

UNITED STATES COURT
FOR THE WESTERN DISTRICT OF TEXAS

Carlos Alberto Sosa Morales

A# 

Petitioner,

v.

Pam Bondi, ATTORNEY GENERAL,
Kristi Noem, SECRETARY OF THE
DEPARTMENT OF HOMELAND
SECURITY, Maria Deandra Ybara,
U.S. ICE FIELD OFFICE DIRECTOR,
Angel C. Garite, ASSISTANT FIELD
OFFICE DIRECTOR OF EPC

Respondents

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EP 26CV0345

Civil Action No.
PETITION FOR A WRIT OF
HABEAS CORPUS PURSUANT
TO 28 U.S.C. §2241, BY A
PERSON SUBJECT TO
INDEFINITE IMMIGRATION
DETENTION.

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INTRODUCTION

1. Petitioner, proceeding *Pro Se*, a native and citizen of El Salvador, 44 years old, who entered the U.S. without inspection in 2008. Currently detained at the El Paso Processing Center located at 8915 Montana Ave. El Paso, Texas 79925. On April 23rd, 2024, Petitioner was placed in ICE custody. On November 13, 2024, Petitioner had a merits hearing on Asylum, Withholding of Removal and Deferral of Removal under C.A.T., Petitioner testified extensively under oath in support of his I-589 application, at the end of the hearing the Immigration Judge ("IJ"), granted Petitioner Deferral of Removal under C.A.T., that decision became final on December 13, 2024. Petitioner, *Pro Se*, does hereby petition this Court for a writ of habeas corpus to remedy Petitioner's indefinite and prolonged

detention by Respondents'.

2. Petitioner has been in civil detention since April 23, 2024, over 16 months. Accordingly, to vindicate Petitioner's statutory and constitutional rights and to put an end to his continued arbitrary prolonged detention, this Court should GRANT the instant petition for writ of habeas corpus and order Petitioner immediately be released or in the alternative grant a constitutionally adequate bond hearing.

3. DHS/ICE cannot remove Petitioner to country of origin unless the order of deferral is terminated. Petitioner has no ties to any third country. It is Petitioners' understanding that several third countries have already rejected to accept Petitioner. Thus, there is no removal in the foreseeable future. Absent an order from this Court, Petitioner will likely remain detained for many more months if not years.

4. Furthermore, ICE's ongoing decision to refuse release of Petitioner is inconsistent with ICE's own policy, pursuant to ICE directive 16004.1, long-standing ICE policy favors the prompt release of non-citizens who have been granted, asylum, withholding, or CAT relief. "It is ICE policy to release individuals who have been granted protection relief by an immigration judge." ¹ See *Ortiz v. Orange Cnty.*, 2024 U.S. Dist. LEXIS 216444 ("The Court previously held Molina's continued detention during the pendency of his immigration proceedings constituted an ongoing injury-in-fact because he was being held in contravention of ICE policy[16004.1]. At the time, an immigration judge had granted Molina relief from removal proceedings because he found Molina was likely to be tortured upon returning to his home country.")

5. The Supreme Court has required stringent substantive standards and strong procedural protections for civil detention, particularly when prolonged.² The Supreme Court has said that, under the Due Process Clause, detention must "bear a reasonable relation to the purpose for which the individual was committed." In *Diop*, held that once mandatory detention becomes prolonged, mandatory detention no longer serves the legitimate purpose of the statute and ceases to govern the individual

¹ See ICE Directive 16004.1: Detention Policy Where an Immigration Judge has Granted Asylum and ICE Has Appealed (Feb. 9, 2004), https://www.prisonlegalnews.org/media/publications/ice_memo_detention_policy_where_immigration_judge_has_granted_asylum_and_ice_has_appealed_2004.pdf; see also Tae D. Johnson, Acting Director, ICE REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and ICE has Appealed (June 7, 2021) available at, https://www.acluva.org/sites/default/files/field_documents/redacted_petition_exhibit_excerpts_for_press_release_8-3-23.pdf; (found at 44-45)

² The Supreme Courts holding in *Demore* is "narrow...grounded in repeated reference" to the brevity of removal proceedings; *Victor v. Mukasey*, 2008 US Dist. LEXIS 96187; *Ocellin v. District Director*, 2009 US Dist. LEXIS 51444.

detention.³ When a non-citizen's removal is not reasonably foreseeable, detention serves no legitimate government purpose, and thus the non-citizen must be released. *Zadvydas*, 533 U.S. at 700-01.

6. The Fifth Amendment's Due Process Clause forbids the government from depriving any "person . . . of . . . liberty . . . without due process of law." *U.S. Const. amend. V*. "[T]he Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful, temporary, or permanent." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020). Courts have interpreted *Zadvydas* as holding that the longer the foreign national is detained the less evidence must be provided to obtain relief.⁴

7. This particular prolonged detention challenge arises post final order, wherein immigration court proceedings have concluded, petitioner has been granted CAT relief, and continued custody attributable to arbitrary decisions made by the government. Despite success on CAT claim over ten months ago, petitioner remains in custody.⁵ The release of the alien is both necessary and appropriate. Prolonged detention of more than a year without a bond hearing violates the due process clause requiring immediate release or a constitutionally adequate bond hearing. This Court should order his immediate release under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), in light of the "extraordinary circumstances" of this case.

8. As the Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), noncitizens cannot be detained indefinitely if the government is unable to carry out their removal. Instead, detention after a final order of removal is authorized only when removal is reasonably foreseeable. As a guide to courts, the Court in *Zadvydas* established a presumption that detention after a final order of removal was permissible for the six months. Detention after a final order may be unlawful even when six months have not passed, particularly if it is clear that the United States will not be able to effect a noncitizen's removal. But after that six-month period, once a 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 the longer a noncitizen has been detained, the stronger the government's showing must be.

9. Petitioner is entitled to release under the framework of *Zadvydas* and *Mapp* unless the government promptly demonstrates that there is a significant likelihood of removal in the reasonably

3 *Diop v. ICE DHS*, 656 F.3d 221, 233-34 (3rd Cir. 2011)

4 *Hassoun v. Sessions*, 2019 U.S. Dist. LEXIS 451 (W.D.N.Y. 2019)(quoting *Alexander v. A.G.*, 495 Fed. Appx. 274, 276-78; *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 406 (W.D.N.Y. 2009)

5 *Tkochenko v. Sabol*, 792 F. Supp. 2D 733, 737 (3rd Cir. 2011)

foreseeable future. Petitioner asks this Court to find that his prolonged detention is unreasonable and to order his immediate release.

10. Petitioner brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which "authorizes a district court to grant a writ of habeas corpus whenever a petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003) (quoting 28 U.S.C. § 2241(c)(3)), seeking immediate release or, in the alternative, an individualized bond hearing pursuant to *Black v. Dir. Thomas Decker*, 103 F.4th 133 (2d Cir. 2024), before a neutral decision maker at which Respondents bear the burden to justify his continued detention by clear and convincing evidence that Petitioners' continued detention is justified and further that Petitioners' continued detention is necessary to serve a compelling regulatory purpose, such as minimizing risk of flight or danger to the community. "Whether detention is necessary to serve a compelling regulatory purpose requires consideration of whether a less-restrictive alternative to detention would also address the government's interests. In other words, the decision maker must find that no condition or combination of conditions of release can reasonably ensure Petitioners' appearance and the safety of the community—that is, even with conditions, Petitioner presents an identified and articulated risk of flight or a threat to the community, and that the immigration judge must consider Petitioners' ability to pay when setting any bond amount." (quoting *K.U. v. Freden*, 2025 U.S. Dist. LEXIS 98044 (2d Cir. W.D.N.Y. 2025))

PARTIES

11. Petitioner is a El Salvador citizen who was granted deferral of removal under the C.A.T. On November 13, 2024. The Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA"), on April 23, 2024, charging petitioner as being an alien present in the United States who has not been admitted or paroled, under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"). Petitioner has been detained since then without the opportunity for bond. Petitioner's removal proceedings were heard at the Elizabeth Immigration Court in Elizabeth New Jersey, and his case became administratively final on December 13, 2024.

12. Respondent Maria Deanda Ybara is the ICE Field Office Director of the EOIR Field Office of ICE and is Petitioner's immediate custodian. See *Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000), cert. Denied, 122 S. Ct. 43 (2001).

