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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRISTIAN DE JESUS CARDENAS BRAVO,

Petitioner,

v.

PAUL PERRY, *et al.*,

Respondents.

Case No. 1:25-cv-463

PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE TO HABEAS PETITION

Petitioner Cristian Cardenas Bravo has been detained in a prison-like immigration facility for over sixteen months, primarily in a Special Management Unit that ICE's staff agree is ill-equipped to care for him. In its response to the habeas petition, the Government makes arguments that this Court has routinely rejected over the last decade. *See, e.g., Gutierrez v. Hott*, 475 F. Supp. 3d 492, 496-97 (E.D. Va. 2020) (listing cases). In this Court, it is "well-established that [non-citizens] detained under § 1226 must receive bond hearings if their lengthy detentions violate Due Process." *See Bah v. Barr*, 409 F. Supp. 3d 464, 467 (E.D. Va. 2019). Distracting from this Court's well-established precedent, the Government primarily relies on two Supreme Court cases – *Demore v. Kim*, 538 U.S. 510 (2003) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). But neither of these cases is inconsistent with the oft-utilized *Portillo* factors, which the Court should apply here. Most, if not all, of the *Portillo* factors favor Mr. Cardenas and warrant a constitutionally adequate bond hearing. At the bond hearing, Mr. Cardenas respectfully requests that this Court order the Government to bear the burden of proof to justify his detention by clear and convincing evidence and that the adjudicator consider his ability to pay and alternatives to detention.

The Government also quickly dismisses Mr. Cardenas' Rehabilitation Act claim, failing to engage with the record on how ICE's acts and omissions have impeded his participation in the immigration removal process. *See Fraihat v. ICE*, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020), *rev'd on other grounds*, 16 F.4th 613 (9th Cir. 2021) (Ruling that a "programmatic 'benefit'" in a Rehabilitation Act claim is "participation in the removal process."). For months, despite the recommendation of ICE's medical staff that he be transferred to a facility with a Mental Health Unit and SDDO's Mullan's assurances that they were seeking a suitable facility, Respondents have kept Mr. Cardenas in Caroline's Special Management Unit. At his most recent April 10, 2025, immigration hearing, Mr. Cardenas testified that his mental health has worsened in ICE detention.[1] The record shows that Mr. Cardenas rarely made eye contact, held his head in his hands, cried, and was silent or struggled to respond to participate in his removal process due to his declining mental health. For the reasons stated in the petition, Dkt. No. 1, and in this reply brief, Mr. Cardenas' prolonged detention without a reasonable accommodation – conditional release from custody to seek adequate mental health care – violates his rights under the Rehabilitation Act.

ARGUMENT

I. Mr. Cardenas' Continued Detention Violates the Due Process Clause.

A. This Court should analyze Mr. Cardenas' due process claim under the *Portillo* factors.

For nearly a decade, this Court's consistent law and practice have been to evaluate the individual circumstances of noncitizens subject to prolonged detention without bond to determine whether due process entitles them to a court-ordered bond hearing. *See, e.g., Abreu v. Crawford*,

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[1] Undersigned counsel Ms. Blandon attended this hearing as an observer via Webex and took detailed notes. Petitioner plans to separately move for submission of the Digital Audio Recording (DAR) as supplemental evidence in support of the petition. Alternatively, or additionally, Petitioner may move for submission of the written transcript of the hearing, once it is prepared and obtained by counsel.

