HOLLY S. COOPER, CSB # 197626
Law Office of Holly S. Cooper
P.O. Box 4358
Davis, CA 95617
(530) 574-8200
Fax (530) 752-0822

CARTER C. WHITE, CSB # 164149
Attorney at Law
P.O. Box 2202
Davis, CA 95617
(530) 848-0597
Fax (530) 752-5788
Carter.White@gmail.com

Counsel for Petitioner,

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

, Petitioner, vs. MICHAEL CHERTOFF, Secretary of the United States Department of Homeland Security; MICHAEL B. MUKASEY, Attorney General of the United States; NANCY ALCANTAR, San Francisco Field Office Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement; DONNY YOUNGBLOOD, Sheriff of Kern County Sheriff's Department and Lerdo Pre-Trial Detention Facility, Respondents.	CASE NO.: Agency No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR ORDER TO SHOW CAUSE**

Petitioner, , offers this memorandum of points and authorities in support of his petition for a writ of habeas corpus and request for order to show cause.

Table of Contents

Index of Authorities

Cases

Statutes and Rules

//

//

//

//

Introduction

During the past four years while the government has sought to deport Mr. , he has spent a collective thirty-three months in immigration detention. Under Ninth Circuit precedent, prolonged detention has been held unconstitutional and where the detainee is challenging the very notion that he is removable, detention is only permissible where removal is "expeditious." Mr. prevailed in one petition for review to the Ninth Circuit, and his case is pending in the Ninth Circuit again on a second petition for review on the same legal issue. Mr. , a lawful permanent resident, pled no contest to violating Calif. Veh. Code § 10851(a) (driving or taking of vehicle without consent of owner). The government's evidence from Mr. 's immigration proceeding does not establish that his conviction qualifies as an aggravated felony, and Mr. is therefore neither removable nor subject to mandatory detention under the immigration statutes. Because the circumstances of his case are virtually indistinguishable from those in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) (prior conviction under Calif. Veh. Code § 10851(a) did not qualify as aggravated felony under categorical or modified categorical approaches) and *Penuliar v. Mukasey*, ___ F.3d___, 2008 WL 1792649 (9th Cir., April 22, 2008) (reaffirming *Vidal*), there is no significant likelihood of Mr. 's removal from this country in the reasonably foreseeable future. In fact, it is quite likely that Mr. will ultimately prevail in his immigration proceeding, avoid removal altogether, and retain his status as a lawful permanent resident. This Court therefore should order his immediate release from immigration custody.

//

//

Factual Allegations

Petitioner ("Petitioner" or "Mr. ") is a native and citizen of the Philippines, and is a lawful permanent resident of the United States. During the pendency of immigration removal proceedings against him, he has spent over thirty-three months in custody, including a period of over seven months commencing in August 2007 and continuing to the present time.

Mr. is 43 years old. He immigrated to the United States in 1980 at the age of fifteen. He is a lawful permanent resident with extensive family ties in this country. His entire family lives in the United States, and they are all United States citizens, including his two minor children.

On February 18, 1999, in the Superior Court of the State of California, County of Solano, Mr. pled no contest to violating Calif. Veh. Code § 10851(a), driving or taking of a vehicle without consent of owner (hereafter "section 10851(a)"). Exh. 25-27.[1] The court later sentenced him to two years in prison for this conviction. Exh. 23, 30.

On April 15, 2003, the Immigration and Naturalization Service issued a Notice to Appear (NTA), alleging that Mr. was subject to removal from the United States for having been convicted of an aggravated felony, section 10851(a). Exh. 32. The government served the NTA on Mr. on February 24, 2004. Exh. 33. At the time Mr.

[1] In this document, "Exh. #" refers to the page number of the exhibit attachment filed contemporaneously with this petition and memorandum. Many of these exhibits are also contained in the Certified Administrative Record (cited herein as "CAR") from the Petitioner's immigration proceeding.

was already in the custody of the immigration authorities at the Eloy Detention Facility in Eloy, Arizona. Exh. 34.

On May 11, 2004, the Immigration Judge (IJ) sustained the allegations in the NTA and ordered Mr. removed from the United States. Exh. 13-18. The IJ found Mr. removable under section 237(a)(2)(A)(iii) of the INA, any time after admission convicted of an aggravated felony as defined in section 101(a)(43)(G) of the INA, a theft offense or burglary offense for which the term of imprisonment is at least one year.