13. Respondent Angel C. Garite is the Assistant Field Office Director of El Paso Processing Center, where the Petitioner is currently detained under the authority of ICE, alternatively may be considered to be Petitioner's immediate custodian.

14. Respondent Kristi Noem is named in her official capacity as the Secretary of the United States Department of Homeland Security. In her official capacity, she is responsible for administration of the immigration laws pursuant to 8 U.S.C. § 1103(a), she routinely transacts business in the Western District of New York, she supervises Respondents Freden and Harvey, and she is legally responsible for the pursuit of Petitioner's detention and removal. Respondent Noem's office is located at the United States Department of Homeland Security, Washington, D.C. 20528.

15. Respondent Pamela Bondi is named in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for administration of the immigration laws as exercised by EOIR, pursuant to 8 U.S.C. § 1103(g). He routinely transacts business in the Western District of Pennsylvania and is legally responsible for administering Petitioner's removal and custody redetermination proceedings and the standards used in those proceedings. Respondent Garland's office is located at the United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

JURISDICTION

16. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 2241; 28 U.S.C. § 1331; Article I, § 9, cl. 2 of the United States Constitution; and the All Writs Act, 28 U.S.C. § 1651. Additionally, the Court has jurisdiction to grant injunctive relief in this case pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Petitioner's detention as enforced by Respondents constitutes a "severe restraint[]" on [Petitioner's] individual liberty," as Petitioner is "subject to restraints not shared by the public generally," he "cannot come and go as he pleases," and his "freedom of movement rests in the hands of," public officers. *See, Hensley v. Municipal Court*, 411 U.S. 345 351 (1973)

17. Federal courts also have federal jurisdiction, through the APA, to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). APA claims are cognizable on habeas. 5 U.S.C. § 703 (providing that judicial review of agency action under the APA may proceed by "any applicable form of legal action,

including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus"). The APA affords a right of review to a person who is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Respondents' continued detention of Petitioner up to and past the 90-day removal period has adversely affected petitioners' liberty and freedom.

18. Although only the Court of Appeals has jurisdiction to review removal orders directly through a petition for review, *see* 8 U.S.C. § 1252(a)(1), (b), district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness or constitutionality of their detention by ICE. *Jennings v. Rodriguez*, 583 U.S. 281, 292-96 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). *See also Black v. Dir. Thomas Decker*, 103 F.4th 133 (2d Cir. 2024).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

19. There is no statutory requirement to exhaust administrative remedies where a noncitizen challenges the lawfulness of detention. Courts are in agreement that "there is no statutory requirement of administrative exhaustion before immigration detention may be challenged in federal court by a writ of habeas corpus." *Velasco Lopez v. Decker*, No. 19-CV-2912 (ALC), 2019 U.S. Dist. LEXIS 82881, 2019 WL 2655806, at *2 (S.D.N.Y. May 15, 2019), *aff'd*, 978 F.3d 842 (2d Cir. 2020) (quoting *Joseph v. Decker*, 2018 U.S. Dist. LEXIS 198781, 2018 WL 6075067, *5 (S.D.N.Y. Nov. 21, 2018)). Where, as here, the agency has predetermined a dispositive issue, no further action is necessary. *Brevil v. Jones*, 2018 U.S. Dist. LEXIS 194933, 2018 WL 5993731, *3 (S.D.N.Y. Nov. 14, 2018) (citing *Araujo-Cortes v. Shanahan*, 35 F.Supp.3d 533, 538 (S.D.N.Y. 2014)).

20. Because Supreme Court precedent, regulations, and precedent decisions by the Board of Immigration Appeals ("BIA") require Immigration Judges ("IJ's") to find that individuals detained pursuant to §1225(b) are subject to detention without bond, *see Jennings*, 583 U.S. at 303; 8 C.F.R. § 1003.19(h)(2)(b); *Matter of Oseiwsu*, 22 I&N Dec. 19 (BIA 1998), no further administrative remedies are required.

21. In any event, Petitioner has repeatedly sought release from Respondents using the statutory mechanisms available to him. He has submitted several parole release requests, participated in Custody Determination interviews, presented mitigating evidence and still remains detained. Any attempt by Petitioner to challenge the burden allocation would have been futile. The BIA has consistently and clearly held that the burden in a bond hearing [custody redetermination] should be

placed on the alien seeking release. *See Matter of Guerra*, 24 I&N Dec. 37 (BLA 2006) (noncitizen in DHS custody "must establish to the satisfaction of the Immigration Judge" that he is not a danger, flight risk, or threat to national security for bond to be set"). Because of this placement of burden, Petitioner would not have been able to meaningfully challenge the IJ's or Respondents' weighing of the evidence. Any claim by Petitioner that the burden should have belonged to the Government and not to him would have been futile. *Brevil*, 2018 U.S. Dist. LEXIS 194933, 2018 WL 5993731 at *3. July 25, 2025

VENUE

22. Venue lies in the Western District of Texas, because Petitioner is currently detained in the territorial jurisdiction of this Court, at the El Paso Processing Center. 28 U.S.C. §1391.

STATEMENT OF FACTS AND LEGAL BACKGROUND

A. PETITIONERS CONTINUED DETENTION IS UNLAWFUL UNDER *ZADVYDAS* SINCE REMOVAL IS NOT REASONABLY FORESEEABLE, AND THIS COURT SHOULD ACCORDINGLY ORDER IMMEDIATE RELEASE UNDER *MAPP*

23. When an IJ grants a non-citizen withholding or CAT relief, the IJ issues a removal order and simultaneously withholds or defers that order with respect to the country or countries for which the non-citizen demonstrated a sufficient risk of persecution or torture. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271 2283 (2021).

24. When non-citizens have a final withholding or CAT relief grant, they cannot be removed to the country or countries for which they demonstrated a sufficient likelihood of persecution or torture. See 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(b)(2). While ICE is authorized to remove non-citizens who are granted withholding or CAT relief to alternative countries, see 8 U.S.C. § 1231(b); 8 C.F.R. §1208.16(f), the removal statute specifies restrictive criteria for identifying appropriate countries. Non-citizens can be removed, for instance, to the country "of which the [non-citizen] is a citizen, subject, or national," the country "in which the [non-citizen] was born," or the country "in which the [non-citizen] resided" immediately before entering the United States. 8 U.S.C. § 1231(b)(2)(D)-(E).

25. If ICE identifies an appropriate alternative country of removal, ICE must undergo further

proceedings in immigration court to effectuate removal to that country.^{*6} See *Jama v. ICE*, 543 U.S. 335, 348 (2005) (“If [non-citizens] would face persecution or other mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); [and] relief under an international agreement prohibiting torture, see 8 C.F.R. §§ 208.16(c)(4), 208.17(a) (2004)...”); *Romero v. Evans*, 280 F. Supp. 3D 835, 848 n.24 (E.D. Va. 2017) (“DHS could not immediately remove petitioners to a third country, as DHS would first need to give petitioners notice and the opportunity to raise any reasonable fear claims.”), *rev’d on other grounds*, *Guzman Chavez*, 141 S. Ct. 2271. See also 8 C.F.R. § 208.16(c); 28 C.F.R. § 200.1. See *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir.); *I.N.S. v. Aguirre-Aguirre*, 562 U.S. 415, 419, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999); *Nasralla*, 140 S. Ct. @ 1687; *D.H.S. v. Thuraissigam*, 140 S. Ct. 1959, 1964-65, 207 L. Ed. 2d 427 (2020)

26. As a result of these restrictions and procedures, “only 1.6% of non-citizens granted withholding-only relief were actually removed to an alternative country” in FY 2017. *Guzman Chavez*, 141 S. Ct. at 2295 (Breyer, J., dissenting). An analysis of statistics provided by ICE and EOIR for FY 2020 reveals that this percentage was at most 3.3% during that period.^{*7} See also *Munoz-Saucedo v. Pittman*, 2025 U.S. Dist. LEXIS 120414, *21 (“Petitioner provides deportation data from fiscal years 2020 through 2023, which appears to show that in those years, ‘ICE removed...only 5 non-citizens granted withholding or CAT relief to alternative countries.’”); *Vaskanyan v. Janecka*, 2025 U.S. Dist. LEXIS 137846

