No. 21-35023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER MARTINEZ,
Petitioner-Appellant,

v.

LOWELL CLARK, Warden, Northwest Detention Center, et al.,
Respondents-Appellees.

On Appeal from the United States District Court, Western District of Washington
No. 2:20-cv-00780-TSZ

BRIEF OF *AMICI CURIAE* ACLU FOUNDATION, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND UCLA SCHOOL OF LAW CENTER FOR IMMIGRATION LAW AND POLICY IN SUPPORT OF PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the *amici curiae*, American Civil Liberties Union Foundation, American Civil Liberties Union Foundation of Southern California, and UCLA School of Law Center for Immigration Law and Policy certify that no entity has a parent corporation and that no publicly held corporation owns any of the entities' stock.

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

The ACLU of Southern California is a nonpartisan, nonprofit organization of over 100,000 members dedicated to the preservation of civil liberties and civil rights. The ACLU of Southern California has litigated a number of landmark immigrants' rights cases as part of its overall mission of litigation and advocacy to protect immigrants' rights.

Founded in 2020, the Center for Immigration Law and Policy at the UCLA School of Law generates innovative ideas at the intersection of immigration scholarship and practice; serves as a hub for transforming those ideas into meaningful changes in immigration policy at the local, state, and national level; and empowers students with unique opportunities for experiential learning through work with academics, practitioners, policymakers, and activists. The Center engages in strategic litigation in furtherance of its mission. Professor from Practice and Faculty

Co-Director Ahilan Arulanantham has been lead counsel in the *Rodriguez* litigation since its inception.

Amici have a longstanding interest in defending the due process rights of noncitizens against arbitrary detention. Indeed, counsel for *amici* have litigated the key cases on this issue before this Court. These cases include *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd on other grounds sub nom.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (counsel of record); *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (counsel of record); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) (amicus); *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008) (counsel of record); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008) (amicus); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) (amicus); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (counsel of record); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (counsel of record).

Amici submit this brief to specifically address the panel's conclusion that due process does not require consideration of alternatives to detention at bond hearings for noncitizens subjected to prolonged detention.

SUMMARY OF ARGUMENT

The panel held that due process does not require immigration judges ("IJs") to consider a noncitizen for supervised released (or release on "alternatives to detention") when deciding if they should remain subject to prolonged detention.

Martinez v. Clark, 36 F.4th 1219, 1231-32 (9th Cir. 2022). This ruling squarely conflicts with longstanding Circuit precedent. The panel's holding directly contravenes this Court's holding in *Rodriguez v. Robbins (Rodriguez III)* that due process requires the IJ "to consider the use of alternatives to detention in making bond determinations" in cases of prolonged confinement, because "[w]hen the period of detention becomes prolonged, the private interest that will be affected … is more substantial" and "greater procedural safeguards are therefore required." 804 F.3d 1060, 1087-88 (9th Cir. 2015), *rev'd on other grounds sub nom.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). The panel's holding additionally conflicts with the reasoning of *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), and *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), which recognize the fundamental liberty interest at stake in immigration detention and the need for strong procedures to prevent arbitrary deprivations of liberty.

Amici have a longstanding interest in these issues and have litigated the key cases relevant to this appeal before this Court: as lead counsel in *Rodriguez* and *Hernandez*, and as *amici* in *Singh*. *See also* Statement of Interest, *supra*. Based on their extensive experience, *amici* write to provide perspective on the Ninth Circuit's engagement with prolonged immigration detention cases over the past decade and a half, including its treatment of the due process issues at the core of this appeal. That

history demonstrates that the panel's decision creates an irreconcilable conflict with the Ninth Circuit's established precedent.

