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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOHN DOE, Petitioner, v. MOISES BECERRA, et al., Respondents.	Case No. 5:23-cv-04767-PCP **RESPONDENTS' RETURN TO PETITION FOR WRIT OF HABEAS CORPUS**

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I. Introduction

Petitioner entered the United States without inspection, admission, or parole, and was later convicted of assault with great bodily injury, robbery and attempted robbery. Petitioner is now in removal proceedings and was taken into custody by U.S. Immigration and Customs Enforcement ("ICE") pursuant to 8 U.S.C. § 1226(c) ("Section 1226(c)"), which mandates the detention of noncitizens convicted of certain crimes pending removal proceedings. Petitioner's habeas petition challenges this congressionally mandated custody as a violation of his substantive and procedural due process rights. But, as a threshold issue, this Court lacks jurisdiction over Petitioner's habeas petition because he did not name the proper respondent and did not bring his petition in the proper judicial district. The Supreme Court has held that a petitioner challenging present physical confinement (as Petitioner does here) must name his immediate custodian, i.e., the warden of the facility where he is held, as respondent, and must bring his petition in the district of confinement. *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35, 442-43, 447 (2004). Binding Ninth Circuit case law likewise confirms that "jurisdiction lies in only one district: the district of confinement." *Lopez-Marroquin v. Barr*, 955 F.3d 759, 760 (9th Cir. 2020) (quoting *Padilla*, 542 U.S. at 443). Petitioner is confined in the Golden State Annex ("GSA") in the Eastern District of California. Petitioner thus must name as respondent the warden of GSA and must bring his petition in the Eastern District. Because Petitioner did not name the warden and because this Court is not in the district of confinement, this Court lacks jurisdiction over this petition. Further, even if this Court had jurisdiction, Petitioner has not established a cognizable due process claim because Petitioner's length of detention does not constitute either a substantive or procedural due process violation. Respondents respectfully request that the Court dismiss the petition or transfer it to the Eastern District of California, or, if the Court reaches the merits, deny the petition.

II. Statement of Facts

A. Petitioner's Background and Criminal Convictions

Petitioner is a native and citizen of Mexico. Dkt. No. 1 ("Petition") ¶ 30; Declaration of Deportation Officer Paul Villagran ("Villagran Decl.") ¶ 3. He was first brought to the United States as an infant without being inspected, admitted, or paroled, and settled in the South Los Angeles area with his mother. Petition ¶¶ 30-31. When he was about 12 or 13, Petitioner joined the Florencia 13 gang, and

later obtained multiple gang-related tattoos. Petition ¶ 34. Petitioner has two convictions. Villagran Decl. ¶¶ 5-6. In 1997, Petitioner pleaded guilty to assault with great bodily injury. *Id.* ¶ 5. While on probation in 2000, Petitioner was arrested again and charged with attempted robbery, robbery, and carjacking. Petition ¶ 36; Villagran Decl. ¶ 6. At trial, a jury found Petitioner guilty of robbery and attempted robbery. Petition ¶ 38. The judge sentenced Petitioner to 26 years and four months in prison. *Id.* The judge applied sentencing enhancements based on Petitioner's 1997 conviction and gang involvement. *Id.*; Villagran Decl. ¶ 6. Petitioner appealed, successfully challenging the gang enhancement and reducing his sentence by three years. Petition ¶ 39.

B. Petitioner's Removal Proceedings

At the conclusion of Petitioner's sentence, ICE commenced removal proceedings. Villagran Decl. ¶ 7. Petitioner was taken into custody on September 30, 2021. *Id.* ¶ 8. Petitioner is subject to mandatory detention pursuant to Section 1226(c) and is detained at GSA in McFarland, California. *Id*.

On September 30, 2021, and October 12, 2021, the Department of Homeland Security ("DHS") conducted a custody redetermination to assess whether Petitioner's detention was warranted in light of the requirements in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), relating to the conditions at immigration detention facilities during the COVID-19 pandemic. Villagran Decl. ¶ 9. DHS concluded that detention was warranted because the petitioner constituted a threat to public safety if released. *Id.*

Petitioner appeared for a removal hearing before an IJ on October 26, 2021, and requested a continuance to consult with an attorney. *Id.* ¶ 11. The IJ granted the request, and the hearing was continued to November 16, 2021. *Id.* On November 16, Petitioner appeared and was represented by counsel, who requested a continuance to allow time for attorney preparation. *Id.* The IJ granted the request and scheduled the next hearing for December 7, 2021. *Id.* At the December 7, 2021 hearing, Petitioner, through counsel, admitted the allegations and conceded the charge of removability listed in the Notice to Appear. *Id.* ¶ 13. Petitioner's counsel requested a continuance to allow time to file an application for relief. *Id.* The IJ granted the request and scheduled the next hearing for January 4, 2022. *Id.*

Petitioner appeared for the removal hearing before an IJ on January 4, 2022, and a merits hearing was set for March 2, 2022. *Id.* ¶ 14. On January 31, 2022, Petitioner's counsel filed a Motion to

Continue. *Id.* ¶ 15. The IJ granted the motion and set Petitioner's merits hearing for June 1, 2022. *Id.* However, on May 26, 2022, Petitioner's counsel filed a second Motion to Continue. *Id.* ¶ 16. The IJ granted the motion and set Petitioner's merits hearing for June 9, 2022. *Id.*

The merits hearing was held before an IJ on June 9, 2022. *Id.* ¶ 17. Petitioner was represented by counsel, who requested a continuance to review ICE's evidentiary filing. *Id.* The IJ granted the request and set a merits hearing for July 12, 2022. *Id.* The hearings on Petitioner's request for relief from removal took place on July 12 and August 11, 2022. *Id.* ¶ 18. On November 7, 2022, the IJ issued a written decision denying Petitioner's request for relief and ordering him removed to Mexico. *Id.* ¶ 19.

Petitioner appealed the IJ's order of removal to the Board of Immigration Appeals ("BIA") on December 5, 2022. *Id.* ¶ 20. He subsequently requested and was granted an extension of time to file a brief in support of his appeal and, on February 28, 2023, filed his brief. *Id.*

On May 4, 2023, the BIA dismissed Petitioner's appeal as well as a motion to hold the appeal in abeyance. Petition ¶ 64; Villagran Decl. ¶ 21. Petitioner filed a Petition for Review with the Ninth Circuit, which is currently pending. Villagran Decl. ¶ 22. Separately, Petitioner moved to reopen his removal proceedings based on ineffective assistance of counsel. *Id.* ¶ 23; Petition ¶ 66. The BIA denied that motion on September 5, 2023. Villagran at ¶ 25. A Petition for Review of that decision is also currently pending before the Ninth Circuit. *Id.* ¶ 26.

Petitioner sought release on an order of supervision on August 10, 2023, arguing that he is unlikely to be removed in the foreseeable future, he is not a flight risk or danger to the community, and his detention does not constitute a priority under DHS enforcement priorities. Petition Exh. B ¶ 35. ICE denied that request. *Id.* ¶ 70.