27. To comply with *Zadvydas*, DHS issued additional regulations in 2001 that established “special review procedures” to determine whether detained non-citizens with final removal orders are likely to be removed in the reasonably foreseeable future. See *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Fed. Reg. 56,967 (Nov. 14, 2001). While 8 C.F.R. § 241.4’s custody review process remained largely intact, subsection (i)(7) was added to include a supplemental review

⁶ ICE itself acknowledges this obligation. In 2020, officials within ICE’s Office of the Principal Legal Advisor (OPLA) creates and circulates forms-acquired through a Freedom of Information Act (FOIA) request-that were designed to advise non-citizens of ICE’s intent to pursue third country removal and afford them the opportunity to seek withholding-only relief for that country. ICE Notice of Third Country Removal Form. See also *Wahidulla v. Cobb*, 862 F.2d 362(1st Cir 1988); *Khouzam v. A.G.*, 549 F.3d 235 (3d Cir. 2008); *D.V.D. v. U.S. D.H.S.*, 2025 U.S. Dist. LEXIS 74197

⁷ EOIR data indicates that approximately 386 non-citizens were granted withholding-only relief in FY 2019-2020. Data on Porst Relief Detention and Removal at 1. In response to a 2021 FOIA request, the ICE-ERO Statistical Tracking Unit provided data showing that a total of 13 people in “Case Category 5C (Relief Granted-Withholding of Deportation/Removal)” were removed in FY 2019 and 2020. *Id.* At 2. Comparing these data suggests that approximately 3.3% of non-citizens granted withholding or CAT relief were ultimately deported by ICE during that period. To the extent that the ICE data includes non-citizens removed to their home country after their withholding or CAT grant was terminated, the percentage of non-citizens removed to third countries following a final withholding or CAT relief grant is even lower.

procedure that ICE HQ must initiate when “the [non-citizen] submits, or the record contains, information providing a substantial reason to believe that removal of a detained [non-citizen] is not significantly likely in the reasonably foreseeable future.” *Id.* § 241.4(i)(7).

28. Under this procedure, ICE HQ evaluates the foreseeability of removal by analyzing factors such as the history of ICE’s removal efforts to third countries. *See id.* § 241.13(f). If ICE HQ determines that removal is not reasonably foreseeable but nonetheless seeks to continue detention based on “special circumstances,” it must justify the detention based on narrow grounds such a national security or public health concerns, *id.* § 241.14(b)-(d), or by demonstrating by clear and convincing evidence before an IJ that the non-citizen is “specially dangerous.” *Id.* § 241.14(f). ICE HQ interviewed Petitioner on June 17, 2025. They have yet to inform Petitioner of decision which remains pending and prolonged with no date in sight.

ICE POLICY

29. Consistent with the statutory and regulatory scheme, long-standing ICE policy favors the prompt release of non-citizens who have been granted withholding or CAT relief. In 2000, the then-Immigration and Naturalization Service (INS) General Counsel issued a memorandum clarifying that 8 U.S.C. § 1231 authorizes but does not require the detention of non-citizens granted withholding of removal or CAT relief during the 90-day removal period.⁸ (See EXH. D), ICE Policies on Post-Relief Release at 1. A 2004 ICE memorandum turned this acknowledgement of authority into a presumption, stating that “it is ICE policy to favor the release of [non-citizens] who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain.” *Id.* At 2.

30. ICE leadership subsequently reiterated this policy in a 2012 announcement, clarifying that the 2000 and 2004 ICE memorandums are “still in effect and should be followed” and that “[t]his policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period.” *Id.* At 3. Finally, in 2021, Acting ICE Director Tae Johnson circulated a memorandum to all ICE employees reminding them of the “longstanding policy” that “absent exceptional circumstances,...non-citizens granted, asylum, withholding or removal, or CAT protection by an immigration judge *should* be released...” *Id.* At 4 (emphasis added). Director Johnson clarified that “in considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat of danger to the community.” *Id.*

⁸ INS, housed within the Department of Justice, became ICE after the formation of DHS in 2002.

31. Petitioner has formally requested release/custody review on multiple occasions from ICE. First requested parole in March 2025 through the tablet and again on April 21, 2025, while unrepresented. On June 17, 2025, Petitioner had an interview with ERO ICE, Petitioner submitted mitigating evidence as well as letters of support. (EXH. E) According to ICE, despite numerous follow-up emails, that decision is still pending.

32. ICE has not identified any exceptional circumstances warranting continued detention under ICE Policy.

33. Petitioner has been diagnosed with PTSD, mental distress disorder and cognitive disassociation, which requires counseling and have to take medication regularly, is prone to anxiety and sleep deprivation, insomnia. Additionally, Petitioner has been assaulted while detained by staff and experienced excessive force used by officers at BFDF, which has caused loss of vision and migraines.

ARGUMENT

PETITIONER'S CONTINUED DETENTION IS UNLAWFUL UNDER ZADVYDAS BECAUSE REMOVAL IS NOT REASONABLY FORESEEABLE, AND THIS COURT SHOULD ACCORDINGLY ORDER IMMEDIATE RELEASE

34. Petitioner will very likely *not* be deported from the United States, let alone in the reasonably foreseeable future. Petitioner cannot be deported to his home country because has a CAT deferral of removal Relief. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(b)(2).

35. Furthermore, it is exceedingly unlikely that ICE will identify an alternative country to which it can remove petitioner. ICE only managed to remove to third countries approximately 3% of non-citizens granted withholding and CAT relief in FY 2019 and 2020, and a significant increase in ICE's third country removals is highly doubtful without a substantial change in diplomatic relationships between the United States and other countries. ⁹

36. Therefore, petitioners removal is not reasonably foreseeable because 1) Petitioner cannot be deported to home country due to CAT deferral relief grant; 2) ICE has historically managed to remove only a tiny fraction of non-citizens granted withholding or CAT to alternative countries; 3) BUF

⁹ Foreign countries do not accept the deportation of random non-citizens who lack any connection to their territory. According to a 2019 DHS report on ICE deportations procedures "foreign governments do not issue travel documents without confirming the identity and citizenship of the [non-citizen]" and "with limited exceptions, require a passport or temporary travel permit to accept their nationals back into the country." *DHS Office of the Inspector General, ICE Faces Barriers in Timely Repatriation of Detained Aliens (March 11, 2019), at 8.* <https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf>.

ICE failed to remove similarly situated individual in the last year, leading to their eventual release; 4) assuming any additional ICE requests, (which ICE has not informed Petitioner of and is not aware of any such pending requests) any countries to which assumed requests may be pending have no logical reason to accept petitioners deportation and have provided no timeline under which they might decide; and 5) deporting petitioner to alternative country would require additional lengthy proceedings. *See Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 78984, n *5 (W.D.N.Y. Jan. 2, 2019)(finding removal not reasonably foreseeable where several countries had declined to issue travel documents and several others had provided no response or timeline for response).

37. This Court similarly relied on the likely impossibility of removal in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), where was held that an alien's continued detention was not authorized by statute. In *Nadarajah*, the BIA had "awarded [*Nadarajah*] asylum twice, as well as protection under the Convention Against Torture," and yet his detention continued for over five years while the government appealed the outcome of these agency proceedings. *Id.* at 1071, 1081. Held that *Nadarajah* had successfully demonstrated that there was no significant likelihood of his removal in the reasonably foreseeable future, because as a result of the asylum and CAT findings, "the government is not entitled to remove *Nadarajah* to Sri Lanka, and no other country has been identified to which *Nadarajah* might be removed," thus forming a "powerful indication of the improbability of his foreseeable removal." *Id.* at 1081-82. *Nadarajah*, like *Zadvydas* and *Clark*, thus involved the detention of an alien whom the government could not lawfully remove. *see D'alessandro v. Mukasey*, 2009 U.S. Dist. LEXIS 24954; *Charles v. Decker*, 2017 U.S. Dist. LEXIS 229029; *Singh v. Whittaker*, 362 F. Supp. 3d 93 (W.D.N.Y. 2019)

38. For the reasons stated above, petitioner has clearly met his burden. Unlike *Zadvydas* and the vast majority of its progeny, which analyzed whether ICE will foreseeably be able to remove the petitioner to their home country or country of citizenship, *see, e.g., Zadvydas*, 533 U.S. at 684-85, the question here is whether ICE will be able to deport petitioner to random third countries to which they have no connection whatsoever.