No. 1:24-cv-01782, 2025 WL 51475 (E.D. Va. Jan. 8, 2025); *Santos Garcia v. Garland*, No. 1:21-cv-742, 2022 WL 989019 (E.D. Va. Mar. 31, 2022) (Alston, J.); *Martinez v. Hott*, 527 F. Supp. 3d 824 (E.D. Va. 2021) (Alston, J.); *Deng v. Crawford*, No. 2:20-cv-199, 2020 WL 6387326 (E.D. Va. Oct. 30, 2020); *Songlin v. Crawford*, No. 3:19-cv-895, 2020 WL 5240580 (E.D. Va. Sep. 2, 2020); *Gutierrez*, 475 F. Supp. 3d at 496-97; *Urbina v. Barr*, 1:20-cv-325, 2020 WL 3002344 (E.D. Va. June 4, 2020); *Palomares-Gastelum v. Barr, et al.*, No. 1:19-cv-1428, Order (Dkt. No. 28) (E.D. Va. Feb. 19. 2020); *Bah*, 409 F. Supp. 3d at 467; *Portillo v. Hott*, 322 F. Supp. 3d 698 (E.D. Va. 2018); *Mauricio-Vasquez v. Crawford*, No. 1:16-cv-01422, 2017 WL 1476349, at *1 (E.D. Va. Apr. 24, 2017); *Haughton v. Crawford*, No. 1:16-cv-634, 2016 WL 5899285, at *10 (E.D. Va. Oct. 7, 2016).

The Government instead relies on the only case in the last decade in which this Court departed from this well-established caselaw, without any reasoning. Resp. at 7 (citing *McDougall v. Crawford*, 1:24-cv-00124, Order (Dkt. No. 16) (E.D. Va. Sept. 20, 2024) (Hilton, J.)). The Government also cites *Castaneda v. Perry* in support of its position that the *Portillo* factors are not binding authority, but *Castaneda* is distinguishable because it concerned a noncitizen subject to detention under § 1231, not § 1226(c), the provision governing Mr. Cardenas' detention. Resp. at 7, n.1 (citing 2022 WL 46248321 at *4, n.7 (E.D. Va. Sept 30, 2022), *affirmed*, (95 F.4th Cir. 2024)). The Government neglected to provide the full quote from *Castaneda,* which shows that *Portillo* applies to § 1226(c) detention. 2022 WL 46248321 at *4, n.7 "The Court does not consider the application of *Portillo* here because it is not binding on this Court *and, as Petitioner concedes,* Portillo *arose in the context of, and is generally applied to, prolonged detention under § 1226(c), not § 1231.*") (emphasis added).

The Government primarily relies on *Demore* for the proposition that no one detained under § 1226(c) is entitled to receive a bond hearing, no matter how long their detention lasts. This is ironic, given that Justice Kennedy's concurrence in *Demore* was the origin of the law on which Petitioner relies. The *Demore* court rejected a *facial* challenge to 8 U.S.C. § 1226(c) but expressly left open *as-applied* challenges such as this one. 538 U.S. at 532 ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident [noncitizen] such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (Kennedy, J., concurring).

This Court has repeatedly noted this important distinction between facial challenges and as-applied challenges, as have circuit courts. *See, e.g. Bah*, 409 F. Supp. 3d at 470 (noting that *Demore* "recognized that the prolonged detention of [noncitizens] absent justification could violate Due Process"); *Black v. Decker*, 103 F.4th 133, 142 (2d Cir. 2024) ("Critically, however, *Demore* and *Jennings* leave open the question whether prolonged detention under section 1226(c) without a bond hearing will *at some point* violate an individual detainee's due process rights.") (emphasis in original). And this distinction gave rise to this Court's creation of the *Portillo* factors, *see* 322 F. Supp. 3d at 706, which has been nearly universally applied thereafter. *See, e.g., Martinez*, 527 F. Supp. 3d at 836.