C. The Golden State Annex Detention Facility in the Eastern District of California

The Golden State Annex ("GSA"), where Petitioner is detained, is in McFarland, California, in the Eastern District of California. Declaration of Acting Assistant Field Office Director ("AFOD") Nancy Gonzalez ("Gonzalez Decl.") ¶ 4. GSA is a contract detention facility that is owned and managed by The GEO Group, Inc. ("GEO"). *Id*. GEO is an independent contractor that provides the facility with management, personnel, and services for 24-hour supervision of noncitizens in ICE custody at GSA. *Id.* The Facility Administrator (*i.e.*, the warden) of GSA is a GEO employee, whose office is based in

McFarland and provides direct on-site supervision of the facility and its personnel. *Id.*

Besides GEO's own private internal oversight and inspection processes, the federal government also mandates oversight through various inspection processes by ICE and other entities. *Id.* ¶ 5. AFOD Gonzalez and her staff directly liaise with the warden and other GEO employees at GSA. *Id.* ¶ 6. AFOD Gonzalez is based in Bakersfield, in the Eastern District of California. *Id.*; 28 U.S.C. § 84(b). AFOD Gonzalez's direct line supervisor is Deputy Field Office Director ("DFOD") Orestes L. Cruz, who is also based in Bakersfield, and who is responsible for direction and oversight of ICE immigration enforcement operations in nine counties, all in the Eastern District of California. *Id.* ¶ 7. DFOD Cruz's direct supervisor is Field Office Director ("FOD") Moises Becerra, who oversees ICE's San Francisco Area of Responsibility ("AOR"), which consists of ten offices. *Id.* ¶¶ 7-8. Two of these offices are in this District, five are in the Eastern District, one is in another state (Hawaii), and two are in U.S. territories (Guam and the Northern Mariana Islands). *Id.* ¶ 8. The San Francisco AOR includes five detention facilities: two in the Eastern District, one in Hawaii, one in Guam, and one in the Northern Mariana Islands (and none in this District). *Id.* ¶ 10 & Exh. 1.

III. Argument

A. The Court Lacks Jurisdiction Because Petitioner Did Not Name His Immediate Custodian as Respondent and Because Jurisdiction Lies in Only One District: the District of Confinement (the Eastern District of California).

1. The Only Proper Respondent to a Habeas Petition Challenging Present Physical Confinement is the Petitioner's Immediate Custodian—the Warden of GSA.

For "over 100 years," the Supreme Court has held that the proper respondent for a habeas petition challenging present physical confinement is the person who has "immediate custody" of the petitioner. *Padilla*, 542 U.S. at 434-35 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

In *Padilla*, the Supreme Court explained that "[t]he consistent use [in the habeas statute] of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition." *Id.* at 434 (quoting 28 U.S.C. §§ 2242, 2243). The Supreme Court further explained that the proper respondent is "[the] person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge[.]" *Id.* at 435 (emphasis in original). Consequently, the Supreme Court held, "the default rule is that the proper

respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.*

Petitioner here named four individuals as respondents—the ICE San Francisco FOD, the Secretary of Homeland Security, the Director of ICE, and the Attorney General—but none of these respondents was proper. The only proper respondent is the warden of GSA, whom Petitioner has not named. *See, e.g.*, *Swaby v. Garland*, No. 23-cv-03443-SK (PR), 2023 WL 5920085, at *1 (N.D. Cal. Aug. 4, 2023) (*Swaby I*) (holding that the only proper respondent in a habeas petition challenging immigration detention at GSA was the warden of GSA, and dismissing other respondents, including Attorney General, Secretary of Homeland Security, and ICE San Francisco FOD, as improperly named); *Barocio-Mendez v. Warden*, No. 20-cv-06110-YGR (PR), 2021 WL 624177, at *2 (N.D. Cal. Jan. 12, 2021) (generally same); *Hem v. Warden*, No. 16-cv-07359-LB, 2017 WL 11610531, at *1 (N.D. Cal. Jan. 13, 2017) (generally same); *Seng v. Warden*, No. 16-6818 SK (PR), 2017 WL 11610530, at *1 (N.D. Cal. Jan. 12, 2017) (generally same).[1]

The habeas petition must therefore be dismissed because it does not name the proper respondent. *Brittingham v. United States*, 982 F.2d 378, 379-80 (9th Cir. 1992) (affirming dismissal of habeas petition for lack of jurisdiction where petitioner did not name warden of facility where he was confined as respondent); *accord, e.g.*, *Kholyavskiy v. Achim*, 443 F.3d 946, 953-54 (7th Cir. 2006) (affirming dismissal of habeas petition challenging immigration detention for lack of jurisdiction where petitioner named ICE FOD as respondent but did not name warden of facility where he was confined, because only the warden, not FOD, is the proper respondent).[2]

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[1] Petitioners may name wardens as respondents by title or function, and thus lack of knowledge of the warden's name presents no impediment to bringing a petition. *See, e.g.*, *Shepherd v. Unknown Party, Warden*, 5 F.4th 1075 (9th Cir. 2021) (naming warden by title); *Barocio-Mendez*, 2021 WL 624177 (same); *Hem*, 2017 WL 11610531 (same); *Seng*, 2017 WL 11610530 (same).

[2] Petitioner suggests that the ICE FOD, not the warden, is the proper respondent because he is a federal official, whereas the warden of GSA is not. The Ninth Circuit held in *Brittingham*, however, that the respondent to a habeas petition by a detainee in federal custody need not be a federal official. *See Brittingham*, 982 F.2d at 379-80 (holding that proper respondent for habeas petition brought by federal prisoner being held in a state jail was not the federal official who had placed him in the state jail (the U.S. Marshal) or the federal officials with authority to release him (the Federal Parole Commission), but rather the state jail warden, because "[t]he proper respondent in a federal habeas corpus petition is the petitioner's 'immediate custodian,'" i.e., "the person having day-to-day control over the prisoner. That person is the only one who can produce 'the body' of the petitioner."). The Supreme Court cited *Brittingham* with approval, *Padilla*, 542 U.S. at 435, and that decision is binding on this Court. Further,

2. The District Court Lacks Jurisdiction Over the Petition Because It Lies Outside the District of Confinement.

Further, as the Supreme Court explained in *Padilla*, a petition challenging present physical confinement must be brought in the district of confinement. In 1867, Congress amended the habeas statute to add a statutory limiting clause to what is now 28 U.S.C. § 2241(a), restricting district courts to granting habeas relief "within their respective jurisdictions." *Padilla*, 542 U.S. at 442. The Supreme Court has examined at length Congress's purpose in adding this "respective jurisdictions" limiting clause to § 2241(a). As the Supreme Court explained:

> Congress added the limiting clause—"within their respective jurisdictions"—to the habeas statute in 1867 to avert "the inconvenient [and] potentially embarrassing possibility" that "every judge anywhere [could] issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo v. United States*, 364 U.S. 611, 617 (1961). Accordingly, with respect to habeas petitions "designed to relieve an individual from oppressive confinement," the traditional rule has always been that the Great Writ is "issuable only in the district of confinement." *Id.*, at 618.

