NO. 09-56345

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO PONCE DE LEON,

Petitioner-Appellant,

v.

JANET NAPOLITANO, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Honorable Marilyn L. Huff, District Judge Presiding

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO PONCE DE LEON,	)	C.A. No. 09-56345
	)	D.C. No. 08CV2406-H (RBB)
Petitioner-Appellant,	)	
	)	
v.	)	APPELLANT'S REPLY BRIEF
	)	
JANET NAPOLITANO, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	
	)	

INTRODUCTION

Mr. Ponce respectfully submits this Reply, pursuant to Federal Rules of Appellate Procedure Rule 28(c), to address arguments raised by the government. He incorporates here by reference the arguments made in his opening brief.

As explained in the opening brief, and in the pleadings below, Mr. Ponce de Leon seeks the following relief: He wants an injunction prohibiting immigration officials from imposing future immigration arrest and/or detention upon him. See AOB 7, 15; ER 12. That, in short, is the "further relief to grant"—and to which, as the law establishes, he is entitled. See AOB 42-50 (explaining that the government's detention scheme violates the Due Process clause); contra GB 5 (arguing that "there is no further relief to grant"). The government, taking the ostrich's approach, just fails to address the issue. It attempts instead to gain ground by confusing the imposition of *detention*, which is at issue here, with initiation of *removal proceedings*, which is not. See, e.g., GB 6, 8 (urging confusion of the issues by arguing that "there is no reason to believe that DHS will reinstate *removal* proceedings") (emphasis added). Detention and removal proceedings are governed separately under the statutes and regulations, and one does not necessarily entail the other; the government often arrests and detains without instituting removal proceedings. See, e.g., 8 U.S.C. § 1357(a)(2) (authorizing agents to conduct warrantless arrests of "aliens" believed to be unlawfully present). The government's arguments are meritless and are addressed in turn below.

ARGUMENT

I.

THE CASE IS NOT MOOT

A. Overview of the Controversy

A quick review of the problem at the heart of this case helps illuminate the fallacy of the government's position on mootness. The controversy arises from the following undisputed facts: A United States citizen was detained by immigration officials on the belief that he was an alien.[1] He was ultimately released, but only after suffering nearly three months in a small, concrete-walled cell. No policy or

[1]Mr. Ponce de Leon is a citizen by derivation through his father; the government describes this as "[a person for whom the] likelihood of success on his application for a certification of citizenship is virtually assured." GB 8.

mechanism enables the government to detect when it has placed a citizen, rather than an alien, under immigration arrest. No policy or mechanism enables a wrongly detained citizen to notify authorities and obtain review of the lawfulness of detention (as distinguished from *removal*). Literally dozens, and probably hundreds, of citizens are subjected to immigration detention. See AOB 10-11 (providing record citations). The government's policy, which was inflicted on Mr. Ponce de Leon, is to detain based on a "presumption of alienage"—its own words, GB 6—and to deny a hearing on the lawfulness of detention. See ER 39 ("You may not request review of [the detention] determination. . . ."). It is this policy, under which Mr. Ponce de Leon was *presumed* detainable without a sufficiently expeditious means of challenging that presumption, whose lawfulness is challenged here.

B. The Government Has Not Met Its Burden of Proving Mootness

In his opening brief, Mr. Ponce de Leon explained that the case is not moot for four reasons: (1) the challenged policy is ongoing and thus the "problem has [not] ceased" and fails to meet even the threshold for showing mootness, Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1117 (9th Cir. 2003); (2) the government has not come remotely close to meeting the "heavy burden" of proving mootness under voluntary cessation doctrine; even if it had, (3) the matter is capable of repetition, yet evading review and (4) the case falls squarely under the federal public defender exception of United States v. Howard, 480 F.3d 1005 (9th Cir. 2007), and United States v. Brandau, 578 F.3d 1064 (9th Cir. 2009).

