NO. 09-56345

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO PONCE-DE LEON,

Petitioner-Appellant,

v.

JANET NAPOLITANO, et al.,

Respondent-Appellee.

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

APPELLANT'S OPENING 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 OPENING BRIEF
	)	
JANET NAPOLITANO, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	
	)	

JURISDICTIONAL STATEMENT

Petitioner Francisco Ponce de Leon appeals from the order dismissing his petition for writ of habeas corpus by the Honorable Judge Marilyn L. Huff, United States District Judge, Southern District of California, entered on July 8, 2009. The district court had original jurisdiction over the petition pursuant to 28 U.S.C. § 2241.

A. Venue

This Court has jurisdiction over a timely appeal, Fed. R. App. P. 4(b), from a final order entered in the Southern District of California, within the Ninth Circuit's geographical jurisdiction, 28 U.S.C. § 1294(1).

B. Appellate Jurisdiction

The order and final judgment were entered on July 8, 2009. Mr. Ponce de Leon timely filed a Notice of Appeal on August 24, 2009. Fed. R. App. P. 4(a)(1)(B). This

Court has jurisdiction over the appeal from the final decision of the district court pursuant to 28 U.S.C. §§ 1291 & 2253(a). No certificate of appealability is required for appeal from denial of a petition under 28 U.S.C. § 2241. See 28 U.S.C. § 2253(c)(1); Forde v. U.S. Parole Comm'n, 114 F.3d 878, 879 (9th Cir. 1997).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does a claim seeking to enjoin the government from maintaining its policy of arresting and detaining United States citizens as "aliens" without a constitutionally adequate predetermination of alienage become moot when the petitioner is released but the policy remains in force, the respondents have never acknowledged his citizenship, and immigration officials have not disavowed their claimed authority to take him into custody again?

II. Does the government violate the Due Process Clause and the Non-Detention Act when it imposes immigration detention on individuals with plausible claims to citizenship without first establishing alienage (and thus detention authority) by clear and convincing evidence at a hearing before a neutral arbiter?

STATEMENT OF THE CASE

This case was initiated after Mr. Ponce de Leon, a United States citizen, was taken into immigration detention by Immigration and Customs Enforcement (ICE) officers on October 14, 2008. Removal proceedings were initiated. In the meantime, to challenge his detention, Mr. Ponce de Leon filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 with the United States District Court for the Southern District of California on December 29, 2008, naming as respondents the Secretary of the Department of Homeland Security, the Attorney General, the local immigration

officials responsible for his detention, and the officer in charge of his detention facility. CR1.[1] On January 6, 2009, ICE released Mr. Ponce de Leon from custody under conditions of supervision. On January 7, 2009, an immigration judge found him to be an United States citizen and terminated the removal proceedings. On July 8, 2009, the district court dismissed the habeas petition as moot. CR15.

STATEMENT OF FACTS

Mr. Ponce de Leon raises two issues on appeal: (1) whether the government has met its burden of proving mootness where it has never disavowed its policy of imposing detention on individuals with plausible claims to United States citizenship without any preliminary determination of alienage at a hearing before a neutral arbiter; and (2) whether, in light of the Non-Detention Act's prohibition on immigration detention of United States citizens, the Due Process Clause permits the government to arrest and detain people with plausible claims to citizenship without first proving alienage by clear and convincing evidence to a neutral arbiter.

Relevant facts are presented below.

[1] "CR" citations refer to documents in the Clerk's Record as numbered in the district court's docket. "ER" refers to Appellant's Excerpts of Record.

A. The Government's Unlawful Detention of Mr. Ponce de Leon

This case arose from the government's decision to place Mr. Ponce de Leon in immigration detention at the Correctional Corporation of America's San Diego Detention Center ("CCA") despite actual notice that he had a plausible claim—in fact, an all-but-certain claim—to United States citizenship. Mr. Ponce de Leon is a United States citizen born in Mexico. He derived citizenship by operation of law from his father, Fernando Ponce de Leon Sr. ("Fernando Sr."), a native-born American citizen. CR1 at 3, 6-8 & App. D; ER 3, 6-8, 24.

So did his brother, Fernando Ponce de Leon Jr., also born in Mexico, two years before Mr. Ponce de Leon. CR1 at 3-4 & App. A; ER 3-4, 14. The derivative citizenship inquiry for the two brothers, which looks to their father's physical presence in the United States before their birth, was almost identical. The one material difference was this: Because Fernando Jr. was born in 1959, he had to prove that Fernando Sr. was present in the United States for at least ten years prior to 1959; Mr. Ponce de Leon, by contrast, had to prove that Fernando Sr. was present for at least ten years prior to his birth in 1961.[2]

[2]Derivative citizenship law also requires proof of legitimation by the father, which was easily established in Mr. Ponce de Leon's case by his father's acknowledgment of paternity on his birth certificate, his public holding out of the child as his own, and his marriage to his mother on June 27, 1979. CR1 at 7-8 & Apps. B & C; ER 7-8, 17-20, 22.

Fernando Jr. did, in fact, prove their father's physical presence for ten years before 1959. He successfully terminated removal proceedings instituted by the Department of Homeland Security ("DHS") after presenting his citizenship claim to the San Diego Immigration Court. CR1 at 3-4 & App. A; ER 3-4, 14. The evidence presented by Fernando Jr.—proof of ten years of presence before 1959—obviously also proved up the necessary showing for Mr. Ponce de Leon. That is, any given ten-year period before 1959 (when Fernando Jr. was born) is, by logical necessity, also a ten-year period preceding 1961 (when Mr. Ponce de Leon was born).

All of this was known to the San Diego immigration authorities by February 7, 2008, the day that an immigration judge ("IJ") ordered Fernando Jr.'s proceedings terminated. CR1 at App. A; ER 14. Yet, one month later, and despite his all-but-proven citizenship, a San Diego Deportation Officer, a low-level local immigration agent, determined that DHS would take Mr. Ponce de Leon into immigration custody. CR1 at App. J; ER 39. The immigration official asserted the following on a "Notice of Custody Determination," dated March 18, 2008:

> I have determined that pending a final determination by the immigration judge in your case . . . you shall be detained in the custody of the Department of Homeland Security.

ER 39. The Notice expressly precluded any review of the officer's decision, informing Mr. Ponce de Leon:

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

ER 39. It made no mention of Mr. Ponce de Leon's derivative citizenship claim. It did not claim to have reviewed the issue, or to have considered any relevant evidence. Neither did it claim to have given Mr. Ponce de Leon an opportunity to present any evidence. It did not acknowledge the Non-Detention Act, 18 U.S.C. § 4001, or that section's prohibition on detention of United States citizens. Instead, the notice simply asserted that detention was "[p]ursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations." ER 39.

The March 18 custody determination was made while Mr. Ponce de Leon was serving a state prison sentence. When he completed the sentence on October 14, 2008, seven months later, the government took Mr. Ponce de Leon into custody. During those seven months, Mr. Ponce de Leon was never afforded a hearing to determine whether he was in fact subject to the government's immigration detention authority.

Mr. Ponce de Leon was not afforded an opportunity to present the evidence of his citizenship to a neutral arbiter until January 7, 2009, when he appeared before an immigration judge to present the merits of his defense to deportation. CR1 at 4, CR12 at 1; ER 4, 51. By that time, nearly three months had passed since he was put in

detention under the government's claimed "authority contained in section 236 of the Immigration and Nationality Act." See ER 39. Mr. Ponce de Leon prevailed at the hearing; the immigration judge terminated the removal proceedings. CR12 at 2, CR12-1 at 2; ER 52, 54.

B. Mr. Ponce de Leon's Attempt to Seek Relief Through Habeas Corpus

Mr. Ponce de Leon languished for two months in immigration detention before becoming aware and seeking the assistance of his present counsel, the federal defender organization for his district of confinement. On December 29, 2008, he filed his petition for habeas corpus with the district court, which subsequently appointed counsel upon finding that "Petitioner is likely to prevail on his claim." CR11 at 2; ER 49.