Mr. appealed the IJ's decision. On September 28, 2004, the Board of Immigration Appeals (BIA) granted a summary affirmance, without opinion, of the IJ's decision. Exh. 6.

Mr. filed a petition for review of the BIA decision in Case No. 04-75440 in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). On March 15, 2006, the Ninth Circuit granted the petition for review and remanded the case to the BIA, citing its recent decision in *Penuliar v. Gonzales,* 435 F.3d 961, 969-70 (9th Cir. 2006) that Calif. Veh. Code § 10851 is not an aggravated felony under the INA "in circumstances indistinguishable from 's case." *XXXXX v. Gonzales*, 2006 (9th Cir., ****, . **, 2006) (unpublished disposition). Exh. 8-9.

On May 1, 2006, the government filed a petition for panel rehearing in the Ninth Circuit in Case No. 04-75440.

On June 14, 2006, the government granted Mr. 's release from custody on an order of recognizance. Exh. 7, 35-37. At that time, he had been in custody as a civil immigration detainee for over twenty-seven months (since at least February 24, 2004). Mr.

was released to his family residence in Northern California, where he lived and worked supporting his family until the government returned him to custody in August 2007.

On December 19, 2006, in Case No. 04-75440, the Ninth Circuit ordered that the government's petition for rehearing be held in abeyance pending the Supreme Court's resolution of *Gonzales v. Duenas-Alvarez.* Exh. 38.

On January 17, 2007, the Supreme Court issued its decision in *Gonzales v. Duenas Alvarez*, 549 U.S. 183, 127 S.Ct. 815 (2007). The Court held that a "theft offense" which is an "aggravated felony" under the INA, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting. The Court's opinion left open two other questions (1) that Calif. Veh. Code § 10851 does not categorically define a theft offense because it includes liability for accessories after the fact, the proof of which does not require a showing that the individual committed a theft, and (2) that Calif. Veh. Code § 10851 applies not only to theft, but also to joyriding, which involves so limited a deprivation of the use of a vehicle that it falls outside the generic definition of "theft." 127 S.Ct. at 822-23.

On July 6, 2007, the Ninth Circuit issued another order that the government's petition for panel rehearing in Case No. 04-75440 be held in abeyance pending the Ninth Circuit's en banc decision in *United States v. Vidal*, No. 04-50185, or further order of the Court.

Despite the fact that the government's petition for review remained pending in the Ninth Circuit in Case No. 04-75440, in response to the Ninth Circuit's earlier order remanding the matter, on August 3, 2007, the BIA again ordered Mr. removed from the United States, contending that the Supreme Court's decision in *Gonzales v. Duenas-Alvarez* overruled *Penuliar* and concluded that a conviction for unlawful driving or taking a vehicle in violation of Calif. Veh. Code § 10851(a) is an aggravated felony under the INA. Exh. 6.

After the BIA issued this second order of removal, on August 17, 2007, the San Francisco Field Office Director for Citizenship and Immigration Services sent Mr. an "appointment notice" requesting his appearance at their San Francisco office. Exh. 39. When Mr. voluntarily appeared for the appointment on August 29, 2007, his immigration bond was revoked and he was taken back into immigration custody, where he remains today.

On September 4, 2007, Mr. filed a second petition for review in the Ninth Circuit, challenging the August 3, 2007, order of the BIA. The Ninth Circuit assigned Case No. 07-73525 to Mr. 's second petition for review.

On October 10, 2007, the Ninth Circuit issued its en banc decision in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc), and held that a conviction under Calif. Veh. Code § 10851(a) did not qualify as an aggravated felony under either the categorical or modified categorical approaches in circumstances virtually indistinguishable from those in Mr. 's case.

On October 18, 2007, in Case No. 07-73525 (Mr. 's second petition for review), Mr. moved for a stay of his removal pending the Court's determination of his petition for review.

