PETER J. ELIASBERG (SBN 189110)
AHILAN T. ARULANANTHAM (SBN 237841)
RANJANA NATARAJAN (SBN 230149)
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
Tel: (213) 977-9500
Fax: (213) 250-3919

Attorneys for Petitioner
(Additional counsel listed on following page)

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALEJANDRO GARCIA,
A# 41-551-486, et al.

Petitioners,

vs.

JAMES HAYES, Immigration and and Customs Enforcement Los Angeles District Field Office Director; GEORGE MOLINAR, Chief of Detention and Removal Operations, San Pedro Detention Facility; MICHAEL CHERTOFF, Secretary, Department of Homeland Security; ALBERTO GONZALES, United States Attorney General; PAUL WALTERS, Chief of Police for the city of Santa Ana; LEE BACA, Sheriff of Los Angeles County; SAMMY JONES, Chief of the Custody Operations Division of the Los Angeles County Sheriff's Department;

Respondents.

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Case No.:
CV07 3239 VAP (E)

PETITION FOR WRIT OF HABEAS CORPUS

CLASS ACTION

Additional counsel:

JUDY RABINOVITZ**
AMERICAN CIVIL LIBERTIES FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2618
Facsimile: (212) 549-2654

CECILLIA D. WANG (CSB #187782)
MÓNICA M. RAMÍREZ (CSB #234893)*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0775
Facsimile: (415) 395-0950

JAYASHRI SRIKANTIAH (CSB #189566)
STANFORD LAW SCHOOL IMMIGRANTS'
RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone: (650) 724-2442
Facsimile: (650) 723-4426

*Pending admission to Central District of California
**Application for admission *pro hac vice* forthcoming

JURISDICTION AND VENUE

1. Petitioner Alejandro Rodriguez has been incarcerated by the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") for over three years while his immigration proceedings have been on-going, without a hearing as to whether his continued detention is justified. He challenges his prolonged detention on statutory and constitutional grounds, on behalf of himself and other similarly-situated detainees. This Court has subject matter jurisdiction pursuant to 28 U.S.C. 2241 (habeas corpus), 28 U.S.C. 1651 (All Writs Act), and the Suspension Clause of Article I of the U.S. Constitution. INS v. St. Cyr, 533 U.S. 289, 304 (2001). This Court also has jurisdiction to hear this case under 28 U.S.C. 1331, which confers jurisdiction to consider federal questions. Walters v. Reno, 145 F.3d 1032, 1052 (9th Cir. 1998).[1]

2. Because Petitioner and the detainees he seeks to represent challenge their custody, jurisdiction is proper in this court. While the courts of appeals have jurisdiction to review removal orders directly through petitions for review, see 8 U.S.C. 1252(a)(1), (b), the federal district courts have jurisdiction under 28 U.S.C. 2241 to hear habeas petitions by non-citizens challenging the lawfulness of their detention. See, e.g., Demore v. Kim, 538 U.S. 510, 516-17 (2003); Nadarajah v. Gonzales, 443 F.3d 1069, 1075-76 (9th Cir. 2006).

3. This Court may grant relief under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1651 (All Writs Act), 28 U.S.C. 2241 and 2243 (habeas corpus), and 28 U.S.C. 2201-02 (declaratory relief).

4. Venue is proper in the Central District of California pursuant to 28 U.S.C. 2241(d) because Petitioner is incarcerated at the Immigration and Customs

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[1]The Due Process Clause and Article III of the Constitution also require that some judicial forum remain available for Petitioner to challenge the lawfulness of his detention.

Enforcement (ICE) detention facility in San Pedro, California, which is within this District, and all potential class members are incarcerated at facilities within this District. Venue is proper pursuant to 28 U.S.C. 1391(b) because a substantial part of the events giving rise to these claims occurred in this District.

INTRODUCTION

5. Petitioner Alejandro Rodriguez is a citizen of Mexico who came to the United States at the age of one. He has been detained for over three years without any kind of hearing concerning whether or not his prolonged detention is justified. The government has refused even to consider him for release while he litigates his removal case, despite the fact that his case presents a complex and novel question of law explicitly left open by the Supreme Court and the Ninth Circuit.

