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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FULVIO CASTILLO GOMEZ,

Petitioner,

v.

SERGIO ALBARRAN, Field Office Director, San Francisco Field Office, U.S. Immigration and Customs Enforcement; DAVID J. VENTURELLA, Acting Director, U.S. Immigration and Customs Enforcement; MARKWAYNE MULLIN, Secretary of Homeland Security; TODD BLANCHE, Attorney General of the United States, all in their official capacities,

Respondents.

CASE NO. _____

PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

IMMIGRATION DETENTION CASE

EMERGENCY RELIEF REQUESTED

Related to Case No. 5:26-cv-01790-NW (Wise, J.)

INTRODUCTION

1. Fulvio Castillo Gomez is a 58-year-old Salvadoran man who has lived in Napa, California for twenty years. He runs a cleaning business that employs four people, pays his taxes, and cared for his wife through cancer treatment. On September 29, 2026, Respondents took him into custody at an ICE check-in, revoking the Order of Supervision under which he had reported without fail for six months. This detention occurred even though Respondents concede that Mr. Gomez cannot be removed on account of his pending motion to reopen, which has created an automatic stay of removal under 8 U.S.C. § 1229a(b)(5)(C). *See Castillo Gomez v. Albarran*, No. 5:26-cv-01790-NW, ECF No. 76 ("Sept. 22 Tr.") (Abel Decl. Ex. E) at 10:14–17 (SAUSA William Skewes-Cox stating: "[W]hile that motion to reopen is pending in Texas, the removal order cannot be executed."). Documents from the related case and from the immigration proceedings that are cited in this petition are attached to the concurrently filed Declaration of Jonathan Abel ("Abel Decl.").

2. Petitioner's only criminal allegation in twenty years in this country is a misdemeanor DUI charge, which is currently pending in Napa County Superior Court and for which he has pleaded not guilty. *Castillo Gomez*, ECF No. 65 at 24; ECF No. 65-3 at 3 (Abel Decl. Ex. F). An IJ recently found that he is not a danger to the community. The reason Respondents give for attempting to detain Mr. Gomez is to carry out a 20-year-old in absentia removal that is the subject of his pending motion to reopen. Sept. 22 Tr. at 12:11–13, 26:1–4; 24:1–8 (SAUSA: "that would be the purpose here, that assuming Petitioner is in detention, that the moment the immigration judge in Texas denies the motion to reopen, . . . he could be expeditiously removed"); *Castillo Gomez*, ECF No. 65-8 (Abel Decl. Ex. G) at 1:57:30, 1:57:50. In short, Respondents have detained Mr. Gomez for the purpose of removing him, even as they acknowledge that he cannot be removed while his motion to reopen is pending. As described below, this detention of Mr. Gomez is contrary to regulation, statute, and the Constitution.

3. This is a new petition, raising claims that did not exist when Mr. Gomez filed his first habeas petition on March 2, 2026. That petition challenged an arrest made without any pre-

deprivation hearing and before he knew of the in absentia order. Everything that matters here happened later: (1) the August 5 motion to reopen and the stay it triggered; (2) the August 10 pre-deprivation hearing held under this Court's preliminary injunction, at which the immigration judge found no risk of danger, but authorized re-detention "for purposes, among other things, of effectuating the removal order," even as the IJ refused to acknowledge the stay of removal, ECF No. 65-8 at 1:57:50; and (4) the September 29 revocation of his supervised release.

4. Mr. Gomez's motion to enforce the injunction remains pending in the related case, and this petition does not ask the Court to revisit the conduct of the August 10 hearing, which is before the Board of Immigration Appeals. Mr. Gomez filed his BIA appellate brief on Monday, September 28; the government's brief is due today. At the September 22 hearing on the motion to enforce, Judge Wise explained that a challenge to detaining a person who cannot be removed "is a whole different argument and a whole different petition than the petition that was originally filed," and that Mr. Gomez could "file another petition, whether it's here or somewhere else, if, in fact, . . . they were to detain him and you don't have a removal order that you could execute on." Sept. 22 Tr. at 15:22–16:6. This is that petition.

5. Detention under 8 U.S.C. § 1231(a)(6) is authorized only for the period "reasonably necessary to bring about that alien's removal from the United States," and "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001). Removal is not merely unforeseeable here; it is prohibited by an Act of Congress for as long as the motion to reopen is pending, a period that could be days or months and that only the Harlingen (Texas) Immigration Court controls. Respondents' own regulations permit revocation of supervised release "to enforce a removal order," 8 C.F.R. § 241.4(l)(2)(iii), the ground DHS itself invoked, and do not permit it to enforce an order that cannot be enforced. And the Due Process Clause forbids civil confinement that bears no "reasonable relation" to the purpose for which the individual is committed. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Zadvydas*, 533 U.S. at 690.

6. This Court foresaw the problem before the arrest. At the September 22, 2026, hearing on the motion to enforce, Judge Wise observed that "there is something that feels a little bit circular about this," because detention to execute a removal order "only becomes relevant . . . if you have a removal order," and questioned why, "if the whole basis of having him in custody in that interim period of time is so that they can save the number of hours or the day it would take to get him into custody so that they can get him on a plane, . . . keeping somebody in custody for weeks or months until that happens" could be appropriate. Sept. 22 Tr. at 22:16–24, 25:1–11. Respondents' answer was that "this is the point of flight risk as a basis for detention." *Id.* at 25:21–24. That answer assumes a removal to secure his presence for. There is none.

7. Mr. Gomez asks the Court to order his immediate release. To preserve its jurisdiction, he asks the Court to order that he not be transferred out of this District or removed from the United States while this petition is pending, as this Court ordered on the first night of the related case. *Castillo Gomez*, ECF No. 3 (Chhabria, J.).

