IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Lenin A. Hernández-Argujo *Petitioner*, v. Diane Witte, Acting Field Office Director, El Paso Field Office, U.S. Immigration and Customs Enforcement; Kirstjen Nielsen, Secretary of the Department of Homeland Security; Ronald Vitiello, Acting Director, U.S. Immigration and Customs Enforcement; Jefferson Beauregard Sessions III, Attorney General of the United States; Joe Renteria, Officer in Charge, El Paso Service Processing Center, *Respondents*.	Case No. EP-18-cv-276

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

David Hausman* (NY 5510011)
Michael K.T. Tan* (NY 4654208)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
dhausman@aclu.org
mtan@aclu.org

Edgar Saldivar (TX 24038188)
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
Phone: (713) 325-7011
esaldivar@aclutx.org

Carlos Spector (TX 18903500)
1430 E. Yandell
El Paso, TX 79902
Tel: 915-544-0441
Fax: (915) 544-1814
spectorimm@yahoo.com

Kristin Greer Love* (NM 150902)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103
klove@aclu-nm.org
Phone: (505) 266-5915 x 1007
Fax: (505) 266-5916

Attorneys for Petitioner
*Application for admission *pro hac vice* forthcoming.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

Lenin Hernández-Araujo sought asylum at the Texas border in May 2016. Since that time, he has been imprisoned by U.S. Immigration and Customs Enforcement ("ICE") while litigating his asylum case, even though he has never been accused of any crime and even though nearly half of the delay in his immigration proceedings was caused by a nonattorney's fraudulent representation in his case. He is currently incarcerated at the El Paso Processing Center; he has been detained for well over two years. Mr. Hernández is only 22 years old.

Throughout this time, Mr. Hernández has not received any hearing at which he could contest his detention before a neutral decisionmaker. Instead, the only administrative process that could have led to Mr. Hernández's release—the "parole" process—is conducted by the jailing authority: ICE. In response to Mr. Hernández's most recent request for parole, ICE ordered his continued detention through a form denial letter asserting that he is a flight risk, without providing any factual basis for that decision, and ignored the uncontested evidence that Mr. Hernández does not present a flight risk: he would live with his U.S. citizen uncle if released, and he has a strong incentive to appear for further proceedings, where he is pursuing an asylum claim and potentially a U-visa as a victim of a crime.

Mr. Hernández's prolonged detention violates the Due Process Clause of the Fifth Amendment. At a minimum, this Court should order an immediate bond hearing, before this Court or before an immigration judge, where the government bears the burden of justifying by clear and convincing evidence that Mr. Hernández's detention is necessary to prevent his flight or to protect public safety. Indeed, due process requires more: this Court should order Mr. Hernández's immediate release because his detention bears no reasonable relation to any government purpose and because his parole reviews fail to provide any factual basis or facially

legitimate and bona fide reason for his ongoing detention.

BACKGROUND

Statutory Background

Mr. Hernández is imprisoned under the provisions of the Immigration and Nationality Act ("INA") that govern individuals who present themselves at ports of entry and request asylum in the United States. *See* 8 U.S.C. § 1225(b)(1)(B)(ii). 8 U.S.C. § 1225(b) generally provides for the expedited removal of individuals who present at ports of entry and are deemed inadmissible on specified grounds. Section 1225(b)(1)(B)(ii) provides that individuals who are otherwise subject to expedited removal but establish a "credible fear of persecution" during an initial interview "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing before an immigration judge inside the United States. The statute defines a "credible fear" as "a significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

The statute provides that individuals in Mr. Hernández's situation—those who presented themselves at ports of entry and were screened into this country after a favorable credible fear determination—can be considered for release only through the "parole" process. 8 U.S.C. § 1182(d)(5)(A); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). ICE officers (i.e. the jailing authorities) informally conduct such reviews. Officers make parole decisions—that result in months or years of additional incarceration—by checking boxes on a form.

Even in that process, however, officers are required, under the statute, regulations, and agency guidance to consider the facts of each case. According to the statute and agency regulations, the Secretary of Homeland Security "may invoke" the parole authority "for urgent humanitarian reasons or significant public benefit" for individuals who are "neither a security

risk nor a risk of absconding." *Id.*; 8 C.F.R. § 212.5(b). In addition, a 2009 ICE Directive requires that "[e]ach alien's eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien's case," and that if an asylum-seeker establishes his identity and shows that he presents neither a flight risk nor a danger to the public, "[ICE] should, absent additional factors . . . parole the alien on the basis that his or her continued detention is not in the public interest." ICE Directive 11002.1 ¶ 6.2.