1. The Relief Sought by Mr. Ponce De Leon

In the petition, Mr. Ponce de Leon sought two forms of relief: (1) immediate release; and (2) prospective relief in the form of an injunction preventing respondents from imposing detention without first making a showing by clear and convincing evidence at a hearing before an impartial arbiter that the putative detainee is, in fact, an alien subject to the government's immigration authority. CR1 at 8-12; ER 8-12. As Mr. Ponce de Leon had been detained as an alien under the government's policy of not holding a preliminary hearing of any sort, he feared not only continued detention, but future unlawful detention after his release.

The district court took no action on the petition for several months. On May 7, 2009, Mr. Ponce de Leon filed a motion requesting the district court to set a briefing schedule, which was granted on May 15. CR11 (ordering a response by June 2, 2009). By then, the removal proceedings had long since been terminated by the immigration court and Mr. Ponce de Leon had been released. CR12 at 2; ER 52.

2. The Government's Response to the Petition

In its responsive pleading, the government did not refute the allegations in the petition. Instead, the government argued that the petition should be dismissed "[b]ecause Petitioner is no longer in DHS custody." CR12 at 2; ER 52. It admitted that DHS had given no thought to Mr. Ponce de Leon's citizenship until January 6, 2009, *the day before* his immigration court merits hearing, when DHS finally decided to "review[] and consider[] Petitioner's documentation in support of his claim to U.S. citizenship," and released him. CR12 at 2; ER 52. Notably, despite the termination of proceedings five months before the return was filed, the government refused to acknowledge Mr. Ponce de Leon's United States citizenship. Instead, it described Mr. Ponce de Leon as "a native of Mexico who claims derived U.S. citizenship." CR12 at 1; ER 51.

The government explained that the immigration judge terminated proceedings at DHS's request:

> On January 6, 2009, having reviewed and considered Petitioner's documentation in support of his claim to U.S. citizenship, DHS released Petitioner from custody and moved for termination of the removal proceedings. Accordingly, on January 7, 2009, the IJ terminated removal proceedings.

CR12 at 2; ER 52. It presented the order of the IJ in Mr. Ponce de Leon's case, which indicated only that: "Proceedings were terminated"—not why, or whether the charges were dismissed with prejudice. CR12-1 at 2; ER 54. It also attested, through the declaration of the Assistant U.S. Attorney, that the IJ terminated proceedings "based on DHS's motion to terminate the removal proceedings," rather than due to an adjudication on the merits. CR12-1 at 1; ER 53. The government did not claim that the immigration court made a determination of Mr. Ponce de Leon's citizenship. More significantly, it did not disavow its claimed authority to detain Mr. Ponce de Leon (whom it describes as "a native of Mexico") under the immigration laws. CR12 at 2; ER 52. Neither did it make any assurance that DHS would not arrest and detain Mr. Ponce de Leon in the future.

As for Mr. Ponce de Leon's request for prospective injunctive relief, the government did not present evidence why such relief would be unnecessary. It did not deny that it maintains a policy of relying on foreign birth and bare allegations of alienage to impose immigration detention on people with a plausible claim to United States citizenship. It made no assurance that it would change its policy of detaining plausible citizens without first holding a hearing as a precondition to detention. It

made no suggestion that it now regards Mr. Ponce de Leon as a United States citizen; instead, the government expressly stated that it classifies him as a "native of Mexico" who only "claims derived U.S. citizenship." CR12 at 1; ER 51. It did not claim that the immigration proceedings were terminated with prejudice. And it does not disavow its authority to subject Mr. Ponce de Leon to future immigration detention.

3. The District Court's Denial of the Petition As Moot

In his traverse, Mr. Ponce de Leon explained that the government had failed to meet its burden of proving that the case should be dismissed as moot because it never disavowed the challenged policy and failed to show that it was absolutely clear that detention would not recur. He also contended that the doctrines of voluntary cessation and capable of repetition, yet evading review precluded dismissal on mootness grounds. He submitted evidence of numerous other cases of detention of United States citizens, including:

- the 7-month detention of a naturalized citizen and military veteran, Rennison Vern Castillo;
- the detention and deportation in 2007 of a mentally ill citizen, Pedro Guzman;
- the detention, deportation, and illegal reentry conviction in 2004 of a derivative citizen, Duarnis Perez;
- the month-long detention of a native-born United States citizen who worked in the detention facility kitchen for $1 a day until he earned the thirty dollars it cost to order a copy of his birth certificate;

- the seven-month detention of a United States citizen who was forced to undergo DNA testing to prove he was his mother's son;

- an immigration raid in 2008 that generated over 100 wrongful arrest claims from United States citizens;

- a Vera Institute report documenting 322 people in immigration detention with claims to United States citizenship in 2007; and

- an Associated Press investigation documenting 55 cases of United States citizens detained in the past eight years.

CR14 at 12-16, 19-20, 46, 47; ER 67-71, 74-75, 101, 102.

Without addressing Mr. Ponce de Leon's points, the district court dismissed the petition as moot. The sum total of the district court's analysis was the following:

> The Court dismisses without prejudice the petition as moot because Petitioner is no longer in DHS custody and the removal proceedings against him were terminated. See 28 U.S.C. § 2241; Abdala v. INS, 488 F.3d 1061, 1064 (9th Cir. 2007) (release or removal of detainee renders habeas petition moot in the absence of some collateral consequence redressable by habeas relief). Petitioner sought immediate release from unlawful detention in his petition, and having been released and the removal proceedings terminated, there are no collateral consequences redressable by Petitioner's requested habeas relief of immediate release.

CR15 at 1-2; ER 136-37. There was no discussion of the government's refusal to acknowledge Mr. Ponce de Leon's citizenship, its failure to disavow the authority and possibility that DHS will subject him to detention again, or persistence of the challenged policy to impose often months-long detention without a hearing. The district court's final order in this case was filed on July 8, 2009, over six months after

the petition was filed, and over nine months after Mr. Ponce de Leon was taken into detention. CR15; ER 136-37.

This appeal follows.

SUMMARY OF ARGUMENT

The district court's order should be reversed because the government entirely failed to meet its burden of proving mootness under both the "voluntary cessation" and "capable of repetition, yet evading review" doctrines. Under voluntary cessation law, the presumption of justiciability was not overcome here because the government, which has exclusive and unilateral control over the cessation and re-institution of the unlawful act (immigration detention of plausible United States citizens without establishing alienage, and thus authority to detain, as a precondition of detention), failed to prove that there exists no "reasonable expectation" that it will unlawfully detain United States citizens in the future. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). In particular, it has never disavowed the challenged policy or otherwise promised not to revisit the wrong on Mr. Ponce de Leon or others—indeed, it refuses even to acknowledge that Mr. Ponce de Leon is a citizen who may not legally be detained under the Immigration and Nationality Act (INA)—and it continues to maintain the challenged policy.

The matter is likewise capable of repetition, yet evading review for much the same reasons. The average natural duration of immigration detention is, at the

outside, around five months—not enough time to permit appellate review. Under United States v. Howard, 480 F.3d 1005 (9th Cir. 2007), and United States v. Brandau, 578 F.3d 1064 (2009), the matter is capable of repetition because the "ongoing government policy" challenged here can reasonably be expected to affect other clients of the federal defender office representing Mr. Ponce de Leon. Even were future detention of Mr. Ponce de Leon himself the correct unit of analysis, the matter is capable of repetition in light of ICE's history of detaining him and others without any mechanism of deterring repeated wrongful detention in the future, its policy of conducting mass arrests and detentions, and its reservation of the right to re-detain and re-charge him by refusing to acknowledge his citizenship.