6. Mr. Rodriguez is not alone. The government currently detains dozens of detainees in the Central District for more than six months – many of them for years – without providing them with any kind of hearing to determine whether their prolonged detention is warranted. Thus, the government routinely incarcerates people for months or years without even considering whether they present a danger or flight risk, or whether their detention is significantly likely to end in the reasonably foreseeable future.

7. Petitioner brings this action seeking only one form of relief – a hearing to determine whether his continued detention is justified – because of this Court's recent decisions concerning prolonged immigration detention. As Petitioner is well-aware, other detainees challenged their prolonged detention before this Court several months ago. See Mussa v. Gonzales, CV 06-2749 TJH (JTL) (C.D. Cal. 2006). In Mussa, the primary relief sought by the detainees was their immediate release. This Court held that such individual relief could not be afforded in a joined lawsuit. "Given the variation among the factual and procedural scenarios alleged in the First Amended Petition, what may constitute

unreasonably prolonged detention in one case may not be so in another, even though the detentions may fall under the same statute." Order Dismissing Without Prejudice at 9, Mussa v. Gonzales, CV 06-2749 TJH (JTL) (C.D. Cal. 2006). In response, the Petitioners in Mussa re-filed their cases as individuals.[2] Upon re-filing, each petitioner sought either immediate release or, in the alternative, a hearing to determine whether his detention was justified. This Court granted the alternative request for relief – a hearing – for each petitioner. Thus, the Court granted the identical hearing relief for all of the Petitioners, notwithstanding "the variation among the factual and procedural scenarios" in their cases.[3]

8. In response to this Court's decisions, Petitioner here does not seek immediate release, either for himself or for the putative class members. Instead, he seeks only a hearing to determine whether his prolonged detention is justified, just as this Court ordered in the individual cases described above.

9. Petitioner, like all the detainees he seeks to represent, is detained under one of three general immigration detention statutes that govern the detention of most non-citizens whom the government is trying to remove. See 8 U.S.C. 1226 (authorizing detention of aliens pending a determination of removability); 8 U.S.C. 1225(b) (authorizing detention of aliens seeking admission); 8 U.S.C. 1231(a) (authorizing detention of aliens with final order of removal during and after the removal period). In keeping with the Ninth Circuit's terminology, these three statutes are referred to herein as the "general immigration detention statutes." The Ninth Circuit has narrowly construed these general immigration detention

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[2]The government voluntarily released some of the Petitioners in Mussa. Those who were not released re-filed as individuals.

[3]See Order Granting Motion for Preliminary Injunction, Diouf v. Gonzales, CV06-7452 (C.D. Cal. January 4, 2007); Martinez v. Gonzales, CV06-7609 (C.D. Cal. January 4, 2007); Soeoth v. Gonzales, CV06-7451 (C.D. Cal. January 4, 2007); Rasheed v. Gonzales, CV06-7449 (C.D. Cal. January 4, 2007). All of the counsel of record in Mussa and the subsequent individual petitions are also counsel of record here.

statutes – those statutes that do not specifically authorize prolonged detention. See Nadarajah v. Gonzales, 443 F.3d 1069, 1078, 1080-81 (9th Cir. 2006) (contrasting general immigration detention statutes that do not explicitly authorize prolonged detention with specific statutes authorizing prolonged detention on, inter alia, national security grounds, and holding that "the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period").

10. Neither Petitioner nor any other person he seeks to represent is detained pursuant to one of the detention statutes that specifically authorizes prolonged detention. See 8 U.S.C. 1226a; 8 U.S.C. 1531-37 (authorizing prolonged detention of, inter alia, suspected terrorists).

11. Courts have repeatedly held that the general immigration detention statutes must be construed narrowly, so as not to authorize prolonged and indefinite detention. See Zadvydas v. Davis, 533 U.S. 678, 697 (2001) (contrasting general detention statute with specific statute authorizing prolonged detention); Clark v. Martinez, 543 U.S. 371, 379 n.4 (2005) (same); Nadarajah v. Gonzales, 443 F.3d 1069, 1078 (9th Cir. 2006) (same); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2006) (construing general detention statute not to authorize prolonged mandatory detention). Moreover, if these statutes did authorize prolonged detention, they would violate the Due Process Clause, at least absent substantially greater procedural constraints. See generally Zadvydas, 533 U.S. at 690-92.