The Government argues that because removal proceedings have a definite termination point, "mandatory detention under § 1226(c) is constitutional so long as it continues to serve its purpose of preventing risk of flight or dangerousness." Resp. at 10. But this is the whole point of the *Portillo* analysis: to ensure, on a case-by-case basis, that a neutral adjudicator evaluates whether a noncitizen is a flight risk or danger. To the extent the Government means that § 1226(c)

detention is constitutional so long as ICE *alleges* someone is a flight risk or a danger, this is nonsensical. Most noncitizens subject to mandatory detention have no statutory or regulatory entitlement to any individualized review of their custody whatsoever, not even an internal review by ICE. This standard would lead to nearly every noncitizen remaining detained until the end of their proceedings without the opportunity for an as-applied challenge. *See Santos Garcia*, 2022 WL 989019, at *5 (noting that under a "'purpose-based standard' derived from *Demore*. . . it is difficult to imagine a mandatory detention scenario that would fail this purposive standard . . . [and] it is also difficult to square this position with the language of *Demore* itself"). ICE may not deprive noncitizens of liberty indefinitely during their removal proceedings with a mere allegation of dangerousness or flight risk. "At some point," prolonged detention under § 1226(c) will violate an individual detainee's due process rights. *Black*, 103 F.4th at 142 (citing *Demore* and *Jennings*).

The Government proposes, with little explanation, that the Court should apply the three-factor test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), instead of *Portillo*. Resp. at 13. For over a decade, this Court has used the *Portillo* factors, which are derived from *Mathews* and its commitment to an individualized due process analysis. *See Portillo*, 322 F. Supp. 3d at 705 (citing *Mathews* and observing that its analysis is "consistent with how the Due Process Clause has traditionally been understood"). This Court applied the *Portillo* factors as recently as three months ago, and this Court should do the same here. *See Abreu,* 2025 WL 51475 at *5.

This Court has at least once applied *Mathews* in addition to *Portillo* and come to the same conclusion under both. *See, e.g., Santos Garcia*, 2022 WL 989019, at *8 (all three *Mathews* factors tipped in Petitioner's favor). As to the first factor, the Government is incorrect that Mr. Cardenas has a limited liberty and suggests that he is an "illegal [noncitizen]." Resp. at 14. The Government also incorrectly implies that he is in withholding-only proceedings. Resp. at 15. Mr. Cardenas is a

Legal Permanent Resident with a strong liberty interest. *Demore*, 538 U.S. at 532-33, ("[A] lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (Kennedy, J., concurring). The interest in bodily liberty is the most significant liberty interest there is, and "there can be no serious dispute that Petitioner's liberty interest cuts in favor of his request for a bond hearing." *Santos Garcia*, 2022 WL 989019, at *8.

The Government argues that the second factor – the risk of erroneous deprivation of liberty through the procedures used – weighs in their favor because the statutes and regulations already provide some protections to noncitizens detained under § 1226(c). But the narrow exception in § 1226(c) permitting release for witness protection is not an "extensive protection." Resp. at 15. Regardless, as the period of confinement lengthens, it becomes even more important to provide additional procedural protections because the risk of erroneous deprivation has grown. *Id.* at *8. Over time, "there is most certainly a heightened risk that Petitioner is being erroneously deprived of his strong interest in bodily liberty." *Cardona Tejada v. Crawford*, 2021 WL 2909587 (E.D. Va.) at *3. Thus, the second *Mathews* factor weighs in Mr. Cardenas' favor.

The Government argues that the third factor is in its favor because "the government's interests in maintaining the existing procedures are legitimate and significant." Resp. at 16. But "even these interests are overborn by extraordinary facts," and where the habeas petition seeks a bond hearing, "the Government's administrative burden of conducting such a bond hearing is minimal." *Santos Garcia*, 2022 WL 989019, at *9. There is no reason to depart from applying *Portillo* here, but if the Court were to, this Court should still grant Mr. Cardenas' petition.

B. The *Portillo* factors favor Mr. Cardenas.

As an initial matter, the Government does not meaningfully dispute that the first *Portillo* factor, the duration of detention, favors Mr. Cardenas. Resp. at 18-19. The Government merely

argues that this Court should place equal significance on the other *Portillo* factors. Resp. at 19. This runs afoul of *Portillo*, which ruled that the length of detention is "the most important" factor. *Portillo*, 322 F. Supp. 3d at 707–08. Here, because the first factor favors Mr. Cardenas, this Court should order a bond hearing for Mr. Cardenas unless *all* the other factors favor the Government. *See Bah*, 409 F. Supp. 3d at 471–72; *Songlin*, 2020 WL 5240580, at *7 (ordering a bond hearing where the second, third, and fifth factors favored the Government, the first favored the noncitizen, and the fourth was neutral).