The district court should be directed to enter judgment in Mr. Ponce de Leon's favor on the merits. It is undisputed that the government altogether lacks authority under the immigration laws to detain United States citizens, which expressly authorize detention only of "aliens." See Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008) (immigration detention of citizens "would be unlawful under the Constitution and under the Non-Detention Act"). The government must be enjoined from imposing detention on individuals with plausible claims to United States citizenship without first establishing alienage at a hearing comporting with the requirements of the Due Process Clause. Under the balancing test set forth in Matthews v. Eldridge, 424 U.S. 319, 335 (1976), the individual's strong interest in personal liberty far outweighs

administrative burden of requiring the government to make such a showing, and the present mechanism, detention based upon the unreviewable edict of a low-level, local immigration officer, is utterly inadequate. The government's interest in detention without first holding such a hearing thus violates the Fifth Amendment's procedural due process requirement.

ARGUMENT

I.

THE CLAIM FOR INJUNCTIVE RELIEF WAS NOT MOOT BECAUSE THE GOVERNMENT HAS NEVER DISAVOWED THE CHALLENGED POLICY OF DETAINING PLAUSIBLE CITIZENS OR EVEN ACKNOWLEDGED THAT IT MAY NOT DETAIN MR. PONCE DE LEON UNDER THE IMMIGRATION LAWS

A. INTRODUCTION

This case presents a live "case or controversy": May the government arrest and detain a person who has at least a plausible claim to United States citizenship without first holding a constitutionally adequate hearing establishing that the person is an alien and thus subject to the authority to detain under the immigration laws? It was justiciable at the time it was filed (*i.e.*, Mr. Ponce de Leon had standing), and it remains justiciable now (*i.e.*, it is not moot). It is undisputed, of course, that if an individual 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." Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008).

The district court's decision should be reversed because the government utterly failed to meet its "heavy burden" of proving mootness: the challenged policy remains in effect, and the government's voluntary cessation of Mr. Ponce de Leon's detention does not make "absolutely clear" that it will not return to the unlawful behavior,

especially in light of its refusal to disavow its unlawful detention of Mr. Ponce de Leon.

B. STANDARD OF REVIEW

"Mootness is a question of law reviewed de novo." Alaska Ctr for the Env't v. U.S. Forest Serv., 189 F.3d 851, 854 (9th Cir. 1999).

C. THE GOVERNMENT FAILED TO MEET THE "HEAVY BURDEN" OF PROVING MOOTNESS

This is one of those rare cases where the question of who bears the burden of proof makes a real difference. See, e.g., Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221 (2000) (unanimously reversing where the Tenth Circuit "placed the burden of proof on the wrong party"). Here, it was the government—and it failed to meet that burden. It is well established that it is the "party asserting mootness" who bears the burden of "establishing that there is no effective relief remaining for a court to provide." Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116-17 (9th Cir. 2003). As this Court and numerous other courts have said, establishing mootness is a "heavy burden"—one that was not met here. Oregon Advocacy Ctr., 322 F.3d at 1116; see also United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) ("the burden [of proving mootness] is a heavy one").

What the government had to—but failed to—prove was that, in the words of the Supreme Court, it is "absolutely clear that the litigant no longer had any need of the

judicial protection that it sought." Adarand Constructors, Inc., 528 U.S. at 220. In the absence of a showing that "there was no reasonable expectation that the wrong will be repeated," a properly raised and redressable claim remains justiciable by a federal court. See Anderson v. Evans, 371 F.3d 475, 502 n.27 (9th Cir. 2004). The proper placement of the burden is particularly important where, as here, cessation and re-infliction of the wrongful act is entirely within the government's control.

Yet, the district court entirely failed to put the government to its burden, and its conclusory decision did not address the two relevant strands of mootness doctrine: (1) voluntary cessation and (2) capable of repetition, yet evading review. The government failed to meet its burden under both lines of law.

1. Voluntary Cessation

In "voluntary cessation" cases—cases where the defending party claims the matter has become moot because it has stopped doing the offending activity (here, the claimed cessation is release from custody)—courts apply a presumption against mootness. As the Supreme Court has explained: "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" County of Los Angeles v. Davis, 440 U.S. 615, 631 (1979) (quoting W.T. Grant Co., 345 U.S. at 632).

That "general rule" applies unless the defending party can meet the two-pronged test set forth in Davis by showing that: "(1) it can be said with assurance that

'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Davis, 440 U.S. at 631 (citations omitted). Only if "both conditions are satisfied" can it "be said that the case is moot." Id. Neither prong was met here.

a. The Government Failed to Meet Its Burden of Proving That There Is "No Reasonable Expectation of Recurrence"

The "reasonable expectation of recurrence" test is strictly construed against defending parties who, as here, invoke voluntary cessation as a defense to suit. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (noting that if voluntary cessation deprived a court of jurisdiction, "the courts would be compelled to leave the defendant free to return to his old ways") (quotation marks and alteration omitted). To determine whether the defending party has met its showing of "no reasonable expectation of recurrence," courts look to both objective factors—such as happenstance or events beyond the parties' control—see, e.g., Davis, 440 U.S. at 631-32 (the allegedly wrongful hiring practice was only in place due to the existence of "a temporary emergency shortage of firefighters" a temporary circumstance beyond the parties' control that had since dissipated), and subjective factors—such as what assurances or promises the defendant has made. See, e.g., Rosales-Garcia v. Holland, 322 F.3d 386, 397 (6th Cir. 2003) (considering whether

the government had made any "promise" to desist from future detention of the petitioner).

i. No Objective Factors Dispel the Reasonable Expectation of Recurrence

There is no intervening, objective change in circumstances at play here. In other words, there is nothing the government can point to that is remotely akin to the end of the "temporary emergency shortage of firefighters" in Davis that mooted the dispute over a temporary hiring practice no longer employed by the defendant. See id. at 632. In Davis, the plaintiffs disputed the legality of the firefighter hiring plan that Los Angeles County had put forth and briefly considered using in 1972, but rapidly abandoned when minority representatives objected. Id. at 629. That hiring plan—which was never put into effect—was proposed only as an emergency stopgap measure to "expedite the hiring of sufficient firefighters to meet the immediate urgent requirements of the Fire Department." Id. Those "immediate urgent requirements," in turn, were due to an unintended hiring freeze resulting from separate, unrelated litigation in state court that enjoined Los Angeles from implementing the race-neutral hiring method it had previously proposed in 1971, which ostensibly would have addressed the complaints of the Davis plaintiffs. Id. But by the time the lawsuit made its way to the Supreme Court in 1979, the 1972 plan was ancient history. It had been thoroughly "abandoned, uneffectuated, prior to the commencement of [the] litigation."

Id. Moreover, the county had found and implemented a different method of hiring that was satisfactory to the Davis plaintiffs and the "temporary emergency manpower" shortage at the fire department was long gone. Id. at 631. In short, the extrinsic circumstance that had created the offending act—the unrelated state court injunction that caused a temporary emergency firefighter shortage—had resolved itself with no threat of future recurrence. See id. at 631-32 (holding that there was "no reasonable expectation that petitioners will use an unvalidated written examination for the purposes contemplated in 1972").

Here, by contrast, there are no intervening extrinsic circumstances for the government to blame. Both the government's unlawful detention of Mr. Ponce de Leon and its policy of detaining plausible citizens without a hearing are its own doing. Unlike the county in Davis, the government here is not caught between the rock of two opposing lawsuits restricting its options and the hard place of the urgent need to stem the threat to public safety posed by a temporary firefighter shortage. To the contrary, the respondents' actions here are a far cry from Los Angeles County's good faith efforts to tread the thin line it was presented with. The decision to subject Mr. Ponce de Leon to three months of unlawful immigration detention was solely and unilaterally made by DHS. So was the decision to release him. As the government has admitted, "DHS released petitioner from custody" not because it was ordered to by a court or immigration judge, but because it elected to do so itself upon

"review[ing] and consider[ing] Petitioner's documentation in support of his claim to U.S. citizenship." ER 51-52; see also ER 53 (DHS made decision to release before the immigration judge took any action). Moreover, unlike in Davis, where the entire hiring plan was scrapped, the offending policy here remains unchanged.

