No. 09-17495

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAIME ALDOS LEONARDO,
Appellant,
v.

PHILLIP CRAWFORD,
Appellee.

On Appeal from the United States District Court
for the District of Arizona

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTERESTS OF *AMICI*

Amicus ACLU and ACLU-SC have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's power to subject non-citizens to immigration detention, and have litigated most of the leading cases in this area. *See* Motion for Leave to Submit Late Brief of Amicus Curiae.

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This habeas petition challenges prolonged incarceration at the hands of executive officials acting with no prior judicial oversight. Petitioner has been incarcerated for four and a half years pending completion of his immigration case. An immigration judge (IJ) ratified his detention in a bond hearing held pursuant to *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008). Review by the district court (and this Court now) present the only opportunity for federal court review of the legality of this detention.

Amici submit this brief to address two questions. First, to what extent may district courts review detention decisions made after a bond hearing under *Casas-Castrillon*, and, in particular, can a district court review not only challenges to the adequacy of that hearing but also to the ultimate detention determination itself? Second, what substantive standard must the government satisfy in a *Casas* bond hearing in order to validate a non-citizen's detention for a prolonged period

pending a decision in his or her removal case?

With respect to the first question, district courts possess broad authority in habeas to review detention decisions made pursuant to *Casas* hearings; that review encompasses not only constitutional and legal challenges to the adequacy of the hearing but also challenges to an IJ's findings that a detainee poses a sufficient danger and/or flight risk to justify continued detention without bond. In the instant case, the district court erred in finding that Petitioner's claims were unreviewable under 8 U.S.C. 1226(e) simply because he had received a bond hearing before an IJ. ER 33-34, 39. As set forth *infra*, Section II, the district court's jurisdictional holding is wrong for multiple reasons. First, the statute relied upon by the district court, 8 U.S.C. 1226(e), bars only review of "discretionary" claims. The claims that the Petitioner raised in his habeas petition do not involve the exercise of discretion, but rather questions of law, and "mixed" questions involving application of law to fact. *See infra* Section II.A. Second, while aspects of an Attorney General's bond determination may be discretionary, the ultimate decision to subject a non-citizen to prolonged immigration detention implicates a fundamental liberty interest and, for that reason, is subject to due process constraints. *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Thus, due process always requires that any given individual's detention bear a "reasonable relation" to its purpose in that case, *id.* at 690, and a habeas court has an obligation to ensure compliance with this

standard. *See infra* Section II.B. Finally, a conclusion that Petitioner's claims are not reviewable would conflict not only with the text of the habeas statute and recent Supreme Court cases interpreting it, but also with the Suspension Clause itself. As the Supreme Court made clear in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), habeas corpus review is strongest when executive branch officials incarcerate people for prolonged periods without prior judicial oversight. Thus, the scope of habeas review here must be as robust as it is in virtually any other legal context. *See infra,* II.C. [1]

Turning to the second question – the substantive standard that must be satisfied in a *Casas* hearing – this Court should find that in order to justify prolonged immigration detention pending the conclusion of removal proceedings the government must show by "clear and convincing" evidence that "no conditions

1 The government argues that, even if there were no jurisdictional obstacles to the district court hearing Petitioner's claims, prudential considerations required that he exhaust his administrative remedies by first appealing the IJ's *Casas* decision to the BIA. Response Brief of the Respondent-Appellee ("Gov Br") at 20-24. As a threshold matter, the government appears to have waived this argument by failing to raise it before the district court. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 200 (2007); 5 C. WRIGHT & A. MILLER, FED. PRAC. & PROC. CIV. § 1278 (3d ed. 2010). In any event, prudential exhaustion is not warranted here both because of the length of time needed to complete an appeal to the BIA and because of the BIA's inability to resolve substantive due process challenges to detention. *See Terrell v. Brewer*, 935 F.2d 1015, 1019 (9th Cir. 1991). *Bagues-Valles v. I.N.S.* 779 F.2d 483, 484 (9th Cir. 1985). This Court need not reach the issue, since the BIA has considered and rejected Petitioner's bond appeal, *see In Re Leonardo*, 2010 WL 1975990 (BIA Apr. 28, 2010), and no prudential interests would be served by remanding his case back to the district court or requiring the filing of a new habeas.

of release" are sufficient to protect the government's interests in preventing flight and danger. In addition, the Court should make clear that a showing of particularly serious danger is required – given that detention may last for years -- and a detainee's criminal history alone is insufficient to make that showing. While this Court has not addressed these issues in its prior decisions concerning prolonged immigration detention and the district court did not address them below (largely due to its jurisdictional holding), a review of analogous civil detention law makes clear that the Due Process Clause requires such rigorous standards. *See infra,* III.