Padilla, 542 U.S. at 442. The Supreme Court further analyzed the text of the federal habeas statute as a whole (28 U.S.C. §§ 2241-55) and observed that the statutory text is replete with references to petitions being heard only in a singular district: the district of confinement. For example, Section 2241(b) expressly refers to a singular district court having jurisdiction. *Id.* (providing that appellate courts may transfer habeas petitions "to *the* district court having jurisdiction to entertain it) (emphasis in original). And Section 2242 expressly refers to that singular court as "the district court of the district *in which the applicant is held*." *Id.* (emphasis in original). Similarly, Section 2241(d) expressly refers to "the district court for the district wherein [petitioner] is in custody" and provides an exception to this district-of-confinement rule for petitioners serving state criminal sentences in states with multiple districts—an exception that "would have been unnecessary if . . . § 2241's general habeas provisions permit a prisoner to file outside the district of confinement." *Id.* at 443. Consequently, the Supreme Court held:

> The plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, ***jurisdiction lies in only one district:***

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even assuming (counterfactually) that the proper respondent had to be a federal official, the proper respondent would be the most immediate federal official, i.e., AFOD Gonzalez, and not the FOD. *See Saravia v. Sessions*, 280 F. Supp. 3d 1165, 1187 (N.D. Cal. 2017) (cited by Petition ¶ 14) (holding that proper respondent was most immediate federal official, even if that official was a low-level official who had no actual legal authority over petitioner's detention, and not more removed director-level officials) ("*Padilla* instructs courts *not* to look to the official who exercises legal control over the petitioner where present physical confinement is at issue") (emphasis in original) (citing *Padilla*, 542 U.S. at 439).

the district of confinement.

Id. (emphasis added). As the Supreme Court explained, there were two specific purposes behind Congress's "respective jurisdictions" limiting clause and the district-of-confinement rule Congress imposed: (1) preventing judges from exercising jurisdiction over habeas petitions "on behalf of applicants far distantly removed from the courts whereon they sat," *id.* at 442, and (2) "preventing forum shopping by habeas petitioners," *id.* at 447.

The Ninth Circuit strictly adheres to this district-of-confinement rule. *See*, *e.g.*, *Muth v. Fondren*, 676 F.3d 815, 818 (9th Cir. 2012) ("§ 2241 petitions must be filed in the district where the petitioner is confined"); *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006) (same); *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (same). This is true for challenges to immigration detention. *Lopez-Marroquin v. Barr*, 955 F.3d at 759-60; *accord, e.g.*, *Birru v. Barr*, No. 19-72758, 2020 WL 12182460, at *1 (9th Cir. Apr. 30, 2020) (adhering to district-of-confinement rule and transferring challenge to immigration detention brought by noncitizen confined at non-federal contract facility within San Francisco AOR located in the Eastern District of California, to the Eastern District because the court in district "where petitioner is being held" was "the district court having jurisdiction to entertain it"); *Chavez v. Barr*, No. 20-70461, 2020 WL 13017244, at *1 (9th Cir. Apr. 30, 2020) (same); *Calderon v. Barr*, No. 19-72548, 2020 WL 13033204, at *1 (9th Cir. Apr. 30, 2020) (same); *Millan-Rodriguez v. Lynch*, No. 16-71318, 2016 WL 11773897, at *1 (9th Cir. Oct. 19, 2016) (same).

Every other Court of Appeals that has addressed this issue likewise applies the district-of-confinement rule to habeas petitions challenging immigration detention. *Argueta Anariba v. Director*, 17 F.4th 434, 444 (3d Cir. 2021) (quoting *Padilla*, 542 U.S. at 441) ("[W]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement."); *Thompson v. Barr*, 959 F.3d 476, 491 (1st Cir. 2020) (citing the Ninth Circuit's decision in *Lopez-Marroquin* for the proposition that jurisdiction lies only in the district of confinement); *Kholyavskiy*, 443 F.3d at 951 ("[T]he only proper venue for habeas proceedings is the federal district in which the petitioner is detained."); *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003) (citation and internal quotation marks omitted) ("[A] § 2241 petition must be filed in the district court that has jurisdiction over a prisoner's place of confinement.").

Numerous courts in this district have also followed the district-of-confinement rule and transferred habeas petitions challenging immigration detention in the Eastern District of California, to the Eastern District. *See, e.g.*, *Swaby v. Wofford*, No. 23-cv-03443-SK (PR), 2023 WL 6393905, at *1 (N.D. Cal. Sept. 25, 2023) (*Swaby II*) (transferring habeas petition challenging immigration detention at GSA to Eastern District because "jurisdiction lies in only one district: the district of confinement. This district-of-confinement rule is a 'bright-line rule' that does not contain any exceptions [applicable here] . . . . [T]he Ninth Circuit has made clear that the bright-line district-of-confinement rule applies to habeas challenges to immigration detention such as this case.") (citing *Padilla*, 542 U.S. at 442, 443, 449-50; *Lopez-Marroquin*, 955 F.3d at 760); *Alvarado Henriquez v. Sessions*, No. 18-cv-06647-JST (PR), 2018 WL 11312483, at *1 (N.D. Cal. Nov. 27, 2018) (transferring petition by detainee within the San Francisco Field Office AOR but actually confined in the Eastern District, to the Eastern District); *Al Maha Basheer v. Jennings*, No. 18-cv-02383 NC (PR), 2018 WL 11312001, at *1 (N.D. Cal. Apr. 24, 2018); *Maling v. Johnson*, No. 16-03161 EJD, 2016 WL 11731495, at *1 (N.D. Cal. July 29, 2016); *Chin v. Aiken*, No. 15-cv-05034-JST (PR), 2015 WL 13899769, at *1 (N.D. Cal. Nov. 17, 2015); *Mejia v. Holder*, No. C 14-1924 NC (PR), 2014 WL 12956092, at *1 (N.D. Cal. Apr. 30, 2014); *Luu v. INS*, No. C 08-3350 JSW (PR), 2008 WL 2923597, at *1 (N.D. Cal. July 24, 2008); *Zelaya-Perez v. Dist. Dir. of INS*, No. C 01-2694 MJJ(PR), 2001 U.S. Dist. LEXIS 12456, at *2-3 (N.D. Cal. Aug. 13, 2001); *Cuellar v. INS*, No. C 01-2917 MMC, 2001 WL 940874, at *1 (N.D. Cal. Aug. 13, 2001); *Tri v. INS*, No. C 98-3981 EDL PR, 1998 WL 827557, at *1 (N.D. Cal. Nov. 20, 1998); *see also Cruz-Zavala v. Barr*, 445 F. Supp. 3d 571, 574 n.3 (N.D. Cal. 2020) (Koh, J.) (while rule can be waived, absent waiver, "jurisdiction for a § 2241 habeas corpus petition challenging 'present physical confinement' must be filed in the district where the petitioner is confined: here, the Eastern District of California").

