DISTRICT JUDGE ROBERT S. LASNIK
MAGISTRATE JUDGE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALEJANDRO BALTODANO, Petitioner, v. PAMELA BONDI, Attorney General of the United States; KRISTI NOEM, Secretary, United States Department of Homeland Security; CAMMILLA WAMSLEY, Seattle Field Office Director, United States Citizenship and Immigration Services; BRUCE SCOTT, Warden of Immigration Detention Facility; and the United States Immigration and Customs Enforcement, Respondents.	No. CV25-1958-RSL-MLP MOTION FOR TEMPORARY RESTRAINTING ORDER Note on Motion Calendar: October 20, 2025 **Expedited Hearing Requested** **Oral Argument Requested**

I. INTRODUCTION

Two weeks ago, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. In the petition, he asserts that, because he has been granted deferral of removal to his home country by an immigration judge, his detention for more than six months by immigration officials violates the Fifth Amendment's Due Process Clause and 8 U.S.C. § 1231 as interpreted by *Zadvydas v. Davis,* 533 U.S. 678, 689 (2001). Petitioner also claimed that there is a risk of unconstitutionally punitive deportation to a third country and also of deportation without the due process required by Ninth Circuit precedent. Although he tried to reach agreement with the United States Attorney's Office about expediting the case, he has so far been unable to do so.

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After the petition was filed, he learned that ICE was actively seeking a third country to deport him to. *See* Ex. 1, Decl. Veronica Barba, Esq. Because of the real and imminent risk of punitive deportation to a third country in violation of his constitutional and statutory rights, Petitioner Baltodano moves this Court for a temporary restraining order barring any third-country removal without notice and an opportunity to be heard in reopened removal proceedings while this habeas proceeding is pending and for an order requiring his immediate release from custody.

II. STATEMENT OF FACTS

The facts of this case are set out in greater detail in the § 2241 petition filed at Dkt. 1. In short, Mr. Baltodano is from Nicaragua but has been granted deferral of removal under the Convention Against Torture and will not be removed to Nicaragua. In immigration proceedings he was found to be a member of the *Franco* class, permitting him a Qualified Representative in immigration proceedings, and Veronica Barba, Esq., was appointed to represent him. Ultimately an immigration judge decided to grant him deferral of removal based on a finding that Mr. Baltodano was credible and on information about Mr. Baltodano's political activism [redacted] and chronic mental health disorders including diagnoses of bipolar disorder, schizophrenia, persistent depressive disorder, and posttraumatic stress disorder. Dkt. 1-1 at 6–11.

Mr. Baltodano has no ties to any third countries and multiple serious mental health diagnoses which are unlikely to be appropriately treated by the prison systems of countries such as El Salvador, in which severe abuses and deprivation of medical care have been documented. *See, e.g.*, Scott Neuman, *Abrego Garcia Says He Was Severely*

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Beaten in Salvadoran Prison, npr.org (July 3, 2025) [https://perma.cc/D5A5-BS7L] (citing https://storage.courtlistener.com/recap/gov.uscourts.mdd.578815/gov.uscourts.mdd.578815.211.3.pdf [https://perma.cc/DKD6-H2ZQ]).

III. LEGAL STANDARD

To obtain a TRO, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839–40 & n.7 (9th Cir. 2001) (noting that a TRO and preliminary injunction involve "substantially identical" analysis). In this Circuit, courts employ "an alternative 'serious question' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (citation omitted). Under this approach, the four *Winter* elements are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A TRO may be granted where there are "'serious questions going to the merits' and a hardship balance . . . tips sharply toward the plaintiff," and so long as the other *Winter* factors are met. *Id.* at 1132.

IV. ARGUMENT

This Court should issue a temporary restraining order because "immediate and irreparable injury . . . or damage" is occurring and will continue in the absence of an order. Fed. R. Civ. P. 65(b). Respondents have detained Petitioner Baltodano in violation of his due process and statutory rights and threaten to remove him to a third country without adhering to constitutional and statutory procedural protections and in violation of bedrock law prohibiting the government from imposing punitive measures on noncitizens ordered removed. This Court should order Petitioner Baltodano's release

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and enjoin removal to a third country where he may be imprisoned or harmed and absent legally required protections.

A. Petitioner Is Likely to Succeed on the Merits of His Claims.

1. Petitioner Is Likely to Succeed on the Merits of His Claim That His Detention Is Unconstitutional and Unlawful.

Petitioner Baltodano is likely to succeed on the merits of his claim that his re-detention violates the Due Process Clause, 8 U.S.C. § 1231(a), and governing regulations.