Neither can the government claim that the IJ's termination of removal proceedings posed a Davis-like change of circumstances. As the government has repeatedly stated, the immigration judge terminated proceedings only because DHS asked him to: "[O]n January 7, 2009, *based on DHS's motion to terminate* the removal proceedings, the Immigration Judge . . . terminated the removal proceedings." ER 53 (emphasis added); see also ER 52 ("DHS . . . moved for termination of the removal proceedings. Accordingly, . . . the IJ terminated the removal proceedings."). Thus, far from being an independent circumstance beyond the control of the parties, the termination of proceedings was an event that DHS itself (one of the respondents sued here) precipitated.

Finally, and devastating to the government's claim of mootness, the policy challenged by Mr. Ponce de Leon simply has not ended. The government makes no effort to dispute what it knows to be true: it continues to maintain its policy of refusing to hold a hearing to establish alienage as a precondition to detention in cases where the individual has a plausible claim to citizenship. Indeed, DHS informed Mr. Ponce de Leon in writing: "You may not request a review of this [detention]

determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody." ER 39. This policy is not only readily applicable to Mr. Ponce de Leon, it has in fact been applied to him and will remain applicable unless his claim for injunctive relief is heard on the merits.

Indeed, the case for mootness here is far weaker than it was in NYPIRG v. Johnson, where the Second Circuit viewed with skepticism the defendant's argument that a settlement and subsequently entered consent decree rendered the case moot. See 427 F.3d 172, 185 (2d Cir. 2005) ("We are unpersuaded that the EPA and the DEC, on the basis of the voluntary agreement reached here, would not in the future sidestep the mandated Title V permit objection procedures."). NYPIRG's strict application of the presumption against mootness—even where a binding consent decree limited the actions of the defendant—highlights the extreme deficiency of the government's showing here: there is no settlement in place here at all, and certainly nothing to show that the government "would not in the future sidestep" the Due Process Clause and Non-Detention Act's prohibition on citizen detention. See id.

ii. No Subjective Factors Dispel the Reasonable Expectation of Recurrence

Likewise, the government can identify no subjective factors guaranteeing the permanence of the defendant's voluntary cessation. Courts have looked to whether the defendant has "expressly disavowed" future acts, e.g., In re Pruett, 133 F.3d 275,

278 (4th Cir. 1997) (in discovery dispute case, observing that "Royal has not expressly disavowed future attempts to seek ex parte discovery" and concluding that "[t]he issue will continue to arise"), or made any "promise" to refrain from reinstituting the wrongful event, e.g., Rosales-Garcia, 322 F.3d at 397 (government had released habeas petitioner from immigration detention but case was not moot because it "has made no [] promise" to refrain from arresting and detaining him in the future).

Where an ongoing and systemic problem or policy is at issue, as here, courts have also looked to whether the defendant has "proffered [] evidence to suggest that th[e] problem has ceased," e.g., Oregon Advocacy Ctr., 322 F.3d at 1117 ("In light of the record and of OSH's failure to proffer contrary evidence, we must assume that the detention of incapacitated criminal defendants in Oregon county jails for weeks or months continues to occur."), or whether it "reserves the right" to maintain its policy and make individual decisions under the policy that could result in future harm, e.g., Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519, 529 (8th Cir. 1993) ("DHS reserves the right to set [Medicaid] reimbursement rates, and DHS has clearly not met its burden of showing that a reduction will not be repeated").

Here, not a single one of the subjective factors favors the government. The government has never made an "express disavowal" of its authority to detain Mr. Ponce de Leon under the immigration laws (even though he is a United States

citizen); nor has it expressly disavowed the right to detain citizens accused of being deportable aliens without first holding a due process-compliant hearing to determine alienage. See In re Pruett, 133 F.3d at 278 (concluding that, in the absence of express disavowal, "[t]he issue will continue to arise, and, in light of its relatively ephemeral nature, we believe we should keep it in our grasp"). The government has not, for example, conceded that Mr. Ponce de Leon is indeed a United States citizen. Nor has it disavowed the three months of unlawful detention it imposed on him from October 2008 to January 2009.

Neither has it promised not to detain Mr. Ponce de Leon again in the future. Far from it; indeed, it studiously refuses to acknowledge that Mr. Ponce de Leon is a United States citizen.[3] It insists on describing him as "a native of Mexico who *claims* derived U.S. citizenship"; nowhere does it indicate any acceptance of the fact that Mr. Ponce de Leon actually is a citizen. ER 51 (emphasis added). The government's choice of language is highly revealing. The ordinary definition of "claim" assumes that the status of the claim has not been finally determined: "claim" means "to state to be true, especially when open to question." American Heritage Dictionary (4th ed. 2009). Thus, it is evident that in the government's view, Mr. Ponce de Leon is

[3]Proof of Mr. Ponce de Leon's derivative citizenship is laid out in the petition. See CR1 at 5-8 & Apps. B-H; ER 5-8, 17-35.

someone who merely asserts citizenship, a matter "open to question"—that is, he is not someone whose citizenship status DHS views as having been determined.

The government, moreover, takes pains to make clear that removal proceedings were terminated not because an immigration judge had found Mr. Ponce de Leon to be a citizen, but instead at DHS's behest. In its own words:

> *[B]ased on DHS's motion* to terminate the removal proceedings, the Immigration Judge ("IJ") terminated the removal proceedings.

ER 53 (emphasis added); see also ER 52 (". . . DHS . . . moved for termination of the removal proceedings. Accordingly, on January 7, 2009, the IJ terminated the removal proceedings."). In short, not only does the government fail to make the express disavowal required by Pruett and Rosales-Garcia, it has clearly reserved the right to impose future immigration detention on the "native of Mexico" whose "claim" to citizenship it refuses to accept. See Arkansas Medical Society, Inc., 6 F.3d at 529 (case was not moot where defendant "reserve[d] the right" to set the challenged Medicaid reimbursement rates).

Without an express disavowal or promise, and in light of the government's contrary position, the government has failed to meet its burden of assuring the court that the complained-of unlawful detention will not again befall Mr. Ponce de Leon or other United States citizens. Moreover, it is clear that the holding of Oregon Advocacy Center applies here because immigration detention of United States citizens

is an "ongoing, pervasive, and systemic problem." 322 F.3d at 1117. Mr. Ponce de Leon adduced evidence demonstrating the extent of the systemic problem: five specific cases of actual United States citizens who suffered prolonged detention in recent years (and this just scratches the surface); 55 cases of detained citizens discovered by the Associated Press in the past eight years; literally hundreds of cases of people with citizenship claims subjected to immigration detention; and hundreds more cases of citizens wrongfully arrested by immigration officials. See ER 67-71, 74-75, 101, 102.