39. Previous custody determination reviews have been cursory and on policy based metrics which conflates enforcement preferences with risk. Actual indicia's of risk irrelevant in ICE-DHS custody determinations, representative more of policy priorities. ¹⁰ The link between enforcement

¹⁰ See Mark Noferi & Robert Koulis, *The Immigration Detention Risk Assessment*, 29 GEO. Immigr. L. J. 45, 51 (2014); see also Kate Evans & Robert Koulis, *Manipulating Risk: Immigration Detention Through Automation*, 24 Lewis & Clark L. Rev. 789, 789 (2020).

policy and risk assessment is fundamentally flawed and deviates from true risk, unmoored from constitutional constraints and the result is brazen violation of the Constitutional demands,

* Custody determinations are categorical denials of release rather than individualized assessments. ¹¹

*Custody decisions driven by political/enforcement preferences rather than risk to public safety or flight. ¹²

*Risk Classification assessment manipulation, which lacks transparency, DHS ICE adjusts factors to be considered and undue weight given to those factors, not based on any new evidence or data related to the safety or flight risk.

*DHS ICE fails to follow its own policies in violation of due process, APA, and the Accardi doctrine. As well as constitutional guarantees, liberty interests and creates automated system of unconstitutional detention which becomes prolonged and indefinite. ¹³ "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures...even where the internal procedures are possibly more rigorous than otherwise would be required." ¹⁴

* A past criminal record should only be considered to the extent it is indicative of future dangerousness. ¹⁵

*DHS ICE officials acknowledge, that it does not take into account certain factors that should be considered, when deciding whether to continue to detain someone.

Specifically, eligibility for relief, whether relief has already been granted, length of lawful status in the U.S., entry as a minor, lack of ties and conditions in country of origin or

¹¹ See *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2D 653 (2001); *Demore v. Kim*, 538 U.S. 510, 527 (2003); *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); See also *Velasco v. Decker*, No. 1:20-cv-01803 (S.D.N.Y. Feb. 28, 2020); *U.S. v. Salerno*, 481 U.S. 739, 755 (1987)(In our society liberty is the norm, and detention...is the carefully limited exception.); *Urena*, 25 I&N Dec. 140, 141 (BIA 2009)

¹² See, Order appointing Special Master at 5-6 (Doc. 281), *Frailhat v. U.S. I.C.E.*, No. EDCV 19-1546 JGB (SHKx)(C.D. Cal. Mar. 20, 2021)

¹³ See E-Mail from ERO Taskings on behalf of Marc Rapp, Assistant Dir. For Law Enf't Sys. & Analysis, regarding changes to the RCA scoring Methodology, to Field Office Directors (Jan. 6, 2014, 05:17 EST), (Feb. 11, 2015, 1:03 PM); see also, *ATP Rules Matrix V.3*, Duke L. Scholarship Repository (N.D.) https://scholarship.law.duke.edu/faculty_scholarship/3994/; see also *Accardi*, 347 U.S. at 266.

¹⁴ See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. cir. 1977)

¹⁵ See *Singh*, 638 F.3d at 1025 (observing that the "recency and severity of the offense must be considered and that even a lengthy record of prior convictions, including some past violent convictions, may not meet the standards for clear and convincing evidence of "future dangerousness" where the "impetus for his previous offenses [] has ceased."); See also *Chin Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3rd Cir. 1999)("[P]resenting danger to the community at one point by committing crime does not place them forever beyond redemption, measures must be taken to assess the risk of flight and danger to the community on a current basis.")

nationality that renders removal unlikely. ¹⁶

*DHS-ICE fails to assess 'Special Vulnerabilities' or give those proper weight, or take into account certain factors such as in this case; 1 cognitive disassociation 2 Depression 3 PTSD 4 Anxiety 5 sleep deprivation, insomnia 6 Primary caretaker responsibilities. All of which have been exacerbated and deteriorating while in ICE custody.

40. Instead of industry-standard risk methodology informing the use of civil detention, the customary use of detention is driving the methodology. "Risk" levels, mirror the executive branch's enforcement priorities, but enforcement priorities do not necessarily correspond to the danger someone poses or their likelihood of flight. ¹⁷ Instead of local ICE officers and supervisors conforming their detention decisions to risk based assessments, the scoring rubric has been altered to match pre-existing policy, conflates risk with enforcement preferences. This link lacks an underlying logic, enforcement priorities do not necessarily correlate with a risk to public safety or risk of flight. The characteristics used to determine an individual priority for enforcement have no inherent bearing on the need for detention. ICE-DHS however stopped distinguishing indicia of risk from political preference, instead engineered methodology to conform to local customs. Alien's removable status itself, bears no relation to detainees dangerousness. ¹⁸ "Due process is not satisfied, by rubberstamp denials based on temporally distant offenses. The process due even to excludable aliens requires an opportunity for an evaluation of the individuals' current threat to the community and his risk of flight." *Chin Thon Ngo*, 192 F.3d @ 398.

41. The government should not be deemed to have met its burden based on documents that are inherently suspect or prone to error. *cf. James v. Mukasey*, 522 F.3d 250, 257 (2nd Cir. 2008); *Francis v. Gonzales*, 442 F.3d 131, 141 (2nd Cir. 2006); *Dickson v. Ashcroft*, 346 F.3d 44, 55 (2nd Cir. 2003); *Matter of Guevara*, 20 I & N Dec. 238, 244 (BIA 1991); *Matter of Tang*, 13 I & N Dec. 691, 692 (BIA 1971). The heightened liberty interest and decreased government safety interest skews the balancing test in favor of the liberty interest for individuals who are detained on the basis of old convictions. The result is a brazen violation of the constitutional demands, losing its constitutional footing. Resulting in automated recommendations of continued detention.

¹⁶ U.S. ICE, Risk Classification Assessment: Training SME & Key User Training (May 2012); Combined RCA Virtual University Release, Duke L. Scholarship Repository 180 (2012) https://scholarship.law.duke.edu/faculty_scholarship/3994/
¹⁷ See U.S. ICE ERO Risk Classification Assessment (RCA) FAQ's Version 1 (Jul. 2012)
¹⁸ See *Foucha*, 504 U.S. 71, 82

THIS COURT SHOULD ORDER THE IMMEDIATE RELEASE OF PETITIONER

42. Because petitioners removal is not reasonably foreseeable, *Zadvydas* requires that he be immediately released. *See 533 U.S. at 700-01* (describing release as an appropriate remedy); 8 U.S.C. § 1231(a)(6) (authorizing release “subject to...terms of supervision”). To order Petitioners’ immediate release, this court need only determine that their removal is not reasonably foreseeable under *Zadvydas*; it need not analyze whether they pose a danger to the community or a flight risk. *See 533 U.S. at 699-700* (“[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”).

43. *Zadvydas* explicitly held that flight risk is already baked into the reasonable foreseeability analysis, *see id. At 690* (observing that the “justification...[of] preventing flight...is weak or nonexistent where removal seems a remote possibility at best”), and that dangerousness cannot unilaterally justify indefinite civil detention barring “special circumstances,” which may include the non-citizen being a “suspected terrorist[]” but do not include the non-citizen’s “removable status itself.” *id. At 691*. *See also Kansas v. Hendricks, 521 U.S. 346, 358 (1997)* (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary [civil detention].”) With respect to petitioners detention, ICE has not invoked the regulation governing these “special circumstances” determinations, nor could they reasonably do so because petitioner clearly does not present a national security or public health concern and does not have a criminal conviction qualifying him as “specially dangerous.” *see 8 C.F.R. § 241.14. see also, Hassoun v. Searls, 2019 U.S. Dist. LEXIS 215383 (W.D.N.Y., Dec. 13, 2019)*

44. To the extent this Court considers any factors outside of the foreseeability of petitioners removal, which it need not do, petitioners have significant equities that warrant release. Petitioner for example, has lived in the United States for over 10 years, has two daughters and a son born in the United States, a place to live, and family ties that anchor him to the community. (EXH's. A & E) Petitioner does not pose a flight risk, to the contrary has strong incentive to appear at proceedings and litigate available defenses and refugee status.

45. Additionally, this Court or ICE is free to impose conditions on release to mitigate any potential concerns regarding flight risk or danger. *See Zadvydas, 533 U.S. at 700* (“[T]he [non-citizen]’s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.”) *See also Black v. Dir. Thomas Decker, 103 F.4th 133 (2d Cir.*

2024).