If, however, the officer misapplies this standard, fails to apply this standard, or otherwise abuses his discretion to deny parole, the noncitizen has recourse to no hearing before a neutral decisionmaker, no record, and no appeal.

Mr. Hernández's Detention

Mr. Hernández is currently imprisoned by ICE at the El Paso Service Processing Center in El Paso, Texas. Declaration of Lenin A. Hernández-Argujo ("Hernández Decl.") ¶ 4. He has been in immigration detention since May 27, 2016, or nearly 28 months. *Id.* ¶ 6.

Mr. Hernández was born in El Salvador in 1996. *Id.* ¶ 2. His uncle is a U.S. citizen, and his grandparents are lawful permanent residents. His uncle and grandparents live together in Santa Ana, California. *Id.* ¶ 34. Mr. Hernández was forced to flee El Salvador in May 2016, after he was beaten and threatened by members of MS-13, an armed gang that controls large swathes of territory in El Salvador. *Id.* ¶ 7-10.

Mr. Hernández was a student in El Salvador. *Id.* ¶ 7. On May 11, 2016, as he was walking to school, members of MS-13 approached him to demand that Mr. Hernández join the gang, sell drugs for them, and collect extortion money. *Id*. Mr. Hernández refused to be recruited because he opposed MS-13's illegal and brutal activities. *Id*. The MS-13 gang members therefore

demanded that he pay them $300 a month, threatening to kill him and his family if he did not comply. *Id.*

When Mr. Hernández responded that he did not have the money, a gang member began to beat him, striking him in the head and chest. *Id.* ¶ 8. The gang members warned Mr. Hernández that there would be trouble if he informed the police, as police officers worked for MS-13. *Id.* The gang members told Mr. Hernández that he had until the following day to decide what to do. *Id.* ¶ 9.

Fearing for his life, and unable to turn to the police for protection, Mr. Hernández left El Salvador. *Id.* ¶ 10. On or around May 27, 2016, Mr. Hernández presented himself to immigration authorities at the Paso Del Norte Port of Entry in El Paso, Texas and asked for asylum. *Id.* ¶ 11.

On June 30, 2016, an asylum officer determined that Mr. Hernández had a credible fear of persecution and referred him to immigration court to pursue his asylum claim. *Id.* ¶ 12. Initially, Mr. Hernández retained Annette Briones de Jesus to represent him in removal proceedings. Declaration of Carlos Spector ("Spector Decl.") ¶ 20, Ex A, at 22.

Mr. Hernández subsequently discovered that Ms. Briones, who had held herself out as a licensed immigration attorney, was in fact a nonlawyer. Hernández Decl. ¶ 14. ICE officials had allowed Ms. Briones to enter the El Paso Service Processing Center as an attorney and to fraudulently enter an appearance as counsel of record in Mr. Hernández's immigration proceedings. *Id.* ¶ 15.

After discovering that Ms. Briones was not a lawyer, Mr. Hernández retained new counsel: Carlos Spector. *Id.* ¶ 16. Through his new counsel, Mr. Hernández referred Ms. Briones's fraud to local and federal law enforcement agencies for prosecution on federal perjury

charges under 18 U.S.C. § 1621, arising from her unauthorized practice of law and materially false representations before federal and state agencies. *Id.* ¶ 21.

Mr. Hernández has volunteered to communicate and cooperate with ICE officials during any investigation into Ms. Briones's fraud. *Id.* ¶ 22. On January 29, 2018, Mr. Hernández submitted a request to the Office of the Inspector General of the Department of Homeland Security to review and investigate ICE misconduct in facilitating Ms. Briones's fraudulent access to Mr. Hernández and her unlawful appearance before an immigration judge. *Id.* ¶ 23; *see also* Spector Decl. ¶ 20, Ex. A, at 22-23.

As a result of Ms. Briones's fraudulent representation, Mr. Hernández had his first hearing with qualified legal representation on May 22, 2017, nearly a year after he was initially detained. Spector Decl. ¶ 8. Further delays followed: one hearing was rescheduled because Mr. Spector had quadruple bypass surgery, *id.* ¶ 10, the immigration judge issued one continuance on her own motion, *id.* ¶ 9, and the immigration court rescheduled four hearings on its own motion, *id.* ¶¶ 13, 15-16, 18. During the period in which he was represented by Mr. Spector, Mr. Hernández sought four brief continuances, in part as a result of Mr. Spector's surgery and of Mr. Hernández's transfer between detention centers, totaling approximately three and a half months. *Id.* ¶¶ 9-14.

