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6 **Varrío Foreste**

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10 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

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Case No. **3:26-cv-00139-BAS-DEB**

Petitioner,

v.

PETITIONER'S REPLY

Patrick Diver, Field Office Director of Enforcement and Removal Operations, San Diego Field Office, Immigration and Customs Enforcement; Kristi NOEM, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Pamela BONDI, U.S. Attorney General; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Christopher J. LaRose, Warden of Otay Mesa Detention Center,

Respondents.

1 **INTRODUCTION**

2 1. Respondents’ opposition does not justify continuing to hold Mr. Foreste—an
3 otherwise law-abiding TPS beneficiary and father of a U.S.-citizen infant—in civil immigration
4 detention for nearly a year based on a momentary, inadvertent border crossing and without any
5 concrete prospect of removal or third-country transfer. First, 8 U.S.C. § 1252(g) does not bar
6 habeas review of custody claims that challenge the legality and duration of detention. *Reno v.*
7 *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *Jennings v. Rodriguez*,
8 583 U.S. 281 (2018). Second, although *Jennings* held § 1225(b) mandates detention without a
9 statutory bond hearing, it expressly left open constitutional challenges to prolonged detention;
10 the Ninth Circuit requires courts to assess due process under a fact-intensive
11 framework. *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Rodriguez Diaz v. Garland*, 53 F.4th
12 1189 (9th Cir. 2022). On this record—prolonged detention approaching a year, no final removal
13 order, EOIR still at master-calendar posture, TPS history and unresolved TPS withdrawal/reopen
14 notices, and no evidence that Uganda will accept Petitioner—due process requires, at minimum,
15 an individualized hearing at which the government bears the burden to justify continued
16 detention by clear and convincing evidence, or release under appropriate conditions.

17 **FACTS AND RECORD STATUS**

18 2. *TPS history and status*: USCIS granted Petitioner Temporary Protected Status
19 (TPS) on November 7, 2024, with validity through February 3, 2026. USCIS later issued a
20 Notice of Intent to Withdraw/ Revoke TPS on April 28, 2025, citing an alleged failure to
21 maintain continuous physical presence based on departure without advance parole. The agency
22 then issued an approval notice with shortened validity through August 3, 2025, and subsequently
23 issued a “Reopen Notice” on April 23, 2025, for the TPS application. The record thus shows
24

1 USCIS has not provided a final, reasoned resolution of Petitioner’s TPS and, at various times,
2 recognized his TPS through at least August 3, 2025.

3 3. *Inadvertent, brief border crossing and arrest:* On February 21–22, 2025, while
4 following Google Maps during deliveries for work, Petitioner inadvertently crossed into Mexico
5 and returned through San Ysidro POE vehicle lanes. CBP’s I-213 records that he presented his
6 EAD, stated he had lived in the U.S. for two years under TPS, and “left the country by accident.”
7 He was charged as an arriving alien inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I) and placed
8 in § 1229a proceedings under § 1225(b)(2).

9 4. *Detention timeline and EOIR posture:* Petitioner has been detained at Otay Mesa
10 since February 21–22, 2025—now roughly 11 months. The immigration case remains at the
11 master calendar stage, with the first master set for February 17, 2026, evidencing that
12 proceedings have not advanced to merits and will extend further. U.S. family and community
13 ties; no criminal history: Petitioner is the father of a U.S.-citizen daughter born in La Mesa,
14 California on September 3, 2023, has lived and worked in San Diego, and has no known criminal
15 history. He has maintained identification and driver’s license, and bank records reflect ongoing
16 financial support of his household.

17 5. *ACA-to-Uganda theory:* DHS references a recently published U.S.–Uganda
18 Asylum Cooperative Agreement (ACA) and has moved in immigration court to pretermite
19 protection applications on that basis. But DHS has produced no evidence that Uganda has agreed
20 to accept Petitioner or that transfer is operational or imminent; no travel documents or
21 acceptance are in the record.

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ARGUMENT

I. Section 1252(g) does not bar this Court’s habeas review of the legality and duration of Petitioner’s detention.

6. Respondents’ reliance on 8 U.S.C. § 1252(g) is misplaced. The Supreme Court has made clear that § 1252(g) is “narrow,” applying only to “three discrete actions” the agency may take—“to ‘commence proceedings, adjudicate cases, or execute removal orders.’” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). This petition does not ask the Court to commence, adjudicate, or execute removal; it challenges only the legality and duration of civil confinement and seeks release or a constitutionally adequate hearing—relief historically available under 28 U.S.C. § 2241. See *Jennings v. Rodriguez*, 583 U.S. 281, 292–94 (2018) (detention challenges are not barred by jurisdiction-channeling provisions). Section 1252(b)(9) likewise does not “zipper” this independent custody claim. *Id.* And § 1252(f)(1) does not foreclose individual relief. *Garland v. Aleman Gonzalez*, 596 U.S. 66, 72–74 (2022). Likewise, *Zadvydas v. Davis*, 533 U.S. 678 (2001) held that “28 U.S.C. § 2241 habeas proceedings are available as a forum for statutory and constitutional challenges” to immigration detention and emphasized that “none of the statutory provisions limiting judicial review of removal decisions applies” to such custody challenges.