Respondents recognize that some courts in this District have at times declined to follow the district-of-confinement rule. *See* Petition ¶ 17 n.2. But these decisions conflict with the express holdings of the Supreme Court and Ninth Circuit that "jurisdiction lies in only one district: the district of confinement." None of these decisions examines the Supreme Court's analysis of the text of the habeas statute in *Padilla*. None of these decisions cites any appellate authority that supports departing from the district-of-confinement rule. *Cf. Padilla*, 542 U.S. at 449-50 (noting the absence of "*a single case* . . . in

which we allowed a habeas petitioner challenging his present physical custody within the United States to name as respondent someone other than the immediate custodian and to file somewhere other than the district of confinement" (emphasis in original).[3] The issue of whether a district court may exercise habeas jurisdiction in contravention of this bright-line district-of-confinement rule that the Supreme Court and the Ninth Circuit have set out is currently on appeal before the Ninth Circuit. *See Doe v. Garland*, Opening Br., No. 23-15361 (9th Cir. Sept. 6, 2023), ECF No. 6. Respondents respectfully submit that the Court must follow the binding authority from the Supreme Court and Ninth Circuit that "jurisdiction lies in only one district: the district of confinement" rather than relying on the district court decisions that have departed from this precedent. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017) (issuing writ of mandamus to district courts that adopted practice that departed from rule set forth in published Ninth Circuit decision, holding that such practice was "clear error" and "a persistent disregard of this court's authority"); *see also Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

Petitioner's theory that he can bring his petition here, outside the district of confinement, cannot be squared with a coherent theory of jurisdiction. As the Ninth Circuit has held, "[t]o derive a coherent theory of federal jurisdiction, one must consider the entire federal jurisdictional constellation." *In re Gruntz*, 202 F.3d 1074, 1079 (9th Cir. 2000) (en banc). One cannot conclude that the district of the FOD has jurisdiction in a vacuum, without considering the question of whether the district of confinement has jurisdiction. In order for this District to have jurisdiction, one of the following two propositions must be true: (1) this District has jurisdiction *in lieu of* the district of confinement, i.e., the district of confinement *lacks* jurisdiction, or (2) this District has jurisdiction *in addition to* the district of confinement, i.e., two separate districts *both* have jurisdiction. Neither of these propositions is viable.

First, it is indisputable that the district of confinement has jurisdiction. The Ninth Circuit routinely and consistently transfers habeas petitions brought by immigration detainees held at non-

[3] Petitioner cites *Roman*, 340 F.3d 314, a pre-*Padilla* decision, and states that it held that the INS district director for an area including a detention center was the proper respondent for a habeas petition. Petition ¶ 15. Petitioner neglects to mention that the Sixth Circuit transferred that case *not* to the district of the director—the Eastern District of Louisiana—but instead to the district of confinement—the Western District of Louisiana—because "a § 2241 petition must be filed in the district court that has jurisdiction over a prisoner's place of confinement." *Id.* at 328-29 (quotation marks omitted). Far from supporting Petitioner's position that jurisdiction lies in this District, *Roman* directly undermines it. No other appellate decision, from any Circuit, supports departing from the district-of-confinement rule.

federal contract facilities within the San Francisco AOR but actually located in the Eastern District, to the Eastern District, *see, e.g.*, *Birru*, 2020 WL 12182460, at *1; *Chavez*, 2020 WL 13017244, at *1; *Calderon*, 2020 WL 13033204, at *1; *Millan-Rodriguez*, 2016 WL 11773897, at *1—something it could not do if the district of confinement lacked jurisdiction. *See Hernandez*, 204 F.3d at 865 (explaining that "a court may not transfer a claim 'where the transferee court lacks jurisdiction and thus could not have originally heard the suit'"). Further, if the district of confinement lacked jurisdiction, and only the district of the FOD had jurisdiction, this would mean that all petitioners throughout the San Francisco AOR—i.e., all petitioners in the Eastern District of California, in Hawaii, in Guam, and in the Northern Mariana Islands—would have to file their petitions here, hundreds or thousands of miles away from where they are located. As the Supreme Court held, in adding the "respective jurisdictions" limiting clause to § 2241(a), Congress specifically sought to prevent district judges from issuing habeas writs "on behalf of applicants far distantly removed from the courts whereon they sat." *Padilla*, 542 U.S. at 442. The proposition that the district of confinement lacks jurisdiction directly conflicts with Congress's legislative design. It is indisputable that the district of confinement has jurisdiction. *Id.* at 443 ("jurisdiction lies in . . . the district of confinement"); *Lopez-Marroquin*, 955 F.3d at 760 (same).

Second, it is equally indisputable that two separate districts cannot both have jurisdiction. Jurisdiction in two separate districts necessarily affords petitioners the opportunity to forum shop between the districts. As the Supreme Court held, in adding the "respective jurisdictions" limiting clause to Section 2241(a), Congress specifically sought to "prevent[] forum shopping by habeas petitioners" and the "rampant forum shopping, district courts with overlapping jurisdiction, and the [] inconvenience, expense, and embarrassment" that would ensue if two districts were both to have jurisdiction. *Padilla*, 542 U.S. at 447. The proposition that jurisdiction lies in more than one district directly conflicts with Congress's legislative design. It is indisputable that the two districts cannot both have jurisdiction. *Id.* at 443 ("jurisdiction lies in only one district"); *Lopez-Marroquin*, 955 F.3d at 760 (same).

The Supreme Court has made clear that "courts [must] take care not to exceed their 'respective jurisdictions' established by Congress." *Padilla*, 542 U.S. at 451. Jurisdiction over the instant Petition does not lie in this District, and this Court thus must dismiss the petition for lack of jurisdiction or transfer it to the Eastern District of California.

B. Petitioner is Lawfully Detained Pursuant to 8 U.S.C. § 1226(c) and is Not Entitled to Release or a Bond Hearing.

To the extent this Court considers the merits, the petition should be denied. Petitioner claims that his detention under 8 U.S.C. § 1226(c) has become unconstitutionally prolonged and that due process requires that he be released or afforded a bond hearing before this Court. But the Constitution does not require the government to release individuals during the pendency of their removal proceedings when those individuals have committed felony criminal offenses, have been ordered removed from the United States, and have voluntarily decided to seek relief from their removal. Nor has Petitioner's detention been unconstitutionally prolonged. Even if this Court were to conclude that Petitioner is entitled to a bond hearing, that function falls within the scope of responsibility of the immigration court, and there is no authority for the proposition that the hearing should be before this Court. Petitioner's detention is neither substantively nor procedurally unconstitutional. The Court should deny his petition.

C. Mandatory Detention of Criminal Noncitizens Under 8 U.S.C. § 1226(c) During Removal Proceedings Is Constitutional.

Petitioner is currently in custody pursuant to the mandatory detention requirements of 8 U.S.C. § 1226(c) and his removal proceedings are progressing. This is not a case where detention is indefinite. Rather, Petitioner's detention "has a definite termination point: the conclusion of removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018) (internal quotation marks omitted).