The Government misunderstands or misrepresents the calculation of time served to understand the second factor – whether the civil detention exceeds the criminal detention for the underlying offense. Resp. at 19. There is no basis for the Government's contention that this Court should consider the time in prison that Mr. Cardenas *could have*, but did not, serve. *Id.*; *see Portillo*, 322 F. Supp. 3d at 708 (examining "the time that the [non-citizen] actually spent in criminal custody rather than just the full length of the sentence imposed") (citing *Haughton*, 2016 WL 5899285, at *9). The second factor's purpose is to ensure that noncitizens generally do not spend more time in mandatory immigration detention than they already served in prison for the offense that prompted their immigration detention. Since Mr. Cardenas has been detained by the Government for 16 months and served 28 months in criminal detention, the second factor does not favor him. But this Court may and should still grant his petition, especially in light of the other factors. *See Mauricio-Vasquez*, 2017 WL 1476349, at *4 ("As to the second factor, while the fifteen months [in ICE custody] do not exceed the three years of criminal detention Petitioner served for the underlying offense, it is already nearly half that time and so is therefore substantial. . .").

As to the third factor, the Government fails to acknowledge or offer any reasoning for its bad-faith delays. *Compare* Dkt. 1 at ¶ 43, *with* Resp. at 19-20. As explained in Mr. Cardenas' petition, DHS counsel failed to meet two deadlines set by the IJ, and the Government does not even attempt to explain such failures to this Court. *See* Resp. at 19-20; Dkt. No. 10-1, Declaration of James A. Mullan (failing to acknowledge or explain the two missed deadlines). Their failure to meet deadlines without explanation is in bad faith and tips the third factor in Mr. Cardenas' favor. *Abreu*, 2025 WL 51475 at *6 ("Because Respondents set forth no valid justification for these delays, the Court finds this [third] factor weighs in favor of [the noncitizens].")

The fourth factor asks this Court to consider legal errors that extend the duration of detention. Respondents argue that Mr. Cardenas' case has proceeded at a normal pace and that this factor should be neutral. Resp. at 20. But Respondents fail to address Mr. Cardenas' arguments as to the legal errors that extended the duration of detention, including the delay in adjudicating him legally incompetent and the Government's failure to meet two deadlines. *Compare* Dkt. 1 at ¶ 43, *with* Resp. at 19-20. As such, this fourth factor also weighs in Mr. Cardenas' favor.

Regarding the fifth factor, Mr. Cardenas reserved appeal of the IJ's decision denying relief, and he will file the appeal before the expiration of the 30-day deadline. Since neither party can predict the outcome of this appeal, the fifth factor is neutral. But with other factors favoring Mr. Cardenas, the Court can and should still grant his petition. *Santos Garcia*, 2022 WL 989019, at *5 (finding that fifth factor "stands in equipoise" but granting petition).

C. The Government must bear the burden of proof at the bond hearing, and the adjudicator must consider the ability to pay and alternatives to detention.

In each of their most recent decisions ordering a bond hearing as a remedy to prolonged mandatory detention, the majority of jurists of this Court have expressly placed the burden of proof on the Government to justify continued detention. *See Abreu*, 2025 WL 51475 at *6 (Nachmanoff,

J.), *Gutierrez*, 475 F. Supp. 3d at 499 (Brinkema, J.); *Bah*, 409 F. Supp. 3d at 72 (Ellis, J.); *Mbalivoto v. Hott*, 527 F. Supp. 3d 838, 852 (E.D. Va. 2020) (Trenga, J.). The same is true for the last two federal circuit courts to reach this issue. *See Black,* 103 F. 4th 133 at 157; *German Santos, 965 F. 3d at* 214. Thus, a consensus is clearly emerging that when the Government subjects a noncitizen to prolonged mandatory detention in violation of due process, the Government must be the one to justify the noncitizen's continued detention.[2]

