionality of prolonged § 1226(c) detention without a custody hearing, the *Jennings* remand would have been unnecessary. In the absence of controlling appellate authority, district courts may draw their own conclusions based on available law. Reflecting this, at least one court

in this District recently held that § 1226(c) detention becomes prolonged after six months and requires a bond hearing. *Rodriguez v. Nielsen*, No. 18-CV-04187-TSH, 2019 WL 7491555, at *6 (N.D. Cal. Jan. 7, 2019). No authority prevents this Court from doing the same.

B. Under Any Balancing Test, Petitioner's Detention Has Become Prolonged, Necessitating A Custody Hearing By A Neutral Magistrate

Respondents do not engage with Mr. Sanchez's argument that his detention has become unconstitutionally prolonged under the tests set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020), except to assert that "[t]he Supreme Court has never applied [them] to section 1226(c) claims." Return at 14 n.5. They ignore all the habeas courts that have, after *Jennings*, turned to one of these tests to assess whether an individual's detention is prolonged. On the merits, they also fail to persuade that Mr. Sanchez's detention is *not* prolonged.

The Supreme Court articulated the *Mathews* balancing test to meet the "'flexible'" demands of due process, *Mathews*, 424 U.S. at 334, and the Ninth Circuit has repeatedly applied it to the immigration context. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (*Mathews* test applies in immigration detention context because "there has been a deprivation of liberty and due process is required"); *C.J.L.G. v. Barr*, 923 F.3d 622, 632 (9th Cir. 2019) (en banc) ("Where due process interests are at stake in a child's removal proceedings, this court looks to the familiar test formulated in *Mathews v. Eldridge* . . . ."). In this District, after *Jennings*, courts have frequently applied both the *Mathews* test and *German Santos* factors to prolonged detention habeas claims.[4] There is nothing novel about applying either test here.

Respondents' application of the *German Santos* factors to Mr. Sanchez's detention fares

[4] *See, e.g.*, *Rajnish v. Jennings*, No. 3:20-cv-07819-WHO, 2020 WL 7626414, at *8 (N.D. Cal. Dec. 22, 2020) (applying *Mathews* test to prolonged detention claim); *Montoya Echeverria v. Barr*, No. 20-cv-02917-JSC, 2020 WL 5106848, at *3 (N.D. Cal. Aug. 31, 2020) (same); *Jimenez v. Wolf*, No. 19-cv-07996-NC, 2020 WL 510347, at *3 (N.D. Cal. Jan. 30, 2020) (same); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 963 (N.D. Cal. 2019) (same); *Lopez Reyes v. Bonnar*, 362 F. Supp. 3d 762, 775 (N.D. Cal. 2019) (same); *Romero Romero v. Wolf*, No. 20-cv-08031-TSH, 2021 WL 254435, at *4 (N.D. Cal. Jan. 26, 2021) (applying similar factors as *German Santos* test to prolonged detention claim); *Rodriguez Diaz v. Barr*, No. 4:20-cv-01806-YGR, 2020 WL 1984301, at *7 (N.D. Cal. Apr. 27, 2020) (same); *Masood v. Barr*, No. 19-cv-07623-JD, 2020 WL 95633, at *3 (N.D. Cal. Jan. 8, 2020) (same); *Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal. Jan. 25, 2019) (same); *De Paz Sales v. Barr*, No. 19-cv-04148-KAW, 2019 WL 4751894, at *6 (N.D. Cal. Sept. 30, 2019) (same).

no better than their argument the factors ought not to apply at all. Their objections boil down to the allegedly "extensive" continuances Mr. Sanchez sought in the immigration court, which Respondents characterize as "'delay caused by petitioner's litigation strategy.'" Return at 12, 13. But several of Mr. Sanchez's continuances were sought for the purpose of obtaining attorney representation—a purpose courts have recognized is *not* dilatory. *See, e.g.*, *Ramirez-Arias v. INS*, 11 F. App'x 768, 770 (9th Cir. 2001) (continuances to "retain counsel" were "not . . . a method to delay the proceedings"); *Ranchinskiy v. Barr*, 422 F. Supp. 3d 789, 798 (W.D.N.Y. 2019) (continuances to seek counsel are not "bad faith delay tactics," and "it would not be appropriate to utilize these requests . . . to penalize Plaintiff"). His remaining continuances were for time to gather evidence and file a Form I-130 Petition for Alien Relative *while pro se and detained and during the pandemic*; or, after hiring an attorney, for attorney preparation. *See* Supplemental Declaration of Barbara Plantiko & Exh. A (providing context for the continuances Mr. Sanchez sought after retaining an attorney); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1110 (9th Cir. 2010) (a continuance to gather evidence does not reflect "any unreasonable conduct" by the noncitizen). In requesting continuances, Mr. Sanchez availed himself of his constitutional and statutory rights to due process; the right to secure and be represented by counsel; and the right to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019).