This state of affairs is indistinguishable from the "ongoing, pervasive, and systemic problem" of delays in accepting mentally incapacitated criminal defendants by the Oregon state mental hospital in Oregon Advocacy Center. In that case, this Court held that the plaintiff's challenge to the delays was not moot for two reasons: first, the defendant "failed to proffer contrary evidence" to dispel the presumption that the wrongful detention of mentally incapacitated inmates in county jails "continues to occur"; and second, because the plaintiff there challenged not only the delay in a specific case, "but also *the policy that results in such delays*." Oregon Advocacy Ctr, 322 F.3d at 1117-18 (emphasis in original). Both reasons pertain here: the government has proffered no evidence to suggest that it will not continue to arrest and detain citizens (or for that matter, that it will not re-arrest and detain Mr. Ponce de Leon himself), and Mr. Ponce de Leon has challenged the government's policy of

requiring no hearing as a precondition to imposing detention—the "policy that results in [the challenged harm]." See id. Thus, here, as in Oregon Advocacy Center, the "continued and uncontested existence of the policy that gave rise to [the] legal challenge forecloses [respondents'] mootness argument." The holding of that case is binding here; the district court's judgment should be reversed.

b. Complete and Irrevocable Eradication of Effects

The government fares no better at proving the second prong of the Davis test because the challenged policy has not been changed. When a government policy is at issue, a "permanent" change in position is generally required to prove that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." See United States v. Brandau, 578 F.3d 1064, 1068-69 (2009). An agency rule change or statutory change will suffice. See id. (citing White v. Lee, 227 F.3d 1214, 1243 & n.1 (9th Cir. 2000)). Anything less, however, is likely to be inadequate. See id. at 1069 (even the district court's change to its shackling policy did not render the case moot). Indeed, even where there is a policy change, any suggestion that the changed policy is "not in its final iteration"—that is, the change is not permanent—will defeat the argument that the interim change is "irrevocable." Id. (looking to the district court's "re-promulgation of the shackling policy on three separate occasions since these cases began" and concluding that "any relief that the new policy has afforded is not 'irrevocable.'").

Here, there has not even been a change in the challenged policy, let alone one that is "permanent" and "irrevocable." The government continues to maintain its citizen detention policy; nothing suggests otherwise. This fact alone is decisive under Brandau. See id. (in challenge by pretrial detainee to district court shackling policy, his release did not render the case moot because, despite the change in policy, it was not "absolutely clear" that the change was permanent or had been actually effectuated). Given that an actual policy change could not render the case moot where it was not established to be "final," the total lack of policy change here completely defeats any contention that the controversy has been "completely and irrevocably eradicated."[4] In short, Brandau precludes a finding of mootness here so long as the government has not permanently changed its detention policy.

It is important to recall that this case (like Brandau) presents a challenge to an ongoing government policy—not just to Mr. Ponce de Leon's individual detention. In the absence of a policy challenge, the nature of the "irrevocable eradication" analysis can often be quite different. This is because, instead of looking to the ongoing effects of the policy, it asks whether the disparate event (which has become

[4]Remarkably, and even setting aside the dispositive fact of the unchanged policy, the government has not even changed its position regarding detention of Mr. Ponce de Leon, specifically. At no time during the pendency of this litigation has the government disavowed its claimed authority to subject Mr. Ponce de Leon to immigration detention. As described above, it continues to refuse recognition of his United States citizen status, and has never promised not to detain him in the future.

unredressable) continues to have effects that are redressable. See, e.g., Abdala v. INS, 488 F.3d 1061, 1064-65 (9th Cir. 2007); see also Alvarez v. Smith, 558 U.S. –, 2009 WL 4573274 (Dec. 8, 2009) (challenge to state forfeiture law was moot where prospective relief was not at issue and redress could be had through damages actions). Abdala v. INS, the case the district court cited in dismissing this case, is such a case. In Abdala, the petitioner was an INS detainee who filed a habeas petition challenging only "the length of his pre-deportation detainment." Id. at 1062. Shortly thereafter, he was deported to Somalia. The Court held that his case became moot upon his deportation because there was no harm left for the court to redress. See id. at 1064-65 ("As of the date of his deportation, there was no extant controversy for the district court to act upon and Abdala's petition was moot"). As this Court explained, habeas cases seeking only release from custody or a stay of deportation typically become moot when the petitioner is deported or released from custody because "successful resolution of their pending claims could no longer provide the requested relief." Id.

Here, by contrast, Mr. Ponce de Leon raises a policy challenge that remains redressable despite his release. That fact, in short, explains why Brandau controls rather than Abdala—and why the district court erred in relying on Abdala. Indeed, the district court entirely failed to address the fact that Mr. Ponce de Leon raised a policy challenge; it apparently simply assumed that he sought only release from custody. See

CR 15 at 2; ER 137. Its order makes clear that it never considered the legal implications of a policy challenge:

> Petitioner sought immediate release from unlawful detention in his petition, and having been released and the removal proceedings terminated, there are no collateral consequences redressable by Petitioner's requested habeas relief of immediate relief.

CR15 at 2; ER 137. The order's failure to make any mention of Mr. Ponce de Leon's policy challenge and request for prospective relief suggests that this claim was simply overlooked by the district court. See CR1 at 12; ER 12 (habeas petition, requesting "by way of a preliminary and final injunction . . . an order prohibiting Respondents from imposing further detention and/or arrest upon Petitioner, without first establishing that he is an 'alien' subject to the immigration statutes"). As Mr. Ponce de Leon undeniably had standing at the time the suit was filed, cf. Spencer v. Kemna, 523 U.S. 1, 7 (1998) ("[a]n incarcerated [person's] challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury"), the case has not become moot in the interim.

In sum, the government has failed to meet the "stringent" standard for voluntary cessation cases of "ma[king] it absolutely clear" that the wrongful behavior "could not reasonably be expected to recur." See Friends of the Earth, Inc., 528 U.S. at 189. They have thus failed to dispel the presumption of justiciability.

2. Capable of Repetition, Yet Evading Review

This case is not moot for a second reason: the dispute is one that is "capable of repetition, yet evading review." Under this line of law, courts retain jurisdiction despite the cessation of the complained-of wrong "when (1) the duration of the challenged action is too short to be litigated prior to cessation, and (2) there is a 'reasonable expectation' that the same parties will be subjected to the same offending conduct."[5] Demery v. Arpaio, 378 F.3d 1020, 1026 (9th Cir. 2004). Where the petitioner is "challenging an ongoing government policy" and his legal counsel is an institutional repeat player certain to encounter the future adverse effect of the policy on some future client—the federal public defender presents the paradigmatic example—the court relaxes the requirement that "the same parties" be affected in the future. See United States v. Howard, 480 F.3d 1005, 1009 (9th Cir. 2007) (holding that challenge by individual pretrial detainees to shackling policy was "materially similar to a class action" and was not moot because "some future charge assuredly" would be shackled and represented by "the office of the Federal Public Defender").

[5]"Voluntary cessation" and "capable of repetition, yet evading review" doctrines are not mutually exclusive. The latter applies, however, even in cases where the cessation is not a result of the defendant's actions; indeed, the "classic case" is Roe v. Wade, 410 U.S. 113 (1973), where it was the length of human gestation, not the defendant's actions, that potentially limited review. See United States v. Howard, 480 F.3d 1005, 1009 (9th Cir. 2007). For this reason, when both doctrines apply, courts utilize voluntary cessation law's presumption of justiciability and placement of the burden on the defendant in the course of conducting "capable of repetition" analysis. See, e.g., Anderson, 371 F.3d at 502 n.27.

a. The Duration of the Unlawful Detention Is Too Short to Be Litigated

The controversy here evades review because the government's unlawful detention of plausible United States citizens lasts, on average, no more than several months—not enough time to permit litigation. A matter is too short in duration if "in its regular course, [it] resolves itself without allowing sufficient time for appellate review." Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1173-74 (9th Cir. 2002). This Court has held that a period of two years is "not enough time to allow for full litigation." Id. (citing Alaska Ctr. for the Env't, 189 F.3d at 855).

Unlawful citizen detention easily satisfies the duration prong. Like the pretrial shackling challenged in Howard, the duration question focuses on the time it takes for the harm to take effect. See Howard, 480 F.3d at 1009 (considering whether the case could be reviewed "before the harm of shackling at the initial proceeding was completed."). The harm here—being a plausible citizen detained under color of immigration law in the absence of prior notice and a procedurally adequate hearing—takes immediate and irrevocable effect as soon as the arrest and detention are effectuated. This is, of course, too soon for review to be had.