The Supreme Court has upheld mandatory detention under § 1226(c) as facially constitutional. *Demore v. Kim*, 538 U.S. 510, 513, 519-21, 531 (2003) (citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Carlson v. Landon*, 342 U.S. 524 (1952); *Reno v. Flores*, 507 U.S. 292 (1993)). As the Supreme Court explained in *Demore*, "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the lawful permanent resident at issue in that case] be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513. In reaching that conclusion, the Supreme Court reaffirmed that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 521 (citation and internal quotation marks omitted). The Supreme Court thus upheld "detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Id.* at 523. The

Supreme Court further reaffirmed that immigration detention can be constitutional even in the absence of any showing that an individual detainee posed a flight risk or a danger to the community. *See id.* at 523-27 (discussing *Carlson* and concluding that detention was constitutional "even without any finding of flight risk" or "individualized finding of likely future dangerousness"). In short, "the Supreme Court recognized [that] there is little question that the civil detention of aliens during removal proceedings can serve a legitimate government purpose, which is 'preventing deportable . . . aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.'" *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-65 (9th Cir. 2008) (quoting *Demore*, 538 U.S. at 528). The Supreme Court noted that Congress could have required that criminal noncitizens be provided individualized bond hearings. *Demore*, 538 U.S. at 528. But the Supreme Court affirmed the constitutionality of Congress's choice to require mandatory detention, holding that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.*

Nor does the legitimate interest in the mandatory detention of criminal noncitizens wane with the passage of time. Detention of criminal noncitizens during removal proceedings remains constitutional so long as it continues to "serve its purported immigration purpose." *See id.* at 527. Those purposes—ensuring a noncitizen's appearance for removal proceedings and preventing the noncitizen from committing further offenses—are present throughout removal proceedings and do not abate over time. And as the Ninth Circuit explained, "the government clearly has a strong interest in preventing aliens from 'remaining in the United States in violation of our law.'" *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1208 (9th Cir. 2022) (brackets omitted) (quoting *Demore*, 538 U.S. at 518). Further, "[t]he government has an obvious interest in 'protecting the public from dangerous criminal aliens.'" *Id.* (quoting *Demore*, 538 U.S. at 515). These interests grow stronger (not weaker) as time goes on:

> These are interests of the highest order that only increase with the passage of time. The longer detention lasts and the longer the challenges to an IJ's order of removal take, the more resources the government devotes to securing an alien's ultimate removal. The risk of a detainee absconding also inevitably escalates as the time for removal becomes more imminent. Indeed, the Supreme Court has specifically recognized Congress's determination that the government has been unable to remove deportable criminal aliens because of its initial failure to detain them. For all these reasons, the government's interests [in detention] are significant.

Id. at 1208-09 (citing *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2290 (2021)); *Demore*, 538 U.S. at 519); *see also Jennings*, 138 S. Ct. at 836 ("Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made."); *Fraihat v. ICE*, 16 F.4th 613, 647 (9th Cir. 2021) ("The government has an understandable interest in detaining such persons to ensure attendance at immigration proceedings, improve public safety, and promote compliance with the immigration laws."); *Prieto-Romero*, 534 F.3d at 1065 ("[Petitioner] foreseeably remains *capable* of being removed—even if it has not yet finally been determined that he *should* be removed—and so the government retains an interest in 'assuring [his] presence at removal.'") (emphasis in original); *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996) ("And, of course, [a removable noncitizen] may not be so easy to find once his litigation options are exhausted.").

While Petitioner does not contest that he is subject to mandatory detention under Section 1226(c), he claims that his detention has become "prolonged." Petition ¶ 1. Petitioner has been detained for two years; however, he downplays that his detention has been protracted by his own litigation decisions. Petitioner made three requests for a continuance during his removal hearings. Despite the continued hearings, Petitioner received a merits hearing within six months of ICE initiating removal proceedings. That hearing was continued three times upon requests by Petitioner's counsel (Petition ¶¶ 55-56), but Petitioner was ordered removed to Mexico approximately three months after the hearing concluded. Petitioner decided to appeal, and the BIA ruled in a little over two months of Plaintiff's filing of his brief. Villagran Decl. ¶¶ 20-21. The Petition for Review is now pending before the Ninth Circuit. Therefore, Petitioner's claim that there is "no end in sight" to his detention (Petition ¶ 4) is both inaccurate (because Ninth Circuit review is of finite duration) and overstated.

To be sure, in upholding mandatory detention under Section 1226(c), the *Demore* Court relied on pre-2003 statistics compiled by the Executive Office for Immigration Review to find that, "in the majority of cases," detention lasted for less than 90 days. *Demore*, 538 U.S. at 529; *but see Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (noting that those statistics were wrong and that detention normally lasts twice as long). It also noted, however, that, in 15 percent of cases, detention lasted longer

where the noncitizen appealed to the BIA, and that such appeals took an average of an additional four months. *Demore*, 538 U.S. at 529. The *Demore* Court also held that detention under Section 1226(c) could run longer while still being constitutional—for instance, where the noncitizen himself requested continuances of his removal proceedings. *See id.* at 531 n.15 (finding mandatory detention of six months constitutional where "[the noncitizen] himself had requested a continuance of his removal hearing" and "received a continuance to obtain documents relevant to his withholding application").

Acknowledging that those kinds of decisions to knowingly prolong one's detention may be difficult ones to make, the Supreme Court explained that "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Id.* at 530 n.14 (quoting *McGautha v. California*, 402 U. S. 183, 213 (1971)); *see also Rodriguez Diaz*, 53 F.4th at 1207-08 (holding detention constitutional where, among other things, "most of the period of [petitioner]'s detention arose from the fact that he chose to challenge before the BIA and later this Court the IJ's denial of immigration relief"); *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) (holding that the petitioner, who had been confined without bail for eight years, had "exercised skillfully his rights under the deportation statute, delaying and perhaps preventing the outcome sought by the government," and that "[a]lthough this litigation strategy [was] perfectly permissible," the petitioner could not "rely on the extra time resulting therefrom to claim that his prolonged detention violate[d] substantive due process"); *Rivas Avalos v. Sessions*, No. 18-cv-02342-HSG, 2018 WL 11402701, at *2 (N.D. Cal. May 25, 2018) ("delay caused by petitioner's litigation strategy does not ripen his detention into a constitutional claim") (citation and internal quotation marks omitted); *Garcia Gonzalez v. Bonnar*, No. 18-cv-05321-JSC, 2018 WL 4849684, at *5 (N.D. Cal. Oct. 4, 2018) (finding ten-month detention not unconstitutional because, among other things, "at least some of the delay in setting [p]etitioner's hearing was the result of [p]etitioner's requests for continuances to obtain an attorney and to pursue alternative forms of relief"); *Dryden v. Green*, 321 F. Supp. 3d 496, 502-03 (D.N.J. 2018) (detention not unconstitutional where "the majority of the delay in Petitioner's immigration results is directly attributable to Petitioner's own delay in acquiring counsel and ultimately filing his petition for relief"); *Aguayo v. Martinez*, No. 1:20-cv-00825, 2020 WL 2395638, at *3 (D. Colo. May 12, 2020) (detention

not unconstitutional where petitioner requested multiple continuances and, thus, "like the detainee in *Demore*, [his] prolonged detention is largely of his own making"); *Crooks v. Lowe*, No. 1:18-cv-0047, 2018 WL 6649945, at *2 (M.D. Pa. Dec. 19, 2018) (detention not unconstitutional where "there is no indication in the record that the government has improperly or unreasonably delayed the proceedings").