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction under 28 U.S.C. § 2241, 28 U.S.C. § 1331, 28 U.S.C. § 1651, 28 U.S.C. §§ 2201–02, and Article I, § 9, cl. 2 of the Constitution. "[H]abeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas*, 533 U.S. at 688; *see Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018); *Demore v. Kim*, 538 U.S. 510, 516–17 (2003).

9. Mr. Gomez is "in custody" within the meaning of 28 U.S.C. § 2241(c). He is physically detained by Respondents. At the time of filing, he is held within this District, at 630 Sansome Street, San Francisco. Abel Decl.. Jurisdiction attaches upon the filing of the petition, and the Court retains jurisdiction notwithstanding any subsequent transfer of Petitioner outside the District. *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004) (citing *Ex parte Endo*, 323 U.S. 283, 306 (1944)).

10. Section 1252(g) of Title 8 does not bar this petition. Mr. Gomez does not ask this Court to review the validity of his removal order, to stay its execution, or to review any "decision

or action" to "execute" it. Execution is already stayed by statute. He challenges only the lawfulness of his physical confinement. Such a challenge is "sufficiently independent of the merits of the removal order" to fall outside § 1252's channeling provisions, *Singh v. Holder*, 638 F.3d 1196, 1211–12 (9th Cir. 2011), and the Ninth Circuit reads § 1252(g) "narrowly" to reach only the three discrete discretionary actions it names, *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018).

11. *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022), on which Respondents have relied in the related case, involved a petitioner who sought an order preventing his removal while a motion to reopen was pending. Mr. Gomez seeks release from custody, which is the historic "core" of the writ. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969–70 (2020). Courts confronting exactly this posture, a noncitizen whose removal is already stayed by a pending lack-of-notice motion to reopen, have held that *Rauda* is "inapposite" because the petitioner "is not seeking to enjoin, stay, or delay her removal order." *Mejia-Pineda v. Mullin*, No. 5:26-cv-03350-AJR, 2026 WL 2339713, at *4 (C.D. Cal. Aug. 12, 2026) (Harlingen in absentia order; motion to rescind under § 1229a(b)(5)(C)(ii) pending); *Aguilar Garcia v. Kaiser*, 2025 WL 2998169, at *3 (N.D. Cal. Oct. 24, 2025); *see Ibarra-Perez v. United States*, 154 F.4th 989, 997 (9th Cir. 2025) (§ 1252(g) does not bar due process claims). This Court has already so held on this record. *Castillo Gomez*, No. 5:26-cv-01790-NW, ECF No. 29 (Abel Decl. Ex. J) at 5–6 (May 5, 2026).

12. Venue is proper in this District under 28 U.S.C. § 2241(a) and 28 U.S.C. § 1391(e) because Petitioner is detained here, his immediate custodian is here, and the events giving rise to the petition occurred here. Petitioner is concurrently filing an Administrative Motion to Consider Whether Cases Should Be Related under Civil L.R. 3-12 in Case No. 5:26-cv-01790-NW.

PARTIES

13. Petitioner Fulvio Castillo Gomez is a native and citizen of El Salvador. He has resided in Northern California since approximately 2006. He is presently in the physical custody of Respondents.

14. Respondent Sergio Albarran is the Field Office Director of the San Francisco Field Office of U.S. Immigration and Customs Enforcement ("ICE"), Enforcement and Removal

Operations. He is responsible for the detention of noncitizens within ICE's San Francisco Area of Responsibility, including Petitioner, and he is Petitioner's immediate custodian. He is sued in his official capacity.

15. Respondent David J. Venturella is the Acting Director of ICE. He is responsible for the administration and enforcement of the immigration laws, including the detention and removal of noncitizens, and is sued in his official capacity.

16. Respondent Markwayne Mullin is the Secretary of Homeland Security and has ultimate authority over the Department of Homeland Security ("DHS"), including ICE. He is sued in his official capacity.

17. Respondent Todd Blanche is the Attorney General of the United States. The Attorney General oversees the Executive Office for Immigration Review, which administers the immigration courts and the Board of Immigration Appeals, and is sued in his official capacity.

THIS PETITION IS NOT SUCCESSIVE, AND EXHAUSTION IS NOT REQUIRED

A. The petition challenges a new custody on grounds that could not have been raised before.

18. This is Mr. Gomez's second petition under 28 U.S.C. § 2241. The first, *Castillo Gomez v. Albarran*, No. 5:26-cv-01790-NW, challenged his March 2, 2026 arrest, which occurred without any pre-deprivation, at a time when he did not know of the in absentia order. This petition challenges a different custody: the detention that began on September 29, 2026, when Respondents revoked an Order of Supervision under which Mr. Gomez had lived in full compliance for six months, in reliance on an August 10, 2026 custody decision, and during a statutory stay of removal triggered by a motion filed on August 5, 2026. None of those events had occurred when the first petition was filed, and the central claim here, that detention is unauthorized and purposeless while removal is barred by statute, was not and could not have been presented in March.