46. *Black v. Decker*, held that "a non-citizen's constitutional right to due process precludes...unreasonably prolonged detention." *Id.* @ 138. Further, it held that the three-factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), "supplies the proper framework for determining when and what additional procedural protections are due such a detainee." To determine whether detention has become unreasonable or unjustified, the courts in this district apply a multi factor case by case analysis to determine whether detention has become "unreasonable or unjustified", *E.g.*, *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018); *see also Jack v. Decker*, No. 21-cv-10958, 2022 U.S. Dist. LEXIS 165099, 2022 WL 4085749, at *10 (S.D.N.Y. Aug. 19, 2022).

ANALYSIS OF DUE PROCESS FACTORS

1.) The most important factor is duration of detention. ^{*19} Extending Demore's logic to as-applied challenges explain that detention "becomes more and more suspect" after five months. Therefore, in terms of duration of this detention, Petitioner's case falls squarely within that array of cases where prolonged detention, spanning a year or more, has inspired profound constitutional concerns justifying habeas relief.

47. Petitioner's detention is already more than 16 months long. It is almost three times longer than the six months that the Demore court upheld as only "somewhat longer than average" (538 U.S. at 530-31). *Perez v. Decker*, 2018 U.S. Dist. LEXIS 141768, 2018 WL 3991497, at *5 (S.D.N.Y. Aug. 20, 2018)(finding that detention for more than nine months weighed in favor of petitioner). Detention beyond six months "is more likely to be unreasonable, and thus contrary to due process." *Garcia v. Decker*, No. 22 Civ. 6273, 2023 U.S. Dist. LEXIS 97661, 2023 WL 3818464, at *5 (S.D.N.Y. June 5, 2023) (citation omitted) Courts in this district have regularly granted habeas relief when faced with much shorter terms of detention. *Id.* (seventeen months); *Vallejo v. Decker*, 2018 U.S. Dist. LEXIS 132366, 2018 WL 3738947, at *4 (S.D.N.Y. Aug. 7, 2018)(noting that seventeen months was "to put it mildly, significant,"); *Hylton*, 502 F. Supp. 3D at 854 (fourteen months); *Graham v. Decker*, No.20 Civ. 3168, 2020 U.S. Dist. LEXIS 107520, 2020 WL 3317728, at *5 (S.D.N.Y. June 18, 2020)(ten months); *Cabral v. Decker*, 331 F. Supp. 3D 255, 261 (S.D.N.Y. 2018)(seven months). Accordingly, the length of time weighs strongly in Petitioner's favor.

¹⁹ See *Chavez-Alvarez*, 783 F.3d at 474, 475-78; *Diop*, 656 F.3d at 233-34; *Velasco Lopez*, 978 F.3d at 851; *United States v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

2.) The Party responsible for the delay which caused the petitioner's detention to become prolonged. In this regard, delays attributable to the government weigh heavily against respondent in conducting this analysis.

48. This lengthy period of prolonged continued detention largely attributable to custody decisions made by the government, thus for the past year the government has been the principle agent of the delays in this case, the government has been the principle prosecutor and decision maker. In such instances where immigration officials have made choices that prolonged and delayed removal proceedings, the release of the alien pending completion of this protracted litigation is both necessary and appropriate. "The mere fact that alien [was granted] relief from deportation does not authorize the [government] to drag its heels indefinitely in making a decision. The entire process, not merely the original deportation hearing, is subject to the Constitutional requirement of reasonability." *Iwu v. Searls*, 2024 U.S. Dist. LEXIS 87829 (W.D.N.Y. 2024); *Joseph v. Barr*, 2019 U.S. Dist. LEXIS 138364 (W.D.N.Y. Aug. 15, 2019)(quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003)(cited in *Hechavaria*, 891 F.3d @ 56 n.6). Thus, this factor also weighs in Petitioners' favor.

3.) Whether the petitioner has asserted defenses to removal

49. Indeed, it is evident that petitioner has made substantial showing and prevailed on the merits; an IJ has found petitioner credible and has found more likely than not that petitioner will be harmed and tortured, granting CAT relief, deferral of removal and therefore DHS cannot remove petitioner to the country in the removal order unless the order of deferral is terminated and which is clothed with the 'presumption of regularity'. Petitioner remains in legal limbo-neither free nor removed-for over 16 months. Since petitioner's continued detention is now of an excessive duration and is largely the product of governmental delays stemming from efforts by immigration officials to seek a third country that will accept petitioner, an issue which may entail further protracted litigation, and for which this petitioner is now entitled to habeas relief and release under reasonable conditions of supervision pending adjudication of governments decision due to his extraordinary circumstances and substantial claims. See *Zuniga v. Garland*, 2021 U.S. Dist. LEXIS 240548 (W.D.N.Y. Dec. 16, 2021) (quoting, *Cabral*, 331 F. Supp. 3d at 261-62)(finding the third factor weighed in petitioner's favor because he asserted several defenses to his removal "including asylum . . . and relief under the Convention Against Torture"); *Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 U.S. Dist. LEXIS 141768, 2018 WL 3991497, at *5 (S.D.N.Y. Aug. 20, 2018) ("Petitioner has made a claim for asylum that could

be a defense to his removal, again tilting the scales toward his unreviewed detention being unreasonable.”). Thus, this factor also weighs strongly in Petitioner’s favor.

4.) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable;

50. Petitioner was in criminal custody for approximately 17 months. The time Petitioner has now spent in ICE custody is approximately 21 months. Petitioner’s immigration detention has now exceeded the time he was incarcerated. This factor also favors Petitioner. *See Velasco Lopez v. Decker*, 978 F.3d 842, 851-52 (2d Cir. 2020).

5.) Whether the conditions of confinement are ‘meaningfully different from criminal detention/punishment’. So if an alien’s civil detention looks penal, that tilts the scales towards finding the detention unreasonable. Chavez-Alvarez, 783 F.3d at 478. And as the length of detention grows, so does the weight that we give this factor.

51. Petitioner was held at the Buffalo Federal Detention Facility before his transfer to the El Paso Processing Center. At BFDF Petitioner was housed in a two tier (2 floors), maximum security unit with 48 rooms which holds two detainees per room. He was locked down for 18 hours per day. There were issues ranging from inability to get medical and dental care to physical and psychological abuse by staff. Guards at BFDF would physically harm people by using or threatening force or inappropriately placing people in solitary confinement and subjecting detainees to racist remarks, religious and sexual orientation discrimination and retaliation for filing complains about detention.

52. “In light of all that the record suggests that Joseph’s confinement at the BFDF is indistinguishable from penal confinement.” *Joseph v. Barr*, 2019 U.S. Dist. LEXIS 138369 (W.D.N.Y. 2019); *Cantor v. Freden*, 2025 U.S. Dist. LEXIS 2857 (W.D.N.Y. 2025); *Jamal A.*, 358 F. Supp. 3D at 860.

53. Since Petitioner’s transfer from BFDF to the El Paso Processing Center Petitioner continues to experience difficulty receiving medical and dental care. Petitioner’s mental state is continuing to worsen due to the overall prolonged detention and multiple transfers that take a toll on the person physically and psychologically. While in El Paso Processing Center the Petitioner is housed in a dorm of 60 other detainees on average, with no privacy having to perform his ablutions in front of other men. The constant high level of noise in the dorm along with aggression among detainees results in high tension and causes an extremely high stress environment. After 21 months of such psychological stress a person develops a Post Traumatic Stress Disorder.

BFDF is consistent with its carceral nature and with abuse. ²⁰ Thus this fourth factor heavily favors Petitioner.

6.) the nature of the crimes committed by the petitioner

54. In January 2018, Petitioner pleaded nolo contendere to a non-violent crime of conspiracy to second degree assault, the nature of the crime Petitioner was convicted of, weighs against Petitioner on its face, however, Courts have noted that while past criminal convictions, are critical to evaluating a petitioner's risk of danger to the community, "[t]he process due even to excludable aliens requires an opportunity for an evaluation of the individual's *current* threat to the community and his risk of flight." *Hechavarria v. Whittaker*, 358 F. Supp. 3d 227, 240 (W.D.N.Y. 2019) (quoting *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999)). Also, there is no evidence in the record showing that Petitioner poses a current threat to the community-indeed. Thus, on the whole, this factor is at best neutral.