On October 29, 2007, the Ninth Circuit denied the government's petition for panel rehearing in Case No. 04-75440, Mr. 's first petition for review. Thus, the Ninth Circuit had the benefit of both the Supreme Court's decision in *Gonzales v. Duenas-Alvarez,* and its own decision in *United States v. Vidal, supra,* before its final adjudication of the government's petition for panel rehearing in Mr. 's first petition for review. The

government did not seek further rehearing of Mr. 's first petition for review in the Ninth Circuit, nor did it seek review of the matter in the Supreme Court.

On November 20, 2007, in Ninth Circuit Case No. 07-73525, the government filed the Certified Administrative Record (CAR) of the proceedings before the IJ and the BIA in Mr. Tabr 's removal case. The oral decision of the Immigration Judge, contained in the CAR, includes this passage:

> The Department of Homeland Security provided to the Court Exhibit 2 herein, which the Respondent's ['s] counsel objects to alleging that it is hearsay among other things. Most important in Exhibit 2 is sub exhibit 2. That sub exhibit 2 constitutes [sic] of a felony complaint showing that the Respondent was charged with the unlawful driving or taking of a vehicle. It also shows an abstract of judgement [sic] and prison commitment. It shows that the Respondent [Mr.] was convicted on count number four in the aforementioned criminal complaint, driving or taking of vehicle. It concludes that the crime was committed in 1998, the conviction date is the 18th of February 1999, and that the Respondent plead guilty [sic] to that offense and received a median term of two years. It also contains a copy of the Respondent's waiver of constitutional rights and the declaration of his motion to change plea from innocent to guilty [sic].

Exh. 15-16 (CAR 78-79).

The documents in the CAR that relate to Mr. 's criminal charge include four pages of a five-page felony complaint (Exh. 19-22; CAR 115-118), an abstract of judgment (Exh. 23-24; CAR 119-120), a waiver of constitutional rights and declaration in support of defendant's motion to change plea [from not guilty to no contest] (Exh. 25-27; CAR 121-123), and criminal minute orders (Exh. 28-31; CAR 124-127). There are declarations in the waiver form signed by both Mr. and his public defender. Exh. 25-27; CAR 121-123. The waiver form states that Mr. pled "no contest under *Peo*[*ple*] *v. West* [, 3 Cal.3d 595, 477

P.2d 409 (Cal. 1970)]" to amended counts 4 and 5, and indicates that "[t]he facts upon which this change of plea are based are those contained in the preliminary transcript." Exh. 25-27; CAR 121, 123. In her declaration, Mr. 's defense attorney interlineated the initials "nc" in the three places where the form said "guilty," and repeats "no contest under *Peo*[*ple*] *v. West*" above her signature. Exh. 27; CAR 123.

The felony complaint in the CAR is not the charging document that served as the basis for Mr. 's no contest plea. This is clear because Mr. is not charged with violating Cal. Veh. Code § 10851(a) in the document. Exh. 19-22; CAR 115-118. Count 4 of the document charges Mr. with a different offense, and Count 5 of the complaint charges a different individual with violating § 10851(a). Exh. 22, 21; CAR 118, 117.

On November 29, 2007, in Ninth Circuit Case No. 07-73525, the government filed a pleading opposing Mr. 's motion for stay of removal, and moving to dismiss the second petition for review for lack of jurisdiction. The government argues that Mr. did not preserve his "accessory after the fact" argument before the BIA, and that the argument is barred by res judicata because Mr. allegedly did not raise the argument in his first petition for review in 2004. In the same pleading, the government argued in the alternative, that the Ninth Circuit should hold Mr. 's second petition for review in abeyance pending the decision of the Solicitor General whether to seek review by petition for writ of certiorari in the Supreme Court of the Ninth Circuit's decision *United States v. Vidal*.

On December 3, 2007, the in Case No. 07-73525, Ninth Circuit ordered that a temporary stay of Mr. 's removal was in effect, and that briefing of the matter was suspended pending disposition of Mr. 's motion to stay removal.

On December 27, 2007, in Supreme Court Case No. 07A545, the United States applied for an extension of time to file its petition for writ of certiorari in *United States v. Vidal*. On January 2, 2008, Justice Kennedy granted the application, extending the time for the filing of the petition for a writ of certiorari until February 7, 2008. On information and belief, the government has decided not to seek certiorari in the *Vidal* case.