II. THE DISTRICT COURT HAD BROAD AUTHORITY IN HABEAS TO REVIEW ALL OF PETITIONER'S CLAIMS.

Because Petitioner challenges his prolonged incarceration at the hands of executive officials with no prior judicial review, the habeas court had broad authority to consider the validity of that detention.

A. The District Court Erred in Holding That Petitioner's Challenge to His Continued Detention Was Unreviewable Under 1226(e).

The district court erred when it held that Petitioner's challenge to his continued detention was unreviewable simply because he had received a bond hearing before an immigration judge, as ordered by the district court. ER 33-34 (citing *Prieto-Romero,* 534 F.3d 1053,1067) (9th Cir. 2008) (citing 8 U.S.C. 1226(e)) But the statute relied upon by the district court, 8 U.S.C. 1226(e), bars only review of "discretionary" decisions. As this Court has repeatedly recognized,

legal questions pertaining to the exercise of discretion remain reviewable. *See, e.g.*, *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 829 (9th Cir. 2002). In the instant case, Petitioner challenged the IJ's determination that he posed a danger warranting denial of bond, including the IJ's presumption that Petitioner's conviction for a non-violent offense rendered him a danger. Petitioner's Memorandum, CR 51 at 6. These claims raise legal issues concerning the manner in which the *Casas* hearing was conducted.

Moreover, an IJ's ultimate determination that an individual poses a danger or flight risk sufficient to warrant prolonged detention is itself a legal conclusion – involving the application of law to facts, rather than an exercise of discretion. The Board of Immigration Appeals (BIA) has held in several unpublished decisions involving appeals from *Casas* hearings that the question whether someone is a danger or a flight risk is a mixed question subject to de novo review. *See, e.g.*, *In re Cota-Meza*, 2010 WL 1976000 (BIA Apr. 23, 2010) ("Whether an alien should be released from DHS custody is a question of judgment that we review de novo."); *In re Garnica-Ramirez*, 2010 WL 1250990 (BIA Mar. 2, 2010) ("Whether an alien poses such a danger is a question of judgment that we review de novo, but the factual findings underlying such a judgment are reviewed for clear error"). Under BIA case law, "question of judgment" is a term of art that refers to mixed questions. *See Matter of V-K*, 24 I. & N. Dec. 500, 501-02 (BIA 2008) (holding

that an Immigration Judge's "prediction or finding regarding the likelihood that an alien will be tortured" is a "mixed question of fact and law, or a question of judgment"); *see also* 8 C.F.R. 1003.1(d)(3)(ii) (authorizing de novo review of "questions of law, discretion, *and judgment*") (emphasis added).

Lest there be any doubt, in the closely analogous pre-trial detention context, this Court treats flight risk and danger as legal categories grounded in historical facts, and therefore reviews *de novo* the ultimate pre-trial detention order. *United States v. Hir*, 517 F.3d 1081, 1086-87 (9th Cir. 2008) (the ultimate question "of whether the district court's factual determinations justify the pretrial detention order is reviewed de novo"); *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (holding that "the conclusions based on [danger-related] factual findings present a mixed question of fact and law"). *Cf. Ramadan v. Gonzales*, 479 F. 3d 646 (per curiam) (revising prior decision) (holding that the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) encompasses claims involving the "application of law to fact"), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007).

This Court's decision in *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), is not to the contrary. *Prieto-Romero* found that an IJ's determination that $15,000 was an appropriate amount to secure the presence of the petitioner – whom the IJ had already determined did *not* present a danger and flight risk, and therefore could be released on bond – was within the IJ's discretionary authority

and thus not reviewable under 1226(e). 534 F.3d at 1067. In contrast, Petitioner here challenges the IJ's refusal to set bond at all, rather than the bond *amount*. As explained below, neither the Constitution nor the immigration statutes permit an immigration judge unfettered discretion to order prolonged incarceration absent a threshold showing of danger or flight risk sufficient to warrant continued detention.[2]

B. The District Court Had Jurisdiction to Review the Due Process Challenge to the Reasonableness of Prolonged Detention in this Case, Notwithstanding a "Discretionary" Determination Denying Bond.