7.) Whether Petitioner's detention is near conclusion or under the statute is likely to continue. When the alien's removal proceedings are unlikely to end soon, this suggests that continued detention without a bond hearing is unreasonable. ²¹

55. Petitioner is likely to stay detained for some time. No confidence exists that this is a case in which the period of continued detention pending removal has any fixed, finite or identifiable duration. Indeed, to date this period of detention has already extended over 16 months. During this lengthy period this case has been the subject of proceedings before an immigration judge and multiple custody reviews which currently remains pending, because of heavy caseload, it cannot be predicted when a decision will be rendered. This means Petitioner will stay in detention given the stakes involved in this litigation for the parties which is described as a matter of life or death for Petitioner, it can be readily expected that any ruling, whether favorable or adverse to Petitioner, will inspire further proceedings, and compel what this court has previously described as a 'maze of removal proceedings' ²² Which may span many months. In such instances, release of the alien pending completions of these proceedings is fully justified. So the likelihood that Petitioner's detention will continue strongly supports a finding of unreasonableness and favors Petitioner.

56. Petitioner has a family that depends on him, a family that is suffering lasting emotional

²⁰ See, Anil Kalhan, Rethinking Immigration Detention, 110 Clom. L. Rev. Sidebar 42, 43 (2010)(stating that "detention now represents a deprivation as severe as removal itself," and asserting that the term "detention" improperly "masks circumstances approximating criminal incarceration or imprisonment" See also, Studying the Hazy Line Between Procedure & Substance in Immigration Litigation, 30-9 Benders Immigration Bulletin 01 (2025) *N.47 Rebecca Merton, Cynthia Galaz & Christina Fialho, "Immigration Detention is Psychological Torture".

²¹ See *Chavez-Alvarez*, *Id.* At 477-78

²² See *Victor v. Mukasey*, *Id.* At *5

economic, and physical hardships caused by this forced separation of a loved one. *Kalhan*, supra note 20, at 46 (“The resulting economic, emotional, and psychological harms are visited upon not just detainees, but also their family members,” including “children or other dependents.”). Petitioner has lost ability to support his family, placed under undue strain and is destroying family relationships, separated petitioner from his children and caused long term psychological and physiological damage. ²³

57. For these reasons, each of the factors of the multi factor test demonstrate that Petitioner’s detention without bond hearing has become unreasonably prolonged. *See Arce-Ipanaque v. Decker*, No. 19-CV-1076 (JMF), 2019 U.S. Dist. LEXIS 82423, 2019 WL 2136727, at *2 (S.D.N.Y. May 15, 2019) (“At bottom, the minimal burden that a bond hearing would place on the Government is far outweighed by [the petitioner]’s interest in ensuring that his continued detention is justified.” (quotation and original alteration omitted)).

B. PETITIONER’S DETENTION FOR OVER 16 MONTHS UNREASONABLY PROLONGUED & ICE’S CONTINUED DETENTION WITHOUT REVIEWING CUSTODY UNDER ICE POLICY VIOLATES THE APA AND DUE PROCESS

58. Under the *Accardi* doctrine, which originated in the context of an immigration case and has been developed through subsequent immigration case law, agencies are bound to follow their own rules that affect the fundamental rights of individuals, even self-imposed policies and processes that limit otherwise discretionary decisions. *See Accardi*, 347 U.S. at 226 (holding that BIA must follow its own regulations in its exercises of discretion); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures...even where the internal procedures are possibly more rigorous than otherwise would be required.”).

59. The requirement that an agency follow its own policies is not “limited to rules attaining the status of formal regulations.” *Montilla v. INS*, 926 F.2d 162, 167 (2nd Cir. 1991). Even an unpublished manual or policy binds the agency if “an examination of the provision’s language, its context, and any available extrinsic evidence “supports the conclusion that it is ‘mandatory’ rather than merely precatory.” *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977); *See also Morton*, 415 U.S. at 235-36 (applying *Accardi* to violation of internal agency manual); *U.S. v. Heffner*, 420 F.2d 809, 813 (4th Cir. 1969)(“Nor does it matter that these IRS instructions to Special Agents were not promulgated in

²³ See, Fatma Marouf, Alternatives to Immigration Detention, 38 Cardozo L. Rev. 2141, 2150-54 (2017)

something formally labeled a 'Regulation'...").

60. When agencies fail to adhere to their own policies as required by *Accardi*, courts typically frame the violation as arbitrary, capricious, and contrary to law under the APA, see *Damus v. Nielson*, 313 F. Supp. 3D 317, 337 (D.D.C. 2018) ("It is clear, moreover, that [*Accardi*] claims may arise under the APA"), or as a due process violation. See *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process.") (internal quotations omitted).

61. Prejudice is generally presumed when an agency violates its own policy. See *Montilla*, 926 F.2d at 167 ("We hold that an alien claiming the INS has failed to adhere to its own regulations...is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them."); *Heffener*, 420 F.2d at 813 ("The *Accardi* doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict")

62. To remedy an *Accardi* violation, a court may direct the agency to properly apply its policy, see *Damus*, 313 F. Supp. 3D at 343 ("[T]his court is simply ordering that Defendants do what they already admit is required."), or a court may apply the policy itself and order relief consistent with the policy. See *Jimenez v. Cronen*, 317 F. Supp. 3D 626, 657 (D. Mass. 2018) (scheduling bail hearing to review petitioners' custody under ICE's standards because "it would be particularly unfair to require that petitioners remain detained...while ICE attempts to remedy its failure").

63. ICE's long-standing policy (hereinafter "the Policy") is to release non-citizens immediately following a grant of withholding or CAT relief absent exceptional circumstances. See EX. D at 2 ("In general, it is ICE policy to favor the release [non-citizens] who have been granted protection by an immigration judge, absent exceptional concerns..."); *id.* at 4 ("Pursuant to longstanding policy, absent exceptional circumstances...non-citizens granted asylum, withholding of removal, or CAT protection by an immigration judge *should* be released...")(emphasis added). The Policy specifically instructs the local ICE field office to make an individualized determination whether to keep a non-citizen detained based on exceptional circumstances. See *id.* at 3 ("[T]he Field Office Director must approve any decision to keep a[] [non-citizen] who received a grant of [asylum, withholding, or CAT relief] in custody.")

64. The Policy constitutes ICE's interpretation of the statute and regulations governing post-

removal order detention. *See* 8 U.S.C. § 1231; 8 C.F.R. §§ 241.4, 241.13, 241.14. ICE has reasonably concluded that 8 U.S.C. § 1231(a)(2) does not require the detention of non-citizens granted withholding or CAT for the entirety of the 90-day removal period and that ICE "has the authority to consider the release of such [non-citizens] during the removal period." EX. D at 1. Furthermore, ICE stated that the release policy established in 2004 "applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period," thereby explicitly extending the Policy to non-citizens with final removal orders who were granted withholding or CAT relief. *id.* at 4

65. Such an application of the Policy is consistent with the broad discretion afforded to ICE by statute and regulations governing post-removal order detention and is reasonable interpretation of the ambiguities in that framework. Neither the statute nor regulations specifically contradict the Policy, *(n.10) and the regulatory language suggests that the standard custody review procedures for non-citizens with final removal orders do not apply to non-citizens like petitioner who has been detained for over six months and has been granted CAT relief and lacks a connection to any alternative country. *See, e.g.,* 8 C.F.R. § 241.14(b)(4) ("The custody review procedures in this section do not apply after the Service has made a determination, under the procedures provided in 8 C.F.R. § 241.13, that there is no significant likelihood that [non-citizen] under final order of removal can be removed in the reasonably foreseeable future."). The Policy and its application to Petitioner is thus entitled to deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice Auer deference..."); *Auer v. Robbins*, 519 U.S. 452 (1997) (deferring to Labor Secretary's reasonable interpretation of overtime pay regulations);

66. The Policy is precisely the type of rule ICE is obligated to follow under *Accardi*. In *Damus*, the U.S. District Court for the District of Columbia found that a similarly styled ICE directive from 2009 laying out "procedures ICE must undertake to determine whether a given asylum-seeker should be granted parole" fell "squarely within the ambit of those agency actions to which the [*Accardi*] doctrine may attach," in part because it "establish[ed] a set of minimum protections for those seeking asylum" and "was intended-at least in part-to benefit asylum-seekers navigating the parole process." 313 F. Supp. 3d at 324, 337-38; *See also, Pasquini v. Morris*, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instructions confers non substantive rights on the [non-citizen]-applicant, it does confer the procedural right to be considered for such status upon application."). Similarly, the Policy here establishes procedures for reviewing the custody of non-citizens who are granted immigration relief and is clearly intended, at least in part, to benefit those non-citizens. *See EX.*

D at 4 (referring to "ICE policy favoring a non-citizen's release")

67. Furthermore, by reiterating the Policy four times over the last two decades and using mandatory language, ICE leadership has clearly indicated that it intends the Policy to be binding on all field offices and officers. *See, e.g.*, EX. D at 2 ("In all cases, the Field Office Director *must...*") (emphasis added); *id.* at 4 ("I am using this reminder to ensure that ICE personnel remain cognizant of and continue to follow this Directive"); *see also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("[A]n agency pronouncement is transformed into a binding norm if so intended by the agency.")