On January 8, 2008, in Ninth Circuit Case No. 07-73525, Mr. filed his response to the government's motion to dismiss his second petition for review and to hold the proceeding in abeyance, and contemporaneously filed his own motion for summary adjudication of the matter. Mr. argues that the Ninth Circuit's favorable ruling in the 2004 petition for review has a preclusive effect in the second petition for review, that he properly exhausted his claim that he is not removable because his conviction is not an aggravated felony, that at any rate exceptions to the exhaustion doctrine apply in this case, and that the Court should not hold the petition in abeyance. On January 15, 2008, in Ninth Circuit Case No. 07-73525, the government filed its reply in support of its motion to dismiss, or in the alternative, response in opposition to Mr. 's motion for summary disposition.

On March 14, 2008, the Ninth Circuit issued an order on several motions in Case No. 07-73525. Exh. 40-41. The Court denied, without prejudice, the government's motion to dismiss the petition for review for lack of jurisdiction. The Court denied Mr. 's motion for summary disposition. The Court granted Mr. 's motion for a stay of removal while his petition for review in pending. The Court denied as moot the government's motion to stay appellate proceedings due to a possible petition for writ of certiorari in *Vidal*, citing the Supreme Court's denial of the petition. Finally, the Ninth Circuit set a briefing schedule in the

case, requiring Mr. 's opening brief to be filed by June 23, 2008, and the answering brief by August 22, 2008. *Id.*

The Ninth Circuit has posted a set of "Frequently Asked Questions" on its website. The answers to these questions indicate a time estimate in civil cases of nine to twelve months from the date briefing is completed until oral argument, and three months to one year from oral argument until the Court issues a decision. Exh. 42-43. Thus, in Case No. 07-73525, Mr. 's second petition for review of his removal order, the Ninth Circuit is not likely to enter a decision until sometime between September 2009 and September 2010. Either party's filing of a petition for rehearing or petition for writ of certiorari would cause additional delay. See also *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (foreseeable process in Ninth Circuit is one year or more after filing of government brief in immigration petition for review). Thus, there is no significant likelihood that Mr. 's second petition for review will be adjudicated in the reasonably foreseeable future.

Legal Argument

1. 8 U.S.C. §1226(c) Does Not Authorize Prolonged and Indefinite Detention

As no final order of removal exists, Petitioner is subject to mandatory detention pursuant to the pre-removal detention statue 8 U.S.C. §1226(c)[2]. Both the Supreme Court and

[2] The two primary detention-authorizing statutes are 8 U.S.C. §1226(c) and §1231(a)(2). Determining which statute controls Petitioner's confinement turns on whether a final order of removal exists. Here, even though a removal order has been adjudicated at the administrative level, 8 U.S.C. § 1231(a)(1)(B) states that a "removal order begins on the latest of the following: (i) The date the order of removal becomes administratively final"; or "[i]f the removal order is judicially reviewed and if court orders a stay of the removal of the alien, the date of the court's *final order*." (emphasis added). Under the plain language of the statute, Petitioner does not have a final order because he has a judicially ordered stay of removal in effect at the Ninth Circuit and, thus, the detention authorizing statute cannot be 8 U.S.C. 1231(a)(1)(B) and must be 1226(c).

Moreover, *Zabadi v. Chertoff*, 2005 WL 3157377 (N.D. Cal., Nov. 22, 2005), is instructive on this determination. In *Zabadi*, the petitioner filed a motion for stay of removal with the Ninth Circuit after the BIA had reversed the Immigration Judge's decision to release Zabadi because Respondent was subject to mandatory

Ninth Circuit have emphatically emphasized that detention pursuant to 8 U.S.C. §1226(c) should be "brief," "expeditious," "reasonable," and "definite" *Demore v. Kim,* 538 U.S. 510, 513 (2003); *Nadarajah v. Gonzales,* 443 F.3d 1069 (9th Cir. 2006); *Tijani v. Willis,* 430 F.3d 1241, 1242 (9th Cir. 2005). In *Kim,* the Supreme Court upheld mandatory detention of aliens convicted of crimes, without bond hearings, for "the brief period necessary" to undergo removal proceedings. *Kim,* 538 U.S. at 513. Although the Court declined to specify a reasonable interval for such brevity, it noted that the Executive Office for Immigration Review reports that the majority of pre-removal detention periods typically endure between forty-seven days and approximately four months, a period less than the presumptively reasonable six month duration presented by the Court's decision in *Zadvydas v. Davis,* 533 U.S. 678 (2001).