7. This petition does not ask the Court to halt, commence, or adjudicate removal; it challenges only the legality and duration of civil detention—a classic habeas claim cognizable in federal court. The Supreme Court has recognized that habeas remains available for statutory and constitutional challenges to immigration custody notwithstanding § 1252’s channeling provisions. *See, e.g.*, (discussing) *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *INS v. St. Cyr*, 533 U.S. 289 (2001). Accordingly, Respondents’ district-court cases cannot overcome binding

1 Supreme Court precedent narrowly construing § 1252(g), and the Court should reject the
2 jurisdictional bar and reach the merits.

3 **II. Even under § 1225(b), the Constitution prohibits prolonged, nonpunitive civil**
4 **confinement untethered to a realistic removal timeline; on this record, due process**
5 **requires an individualized hearing or release.**

6 **A. *Jennings* left open constitutional limits on the duration of § 1225(b)**
7 **detention.**

8 8. The Supreme Court held that §§ 1225(b)(1) and (b)(2) contain no statutory bond-
9 hearing requirement and “mandate detention” during removal proceedings, and it expressly
10 declined to resolve whether prolonged detention under those provisions is constitutional.
11 See *Jennings v. Rodriguez*, 583 U.S. 281 (2018), 297–302. ^[4] As a result, constitutional
12 challenges may proceed on an as-applied basis in individual habeas actions. See *Rodriguez Diaz*
13 *v. Garland*, 53 F.4th 1189 (9th Cir. 2022) (addressing an as-applied due process challenge under
14 a balancing framework), and order denying rehearing en banc (noting the opinion “should not be
15 read to foreclose habeas relief” and emphasizing individualized analysis).

16 9. The Ninth Circuit instructs courts to evaluate due process challenges to prolonged
17 immigration detention through a fact-specific analysis that weighs the individual liberty interest,
18 the risk of erroneous deprivation, and the government’s interests—i.e., a *Mathews*-type
19 balancing framework applied in the immigration-detention context. See *Rodriguez Diaz v.*
20 *Garland*, 53 F.4th 1189 (9th Cir. 2022), 1195–1206 (recognizing liberty interests in freedom
21 from physical restraint and applying balancing). District courts have operationalized that inquiry
22 by considering the total time already served, the likely future duration, and which party is
23 responsible for delay—an approach consistent with the circuit’s emphasis on individualized
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1 assessments. See *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022); see also Ninth
2 Circuit order emphasizing case-by-case analysis.

3 10. “Freedom from imprisonment ... lies at the heart of the liberty that [the Due
4 Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678 (2001).

5 **B. The record facts tilt the due process balance in Petitioner’s favor.**

6 11. *Length and likely future duration*: Petitioner has been detained for about 11
7 months already, with *still* a master calendar hearing set for February 17, 2026—nearly a year
8 after detention began. That schedule confirms removal proceedings have not reached merits and
9 will continue for months thereafter (including any briefing and appeals), lengthening detention.
10 As detention lengthens, courts have recognized escalating constitutional concerns with prolonged
11 civil confinement. See, e.g., *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), 1074, 1088–
12 90 (noting average detentions of well over a year in the record and requiring safeguards when
13 detention becomes prolonged).

14 12. *Lack of foreseeable removal or third-country transfer*: Where removal is not
15 “reasonably foreseeable,” continued civil detention becomes constitutionally suspect. *Zadvydas*
16 *v. Davis*, 533 U.S. 678 (2001) (construing detention authority to avoid indefinite confinement
17 and requiring release once there is “no significant likelihood of removal in the reasonably
18 foreseeable future,” with a presumptive benchmark of six months in the post-order context).
19 Although *Zadvydas* addressed post-order detention, its constitutional reasoning regarding
20 indefinite civil confinement informs as-applied due process scrutiny where the government
21 cannot identify a concrete, executable end point for custody. DHS has not produced any
22 acceptance or travel documents from Uganda, nor any evidence the referenced ACA is
23 operational for Petitioner. Absent concrete proof of acceptance and an executable transfer plan,
24

1 third-country removal is speculative. Nor has DHS shown that Petitioner’s removal to Haiti is
2 presently permissible given the agency’s own mixed TPS record (approval to 2/3/2026;
3 subsequent shortening to 8/3/2025; and a later “Reopen Notice” dated 4/23/2025). On this
4 record, removal is not reasonably foreseeable in the near term.

