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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AYUSH THAKUR,

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of the Department of Homeland Security, et al.

Respondent.

CASE NO.: 26-cv-3315-BJC-JLB

Reply

In Mr. Thakur's previous habeas petition, both his prior attorney and Respondents claimed that Mr. Thakur was a class member of *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, --- F. Supp. 3d ---, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025), and thus eligible for a bond hearing. *See Tayush Thakur v. Luis Soto et al.*, No. 25-17269 (MAS), 2025 WL 3564642, at *1 (D.N.J. Dec. 12, 2025) ("*Thakur I*"). This was incorrect.

Because Mr. Thakur was apprehended at the border in 2023 and determined to be entitled to conditional parole under 8 U.S.C. § 1226(a)(2)(B) (i.e. Order of Release on Recognizance) into the United States, he could *not* have been a *Maldonado Bautista* class member. The New Jersey District Court granted the

appropriate relief for a *Maldonado Bautista* class member, which is not the appropriate relief for someone like Mr. Thakur who had already been conditionally paroled into the country.

Mr. Thakur then filed a new habeas petition, and Federal Defenders of San Diego, Inc., identified the *correct* due process violations based on Mr. Thakur's prior grant of conditional parole and sought the appropriate relief—immediate release. In its response, the government argues that this Court should not consider his claims in this amended petition because they are an abuse of the writ. ECF 15.

Mr. Thakur should not pay the price for his prior counsel's ineffectiveness. These errors meet either of the exceptions to the abuse of the writ doctrine: (1) cause for the successive petition and that denying it would prejudice the petitioner or (2) a fundamental miscarriage of justice would result from failure to entertain the claim. *See McCleskey v. Zant*, 499 U.S. 467, 494–5 (1991). Accordingly, this Court should apply the correct legal framework and grant the appropriate relief, which is immediate release.

ARGUMENT

Because Mr. Thakur's prior counsel incorrectly characterized him as a *Maldonado Bautista* class member, his conditional parole argument is not an abuse of the writ and need not be exhausted. And because Respondents have waived any argument on the merits, this Court should grant the petition and order his immediate release.

I. Mr. Thakur's claim is not an abuse of the writ.

On November 6, 2025, Mr. Thakur, represented by prior counsel, submitted a habeas petition arguing that because his detention was governed by 8 U.S.C. § 1226(a) the BIA's decision in *Matter of Yahure Hurtado*, 29 I&N Dec. 216 (BIA 2025), did not apply. *Thakur v. Soto*, 25-cv-17269-MAS, ECF 1 (Nov. 6, 2025) attached as Exhibit B. Nowhere in that petition does it state that ICE had already made the decision to release Mr. Thakur into the country via a conditional parole.

Nowhere in the petition is there an argument that under Due Process that "when ICE has the initial discretion to detain or release a noncitizen pending removal proceedings, after that individual is *released from custody* [he] has a protected liberty interest in remaining out of custody." *Pinchi* v. Noem, 792 F. Supp. 3d 1025, 1032 (N.D. Cal. 2025) (emphasis added). Everyone appears to have assumed that Mr. Thakur was under *Maldonado Bautista*.

But Mr. Thakur was not a *Maldonado Bautista* class member. *Maldonado Bautista* defined the bond eligible class as follows:

> **Bond Eligible Class**: All noncitizens in the United States without lawful status who (1) have entered or will enter the United States without inspection; (2) were not or will not be apprehended upon arrival; and (3) are not or will not be subject to detention under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231 at the time the Department of Homeland Security makes an initial custody determination.

Bautista v. Santacruz, 813 F. Supp. 3d 1084, 1095 (C.D. Cal. 2025), *judgment entered sub nom. Maldonado Bautista v. Noem*, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3678485 (C.D. Cal. Dec. 18, 2025) (emphasis added). But Mr. Thakur was apprehended by border patrol within hours of entering the United States, detained, inspected, and then allowed to enter the country via conditional parole. He is therefore not a *Maldonado Bautista* class member. He was only re-detained unexpectedly—and with no process—after a year on conditional parole. *See id.* at ¶ 4. But based on prior counsel's ineffective argument, the Court granted the petition and ordered a *Maldonado Bautista* bond hearing.

Mr. Thakur then filed a new petition, and this Court appointed Federal Defenders. Federal Defenders amended the petition, raising Due Process Claims based on a conditional parole revocation. ECF 15-2.

The government's response does not at all address the merits of the amended petition's claims. Instead, the government argues that Mr. Thakur's amended petition amounts to abuse of the writ. But Mr. Thakur can meet either of the

exceptions to the abuse of the writ doctrine: (1) cause for the successive petition and that denying it would prejudice the petitioner or (2) a fundamental miscarriage of justice would result from failure to entertain the claim. *See McCleskey*, 499 U.S. at 494–5. As Respondent aptly cites, "Respondents carry the burden of initially showing abuse of discretion," *McCleskey*, 499 U.S. at 477. ECF 15 at 2. Once that happens, the burden shifts to the Petitioner to demonstrate one of the exceptions. *McCleskey*, 499 U.S. at 477. The record makes clear that Mr. Thakur can show not only cause and prejudice but also a fundamental miscarriage of justice.

Mr. Thakur can show cause through the ineffective assistance of the attorney who represented him in the prior petition. "The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *Id.* at 498. Ineffective assistance of counsel occurs when an attorney's performance was deficient such that the client was deprived of counsel in violation of their Sixth Amendment right, and the deficient performance caused prejudice to the client. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both of those elements are clearly met here, demonstrating cause for Mr. Thakur's new claims.