This consensus is consistent with the law of the Supreme Court and the Fourth Circuit. The burden of proof at bond hearings was not at issue in any of the Supreme Court cases the Government cites. *Demore*, 538 U.S. 510 (addressing whether § 1226(c) is facially constitutional); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (detention of unaccompanied juvenile noncitizens who are not eligible for standalone bond hearings); *Carlson v. Landon*, 342 U.S. 524, 543 (1952) (affirming the detention of Communists without bail under the framework of the Subversive Activities Control Act, with four Justices dissenting). While the burden of proof was at issue in *Miranda*, that case merely held that placing the burden on noncitizens in standard bond hearings at the outset of their detention did not violate due process. 34 F.4th 338, 365–66 (4th Cir. 2022). It is quite a different situation when a court finds that an individual's prolonged detention violates due process and places the burden of proof on the Government at the court-ordered bond hearing as a remedy. *See Jarpa v. Mumford*, 211 F. Supp. 3d 706, 722 (D. Md. 2016) (observing that placing burden on non-citizen would be "inconsistent with having found [their] continued detention unconstitutional.").

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[2] To the extent it is appropriate to apply the *Mathews* factors in this case, it would be with respect to the procedures at the court-ordered bond hearing. *See Black,* 103 F. 4th 133 at 156-57 (applying *Mathews* to determine that district court appropriately required the Government to bear burden of proof and the IJ to consider ability to pay and alternatives to detention).

Petitioner notes that his alternative request for relief on the Due Process Claim, which the Government mischaracterizes as a request for "immediate release," merely asks this Court to evaluate *itself* whether the Government has shown he is a danger to the community or flight risk, rather than assigning this task to an IJ. *See Leslie v. Att'y Gen. of U.S.*, 678 F.3d 265, 271 (3d Cir. 2012) (remanding to district court with instructions to conduct an individualized bond hearing). District courts in the Third Circuit, for example, have done this in unique cases involving exceptionally lengthy detention or urgent medical issues, both of which are present here. *See Leslie v. Holder*, 865 F. Supp.2d 627, 641 (M.D. Pa. 2012); *Madrane v. Hogan,* 520 F. Supp. 2d 654, 670 (M.D. Pa. 2006); *see* Dkt. No. 1 at ¶¶ 20-23 (describing Mr. Cardenas' mental health issues). The Government argues that it would be a waste of judicial resources for this Court to conduct Mr. Cardenas's bond hearing. Resp. at 21, n. 3. But the opposite may be true. If the IJ fails to conduct the bond hearing under the Court's order, as occurred in *Abreu*, the Petitioner would be forced to return to this Court on a Motion to Enforce, consuming more judicial resources. *Abreu*, Dkt. No. 31 (granting motion to enforce). While Petitioner acknowledges that the Court conducting the bond hearing in the first instance is not a common remedy, he asks this Court to do so in these unique circumstances, especially considering that this Court is now familiar with the record.

Finally, Mr. Cardenas reiterates his request that the bond adjudicator, whether that is an IJ or this Court, consider his ability to pay bond and alternatives to detention. The fact that existing regulations already *permit* IJs to consider a broad range of factors at bond hearings, Resp. at 23, does not mean that this Court cannot *require* specific factors to be considered in these cases. *See Black,* 103 F.4th 133 at 159. ("Requiring that two of those factors be alternatives to detention and the noncitizen's ability to pay does nothing to constrain [the IJ's] discretion."). For the same reason, the Fourth Circuit's decision in *Miranda* does not preclude this Court from requiring the

adjudicator to consider his ability to pay and alternatives to detention here. *See* 34 F.4th at 353. Mr. Cardenas requests a bond hearing at which the Government must bear the burden to justify his continued detention and at which the adjudicator must consider his ability to pay and alternatives to detention.