19. The statutory bar on second or successive petitions in 28 U.S.C. § 2244 does not apply to a § 2241 petition challenging immigration detention. *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000). The common-law abuse-of-the-writ doctrine, which the government bears

the burden of pleading, generally forbids only the reconsideration of claims that "were or could have been raised in a prior habeas petition." *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011); *Eldridge v. Howard*, 70 F.4th 543, 551 (9th Cir. 2023). Courts in this Circuit have repeatedly held that a second petition filed after a court-ordered custody hearing, challenging the detention that followed that hearing, is neither successive nor abusive, because "the first petition sought process that Petitioner had not yet received, while [the second] challenges his continued detention after that process occurred," and treating both as challenges to "the same immigration detention" would "overlook the relevant distinction" by "framing the claims at [too] high [a] level of generality." *Mario Rene C.C. v. Warden*, No. 1:26-cv-05037-MWJS, 2026 WL 2444748, at *2 (E.D. Cal. Aug. 19, 2026); *see Salazar-Sorto v. Mullin*, No. 5:26-cv-04690-KES, 2026 WL 2621203, at *2–3, *6 (C.D. Cal. Sept. 4, 2026) (granting second petition, filed as a new action, after court-ordered bond hearing resulted in flight-risk-only denial); *Hernandez Arechiga v. Bowen*, No. EDCV 26-4957-AS, 2026 WL 2677266, at *1–3 (C.D. Cal. Sept. 11, 2026) (granting second petition where noncitizen released under first habeas order was re-detained at an ICE check-in on an in absentia order later rescinded for lack of notice). The abuse-of-the-writ doctrine applies where a second petition simply re-argues the adequacy of the same hearing already litigated in a motion to enforce, on an unchanged factual predicate. *Chiniakov v. Lyons*, No. 5:26-cv-4106-DMK, 2026 WL 2525611, at *2–3 (C.D. Cal. Aug. 26, 2026). That is not this case. Mr. Gomez was released, not continuously detained; his custody was revoked anew on September 29; and the claims pleaded here rest on the statutory stay and the absence of any lawful purpose for detention during it, not on the conduct of the August 10 hearing.

20. The Court presiding over the related case has already said as much. Asked to consider the lawfulness of detaining Mr. Gomez while removal is stayed, the Court explained that the question was "a whole different argument and a whole different petition than the petition that was originally filed, which doesn't mean that you couldn't file another petition, whether it's here or somewhere else, if, in fact, . . . they were to detain him and you don't have a removal order that you could execute on." Sept. 22 Tr. at 15:22–16:6. The Court further stated that any disposition of

the first petition would be "without prejudice for the petitioner to file whatever relief in whatever jurisdiction, if and when he is detained." *Id.* at 18:23–19:2.

B. Exhaustion is not required and, in any event, is excused.

21. No statute requires exhaustion of administrative remedies before a noncitizen may challenge the lawfulness of his detention under 28 U.S.C. § 2241. Prudential exhaustion is not warranted. The claims presented here are questions of statutory authority and constitutional law that neither the Board of Immigration Appeals nor the Immigration Court has power to decide. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1035 (BIA 1999) ("neither the Immigration Judge nor this Board may rule on the constitutionality of the statutes that we administer"). Requiring exhaustion would be futile and would cause irreparable harm, because the harm alleged is the detention itself. *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004); *Hernandez v. Sessions*, 872 F.3d 976, 988–89 (9th Cir. 2017).

22. Petitioner has in any event pursued every administrative avenue available to him. He filed a motion to rescind and reopen the in absentia order in the Harlingen Immigration Court on August 5, 2026, which remains pending. He filed a timely appeal to the Board of Immigration Appeals from the immigration judge's August 10, 2026 custody decision on September 8, 2026; briefing closes on September 29, 2026, and no decision is expected for months. Sept. 22 Tr. at 3:10–4:25. Neither proceeding can address the claims raised here. Where, as here, the immigration judge found no danger, the record of the hearing (a transcript and a written decision) is already before the Court, and the petition presents recurring legal questions rather than a request to reweigh facts, courts in this Circuit excuse exhaustion because "requiring him to complete administrative review would necessarily prolong the very detention he challenges." *Mario Rene C.C.*, 2026 WL 2444748, at *3; *Salazar-Sorto*, 2026 WL 2621203, at *4–6 (excusing exhaustion where IJ found flight risk but not danger and did not consider alternatives to detention, and noting that whether an IJ must consider alternatives "particularly if the IJ's main conclusion is flight risk" is a recurring legal question); *see also Gallosa-Zapata v. Warden*, No. EDCV 26-4213-AS, 2026 WL 2410945,

at *4 n.3 (C.D. Cal. Aug. 17, 2026) (excusing exhaustion where noncitizen with pending lack-of-notice motion to reopen was detained without process).

STATEMENT OF FACTS

A. Mr. Gomez's entry, release, and twenty years in California

23. Mr. Gomez entered the United States near Pharr, Texas on or about March 3, 2006. He was apprehended by the Border Patrol, processed for removal proceedings, and released on his own recognizance the following day, even though he had no address in the United States. He is a monolingual Spanish speaker who cannot read or write beyond his own name. *Castillo Gomez*, ECF No. 29 at 2–3.

24. The Notice to Appear directed him to appear at the Harlingen Immigration Court on May 2, 2006. He did not understand that he had a hearing and did not appear. An immigration judge ordered him removed in absentia that day. The parties agree that the removal order was never served on him. *Id.* at 3 & n.8. The order does not advise of any right to appeal or of the time within which to challenge it. *Id.* at 8 n.8.

25. Mr. Gomez settled in Napa, where he has lived for twenty years. He married, raised children, built a registered cleaning business that employs four people, and paid federal income taxes. He is the sole financial support of his wife, who was treated for uterine cancer and does not drive; he takes her to her medical appointments. He himself takes daily medication for hypertension and requires treatment for sleep apnea. Abel Decl. His name and address appear in numerous federal records, including his tax returns and his wife's pending asylum application. In 2024, his attorney submitted multiple Freedom of Information Act requests to the Department of Justice seeking every record concerning him; the Department responded that it "could not locate the record." *Id.* at 3–4. His only contact with the criminal justice system in twenty years is a pending October 2025 misdemeanor charge in Napa County, to which he has pleaded not guilty. Castillo Gomez, ECF No. 65 at 24.