5 13. *Government-caused delay and procedural posture:* The NTA issued in
6 February/March 2025; yet a master calendar hearing is still set for mid-February 2026. The
7 record does not show Petitioner-caused delays; rather, government scheduling and litigation
8 posture (including the ACA motion) are the principal drivers. Continued nonpunitive
9 confinement while the government’s own process unfolds, with no imminent end point, raises
10 serious due process concerns. Prolonged nonpunitive confinement while agency process unfolds,
11 without a realistic endpoint, heightens due process concerns. See *Rodriguez Diaz v. Garland*, 53
12 *F.4th 1189 (9th Cir. 2022)*, 1205–06 (assessing risk of error and burden-shifting in light of
13 liberty interests and procedures provided).

14 14. *Individual equities:* Petitioner has no criminal history, longstanding U.S.
15 residence and work, and an infant U.S.-citizen child. The government cites no individualized
16 public-safety rationale. These facts increase the weight of Petitioner’s liberty interest and
17 diminish the government’s interest in continued confinement. See *Rodriguez v. Robbins*, 804
18 *F.3d 1060 (9th Cir. 2015)*, 1203–08 (endorsing consideration of danger/flight factors and
19 requiring clear-and-convincing proof to justify ongoing civil detention where detention becomes
20 prolonged).

21 15. On balance, due process requires more process: at minimum, an individualized
22 hearing at which the government justifies continued detention by clear and convincing evidence
23 and the decisionmaker considers less-restrictive alternatives. See *Rodriguez Diaz v. Garland*, 53
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1 *F.4th 1189 (9th Cir. 2022)*, 1195–1206 (applying individualized balancing and recognizing
2 habeas as-applied challenges); *Aleman Gonzalez v. Barr*, 955 *F.3d* 762 (9th Cir. 2020), 766–67,
3 770–72 (requiring bond hearings and clear-and-convincing burden in prolonged-detention
4 context under circuit precedent).

5 **C. *Mezei* and *Thuraissigiam* do not authorize unlimited civil confinement**
6 **pending § 1225(b)(2) proceedings.**

7 16. Respondents invoke *Mezei* and *Thuraissigiam* to argue that arriving aliens have
8 no due process right beyond what Congress affords. But those cases addressed admission and the
9 scope of process regarding entry determinations—especially expedited removal—not the
10 constitutional limits on the duration of physical confinement in civil detention pending
11 adjudication.

12 *Mezei* arose in a very different statutory era and concerned exclusion at the threshold,
13 not open-ended civil confinement in modern detention facilities while an agency
14 pursues speculative third-country transfer. *Shaughnessy v. United States ex rel. Mezei*,
345 *U.S.* 206 (1953).

15 *Thuraissigiam* concerned the scope of habeas to obtain additional review of a
16 negative credible-fear determination in expedited removal, not challenges to civil
17 detention. The Court did not hold that the government may detain an arriving alien
for as long as it wishes absent any showing of necessity. *Department of Homeland
Security v. Thuraissigiam*, 591 *U.S.* 103, 138–40 (2020).

18 17. By contrast, the Supreme Court has flagged serious constitutional concerns with
19 indefinite immigration detention and has construed detention statutes to avoid such problems.
20 See *Jennings v. Rodriguez*, 583 *U.S.* 281 (2018) (resolving only statutory questions and
21 remanding without deciding constitutional limits), and Ninth Circuit authority recognizing
22 heightened safeguards as detention becomes prolonged.

23 18. While *Jennings v. Rodriguez*, 583 *U.S.* 281 (2018) forecloses engrafting a
24 statutory bond-hearing requirement into § 1225(b), it leaves intact the fundamental principle that

1 freedom from physical restraint is a core liberty interest and that prolonged civil confinement
2 outside narrow, nonpunitive circumstances triggers due process scrutiny—an approach the Ninth
3 Circuit continues to apply through individualized balancing in as-applied habeas cases.
4 See *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022); Ninth Circuit order emphasizing
5 that as-applied challenges remain available.

6 **III. REMEDY**

7 19. The requested relief is individualized and fits within traditional habeas powers to
8 remedy unlawful custody under 28 U.S.C. § 2241 and 28 U.S.C. § 2243. *Zadvydass v. Davis*, 533
9 U.S. 678 (2001) confirms habeas availability for statutory and constitutional detention
10 challenges. Also, consistent with *Jennings*, Petitioner seeks individualized, case-specific relief.

11 The Court should order:

12 20. Immediate release under appropriate conditions, or, alternatively,

13 21. A bond hearing within seven (7) days before an impartial decisionmaker at which
14 DHS bears the burden to justify continued detention by clear and convincing evidence and the
15 decisionmaker considers less restrictive alternatives to detention. DHS bears the burden to justify
16 continued detention (consistent with due process concerns described in *Zadvydass*).

17 22. Enjoin Respondents from removing Petitioner to Uganda absent (1) written
18 evidence that Uganda has agreed to accept Petitioner and (2) adequate procedural protections to
19 adjudicate any protection claim in that third country.

20 23. If the Court is concerned that any requested relief relating to a third-country
21 transfer exceeds custody-focused habeas relief, it may sever or reserve that issue and still grant
22 relief directed solely to the unlawfulness of continued detention.