In arguing that the district court lacked jurisdiction to review Petitioner's challenge to the IJ's denial of bond based on danger and flight risk, the government accused the Petitioner of attempting to re-package his challenge to the Attorney General's discretion as a constitutional claim. Response Brief of the Respondent-Appellee ("Gov Br") at 13,17. But it is the government, not Petitioner, that mischaracterized his claims, by treating even the substantive due process element of the challenge to prolonged detention as "a garden-variety" challenge to the

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2 *Prieto-Romero* also reaffirmed that claims challenging the Attorney General's statutory authority remain cognizable, notwithstanding Section 1226(e). *Id*. at 1067. To the extent that *dicta* in footnote 11 of *Prieto-Romero* suggests that constitutional challenges to the IJ's bond decision are limited to claims that the detainee received a "full and fair hearing," that *dicta* is inconsistent with the holding of *Boumediene* and a long line of immigration habeas cases. *See infra*. Section II.C. Those cases make abundantly clear that the district courts retain jurisdiction to review the claims raised here, including the basic claim that the length of detention is unconstitutionally excessive in relation to its purpose.

exercise of discretion. *Id.* at 13.

Although framed in somewhat different terms, Petitioner's core claim is that his prolonged detention violates substantive due process because it lacks a sufficient justification to outweigh the significant deprivation of his liberty. Petitioner's Memorandum, CR 51 at 14-15 (arguing that his detention had not been sufficiently justified by flight risk or danger concerns); SER 29-33 (section of Petitioner's district court brief citing case law holding that the loss of liberty must be justified by appropriate reasons and only after the individual has been afforded meaningful procedural protections). This claim unquestionably presents a constitutional question that a habeas court must decide, regardless of an IJ's decision to deny the Petitioner release on bond.

In *Zadvydas*, the Supreme Court made clear that immigration detention implicates a fundamental liberty interest – the right to be free from physical restraint – and is subject to the same due process constraints as other forms of civil detention. *Zadvydas*, 533 U.S. at 690-91. Thus, like other forms of civil detention, immigration detention must bear a "reasonable relation" to its purpose. Especially where it is prolonged, due process requires a sufficiently strong justification that "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (quotations and citations omitted).

Although *Zadvydas* involved the detention of people whose removal cases

had concluded, the Attorney General's "discretionary" authority to detain people while their removal cases remain pending is also subject to both constitutional and statutory limits. *See, e.g.*, *Casas-Castrillon*, 535 F.3d at 950 (finding that prolonged detention pending completion of removal proceedings raises serious constitutional problems); *Ly v. Hansen*, 3351 F.3d 263, 273 (6th Cir. 2003) (same); *cf. Demore v. Kim*, 538 U.S. 510, 527-31 (2003) (upholding brief period of mandatory detention because it was reasonably related to its purpose); *Carlson v. Landon*, 342 U.S. 524, 546 (1952) (upholding temporary detention pending removal proceedings while noting that case did not involve situation of "unusual delay" in proceedings).

Similarly, in the pre-trial and civil commitment contexts, federal courts have repeatedly recognized that prolonged incarceration can be unconstitutional if its length renders it unreasonable in relation to its purpose. *See, e.g.*, *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988) (applying excessiveness test to cases challenging prolonged pretrial detention because "the due process limit on the length of pretrial detention requires assessment on a case-by-case basis [including consideration of] the length of confinement"); *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (holding, in context of detention while awaiting sex offender commitment proceedings, that "due process requires that the nature and *duration* of commitment bear some reasonable relation to the purpose for which the

individual is committed.")(emphasis added); *Seling v. Young*, 531 U.S. 250, 265 (2001) (same, for detention after commitment as sex offender); *Jackson v. Indiana*, 406 U.S. 715, 738(1972) (same, for civil commitment based on mental illness); *see also United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993) ("[p]retrial detention of a defendant, when of reasonable duration, serves important regulatory purposes, including the prevention of flight and the protection of the community from a potentially dangerous individual. . . . However, when detention becomes excessively prolonged, it may no longer be reasonable in relation to the regulatory goals of detention, in which event a violation of due process occurs").[3]

Thus, the district court erred in treating Petitioner's argument that he does not present a sufficient danger or flight risk to justify his prolonged detention as a challenge to a discretionary determination. ER at 22, 33-34, 39. On the contrary, Petitioner raises a fundamental due process claim that the district court is obligated to address.

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3 Indeed, in the pretrial detention context courts have explicitly recognized that evidence sufficient to justify short detention may be insufficient to justify more prolonged detention. *See United States v. Accetturo*, 783 F.2d 382, 388 (1986) (advocating renewed bail hearings where pre-trial detention has gone on for a long period of time because "[i]n some cases, the evidence admitted at the initial detention hearing, evaluated against the background of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention.").