12. Earlier this year, as noted above, this Court issued rulings in four separate, individual cases involving persons who 1) had been detained for more than six months under the general immigration detention statutes, and 2) had never been given a hearing to determine whether their prolonged detention was justified. In each of these cases, the Court required Respondents to provide immediate hearings to the petitioners. See Order Granting Motion for Preliminary Injunction,

Diouf v. Gonzales, CV06-7452 (C.D. Cal. January 4, 2007); Martinez v. Gonzales, CV06-7609 (C.D. Cal. January 4, 2007); Soeoth v. Gonzales, CV06-7451 (C.D. Cal. January 4, 2007); Rasheed v. Gonzales, CV06-7449 (C.D. Cal. January 4, 2007). All four persons were released from detention.

13. Notwithstanding these repeated rulings by courts at all levels, including the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for this District, Respondents continue to maintain an unlawful policy or general practice. Pursuant to this unlawful policy or general practice, Respondents have incarcerated the Petitioner and each of the similarly-situated persons he seeks to represent pursuant to one of the general immigration detention statutes for more than six months – and, in the case of the Petitioner, for more than three years. Pursuant to Respondents' policy or general practice, during that time neither Petitioner nor any other similarly-situated person has had a hearing to determine whether his prolonged detention remains justified.

14. Respondents' general policies and practices of prolonged detention without a hearing are in clear and obvious violation of the statutory and constitutional rights of the Petitioner and other similarly-situated persons he seeks to represent. Despite repeated judicial rulings, Respondents knowingly and willfully persist in their unlawful conduct, continuing to maintain their illegal detention policies and practices in this Circuit and District. To remedy this on-going violation of the law, Petitioner brings this habeas petition seeking declaratory and injunctive relief on behalf of himself and a class of similarly-situated persons.

PARTIES

15. Petitioner Alejandro Rodriguez is a citizen of Mexico. He has been detained for over three years while litigating his removal case. He has never been afforded a hearing to determine whether his prolonged detention is justified. He

currently is detained at the San Pedro ICE detention facility in San Pedro, California.

16. Respondent James Hayes is the Field Office Director for the Los Angeles District of ICE. In his official capacity, Mr. Hayes is authorized to release Petitioner and has legal custody of him. He is sued in his official capacity.

17. Respondent George Molinar is the Chief of Detention and Removal Operations at the ICE San Pedro Detention Facility in San Pedro, California. Mr. Molinar has legal custody of Petitioner. Mr. Molinar is sued in his official capacity.

18. Respondent Michael Chertoff is the Secretary of Homeland Security and heads the Department of Homeland Security, the arm of the U.S. government responsible for enforcement of immigration laws. Mr. Chertoff is the ultimate legal custodian of Petitioner. Mr. Chertoff is sued in his official capacity.

19. Respondent Alberto Gonzales is the Attorney General of the United States and the head of the Department of Justice, which encompasses the BIA and immigration judges as a subunit – the Executive Office of Immigration Review. Mr. Gonzales shares responsibility for implementation and enforcement of the immigration laws along with Respondent Chertoff. Mr. Gonzales is a legal custodian of Petitioner. Mr. Gonzales is sued in his official capacity.

20. Respondent Paul Walters is the Chief of Police for the city of Santa Ana, and therefore the officer responsible for the operation of the Santa Ana County Jail. He is a legal custodian of people detained at the Santa Ana County Jail. Mr. Walters is sued in his official capacity.

21. Respondent Lee Baca is the Sheriff of Los Angeles County, and therefore the officer responsible for the operation of the Mira Loma detention facility in Lancaster, California. He is a legal custodian of people detained at the that facility. Mr. Baca is sued in his official capacity.

22. Respondent Sammy Jones is the Chief of the Custody Operations

Division of the Los Angeles County Sheriff's Department. He is the officer in charge of all of the County's detention facilities and jails. He is a legal custodian of people detained at the Mira Loma facility. Mr. Jones is sued in his official capacity.

FACTS AND PROCEDURAL HISTORY

Personal History

23. Petitioner Alejandro Rodriguez has been detained for over three years while he has challenged the government's efforts to deport him to Mexico, a country where he has not lived since he was a baby.