In response to the question of mootness, the government poses only one argument. It asserts that *Mr. Ponce de Leon* bears the burden of proof. See GB 7-8 (arguing that "Appellant has presented absolutely no evidence to support any expectation [of recurrence]"). The government's two remaining arguments, that citizens may be subjected to immigration detention, GB 5-6, and that "ample due process" was afforded because immigration authorities lacked "automatic knowledge" of Mr. Ponce de Leon's citizenship claim, GB 6-7, (though equally meritless) actually go to the underlying merits and are addressed below in Section II.

1. The burden of proof lies on the government, not Mr. Ponce de Leon

The government's burden of proof argument, GB 7-8, is just plain wrong on the law—and so wrong as to border on frivolous. Fatal to the government's claim that it is Mr. Ponce de Leon who must "present[] . . . evidence" to establish voluntary cessation and *disprove* mootness, GB 8, is the one thing it studiously avoided throughout its brief: controlling case law. It could not be more clear that the burden of showing mootness falls on the government. The Supreme Court, in Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., spelled this out in simple, unambiguous terms:

> The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up *lies with the party asserting mootness*.

528 U.S. 167, 189 (2000) (emphasis added; quotation marks and alteration omitted); see also Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000) (same).

That case clarified the law on mootness. Before the Supreme Court's 2000 decision in Friends of the Earth, lower courts had "confused mootness with standing," misled by the oft-repeated though inaccurate description of mootness as "standing set in a time frame." 528 U.S. at 189-90 (describing the Court of Appeals's confusion as "understandable"). After the Supreme Court's extensive discussion and clarification of the differences between mootness and standing in Friends of the Earth, there remains no basis for appellate courts to cling to the confused state of prior law. In the same term, the Supreme Court reversed a decision of the Tenth Circuit holding a case to be moot by "placing the burden of proof on the wrong party." See Adarand Constructors, Inc. , 528 U.S. at 221 ("the Tenth Circuit 'confused mootness with standing'").

The government's mootness argument is striking for its total failure to cite to Friends of the Earth, Adarand Constructors, or, for that matter, any opinion issued after the Supreme Court's decisions in those cases. Neither does the government make any effort to distinguish those cases, which were cited in Mr. Ponce de Leon's opening brief. See, e.g., AOB 16, 17, 18, 30. Indeed, it stakes its argument on two

Ninth Circuit cases that predate Friends of the Earth. GB 7-8 (citing Sze v. INS, 153 F.3d 1005, 1008 (9th Cir. 1998), and Public Utilities Comm'n of State of Cal. v. FERC, 100 F.3d 1451, 1460 (9th Cir. 1996)). Sze, a mandamus action, engaged in precisely the "confusion" of mootness with standing that was dispelled by Friends of the Earth two years later. Its holding that the *plaintiff* bore the burden of establishing that voluntary cessation resulted from the litigation was, as explained above, overruled by Friends of the Earth. See Sze, 153 F.3d at 1008. Indeed, Sze has never been cited in a published decision by this Court except to overrule it on other grounds, see United States v. Hovsepian, 359 F.3d 1144, 1161 (9th Cir. 2004) (en banc), and in a case that properly placed the mootness burden on the defendants, see Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1194-95 (9th Cir. 2000) (properly placing burden of proving voluntary cessation on defendants, who had shown that cessation resulted from a state legislative enactment).

Public Utilities Comm'n, the other case relied on by the government, falls squarely in the line of cases where the defendant established that objective, extrinsic circumstances dispelled the reasonable expectation of recurrence, as discussed in Mr. Ponce de Leon's opening brief. See AOB 18-22. There, the defendant met its burden of proving that the cessation was due to an objective change in circumstances unrelated to the lawsuit. Specifically, the defendant, a natural gas company, decided to refuse the federal certification to build a pipeline in California, whose issuance prompted suit by state public utilities, after it became aware of market conditions that made the pipeline project economically unfeasible. See 100 F.3d at 1458, 1460. In short, Public Utilities Comm'n was a case where the defendant did meet its burden of establishing mootness. The only other case referenced by the government, United States v. W.T. Grant Co.,clearly places the burden of proof on the defendant. 345 U.S. 629, 632-33 (1953) ("The case may . . . be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one.") (citation and quotation marks omitted).