II. Respondents Are Violating Mr. Cardenas' Rights Under the Rehabilitation Act.

A. Mr. Cardenas' claim under the Rehabilitation Act is cognizable.

The Government mischaracterizes Mr. Cardenas' claim under the Rehabilitation Act. He is not challenging the conditions of his confinement. He is alleging that ICE's actions and failure to act with respect to his care have constructively denied him access to participate in his removal proceedings. Respondents' summary dismissal of Mr. Cardenas' claim completely fails to respond to Mr. Cardenas' legal arguments, supported by *Sierra Club*, *Galvez-Letona*, and *Fraihat*. *Compare* Dkt. 1 at ¶¶ 60-62, with Resp. at 24-30.

The cases the Government cites from this Court do not support their position that Mr. Cardenas' Rehabilitation Act claim should be dismissed. While the petitioners in *Olajide* and *McCain* alleged medical abuse or neglect as part of their habeas petitions, Resp. at 25-26, they did not make claims under the Rehabilitation Act. The *pro se* petitioner in *Olajide v. B.I.C.E* alleged he was not receiving adequate medical care, and this Court concluded his claims should be asserted in a tort claim. 402 F. Supp. 2d 688, 695 (E.D. Va. 2005). The petitioner did not allege any disability-based discrimination or make any claim under the Rehabilitation Act that ICE's failures were denying him access to a program. *Id.* Likewise, the criminally detained petitioner in *McCain v. Garrity* did not make any claim under the Rehabilitation Act. 2002 WL32362032 (E.D. Va. July 16, 2002).

Moreover, the Government argues that the Rehabilitation Act claim cannot be brought through a habeas petition because it does not challenge "the validity of any confinement or [the] particulars affecting its duration." Resp. at 25 (citing *Hill v. McDonough*, 547 U.S. 573, 579 (2006)). But this is precisely what Petitioner is challenging. He argues that as long as ICE detains him at Caroline without appropriate mental health care, he will continue to be deprived of equal opportunity to participate in his removal proceedings, and therefore that he needs to be released from Caroline to seek adequate mental health care.

The Government seeks to excuse itself by merely noting that Mr. Cardenas has had a long and troubled mental health history, and that there is nothing more they could do for him inside ICE detention. Resp. at 29. ("He does not identify what care he would receive in a medical unit that he is not currently receiving."). But Respondents' own employees have said he would receive better care elsewhere. Dkt. 1 at ¶ 66; Ex. F. at ¶¶ 6, 8, 14. ICE Health Service Corps (IHSC) Eastern Regional Clinical Director Abelardo Montalvo urged months ago that Mr. Cardenas should be transferred to an ICE facility with a Mental Health Unit. *Id.* In an educational pamphlet from 2021, IHSC noted that Mental Health Units provide significant benefits including ensuring the safety and care of the detained population, decreasing inpatient hospitalizations, and improving mental health and well-being.[3] Another top-listed programmatic benefit is that Mental Health Units reduce "use of, and length of stay in, Special Management Units," which are merely "facilities that protect detainees, staff, and the community from harm." *Id.* Special Management Units are not Mental Health Units, and Respondents' implication that they are equivalent is wholly unsupported by the evidence and ICE's own guidance from IHSC. The educational pamphlet expressly says that another major benefit of Mental Health Units is that they "increase[] detainees' participation in the

[3] ICE ERO, Vulnerable Populations: Mental Health Care, available at https://www.ice.gov/doclib/detention/infographicMentalHealth.pdf.

legal process and immigration court proceedings," precisely what Mr. Cardenas needs under the Rehabilitation Act. *Id.*