24. Mr. Rodriguez came to this country in September 1979. He was one year old. Mr. Rodriguez's father, then a lawful permanent resident, became a naturalized citizen on September 17, 1986. Mr. Rodriguez became a lawful permanent resident on June 4, 1987, when he was nine years old. See Exhibit 1 (Declaration of Alejandro Rodriguez).[4]

25. On or about July 29, 1998, Mr. Rodriguez pled guilty to Unlawful Driving or Taking of a Vehicle under section 10851(A) of the California Vehicle Code (CVC). For this crime he was sentenced to 2 years. Five years later, on or about October 21, 2003, he pled no contest and was convicted of Possession of a Controlled Substance under California Health and Safety Code section 11377(A), for which he received formal probation of 5 years under the conditions of California Prop 36. He was transferred to DHS custody after his arrest, on April 10, 2004. He has been detained ever since, now in excess of three years.

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[4]Petitioner narrowly missed becoming a citizen due to events beyond his control. He would have gained automatic citizenship, through his father, if his parents had legally separated prior to his 18th birthday, or if he had been under the age of 18 at the time of the enactment of the Child Citizenship Protection Act of 2000. However, his parents formally separated shortly after he turned 18, and he was 23 by the time the Act passed. See 8 U.S.C. 1431.

Removal Proceedings

26. The government charged Mr. Rodriguez with being removable based on his drug offense, on April 15, 2004. At his removal hearing, Mr. Rodriguez contested that his conviction rendered him removable, and argued in the alternative that he was eligible for relief from removal.[5]

27. The government received a continuance to alter the charging documents in his case, after which it charged Mr. Rodriguez with being deportable on an additional ground based on his 1998 conviction for theft. Subsequently, on July 21, 2004, an immigration judge ordered him removed, holding that both his drug offense and his theft offense rendered him removable. The Judge held that the drug offense was a controlled substance offense triggering removal and that the theft conviction was an aggravated felony, triggering mandatory removal.[6] The immigration judge ordered him deported to Mexico. Mr. Rodriguez appealed that decision to the BIA.

28. On December 21, 2004, the Board reversed the Judge's decision that the drug possession conviction rendered Mr. Rodriguez removable, but upheld the decision that his theft conviction was an aggravated felony.

29. On December 28, 2004, Mr. Rodriguez timely petitioned for review

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[5]An ICE officer initially deemed him eligible for release on bond, and set the bond at $15,000. See Exhibit 2 (Notice of Custody Determination, I-286). However, Mr. Rodriguez was unable to afford the bond in that amount, and an immigration judge denied his request to lower the bond amount. Shortly after the BIA decided his case in 2004, the government revoked that bond order and ordered him detained without bond.

[6]Although not charged in the immigration charging document, the government also presented evidence from court records that, on or about October 24, 2003, a man using the name Alejandro Rodriguez (who also used another name as an alias) pled guilty to California Health and Safety Code section 11550(a), Under the Influence of a Controlled Substance, and was sentenced to 120 days in jail, which he served during the same time that Mr. Rodriguez was released and reporting to the court for his conviction of October 21, 2003. The date of conviction makes it highly unlikely that Mr. Rodriguez was in fact convicted of this offense. Nonetheless, the IJ ruled that this conviction constituted a second drug offense, rendering Petitioner removable on the basis of the drug convictions.

of the Board's decision to the Ninth Circuit, arguing inter alia that his crime was not an aggravated felony as defined by the Immigration and Nationality Act. Mr. Rodriguez then sought a stay of removal, which the government opposed. Thereafter, the Ninth Circuit granted his request for a stay of removal, and therefore necessarily found that his case presents substantial legal claims. See Maharaj v. Ashcroft, 295 F.3d 963, 966 (9th Cir. 2002); Exhibit 3 (order granting stay of removal).

30. While Mr. Rodriguez's case was pending at the Ninth Circuit, that court decided Penuliar v. Ashcroft, 395 F.3d 1037 (9th Cir. 2005) vacated sub nom Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007). In Penuliar, the Ninth Circuit held that the theft statute under which Mr. Rodriguez had been convicted was not an aggravated felony, for several reasons. Id. at 1044-45 (holding that the California statute was too broad to constitute an aggravated felony because it permitted conviction of, inter alia, aiders and abettors and accessories).

31. Six months after the Penuliar decision, on June 27, 2005, the government moved to hold Mr. Rodriguez's case in abeyance pending potential rehearing proceedings in Penuliar. On or about July 14, 2005, the Ninth Circuit granted the government's motion. Mr. Rodriguez had been in detention for fifteen months at the time the motion was granted.