Mr. Hernández's hearing on the merits of his asylum claim took place on April 20, 2018, nearly two years after he initially sought asylum at a port of entry. Hernández Decl. ¶ 17. At that hearing, the immigration judge found that Mr. Hernández had testified credibly in all respects, but nonetheless denied his asylum claim, holding that Mr. Hernández had not demonstrated a sufficient nexus between his fear of further persecution by MS-13 and a protected ground for asylum. *Id.* ¶ 18.

Mr. Hernández promptly appealed to the Board of Immigration Appeals. *Id.* ¶ 19. First, he argued that the immigration judge lacked jurisdiction over his case because the Notice to Appear was defective. *Id.* Second, he argued that the immigration judge erroneously denied his asylum claim. *Id.* Specifically, he noted that he had presented evidence that he was harmed on account of his political opinion (his opposition to MS-13's activities) and that he had presented evidence of past persecution (his testimony describing his beating at the hands of a member of MS-13). Mr. Hernández's appeal is still pending. *Id.*

Mr. Hernández's Parole Requests

Initially, Ms. Briones submitted parole requests on Mr. Hernández's behalf that ICE summarily denied. *Id.* ¶ 26; Spector Decl. ¶ 20, Ex. A, at 1. On June 14, 2017, Mr. Spector filed a parole request for Mr. Hernández with several supporting documents, including proof that his uncle—then a lawful permanent resident and now a naturalized U.S. citizen—could provide a home and financial support for him while he is in immigration proceedings. *Id.* ¶ 25. That request was denied. *Id.*

Mr. Hernández challenged those parole denials as a named plaintiff in a class action in the District of Columbia. In that case, he challenged ICE's failure to conduct individualized parole determinations. The court held that ICE's failure to do so violated its own parole directive, and issued a preliminary injunction requiring ICE to conduct new, individualized determinations. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018); Hernández Decl. ¶ 27. None of the claims brought in that action are being litigated in this action.

After that preliminary injunction, Mr. Hernández sought a new parole determination with his new counsel. That new parole request relied on documents showing that Mr. Hernández's

uncle would be a reliable sponsor, including copies of identity documents, of pay stubs, and a 2017 tax return. Spector Decl. ¶ 20, Ex A, at 5-20.

Mr. Hernández's new parole request also noted that Ms. Briones's fraudulent representation could make Mr. Hernández eligible for a U-visa, a form of immigration relief available to victims of crimes who cooperate with law enforcement. *Id.* at 2. The request noted that the delay by the ICE Office of the Inspector General in responding to Mr. Hernández's complaint has led to a corresponding delay in filing such an application, further prolonging Mr. Hernández's detention. *Id.*

In response, Mr. Hernández received a form letter with boxes ticked next to the sentences: "You have not established to ICE's satisfaction that you are not a flight risk," "Imposition of a bond or other conditions of parole would not ensure, to ICE's satisfaction, your appearance at required immigration hearings pending the outcome of your case," and "ICE previously provided you with a written decision declining to grant parole, and you have failed to provide additional documentation or to demonstrate any significant changed circumstances which would alter ICE's previous determination." Spector Decl. ¶ 21, Ex B, at 1-2.

The parole denial included no facts. *Id.* For example, the denial did not address Mr. Hernández's evidence that he would live with his recently naturalized U.S. citizen uncle, Juan Carlos Araujo Hernández. *Id.* Nor did the denial address the fraudulent misrepresentation that delayed and prejudiced Mr. Hernández's immigration proceedings, nor his eligibility for a U-visa as a victim of perjury, which would create an incentive for him to appear for subsequent hearings. *Id.*

The denial, in stating that Mr. Hernández had not "provide[d] additional documentation or . . . demonstrate[d] any significant changed circumstances," also did not acknowledge or

address the extensive documentary evidence, in the form of pay stubs and a 2017 tax return, that Mr. Hernández's uncle has a steady income and could support him if released. *Id.*

Mr. Hernández is only 22 years old and has now spent a significant portion of his life in ICE custody. Hernández Decl. ¶ 2. Throughout his nearly 28 months in the United States, Mr. Hernández has lived behind bars in the El Paso Service Processing Center. *Id.* ¶ 4, 6.