The INA provides that after a removal order becomes final, the government "shall remove the alien from the [U.S.] within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). This 90-day period is often referred to as the initial removal period and during it, the government "shall detain the alien." *Id.* § 1231(a)(2). In some circumstances, federal immigration authorities can continue to detain an alien beyond the initial removal period. Specifically, section 1231(a)(6) allows the government to detain certain enumerated classes of immigrants—including those ordered removed due to criminal convictions—for more than 90 days. *Id.* § 1231(a)(6).

The Supreme Court, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), rejected the government's position that section 1231(a)(6) permitted indefinite detention following the initial removal period. It held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" because it would become punitive. *Id.* at 690. "[G]overnment detention violates [the Fifth Amendment's Due Process Clause] unless the detention is ordered in a criminal proceeding with adequate procedural protections." *Id.* The Court held that section 1231(a)(6) "implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal." *Id.* at 679. Thus, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [section 1231(a)(6)]." *Id.* at 699. "[F]or the sake of

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uniform administration in the federal courts," the Court found that postremoval detention was "presumptively reasonable" for the first six months. *Id.* at 700–01.

After that "presumptively reasonable" six-month period ends, once the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* at 701.

Petitioner Baltodano has been detained ever since the order preventing his deportation to his home country was issued on March 5, 2025. It is not reasonably foreseeable that he will be deported to Nicaragua, and he has neither ties nor travel documents secured to any other country.

2. Petitioner Is Likely to Succeed on the Merits of His Claim That He Is Entitled to Legally Required Procedures Prior to Any Nonpunitive Third-Country Removal.

Petitioner Baltodano is likely to succeed on the merits of his claim that he may not be removed to a third country absent Respondents following the legally required multistep procedures set out in 8 U.S.C. § 1231(b) and required by due process.

In Petitioner's case, there is an order from an immigration judge preventing his removal to Nicaragua. Moreover, to remove Petitioner to a third country, the statute requires that the Attorney General—here, an immigration judge—first determine that the designated third country "will accept [Petitioner] into that country." *Id.* § 1231(b)(2)(E)(vii); *see Himri v. Ashcroft*, 378 F.3d 932, 939 n.4 (9th Cir. 2004) (8 U.S.C. § 1231(b)(E)(vii) "indisputably requires the Attorney General to prove that the proposed country of removal is willing to accept the alien"); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 344 (2005). It is the immigration judge, not DHS, that the statute authorizes to designate a third country for removal. 8 U.S.C.

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§ 1231(b)(2)(E)(vii) ("the Attorney General shall remove the alien to . . ."); *see also* 8 C.F.R. § 1240.10(f) (in removal proceedings the immigration judge "shall . . . identify for the record a country, or countries in the alternative, to which the alien's removal may be made"). Here, to remove Petitioner to a third country would require Respondents to move to reopen Petitioner's 25-year-old removal proceedings to ask an immigration judge to designate a third country under the statutory process. *See, e.g.*, *Sadychov v. Holder*, 565 F. App'x 648, 651 (9th Cir. 2014) (unpublished) (holding that should a new country of removal be designated, "the agency must provide [the noncitizen] with notice and an opportunity to reopen his case for full adjudication of his claim of withholding of removal from" the third country); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1009, 1011 (W.D. Wash. 2019) (finding that removal proceedings "shall be reopened and a hearing shall be held before the immigration judge so that petitioner may apply for relief from removal" as to a country not designated in prior proceedings).

Adherence to that process also ensures Petitioner's statutory right to claim protection in immigration court against removal to a third country where he may be persecuted or tortured, a form of protection known as withholding of removal, 8 U.S.C. § 1231(b)(3)(A); *see also* 8 C.F.R. §§ 208.16, 1208.16, as well as his right to claim deferral of removal under the Convention Against Torture ("CAT"). *See* 28 C.F.R. § 200.1 ("A removal order . . . shall not be executed in circumstances that would violate [the CAT]"); 8 C.F.R. §§ 208.17–18, 1208.17–1208.18.

Such protections are especially important for Petitioner Baltodano, whose severe mental illness may make him more susceptible to persecution or torture, and make it more likely that he would be granted asylum or CAT protections, in comparison to other detainees.

Of course, the statutory framework is entirely meaningless without meaningful notice of a third-country removal and an opportunity to respond that comports with

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Fifth Amendment due process. *See Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2163 (2025) (Sotomayor, J., dissenting) ("[t]he Fifth Amendment unambiguously guarantees that right" to notice of a third country removal so that a noncitizen "learn[s] about it in time to seek an immigration judge's review"). Notice cannot be "last minute" because that would deprive an individual of a meaningful opportunity to apply for fear-based protection from removal. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999). Individuals must have time to prepare and present relevant arguments and evidence and to seek reopening of their removal case. "[W]ritten notice of the country being designated" is required and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)" must be specified. *Aden*, 409 F. Supp. 3d at 1019; *see also D.V.D. v. U.S. Dep't of Homeland Sec.*, CV25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025) ("All removals to third countries, i.e., removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen's order of removal, must be preceded by written notice to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand." (internal citation omitted)); *Andriasian*, 180 F.3d at 1041 (due process requires notice to the noncitizen of the right to apply for asylum and withholding to the country where they will be removed).