Finally, even if this Court were to ignore the decade or so of controlling precedent, Mr. Ponce de Leon would still prevail under Sze's requirement that he show that this litigation caused the government to release him. See 153 F.3d at 1008. Assuming *arguendo* that the government has not forfeited this argument by failing to raise it below,[2] Mr. Ponce de Leon would present on remand the following evidence:

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[2]Indeed, the government should be estopped from making this argument because its own Return suggests that Mr. Ponce de Leon was released *as a result of* the filing of the habeas petition. See Whaley v. Belleque, 520 F.3d 997, 1002 (9th Cir. 2008) (judicial estoppel prevents litigant from taking inconsistent positions to gain litigation advantage). Specifically, the government stated:

> Meanwhile, on December 29, 2008, Petitioner commenced this habeas action. On January 6, having reviewed and considered Petitioner's documentation in support of his claim to U.S. citizenship, DHS released Petitioner from custody . . . .

ER 52. Its own brief here takes a similar position. See GB 7 ("all indications are that DHS promptly released Appellant after receiving and analyzing the documentation he

- that on December 29, 2008, the day the habeas petition was filed, the attorney representing Mr. Ponce de Leon in his immigration proceedings provided a copy of the pleadings and supporting documentation to Julia Klein, the DHS counsel prosecuting the removal;

- that two days later, after reviewing the petition, DHS counsel contacted Mr. Ponce de Leon's immigration attorney and stated that DHS had decided to release him and that an email to that effect had gone to the appropriate ICE agents;

- and that DHS counsel stated that ICE might arrest and detain Mr. Ponce de Leon again if he were to come into law enforcement custody while his application for certificate of citizenship was pending.

This evidence, which the government is just as aware of as Mr. Ponce de Leon, certainly suffices to meet the (overruled) Sze standard. There was no reason to present it to the district court, given that there was never any suggestion in the proceedings below that, ten years of post-Friends of the Earth mootness law notwithstanding, Mr. Ponce de Leon somehow bore the burden of proof. See, e.g., ER at 51-52. It would be unfair to permit assertion of this forfeited argument where Mr. Ponce had dispositive evidence that was not offered below because he had no way of anticipating that the government would attempt to revive such a thoroughly discredited standard.

submitted to support his claim").

2. The case is not moot regardless of the merit of the government's argument

The second reason why the government's contentions fail is because they simply do not address the applicability of Oregon Advocacy Center, Howard and Brandau, and the capable of repetition yet evading review doctrine. Its mootness claim focuses solely on voluntary cessation, which was only one of the four independently dispositive mootness arguments raised in Mr. Ponce de Leon's opening brief. See supra at 3-4 (summarizing the arguments). Even if this Court were somehow to place the burden of proving voluntary cessation on Mr. Ponce de Leon and hold the evidentiary silence against him, the case still would not be moot for three reasons, all set forth in the opening brief. First, it is not moot because the harm is capable of repetition, yet evading review. See AOB 31-41. Second, the case falls within the Howard/Brandau framework, which presumes recurrence for clients of the federal defender challenging an ongoing government policy. See AOB 36-39. And third, as the evidence shows, Mr. Ponce de Leon himself reasonably risks future detention due to the government's total lack of any mechanism to track or prevent citizen detention and its practice of engaging in large-scale, mass immigration sweeps and arrests in employment and other settings. See AOB 39-41.

In sum, there very much remains a case or controversy at issue here. The parties dispute the legality of the government's detention policy as applied to individuals with plausible claims to citizenship. Mr. Ponce de Leon runs a real risk of being subjected to this policy again (although he does not have to establish this to survive a mootness challenge), and there is relief for the court to grant—namely, an injunction prohibiting his arrest or detention so long as the detention policy continues to violate the law.