B. The March 2, 2026 arrest and the related habeas case

26. On March 2, 2026, masked ICE officers arrested Mr. Gomez in a bank parking lot in Napa. He filed a petition for a writ of habeas corpus that evening, *Castillo Gomez v. Albarran*, No. 5:26-cv-01790 (N.D. Cal.), and this Court (Chhabria, J., as duty judge) ordered that "the government is prohibited from deporting the petitioner or removing him from the district while the TRO application is pending." ECF No. 3 (Abel Decl. Ex. K). The next day the Court (Wise, J.) granted a temporary restraining order, ordered Mr. Gomez released, and enjoined his re-detention "without notice and a pre-deprivation hearing before a neutral decisionmaker." ECF No. 6 at 4. He was released on March 3, 2026.

27. Only after the petition was filed did the government disclose the existence of the 2006 in absentia order. The government moved to dissolve the TRO on the ground that the order changed the statutory basis for detention. The Court denied the motion and, after full briefing and argument, granted a preliminary injunction on May 5, 2026. ECF No. 29. The Court held that the 90-day removal period under 8 U.S.C. § 1231(a)(1) expired in October 2006; that Mr. Gomez's inability to provide an address was not an act to prevent removal that could extend it; that detention under § 1231(a)(6) required compliance with the notice and custody-review procedures of 8 C.F.R. § 241.4, which the government had not provided; and that, independently, the Due Process Clause entitled him to notice, an opportunity to be heard, and an individualized custody determination before a neutral immigration judge before any re-detention. *Id.* at 7–14. The Court found that Mr. Gomez's 2006 release "amounts to a determination that he posed no danger or flight risk," creating an "implied promise" on which he had relied for twenty years, *id.* at 11 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)), and that the government had "articulated no legitimate interest" in detaining him and "expressed no concern that Mr. Gomez is a flight risk, or that he poses a threat to the community," *id.* at 12. When government counsel asserted at the April 29 hearing that Mr. Gomez had spent twenty years "evading" removal, the Court observed that "you can't evade unless you know about it," and counsel conceded: "I don't have a factual basis that he knew about it." ECF No. 32 at 13:14–18.

C. Release on an Order of Supervision and full compliance

28. Following his release, ICE placed Mr. Gomez on an Order of Supervision under 8 U.S.C. § 1231(a)(3) and 8 C.F.R. § 241.5, requiring him to report in person to the San Francisco Field Office. Abel Decl. & Ex. B. Between March and September 2026 he reported in person at every scheduled check-in, five in all. Abel Decl. He appeared at his pre-deprivation hearing in immigration court, on August 10.

D. The motion to reopen and the statutory stay of removal

29. Respondents refused for months to produce the immigration court record from 2006 and the unredacted A-file. After Mr. Gomez brought a FOIA action and this Court ordered production, *Gomez v. USCIS*, No. 26-cv-06134-NW, 2026 WL 1773909 (N.D. Cal. June 21, 2026), he obtained the 2006 Border Patrol paperwork. Those records show, among other things, that the Border Patrol checked a box indicating that Mr. Gomez, who cannot read, had read his rights to himself. The records contain other internal inconsistencies that undermine the government's assertion that the Notice to Appear was translated for him. *Castillo Gomez*, ECF No. 65 at 20–21; ECF No. 65-6 at 13–20, 337–38. In short, the records support Mr. Gomez's claim that he was not given notice of his initial immigration court hearing, thus lending strength to his argument that the *in absentia* order should be reopened and rescinded for lack of notice.

30. On August 5, 2026, Mr. Gomez filed in the Harlingen Immigration Court a motion to rescind the in absentia order and reopen proceedings on the ground that he did not receive notice of his 2006 hearing, together with an application for asylum, withholding of removal, and protection under the Convention Against Torture. *Id.*, ECF No. 61; Abel Decl. Ex. D. A motion to rescind an in absentia order for lack of notice may be "filed at any time," and "[t]he filing of the motion to reopen" based on lack of notice "shall stay the removal of the alien pending disposition of the motion by the immigration judge." 8 U.S.C. § 1229a(b)(5)(C)(ii), (C); 8 C.F.R. § 1003.23(b)(4)(ii). The motion remains pending. Respondents agree that the stay is in effect and that Mr. Gomez cannot be removed while it is. Sept. 22 Tr. at 10:14–17, 22:5–7.

31. If the immigration judge denies the motion, Mr. Gomez will appeal to the Board of Immigration Appeals and, if necessary, petition for review in the court of appeals. If the motion is granted, the 2006 order will be rescinded, removal proceedings will reopen, and Mr. Gomez will be a noncitizen in pending removal proceedings with an application for relief before the immigration court. Respondents' counsel has acknowledged that in that event "this case would be entirely different" and "the government would need to revisit every one of its positions." Sept. 22 Tr. at 10:19–24.

E. The August 10, 2026 custody hearing

32. On May 20, 2026, DHS moved the Harlingen Immigration Court to schedule the pre-deprivation hearing required by the preliminary injunction. Its motion stated that detention was "appropriate to enforce a removal order," that travel documents to El Salvador were readily available, and that "the only obstacle preventing the respondent's removal is the district court ordered pre-deprivation hearing." *Castillo Gomez*, ECF No. 65-5 (Abel Decl. Ex. H) at 3–5. After venue was changed to San Francisco, the hearing took place on August 10, 2026 before Immigration Judge Frank A. Seminerio.