C. Precluding Review of Petitioner's Claims Would Violate Not Only the Habeas Statute but Also the Suspension Clause.

Given that Petitioner's claims do not challenge the exercise of discretion, but rather involve a challenge to prolonged detention without trial by executive branch officials, there should be no serious dispute that the habeas statute authorizes judicial review of these claims. *See* 28 U.S.C. 2241(c)(1), (c)(3) (conferring district court jurisdiction to review detention of anyone "in custody under or by color of the authority of the United States" or of anyone detained "in violation of the Constitution or laws or treaties of the United States"); *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004) (holding that habeas statute created jurisdiction to review claims raised by detainees held at Guantanamo Bay because "[p]etitioners contend that they are being held in federal custody in violation of the laws of the United States . . . Section 2241, by its terms, requires nothing more"); *INS v. St. Cyr*, 533 U.S. 289, 302 (2001) (holding that federal habeas statute provides jurisdiction for district courts to review legal claims, "including the erroneous application or interpretation of statutes"); *Demore*, 538 U.S. at 517 (2003) (upholding the district courts' jurisdiction under Section 2241 to consider constitutional challenge to an individual non-citizen's detention, notwithstanding 8 U.S.C. 1226(e)).

If, however, the relevant federal statutes were construed as foreclosing review of such claims, they would be unconstitutional under the Suspension Clause. As the Supreme Court made clear in *Boumediene v. Bush*, 128 S.Ct. 2229,

2269 (2008), the Suspension Clause requires robust federal court review of all detention authorized solely by executive branch officials, particularly where, as here, the detention is prolonged and the administrative proceedings so lacking in procedural safeguards.

In *Boumediene*, the Supreme Court held that enemy combatants subjected to prolonged detention at Guantanamo Bay were entitled under the Suspension Clause to habeas review of the validity of their administrative detentions, notwithstanding a federal statute that specifically stripped the federal courts of review over such claims. *Id*. at 2262. The administrative review scheme, known as the Combatant Status Review Tribunal ("CSRT"), gave detainees a right to a hearing before military officials to determine whether or not they were enemy combatants. *Id*. at 2241; 2269-71. Although the CSRT determinations were reviewable in the Court of Appeals under the Detainee Treatment Act ("DTA"), the scope of that review was limited by the DTA, such that it arguably did not allow for the full panoply of legal challenges normally available in habeas proceedings, *id*. at 2271-72, and clearly did not allow for searching review of the CSRT's factual findings, including the presentation of new information that was not presented to the CSRT itself. *Id*. at 2272.

The Supreme Court held that this detention scheme failed to satisfy the requirements of the Suspension Clause, and in doing so emphasized several defects

in the CSRT process that rendered them an inadequate substitute for district court habeas proceedings. The Court noted the prolonged length of detention that the CSRTs purported to authorize, *id.* at 2269, 2275, the informality and inadequacy of the administrative review process, including relaxed evidentiary rules that permitted the use of hearsay, *id*. at 2269, and the lack of a right to counsel in that administrative proceeding. *Id.* at 2259, 2269.

After canvassing the historical evidence concerning habeas review of detention imposed by executive officials, the Court concluded that where a district court assesses the validity of such detention, the Suspension Clause requires that the district court conduct *de novo* review of all legal claims, including claims challenging "the erroneous application or interpretation of relevant law," *id*. at 2266, and that the district court have "authority to assess the sufficiency of the Government's evidence against the detainee." *Id*. at 2270; *see also St. Cyr*, 533 U.S. at 301 n.14 ("At common law . . . an attack on an executive order could raise *all issues* relating to the legality of the detention.") (citing *Note, Developments in the Law-Federal Habeas Corpus*, 83 Harv. L.Rev. 1038, 1238 (1970)) (emphasis added).

The parallels between the detention scheme at issue here and that at issue in *Boumediene* are striking. Most important, the scheme operating under the *Casas-Castrillon* framework is run entirely by executive officers, just like the CSRT

process. Thus, as a structural matter, immigration judges cannot provide "a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence." *Id.* at 2269. *Compare* 8 C.F.R. 1.1(l) (immigration judges appointed by and subject to supervision by the Attorney General) *with Boumediene*, 128 S.Ct. at 2269 (holding need for rigorous review "most pressing" where detention occurs entirely at the hands of the executive) *and id.* at 2267 ("It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention.").

The detentions at issue under *Casas* share several other structural features with the detentions in *Boumediene*. First, the detentions authorized in *Casas* hearings often last for years, and in some cases last just as long as the detentions at issue in *Boumediene*. *Compare Boumediene*, 128 S.Ct. at 2269 ("The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry") *and id.* at 2275 ("In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.") *with Casas-Castrillon*, 535 F.3d at 944 (detainee incarcerated seven years); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006) (detainee incarcerated for "almost five years"); *Martinez v. Gonzales*, 504 F. Supp. 2d 887, 889 (C.D. Cal. 2007) (over four years). Second, the evidentiary rules are extremely relaxed in hearings