Here, Petitioner not only made the decision to appeal to the BIA but made six separate requests to continue hearings in front of the IJ. Thus, the prolonged detention is "largely of his own making." *Id.* As the Supreme Court and other courts cited above have held, the fact that Petitioner might want or need more time to seek relief from his removal, and that this added time might subject him to being further detained, does not render the detention unconstitutional.

1. Petitioner's Detention Does Not Violate His Substantive Due Process Rights.

Petitioner broadly contends that his continued detention no longer "bear[s] some reasonable relation" to its purpose and has thus become "punitive." Petition ¶¶ 78-81 (citing non-immigration cases, *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) and *United States v. Salerno*, 481 U.S. 739 (1987)). In *Salerno*, however, the Supreme Court ultimately held that pretrial detention under the Bail Reform Act (not applicable here) did not violate the defendant's substantive due process rights, noting that Congress was "[r]esponding to 'the alarming problem of crimes committed by persons on release,'" and that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." 481 U.S. at 742, 746. Similarly, here, Congress has determined that mandatory detention under Section 1226(c) serves the permissible purposes of making sure Petitioner will appear for any future proceedings and that the government can effectuate his removal if necessary.

Justice Kennedy's concurrence in *Demore* recognized that the "ultimate purpose behind the detention is premised upon the [noncitizen's] deportability." 538 U.S. at 531 (Kennedy, J., concurring). He thus viewed the constitutionality of continuing detention without a bond hearing as depending on the circumstances: if there were an "unreasonable delay by the [Government] in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532-33. No such circumstances are present here. To the contrary, the proceedings against Petitioner have been moving as expeditiously as possible. Less than two weeks after being detained,

DHS conducted a custody redetermination. Villagran Decl. ¶¶ 8-9. Two weeks later, Petitioner appeared for removal proceedings. *Id.* ¶ 11. Any delay in Petitioner's merits hearing was a result of repeated requests for continuances on behalf of Petitioner. On appeal, Petitioner sought an extension of time to file his opening brief. *Id.* ¶ 20. Throughout this process, the IJ and BIA have been accommodating of Petitioner's requests while ICE continued to pursue removal as quickly as possible. Petitioner's reliance on *United States v. Torres*, 995 F.3d 695, 709-710 (9th Cir. 2021)—involving the Bail Reform Act, not immigration detention—is thus misplaced. *Torres* upheld a pretrial detention of 21 months as constitutional, even though (unlike here) the government was the party responsible for a year's worth of continuances which the defendant had expressly opposed. 995 F.3d at 700, 708.

The government's permissible purposes in detention do not diminish over time, and especially not because Petitioner has voluntarily elected to contest removal. Indeed, "detention of deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 527-28 (emphasis in original). And detention under Section 1226(c) "has 'a definite termination point': the conclusion of removal proceedings." *Jennings*, 138 S. Ct. at 846. Because Petitioner's detention serves these legitimate congressionally mandated goals with a definite end in sight, it is not "punitive" and does not violate substantive due process. Indeed, the Ninth Circuit has made clear that "the duration of [a petitioner's] detention, by itself, d[oes] not create a due process violation." *Rodriguez Diaz*, 53 F.4th at 1212. The Ninth Circuit has upheld immigration detention that has lasted for over three years, "because the lack of a 'certain end date' alone 'does not render [a petitioner's] detention *indefinite* in the sense the Supreme Court found constitutionally problematic in *Zadvydas* [*v. Davis*, 533 U.S. 678 (2001)]." *Rodriguez Diaz*, 53 F.4th at 1212 (emphasis in original) (quoting *Prieto-Romero*, 534 F.3d at 1063). Petitioner's shorter detention here does not violate substantive due process.

2. Petitioner's Detention Does Not Violate His Procedural Due Process Rights.

Petitioner argues in the alternative that his continued detention without an "individualized evaluation" violates procedural due process. Petition ¶ 115. While there is no binding precedent holding that Section 1226(c) detention is unconstitutional when it exceeds a certain amount of time, Petitioner

invokes a purported six-month "bright-line" test, after which Section 1226(c) detention would become "prolonged" and require an individualized bond hearing. Petition ¶ 116. Petitioner alternatively contends that an "individualized evaluation" is necessary under a *Mathews* balancing test. Petitioner's detention, however, is not unconstitutional under either of those frameworks.

(i) No Binding Authority Supports a "Bright-Line" Rule.

The supposed "bright-line" test invoked by Petitioner is unsupported. Petitioner cites *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (Petition ¶ 116), but *Zadvydas* did not hold that, as a general matter, detention without a bond hearing becomes unconstitutional after six months. *Zadvydas* involved detention under 8 U.S.C. § 1231(a)(6), which—unlike Section 1226(c)—applies only *after* (1) a final removal order has been entered and (2) the initial removal period set forth in § 1231(a)(1) has lapsed. The noncitizens there had been ordered removed and no further removal proceedings were pending, but the government was unable to effectuate those removal orders because it was unable to find a country that would accept them. *Zadvydas*, 533 U.S. at 684-86. The issue was thus "whether [noncitizens] that the Government finds itself *unable to remove* are to be condemned to an indefinite term of imprisonment within the United States." *Id.* at 695 (emphasis added). The Supreme Court held that after an initial six-month period, "once the [noncitizen] provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. Even so, *Zadvydas* did not impose a "bright-line" six-month test but rather allowed for a flexible framework. *See Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011) (holding that "[i]f the 180-day threshold has been crossed, but the [noncitizen]'s release or removal is imminent," the government should not be required to provide a hearing before an IJ), *overruled on other grounds by Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022).

The *Zadvydas* Court expressly distinguished the Section 1231(a)(6) scenario at issue in that case from Section 1226(c) detention, noting that "post-removal-period detention, unlike detention pending a determination of removability . . . , has no obvious termination point." *Zadvydas*, 533 U.S. at 697; *see also Aleman Gonzalez v. Barr*, 955 F.3d 762, 770 n.3, 777 n.7 (9th Cir. 2020) ("*Demore* . . . is the earliest example of the [Supreme] Court's rejection of our court's reliance on *Zadvydas* to construe the other immigration detention statutes. . . . In reining in our court's reliance on *Zadvydas* . . ., the Court

made it eminently clear that the textual differences amongst the statutes *are* material."), *rev'd on other grounds sub nom. Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). *Zadvydas* also noted that, in Section 1231(a)(6) detention, "by definition the first justification [for detention]—preventing flight—is weak or nonexistent where removal seems a remote possibility at best." 533 U.S. at 690. By contrast, detention under Section 1226(c) "has 'a definite termination point': the conclusion of removal proceedings." *Jennings*, 138 S. Ct. at 846. And unlike the post-removal-period detention in *Zadvydas*, "detention of deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 527-28 (emphasis in original).