For these reasons, the petition for rehearing and rehearing *en banc* should be granted. *See* Fed. R. App. P. 35(a), 40.[1]

ARGUMENT

Rehearing of the panel's due process holding is warranted for two separate reasons. First, the panel decision conflicts with this Court's holding in *Rodriguez III* that due process requires consideration of alternatives to detention when determining if a noncitizen should remain subject to prolonged imprisonment. Second, the decision conflicts with the reasoning of this Court's decisions in *Hernandez* and *Singh*, which—like *Rodriguez III*—hold that due process requires strong protections to ensure that the government's interest in detention outweighs the individual's liberty interest. Because conditions of supervision may adequately address the government's interest in detention—namely, preventing flight risk or danger—due

[1] *Amici* submit that the panel's jurisdictional ruling also warrants hearing for the reasons set forth in the Petition, *see* Dkt. 34-1 at 4-14, including that this is a recurring issue of exceptional importance because the Court's ruling wholly insulated from review a due process determination, and because the ruling is inconsistent with Supreme Court precedent (such as *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020)) and Circuit case law, such as *Singh*, which remanded because "the evidence showing that Singh presented a danger was equivocal" when measured against the clear and convincing standard. 638 F.3d at 1205. However, because of space constraints, *amici* address only the panel's due process ruling here.

process requires that the IJ at least consider such conditions before denying a noncitizen release.

I. The Panel Decision Conflicts With this Court's Holding in *Rodriguez III* That Due Process Requires Considering Alternatives to Detention.

The panel held that the IJ and Board of Immigration Appeals ("BIA") did not err in refusing to consider whether the government's interest in detaining Mr. Martinez could be satisfied by release on certain conditions. That holding squarely conflicts with a long line of this Court's precedent. Most clearly, in *Rodriguez III*, this Court held that due process requires that IJs "consider the use of alternatives to detention in making bond determinations" regarding prolonged confinement. 804 F.3d at 1087. However, the panel here did not even address, much less distinguish *Rodriguez III*. Because the panel's decision directly conflicts with this precedent, rehearing is warranted.

Amici begin by explaining the history of the *Rodriguez* litigation to illustrate how the panel's holding contravenes *Rodriguez III*, and more broadly conflicts with multiple published decisions this Court has issued in *Rodriguez* over the past decade and a half.

A. *Rodriguez II* Upheld a Preliminary Injunction Requiring Consideration of Alternatives to Detention.

The *Rodriguez* class is comprised of noncitizens detained in the Central District of California for six months or longer under the authority of 8 U.S.C.

§§ 1225(b), 1226(a), and 1226(c). Petitioners originally advanced two core claims: (1) they are entitled to a bond hearing after six months of detention, on both due process and statutory grounds; and (2) due process requires that the bond hearing include certain procedural protections, including that the government bears the burden of proof by clear and convincing evidence and that IJs must consider alternatives to detention.

Unlike their claim to a bond hearing, which this Court first recognized (and the Supreme Court later reversed) on statutory grounds, the *Rodriguez* Petitioners prevailed on their claims for procedural protections at bond hearings under the Constitution, not the immigration statutes. *See Rodriguez v. Holder*, No. CV 07-3239 TJH, 2013 WL 5229795, at *1-4 (C.D. Cal. Aug. 6, 2013); *see also Rodriguez III*, 804 F.3d at 1086-89.

Petitioners filed the *Rodriguez* class action in 2007. In the first appeal in the case, this Court ordered certification of the class. *See Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105, 1126 (9th Cir. 2010). Over the next few years, this Court issued several published decisions relevant to the *Rodriguez* Petitioners' substantive claims to relief. *See, e.g.*, *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011) (construing 8 U.S.C. § 1231(a)(6) to require a bond hearing after six months of detention). Most pertinent here, in *Singh*, this Court held that due process requires that the government must bear the burden of proof by clear and convincing evidence

to justify prolonged confinement under the immigration laws; that the district court had jurisdiction to review petitioner's claim that the Immigration Judge erred in assessing his dangerousness under a lesser standard; and that this constituted reversible error. 638 F.3d at 1202-04; *see also Martinez*, 36 F.4th at 1231 (recognizing that *Singh* held that "due process requires . . . the government prove dangerousness or risk of flight by clear and convincing evidence").

Shortly after *Singh*, the *Rodriguez* district court issued a preliminary injunction requiring the Respondents to provide certain class members "a bond hearing before an Immigration Judge," at which the IJ "shall release each Subclass member on *reasonable conditions of supervision, including electronic monitoring if necessary*, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight." *Rodriguez v. Robbins*, No. CV 07-03239-TJH, 2012 WL 7653016, at *1 (C.D. Cal. Sept. 13, 2012) (emphasis added).