held pursuant to *Casas-Castrillon*, just as they are in CSRT proceedings. *Compare Boumediene*, 128 S.Ct. at 2269 (describing evidentiary rules) *with* 8 C.F.R. 1003.19(d) (providing that "[t]he determination of the Immigration Judge as to custody status or bond may be based upon *any information* that is available to the Immigration Judge or that is presented to him or her by the alien or the Service." (emphasis added)). Third, immigration detainees' ability to present witnesses and argument in their defense is severely hampered by the fact that they are detained and have no right to appointed counsel to assist in the development of evidence and arguments in support of their release. Indeed, although the detainees here (unlike those at Guantanamo Bay) have a right to counsel if they can afford it, roughly 84% of immigration detainees are not represented at their removal hearings.[4] The *Boumediene* court found the absence of counsel to assist in the detention challenge before the CSRT another critical reason warranting robust habeas review, because "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," *id*. at 2268.

The history of habeas corpus challenges to immigration detention also shows that Petitioner's claims must be cognizable under the habeas statute. During the period when habeas corpus review in immigration cases was reduced to the

4 See Exec. Summary, *Reforming the Immigration System* (ABA Commission on Immigr., Washington, D.C.), Feb. 2010, at ES-7; *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

constitutional minimum, *see St. Cyr*, 533 U.S. at 308 n.30, the federal courts routinely reviewed petitions brought by non-citizens challenging their detention pending completion of removal proceedings.[5] Indeed, the Supreme Court itself considered just such a case in *Carlson*, *supra*, (holding that dangerous non-citizen communists could be detained pending completion of deportation proceedings). There, non-citizens filed "[p]etitions for habeas corpus . . . alleging that the detention without bond was in violation of the Due Process Clause of the Fifth Amendment." 342 U.S. at 529. Although the case involved what were perceived as pressing national security concerns, the government did not dispute that the courts had jurisdiction. *Id*. at 540.[6] *See also United States ex rel. Potash v. District Director*, 169 F.2d 747, 749 (2d Cir. 1948) (reviewing claim that Attorney General's decision to detain non-citizen pending completion of deportation proceedings was "exercised arbitrarily and in violation of the due process clause of the Fifth Amendment of the Constitution of the United States").

Two conclusions regarding the scope of habeas review here follow from *Boumediene* and the historical precedent from the immigration detention context.

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5 In *St. Cyr*, the Supreme Court described this fifty-year period as the "*Heikkila* period" and noted its relevance for analyzing Suspension Clause claims in the immigration context. *See also Flores-Miramontes v. INS*, 212 F.3d 1133, 1143 (9th Cir. 2000).

6 On the merits, *Carlson* upheld the detention of the petitioners in that case, but stated that "[i]t should be noted that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case." *Carlson*, 342 U.S. at 546.

First, when reviewing a detention that has been upheld pursuant to a *Casas* hearing, the Suspension Clause requires that the habeas court have authority to independently examine and decide all questions of law, including "mixed" questions involving application of law to fact. Second, the Suspension Clause requires that the district court both conduct its own review "to assess the sufficiency of the Government's evidence against the detainee," *Boumediene*, 128 S.Ct. at 2270, and, where necessary, make its own factual findings using its independent authority to obtain evidence. *Id*.

III. DUE PROCESS PERMITS PROLONGED IMMIGRATION DETENTION ONLY IN RARE CIRCUMSTANCES, WHEN THE GOVERNMENT SHOWS BY CLEAR AND CONVINCING EVIDENCE THAT NO CONDITIONS OF RELEASE WILL SUFFICIENTLY PROTECT AGAINST FLIGHT RISK OR A PARTICULARLY SERIOUS DANGER.

Because *Casas* hearings permit administrative decision-makers to determine whether individuals will remain incarcerated for prolonged periods of time – often for years – the Due Process Clause imposes several substantive requirements in these hearings, none of which were met in Mr. Leonardo's case. First, before the government subjects a non-citizen to prolonged detention, it must show that "no conditions of release" will satisfy its regulatory interests by reasonably ensuring the safety of the community and preventing flight. Second, because prolonged detention involves a greater deprivation of liberty, the government must show a *particularly serious* danger, a showing it has not made here. Third, the

government must demonstrate the requisite flight risk and danger by a "clear and convincing evidence" standard of proof. Fourth, the length of anticipated future detention (pending consideration of a detainee's immigration case in this Court) should be considered as part of the *Casas* inquiry. As a result of these rigorous procedural protections, detention of the length at issue here—over three years—should be the rare exception, not the rule.

These substantive standards for *Casas* hearings—involving the role of danger and flight risk, the government's standard of proof, and the consideration of future detention length— derive from the strict limits on prolonged civil detention created by substantive due process. Although *Casas* did not describe what substantive requirements or standard of proof should govern in the hearings it ordered, those issues have been addressed in analogous civil detention contexts, including pretrial detention and civil commitment of the mentally ill. The law in these areas provides critical guidance for resolution of those issues here. *See Zadvydas*, 533 U.S. at 690-91(relying on pretrial detention and civil commitment law to establish constitutional constraints on immigration detention).