II.

THE GOVERNMENT'S DETENTION POLICY VIOLATES THE DUE PROCESS RIGHTS OF INDIVIDUALS WITH A PLAUSIBLE CLAIM TO CITIZENSHIP

Mr. Ponce de Leon argued in opening that he is entitled to judgment on the merits of his underlying claim because the government's immigration detention policy, as applied to people who, like him, have at least a plausible claim to United States citizenship, violates the Due Process Clause. See AOB 42-50 (the policy lacks adequate procedural safeguards under the Mathews v. Eldridge, 424 U.S. 319 (1976), balancing test). This is based on the underlying premise that United States citizens may not be detained under the immigration statutes, as recognized by this Court in Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008).

The government first contends that citizens may subjected to up to five months of immigration detention, GB 5-6 (citing Demore v. Kim, 538 U.S. 510 (2003) (holding that an *alien* may be detained under 8 U.S.C. § 1226(c) for five months)). This is, of course, legally erroneous. It also claims that the procedural safeguards against wrongful detention were adequate because DHS "did not have automatic knowledge" of his brother's citizenship claim, GB 6, and that the government acted "promptly" when it released Mr. Ponce de Leon after nearly three months in custodial detention, GB 7. The government's arguments are forfeited because they were not raised in any defensive pleading below. Even if they were to be considered, they simply highlight the deficiency of the government's policy and at most warrant remand for full litigation on the merits.

A. The Government's Arguments Are Forfeited

The government's arguments on the merits may not be considered here because it failed to raise them in its responsive pleading before the district court. The government's silence in its Return is deemed an admission, and the claims it now makes are forfeited. This is true because, like any other civil defendant, respondents filing a return to a habeas petition are required to raise all the defenses they intend to assert against the petition. See 28 U.S.C. § 2243 (return shall indicate "the true cause of detention"); cf. id. at § 2248 (failure to traverse claims in return deemed conclusive concession of those claims); see also Rules Governing § 2255 Cases, Rule 5, 28 U.S.C. foll. § 2255 ("The answer must address the allegations in the petition."); Rules Governing § 2254 Cases, Rule 5, 28 U.S.C. foll. § 2254 (same); accord Fed. R. Civ. P. 8(b)(1) & (6) (responsive pleading should admit or deny allegations of opposing party and failure to do so is deemed an admission of truth of allegations).

Failure to dispute the factual allegations in the petition constitutes an admission of their truth. See Bland v. California Dep't of Corrections, 20 F.3d 1469, 1474 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000); Cristini v. McKee, 526 F.3d 888, 894 n.1 (6th Cir. 2008) ("When a state's return to a habeas corpus petition fails to dispute the factual allegations contained within the habeas petition, it essentially admits these allegations."); Ukawabutu v. Morton, 997 F. Supp. 605, 609 (D.N.J. 1998) (return must respond to the allegations in petition). Likewise, failure to raise a defense in the return forfeits that argument. See Chaker v. Crogan, 428 F.3d 1215, 1120 (9th Cir. 2005) (limitation and procedural default defenses to second amended petition forfeited by state's failure to raise them in return); Robinson v. Fairman, 704 F.2d 368, 370 (7th Cir. 1983) (same for abuse of writ defense); United States ex rel. Hindi v. Warden of McHenry County Jail, 82 F. Supp. 2d 879, 883 (N.D. Ill. 2000) (any defense not in answer is forfeited). Generally, a limited answer is appropriate only where the judge has already summarily dismissed the unaddressed claims. See Ebert v. Clark, 320 F. Supp. 2d 902, 905 n.7 (D. Neb. 2004).