Several courts, including the Ninth Circuit, have read the Supreme Court's decisions in *Zadvydas* and *Kim* together as imposing limits on the permissible length of detention pending completion of removal proceedings. In *Tijani v. Willis*, *supra*, the Ninth Circuit held petitioner was entitled to habeas relief because Petitioner had contested his removability and the length of detention (thirty months) was not expeditious, and did not conform to the statutory authority extended under §1226(c). By way of guidance, Judge Tashima, in his concurring opinion, identified both the six month threshold posited by the Court in *Zadvydas* and the Executive Office for Immigration's statistical averages utilized by the *Kim* Court as the proper rubrics by which the agency and courts below ought to measure the length of detention

---

detention. *Id.* at *6-7. The District Court held that Zabadi was not confined under the removal period statute § 241(a)(2) but rather under the predecessor statute to INA § 236(a)—INA § 242(a)(2). Thus, the District Court has held where an alien seeks a stay of removal, the detention authorizing statute is § 236, not 241(b)(2). Here, because Petitioner has sought judicial review in the Ninth Circuit with a stay of removal, no final order exists. Thus, the detention authorizing statute is 8 U.S.C. §1226(c).

in determining the point of unreasonableness if they are to carry out their respective mandates appropriately. *Id.* at 1249. In *Nadarajah v. Gonzales*,443 F.3d. 1069 (9th Cir. 2006), the most recent Ninth Circuit case on the matter, the court ruled that the general detention statutes do not authorize the Attorney General to hold detainees in custody for an "indefinite period." *Id.* at 1078. To the contrary, the court declared that custody of an immigrant detainee must be "for a reasonable period" and is only permissible where there is "a significant likelihood of removal in the reasonably foreseeable future." *Id.* at 1079. Again echoing *Zadvydas*, the *Nadarajah* court proposed "a six month detention" period as a presumptively reasonable episode of confinement, but held out an important qualification in the overall evaluation of an individual's continued custody: where the detainee "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." *Id.* at 1077. The court was careful to state that even though the "detention will at some point end," this does not preclude an understanding of the detention period as "indefinite… [n]o one can satisfactorily assure us as the when that day will arrive. Meanwhile, petitioner remains in detention." *Id.* at 1081.

Here, Petitioner's collective thirty-three month detention is thus clearly prolonged for purposes of analyzing the statutory scheme at issue. *See Zadvydas v. Davis,* 533 U.S. 678, 701 (2001) (holding detention beyond six months not authorized by statute where there is "no significant likelihood of removal in the reasonably foreseeable future."). Like petitioner in *Tijani,* Mr. challenged the premise of his removability and the detention authorizing statute, §1226(c) only permits detention where the proceedings are expeditious. Further, similar to the petitioner in *Tijani,* who was detained for thirty months, Mr. 's thirty-three month detention is not "expeditious" and is similarly unconstitutionally prolonged, *Tijani,* 430 F.3d at 1242.

2. Petitioner is Not Ultimately Removable And His Detention Bears No Reasonable Relation to Respondent's Goal of Removal

In *Zadvydas,* the Court held that detention raised serious constitutional questions when its goal of preventing flight was "no longer practically attainable" due to the unlikelihood of the alien's "ultimate removal" and thus ceases to bear a reasonable relation to the purpose for which the individual was committed. *Zadvydas,* 533 U.S. at 690. As detention becomes prolonged, the Due Process Clause requires a proportionately stronger justification to outweigh the significant deprivation of liberty and demands stronger procedural protections to ensure the sufficiency of that justification. *Id.* at 690-91.