A. The Government May Only Impose Prolonged Detention When No Conditions of Release Satisfy its Interests in Preventing Flight or Danger.

The purpose of a *Casas* hearing is to evaluate "the necessity of . . . continued detention." 535 F.3d at 949. In the immigration context, the primary justification for detention is "preventing deportable . . . aliens from fleeing prior to

or during their removal proceedings," *id.*, while preventing danger remains a valid "secondary purpose." *Zadvydas*, 533 U.S. at 697; *Demore*, 538 U.S. at 531 (Kennedy, J., concurring) (noting that although flight risk and danger are both valid purposes for detention, "the ultimate purpose behind detention is premised upon the alien's deportability"). To evaluate the "necessity of detention" against these governmental interests, an immigration judge must consider whether less restrictive alternatives - such as conditions of supervision or electronic monitoring - can satisfy the government's concerns regarding flight risk and danger. *Cf. Zadvydas*, 533 U.S. at 699 (applying substantive due process standard and requiring district courts to "measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal.").

The law governing civil detention in other contexts makes clear that in order to justify the prolonged detention here, the Due Process Clause requires an Immigration Judge to find "no conditions" other than detention that can satisfy the government's interests. With respect to pre-trial detention, federal magistrate and district judges are required to consider a variety of alternatives to incarceration, and may order detention only if they conclude that none of these alternatives will reasonably assure the defendant's presence at trial and the safety of the community. *See* 18 U.S.C. 3142(c)(1)(B); 18 U.S.C. 3142(e). The Supreme Court commented

approvingly on this rigorous scheme in upholding the pre-trial detention statute with respect to detention based on danger. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing that the "no conditions of release" standard strikes appropriate balance of interests). This Court has applied the same rule in other civil detention contexts. *See Jones*, 393 F.3d at 932 (striking down measures to incarcerate civil detainees because government's procedures "[we]re employed to achieve objectives that could be accomplished in so many alternative and less harsh methods").

Courts have clarified the meaning of this "no conditions" standard in considering the constitutionality of lengthy pretrial detention. As one district court explained after exhaustively reviewing pretrial detention cases, "[w]hen courts assess the magnitude of the threat that an individual defendant poses to the government's regulatory interests, we think that the proper focus is . . . not how much threat the defendant would pose if he were as free as any law-abiding citizen, but how much threat he would pose if he were released on the most restrictive available conditions (e.g., 24-hour confinement to a half-way house, electronic monitoring, a high bail guaranteed by people close to the defendant, random searches without probable cause, unannounced substance abuse testing, etc.). It is only by focusing on the actual conditions of release, and what those conditions would contribute to reducing the threat of harm to the government's regulatory

interests, that courts can accurately assess how much continued imprisonment would contribute to achieving the government's regulatory goals." *United States v. Aileman*, 165 F.R.D. 571, 579 (N.D. Cal. 1996) (concluding that pre-trial detention beyond two years is rare, because usually unconstitutional). *See also* 18 U.S.C. 3142(c)(1)(B) (requiring consideration of house arrest, curfews, periodic reporting, furloughs during the day to attend school and employment, and "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community," as alternatives to incarceration); *United States v. Archambault*, 240 F. Supp. 2d 1082, 1084 (D.S.D. 2002) (ordering release from pre-trial detention of twenty months, despite history of violence, "because further detention . . . would exceed the permissible limits of due process," and ordering release to halfway house).

Given this precedent, the Due Process Clause requires that immigration judges find that no other conditions can adequately protect against danger and flight risk before imposing prolonged detention pursuant to *Casas* hearings. Because the immigration judge in Mr. Leonardo's case never considered alternatives to detention, the detention order does not comport with Due Process.[7]

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7 *Amici's* position here is consistent with existing regulations governing what factors an Immigration Judge may consider in bond hearings. *See* 8 C.F.R. 1236.1(c)(8); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). While *Guerra* addresses what factors may be considered in assessing flight risk and danger, it does not speak to what standard of proof should apply in cases involving prolonged