Respondents failed to follow the guidance of the IHSC Eastern Regional Clinical Director and requests by other medical staff that Mr. Cardenas be transferred to a facility with a Mental Health Unit. Counsel notes that immigration counsel Ms. Hyde elevated the concerns of medical staff and urgently requested that ICE transfer Mr. Cardenas to a facility that can provide mental health care. Dkt. 1 at ¶ 28; Dkt. 1-4 at ¶ 11. On October 23, 2024, Supervisory Detention and Deportation Officer James Mullan responded that ICE was "currently working on finding a suitable location" and that "once that facility is located, ICE will coordinate the transfer." *Id.* His otherwise detailed declaration fails to mention this critical conversation with Ms. Hyde or his efforts, if any, in identifying a suitable facility. The Caroline Detainee Handbook expresses that "a detainee who needs health care beyond [Caroline's] resources will be transferred in a timely manner to an appropriate facility where care is available." Dkt. 12-3 at 138. Respondents failed to honor their commitments to transfer Mr. Cardenas to an appropriate facility with a Mental Health Unit.

That said, Petitioner argues that even a transfer to a different facility with a Medical Unit now would not fully address the prolonged disability-based discrimination he is experiencing. Contrary to the Respondents' assertions, Resp. at 29, Mr. Cardenas has identified services he would obtain outside detention that he has not and cannot receive inside detention, for example, individualized dialectical behavioral therapy. Dkt. 1-9 at 2. A transfer months ago to a Mental Health Unit or mental health facility may have mitigated the harm to Mr. Cardenas' ability to participate in his immigration proceedings, but the harm has already been done. The marked decline in his mental health in detention harmed and continues to harm his ability to participate in

his removal proceedings. Mr. Cardenas must be released to seek adequate care and more fully participate in his removal proceedings as he seeks to appeal to the Board of Immigration Appeal (BIA).

B. Respondents' failure to accommodate Mr. Cardenas affected his ability to participate in his removal proceedings.

Without acknowledging *Fraihat*'s holding that participation in removal proceedings is a programmatic benefit under the Rehabilitation Act, the Government argues Mr. Cardenas has not properly alleged that "safeguards were absent" or that the Government's actions "caused any harm" in his removal proceedings. Resp. at 28. The Government argued that since "Petitioner's legal decisions are being handled by a qualified attorney,"[4] he was not denied equal access to his removal proceedings. Resp. at 29. But a noncitizen's removal proceedings cannot be handled exclusively by an attorney. For example, the noncitizen must testify, as Mr. Cardenas had to do at the hearing on April 10. He struggled to do so throughout the hearing, likely due to the ongoing symptoms of his mental health that have not been adequately cared for in Caroline's Special Management Unit.

Though many detainees struggle to participate in their removal proceedings from inside detention, accommodations must be made for disabled individuals. *Durrenberger v. Texas Dept. of Criminal Justice*, 757 F.Supp.2d 640, 650-651 (S.D. Tex. 2010) (rejecting Respondents' arguments that since the average person has trouble hearing during visits, they were not required to provide Rehabilitation Act accommodations to a hearing-impaired detained plaintiff). If Respondents had transferred him to a facility with a Mental Health Unit, or if they now conditionally release him, his mental health care would "increase] [his] participation in the legal

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[4] Last week, the Department of Justice informed legal service providers that the contracts for the National Qualified Representative Program will be terminated effective April 28. As such, it is unclear how much longer Mr. Cardenas will have access to counsel. Dkt. 1 at ¶ 24.

process and immigration court proceedings." ICE ERO, Vulnerable Populations: Mental Health Care. Respondents have not presented arguments that such a transfer or release would impose an undue financial and administrative burden or that it would require a fundamental alteration in the program. Dkt. 1 at ¶ 63; *Durrenberger*, 757 F.Supp.2d at 658 (granting summary judgment for the plaintiff where respondents failed to grant his requests for reasonable accommodations that would have improved his ability to communicate with his attorney and where respondents did not allege such accommodations would be a burden or require a fundamental alteration of the program).