Here, the government made only one claim in its two-page Return. It argued that the petition should be dismissed as moot because Mr. Ponce de Leon had been released from custody. See ER 51-52. It did not deny any of the allegations on the merits of the due process claim; nor did it present any counterarguments that

Mr. Ponce de Leon could have addressed in his Traverse. Its attempt to raise these arguments now (with the exception of its argument that citizens may be subject to immigration authority, which is simply wrong on the law and easily refuted) is particularly egregious because its contentions rely on the lack of evidence that could have been presented to the district court in Mr. Ponce de Leon's Traverse if the claims had been properly raised below. See infra at Section C. The general rule of admission and forfeiture should thus be strictly construed against the government here.

B. United States Citizens May Not Be Detained Under the Immigration Laws

The government's first argument, that United States citizens may be detained under the immigration laws, is demonstrably wrong. This Court has held exactly the opposite in Flores-Torres, which concerned the application of the same statute at issue here, 8 U.S.C. § 1226, to a person who, like Mr. Ponce de Leon, claimed citizenship. The analysis of Flores-Torres applies here:

> Section 1226 of the INA [*sic*[3]] vests the Attorney General with authority to detain an "alien" during removal proceedings." See 8 U.S.C. § 1226(a); id. § 1226(c). Torres, however, asserts that the Attorney General is without authority to detain him because he is not an 'alien,' but a United States citizen. There is no dispute that *if Torres is a citizen the government has no authority under the INA to detain him*, as well as no interest in doing so, and that his detention would be unlawful under the Constitution and under the Non-Detention Act, 18 U.S.C. § 4001.

[3]The reference to "Section 1226 of the INA" should be to "Section 236 of the INA," which is codified at section 1226 of Title 8 of the United States Code.

548 F.3d at 710 (emphasis added). Like Mr. Flores-Torres, Mr. Ponce de Leon is not subject to the detention statute because he is not, as the statute requires, an "alien"; he is a United States citizen. Flores-Torres could not be more clear on this point, and it is indistinguishable.

The government's contention that Demore v. Kim controls, rather than Flores-Torres, is wholly unpersuasive. See GB at 5-6. Demore v. Kim had nothing to do with whether a citizen could be detained under a statute that, by its own terms, is limited only to "aliens." The petitioner there did not claim citizenship; quite the contrary, Mr. Kim was undisputedly an "alien" and had even "conceded that he is deportable" under the INA. See Kim, 538 U.S. at 513, 523 n.6. Demore v. Kim held only that legal permanent resident "*aliens*" may be subjected to up to five months of mandatory detention under 8 U.S.C. § 1226(c). What that has to do with this case, which involves a citizen, not an alien, is entirely mysterious and goes unanswered by the government's brief. Indeed, Kim itself remarked on the heightened protections afforded to United States citizens that are unavailable to aliens:

> In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. . . .
>
> [T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.

538 U.S. at 521-22. The detention policy inflicted on Mr. Ponce de Leon here is precisely the sort of rule that may be forced upon aliens, but is "unacceptable if applied to citizens." See id.

C. Inadequacy of the Government's Procedures Under *Mathews v. Eldridge*

For the first time in this litigation, the government disputes Mr. Ponce de Leon's allegations that its detention policies violate the strictures of procedural due process under the Mathews v. Eldridge balancing test. See AOB 42-50, ER 8-12. Its arguments largely amount to complaints about the absence of any mechanism to alert immigration officials to the presence of citizens in detention—see, e.g., GB 6 (arguing that DHS "did not have automatic knowledge" that Mr. Ponce de Leon's brother was found to be a citizen); id. at 7 (contending that DHS acted "promptly" in releasing him)—and actually highlight precisely the procedural deficiencies in the policy that Mr. Ponce de Leon seeks to enjoin as procedurally insufficient.