32. More than ten months later, following the completion of Ninth Circuit proceedings in Penuliar, the government again moved to hold Mr. Rodriguez's case in abeyance, this time to await its petition for certiorari in Penuliar. The Ninth Circuit granted that motion as well, on or about May 30, 2006. At the time of that decision, Mr. Rodriguez had been in detention for over two years. About two months later, after the Supreme Court granted certiorari, the Ninth Circuit granted another government motion to hold Mr. Rodriguez's case in abeyance for Penuliar. At that time, Mr. Rodriguez had been in detention for nearly 28 months.

33. On January 17, 2007, the Supreme Court decided Gonzales v.

Duenas-Alvarez, 127 S. Ct. 815 (2007), which rejected one of the arguments that California's theft statute did not constitute an aggravated felony, but expressly left open other bases for challenging the government's assertion that conviction under the California theft statute constitutes an aggravated felony. See id. at 822-23 (holding that the inclusion of aiders and abettors did not render the statute too broad to constitute an aggravated felony, but explicitly declining to decide other arguments, including that concerning the inclusion of accessories after the fact). In other words, after almost two years of delays – in each case requested by the government – the Supreme Court decision did not resolve the issues raised in Mr. Rodriguez's case.

34. On March 21, 2007, the Ninth Circuit informed Mr. Rodriguez that the Supreme Court had vacated Penuliar and remanded it back to the Ninth Circuit. Penuliar, 127 S. Ct at 1146 (remanding Penuliar to the Ninth Circuit for further consideration in light of the Court's decision in Duenas-Alvarez). The Government then moved for summary disposition of Mr. Rodriguez's petition for review, to which Mr. Rodriguez responded. In his response, Mr. Rodriguez argued that he intends to pursue his appeal under the theories explicitly left open by the Supreme Court's decision.

Custody Reviews

35. During this entire time, Mr. Rodriguez has remained in detention without ever having been afforded a hearing as to whether his prolonged detention is justified. In fact, the only process Mr. Rodriguez has received with respect to his detention has consisted of what the government calls "File Custody Reviews." The first of these occurred on March 10, 2005, when an ICE agent presumably read through his file and issued a "Decision to Continue Detention." No ICE official interviewed Mr. Rodriguez, let alone held a hearing, prior to making this decision. Instead, ICE merely gave him a questionnaire to fill out, asking for

information regarding family members, employment experience, and any outstanding probation requirements. Although Mr. Rodriguez documented his work as a dental assistant and his extensive family ties, including his U.S. citizen father and sister, and his lawful permanent resident mother and brother, ICE denied his request for release, stating simply that he would remain detained until the Ninth Circuit rendered its decision. The notice offered no further explanation for the decision to continue detention, made no mention of how long Mr. Rodriguez had been detained (eleven months at that time), and offered no suggestions as to what steps he might take to effect a different outcome in any future decisions. See Exhibit 4.

36. In September 2006, ICE conducted another file custody review, which it apparently denied for similar reasons, and in March 2006 the process was repeated again. In each of these instances, the government did not even provide Mr. Rodriguez with a written decision as to why he would remain incarcerated for many more months. In March 2007 the government chose to continue Mr. Rodriguez's detention again. At the time of that last custody decision he had been detained for nearly three years, yet the decision made no mention of this fact. Instead, the decision asserted that continued detention was justified because the Ninth Circuit would decide his case soon, even though Mr. Rodriguez intends to pursue the legal challenges to his removal order explicitly left open by the Supreme Court. See Exhibit 5.

* * *

37. Mr. Rodriguez has always considered himself an American, having grown up and gone to school here for his entire life. Indeed, he has not lived anywhere other than the United States since his initial entry in 1979, at the age of one. Nonetheless, he remains detained, having never received a hearing concerning whether his detention is justified. As of the time of this writing, he has been detained for three years, one month and sixteen days.

Class-Wide Allegations

38. Petitioner is only one of dozens of detainees in the Central District who have been held for more than six months without a hearing to determine whether their prolonged detention is justified. Indeed, it is the government's policy or practice to detain non-citizens under the general immigration detention statutes for prolonged periods of time pending completion of their removal proceedings without providing them with hearings to determine whether such detention is justified. Counsel for Petitioner is aware of over fifty such cases already. See Exhibit 6 (Declaration of Bardis Vakili).