B. Only a Showing of Particularly Serious Danger Can Justify Prolonged Detention.

Because prolonged detention involves such a significant deprivation of liberty, and because danger is a "secondary" rather than the principal interest served by immigration detention, prolonged immigration detention can be justified only by a showing of a *particularly serious* danger that is sufficient to "outweigh[] the `individual's constitutionally protected interest in avoiding physical restraint.'" *See Zadvydas*, 533 U.S. at 690 (citing *Kansas v. Hendricks*, 521 U. S. 346, 356 (1997)). This rule reflects a fundamental feature of our legal system: we generally address dangerousness through the criminal law, with its extremely rigorous procedural protections. *See Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992) (rejecting civil detention scheme for insanity acquittees who were no longer mentally ill based on dangerousness because "[t]he same would be true of any convicted criminal"); *Kansas v. Crane*, 534 U.S. 407 (2002) (requiring that civil commitment rest on showing of volitional impairment lest "civil commitment become a mechanism for retribution or general deterrence — functions properly those of criminal law") (internal citations omitted). Indeed this precedent suggests

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detention. Requiring a heightened standard of proof to justify prolonged detention is also consistent with the fact that immigration detention is civil in nature. Indeed, a recent ICE report noted "important distinctions" between the goals of criminal and immigration detention, and recognized that the agency relies too heavily on "correctional principles" in the administrative detention context. Dora Schriro, Immigration Detention Overview and Recommendations (2009), http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

that only a "special danger," i.e., danger posed by individuals with a mental illness, would be sufficient to justify prolonged immigration detention. *See Zadvydas*, 533 U.S. at 690-91 ("we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections"); 8 C.F.R. 1241.14 (regulations authorizing prolonged post-final-order detention based on "special danger").

The law permits prolonged civil detention in two significant areas which bear on the validity of such detention here. First, such detention is permitted for people with mental illnesses, including sex offenders. The Due Process Clause permits such civil commitment only for detainees who have a mental abnormality which undermines their volitional control, rendering their dangerousness unsuitable for treatment by the criminal process. *Hendricks*, 521 U.S. at 363 (limiting holding to detention of the "dangerously mentally ill"). To be permissible, such detention has to be limited to "a small segment of *particularly dangerous* individuals" who suffer from the volitional impairment that arises from mental illness. *Id.* at 368 (emphasis added).

The Supreme Court has also upheld civil detention based on dangerousness in the pre-trial context. However, such detentions are limited by statute to people charged with the most serious crimes, *Salerno*, 481 U.S. at 747, and to detentions far shorter than those at issue here. *Id.* (noting that the detentions at issue were

limited in time by the Speedy Trial Act). Civil pre-trial detention also occurs only after an adversarial hearing before a magistrate judge. 18 U.S.C. 3142(f); *Salerno*, 481 U.S. at 750.[8]

The risk of danger must also be specifically articulated and cannot be based solely on a detainee's criminal history. As this Court clarified in *Casas*, "the government's purported interest" must be "*actually* served by detention *in [an individual's] case.*" *Casas*, 535 F.3d at 949 (emphasis in original). This requirement runs throughout the Supreme Court's civil detention jurisprudence. *See, e.g.*, *Salerno*, 481 U.S. at 751 (requiring government to demonstrate an "identified and articulable threat to an individual or the community."). Importantly for Mr. Leonardo's case, evidence of past convictions cannot be sufficient, standing alone, to meet this standard. *Foucha*, 504 U.S. at 82-83 (requiring showing of dangerousness beyond that present with "any convicted criminal" to justify civil commitment); *Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (*en banc*) (noting that, under California state law, parole denials must address *current* danger, not merely criminal history, that "an aggravated offense does not, in every case, provide evidence that the inmate is a current threat to public safety," and that an "aggravated offense does not establish current dangerousness unless the record also

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8 Our legal system also permits the civil detention of battlefield combatants for the duration of the relevant military conflict, although the contours of that power remain unclear. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state supports the inference of dangerousness.") (internal citations omitted); *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("To presume dangerousness to the community and risk of flight based solely on . . . past record does not satisfy due process.").[9]

Here, the immigration judge did not specifically articulate the risk of danger, beyond reference to Mr. Leonardo's 2002 conviction for possession of a controlled substance with intent to distribute. CR 43, Audio CD-ROM, Track 5, 1:30, 1:52; Transcript of Bond Hearing (Dkt #17) at 9,10. The sentence for this conviction was probation and one year in jail, which Mr. Leonardo completed long ago. Conviction Record, CR 12, Ex. 3, Attach. 9. (He has since "served" more than four years in immigration detention while challenging his removal. ER 3.) Beyond this, the fact that he is a non-citizen who may be removable does not make him more dangerous than citizens released into society after serving sentences for crimes just like his. *Zadvydas*, 533 U.S. at 692 ("the alien's removable status itself [] bears no

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9 Although *Ngo* involved indefinite detention of an individual whose removal order could not be effectuated, its holding that due process requires more than past convictions to establish danger applies with equal force here. Indeed, *Ngo* involved detention of noncitizens who had never been admitted to the United States, and who have traditionally been afforded less due process protection than noncitizens like Mr. Leonardo who were admitted as lawful permanent residents. *See, e.g., Zadvydas,* 553 U.S. at 693. Moreover, noncitizens who are entitled to *Casas* hearings are still contesting their removal and arguably entitled to greater due process than individuals who have lost their immigration cases.

relation to a detainee's dangerousness").