Part of the problem with the detention policy, as Mr. Ponce de Leon has argued, is that there are no mechanisms in place for people with citizenship claims to alert officials and thus obtain an expeditious hearing on the lawfulness of detention. Obviously, such mechanisms are necessary because, as the government admits, DHS "does not have automatic knowledge" of the merits of any given person's citizenship claim. GB 6. Exactly. It has to be alerted somehow. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (timely notice and the right to be heard fall within the "central meaning of procedural due process"). And as the record shows, not only is there no reliable mechanism to alert DHS about such problems, the policy in place actually informs detainees that they *may not* seek review of ICE's detention decision. Specifically, ICE informed Mr. Ponce de Leon that it had decided he would be "detained in the custody of the Department of Homeland Security" and informed him that:

> You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

See ER 39. In other words, he was told that the statute commanded detention and that it would be futile to seek release or even ask for an immigration judge to review DHS's decision. The words in the notice were imperative: "You may not request a review. . . ." Id. Thus, it is evident that the government's contentions about the silence in the record as to when Mr. Ponce de Leon notified authorities about his claim are irrelevant to the due process issue.

Even if the timing was relevant, at best these arguments might call for remand instead of directed judgment on the merits. On remand, Mr. Ponce de Leon would present evidence that (as the government is certainly aware of because it controls his entire immigration file):

- Mr. Ponce de Leon made repeated efforts upon detention to assert his citizenship claim to ICE agents as well as the immigration judge, and these efforts included mention of his brother;

- Mr. Ponce de Leon filed a formal administrative request to ICE on November 2, 2008, requesting review of his citizenship claim; that request was denied by an ICE officer on the ground that "You must continue to prove your case to the immigration judge";

- Mr. Ponce de Leon sent multiple letters to the immigration judge describing his efforts to obtain release on citizenship grounds; at least one of the letters was rejected for "improper proof of service."

- In his first appearance before an immigration judge in October 2008, Mr. Ponce de Leon did not have the opportunity to state his citizenship because the proceeding was a mass hearing and no such inquiry was made.

See Appendix.[4] Thus, even if these matters were relevant to the due process issue, they only support Mr. Ponce de Leon's claims because they show that "the risk of an erroneous deprivation of [liberty]" is very great under "the procedures used" currently and that "the probable value . . . of additional . . . procedural safeguards," such as implementation of a formal alert-and-review system, is very high. See Mathews, 424 U.S. at 335. In any event, it would be a manifest injustice to hold the absence of evidence *against* Mr. Ponce de Leon when the government is fully aware of its existence and, moreover, created the circumstances that made it unnecessary to introduce it through its forfeiture in the Return.

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[4]The documents included in the appendix are provided as an example of some of the evidence Mr. Ponce de Leon would present were this case to be remanded, and that he would have presented had the government contested the issue in the district court. They are not offered to supplement the record. As Mr. Ponce de Leon maintains, the government's arguments are both forfeited and irrelevant.

Finally, the government also contends that Mr. Ponce de Leon should have "appl[ied] for a certificate of citizenship or passport," which, according to the government, "compelled DHS to bring removal proceedings against him," and that "there is no reason to believe that DHS will reinstate removal proceedings against Appellant before making a preliminary determination of his U.S. citizenship claim." GB 6, 8. These arguments all share the same fallacious conflation of removal proceedings and immigration detention and have no bearing on this case. Mr. Ponce de Leon is seeking relief from *detention* here, not relief from removal proceedings. It is the detention statutes, which by their own terms only apply to aliens, see, e.g., 8 U.S.C. § 1226, that may not be lawfully applied to him. He does not contend that DHS may not institute removal proceedings against him, so long as he is not held in detention. Additionally, it is absurd to suggest that Mr. Ponce de Leon "compelled DHS to bring removal proceedings against him"; initiation of removal proceedings are simply not compulsory on DHS, and the government can provide no evidence otherwise. Finally, whether or not Mr. Ponce de Leon has a certificate of citizenship or passport has no bearing on the lack of procedural safeguards to prevent wrongful immigration detention of citizens. See AOB 10-11; ER 67-71, 74-75, 101, 102 (recounting numerous cases where citizens were detained, including cases where the detainee was native born or had a certificate of naturalization).