33. DHS presented no witnesses and no new evidence, stating that it was "basically resting on the arguments that were presented in our motion," and told the immigration judge at the outset that "our main interest in detaining or redetaining . . . is to execute the final order of removal." *Id.*, ECF No. 65-8 (Hr'g Tr.) at 0:04:33, 0:07:36. The immigration judge declined to consider the motion to reopen, which had been filed with the court four days earlier, on the ground that it was "untimely," and stated that he did not "know when it became necessary to have a pre-deprivation hearing before . . . ICE was allowed to effectuate a removal order." *Id.* at 0:02:28, 0:04:53. He did not consider the effect of the statutory stay of removal. Indeed, the IJ demonstrated on the record that he did not understand that the motion to reopen was based on lack of notice, and this lack of understanding meant that he did not realize there was a stay of removal – a mistaken view that he persisted with despite Mr. Gomez's counsel's repeated efforts to explain it to him.

34. The immigration judge found that Mr. Gomez was not a danger to the community: "I don't necessarily think he's a danger to the community for one criminal charge over 20 years." *Id.* at 1:57:30. His written decision contains no finding of danger. He found Mr. Gomez to be a flight risk, principally because he "failed to appear for his immigration proceedings despite receiving proper notice" in 2006, because his motion to reopen was "20 years late" under a 180-day deadline that does not apply to lack-of-notice motions, and because Mr. Gomez invoked the Fifth Amendment when asked about his pending misdemeanor charge. *Id.*, ECF No. 65-3 (Abel Decl. Ex. F) at 3–6. The decision does not state the standard of proof applied, does not cite 8 C.F.R. § 241.4, does not consider whether any bond or condition of release could address the asserted flight risk, and does not mention the five completed ICE check-ins or the statutory stay. It concludes that Mr. Gomez "may be re-detained," and the immigration judge stated orally that this was "for purposes, among other things, of effectuating the removal order." *Id.* at 6; Hr'g Tr. at 1:57:50.

35. Mr. Gomez appealed the custody decision to the Board of Immigration Appeals on September 8, 2026. Abel Decl. Ex. I. Briefs are due September 29, 2026. Both parties informed this Court that a decision could take months. Sept. 22 Tr. at 3:19–4:25.

F. The September 22, 2026 hearing in the related case

36. Mr. Gomez moved in the related case to enforce the preliminary injunction on the ground that the August 10 hearing did not comply with it. At the hearing on that motion on September 22, 2026, the Court indicated that it was inclined to defer to the administrative appeal on the adequacy of the immigration judge's hearing, but repeatedly questioned the basis for detaining Mr. Gomez while removal is stayed. The Court asked Respondents' counsel, "[s]o what would be the basis for detaining him in that interim period of time?" Respondents' counsel answered: "The legal basis is that the immigration judge found him to be a flight risk justifying his detention, and it is detention pending the final order, an executable final order of removal." Sept. 22 Tr. at 22:10–15. The Court responded that "there is something that feels a little bit circular about this," because the flight-risk determination is "operating under the presumption that there's

a valid removal order," and asked for "the best authority" for detaining someone "while the removal order is in flux." *Id.* at 22:16–23:5. Counsel cited *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022), while acknowledging that "it is not the exact same procedural posture." *Id.* at 23:6–24, 33:10–14.

37. The Court stated that the concern it was "focusing on right now" was that "if the whole basis of having him in custody in that interim period of time is so that they can save the number of hours or the day it would take to get him into custody so that they can get him on a plane, it seems like keeping somebody in custody for weeks or months until that happens, that—that is the part that is of somewhat of concern to me." *Id.* at 25:1–11. Respondents' counsel responded: "this is the point of flight risk as a basis for detention, that an alien can be detained as a flight risk because if at the moment the order does become executable, he can't be found." *Id.* at 25:21–24. The Court stated that this claim was "a whole different petition than the petition that was originally filed, which doesn't mean that you couldn't file another petition, whether it's here or somewhere else, if, in fact, that were to occur, if, in fact, they were to detain him and you don't have a removal order that you could execute on." *Id.* at 15:22–16:6. Respondents' counsel confirmed that, absent an order of the Court, "Respondents would be empowered to detain Petitioner at that check-in." *Id.* at 12:4–7.

G. The September 29, 2026 detention

38. On September 29, 2026, Mr. Gomez reported as required to the San Francisco Field Office for his scheduled check-in, accompanied by counsel, Madeleine Powers. Respondents took him into custody. Abel Decl. Mr. Gomez requires daily medication for hypertension and treatment for sleep apnea. Abel Decl. He does not have his blood pressure medication with him. *Id.*

39. Respondents have identified no change in circumstances since Mr. Gomez was placed on supervision other than the immigration judge's August 10 decision. He has not violated any condition of release. He has not been charged with any new offense. Removal remains stayed by statute. Abel Decl.

LEGAL FRAMEWORK

40. Section 1231(a) of Title 8 governs the detention of noncitizens subject to administratively final removal orders. During the 90-day "removal period," detention is mandatory. 8 U.S.C. § 1231(a)(2). After the removal period, the noncitizen "shall be subject to supervision," *id.* § 1231(a)(3), and certain categories of noncitizens "may be detained beyond the removal period," *id.* § 1231(a)(6). Section 1231(a)(6) does not authorize indefinite or purposeless detention. Read in light of the Due Process Clause, it "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," and "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Zadvydas*, 533 U.S. at 689, 699. The statute's "basic purpose" is "assuring the alien's presence at the moment of removal," and where that purpose cannot be served, detention lacks a legitimate justification. *Id.* at 690, 699.

41. The implementing regulations require that a noncitizen released on an order of supervision be afforded specified procedures before and after release is revoked. Release may be revoked only where "[t]he purposes of release have been served," where the noncitizen violates a condition of release, where "[i]t is appropriate to enforce a removal order or to commence removal proceedings," or where the noncitizen's conduct "or any other circumstance" indicates that release is no longer appropriate. 8 C.F.R. § 241.4(l)(2)(i)–(iv). Upon revocation the noncitizen must be notified of the reasons and afforded "an initial informal interview promptly after his or her return to Service custody" to respond to them. *Id.* § 241.4(l)(1). Notably, the ground DHS invoked in its May 20, 2026 motion in immigration court was § 241.4(l)(2)(iii), the ground that applies where "[i]t is appropriate to enforce a removal order." *Castillo Gomez*, ECF No. 65 at 21 (citing ECF No. 65-5 at 5). An agency must follow its own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954).