In the prior petition, Mr. Thakur's attorney did not raise the appropriate argument: because Mr. Thakur had been on conditional parole, violations of due process entitled him to immediate release. Specifically, "[o]nce a noncitizen has been released, the law prohibits federal agents from rearresting him merely because he is subject to removal proceedings." *Saravia*, 280 F. Supp. 3d at 1760. "Rather, the federal agents must be able to present evidence of materially changed *circumstances*—namely, evidence that the noncitizen is in fact dangerous or has become a flight risk . . . ." *Id.* These conditional parole arguments were routinely and successfully made in habeas petitions across district courts. *See, e.g., Seidulla v. Larose*, No. 26-CV-1555-BJC-MSB, 2026 WL 821172, at *1 (S.D. Cal. Mar. 25,

2026) (granting immediate release for someone who received OREC); *Gomez Mejia v. Dir., Otay Mesa Det. Ctr.*, No. 26-CV-2285-BJC-BJW, 2026 WL 1458998 (S.D. Cal. May 22, 2026) (same); *Tukhlaev v. Imperial Reg'l Det. Facility*, No. 26-CV-2524-JES-VET, 2026 WL 1270055, at *2 (S.D. Cal. May 8, 2026) (granting immediate release on due process grounds to petitioner who was previously released on OREC); *Teran Hurtado, v. Larose*, No. 3:26-CV-00977-BTM-DDL, 2026 WL 1266121, at *2 (S.D. Cal. May 8, 2026) (same); *Yatcin v. Lyons*, No. 26CV1707 DMS VET, 2026 WL 1133899, at *1–2 (S.D. Cal. Apr. 27, 2026) (granting on due process grounds because petitioner previously released on OREC "received no notice or a pre-deprivation individualized determination."); *Nicolas v. Mullin*, No. 26-CV-2464 JLS (MMP), 2026 WL 1113726, at *1–3 (S.D. Cal. Apr. 24, 2026) (same); *Gzirishvili v. LaRose*, No. 3:26-CV-1647-CAB-MMP, 2026 WL 790746, at *1–2 (S.D. Cal. Mar. 20, 2026) (applying the lack of notice analysis in *Noori v. LaRose*, 807 F. Supp. 3d 1146 (S.D. Cal. 2025) to a petitioner who was previously released on OREC); *C.A.R.V. v. Wofford*, No. 1:25-CV-01395 JLT SKO, 2025 WL 3059549, at *9 (E.D. Cal. Nov. 3, 2025) (finding due process violation where petitioner was originally released on OREC); *Leiva Flores*, 2025 WL 3228306, at *5 (similarly finding procedural due process violation for petitioner released on OREC and requiring hearing before detention).

But prior counsel made claims under *Maldonado Bautista*. *See* Exh. B at 2. The prejudice this grave error caused is clear: Mr. Thakur was left to endure several more months in custody, deprived of his liberty. If his amended petition is dismissed, Mr. Thakur will continue to be detained in violation of due process when so many others in this exact same situation have received the appropriate remedy. Because of this, prior counsel was clearly deficient in a way that prejudiced Mr. Thakur.

Next, it would be a clear miscarriage of justice if Mr. Thakur's amended petition were dismissed. "The miscarriage of justice exception to cause serves as

an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty, guaranteeing that the ends of justice will be served in full." *McCleskey*, 499 U.S. at 495 (citation omitted). "The miscarriage of justice standard requires a strong showing of innocence, unfairness, or the like . . . ." *Sotirion v. U.S.*, 617 F.3d 27, 36 (1st Cir. 2010) (citation omitted). "(F)ederal courts must be mindful of the 'ends of justice' before dismissing a successive habeas petition." *Alaimalo v. U.S.*, 645 F.3d 1042, 1050 (9th Cir. 2011). The "fundamental miscarriage of justice exception[] is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). The government has been unable to show why Mr. Thakur's detention is constitutional because it is not. If this amended petition is dismissed, Mr. Thakur will remain detained despite clear evidence that he is entitled to release like so many others who have succeeded on the exact same claim.

In short, former counsel's ineffective assistance of counsel persuaded the prior district court to answer the wrong question (about *Maldonado Bautista*) and grant the wrong relief (a bond hearing). That should not prevent this Court from answering the right question (about conditional parole) and grant the right relief (release)—relief that this Court has consistently granted in conditional parole re-detention cases.

II. Because Respondents have waived any argument on the merits, this Court should grant Mr. Thakur immediate release on the Due Process violations.

In his amended petition, Mr. Thakur argued his re-detention violated the Due Process Clause. He was not provided proper notice, reasoning, and a pre-deprivation hearing in violation of his established due process rights. When he was paroled, the government made a finding that he did not pose a danger to the community and was not a flight risk. *Saravia v. Sessions*, 280 F. Supp. 3d 1168,

1760 (N.D. Cal. 2017) ("Release reflects a determination by the government that the noncitizen is not a danger to the community or a flight risk."). "Once a noncitizen has been released, the law prohibits federal agents from rearresting him merely because he is subject to removal proceedings." *Saravia*, 280 F. Supp. 3d at 1760. "Rather, the federal agents must be able to present evidence of materially changed circumstances—namely, evidence that the noncitizen is in fact dangerous or has become a flight risk . . . ." *Id.*

Respondents have failed to address or rebut any of these arguments on the merits. Accordingly, Respondents have waived, or at least forfeited, their opportunity to contest the Due Process violations or argue against immediate release. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (determining that the government concedes an argument that "was available at the time it filed its answering brief") (citing *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011)). Because this is a textbook example of a conditional parole violation that this Court and others routinely grant, this Court should grant the petition and order Mr. Thakur's immediate release

Respectfully submitted,

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s/ Zandra L. Lopez
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