Respondents appealed the preliminary injunction order to this Court. In their appeal, Respondents primarily challenged whether Petitioners were entitled to a bond hearing at all.[2] Notably, however, Respondents did not contest that—if a bond hearing is required—the IJs must consider alternative conditions of release. This

[2] *See* Opening Br. of Resp'ts-Appellants 19-47, 52-57, *Robbins v. Rodriguez*, No. 12-56734 (9th Cir. filed Oct. 19, 2012) (Dkt. 9).

Court ultimately upheld the preliminary injunction in its entirety, specifically noting that the injunction required IJs to consider "reasonable conditions of supervision." *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1131 (9th Cir. 2013).

B. *Rodriguez III* Reaffirmed *Rodriguez II* and Made Clear that Due Process Requires Consideration of Alternatives to Detention.

This Court's next decision in *Rodriguez* followed the district court's grant of a class-wide permanent injunction upon summary judgment. That injunction required that the government provide (1) bond hearings to class members after six months of detention and (2) additional procedures at those bond hearings to prevent arbitrary deprivations of liberty. These procedures included, among other things, the requirement that IJs consider alternatives to detention, such as electronic monitoring or other conditions of supervision, when deciding whether a class member should be released. *Rodriguez*, 2013 WL 5229795, at *1-4.

The district court's order followed this Court's then-existing precedent. The district court found a right to a bond hearing on *statutory* grounds, following this Court's prior application of constitutional avoidance to interpret the detention statutes to provide a bond hearing after six months of imprisonment. *See Rodriguez II*, 715 F.3d at 1136-44 (construing Sections 1225(b) and 1226(c) to require a bond hearing after six months of detention); *Diouf II*, 634 F.3d at 1087-88 (construing Section 1231(a)(6) to require a bond hearing after six months of detention). By contrast, the district court made clear that the injunction's procedural protections

were grounded in *due process*. *See Rodriguez*, 2013 WL 5229795, at *1-4 (recognizing that "procedural requirements for bond hearings are well settled in the Ninth Circuit," citing *Singh*; that "due process requires a contemporaneous record" of bond hearings; and that notice requirements of the injunction are "consistent with the due process concerns" of Ninth Circuit precedent). That holding was consistent with the parties' briefing, as both sides treated the procedural protections for bond hearings—including consideration of alternatives—as constitutional questions.[3]

This Court upheld both aspects of the injunction, following the same framework as the district court. First, the Court affirmed that, as construed under principles of constitutional avoidance, the statutes required a bond hearing after six months of detention. *Rodriguez III*, 804 F.3d at 1079-84. Second, the Court concluded that due process required that those hearings include additional procedures, including the requirement that IJs consider alternatives to detention. *Id*. at 1086-89.

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[3] *See, e.g.*, Pet'rs' Mot. for Summ. J. 35, *Rodriguez v. Robbins*, 2:07-cv-03239-TJH-RNB (C.D. Cal. filed Feb. 8, 2013) (ECF No. 281) (arguing that "[d]ue process also requires an Immigration Judge to determine . . . that no alternatives to detention would address the government's justifications for detention, namely preventing flight and avoiding danger to the community"); *see also id*. at 35-39; Resp'ts' Cross-Mot. for Summ. J. 47, *Rodriguez v. Robbins*, 2:07-cv-03239-TJH-RNB (C.D. Cal. filed Feb. 8, 2013) (ECF No. 299) (arguing that "[d]ue process does not require immigration judges to consider alternatives to detention"); *see also id*. at 47-50.