Mr. Hernández misses his family and his freedom, *id.* ¶ 39, and his prolonged detention has caused him psychological harm. A recent psychological evaluation found that Mr. Hernández is suffering from Major Depression and Posttraumatic Stress Disorder largely caused by "fear for his safety if deported to El Salvador and distress over the circumstances of prolonged and indefinite detention." Spector Decl. ¶ 22, Ex. C (Psychological Evaluation by David Gangsei, Ph.D.), at 7.

Mr. Hernández does not understand why he has been jailed for over two years despite never having committed a crime, having applied for asylum correctly, and having cooperated with authorities in the investigation of federal perjury charges. In light of his asylum appeal, his possible eligibility for a U-visa, and his willingness to cooperate in an investigation into Ms. Briones's perjury, Mr. Hernández's removal case is unlikely to be resolved for months or years, during which time he faces continued detention by ICE.

ARGUMENT

I. AT A MINIMUM, DUE PROCESS REQUIRES THAT THE GOVERNMENT JUSTIFY MR. HERNÁNDEZ'S PROLONGED IMPRISONMENT AT AN INDIVIDUALIZED HEARING BEFORE A NEUTRAL DECISIONMAKER.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Time and again, to vindicate that protection, courts

have required the government to provide a hearing before a neutral decisionmaker when it subjects people to civil detention for lengthy periods. Under these established principles, immigration confinement without a hearing becomes unconstitutional when it becomes unreasonably prolonged. Indeed, this Court recently ordered a bond hearing, on constitutional avoidance grounds, for an arriving noncitizen who had been detained for less time than Mr. Hernández has while pursuing his asylum claim. *Maldonado v. Macias*, 150 F. Supp. 3d 788, 793, 812 (W.D. Tex. 2015).

This Court should, at a minimum, reach the same outcome here that it reached in *Maldonado*. Mr. Hernández's detention is unreasonably prolonged under the Court's analysis in *Maldonado*, and indeed, under any conceivable standard. Therefore, the Court should—if it does not require Mr. Hernández's outright release, *see* Point II, *infra*—order an immediate bond hearing, either in this Court or before an immigration judge, where the government must show by clear and convincing evidence that Mr. Hernández's ongoing detention is justified based on flight risk or dangerousness.

A. Prolonged Detention Without an Individualized Hearing on Flight Risk and Danger Violates the Due Process Clause.

Due process prohibits prolonged immigration detention without an individualized hearing. An individualized hearing that tests the government's justification for incarceration forms the bedrock procedural protection against prolonged arbitrary imprisonment. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight risk at custody hearings); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on lack of volitional control

and dangerousness). Outside the national security context, the Supreme Court has never authorized prolonged civil confinement without the bedrock protection of an individualized hearing as to the need for incarceration. *See Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

Every circuit to address the issue likewise has found that prolonged mandatory immigration detention without an individualized hearing presents serious due process concerns. Four of them construed immigration detention statutes to require bond hearings after detention becomes prolonged to avoid serious constitutional problems. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1214 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018); *Reid v. Donelan*, 819 F.3d 486, 499 (1st Cir. 2016), *cert. denied*, 138 S. Ct. 1547 (2018), and *opinion withdrawn on reconsideration*, 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018); *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). And the Third Circuit held prolonged immigration incarceration without a bond hearing violates the Due Process Clause. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (lengthy detention without hearing "a violation of the Due Process Clause").

These principles apply regardless of whether a noncitizen was apprehended within the country or, like Mr. Hernández, presented himself at a port of entry, passed a credible fear interview, and is pursuing asylum. Indeed, this Court has specifically concluded that "it is clear that aliens—even inadmissible aliens . . . are entitled to some constitutional protections, including some amount of due process," *Maldonado*, 150 F. Supp. 3d at 800, and that those due process rights place limits on immigration detention. In reaching that conclusion, this Court

noted that the Sixth Circuit has specifically held that applicants for admission and other noncitizens share the same due process rights not to be subjected to unreasonably prolonged detention. *Id.* In *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (en banc), the court evaluated a challenge to the prolonged detention of Cubans who, like Mr. Hernández, were stopped by immigration officials at the border. The government argued "that the detention of excludable aliens cannot raise constitutional concerns because such detention 'does not *implicate* the Fifth Amendment.'" *Id.* at 409. The Court noted that it "could not more vehemently disagree," *id.*, and concluded that "indefinite detention of excludable aliens raises *the same* constitutional concerns under those clauses as the indefinite detention of aliens who have entered the United States," *id.* at 410 (emphasis added); *see also Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999), *amended* (Dec. 30, 1999) (holding that due process requires that "excludable aliens" receive "an opportunity for an evaluation of the individual's current threat to the community and his risk of flight").