39. In response, Petitioner brings this action on behalf of himself and all other persons similarly-situated, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or in the alternative, as a representative action pursuant to a procedure analogous to Rules 23(a) and 23(b)(2). See Ali v. Ashcroft, 346 F.3d 873, 891 (9th Cir. 2003), overruled on other grounds, Jama v. ICE, 543 U.S. 335 (2005) (allowing class action habeas petition). Petitioner proposes to represent a class of all non-citizens within this District who 1) are or will be detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified.

40. The proposed class meets the requirements of Fed. R. Civ. Pro. 23(a)(1). Petitioner's counsel is aware of more than fifty other class members in this District who, like the Petitioner, have been detained for more than six months under one of the general immigration detention statutes and have never been given a hearing to determine whether their prolonged detention is justified. In addition, other persons will be subject to the government's detention policy or general practice in the future. Joinder of all members of this class is therefore

impracticable.

41. The proposed class meets the requirements of Fed. R. Civ. Pro. 23(a)(2). There are several common questions of law and fact in the action. These include 1) whether the government has a policy or general practice of detaining non-citizens in removal proceedings for longer than six months under the general immigration detention statutes without providing a hearing to determine whether such detention is justified, 2) whether this detention policy or practice is authorized by statute, and 3) whether this detention policy or practice violates the Due Process Clause.

42. The proposed class meets the requirements of Fed. R. Civ. Pro. 23(a)(3). The claims of the named Petitioner are typical of the claims of the proposed class. Like all of the proposed class members, the named Petitioner has been detained, pursuant to the government's policy and practice, for more than six months under one of the general immigration detention statutes, but has never been afforded a hearing to determine whether his prolonged detention is justified.

43. The proposed class meets the requirements of Fed. R. Civ. Pro. 23(a)(4). The named Petitioner will fairly and adequately represent the interests of all members of the proposed class because he seeks relief identical to the relief sought by all class members, and because he has no interests adverse to other class members. Moreover, the named Petitioner is represented by pro bono counsel from the ACLU of Southern California, the ACLU Immigrants' Rights Project, the Stanford Law School Immigrants' Rights Clinic, and the law firm of Sidley Austin LLP. These organizations and the attorneys working for them have extensive experience litigating on behalf of detained immigrants and broad experience litigating class actions.

44. The proposed class meets the requirements of Fed. R. Civ. Pro. 23(b)(2). Respondents have acted on grounds generally applicable to the class through their policy and practice of detaining non-citizens in removal proceedings

for longer than six months under the general immigration detention statutes without providing a hearing to determine whether such prolonged detention is justified, making class-wide declaratory and injunctive relief appropriate.

LEGAL BACKGROUND

45. Petitioner here raises only one challenge to his detention. He argues that the government may not detain him for longer than six months without a hearing to determine whether his prolonged detention is justified. He makes this argument on both statutory and constitutional grounds. With respect to the statute, he argues that because his removal proceedings have far exceeded the "expeditious" period for which Congress authorized detention under the general immigration detention statutes, the statute under which he is detained must be construed to require an individualized hearing as to whether or not his detention is justified (taking into account several factors including danger, flight risk, forseeability of removal, and the length of detention). See generally Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (construing 8 U.S.C. 1226(c) to require mandatory detention only in cases of "expeditious" removal proceedings, and ordering a hearing to determine whether detention is justified); Nadarajah v. Gonzales, 443 F.3d 1069, 1078-79 (9th Cir. 2006) (holding that "the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period" and construing 8 U.S.C. 1225(b) to authorize detention only for a "brief and reasonable" period of time necessary to complete removal proceedings, presumptively six months).

46. In the alternative, he argues that his prolonged detention without a hearing to determine whether his detention is justified violates the Due Process Clause. See Zadvydas v. Davis, 533 U.S. 678, 690-92 (2001) (noting "serious" constitutional problem with prolonged and indefinite civil detention unless "limited to specially dangerous individuals and subject to strong procedural protections") (emphasis added).

I. No Statute Authorizes Petitioner's Prolonged Detention Without a Hearing to Determine Whether His Detention is Justified.