The constitutional basis for this Court's holding on alternative conditions in *Rodriguez III* is clear from the text and context of the decision. As they did below, the parties' briefing in *Rodriguez III* treated the issue of consideration of alternatives as a constitutional matter. Petitioners argued that due process required IJs to consider the least restrictive alternative to imprisonment, including various forms of supervision. [4] The government argued that due process imposed no such requirement, citing the Supreme Court's statement in *Demore v. Kim*, 538 U.S. 510, 528 (2003), that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[5]

In upholding the injunction's requirement to consider alternatives, this Court rejected the government's argument under *Demore*, concluding that due process requires special protections for prolonged detentions. As the Court explained, "*Demore* applies only to 'brief period[s]' of immigration detention." *Rodriguez III*, 804 F.3d at 1088 (alteration in original) (quoting *Demore*, 538 U.S. at 513, 523). However, when detention is prolonged, due process requires greater protections. "When the period of detention becomes prolonged, 'the private interest that will be

[4] *See* Pet'rs-Appellees/Cross-Appellants' Combined Principal and Resp. Br. 75-84, *Rodriguez v. Robbins*, Nos. 13-56706, 13-56755 (9th Cir. Sept. 22, 2014) (Dkt. 25-2).
[5] Resp'ts-Appellants' Combined Resp. and Reply Br. 54, *Rodriguez v. Robbins*, Nos. 13-56706, 13-56755 (9th Cir. Dec. 5, 2014) (Dkt. 58).

affected by the official action' is more substantial; greater procedural safeguards are therefore required." *Id.* at 1087-88 (quoting *Diouf II*, 634 F.3d at 1091). The Court therefore rejected the government's argument and held that due process requires IJs to consider alternatives to detention.[6]

C. The Statutory Holding of *Jennings v. Rodriguez* Did Not Alter *Rodriguez III*'s Constitutional Holding.

The Supreme Court's subsequent ruling in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), did not affect this Court's due process ruling in *Rodriguez III*. In *Jennings*, the Supreme Court reversed *Rodriguez III*'s statutory ruling, holding that the plain language of Section 1226 could not be read to require bond hearings after six months of mandatory detention. *See Jennings*, 138 S. Ct. at 846-47; *see also Rodriguez III*, 804 F.3d at 1078-80. The Court further held that Section 1226(a) could not be read to require other procedural protections, including "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Jennings*, 138 S. Ct. at 847. However, the Supreme Court expressly declined to reach whether the same relief could be warranted on constitutional grounds. *Id*. at 851.

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[6] This due process holding is also grounded in the Court's review of core due process precedent in related civil and criminal contexts, which appears earlier in the opinion. *See Rodriguez III*, 804 F.3d at 1074-76 (citing, *inter alia*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992), *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997), *United States v. Salerno*, 481 U.S. 739, 755 (1987), and *Schall v. Martin*, 467 U.S. 253, 263 (1984)).

As explained above, Point I.B., *supra*, *Rodriguez III*'s holding that IJs must consider alternatives to detention was a constitutional, not statutory, holding. Because *Jennings* expressly declined to reach the *Rodriguez* Petitioners' constitutional claims, this Court's due process holding on alternatives to detention remains Circuit law. *See KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1052 n.4 (9th Cir. 1999) ("[A] judgment of reversal is not necessarily an adjudication by the appellate court of any other than the question in terms discussed and decided." (quoting *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 562 (1925))).

In another recent Ninth Circuit decision, this Court recognized that *Singh*'s due process holding remains good law after *Jennings*. *See also Aleman Gonzalez v. Barr*, 955 F.3d 762, 781 (9th Cir. 2020) ("*Jennings*'s rejection of layering such a burden onto § 1226(a) *as a matter of statutory construction* cannot undercut *Diouf II*, nor undercut our constitutional due process holding in *Singh*." (emphasis in original)), *rev'd on other grounds and remanded sub nom.*, *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). The panel itself acknowledged the same. *See Martinez*, 36 F.4th at 1230. The same is true of *Rodriguez III*'s due process holding requiring consideration of alternatives.

II. The Panel Decision Conflicts with the Reasoning of *Hernandez v. Sessions* and *Singh v. Holder*.

The panel decision further conflicts with the reasoning of this Court's rulings in *Hernandez v. Sessions* and *Singh v. Holder*. In both cases, this Court affirmed that, in light of the fundamental liberty interest at stake, due process requires strong procedural protections against unnecessary immigration detention. Even if *Rodriguez III* had never existed, the reasoning of these cases compels consideration of alternatives to detention to determine if restrictions short of detention are sufficient to address potential concerns about flight risk or danger.