Indeed, any other conclusion is untenable. "If excludable aliens were not protected by even the substantive component of constitutional due process, . . . we do not see why the United States government could not torture or summarily execute them." *Rosales-Garcia*, 322 F.3d at 410; *see also Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) (noting that "sure[ly]" even noncitizens who have conclusively lost the right to live here "cannot be tortured"). And the Fifth Circuit has agreed, concluding that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." *Maldonado*, 150 F. Supp. 3d at 800 (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir.1987)).

The Supreme Court's recent decision in *Jennings*, 138 S. Ct. 830, abrogated the statutory holdings of this Court and several Courts of Appeals but did nothing to alter the conclusion—which underpinned those holdings—that unreasonably prolonged immigration detention without an individualized hearing would violate the Due Process Clause. The Supreme Court held in *Jennings* that the *statute* under which Mr. Hernández is detained authorizes detention without a bond hearing. *Id.* at 842-47. But the Court conspicuously declined to suggest that prolonged mandatory detention without a bond hearing is constitutionally permissible, instead remanding that question for the Ninth Circuit to decide in the first instance. *Id*. at 851 ("[W]e do not reach [the constitutional] arguments."). *Jennings* therefore did nothing to disturb the established conclusion that Due Process prohibits prolonged immigration detention without an individualized hearing. The Court should apply that established principle here.

Indeed, in applying that principle, this Court may rely both on its own recent decision in *Maldonado*, 150 F. Supp. 3d 788, and on the many district court decisions likewise requiring bond hearings for arriving asylum seekers in similar or less severe circumstances. *See, e.g.*, *Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497 (S.D.N.Y. Aug. 20, 2018) (holding that due process required a bond hearing for arriving asylum seeker who had been detained for less than a year); *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1018 (N.D. Cal. 2013) (requiring bond hearing after seven months of detention); *Bautista v. Sabol*, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012) (requiring bond hearing after 26 months of detention); *Heredia v. Shanahan*, 245 F. Supp. 3d 521, 527 (S.D.N.Y. 2017), *judgment vacated as moot, appeal dismissed sub nom. Heredia v. Decker*, No. 17-1720, 2018 WL 1163180 (2d Cir. Jan. 2, 2018) (holding that due process required a bond hearing after 21 months of detention).

B. Mr. Hernández's 22-Month Detention Is Unreasonably Prolonged By Any Standard.

Mr. Hernández's more than two-year-long detention without an individualized hearing violates these established due process principles. Its length alone compels an individualized hearing, and such a hearing is even more clearly required in light of the government's role in delaying Mr. Hernández's proceedings (by allowing a nonlawyer to enter his detention center) and the likelihood that he faces months or years more in detention.

First, Mr. Hernández's nearly 28-month imprisonment is unreasonably prolonged on the basis of its length alone. *See Diop*, 656 F.3d at 232 (reasonableness is a "function of the length of the detention"). Indeed, *six* months was the period of presumptive unreasonableness that the Supreme Court adopted in *Zadvydas*, on constitutional avoidance grounds, for individuals for whom removal was not reasonably foreseeable. *Zadvydas*, 533 U.S. at 701 (noting that "Congress previously doubted the constitutionality of detention for more than six months"). And the Second and Ninth Circuits adopted six months—again on constitutional avoidance grounds—as the period after which the government was required to hold bond hearings for individuals in removal proceedings. *Rodriguez*, 804 F.3d at 1065, 1079-81; *Lora*, 804 F.3d at 614-16.

Even where courts have adopted a fact-specific approach to whether detention is unreasonably prolonged, they have understood a year as setting a presumptive outer limit on detention without an individualized hearing. *See Sopo*, 825 F.3d at 1217 (describing one year of detention as typically marking "the outer limit of reasonableness"); *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (holding that detention was unreasonable "certainly by the time Chavez-Alvarez had been detained for one year"); *Reid*, 819 F.3d at 501 (affirming district court's order that the government grant a bond hearing for petitioner detained 14 months).

Although the statutory holdings of these cases have been abrogated by *Jennings*, the constitutional reasoning underpinning those holdings remains persuasive.[1] Neither the Supreme Court nor any Court of Appeals has suggested that nearly 28 months of hearingless immigration detention is permissible under the Due Process Clause. The Court should therefore hold that Mr. Hernández is entitled to a bond hearing on the basis of the length of his detention alone. *See Maldonado*, 150 F. Supp. 3d at 809-11 (holding that the petitioner's 26-month detention was unreasonably prolonged despite the absence of any government delay).