The reasonable purpose of the detention statue is severely undermined when it is applied to an individual with a strong claim that he is not removable and, the government's interest in detention is nominal as such interest is entirely dependent on successfully deporting the lawful permanent resident for his criminal conviction. Here, Mr. prevailed in one petition for review to the Ninth Circuit, and his case is pending in the Ninth Circuit again on a second petition for review on the same legal issue. Mr. , a lawful permanent resident, pled no contest to violating Calif. Veh. Code § 10851(a) (driving or taking of vehicle without consent of owner). The government's evidence from Mr. 's immigration proceeding does not establish that his conviction qualifies as an aggravated felony, and Mr. is therefore neither removable nor subject to mandatory detention under the immigration statutes. Because the circumstances of his case are virtually indistinguishable from those in *United States v. Vidal,* 504 F.3d 1072 (9th Cir. 2007) (en banc) (prior conviction under Calif. Veh. Code § 10851(a) did not qualify as aggravated felony under categorical or modified categorical approaches) and *Penuliar v. Mukasey*, ___ F.3d___, 2008 WL 1792649 (9th Cir., April 22, 2008) (reaffirming

Vidal), there is no significant likelihood of Mr. 's removal from this country in the reasonably foreseeable future. In fact, it is quite likely that Mr. will ultimately prevail in his immigration proceeding, avoid removal altogether, and retain his status as a lawful permanent resident. This Court, therefore, should order his immediate release from immigration custody.

3. Petitioner's Detention Has No Foreseeable Limitation

At the time of this writing, Petitioner has endured over thirty-three months of detention in the custody the Department of Homeland Security despite a strong claim that he is not removable. In light of the procedural posture of Petitioner's case at the Ninth Circuit Court of Appeals, Petitioner's current detention, if unchecked by this Court's intervention, will likely continue for an indeterminable and excessively lengthy period (approximately one to two years). Under the guidance and precedent of the Ninth Circuit, the length of time that Petitioner has remained in custody far exceeds any conceivable understanding of a "brief period" or other standard of reasonableness explored by the courts.

Thus, because the time frames for judicial review in the Ninth Circuit stretches the potential length of future confinement far beyond the temporal restrictions on mandatory detention considered by the *Kim* Court and well in excess of the six month standard of reasonableness promulgated in *Zadvydas,* this Court should release Petitioner from custody.

4. The Burden of Proof Standard Established in *In re Joseph* Violates Petitioner's Fifth Amendment Procedural Due Process Rights

Detention which places the burden on a detainee to show he is not removable is unconstitutional because crucial liberty interests require government protection via procedural

safeguards. Indeed, "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 v. Davis*, 533 U.S. at 690. Accordingly, the Supreme Court has vigorously held that burden of proof standards require stringent procedural protections for the individual where one's liberty interest is in jeopardy and has "consistently adhered to the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual. Rather, where a fundamental right, such as individual liberty, is at stake, the government must be required to bear the lion's share of the burden." *Tijani v. Willis*, 430 F.3d at 1245 (Tashima, J., concurring). *See also Addington v. Texas*, 441 U.S. 418 (1979) (standard for civil commitment must be more than preponderance of the evidence); *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (finding a Louisiana statute placing the burden on acquittees to prove that they are not dangerous to others in order to avoid civil commitment violative of due process); *Stantosky v. Kramer*, 455 U.S. 745 (1982) (requiring greater protections than a preponderance of the evidence standard in parental rights termination proceedings due to the "commanding" liberty interest at stake for the parents and the risk of error inherent to a preponderance standard).

In *In Re Joseph*, 22 I. & N. Dec. 799 (BIA 1999), the BIA determined that an alien contesting their inclusion under 8 U.S.C. § 1226(c) as improper must show that ICE is "substantially unlikely to establish" the charges that render them subject to mandatory detention. *Id.* at 806. In light of Supreme Court precedent requiring the government bear at least a higher burden than the individual where a liberty interest is at stake and the detention at issue is non-punitive, the *Joseph* standard is inadequate and irreconcilable with constitutional

procedural due process protections.[3] *See supra.* A vast chasm exists between the "substantially unlikely" standard instigated under *Joseph* and constitutional burdens determined by the Supreme Court, the impropriety of which is "not just unconstitutional, [but] egregiously so. The [*Joseph*] standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable." *Tijani v. Willis*, 430 F.3d at 1245 (Tashima, J., concurring).