Due process also demands that the government "ask the noncitizen whether he or she fears persecution or harm upon removal to the designated country and memorialize in writing the noncitizen's response. This requirement ensures DHS will obtain the necessary information from the noncitizen to comply with § 1231(b)(3) and avoids [a dispute about what the officer and noncitizen said]." *Aden*, 409 F. Supp. 3d at 1019.

Respondents' third-country removal program skips over these statutory and constitutional procedural protections. According to ICE's July 9, 2025, guidance, individuals can be removed to third countries "without the need for further procedures,"

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so long as "the [U.S.] has received diplomatic assurances." ICE, *Third Country Removals Following the Supreme Court's Order in Department of Homeland Security v. D.V.D., No. 24A1153 (U.S. June 23, 2025)* (July 9, 2025), https://storage.courtlistener.com/recap/gov.uscourts.mad.282404/gov.uscourts.mad.282404.190.1.pdf [https://perma.cc/L9Y2-6CYX]. Petitioner is likely to succeed on the merits of his claim on this fact alone, because the policy instructs officers to violate the statutory and constitutional requirements. The same is true of the minimal procedures ICE offers when no diplomatic assurances are present. The policy provides no meaningful notice (6–24 hours), instructs officers not to ask about fear, and provides no actual opportunity to see counsel and prepare a fear-based claim (6–24 hours), let alone reopen removal proceedings. In sum, it directs ICE officers to violate the rights of those whom they seek to subject to the third-country removal program.

Several courts have recently granted individual TROs against removal to third countries under similar circumstances. *See generally J.R. v. Bostock*, CV25-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025) (immediately enjoining removal to "Cuba, Libya, or any third country in the world absent prior approval from this Court"); *Phan*, 2025 WL 1993735, at *7 (enjoining Respondents from "re-detaining or removing Petitioner to a third country without notice and an opportunity to be heard"); *Hoac*, 2025 WL 1993771, at *7 (same); *Vaskanyan v. Janecka*, CV25-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, CV25-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025).

3. Petitioner Is Likely to Succeed on the Merits of His Claim That the Constitution Prohibits Punitive Third-Country Removals.

Petitioner Baltodano is likely to succeed on the merits of his claim that the Constitution prohibits him from being subjected to Respondents' punitive third-country removal program. The prohibition against imposing punitive measures on an individual

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subject to a final order of removal is as old as immigration law. *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, the Supreme Court struck down a provision of the Chinese Exclusion Act that imposed one year of imprisonment at hard labor as an immigration sanction before their deportation. *Id.* at 237. The Court drew a distinction between "deportation," which it described as a sanction for failure to comply with the legal requirements of residency in the U.S. that may be imposed by executive authorities, and "punishment," which may not. *Id.* at 236–37. The Court held that the government could not attach a punishment to deportation—here, imprisonment—without criminal charges, a judicial trial, and the concomitant protections of the Fifth, Sixth, and Eighth Amendments. *Id.*

The government's third-country removal program defies 130 years of constitutional immigration law between civil penalty and infamous punishment. *See, e.g.*, *Zadvydas*, 533 U.S. at 694. Respondents' third-country removal program is designed to punish those it deports by subjecting them to imprisonment upon their arrival in the receiving countries. Respondents' program is not simply about removing individuals to third countries. It is about removing them to be imprisoned upon arrival and paying countries to carry out said imprisonment; selecting countries and overseas prisons (like CECOT and Guantanamo) notorious for cruelty, torture, lawlessness, and other human rights abuses; and broadcasting these third-country removals across public media platforms to demonize the deportees and strike extreme fear in the immigrant community that people self-deport. This program is about punitive banishment.

To determine whether a given sanction constitutes punishment, courts look to intent. If the government's intent is to punish, "that is the end of the inquiry." *Am. Civ. Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)). Here, the government's own statements show intent to

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deport individuals, particularly those with criminal convictions, into situations of forever confinement or substantial harm.

When the government's intent to punish is unclear, courts move to the second step of the inquiry to determine whether the practices are "so punitive either in purpose or effect as to negate the [government's] intention to deem it civil." *Id.* (quoting *Smith*, 538 U.S. at 92). To determine punitive purpose or effect, courts often turn to the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). *See also Hudson v. United States*, 522 U.S. 93, 99 (1997) ("the factors listed in *Kennedy v. Mendoza-Martinez* . . . provide useful guideposts"). Those factors are: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

Under these factors, the government's third-country removal program undeniably constitutes punishment, as each factor is met. For example, under the first factor, the government's practices of deporting people only to have them imprisoned or subjected to other forms of physical harm, is an "affirmative disability or restraint." The "paradigmatic affirmative disability" is the "punishment of imprisonment." *Smith*, 538 U.S. at 100. Moreover, under this factor, "we inquire how the effects of the [sanction] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 99–100. There can be no question that being deported to a country to be imprisoned or experience other extreme harm will be felt as a significant and direct disability or restraint.