But Mr. Hernández's detention is also unreasonably prolonged for the additional reasons that the government is a significant cause of the delay and that Mr. Hernández faces months or years more in detention should he not receive a bond hearing.

First, much of Mr. Hernández's detention has been caused by ICE's failure to prevent a nonattorney from entering the detention center to enter an appearance on Mr. Hernández's behalf. *See* Spector Decl. ¶¶ 3-8 & ¶ 20, Ex A, at 22. And much of the rest of the delay was caused by the immigration court's repeated rescheduling of Mr. Hernandez's hearings. *Id.* ¶¶ 9, 13, 15-16, 18. Indeed, since Mr. Hernández obtained the services of a lawyer who is a member of the bar, he has only requested four continuances totaling approximately three and a half

[1] As this Court concluded in *Maldonado*, 150 F. Supp. 3d at 802-03, that reasoning is also consistent with the Supreme Court's holding in *Demore v. Kim*, 538 U.S. 510 (2003). *Demore* upheld detention without a bond hearing during removal proceedings based on based on two critical limitations: (1) the petitioner's concession of deportability; and (2) the Supreme Court's understanding that proceedings under Section 1226(c) are typically "brief." *See, e.g.*, *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."). Indeed, as this Court has recognized, "[u]ltimately, the Demore Court tied its holding to this brevity: 'We hold that Congress . . . may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.'" *Maldonado*, 150 F. Supp. 3d at 803 (quoting *Demore*, 538 U.S. at 513). In *Demore*, the Supreme Court believed that, for 85% of cases, the average detention time was 47 days and that, in outlier cases, detention would "last[] . . . about five months in the minority of cases in which the alien cho[se] to appeal." 538 U.S. at 529-30. Nowhere in *Demore* did the Court countenance detention more than five times longer than what it believed was an outlier length.

months—a small fraction of the total time he has been detained.[2] *Id.* at ¶¶ 9-14. And those continuances were in part due to Mr. Spector's health issues and ICE's decision to transfer Mr. Hernández. *Id.* The government is responsible for the large majority of the delay.

Second, if Mr. Hernández does not receive a bond hearing and his appeal is granted, he is likely to remain in detention for months or even years while his asylum application is adjudicated on remand, with further appeals likely to follow. He has the right to remain in the United States during this time. *See* H.R. Rep. No. 104-469, pt. 1, at 158 (1996) ("If the alien meets this threshold, *the alien is permitted to remain in the U.S.* to receive a full adjudication of the asylum claim—*the same as any other alien in the U.S.*") (emphasis added). And even if Mr. Hernández's appeal is not granted, he could petition for review of his order of removal and seek a stay of removal. He would remain detained during that period if this Court does not order a bond hearing.

Mr. Hernández's hearingless detention has become unreasonably prolonged under the Due Process Clause, and he should, at a minimum, receive a bond hearing before this Court or an immigration judge.[3]

---

[2] Mr. Hernández detention would be unreasonable regardless even if the government had not caused any delay, since "[a]n alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him." *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003); *see also Maldonado*, 150 F. Supp. 3d at 809.

[3] Parole determinations plainly do not satisfy the hearing requirement because they lack a record, a neutral decisionmaker, and the possibility of appeal. For example, the Ninth Circuit has explained that six-month administrative custody reviews for individuals subject to final orders of removal do not satisfy due process because "they do not provide for an in-person hearing, they place the burden on the alien rather than the government, and they do not provide for a decision by a neutral arbiter such as an immigration judge." *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011). Indeed, the Supreme Court has required hearings that meet these standards where far lesser interests are at stake. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (in-person hearing required for the recovery of excess Social Security payments).

C. At a Minimum, the Court Should Require a Bond Hearing Before a Neutral Decisionmaker at Which the Government Bears the Burden of Showing, by Clear and Convincing Evidence, Why Mr. Hernández Should Not Be Released.

When a hearing takes place, due process requires the government to show by clear and convincing evidence, that Mr. Hernández should remain detained. To justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that the noncitizen is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Where the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the government bore the burden of proof at least by clear and convincing evidence. *See Salerno*, 481 U.S. at 752 (upholding pre-trial detention where "full-blown adversary hearing," requiring "clear and convincing evidence" and a "neutral decisionmaker"); *Foucha*, 504 U.S. at 81-83 (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee); *see also Maldonado*, 150 F. Supp. 3d at 812 (requiring bond hearing without specifying government's burden, but relying on opinions—including *Rodriguez*, 804 F.3d at 1090—requiring that the government justify detention by clear and convincing evidence); *Perez*, 2018 WL 3991497, at *6 (holding that due process required government to demonstrate by clear and convincing evidence at bond hearing that arriving asylum seeker should remain detained). If this Court orders a bond hearing, the government should bear the burden of proof by clear and convincing evidence.