This Court has long recognized that "due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Hernandez*, 872 F.3d at 990 (quoting *Singh*, 638 F.3d at 1203). Where a restriction short of detention would suffice to address concerns about flight risk or danger, the government's interest in detention cannot outweigh an individual's interest in liberty. Thus, due process necessarily requires consideration of such alternatives to determine if detention is in fact justified. This is particularly true given that the efficacy of alternatives has been widely recognized, including by this Court. *See id*. at 991 (noting the "empirically demonstrated effectiveness of such conditions at meeting the government's interest in ensuring future appearances," including "a 99% attendance rate at all [Executive Office for

Immigration Review ("EOIR")] hearings and a 95% attendance rate at final hearings"); Br. of 43 Social Science Researchers and Professors as *Amici Curiae* in Support of Resp'ts 36-37, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 6276890 (U.S. filed Oct. 24, 2016) (citing data showing that less than 1% of participants in U.S. Immigration and Customs Enforcement's ("ICE") Intensive Supervision Appearance Program ("ISAP") were removed from the program due to arrest by another law enforcement agency).

This requirement is also confirmed by the balance of factors under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, as this Court has repeatedly recognized, "[t]he private interest here—freedom from prolonged detention—is unquestionably substantial." *Singh*, 638 F.3d at 1208; *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."); *Hernandez*, 872 F.3d at 993 (noting that this is "beyond dispute"). Yet the panel here did not even acknowledge Mr. Martinez's fundamental liberty interest in not being subjected to prolonged confinement.

Second, as explained above, "there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty," *Hernandez*, 872 F.3d at 993, unless the IJ is required to determine if restrictions short of detention suffice to address concerns about flight risk or dangerousness. And finally, the government

has "no legitimate interest" in detention where alternatives would adequately satisfy the government's goals. *See id*. at 994. Years of experience under the *Rodriguez* injunction has further proven that the administrative costs of considering such alternatives are minimal.

The panel's decision to the contrary cannot be reconciled with the reasoning of *Hernandez* or *Singh*. First, the panel found *Hernandez* inapplicable because the plaintiffs in that case were found to pose no danger to the community. *Martinez*, 36 F.4th at 1231-32. But this ignores the rationale supporting *Hernandez*'s holding: that "due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Hernandez*, 872 F.3d at 990 (quoting *Singh*, 638 F.3d at 1203). That aspect of *Hernandez*'s holding does not turn on whether the government's justification is flight risk (the facts in *Hernandez*) or danger (as in this case). Alternative conditions may sufficiently mitigate either asserted concern. Consideration of alternatives is required because where they suffice to address concerns about flight risk or dangerousness, detention is not justified.

Second, the panel rejected reliance on *Singh* based on its view that *Singh* represents "the high-water mark of procedural protections required by due process" and should not be extended further. *Martinez*, 36 F.4th at 1231. But nothing in *Singh*

suggests that by addressing the appropriate burden and standard of proof, this Court somehow set a ceiling for all future due process claims concerning prolonged civil incarceration under the immigration laws. To the contrary, since *Singh* was decided, this Court has repeatedly addressed new due process issues and required further protections, as in *Rodriguez III* and *Hernandez*. And the Supreme Court in *Jennings* likewise recognized that due process might compel additional procedural protections for noncitizens subjected to prolonged confinement, while nowhere suggesting that protections beyond *Singh* were foreclosed. Indeed, the Supreme Court remanded precisely for the lower courts to determine what the Constitution demands. *See Jennings*, 138 S. Ct. at 851.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing *en banc* should be granted.

Respectfully submitted,

ACLU FOUNDATION IMMIGRANTS' RIGHTS PROJECT

Dated: September 19, 2022

s/ Michael K.T. Tan
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), and Ninth Circuit Rule 32-1(a), is proportionally spaced, has a typeface of 14 points, and contains 3,628 words.

Dated: September 19, 2022

s/ Michael K.T. Tan
MICHAEL K.T. TAN
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

Dated: September 19, 2022

s/ Michael K.T. Tan
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