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The second factor is also satisfied. "[D]evices of banishment and exile have throughout history been used as punishment." *Mendoza-Martinez*, 372 U.S. at 168 n.23. In 1791, the year the Bill of Rights was ratified, deportation was exclusively used and understood as punishment. *Fong Yue Ting v. United States*, 149 U.S. 698, 740–41 (1893) (Brewer, J. dissenting) (citing President James Madison); *see id.* at 740 ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."). Banishment as a form of punishment dates to ancient times and was used on citizens and noncitizens alike. Peter L. Markowitz, *Deportation is Different*, 13 U. Pa. J. Const. L. 1299, 1308–09 (2011) (tracing the use of banishment from medieval England through colonial America).

The fourth factor—whether it promotes the traditional aims of punishment, retribution and deterrence—is also satisfied. The government's own statements make clear that its goals are retribution and deterrence to encourage people to leave the country on their own. As DHS Secretary Kristi Noem stated, "President Trump and I have a clear message to criminal illegal aliens: LEAVE NOW. If you do not leave, we will hunt you down, arrest you, and you could end up in this El Salvadorian prison." The Supreme Court has made clear that such "general deterrence" justifications are impermissible absent criminal process. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil detention may not "become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (emphasis added)).

The program satisfies the third, fifth, sixth, and seventh factors too because Respondents have designed this program specifically for those being deported for

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criminal convictions, there is no logical nonpunitive rationale for deporting people into dangerous conditions of imprisonment or other harm, and the program is designed to be patently excessive in relation to the purpose of simply removing people from the country.

B. Petitioner Will Suffer Irreparable Harm Absent Injunctive Relief.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Where the "alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (2d ed. 2004)). "Unlawful detention certainly constitutes 'extreme or very serious' damage, and that damage is not compensable in damages." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

Here, the irreparable harm to Petitioner is severe. He has already been unreasonably deprived of months of his life in prolonged immigration detention following the grant of deferral of removal. Absent relief, Petitioner will remain detained in an indefinite and prolonged state, denied his liberty, and removed from his family and community where he belongs.

C. The Balance of Hardships and Public Interest Weigh Heavily in Petitioner's Favor.

The final two factors for a preliminary injunction—the balance of hardships and public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]he balance of hardships tips decidedly in plaintiffs' favor" when "[f]aced with such a conflict between financial concerns and preventable human suffering." *Hernandez*, 872 F.3d at 996 (quoting *Lopez v. Heckler*, 713 F.2d

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1432, 1437 (9th Cir. 1983)). Here, the balance of hardships tips in Petitioner's favor. Petitioner faces weighty hardships: deprivation of his liberty and removal to a third country where he is likely to suffer imprisonment or other serious harm. "[T]he [government] cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Moreover, it is always in the public interest to prevent violations of the U.S. Constitution and ensure the rule of law. *See Nken*, 556 U.S. at 436 (describing public interest in preventing noncitizens "from being wrongfully removed, particularly to countries where they are likely to face substantial harm"); *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019) (When the government's treatment "is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction."). Accordingly, the balance of hardships and the public interest overwhelmingly favor emergency relief to ensure Petitioner's freedom and prevent unlawful third-country removal.

D. The All Writs Act Confers Broad Power to Preserve the Integrity of Court Proceedings.

Besides qualifying for a TRO under the Federal Rules, this is a textbook case for use of the All Writs Act ("AWA"), which provides courts with a powerful tool to "maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (citation omitted); 28 U.S.C. § 1651(a); *California v. M&P Inv.*, 46 F. App'x 876, 878 (9th Cir. 2002) (unpublished) (finding Act should be broadly construed to "achieve all rational ends of law" (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942))).

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully asks the Court to grant the TRO and: (a) to order Petitioner's immediate release from custody while this case is

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litigated; (b) to bar Respondents from removing Petitioner to any third country because Respondents' third-country removal program is punitive; and (c) to bar Respondents from removing Petitioner to a third country without notice and meaningful opportunity to respond in compliance with the statute and due process in reopened removal proceedings.

DATED this 20th day of October 2025.

Respectfully submitted,

s/ *Ann K. Wagner*
Assistant Federal Public Defender
Attorney for Alejandro Baltodano

I certify this motion complies with the page limits specified in LCR 7(e)(3).

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