68. Buffalo ICE has clearly flouted ICE's national policy with respect to petitioners' detention, in violation of *Accardi*. The available evidence demonstrates that BUF ICE is automatically, consistently, and reflexively detaining every non-citizen granted withholding or CAT relief, including Petitioner, and conducts only cursory standard custody reviews pursuant to factors in 8 C.F.R. § 241.4, without regard to the Policy's requirements. At no point does it appear that BUF ICE is conducting an individualized review under the "exceptional circumstances" standard as required by the Policy.

69. There is, furthermore no evidence that the BUF ICE Field Office Director, who is vested with non-delegable review power under the Policy, approved the continued detention of Petitioner after relief grant as required by the Policy. *(n.12)

70. BUF ICE's failure to promptly and properly review petitioners' custody under the Policy is prejudicial to Petitioner. Prejudice can be presumed because the Policy implicates petitioners' fundamental liberty interests and due process rights. *See Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (holding that "violation of a regulation can serve to invalidate a deportation order when the regulation serves a purpose to benefit the [non-citizen]" (internal quotations omitted)). The Policy provides Petitioner with a discrete opportunity to win their freedom from detention and that opportunity has thus far been withheld from him. *See Zadvydas*, 533 U.S. at 690 ("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,")

71. Conducting the standard 90 & 180-day custody review under * C.F.R. § 241.4 does not suffice to comply with the Policy because 8 C.F.R. § 241.4, which facially applies to all non-citizens subject to alternatively final order of removal, employs a different standard that places the burden of proof on the non-citizen to justify their release. *See* 8 C.F.R. § 241.4(d)(1) ("[ICE] may release a[] [non-citizen] if the [non-citizen] demonstrates to the satisfaction of [ICE] that his or her release will not pose a danger to the community or to the safety of other person or to property or a significant risk of

flight...").

72. In contrast, the Policy presumes that non-citizens granted withholding or CAT relief will be released "absent exceptional circumstances, such as when the non-citizen presents a national security threat or a danger to the community," and it specifies that "prior convictions alone do not necessarily indicate a public safety threat or a danger to the community," EX. D at 4. If BUF ICE were to review petitioners' custody under the Policy, Petitioner would very likely be released, as they have only minor criminal convictions and clearly do not pose a national security threat.

73. Therefore, Petitioner has been prejudiced by ICE's failure to review custody under the Policy's "exceptional circumstances" standard. According to the *Accardi* doctrine, ICE's departure from its own policy is arbitrary, capricious, and contrary to law under the APA and violates Petitioners' due process rights.

74. As a remedy, this Court should review Petitioners' custody under the Policy's "exceptional circumstances" standard and order petitioners' release accordingly. *See Jimenez*, 317 F. Supp. at 657 ("In these circumstances, it is most appropriate that the court exercise its equitable authority to remedy the violations of petitioners' constitutional rights to due process by promptly deciding itself whether each should be released."). At the very least, this Court should order that BUF ICE immediately conduct such review for petitioner pursuant to the Policy. *See Damus*, 313 F. Supp. 3d at 343.

75. Civil detention, like Petitioner's, violates due process except in "certain special and 'narrow' nonpunitive circumstances" where the government has a "special justification" that outweighs the individual's core liberty interests in freedom from detention. *Zadvydas*, 533 U.S. at 690 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). ("Due process requires that the nature and duration of [civil] commitment bear some reasonable relation to the purpose for which the individual is committed.") The sole permissible purpose of civil immigration detention are to ensure the appearance of noncitizens at future hearing and to prevent danger to the public. *See Demore*, 538 U.S. at 523-33 (Kennedy, J., concurring); *Zadvydas*, 533 U.S. at 690-91. "[C]ase after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.'" *Velasco Lopez*, 978 F.3d at 851 (quoting *United States v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

PETITIONER'S DETENTION IS UNREASONABLY PROLONGED UNDER THE MATTHEWS BALANCING TEST

76. In addition to this multi factor test, courts have also applied the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether prolonged detention without a bond violates a non-citizen's due process rights. The three *Mathews* factors are: 1) "the private interests that will be affected by the official action;" 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards;" and 3) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* At 348. An application of the *Mathews* factors also shows that Petitioners prolonged detention without a bond hearing is unreasonable.

A. The Private Interest Affected

77. First, the private interest at stake for petitioner is "the most elemental of liberty interests- the interest in being free from physical detention." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)(citing *Foucha*, 504 U.S. at 80); see also 103 F.4th at 151 (quoting *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020)). And while "[t]he private interest here is not liberty in the abstract, but liberty in the United States," *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999). Moreover, Petitioner has been in ICE custody for over a year. In *Black*, the Second Circuit held that even a "seven-month-long detention" absent procedural protections was a "serious[] infringe[ment]" of liberty. 103 F.4th at 151. And while, like the petitioners in *Black*, Petitioner's "detention[] in some sense w[as] the result of a criminal adjudication, since a conviction was the premise for applying section 1226(c)," he has "served his entire sentence" of incarceration. *Id.* (internal quotation marks omitted); Thus, his current "detention[] d[oes] not arise from new or unpunished conduct." *Black*, 103 F.4th at 151; In sum, as in *Black*, "the first Mathews factor weighs heavily in favor of" Petitioner. See *Black*, 103 F.4th at 152.

B. The Risk of Erroneous Deprivation &

The Value of Additional Procedural Safeguards

78. Second, Petitioner faces an acute risk of erroneous deprivation due to the absence, but for action by this court, of a procedure to challenge his prolonged detention. See, e.g., *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 225 (3rd Cir. 2018), abrogated on other grounds, *Johnson v. Arteag-Martinez*, 596 U.S. 573 (2022)(noting, in the context of mandatory detention under 8 U.S.C. § 1231(a)(6), that "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker is substantial.") (quotation marks and citation omitted). In Petitioner's case, this risk is particularly manifest because the immigration judge has granted Petitioner CAT relief, deferral of

removal, and there is nothing in petitioners recent history to indicate current or present dangerousness. *

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79. The legal standards for custody redetermination proceedings directs that IJ's should not automatically deem dangerous a person with a criminal conviction, but should consider the 'extensiveness', 'recency', and 'seriousness' of any criminal conviction, along with any rehabilitation, remorse or post-conviction behaviour. See, *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). The critical question for a custody redetermination is whether an individual "currently" presents a danger or a flight risk, not whether that person was a danger in the past or at the time the prior crime occurred. See, *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3rd Cir. 1999) ("Measures must be taken to assess the risk of flight and danger to the community of a current basis.") In this particular case all of the conduct underlying the criminal convictions are over 10 years old. Petitioner has expressed and demonstrated remorse, empathy, and has renounced criminal associations and affiliations.

80. Moreover, the only process available to petitioner to seek release from detention is to file a request for custody redetermination, which is insufficient to protect petitioners constitutional interests.

C. The Governments Interest

81. Third, Respondents do not have an overriding interest in detaining petitioner, specially without the opportunity for a bond hearing. On the contrary, "requiring Respondents to justify continued detention 'promotes the Government interest...in minimizing the enormous impact of detention cases where it serves no purpose.'" *Black v. Decker*, 103 F.4th 133, 154 (2d Cir. 2024)(quoting *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020). Moreover, conducting bond hearings does not impose undue administrative burdens because they are conducted by immigration courts as a matter of course and because the cost to the government of release alternatives to detention are a fraction of those of detention at jail like facilities like BFDF. *Alternatives to Detention, ICE*, <https://www.ice.gov/features/atd>; see also, *Black*, 103 F.4th at 154-55 (concluding that "the additional resources the government will need to expend to justify continued detention [of mandatory detained non-citizen petitioners] will be minimal-and will likely be outweighed by the costs saved by reducing unnecessary detention.")