II. BECAUSE MR. HERNÁNDEZ'S PROLONGED IMPRISONMENT IS NOT REASONABLY RELATED TO ANY GOVERNMENT PURPOSE, THE COURT SHOULD ORDER HIS RELEASE.

In this case, due process requires not only a bond hearing, but outright release, because Hernández's prolonged detention bears no reasonable relation to a government purpose. Indeed,

Mr. Hernández should also be released because ICE had no factual basis or facially legitimate and bona fide reason for deeming him a flight risk and denying him parole.

A. Mr. Hernández's Detention Bears No Reasonable Relation to Any Government Purpose.

Under fundamental due process principles, detention must "bear [a] reasonable relation to the purpose for which the individual [was] committed." *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Where confinement becomes prolonged, due process requires enhanced protections to ensure that detention remains reasonable in relation to its purpose. *Id*. at 701 ("for detention to remain reasonable," greater justification is needed "as the period of . . . confinement grows"); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited.").

Arriving asylum seekers, like Mr. Hernández, may no longer be detained when their detention ceases to bear any reasonable relation to a government purpose. The Supreme Court has recognized only two valid purposes for civil immigration detention: to mitigate the risks of danger to the community and to prevent flight. *Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 528. If the government can protect these interests without imprisonment, then such imprisonment serves no valid purpose and violates the Due Process Clause.

Mr. Hernández's detention bears no relation to the government's interests in mitigating risk of danger to the community or in preventing flight. Even ICE has never suggested—nor could it—that Mr. Hernández, a student who has never been accused of any crime, poses a danger to the community. And similarly, ICE has provided no legitimate reason to believe that Mr. Hernández presents a flight risk. Indeed, the only written reasons that ICE has offered for

continuing to detain Mr. Hernández are found in checked boxes next to the pre-printed phrases "You have not established to ICE's satisfaction that you are not a flight risk," "Imposition of a bond or other conditions of parole would not ensure, to ICE's satisfaction, your appearance at required immigration hearings pending the outcome of your case," and "ICE previously provided you with a written decision declining to grant parole, and you have failed to provide additional documentation or to demonstrate any significant changed circumstances which would alter ICE's previous determination." Spector Decl. ¶ 21, Ex B, at 1-2. Two of those phrases simply assert, without explanation, ICE's conclusion that Mr. Hernández is a flight risk that requires his detention. The third does not acknowledge the documentation of the identity and financial circumstances of Mr. Hernández's sponsor.

More generally, those boilerplate reasons ignore the extensive evidence, which Mr. Hernández presented in his parole requests, that he will appear at future hearings. As Mr. Hernández has explained, he will, if released, live with his uncle—a U.S. citizen who lives and works in Santa Ana, California. Spector Decl. ¶ 20, Ex A, at 5-20. Even apart from his sponsor, Mr. Hernández has a strong incentive to appear for further immigration proceedings: he has a good chance of obtaining the right to remain in the United States, either through his asylum claim or through a U-visa application that may be available to him as a result of the fraudulent acts of the nonattorney who initially represented him.

Finally, even if there were any valid government purpose served by detaining Mr. Hernández, nearly two years of imprisonment would not bear any reasonable relation to that purpose. *See, e.g.*, *Nadarajah v Gonzales*, 443 F.3d 1069 at 1083-84 (9th Cir. 2006) (granting appellate motion for release after years of detention); *Ly*, 351 F.3d at 271-72 (affirming release of petitioner after 18 months of detention). This is especially true given that Mr. Hernández is

prepared to comply with reasonable conditions of supervision, including electronic monitoring, which is highly effective at ensuring appearance at removal hearings.[4]

In sum, Mr. Hernández's nearly 28-month-long detention bears no reasonable relation to the government's goal of preventing his flight.

B. ICE Denied Mr. Hernández Parole Without Any Factual Basis or Facially Legitimate and Bona Fide Reason for Doing So.

Mr. Hernández's continued detention also violates due process for the additional reason that ICE denied Mr. Hernández parole without any factual basis or facially legitimate and bona fide reason for doing so.