Petitioner cites *Rodriguez v. Nielsen*, No. 18-cv-04187-TSH, 2019 WL 7491555 (N.D. Cal. Jan. 7, 2019), in support of the "bright-line" six-month rule. Petition ¶ 120. The court in that case, however, expressly acknowledged that "there is no controlling precedent" that supports such a rule. *Rodriguez*, 2019 WL 7491555. at *6. And various courts have rejected the claim that a "bright-line" six-month test applies. *See, e.g.*, *Garcia Gonzalez*, 2018 WL 4849684, at *3, *5 (stating that *Demore* "held that a six-month detention under section 1226(c) was not prolonged" and holding that the petitioner had "thus not show[n] a likelihood of success on his claim that detention under 1226(c) beyond six months without a bond hearing is per se unreasonably prolonged"); *Rivas Avalos*, 2018 WL 11402701, at *1 (recognizing that "*Zadvydas* applies specifically to *indefinite* detention" and "not to 'detention pending a determination of removability,' which has a defined termination point," and holding that Section 1226(c) detention exceeding six months without a bond hearing was not unconstitutional); *Ramirez v. Sessions*, No. 18-cv-05188-SVK, 2019 WL 11005487, at *6 (N.D. Cal. Jan. 30, 2019) (rejecting six-month bright-line rule); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1677332, at *7 (N.D. Cal. Apr. 6, 2020) (same).

(ii) Under the *Mathews* Factors, Petitioner's Detention is Not Unconstitutional.

Petitioner alternatively argues that his detention violates procedural due process under a *Mathew*s balancing test. The Supreme Court has never resolved immigration detention challenges under *Mathews*

v. Eldridge, 424 U.S. 319 (1976), and this Court should not do so here. The unique position of noncitizens subject to removal renders inapposite the standard applied to procedural due process claims in other contexts. *Cf. Demore*, 538 U.S. at 527, 528 (holding that a noncitizen's detention under Section 1226(c) is constitutional so long as it "serve[s] its purported immigration purpose," which is to "prevent[] deportable criminal [noncitizens] from fleeing prior to or during their removal proceedings"). The Supreme Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenberry v. United States*, 534 U.S. 161, 168 (2002). And the Ninth Circuit has declined to "decid[e] that *Mathews* applies" to a procedural due process claim brought against a noncitizen's detention under Section 1226(a), the subsection providing for discretionary detention pending removal. *Rodriguez Diaz*, 53 F.4th at 1207. Considering the long line of cases upholding the constitutionality of mandatory detention under Section 1226(c), and the undisputed facts that (1) Petitioner is subject to mandatory detention under the statute; and (2) Petitioner only remains in detention due to his petition to the Ninth Circuit, the Court can and should determine that no further procedure is constitutionally required in these circumstances.

But even if the Court believes that *Mathews* applies, it does not require an additional hearing here.[4] Where applicable, the *Mathews* test requires the Court to consider (1) "the private interest that will be affected by the official action"; (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. These factors weigh against Petitioner's request for an individualized review in this case.

With respect to the first *Mathews* factor, Petitioner overstates his interests. While true at a high level of generality that freedom from detention "lies at the heart of the liberty that [the Due Process]

[4] Petitioner also asks the Court to consider his detention under the Third Circuit's test in *German Santos v. Warden Pike Correctional Facility*, 965 F.3d 203 (3d Cir. 2020). Petition ¶ 145. However, he provides no authority or justification for application of this out-of-circuit decision. Where *German Santos* appears to differ from *Mathews*, it considers the "conditions of confinement," *id.*, which is addressed in the first *Mathews* factor. To the extent that Petitioner claims that the conditions of his detention render him eligible for habeas relief, *see*, *e.g.*, Petition ¶ 150, the Ninth Circuit recently reaffirmed its rejection of a similar argument. *Pinson v. Carvajal*, 69 F.4th 1059, 1067 (9th Cir. 2023) ("*Crawford* explicitly rejected habeas jurisdiction over a federal prisoner's claims related to the conditions of his confinement.") (citing *Crawford v. Bell*, 599 F.2d 890, 891-92 (9th Cir. 1979)).

Clause protects," *Zadvydas*, 533 U.S. at 690, the Supreme Court has clarified that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522. Thus, while "the Fifth Amendment entitles aliens to due process of law in deportation proceedings. . . . detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Id.* at 523. Any assessment of the private interests at stake must therefore account for the fact that the Supreme Court has never held that criminal noncitizens have a constitutional right to be released from custody during the pendency of removal proceedings, and in fact has held the opposite. *See id.* at 531; *Carlson*, 342 U.S. at 538.

It is also important to keep in mind that Petitioner's removal status here is undisputed. This is not a case where Petitioner is challenging whether he is removable in the first instance (e.g., challenging whether he committed the crimes, or challenging whether his crimes are in fact crimes that trigger removability). *Cf. Demore*, 538 U.S. at 522 & n.6 (discussing, in upholding constitutionality of detention, how the permanent resident petitioner there did not challenge that he was removable); *contrast Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (discussing situation where detainees must choose between remaining in detention and "abandoning their challenges to removability even though they may have been improperly deemed removable"). Petitioner does not dispute that he was convicted of the crimes for which he served time. Petitioner does not dispute that these convictions render him removable. 8 U.S.C. § 1227(a)(2)(A). Consideration of the private interest at issue under *Mathews* must thus account for the fact that Petitioner is not simply asserting a right to be at liberty, but rather a right to be at liberty *in the United States*, despite being removable. *Cf. Flores*, 507 U.S. at 306 ("Congress eliminated any presumption of release pending deportation."); *Carlson*, 342 U.S. at 538 ("Detention is necessarily a part of this deportation procedure."); *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) (holding in connection with U.S. citizen seeking permanent residency for his wife and her children that the private right at issue was not "the fundamental right to preserve the integrity of his family" generally, but rather a claimed "right to reside in the United States with his non-citizen relatives. But that theory runs headlong into Congress' plenary power over immigration").

Petitioner also claims that his private interests are strengthened due to his alleged conditions of confinement. Petition ¶ 131. The conditions he alleges, however, do not invalidate or vitiate the

"immigration purpose" that is served when a noncitizen is detained under Section 1226(c). *See Demore*, 538 U.S. at 527 (stating that detention under Section 1226(c) is constitutional so long as it "serve[s] its purported immigration purpose"); *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022) (ruling that conditions of a noncitizen's immigration detention "are not particularly suited to assisting the Court in determining whether detention has become unreasonable and due process requires a bond hearing"). Moreover, "[t]he appropriate remedy for such constitutional violations, if proven, would be a judicially mandated change in conditions and/or an award of damages, but not release from confinement." *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979). Claims regarding conditions of confinement cannot be remedied through a habeas petition, and instead require a "civil rights action." *Pinson v. Carvajal*, 69 F.4th 1059, 1068-69 (9th Cir. 2023); *see also Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (holding that a habeas petition was not "the proper method of challenging 'conditions of . . . confinement'").