The government has presented no additional evidence of danger, much less any evidence of a "particularly serious" or "special" danger that would justify prolonged detention. Under these circumstances, the Court should hold that danger cannot serve as a basis for subjecting Mr. Leonardo to prolonged detention.

C. The Government Must Meet a Clear and Convincing Evidence Standard of Proof to Justify Continued Detention.

The Due Process Clause requires that the government make its showing by "clear and convincing" evidence in order to justify civil detention of the length at issue here. That standard was not applied in Mr. Leonardo's case, where the IJ failed even to specify the standard of proof.

The federal courts have adopted some version of the clear and convincing evidence standard in several cases involving civil detention and other severe deprivations of liberty. *See Addington v. Texas*, 441 U.S. 418, 427 (1979) (striking down civil commitment statute that authorized detention if state made requisite showing by "preponderance of the evidence"); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (requiring clear and convincing evidence for commitment of insanity acquittee beyond length of permissible sentence); *Smith v. Richards*, 569 F.3d 991, 994 (9th Cir. 2009) (noting that statute for sex offender commitment required proof beyond reasonable doubt and acknowledging *Addington*'s "clear and convincing evidence" standard created minimum requirement that is "constitutional in

nature"); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (holding that government must prove deportability by "clear, unequivocal, and convincing" evidence in light of serious liberty interests at stake in deportation proceedings); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (requiring "clear, unequivocal, and convincing evidence" for denaturalization proceedings). *See also* 18 U.S.C. 3142(f) (federal pretrial detention based on dangerousness permitted only upon government making requisite showing by clear and convincing evidence).

Here, where the interests at stake are tantamount to the interests at stake in criminal proceedings, the Constitution demands the rigorous "clear and convincing" standard. As *Addington* explained, "[o]ne typical use of the [clear and convincing] standard is in civil cases involving . . . quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money." *Addington*, 441 U.S. at 424.

Given that the purpose of the *Casas* hearing is to make a determination of whether an individual can be incarcerated for a lengthy period of time, the government must make the requisite showing by clear and convincing evidence. *See Reynoso-Rodriguez v. Napolitano*, No. CIV S-08-321, 2009 WL 3157477, at *8 (E.D. Cal. Sept. 28, 2009) (holding that government must establish "clear and convincing" evidence to order detention at *Casas* hearing).

D. *Casas* Hearings Must Involve Consideration of the Likely Length of Future Detention.

Due Process also requires that *Casas* hearings consider not only the length of detention that an individual like Mr. Leonardo has already endured, but the likelihood that he will suffer continued detention in the future pending final resolution of his immigration case. In the pretrial detention context, courts recognize that in determining whether detention has become unconstitutionally prolonged, they must consider "the non-speculative length of expected [future] confinement." *Aileman*, 165 F.R.D. at 681.

Immigration detainees typically face additional detention of at least a year, and often significantly more, if they do not prevail at their *Casas* hearings, given that the hearing should generally be held upon the filing of a petition for review and a grant of stay from this Court. *See, e.g.*, *Tijani v. Willis*, 430 F. 3d 1241, 1242 (9th Cir. 2005) (noting that "forseeable process in this Court" was "a year of more," where government had already filed its opposition brief).[10] Mr. Leonardo's case is illustrative: he has been detained for nearly four years since filing his petition for review in this Court. ER 3-4 (petition for review filed October 3, 2006). As with the pretrial detention cases, the anticipated length of future detention should be part

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10 *See also* http://www.ca9.uscourts.gov/datastore/general/2009/12/01/FAQs_Dec_09.pdf (estimating that civil appeals generally take anywhere between twelve and twenty months from notice of appeal to oral argument -- assuming no delays in briefing -- and between three months to a year from time of oral argument to decision).

of the calculus in a *Casas* hearing, allowing an immigration judge to consider the nature of the deprivation at stake before deciding to impose further detention. Under this standard, immigration detention for years should be rare, as it is in the pretrial detention context. *See Aileman*, 165 F.R.D. at 579.

CONCLUSION

For these reasons, this Court should grant Petitioner's habeas petition and either order his release under reasonable conditions or remand his case for a proper *Casas* hearing, where the government bears the burden of proving by clear and convincing evidence that no conditions of release will reasonably address the government's interests protecting against flight and danger.

Respectfully submitted,

Dated: July 12, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,997 words.

Dated: July 12, 2010

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