On January 23, 2025, Ms. Hyde filed a Motion for Safeguards to request disability-based accommodations at Mr. Cardenas' future immigration hearings. Dkt. 1 at ¶ 33; Dkt. 1-4 at ¶ 16. DHS counsel refused to state their position until the day of the hearing, April 10, 2025. SDDO Mullan did not address the motion in his declaration or the Government's failure to respond to the motion, nor did the Respondents address the Motion for Safeguards in their response. Resp. at 28-29. At the hearing,[5] IJ Choi began speaking to Mr. Cardenas and asked how he was feeling. Mr. Cardenas responded that he felt tired, different, and like he was somewhere else. Before beginning direct testimony, IJ Choi began to address the Motion for Safeguards, which he had not yet ruled on. One of the safeguard requests was to allow Mr. Cardenas to prepare notes in advance of the hearing and to bring a writing utensil with him. This would have allowed him to prepare what he wanted to say ahead of time. Since IJ Choi had not ruled on the motion before the hearing began, Mr. Cardenas had not prepared notes because Caroline would not have provided him with paper and pen absent a timely safeguards order. Ms. Hyde suggested IJ Choi had constructively denied the Motion for Safeguards by failing to rule on any of its provisions. IJ Choi responded that he had

[5] This factual summary was prepared from Ms. Blandon's notes. As described above, Petitioner intends to move for submission of the DAR from the April 10 hearing.

not denied the motion, and that everyone could go off the record to provide Mr. Cardenas, a mentally disabled man with cognitive impairments, time to prepare notes. Fearing that he would need more time than the court would allow, Ms. Hyde and Mr. Cardenas elected to proceed without the notes, a necessary safeguard. IJ Choi granted the other safeguard requests, including allowing for breaks and permitting leading questions where necessary to orient Mr. Cardenas, but his failure to rule on the motion for notes greatly impaired Mr. Cardenas's ability to recall facts and testify.

Ms. Hyde began questioning Mr. Cardenas and asked him what he feared would happen to him in Mexico – the critical question at the heart of his immigration claim. Though Mr. Cardenas had painstakingly shared his fears with Ms. Hyde and medical staff, when asked this question at the immigration hearing without notes, he took an especially long pause before merely responding that "bad things" would happen. When asked why he was applying for protection from deportation, he could only reply "a lot of reasons." Ms. Hyde noted the long pauses for the record, and that Mr. Cardenas was looking down, avoiding eye contact, and appeared distressed and tearful throughout his testimony.

When the Government attorney began questioning Mr. Cardenas, he said he was not sure how, if at all, he could ask for help in Mexico. IJ Choi asked Mr. Cardenas about his mental health, and Mr. Cardenas said his mental health is "a lot" and that it is worse today than when he entered ICE detention. At the end of the hearing, IJ Choi denied Mr. Cardenas' application for relief, finding Mr. Cardenas credible but that he had not met his burden to prove he would be tortured in Mexico. Mr. Cardenas reserved his right to appeal and plans to imminently file an appeal with the BIA, challenging errors IJ Choi made while adjudicating his application for fear-based relief, including the constructive denial of the Motion for Safeguards provision on prepared notes. Respondents' failure to transfer him to a facility with a Mental Health Unit or immediately release

him constitute disability-based discrimination that harm his ability to participate in his ongoing removal proceedings.

CONCLUSION

For the foregoing reasons, Mr. Cardenas respectfully requests that this Court grant his Petition for Writ of Habeas Corpus and order a bond hearing at which the Government bears the burden of proving he is a present danger or flight risk, and at which the adjudicator must consider his ability to pay and alternatives to detention. Alternatively, Mr. Cardenas requests that this Court order his conditional release to seek adequate mental health care, as a remedy to his Rehabilitation Act claim.

Dated: April 25, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that on this date, I filed this Reply to Response to Habeas Petition and any attachments using the CM/ECF system, which will send a notice of electronic filing (NEM) to all counsel of record.

Dated: April 25, 2025

Respectfully submitted,

/s/ Samantha Hsieh