In sum, the extremely belated and forfeited arguments the government now raises fail to save the procedurally deficient immigration detention policy it maintains. Because the government cannot refute the clear evidence of inadequacy presented by Mr. Ponce de Leon, the district court should be ordered to enter judgment on the merits in Mr. Ponce de Leon's favor. Alternatively, if the Court believes that material facts remain in dispute, the matter should be remanded for factual development before the district court.

CONCLUSION

For the reasons set forth here and in the opening brief, the judgment should be reversed and judgment on the merits directed in favor of Mr. Ponce de Leon. Alternatively, the judgment should be reversed and the case remanded for litigation on the merits before the district court.

Respectfully submitted,

DATED: February 5, 2010

<u>/s/ Janet C. Tung</u>

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Attorneys for Petitioner-Appellant

CERTIFICATE OF RELATED CASES

Counsel for the Appellant is unaware of any other related cases pending before this Court which should be considered in this appeal.

Respectfully submitted,

DATED: February 8, 2010

/s/ Janet C. Tung

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Attorneys for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-56345

I certify that: (check appropriate options(s))

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached ~~opening~~/~~answering~~/reply/~~cross~~ appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 5,044 words (opening, answering, and the second and third briefs filed in cross-appeals must NOT exceed 14,000 words; reply briefs must NOT exceed 7,000 words),

or is

❑ Monospaced, have 10.5 or fewer characters per inch and contain _______ words or ______ lines of text (opening, answering, and second and third briefs filed in cross-appeals must NOT exceed 14,000 words, or 1,300 lines of text; reply briefs must NOT exceed 7,000 words or 650 lines of text).

February 8, 2010
Date

/s/Janet C. Tung
JANET C. TUNG
Federal Defenders of San Diego, Inc.

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on _February 8, 2010___, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Janet C. Tung*________

****

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on ____________, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

____

____

____

____

s/ ________________________

APPENDIX

Date Request Received by ICE:

NOV 04 2008
10:15 Am

U.S. Department of Homeland Security
Bureau of Immigration and Customs Enforcement
Detention and Removal Operations
446 Alta Road, Suite 5400
San Diego, CA. 92158

Detainee Request Form / Peticion del Preso
Otay Mesa Detention Facility

9D 3

Unit A Pod A Room # 116

Notice ! You must fill out this form completely, or it will not be delivered to your deportation officer
Aviso! Debe llenar esta forma completamente, o no sera entregada a su official de deportacion.

Last Name *Apellido* PONCE DE LEON **First Name** *Primer Nombre* FRANK

Date of Birth *Fecha de Nacimiento* 10-25-61 **ICE A#** *Numero de Immigracion* 263126 71

Nationality *Nacionalidad* U.S. CITIZEN

Have you been ordered removed ? Yes/Si ☒ No/no ☐
¿Tiene una orden de deportation?

Detainee Request:
Peticion del Preso: TO DEPORTATION OFFICER.
I HAVE A TALKED TO MY FAMILY AND THEY HAVE THE ORIGINAL BIRTH CERTIFICATE FROM MY DAD AND TRANSLATION OF MY BIRTH CERTIFICATE TO PROVE MY CLAIM AS U.S. CITIZEN. CAN YOU TELL ME HOW TO GET THEM TO YOU?

Do you Desire a response? Yes/Si ☒ No/no ☐
¿Quire una respusta?

Signature of Detainee *Firma del Preso* [signature] **Date** *Fecha* 11-2-08

ICE Response:
Repuesta de ICE:
Mr. Ponce De Leon You claim has Been Reviewed. You must continue to prove your case to the Immigration Judge.

Signature of ICE Officer *Firma del Official de ICE* [signature] **Date** *Fecha* 11/4/08

PONCE DE LEON FRANK
NO:26312671
SAN DIEGO CORRECTIONAL FACILITY
P.O BOX 439049
SAN DIEGO CA 92143
A/A ROOM 116

Nov - 3 - 08

Dear You're Honor.