THE COURT SHOULD ORDER ADDITIONAL PROCEDURAL PROTECTIONS AT PETITIONER'S BOND HEARING

24 see *Matter of Guerra*, 24 I&N Dec. 37, 40 (2006); *Chin Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3rd Cir. 1999)

82. The proper remedy for the violation of Petitioner's due process rights is immediate release or alternatively a bond hearing at which DHS bears the burden to show by clear and convincing evidence that he is a danger or a flight risk. *Black v. Decker Id.*

83. As the Second Circuit also noted, the "settled rule" is that "when a party stands to lose his liberty, even temporarily, [courts] hold the government to a higher burden of proof." *Id.*; see also *Velasco Lopez*, 978 F.3d at 855-56 (applying clear and convincing standard to bond hearings pursuant to § 1226(a) and noting that the standard also applies to pretrial detention and involuntary civil commitment.)

84. Petitioner has been detained in ICE custody for over 16 months and has a paramount interest in liberty from unreasonable prolonged detention. As discussed, the risk that his liberty will be erroneously deprived is uniquely high because of the government's insistence that he does not have the right to a bond hearing. Any interest the government has in his continued detention without a bond hearing does not outweigh the first two factors and does not disturb the rule that the government should bear a higher burden where it deprives individuals of liberty.

85. Finally, the Court should also order the immigration judge to consider alternatives to detention and Petitioner's ability to pay bond. Numerous courts have held that immigration judges must consider whether alternatives to detention (i.e., release on monitoring program or order of supervision) would address concerns of dangerousness or flight risk and whether bond imposes an unreasonable financial burden on the non-citizen. See, e.g., *Hernandez v. Sessions*, 872 F.3d 976, 991 n.4 (9th Cir. 2017)(concluding that "a bond determination that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests."); *Ousman D v. Decker*, No. 20 Civ. 9646 (JMV), 2020 WL 5587441, at *4 (D.N.J. Sept. 18, 2020)(finding that a bond hearing failed to comply with due process where the Immigration Judge did not consider "less restrictive alternatives to detention"); *Leslie v. Holder*, 865 F. Supp. 2d 627, 640-41 (M.D. Pa. 2012) (concluding that "reasonable, and individually tailored, release conditions" could address DHS's concerns about non-citizen's dangerousness and flight risk and that his poverty was a meaningful factor in assessing bond); *Hernandez v. Decker*, No. 18 Civ. 5026 (ALC), 2018 WL 3579108, at *2 (S.D.N.Y. July 25, 2018) (holding that Constitution compels "consideration of...alternatives to detention"); *Fernandez Aguirre v. Barr*, No. 19 Civ. 7048 (VEC), 2019 WL 4511933, at *5 (S.D.N.Y. Sept. 18, 2019)(observing that requiring the consideration of alternatives to detention "tracks the framework for pretrial detention in

the criminal context, where the purpose of considering alternatives is to determine whether measures less intrusive than detention can achieve the same goal (reasonably assuring the safety of the community)”).

86. The Court should therefore order DHS to bear the burden to justify Petitioner's continued detention by clear and convincing evidence and should order EOIR to consider alternatives to detention and ability to pay at a future bond hearing.

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1231(a)(6)

87. Petitioner realleges and incorporates by reference the paragraphs above.

88. 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas*, authorizes detention only for "a period reasonably necessary to bring about the alien's removal from the United States." 533 U.S. at 689, 701.

89. Petitioners' continued detention has become unreasonable because removal is not reasonably foreseeable. Therefore, continued detention violates 8 U.S.C. § 1231(a)(6), must be immediately released.

COUNT II

ARBITRARY AND CAPRICIOUS AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)

90. Petitioner realleges and incorporates by reference the paragraphs above.

91. Courts must hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

92. ICE has deviated from its own policy in continuing to detain Petitioner after being granted immigration relief without determining whether exceptional circumstances warrant continued detention. This is arbitrary, capricious, and contrary to law in violation of the APA.

93. As a remedy, this Court should conduct its own review of Petitioners' custody or, at least, order ICE to review Petitioners' custody under the standard articulated in ICE Policy.

COUNT III

**VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO
THE U.S. CONSTITUTION**

94. Petitioner realleges and incorporates by reference the paragraphs above.

95. ICE has violated petitioners' due process rights by denying an individualized custody review entitled under ICE policy.

96. Petitioner's detention pursuant without a bond hearing is unreasonably prolonged and is therefore unconstitutional and cannot be cured by any *post-hoc* rationalization.

97. The Due Process Clause of the Fifth Amendment of the United States Constitution prohibits the unreasonably prolonged detention of individuals without a bond hearing detained pursuant to 8 U.S.C. § 1225(b). U.S. Const. Amend. V; *Pulatov*, 2019 WL 2643076, at *3; *Leke*, 521 F. Supp. 3D at 603-05.

98. Petitioner's detention is unrelated to the purpose of civil detention.

99. Petitioner has been detained for over sixteen months. His detention is likely to continue because of delays that are not attributable to him. He is detained in Jail-like conditions that are not meaningfully different from criminal punishment, are actually worse.

100. Petitioner has a paramount liberty interest in his freedom from unreasonable detention.

101. Respondents have a minimal interest in his continued detention without a bond hearing because there are no administrative burdens posed by a bond hearing and Respondents should have an interest in detainees being released on bond where continued detention is unnecessary, which is true here where Petitioner does not pose a threat to society, as evidenced, by lack of violent history.

102. Discretionary parole is insufficient to protect Petitioner's due process rights because it features a high risk of erroneous deprivation and does not involve review by a neutral or detached magistrate.

103. But for action by this Court, Petitioner will remain detained in violation of his due process rights.

104. The Court should find that Petitioner's continued detention without a bond hearing violates the Constitution. At a minimum, the Court should order that Respondents grant him a bond hearing at which the government bears the burden to show continued detention is warranted by clear and convincing evidence, and at which an immigration judge must consider alternatives to detention and ability to pay.

105. For the purpose of clarity: the Petitioner is now detained at the El Paso Processing Center. Some of the previous pages and paragraphs mention the Petitioner is being held in Buffalo. Even though the statements about Buffalo ICE and the facility remain true, to not confuse the court the Petitioner respectfully gives this clarity.

PRAYER FOR RELIEF

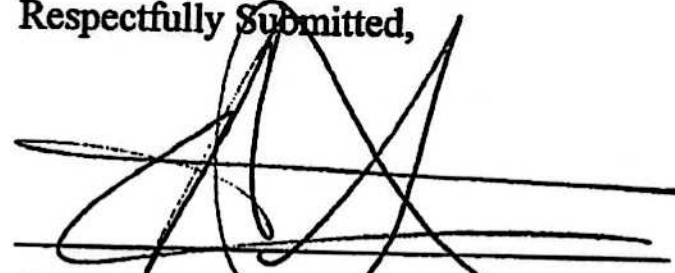
Petitioner respectfully requests that this Court;

- a. Assumes jurisdiction over this matter;
- b. Declare that Petitioner's continued detention violates the Due Process Clause of the Fifth Amendment of the United States Constitution, and Order Petitioner's immediate release;
- c. In the alternatives, issue a writ of habeas corpus ordering that the Petitioner be provided with an unbiased bond hearing;
- d. Grant such relief as the Court deems just and proper.

FEB. 2ND, 2026

DATE

Respectfully Submitted,



CARLOS ALBERTO SOSA MORALES,

A# 

8915 Montana Ave.

El Paso, Texas 79925

**ATTACHMENTS
EXHIBITS**

- A. PETITIONERS' DECLARATION
- B. RELEASE REQUEST PURSUANT DIRECTIVE 16004.1
- C. ICE DECISION TO CONTINUE DETENTION
- D. ICE POLICY MEMORANDUMS
- E. LETTERS OF SUPPORT
- F. CERTIFICATES OF COMPLETION
- G. IMMIGRATION JUDGE'S DECISION
- H. NOTICE TO APPEAR (NTA)
- I. MEDICAL RECORDS