47. Petitioner's first argument is that no statute authorizes his prolonged detention absent a hearing to determine whether his detention is justified, particularly given the serious constitutional issues that would arise were the statute construed otherwise. Two recent Ninth Circuit cases provide strong support for his statutory argument. The Ninth Circuit in Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) held that prolonged immigration detention without a meaningful custody hearing raises serious constitutional problems, and therefore is not permitted under the general detention statute codified at 8 U.S.C. 1226(c). The Ninth Circuit held that 8 U.S.C. 1226(c) authorizes mandatory immigration detention only insofar as removal proceedings are "expeditious." Id. at 1242. Based on the length of the incarceration at issue in that case (two years and six months), the Ninth Circuit directed the district court to grant the writ of habeas corpus unless the government proved at a hearing before an immigration judge that the petitioner presented a sufficiently serious risk of flight or danger to the community to justify his on-going detention.

48. The Ninth Circuit considered the issue again a few months later, and concluded, in a detailed decision, that Congress has only authorized the government to detain immigrants for a "brief and reasonable" period of time necessary to complete removal proceedings – presumptively six months. Nadarajah v. Gonzales, 443 F.3d 1069, 1079 (9th Cir. 2005). Moreover, the Ninth Circuit explained that Congress has not authorized detention beyond this time unless removal is reasonably foreseeable, except under specific statutes concerning national security-related detention that are not at issue here. As the Court held, "[a]fter a presumptively reasonable six-month detention, once the alien 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 1080-81. Implicit in this holding is the recognition that once the government has detained an alien for six months, no statute authorizes continued detention absent a hearing to determine whether the detention remains reasonable notwithstanding its length, and therefore authorized by statute.

49. Further support for Petitioner's position comes from the Supreme Court's decision in Demore v. Kim, 538 U.S. 510 (2003). There, the Court upheld detention without hearings for periods averaging up to five months, while suggesting that detention for significantly longer time periods would not be so authorized. Demore, 538 U.S. at 528 (distinguishing Zadvydas because, inter alia, "the detention here is of a much shorter duration."). As the Ninth Circuit has explained, Demore provides further support for its rule that the measure of presumptive reasonableness for detention pending completion of removal proceedings should be six months. Nadarajah, 443 F.3d at 1080 ("Demore endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable."); cf. Ly v. Hansen, 351 F.3d 263, 276 (6th Cir. 2003) (Haynes, J., concurring in part and dissenting in part) (interpreting Demore to set presumptively unconstitutional time period of four months for mandatory detention of lawful permanent residents pending completion of proceedings).

50. Here, Petitioner has been detained for three years, far longer than the presumptively-reasonable six month period. Accordingly, the immigration statutes do not permit his continued detention without a hearing to determine if his prolonged detention is justified. This Court has ordered such hearings in prior cases. See, e.g., Order Granting Motion for Preliminary Injunction, Martinez v. Gonzales, CV06-7609 (C.D. Cal. January 4, 2007) (ordering hearing before immigration judge under criteria designed to ensure that detention was reasonable

in light of statutory purpose, including danger, flight risk, length of detention, and likelihood of case being finally resolved in government's favor in reasonably foreseeable future); see supra paragraph 11 (collecting other cases in which same order was entered).

51. While Petitioner and the government disagree about what statute governs detention in his case, there is no dispute that Petitioner is detained under a general detention statute. Petitioner contends that he is detained under Section 1226 – the statute governing detention of aliens who are continuing to litigate their removal cases. Under the government's view, Petitioner's detention is governed by another one of the general immigration detention statutes – Section 1231(a) – because the immigration courts have issued a final order of removal in his case. However, the Ninth Circuit has rejected that position, holding that that statute does not apply where an alien's removal order has been judicially stayed, as is the case here. See 8 U.S.C. 1231(a)(1)(B) ("removal period" does not begin to run when stay is in effect); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (applying 8 U.S.C. 1226(c) rather than 8 U.S.C. 1231(a) to case involving alien whose removal was stayed); Martinez-Jaramillo v. Thompson, 120 Fed. Appx. 714, 717 (9th Cir. 2005) (unpublished) ("The government argues that the removal period began when the BIA dismissed Martinez's appeal. That result, however, is simply inconsistent with the language of the statute, which stalls the beginning of the removal period where a stay of removal is granted pending judicial review.").

52. In any event, none of the general immigration detention statutes authorize Petitioner's prolonged detention. See Nadarajah v. Gonzales, 443 F.3d 1069, 1078-79 (9th Cir. 2006) (contrasting general immigration detention statutes that do not authorize prolonged and indefinite detention with specific national security detention statutes that do explicitly authorize prolonged and indefinite detention under certain limited circumstances).