I want to apologize in advance in case that I sound out of line , it is because in my opinion I should not be here, I got release from prison on the 11th. Of October. From reception I stated that in 2000, immigration remove the hold and gave me a form where they check (x) REMOVE HOLD and on the bottom on writing stating because my father is a U.S. citizen I am considered U.S. citizen.

Because I did not, or have any reason to leave the country ,because all my family is here, my wife ,and kids were born here, my mother ,and one sister are citizen, and the other brother and sister are in process of getting a certificate .

I did not applied for a passport because I never thought that because a wrong decision , I will end up in prison again, and because I stated that I hit the person that provoked me in the way of work ,(I meant with my fist) he was the one that pulled out the flash light.)

All I have to do is to request an OLSON REVIEW and get a copy but I need to be out side to do so ,please let me go back to my family to support them, and I promise to do everything to complete my immigration process.

Thank you. Respectively Submitted by

PONCE DE LEON, FRANK
NO: 26312671
SAN DIEGO CORRECTIONAL FACILITY
P.O.BOX 439049
SANDIEGO CA 92143
A/A ROOM116

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
FILED WITH
IMMIGRATION COURT
SAN DIEGO, CA

RE: BOARD REDETREMINATION

Dear you're honor

On November 17 2008 after my bond hearing you told me that soon as I collected the paper work or evidence, for me to contact my deportation officer that he cut not let me out. This letter is to informed you that my family called him the next day telling him that the paper work was ready and that you told me to let him know and to release me, he answer was that he did not have the authority to do that , that I have to wait for the judge.

My family submitted all the paper work that my older brother Fernando Ponce de Leon A.# 041115652 when he appeared before you on February 7 2008, and you granted his petition .

I thought that judge Anthony Atenaide would released me on December 5 2008, but he postponed for an individual hearing for January 7 2009.

I blank out and did not asked for O.R., I remember that you said "NO BODY want you to be here if I am a citizen, please call me back to your court room after you review my brother's case and my evidence.

If I have to appeal please answer me before the 17 Th. of this month.

Thank you. **Respectively Submitted by**

FRANK PONCE DE LEON
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P.O.BOX 439049
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DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

DEC 1 0 2008

IMMIGRATION COURT
SAN DIEGO, CA

JUDGE: HENRY P. IPEMA
401 WEST A STREET,SUITE#800
SAN DIEGO,Ca 92101

92101+7999

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

Francisco Javier Ponce De Leon
San Diego Correctional Facility
P.O. Box 439049
San Diego, CA 92143-9049

DHS, Office of the Chief Counsel
880 Front Street, Suite 2246
San Diego, CA 92101

Name: PONCE DE LEON, Francisco Javier

A 026-312-671

Date of Notice: December 11, 2008

REJECTED FILING
NOTICE TO NON-DETAINED UNREPRESENTED RESPONDENT

On December 10, 2008, the Immigration Court received the attached documents from you. The Immigration Court is returning these documents to you. The documents are being returned to you because they were not correctly filed.

You can correct the mistake and return the documents to the Immigration Court. If you return the documents, you must return them promptly to the Immigration Court. You must also attach this rejection notice to the documents. In addition, you must give or mail a copy of your documents to the Department of Homeland Security, Office of the Chief Counsel. On your documents, you must state that you gave or mailed a copy to the Department of Homeland Security, Office of the Chief Counsel.

Documents being rejected: Letter received by the court 12/10/08 dated December 8, 2008 entitled "Board Redetermination".

The Immigration Court is returning your documents because:

☒ **No Proof of Service or Improper Proof of Service** – You must give or mail a copy of your document to the Department of Homeland Security. On your document, you must state that you gave or mailed a copy to the Department of Homeland Security. The address is:

DHS, Office of the Chief Counsel
880 Front Street, Suite 2246
San Diego, CA 92101

☐ **No Name** – Your document is missing your name.

☐ **No A-Number** – Your document is missing your A-Number.