42. A motion to rescind an in absentia removal order for lack of notice may be filed at any time, and its filing stays removal by operation of law until the immigration judge rules. 8 U.S.C. § 1229a(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). Because an in absentia order can be

challenged only through a motion to reopen, the Ninth Circuit treats such a motion not as a collateral attack but as part of the process for challenging the order itself, and has held that such an order does not become final under 8 U.S.C. § 1101(a)(47)(B) until the period for seeking reopening before the immigration judge has expired or the Board has affirmed. *Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021); *see Tkachev v. Warden of Cent. Valley Annex*, No. 1:26-cv-04039-JLT-HBK, 2026 WL 2666224, at *4 (E.D. Cal. Sept. 10, 2026) (findings and recommendations) (in absentia order not final, and § 1231 inapplicable, while motion to reopen and appeal pending); *Li v. Albarran*, 2026 WL 970529, at *3–4 (E.D. Cal. Apr. 10, 2026) (same); *Bonilla v. Hermosillo*, 2025 WL 3237854, at *3 (W.D. Wash. Nov. 19, 2025) (same).

43. Civil immigration detention is constitutionally permissible only when it bears a "reasonable relation" to a legitimate, non-punitive purpose: preventing flight or protecting the community. *Zadvydas*, 533 U.S. at 690 (citing *Jackson*, 406 U.S. at 738); *Demore*, 538 U.S. at 527–28. A person who has been released from custody has a protected liberty interest in remaining free, *Morrissey*, 408 U.S. at 482, and may be re-detained only upon procedures adequate to ensure that the government's justification outweighs that interest, *Hernandez*, 872 F.3d at 990–91. In this Circuit, at a custody hearing required by due process, the government must prove by clear and convincing evidence that the noncitizen is a flight risk or a danger, *Singh*, 638 F.3d at 1203–04; *Martinez v. Clark*, 124 F.4th 775, 785–86 (9th Cir. 2024), and must consider whether conditions of release short of detention would suffice, *Hernandez*, 872 F.3d at 990–91, 994.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Detention Without Statutory Authority — 8 U.S.C. § 1231(a)(6), as Construed in *Zadvydas v. Davis*

44. Petitioner incorporates the foregoing paragraphs.

45. Respondents assert authority to detain Mr. Gomez under 8 U.S.C. § 1231(a)(6). The claim can be stated simply. Section 1231(a)(6) permits the government to hold a person with a final removal order for one reason: to carry out the removal. Congress has forbidden Mr. Gomez's

removal for as long as his motion to rescind the in absentia order is pending. A statute that authorizes detention in order to remove someone does not authorize the detention of someone whom the law forbids the government to remove. That is the essence of the claim; what follows is the doctrine that confirms it. In *Zadvydas*, the Supreme Court held that § 1231(a)(6) authorizes detention beyond the removal period only for the period reasonably necessary to effect removal, and only where removal is reasonably foreseeable. *Zadvydas*, 533 U.S. at 689, 699–701.

46. Removal is not reasonably foreseeable. It is prohibited by 8 U.S.C. § 1229a(b)(5)(C) for as long as Mr. Gomez's motion to rescind and reopen remains pending, a period of unknown and potentially lengthy duration that Respondents do not control. Respondents concede that they cannot remove him. The basic purpose of § 1231(a)(6) detention, "assuring the alien's presence at the moment of removal," *id.* at 699, cannot be served during a period in which removal is unlawful. Detention on the theory that Respondents wish to have Mr. Gomez in hand should the stay someday be lifted is detention for administrative convenience, not detention "reasonably necessary to bring about [his] removal." *Id.* at 689. Nor can a generalized concern about flight fill the gap. The flight-risk justification for post-order detention derives from, and is measured by, the government's interest in effecting removal; as the Supreme Court explained, that justification "is weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. Where removal is not remote but legally impossible, the justification is not merely weak but absent.

47. The six-month period of presumptively reasonable detention recognized in *Zadvydas* does not save Respondents' position. That presumption reflects the time ordinarily required to accomplish a removal when that removal is legally permissible but practically difficult, for example because a receiving country has not issued travel documents. *Id.* at 700–01. It presupposes that detention is doing the work the statute assigns it: holding the noncitizen while the government works to effectuate a removal it is entitled to carry out. When removal is barred by law, detention does no such work. Respondents have been explicit that travel documents are available for Mr. Gomez and that removal, once permitted, "could be executed fairly quickly." Sept. 22 Tr. at 12:11–13. So the only thing detention accomplishes during the stay is to spare ICE

the task of locating Mr. Gomez at his home in Napa, or at his next scheduled check-in, when and if the stay is lifted. This Court has already identified why that is not enough: "if the whole basis of having him in custody in that interim period of time is so that they can save the number of hours or the day it would take to get him into custody so that they can get him on a plane, . . . keeping somebody in custody for weeks or months until that happens" is a matter "of concern." *Id.* at 25:1–11. Respondents' answer, that "this is the point of flight risk as a basis for detention," *id.* at 25:21–24, assumes what it must prove: that there is a removal to secure his presence for. There is not.