Even taking the total length of detention as the unit of analysis, the duration is too short to permit review. The length of detention tracks the average length of immigration proceedings, which typically take no more than five months. See

Demore v. Kim, 538 U.S. 510, 530-31 (2003) (mandatory detention "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal"). Mr. Ponce de Leon spent just shy of three months in detention; his release was precipitated by the time it took for DHS to review his claim to citizenship. That period of time, as is evident in the record, was determined by the timing of his immigration court proceedings because DHS had to review his documentation before the hearing—in this case, one day before. See ER 52, 53 (DHS "reviewed and considered Petitioner's documentation," and released him on January 6, 2009, the day before his hearing on January 7).

Three to five months is nowhere near enough time to permit appellate review. Here, fourteen months have elapsed since Mr. Ponce de Leon was taken into detention, and at least another one to two and a half years is likely to elapse before a decision is reached in this appeal. See United States Court of Appeals for the Ninth Circuit, Frequently Asked Questions, at http://www.ca9.uscourts.gov, Question Nos. 18 & 19 (in civil cases, it takes approximately 12-20 months from the filing of the notice of appeal to oral argument, and another 3-12 months after argument until a decision is issued). Indeed, five months is likely to evade even district court review alone. Here, it took the district court over five months before it even issued a briefing schedule on the habeas petition. See CR11; ER 48-49 (order issued on May 15, 2009,

five and a half months after petition was filed on December 29, 2008). Decision was not rendered until July 8, 2009, over seven months after the filing of the petition. See CR15; ER 136-37. This time frame, unfortunately, was not atypically long for habeas cases brought under 28 U.S.C. § 2241 in the Southern District of California. In practice, no express time limits apply to district court actions on such petitions. Judges are directed by statute to issue the writ or show cause order "forthwith," and to direct the respondent to respond "within three days," or in the presence of good cause, "not exceeding twenty days." See 28 U.S.C. § 2243. Although Congress clearly intended decision on § 2241 petitions to be expedited, the reality, at least in Mr. Ponce de Leon's district of confinement, is that § 2243's language is treated as purely hortatory and the three- to twenty-day time frame is wholly ignored.[6] In any event, the reality makes plain that the duration prong is easily met here.

It is also relevant to note that the length of detention is solely under respondents' control, and that the event purportedly resulting in mootness was a result of their own actions. Tellingly, they chose to release Mr. Ponce de Leon just eight

[6]See, e.g., Valdez-Bernal v. Chertoff, No. 08CV780-JAH (POR) (S.D. Cal.) (amended petition raising unlawful citizen detention filed on November 25, 2008, in § 2241 habeas case originally filed on April 29, 2008; case remains fully briefed and pending to date, over one year after filing of amended petition); see also Harris v. DHS, No. 06CV1768-BEN (POR) (S.D. Cal.) (section 2241 habeas case remained fully briefed with no decision for eighteen months before case was rendered moot by extrinsic circumstances, over two years after filing of petition); Casas-Castrillon v. Lockyer, No. 05-01552-BEN (NLS) (S.D. Cal.) (decision issued in § 2241 habeas case two years after filing of petition).

days after this litigation was initiated—timing that suggests an intent to prevent adjudication of the dispute. The suspicious timing is exacerbated by the fact that, for the previous three months, DHS had maintained the position that his detention was mandatory and unreviewable. See ER 39 (informing Mr. Ponce de Leon that "the Immigration and Nationality Act prohibits your release from custody" and that he could "not request review of this determination"). Cf. Biodiversity Legal Foundation, 309 F.3d at 1174 (duration prong was satisfied in suit challenging wildlife listing determinations where plaintiffs identified a pattern of listing determinations being made "shortly after litigation began"). As the circumstances surrounding Mr. Ponce de Leon's release show, detention is wholly and exclusively at DHS's discretion. The same is true of the pendency of removal charges, which were dismissed here upon DHS's request. See ER 52, 53. Because ICE "can grant [a detainee] . . . parole [or release] at any time, such detention can always evade review." Rosales-Garcia, 322 F.3d at 397.

The detention here is thus indistinguishable from pretrial detention, which the Supreme Court recognized as inherently temporary in Gerstein v. Pugh, 420 U.S. 103 (1975). And here, as in Gerstein, "it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or [deported]." Id. at 111 n.11; see also United States v. Roblero-Solis, – F.3d –, 2009 WL 4282022, at *6 (9th Cir. Dec. 2, 2009) (individual defendants' challenge to mass

plea practice was not moot despite completion of sentence under Sibron v. New York, 392 U.S. 42 (1968), because "analogous considerations counsel treating as alive these cases where the 'time served sentences' are so short that no appeal would be practicable").

b. There Is a Reasonable Expectation of Repetition

In the ordinary case, the "capable of repetition" test asks whether the conduct will again affect the "same parties" in the future. See Demery, 378 F.3d at 1026. An exception to the "same parties" rule applies under certain circumstances: in class actions, see Gerstein, 420 U.S. at 110 n.11; where the plaintiff is a representative organization challenging an ongoing policy, see Oregon Advocacy Ctr., 322 F.3d at 1117; and where an individual is "challenging an ongoing government policy" and is represented by a representative organization such as the Federal Public Defender, see Howard, 480 F.3d at 1010; see also Brandau, 578 F.3d at 1067.

i. There Is a Reasonable Expectation of Recurrence Under Howard and Brandau

The third exception to the "same parties" rule applies here. As this Court has twice held recently in Howard and Brandau, challenges by individuals are considered "capable of repetition" in policy challenge cases litigated, as here, by the federal public defender. In Howard and Brandau, at issue was the district court's policy of shackling defendants at their initial court appearances. See Brandau, 578 F.3d at 1065

(full body shackling policy in the Eastern District of California); Howard, 480 F.3d at 1008 (leg shackling policy in the Central District of California). By the time the cases wound their way to this Court, the defendants' pretrial proceedings had ended, and the government argued mootness. See Howard, 480 F.3d at 1009. This Court acknowledged that the case was unlike the traditional "capable of repetition, yet evading review" case because it could not "assume that criminal conduct will be recurring on the part of these defendants." Id. at 1009-10. It refused to dismiss, however, holding that lack of repetition as to the same parties "makes no material difference . . . because *some future charge assuredly will be brought against someone*, and the shackling policy would similarly escape review." Id. at 1010 (emphasis added).

The Howard court recognized that, because the defendants were "challenging an ongoing policy," the case was indistinguishable from the organizational plaintiff and class action cases. See id. (citing Oregon Advocacy Ctr., 322 F.3d 1101, and Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374, 1377 (D.C. Cir. 1990)). Because the defendants in Howard were "seeking to represent interests broader that their own, and the attorney bringing the case is a Federal Public Defender with other clients with a live interest in the case," this Court held that the case was "materially similar to a class action in which the class representative's claims may become moot, but there are members of the class whose claims are not moot." Id. (citing Gerstein,

420 U.S. at 110). As this Court subsequently explained: "we held in Howard that the appeal . . . was not moot because *the shackling policy was ongoing*, even though each of the seventeen defendants who challenged that policy . . . were no longer in pretrial criminal proceedings." Brandau, 578 F.3d at 1067 (emphasis added). Howard's holding was subsequently extended in Brandau, which held that an individual's policy challenge might fall under the "capable of repetition, yet evading review" doctrine even where the policy was "at least in writing, no longer in place." See 578 F.3d at 1067-68 (remanding for factual findings on the actual state of the shackling policy).