The time Mr. Sanchez sought to obtain representation, gather evidence, and represent himself in court was not unreasonable or "litigation strategy" intended to prolong detention. Obtaining counsel and gathering evidence while detained and far from family is a challenge for individuals like Mr. Sanchez, who have limited or no income. *See* Ingrid Eagly & Stephen Shafer, Am. Imm. Council, *Access to Counsel in Immigration Court* 6 (Sept. 2016) (detained immigrants face many serious barriers in securing legal counsel). Yet Mr. Sanchez needed representation because "detained immigrants with representation, when compared to their unrepresented counterparts, were *ten-and-a-half times* more likely to succeed" in winning their removal cases. *Id.* at 19 (emphasis added). Mr. Sanchez's desire to hire an attorney and pursue all available avenues of relief to him—even at the cost of his liberty—is a testament to his desire

for a fair opportunity to seek immigration relief.

Mr. Sanchez is not required, as Respondents suggest, to forgo his constitutional and statutory rights to prevent his detention from becoming prolonged. *See* Return at 13. "[I]t ill suits the United States to suggest that he could shorten his detention by giving up [his] rights and abandoning his [appeal]." *Masood v. Barr*, No. 19-cv-07623-JD, 2020 WL 95633, at *3 (N.D. Cal. Jan. 8, 2020); *cf. Prieto-Romero*, 534 F.3d at 1060–61 ("Moreover, we are highly skeptical about the government's suggestion that [a noncitizen's] attempt to seek judicial relief from deportation constitutes conspiring or acting to prevent his removal.") (cleaned up).

Even by Respondents' calculations, Mr. Sanchez's continuances consumed "eight months" of his 20 months in ICE custody. *Id.* at 13. That leaves a full *year* in custody that Respondents cannot attribute to Mr. Sanchez, and which must be attributed in large part to the time the agency has taken to adjudicate his case. Respondents do not attempt to persuade the Court that Mr. Sanchez's detention would *not* be prolonged absent the granted continuances, nor could they. *See Tijani*, 430 F.3d at 1249 (Tashima, J., concurring) ("While it is true that Tijani requested continuances, those occurred early in the process, and have not contributed at all to the year-long delay since the BIA heard his appeal."); *Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal. Jan. 25, 2019) (where habeas petitioner had been detained for "just over a year," that fact weighed "strongly" in his favor).

C. Whether Petitioner's Detention Is Serving The Government's Purpose Is Not Dispositive Of Whether It Is Constitutional

Respondents inexplicably suggest that if Mr. Sanchez's detention is serving its immigration purpose, it is constitutional. *See* Return at 11 (quoting *Demore*, 538 U.S. at 527). That is not the test for constitutionality. While detention that does *not* "serve its purported immigration purpose . . . 'no longer bears a reasonable relation to the purpose for which the individual was committed'" and is thus unconstitutional, *Demore*, 538 U.S. at 527, it cannot follow that detention that *does* serve its purpose is *necessarily* constitutional. Detention that serves its purported purpose may nevertheless violate the Constitution because—for instance—it subjects the detained person to torture, *see, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 738 (2002); fails to protect a person's fundamental rights, *see, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 85–86

(1992); or becomes unreasonably prolonged, *see, e.g.*, *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Whether detention is serving its purported purpose is only one factor courts consider in assessing constitutionality.

Respondents' argument that Mr. Sanchez's prolonged detention is constitutional because their interest in removing him increases with time, *see* Return at 12, is likewise unconvincing. A detained person's interest in his liberty—and in receiving, at least, a neutral adjudicator's assessment of the justifiability of his detention—*also* increases with time. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (as the length of detention increases, it shifts from being presumptively reasonable to presumptively unreasonable). It is precisely because this private interest increases with the length of detention that *Demore* repeatedly emphasized that the validity of the challenged mandatory detention was premised on its expected brevity. *See Demore*, 538 U.S. at 513, 523, 526, 529–31; *see also Zadvydas*, at 690 ("A statute permitting indefinite detention of a[] [noncitizen] would raise a serious constitutional problem."). The existence of a legitimate government interest is no carte blanche to disregard the Due Process Clause. As the Ninth Circuit has long recognized:

> Even if [Petitioner's] continued detention is permitted by statute, . . . due process requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." There is an important difference between whether detention is statutorily authorized and whether it has been adequately determined to be necessary as to any particular person.