48. Nor does the August 10 decision supply the missing authority. This Court held in May that § 1231(a)(6) detention could not proceed absent compliance with 8 C.F.R. § 241.4. *Castillo Gomez*, ECF No. 29 at 8–9. The August 10 decision does not mention § 241.4, does not state a standard of proof, does not address the stay, and authorizes detention for the express purpose of "effectuating the removal order." ECF No. 65-3 (Abel Decl. Ex. F); ECF No. 65-8 (Abel Decl. Ex. G) at 1:57:50. Whatever deference that decision may command on the historical facts it recites, it cannot authorize detention for a purpose the statute does not permit. And Respondents' own regulations, which permit revocation of an order of supervision where "[i]t is appropriate to enforce a removal order," 8 C.F.R. § 241.4(l)(2)(iii), the very ground DHS invoked in immigration court, ECF No. 65-5 (Abel Decl. Ex. H) at 5, do not permit revocation to enforce an order that cannot be enforced.

49. Respondents' position is also foreclosed by this Court's prior construction of the statute on this record. This Court has held that the removal period expired in October 2006 and was not extended by any act of Mr. Gomez, and that detention under § 1231(a)(6) could not proceed without compliance with 8 C.F.R. § 241.4. *Castillo Gomez*, ECF No. 29 at 7–9. Nothing in the August 10 IJ decision – which does not mention § 241.4, the standard of proof, or the statutory stay – supplies the statutory predicate that was missing in March.

50. In the alternative, Mr. Gomez is not presently subject to a final removal order, and § 1231 does not govern his detention at all. A removal order becomes final upon the earlier of the Board's affirmance or "the expiration of the period in which the alien is permitted to seek review

of such order by the Board." 8 U.S.C. § 1101(a)(47)(B). An in absentia order can reach the Board only through a motion to reopen before the immigration judge, and the Ninth Circuit has therefore treated such a motion as part of the process of seeking review of the order, rather than a collateral attack on it, so that the order does not become final until the period for filing the motion has run or the Board has affirmed. *Cui*, 13 F.4th at 996. *Cui* involved a motion under § 1229a(b)(5)(C)(i), which must be filed within 180 days of the order, and the court accordingly measured finality by that window. Mr. Gomez's motion arises under clause (ii), which Congress made available "at any time," because a person who never received notice of his hearing cannot be charged with the running of a period he did not know had begun.

51. That difference makes *Cui*'s reasoning stronger here, not weaker. Whatever may be said of the years in which no motion was pending, a question the Court need not decide, the period in which Mr. Gomez "is permitted to seek review" of his order has not expired, because that review is under way: his motion is pending before the immigration judge, its denial would be appealable to the Board, and Congress attached to its filing the same automatic stay of removal that accompanies a timely clause (i) motion, a stay it did not attach to ordinary motions to reopen under § 1229a(c)(7). *See Tkachev*, 2026 WL 2666224, at *4 (in absentia order "not administratively final," and § 1231 inapplicable, while appeal from denial of motion to reopen filed within 180 days remained pending; such motions "are not treated as collateral challenges to the removal order, but rather as part of the process required in order to challenge the removal order itself") (quoting *Li*, 2026 WL 970529, at *3). Petitioner acknowledges that one district court has applied *Cui*'s 180-day measure to a 2006 in absentia order notwithstanding a lack-of-notice motion filed after the noncitizen's arrest. *L.M.P. v. Chestnut*, No. 1:26-cv-04673-JLT-EGC, 2026 WL 1906293, at *2 & n.1 (E.D. Cal. July 2, 2026). That decision, however, did not address the text of § 1101(a)(47)(B) or the "at any time" provision of clause (ii); it involved a noncitizen who had never been released on supervision and had no motion pending when she was detained (unlike Mr. Gomez); and it applied the six-month *Zadvydas* presumption without considering whether the statutory stay it acknowledged left detention with any purpose to serve. *Id.* at *3–4. An order that

the government is statutorily forbidden to execute, and whose review at the instance of the noncitizen is in progress, is not final in any sense that matters to § 1231.

52. Mr. Gomez's detention is therefore without statutory authority and in violation of the laws of the United States. 28 U.S.C. § 2241(c)(3).

SECOND CLAIM FOR RELIEF

Revocation of Release in Violation of 8 C.F.R. §§ 241.4 and 241.13 and the Administrative Procedure Act

53. Petitioner incorporates the foregoing paragraphs.

54. Mr. Gomez was released on an Order of Supervision under 8 U.S.C. § 1231(a)(3) and complied with every condition of it. Respondents' own regulations permit revocation of such release only on the grounds stated in 8 C.F.R. § 241.4(l)(2), and require, upon revocation, notice of the reasons and a prompt informal interview at which the noncitizen may respond to them. 8 C.F.R. § 241.4(l)(1).

55. None of the regulatory grounds for revocation is present. The purposes of release have not "been served"; Mr. Gomez remains subject to supervision pending a removal that cannot occur. He has not violated any condition of release. Revocation is not "appropriate to enforce a removal order," the ground DHS itself invoked, because the removal order cannot be enforced while removal is stayed by statute. And no "conduct of the alien" or "other circumstance" has arisen since his release that would make continued release inappropriate; the only intervening event is an immigration judge's decision that itself rests on the premise that detention would serve to effectuate removal. Respondents did not abide by their regulations for revoking an order of supervision.

56. Respondents' failure to comply with their own binding regulations renders Mr. Gomez's detention unlawful, *Accardi*, 347 U.S. at 267–68, and constitutes agency action that is arbitrary, capricious, not in accordance with law, and without observance of procedure required by law, 5 U.S.C. § 706(2)(A), (D).

THIRD CLAIM FOR RELIEF

Fifth Amendment — Substantive Due Process

57. Petitioner incorporates the foregoing paragraphs.

58. "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." *Zadvydas*, 533 U.S. at 690. Civil detention must bear a reasonable relation to the purpose for which the individual is confined. *Jackson*, 406 U.S. at 738. In the immigration context, the permissible purposes are preventing flight and protecting the community, and the government's interest in detention to prevent flight is an interest in "assuring the alien's presence at the moment of removal." *Zadvydas*, 533 U.S. at 690, 699.