To satisfy due process, a parole decision must "have articulated *some* individualized facially legitimate and bona fide reason for denying parole, and *some* factual basis for that decision in each individual case" that is "reasonably supported by the record." *Marczak v. Greene*, 971 F.2d 510, 517-18 (10th Cir. 1992).[5] *See also Sierra v. INS*, 258 F.3d 1213, 1219

---

[4] See Mark Noferi, A Humane Approach Can Work: the Effectiveness of Alternatives to Detention for Asylum Seekers, American Immigration Council 2 (July 2015), https://www.americanimmigrationcouncil.org/research/humane-approach-can-workeffectiveness-alternatives-detention-asylum-seekers (reporting the "very high rates of compliance with proceedings by asylum seekers who were placed into alternatives to detention"); see also U.S. Government Accountability Office ("GAO"), Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness 30-31 (Washington, DC: GAO, 2014), http://www.gao.gov/assets/670/66691 l.pdf. (from fiscal years 2011 to 2013, 95 percent of participants in ICE's "full-service" Intensive Supervision Appearance Program ("ISAP") appeared at their scheduled removal hearings).

[5] In *Maldonado*, 150 F. Supp. 3d at 794-95, this Court held that it lacked jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii), over the petitioner's challenge to his discretionary parole denial. But the Court did not consider *Sierra*, 258 F.3d at 1217, in which the Tenth Circuit specifically concluded that 8 U.S.C. § 1252(a)(2)(B)(ii) did *not* strip courts of jurisdiction to consider a such a challenge because "[i]t is never within the Attorney General's discretion to act unconstitutionally." *Sierra* also concluded that 8 U.S.C. § 1226(e) did not apply. *Id.* at 1217-18. The Court in *Maldonado* relied on the Fifth Circuit's decision in *Loa–Herrera v. Trominski*, 231 F.3d 984, 990-91 (5th Cir. 2000). However, *Loa-Herrera* concerned a separate provision limiting judicial review—8 U.S.C. § 1226(e)—that applies to decisions to deny "conditional parole" to noncitizens under 8 U.S.C. § 1226(a). See *Loa-Herrera*, 231 F.3d at 990 (describing conditional parole under section 1226(a)); 8 U.S.C. 1226(e) (limiting review of discretionary judgments "regarding the application *of this section*") (emphasis added). This case, however, does not

(10th Cir. 2001) (reviewing and affirming revocation of parole where the officer had described the factual basis—a citation for fighting—that was the reason for the revocation); *Nadarajah*, 443 F.3d at 1082-84 (holding that the government abused its discretion, and ordering the petitioner released, where the government had based its parole denial on "facially implausible evidence" and where the petitioner's detention was unreasonably prolonged).

The only reasons given for Mr. Hernández's parole decision were three ticked boxes on a form letter. The denial of Mr. Hernández's parole request addressed none of the facts he offered in support of his argument that he presents no risk of flight. Indeed, those ticked boxes articulate *no factual basis whatsoever* for denying Mr. Hernández's parole request. The Court should order his immediate release.

CONCLUSION

The Court should grant the petition and order that ICE release Mr. Hernández. In the alternative, the Court should require that Mr. Hernández receive a bond hearing before this Court or an immigration judge at which the government must demonstrate by clear and convincing evidence why Mr. Hernández should remain detained.

---

involve a denial of conditional parole, but rather a denial of parole under 8 U.S.C. § 1182. This Court retains jurisdiction to review, under the Due Process Clause and that statute, whether ICE presented a facially legitimate and bona fide factual basis for the denial of Mr. Hernandez's parole request.

Dated: September 21, 2018

Respectfully submitted,

David Hausman* (NY 5510011)
Michael K.T. Tan* (NY 4654208)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
dhausman@aclu.org
mtan@aclu.org

Edgar Saldivar (TX 24038188)
ACLU Foundation of Texas, Inc.
P.O. Box 8306
Houston, TX 77288
Phone: (713) 325-7011
esaldivar@aclutx.org

/s/ Carlos Spector
Carlos Spector (TX 18903500)
1430 E. Yandell
El Paso, TX 79902
Tel: 915-544-0441
Fax: (915) 544-1814
spectorimm@yahoo.com

Kristin Greer Love* (NM 150902)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103
klove@aclu-nm.org
Phone: (505) 266-5915 x 1007
Fax: (505) 266-5916

Attorneys for Petitioner

*Application for admission *pro hac vice* forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2018, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing.

Dated: September 21, 2018

Respectfully submitted,

/s/ Carlos Spector
Carlos Spector (TX 18903500)