The current scheme under which Respondents currently assert authority to detain Petitioner does not provide for adjudication of removability that comports with due process requirements for civil detention. The burden of proof under *Joseph* is inappropriate for individuals such as Petitioner, whose liberty interest is at stake. Thus, the disproportionate burden placed on the individual under the *Joseph* standard is fundamentally erroneous and dually violative of due process protections where the individual's liberty interest in inextricably intertwined with a determination of removability.

5. This Court Has Jurisdiction And Authority To Admit Bail To Habeas Petitioners Detained By ICE

Petitioner asks this Court to order his release from custody after over thirty-three months of immigration detention. Alternatively, Petitioner requests the Court to conduct a bond hearing to determine his custody status. In this case, since Petitioner is in the pre-removal period, the applicable standard for release is set forth by statute and Supreme Court

---

[3] Compare the extensive safeguards provided defendants in pretrial detention within the criminal justice system. *See e.g. United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding the Bail Reform Act of 1984 as constitutional due to requirement of a "full-blown adversary hearing" in which "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person," arrestee's right to counsel, and necessary limitations to the length of detention); *Schall v. Martin*, 467 U.S. 253, 274 (1984) (holding pre-trial detention for juveniles constitutional due to the total of "flexible" procedures required, including a "formal, adversarial probable-cause hearing" within three days of initial appearance, with the burden on the Government).

precedent. Although the District Court has the discretion to remand bond hearings to the IJ, the federal courts also have the inherent authority to admit to bail habeas petitioners being detained by the ICE. *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083 n.5 (9th Cir. 2006); *Mapp v. Reno*, 241 F.3d 221, 224-25 (2d Cir. 2001). It has also been held that district courts have the authority, pending an alien's appeal from an order dismissing a writ of habeas corpus and remanding him to custody of Director of Immigration for deportation, to admit him to bail. *U.S. ex rel. Paetau v. Watkins*, 164 F.2d 457 (2d Cir. 1947).

The Supreme Court has suggested that once civil detention becomes "unreasonable or unjustified," a lawful permanent resident alien could be entitled to an individualized determination as to risk of flight and dangerousness. *Demore*, 538 U.S. at 525-526. Furthermore, the Supreme Court has held, "[w]hile removal proceedings are in progress, most aliens may be released on bond or paroled." *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001) (citing statute). Existing statutes, and United States Supreme Court and Ninth Circuit case law dictate that Petitioner, as a lawful permanent resident since 1980, currently in civil pre-removal detention for over thirty-three months, has met the standard to seek an individualized bond hearing under the jurisdiction of federal district court.

The government will likely contend that this Court has "limited power" to grant a bond to a habeas petitioner and can do so "only when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974) (cited in *Mapp v. Reno*, 241 F.3d at 226); *Ostrer v. U.S.*, 584 F.2d 594, 596 n.1 (2d Cir. 1978). However, even in these "exceptional circumstances," the Supreme Court has indicated that a district court has broad discretion in conditioning a judgment granting habeas relief, including whether to release the prisoner

pending appearance. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Furthermore, it has been held that federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters "as law and justice require." *Franklin v. Duncan*, 891 F. Supp. 516, 518 (N.D. Cal. 1995). Moreover, F.R.A.P. Rule 23 "establishes the authority of the federal courts to release both successful and unsuccessful habeas petitioners pending appeal." *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987). The Ninth Circuit recently stated that the "government's argument that the court 'should not consider, let alone grant, extraordinary relief by motion where entitlement vel non to release is the very issue on appeal' is baffling: such a release is precisely what [Rule 23] contemplates." *Nadarajah v. Gonzales*, 443 F.3d at 1083 n.5.

Conclusion and Request for Relief

Petitioners continued detention violates the law. He has proven that he is not a flight risk as he reported to the authorities when asked to do so in August 2007. There is no significant likelihood of Mr. 's removal from this country in the reasonably foreseeable future. This Court should order his release from custody.

For these reasons, Petitioner requests that this Court order his immediate release under reasonable conditions of supervision or hold a bond hearing to determine whether continued detention is justified, and for such other and further relief as the Court deems just and reasonable.

Dated: April 28, 2008

Respectfully submitted,

/S/ Holly S. Cooper

_____

Holly S. Cooper

Carter C. White

Attorneys for Petitioner