59. The immigration judge found that Mr. Gomez is not a danger. The only remaining purpose, securing his presence for removal, cannot be served during a period in which removal is prohibited by law. Respondents have stated that the reason to hold him is so that, "if at the moment the order does become executable, he can't be found" and "his removal could be executed fairly quickly." Sept. 22 Tr. at 12:11–13, 25:21–24. Confining a person for weeks or months in order to spare the government the effort of locating him at an unknown future date, when that person has reported in person to the government every time he has been asked to, has a fixed residence, a business, a family, and pending applications for relief (contained within his pending motion to reopen) that give him every incentive to appear, is not detention reasonably related to a legitimate purpose. This is especially true because Mr. Gomez could be given alternatives to detention that would ensure that he is easy to find, including an electronic monitor. The government's decision to detain Mr. Gomez is the "exercise of power without any reasonable justification in the service of a legitimate governmental objective" that the Due Process Clause forbids. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

60. Mr. Gomez's detention violates the substantive component of the Due Process Clause of the Fifth Amendment.

FOURTH CLAIM FOR RELIEF

Fifth Amendment — Procedural Due Process (Pleaded in the Alternative)

61. Petitioner incorporates the foregoing paragraphs.

62. Mr. Gomez has a protected liberty interest in remaining at liberty: he was released by the government in 2006 and again in 2026, lived under an order of supervision in full compliance with its conditions since his most recent release, and, as this Court has held, holds an "implied promise" protected by *Morrissey*. *Castillo Gomez*, ECF No. 29 at 11. Before that interest may be taken from him, due process requires a determination by a neutral decisionmaker, on a correct understanding of the law, that detention serves a legitimate purpose, at which the government proves by clear and convincing evidence that he is a danger or a flight risk and that no condition or combination of conditions of release would reasonably assure his appearance. *Singh*, 638 F.3d at 1203–05; *Martinez*, 124 F.4th at 785–86; *Hernandez*, 872 F.3d at 990–91, 994; *Castillo Gomez*, ECF No. 29 at 9–14.

63. Petitioner recognizes that the Court presiding over the related case has said from the bench that it is inclined not to review the conduct of the August 10, 2026 hearing while Mr. Gomez's appeal from it is pending before the Board of Immigration Appeals,[1] and he does not ask this Court to do so here. This claim is pleaded in the alternative, and to preserve it, on a single and narrower ground that does not depend on the adequacy of the hearing: the August 10 determination authorized detention "for purposes . . . of effectuating the removal order," *Castillo Gomez*, ECF No. 65-8 at 1:57:50, without considering the statutory stay that made that purpose legally unavailable. A custody determination premised on a purpose the law forbids is not an individualized determination that detention is justified, and it cannot supply the process due for the deprivation of liberty that began on September 29. *See Tiboko-Tifuh v. Noem*, No. 26-cv-1215-JO-DEB, 2026 WL 1603795, at *3 (S.D. Cal. June 4, 2026) (finding resting on speculation about

[1] At the September 22, 2026, the Court indicated that the motion to enforce was under submission and that a written order would issue. *Castillo Gomez*, ECF No. 74. At the time of this filing, no order has yet issued on the docket.

the outcome of the noncitizen's pending proceedings "cannot take the place of evidence or satisfy the clear and convincing evidentiary burden"). The Court need not reach this claim if it grants relief on the First, Second, or Third Claim.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court:

1. Assume jurisdiction over this matter;

2. Order that Respondents shall not transfer Petitioner outside the Northern District of California, and shall not remove him from the United States, while this petition is pending, in order to preserve the Court's jurisdiction;

3. Issue a writ of habeas corpus ordering Respondents to release Petitioner immediately, on the conditions of the Order of Supervision under which he was previously released or on such other reasonable conditions as the Court deems appropriate. Because Petitioner has already received the custody hearing ordered in the related case and the injury alleged here is his detention notwithstanding that process and the statutory stay, release rather than a further hearing is the appropriate remedy. *See Mario Rene C.C.*, 2026 WL 2444748, at *5; *Salazar-Sorto*, 2026 WL 2621203, at *6;

4. In the alternative, order Respondents to release Petitioner unless, within seven days, they provide him a custody hearing before this Court or a Magistrate Judge of this Court, at which Respondents bear the burden of proving by clear and convincing evidence that Petitioner poses a danger to the community or a flight risk that no condition or combination of conditions of release could reasonably mitigate, at which Petitioner's evidence is admitted and considered, and which results in a written decision stating the standard of proof applied, the evidence considered, and the reasons for the decision;

5. Declare that Petitioner's detention during the pendency of his motion to rescind and reopen, and the statutory stay of removal that accompanies it, violates 8 U.S.C. § 1231(a)(6), 8 C.F.R. § 241.4, and the Due Process Clause of the Fifth Amendment;

6. Enjoin Respondents from re-detaining Petitioner during the pendency of the statutory stay absent a material change in circumstances and compliance with the procedures described above;

7. Award Petitioner his costs and reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

8. Grant such other and further relief as the Court deems just and proper.

Dated: September 29, 2026

Respectfully submitted,

/s/ Jonathan Abel
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Attorney for Petitioner

VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I, Jonathan Abel, am one of Petitioner's attorneys and submit this verification on his behalf because he is in Respondents' custody and unable to verify the petition himself. I have personal knowledge of the proceedings described above and have reviewed the records cited. I verify that the factual statements in the foregoing Petition are true and correct to the best of my knowledge, information, and belief.

Executed on September 29, 2026, at Oakland, California.

/s/ Jonathan Abel
Jonathan Abel