II. The Due Process Clause Requires that Petitioner Be Afforded A Hearing As To Whether His Detention is Justified.

53. Petitioner's prolonged detention without a detention hearing also violates the Due Process Clause. As a general matter, prolonged civil detention violates the Due Process Clause unless it is accompanied by both a sufficient justification and strong procedural protections. Zadvydas v. Davis, 533 U.S. 678, 691 (2001). Thus, if the immigration detention statutes are not construed to authorize a procedurally-robust inquiry into the justification for detention, they would violate the Due Process Clause.

54. "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. For this reason, detention must always be reasonable in relation to its purpose. Jackson v. Indiana, 406 U.S. 715, 738 (1972). See also Demore, 538 U.S. at 527-29 (applying "reasonable relation" test).

55. In the immigration context, the primary purpose of detention is to effect the alien's deportation in the event that removal proceedings are finally concluded in the government's favor. Zadvydas, 533 U.S. at 699 (holding that the "statute's basic purpose" is "to assure the alien's presence at the moment of removal"); Demore, 538 U.S. at 528 (upholding brief mandatory detention pending completion of removal proceedings because it "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings.").

56. Even where civil detention serves an appropriate purpose, it must also be accompanied by adequate procedural safeguards. Zadvydas, 533 U.S. at 691. As detention becomes prolonged, the deprivation of liberty at issue becomes greater, and correspondingly requires both a greater justification and more rigorous procedures. Id. at 690-91. See also Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment for periods of one year at a

time, subject to "strict procedural safeguards" including right to jury trial before state court and burden of proof beyond a reasonable doubt); Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) ("due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.") (internal quotations omitted).

57. For Petitioner himself, a constitutionally-adequate hearing would require his release unless "the government shows by clear and convincing evidence that he is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future." See Order Granting Motion for Preliminary Injunction, Martinez v. Gonzales, CV06-7609 (C.D. Cal. January 4, 2007). In addition, any unrepresented detainee would have to be afforded counsel at the government's expense at a hearing where prolonged detention was at stake. See Lassiter v. Dept of Soc. Serv., 452 U.S. 18, 25 (1981) (noting that "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel").

58. Here, Petitioner has been held for a prolonged period of time with no definite end in sight and with no procedural protections of any kind to ensure that his detention is justified. His detention in the absence of a constitutionally-adequate hearing procedure violates the Due Process Clause.

FIRST CAUSE OF ACTION

Violation of Immigration and Nationality Act and Regulations

59. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

60. Respondents' continued detention of Petitioner and other putative

class members under the general immigration detention statutes violates the Immigration and Nationality Act, insofar as the statute under which he is detained does not authorize detention for a prolonged period of time absent a hearing at which the government bears the burden to show that such detention remains justified.

SECOND CAUSE OF ACTION

Violation of Fifth Amendment Procedural Due Process (Right to a Constitutionally Adequate Custody Hearing)

61. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

62. Respondents' continued detention of Petitioner and other putative class members without a hearing to determine whether prolonged detention is justified violates the right to be free of prolonged non-criminal detention without adequate justification and sufficient procedural safeguards, as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court grant the following relief:

a. Assume jurisdiction of this matter;

b. Certify a class under Fed. R. Civ. Pro. 23 (or other analogous procedures) consisting of all non-citizens within this District who 1) are or will be detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified;

c. Appoint Petitioner as Class Representative;

d. Appoint Petitioner's Counsel as Class Counsel;

e. Grant the writ of habeas corpus and order constitutionally-adequate individual hearings before an immigration judge for Petitioner and each member of the class, at which Respondents will bear the burden to prove by clear and convincing evidence that Petitioner and each class member is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future;

f. Declare that Respondents' failure to provide Petitioner and the members of the class with a hearing before an immigration judge, and their failure to meet their burden of justifying continued detention, violates the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment;

g. Enjoin Respondents from failing to provide Petitioner and each member of the Class with a hearing before an immigration judge at which Respondents must bear the burden of justifying continued detention;

h. Grant Petitioner reasonable attorneys' fees, costs, and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412;

i. Grant such other relief as the Court deems just and equitable, including appropriate relief to all class members upon consideration of Petitioner's forthcoming motion for class certification.

DATED: May 16, 2007

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By: _____

AHILAN ARULANANTHAM

Attorney for Plaintiffs