Prieto-Romero, 534 F.3d at 1065 (quoting *Zadvydas*, at 690–91). Because satisfaction of a government interest alone does not make detention constitutional, Respondents' arguments fail.

III. This Court May Order Whatever Relief It Deems Proper

A. This Court Has Authority To Order Petitioner Immediately Released

If the Court grants the habeas petition, it possesses the authority to order Mr. Sanchez immediately released. *See Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973) (the "traditional purpose of habeas corpus" is to provide "immediate or more speedy release."). That his detention is governed by the INA does not alter the Court's authority to order release, even without a bond hearing. *See Victor v. Mukasey,* No. 08-1914, 2008 WL 5061810, at *5 (M.D. Pa. Nov. 25, 2008)

(ordering release of habeas petitioner detained by ICE for over a year, where petitioner showed family ties and government presented no evidence of danger or flight risk).

In addition to its authority under the habeas statutes, the Court may draw upon its equitable powers to order whatever relief it deems proper to remedy a constitutional violation, including immediate release. *See Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (where plaintiffs brought due process claims and invoked the court's subject matter jurisdiction under 28 U.S.C. § 1331, district court could order equitable relief to remedy the constitutional violation regardless of whether it also properly possessed habeas jurisdiction); Petition ¶ 10 (invoking this Court's jurisdiction under 28 U.S.C. § 1331). "Once a [constitutional] right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *see Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) ("Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights."). The Court may apply its equitable powers to "bring an ongoing violation to an immediate halt." *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). This includes requiring Mr. Sanchez's immediate release from ICE custody.

B. If The Appropriate Remedy Is A Bond Hearing, The Government Must Bear The Burden Of Proof By Clear And Convincing Evidence

The Court may also order a bond hearing as the appropriate remedy, conducted either by this Court or by an Immigration Judge. As the Ninth Circuit has repeatedly held, at that bond hearing the government must bear the burden of proof by clear and convincing evidence to justify his continued detention. *See, e.g.*, *Aleman Gonzalez*, 955 F.3d at 766.

In *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011), the Ninth Circuit held that not only does the government bear the burden of proof at a *Casas* bond hearing to justify continued detention, it must prove danger and flight risk by clear and convincing evidence. *Singh* concluded the Due Process Clause requires heightened protections in light of "the substantial liberty interest at stake," reasoning that "even where prolonged detention is permissible, due process requires adequate procedural protections" to justify the physical restraint. *Singh*, 638 F.3d at 1203. (internal quotation marks omitted).

Respondents' argument that *Singh* was "effectively overruled" by *Jennings* is incorrect. Return at 16. "*Jennings* did not invalidate our constitutional due process holding in *Singh*." *Aleman Gonzalez*, 955 F.3d at 766. As the Ninth Circuit explained, "*Singh* was not a statutory construction decision. Instead, we drew from the Supreme Court's constitutional procedural due process jurisprudence placing a heightened burden of proof on the State in civil proceedings in which the individual liberty interests at stake are both particularly important and more substantial than mere loss of money." *Id.* at 772 (cleaned up). Because *Jennings* made no constitutional holding, it "cannot . . . undercut our constitutional due process holding in *Singh*." *Id.* at 781; *see also Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 n.12 (3d Cir. 2018) (post-*Jennings*, expressly adopting *Singh*'s clear and convincing evidence standard in the context of prolonged detention of individuals held under 8 U.S.C. § 1231(a)(6)).

Even if this Court concludes Mr. Sanchez is detained under § 1226(c), the government continues to bear the burden of proof by clear and convincing evidence. Immigration detention is a form of civil confinement, where the long-standing rule imposes the burden "on the government to justify detention by clear and convincing evidence." *Gonzalez*, 2019 WL 330906, at *6. In that context, "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." *Id.* at *7. In light of the liberty interest at stake, due process requires no less, whether the statute of detention is § 1226(a) or § 1226(c). *See Addington v. Texas*, 441 U.S. 418, 427 (1979) ("We conclude that the individual's interest in the outcome of a civil [detention] proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his Petition for Writ of Habeas Corpus and order the relief requested in the Petition.

//

//

//

Respectfully submitted,

Date: August 20, 2021

/s/ Michelle (Minju) Y. Cho
MICHELLE (MINJU) Y. CHO

ACLU FOUNDATION OF NORTHERN CALIFORNIA

Attorney for Petitioner