Howard, Brandau, and Oregon Advocacy Center squarely control here. It is undisputed that the government's citizen detention policy is ongoing; the government makes no claim that it has ceased. It is also a certainty that the government will detain people with at least plausible claims to citizenship in the future; the evidence suggests that this occurs with great frequency. See ER 67-71, 74-75, 101, 102 (the Vera Institute found 322 people in detention with claims to United States citizenship, and numerous cases documented the detention of individuals whose citizenship was verified). Indeed, it is hardly uncommon for derivative citizens to suffer through detention, actually be deported, and subsequently arrive in the federal public defender's office on criminal charges of illegal reentry. See, e.g., ER 70 (describing deportations of Pedro Guzman, a mentally disabled United States citizen, and Duarnis

Perez, another citizen who was wrongly deported and who spent five years in prison as an illegal reentrant).

Like the individuals in Howard and Brandau, Mr. Ponce de Leon is represented by the federal defender in his district of confinement, Federal Defenders of San Diego, Inc., who has "other clients with a live interest in the case." See Howard, 480 F.3d at 1009; see, e.g., Valdez-Bernal v. Chertoff, No. 08CV780-JAH (POR) (S.D. Cal.) (pending). Those cases are thus squarely on point, and the Supreme Court's holding in Gerstein applies here: "it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'" Gerstein, 420 U.S. at 111 n.11.

ii. Reasonable Expectation of Recurrence As to Mr. Ponce de Leon

Mr. Ponce de Leon strenuously maintains the applicability of the Howard/ Brandau line of cases. However, even under the ordinary test, this case satisfies the "capable of repetition" prong because the government has never met its burden of showing that the same harm could not reasonably be expected to be visited upon Mr. Ponce de Leon in the future. See supra at 17-27. "Reasonable expectation" is a low standard that is easily met. See Honig v. Doe, 484 U.S. 305, 318-20 (1988) (there was a reasonable expectation of future adverse school board action against plaintiff

in civil rights suit by disabled students, even though he no longer resided within the local school district and was not enrolled in school). There need not be a demonstrated probability of recurrence; the question focuses on whether the harm is "*capable*" of repetition. See id. at 318 n.6; see also Adarand Constructors, 528 U.S. at 224 (the standard for recurrence is lower for mootness than standing).

A "reasonable expectation" of recurrence is as present here as it was in Honig, and Demery, where this Court looked to the fact that the plaintiff had experienced numerous previous detentions in the local jail whose "Jail Cam" webcast was under review, and concluded that there was "compelling evidence that the plaintiffs likely will be reincarcerated at the Madison Street Jail." Demery, 378 F.3d at 1027. As explained above, the decision to detain Mr. Ponce de Leon was made upon the decision of a low-level local deportation officer, which the government has never disavowed. See ER 39. Tellingly, it has not promised to desist from future arrest and detention of Mr. Ponce de Leon, and even refuses to acknowledge his citizenship. Furthermore, because neither ICE nor any other agency tracks incidents of citizen detention, see ER 68-69, it is clear that the government has no mechanism of ensuring that it does not repeatedly subject the same individual to unlawful detention. It is, moreover, well documented that the government engages in large-scale, mass arrests of individuals, often in innocuous settings such as places of employment, that result in scores of citizens being unlawfully detained. See ER 69.

In addition, the government cannot rely on the immigration judge's termination of proceedings because, as it has repeatedly admitted, proceedings were terminated upon DHS's request rather than pursuant to an adjudication on the merits. ER 52, 53; see also ER 54 (IJ's order does not state proceedings terminated with prejudice). In other words, there exists no *res judicata* bar to prevent DHS from re-arresting and re-charging Mr. Ponce de Leon. See, e.g., Valencia-Alvarez v. Gonzales, 469 F.3d 1319, 1323-24 (9th Cir. 2006) (res judicata only applies if there is a "final judgment . . . *on the merits*"); 8 C.F.R. § 239.2(a)(6)&(7) (a Notice to Appear may be canceled as "improvidently issued," or where "continuation is no longer in the best interest of the government").

In sum, the fact that the government has detained Mr. Ponce de Leon once, makes no promise to refrain from future detention, maintains its unlawful policy of citizen detention, reserves the right to detain or re-charge at will, and has no review process or other mechanism of ensuring that he does not fall victim again to ICE's excessive interpretation of its detention authority, all add up to the conclusion that the government may be reasonably expected to detain Mr. Ponce de Leon again. See Demery, 378 F.3d at 1027; Rosales-Garcia, 322 F.3d at 397 ("Because the INS can revoke Rosales's parole at any time and has in fact revoked Rosales's parole twice in the past fifteen years, there is a reasonable expectation that Rosales will again be subject to indefinite INS detention.").

II.

THE GOVERNMENT MAY NOT SUBJECT INDIVIDUALS WITH A PLAUSIBLE CLAIM TO CITIZENSHIP TO IMMIGRATION ARREST OR DETENTION WITHOUT ESTABLISHING ALIENAGE AT A DULY-NOTICED HEARING AS A PRECONDITION OF DETENTION

The government's policy of citizen detention without establishing alienage (and thus authority to detain) at a duly-noticed, due process-compliant hearing as a precondition of detention violates the Due Process clause and the Non-Detention Act, 18 U.S.C. § 4001. The district court should be directed to enter judgment in Mr. Ponce de Leon's favor on the merits because he has made a meritorious showing under Matthews v. Eldridge, 424 U.S. 319, 335 (1976), to which the government has raised no dispute.

As Mr. Ponce de Leon set forth in his habeas petition, see ER 8-12, it is unlawful for the government to detain United States citizens under color of authority set forth in the INA. It is undisputed the immigration laws do not authorize DHS to detain United States citizens; they expressly authorize detention only of "aliens." See 8 U.S.C. § 1226(a) (an "alien may be arrested an detained"), 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien"), and 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (an arriving "alien . . . shall be detained"). See also 18 U.S.C. § 4001 (prohibiting detention of citizens in the absence of express Congressional authorization); Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir.

2008) (immigration detention of citizens "would be unlawful under the Constitution and under the Non-Detention Act").

And because the fundamental right to liberty at stake, due process and constitutional avoidance require the government to bear the heavy burden of proving its claimed authority to deprive an individual of that right. See 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 the [Due Process] Clause protects"). The Non-Detention Act and the INA must be construed to place the burden of proof by at least clear and convincing evidence upon the government to avoid running afoul of the Due Process Clause. See Flores-Torres, 548 F.3d at 712 ("'In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'") (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)); Tijani v. Willis, 430 F.3d 1241, 1243 (9th Cir. 2005) (Tashima, J., concurring) ("[T]he Supreme Court has consistently adhered to the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual.").

In other words, the government may not simply rely on foreign birth and mere allegations of alienage to impose detention upon individuals who, like Mr. Ponce de Leon, have a non-frivolous claim to citizenship. See Tijani, 430 F.3d at 1243 (Tashima, J., concurring) ("[W]hen a fundamental right, such as individual liberty, is

at stake, the government must bear the lion's share of the burden."). In Flores-Torres, this Court recognized the serious constitutional questions triggered by "the government's position that an individual who asserts a non-frivolous claim of citizenship can be detained during immigration proceedings . . . without habeas review." Flores-Torres, 548 F.3d at 712. The Supreme Court, moreover, has never permitted civil detention without a heightened showing of governmental necessity; to the contrary, it has repeatedly recognized the Constitution's jealous protection of individual liberty. See, e.g., Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (Louisiana civil commitment statute placing the burden on acquittees to prove that they are not dangerous to others violated due process); Addington v. Texas, 441 U.S. 418, 1812-13 (1979) (civil commitment standard of proof must be more than preponderance of the evidence); cf. Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (preponderance of the evidence standard was insufficient in parental rights termination proceedings due to the "commanding" liberty interest at stake for the parents and risk of error inherent to the preponderance standard). These concerns are even further heightened because the detention here requires a determination of citizenship, which has likewise been recognized as an area where the government must bear a heavy burden of proof. See Chaunt v. United States, 364 U.S. 350, 353 (1960) ("clear, unequivocal, and convincing" evidence necessary to set aside a naturalization decree); Schneiderman

v. United States, 320 U.S. 118, 125 (1943) (government must present "clear, unequivocal, and convincing" evidence to uphold a cancellation of naturalization).

Thus, under the only constitutionally permissible construction of the immigration detention statues, the government must meet its burden of proof as a precondition of imposing detention. Here, the government not only failed to comply with this requirement, it did so even after Mr. Ponce de Leon's own brother was found by an immigration judge to be a derivative citizen by virtue of almost identical facts as Mr. Ponce de Leon presented here. See ER 14. In other words, even though Mr. Ponce de Leon was presumptively entitled to a derivative citizenship finding at the time his brother's removal proceedings were terminated in February 2008, DHS unilaterally decided to take him into custody and impose months of unreviewable detention under color of authority set forth in the immigration statutes.

This was no deviation; the practice of arresting and detaining first, and asking questions later (often months later, as here) is typical of the government's policy. The government's application of the immigration detention scheme to hold Mr. Ponce de Leon and other individuals with at least plausible claims to United States citizenship in prolonged detention without first proving his alienage by clear and convincing evidence or ever affording him judicial determination of his citizenship claim runs badly afoul of the Due Process Clause. Even in the related context of parole revocation—which, like immigration detention, concerns non-criminal

incarceration—the Supreme Court has held that due process requires a "preliminary hearing" "as promptly as convenient after arrest" to determine whether there is probable cause or reasonable ground to believe that detention is justified. See Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

The requirements of Morrissey, at the very least, set a floor for the procedural protections that must be in place here. Id. at 487 (notice, the opportunity to appear, present evidence, and be heard, and a limited right to confrontation must be provided at the preliminary hearing). Because Morrissey addressed parole revocation, which implicates a much lower degree of liberty (liberty conditioned on compliance with parole terms) than the unqualified liberty of United States citizens at issue here, the procedures that due process requires Respondents to follow before detaining individuals with non-frivolous claims to citizenship must be substantially higher. See, e.g., Valdivia v. Davis, 206 F. Supp. 2d 1068, 1072-73 (E.D. Cal. 2002) (the "first criteria in assessing the process due" under the applicable Matthews v. Eldridge balancing test are "the value of the liberty interest and the degree of potential deprivation").

Thus, while courts have interpreted Morrissey as requiring the preliminary "probable cause" hearing in the parole revocation context to occur within days of arrest, see, e.g., Validivia, 206 F. Supp. at 1077 n.17 (noting that "the Seventh Circuit has suggested in dicta that a ten-day delay may violate Morrissey, citing Luther v.

Molina, 627 F.2d 71, 75 n.3 (7th Cir. 1980)), proper application of Matthews here requires a preliminary determination of the applicability of the immigration detention statutes to occur before detention is imposed. See Matthews, 424 U.S. at 341. Matthews sets forth a balancing test which weighs the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Applying the first factor here, the individual's liberty interest is at its maximum; no authority permits detention of United States citizens, and individuals like Mr. Ponce de Leon, who was in pre-merits hearing detention, have never been found removable. See Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (O'Connor, J., plurality opinion) (petitioner's "'private interest . . . affected by the official action' is the elemental of liberty interests—the interest in being free from physical detention by one's own government"). Indeed, under the first Matthews prong, this Court must presume that Petitioner is a citizen because the proper "consider[ation is] the interest of the erroneously detained individual." Id. at 530. Deprivation of liberty is a severe infringement with serious consequences on a person's life. See Gerstein, 420 U.S. at 114 (noting in the pretrial detention context that "confinement may imperil the

suspect's job, interrupt his source of income, and impair his family relationships").

As for the second factor, the procedural safeguards currently in place are nonexistent; under the government's policy, neither Mr. Ponce de Leon nor any other individual in like position is afforded an opportunity to challenge the applicability of the immigration detention statutes. See ER 39 (form "Notice of Custody Determination" informing detainee of mandatory, unreviewable detention). To the contrary, despite the fact that DHS possessed direct evidence of Mr. Ponce de Leon's citizenship status, in the form of the IJ's finding that his brother was a citizen, the government did nothing to ensure the lawfulness of its actions before imposing detention under § 1226. Indeed, DHS went so far as to issue Petitioner a notice informing him that he "may not request a review of [the detention] determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody." See ER 39.

Finally, on the third prong, the administrative burden on the government is minuscule compared to the liberty interest at stake. Mr. Ponce de Leon came to the attention of DHS while he was incarcerated in state prison for an offense for which he was serving a two-year term. See ER 46 (allegations in Notice to Appear, issued seven months before he was taken into detention). The government had ample opportunity to conduct a hearing at the state prison before they took him into immigration custody at the termination of his state criminal sentence. Immigration

hearings are regularly held in California state prisons, and requiring a pre-detention preliminary hearing would place only a negligible additional burden on the government.

Such a hearing must, at a minimum, be accompanied by notice of the government's facts and allegations, a hearing at which the individual has the right to present evidence and arguments, and a right of cross-examination; the burden of proof by clear and convincing evidence must lie with the government. See Morrissey, 408 U.S. at 486-87; see also Hamdi, 542 U.S. at 537 (requiring the government to meet a heightened standard of production and rejecting the government's proposed "some evidence" standard). The decision to detain may not be unilaterally made, as it currently is, by a low-level ICE employee. See Gerstein, 420 U.S. at 116-17 (rejecting the state's argument that the practice of warrantless arrest and pretrial detention without a probable cause determination by a magistrate was justified "on the ground that the prosecutor's decision to file an information is itself . . . sufficient"). Due process requires that the government meet its burden to the satisfaction of a neutral arbiter, such as an immigration judge. See id., 420 U.S. at 114 ("When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."). This must be done *before* the imposition of detention. See id. (in pretrial detention context, "the Fourth Amendment requires a judicial determination of

probable cause as a *prerequisite* to extended restraint of liberty following arrest") (emphasis added).

In sum, because the government's policy violates Due Process and the Non-Detention Act, Mr. Ponce de Leon is entitled to an injunction preventing the government from carrying out arrest and detention of plausible citizens without first establishing alienage at a duly-noticed hearing.

CONCLUSION

For the reasons stated above, the judgment should be reversed.

Respectfully submitted,

DATED: December 16, 2009

/s/ Janet C. Tung

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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: December 16, 2009

/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

X Proportionately spaced, has a typeface of 14 points or more and contains 11,906 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).

.

December 16, 2009
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 December 16, 2009, 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

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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.

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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:

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APPENDIX A

Effective:[See Notes]

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [FN1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 4, § 236, 66 Stat. 200; Nov. 29, 1990, Pub.L. 101-649, Title V, § 504(b), Title VI, § 603(a)(12), 104 Stat. 5050, 5083; Dec. 12, 1991, Pub.L. 102-232, Title III, § 306(a)(5), 105 Stat. 1751; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, §§ 303(a), 371(b)(5), 110 Stat. 3009-585, 3009-645.)

[FN1] So in original. Probably should be "sentenced".

1996 Acts. Pub.L. 104-208, Div. C, Title III, § 303(b), Sept. 30, 1996, 110 Stat. 3009-586, provided that:

"(1) **In general.**--The amendment made by subsection (a) [amending this section] shall become effective on the title III-A effective date [with certain exceptions and subject to certain transitional rules, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub.L. 104-208 set out as a note under section 1101 of this title].

Current through P.L. 111-112 (excluding P.L. 111-84) approved 11-30-09

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part III. Prisons and Prisoners
Chapter 301. General Provisions
§ 4001. Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 847; Sept. 25, 1971, Pub.L. 92-128, § 1(a), (b), 85 Stat. 347.)

Current through P.L. 111-112 (excluding P.L. 111-84) approved 11-30-09

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