Lastly, the Court must account for the fact that Petitioner's time in detention is in large part due to his own litigation choices. *See id.* at 1207 ("We also cannot overlook that most of the period of Rodriguez Diaz's detention arose from the fact that he chose to challenge before the BIA and later this Court the IJ's denial of immigration relief."). While Petitioner is free to exercise his legal rights to contest his removability, the Court should not consider the time he has chosen to take in pursuing relief as a factor weighing against the government in a *Mathews* analysis. *See id.* at 1208 ("In short, in evaluating Rodriguez Diaz's interests under the first prong of the *Mathews* analysis, we cannot simply count his months of detention and leave it at that. We must also consider the process he received . . . and the fact that his detention was prolonged due to his decision to challenge his removal order."); *Demore*, 538 U.S. at 531 n.14 (stating "there is no constitutional prohibition against requiring parties" to "mak[e] . . . difficult judgments," such as whether to risk a lengthier detention by deciding to appeal); *see also Prieto-Romero*, 534 F.3d at 1063-65 & n.9 (holding that a noncitizen's detention was not unconstitutionally indefinite when it was prolonged by a challenge to his removal order, and distinguishing a case in which the government made an "unusual move" that delayed resolution).

As to the second *Mathews* factor, the risk of "erroneous deprivation," Petitioner argues that "he has been detained since September 2021 without a hearing before a neutral arbiter as to whether the government can justify detention under his individualized circumstances." Petition ¶ 136. But there is no

risk of an erroneous finding that Petitioner is subject to Section 1226(c); Petitioner does not dispute that the mandatory detention provision of Section 1226(c) applies to him. Nor does he account for Congress's rationale for enacting Section 1226(c)—and electing not to afford criminal noncitizens with an individualized bond hearing during the pendency of their removal proceedings—and for the fact that the Supreme Court subsequently reviewed Congress's enactment of Section 1226(c) and upheld the rationale for not guaranteeing such bond hearings. *See Demore*, 538 U.S. at 518-28; *Flores*, 507 U.S. at 315 ("It may well be that other policies would be even better, but we are not a legislature charged with formulating public policy." (citation and internal quotation marks omitted).

Indeed, Congress adopted Section 1226(c) "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by [noncitizens]." *Demore*, 538 U.S. at 518. In passing Section 1226(c), Congress considered the value of additional procedural safeguards for this subset of noncitizens but ultimately decided against allowing bond hearings, as "evidence suggest[ed] that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Id.* at 519 (noting that Congress was presented with evidence that "[d]etention is [the] key to effective deportation"). In reviewing this rationale, the Supreme Court held that "[t]he evidence Congress had before it certainly supports the approach it selected." *Id.* at 528; *see also id.* at 513. Thus, while Petitioner may not believe that detention is warranted for someone like him, the fact remains that he is mandatorily detained under Section 1226(c)—a procedure that Congress has specifically provided for and that the Supreme Court has held to be reasonable.

Finally, with respect to the third *Mathews* factor, mandatory detention of criminal noncitizens under Section 1226(c) serves "a legitimate government purpose" in that it allows the government to remove a criminal noncitizen upon completion of his removal proceedings. *See id.* at 528. More generally, however, the government's interest in detention—to ensure a noncitizen's appearance for removal proceedings and to protect public safety—falls squarely within its broad immigration powers. The government's interest in effectuating the removal of criminal nonresidents is concrete, as is the government's interest in following Congress's directive to curb any risk of flight through the detention procedures set out by statute. The Supreme Court has long held that "any policy toward aliens is vitally

and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Id.* at 522 (internal quotation marks omitted). In fact, "[o]ver no conceivable subject is the legislative power of Congress more complete." *Flores*, 507 U.S. at 305 (citation and internal quotation marks omitted). Consequently, the Supreme Court has "specifically instructed that in a *Mathews* analysis, [a court] must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Rodriguez Diaz*, 53 F.4th at 1208 (citation and internal quotation marks omitted). The Ninth Circuit has added that "protecting the public from dangerous criminal aliens" and ensuring such individuals can "be successfully removed" are "interests of the highest order that only increase with the passage of time." *Id.* (internal quotation marks omitted); *see Demore*, 538 U.S. at 528.

Those very interests are present here. Following a custody redetermination, DHS concluded that detention was warranted because Petitioner constituted a threat to public safety. Petitioner does not dispute that he was convicted of assault with great bodily injury and robbery. Petitioner is a noncitizen convicted of crimes that subject him to mandatory detention, and the government has expended time and resources in pursuing his removal. *See Rodriguez Diaz*, 53 F.4th at 1208 (stating that the government's interests "only increase with the passage of time" due to the greater resources it "devotes to securing [a noncitizen]'s ultimate removal" and the risk of absconder "inevitably escalat[ing] as the time for removal becomes more imminent"). Nothing suggests that Petitioner's detention is for any other purpose than to ensure his appearance at removal proceedings and prevent him from committing further crimes.

In sum, even if the *Mathews* test applied here, the factors do not weigh in Petitioner's favor. Thus, regardless of the framework applied, he is unable to meet his burden of demonstrating a due process violation to warrant the relief that he seeks.

3. If The Court Grants Petitioner a Bond Hearing, the Hearing Should Be Before an IJ With the Burden of Proof on Petitioner.

Even if the Court were to grant the Petition, the appropriate relief is not immediate release or a hearing before this Court, but a bond hearing before an IJ. "[C]ompelled release of detainees is surely a remedy of last resort." *Fraihat*, 16 F.4th at 642. Courts that have evaluated mandatory pre-removal order detentions have determined that an IJ bond hearing is the appropriate remedy for a claim of prolonged

detention. *See, e.g., Rodriguez v. Robbins*, 804 F.3d 1060, 1084 (9th Cir. 2015), *rev'd sub nom. Jennings*, 138 S. Ct. 830; *Mansoor v. Figueroa*, No. 3:17-cv-01695, 2018 WL 840253, at *4 (S.D. Cal. Feb. 13, 2018) (noting that IJs are well suited to assess eligibility for release, while a district court "lacks the factual support to make a determination about Petitioner's risk of flight or dangerousness to the community"). To order otherwise would contravene the statute's implementing regulations, which place review of custody determinations in the hands of IJs and the BIA.

Moreover, if the Court determines that an additional bond hearing before an IJ is required, Petitioner should bear the burden in accordance with statute, the Constitution, and the Ninth Circuit's decision in *Rodriguez Diaz*. First, in the sole instance when Section 1226(c) permits release of a noncitizen—when release is necessary to provide witness protection—the burden of proof is placed on the noncitizen, not the government, to show that he will not pose a danger to the safety of other persons or of property and, critically, "is likely to appear for any scheduled proceeding." *See* 8 U.S.C. § 1226(c)(2); *Jennings*, 138 S. Ct. at 836, 846-47.

Similarly, the Constitution does not require the government to bear the burden of proof at a bond hearing before an IJ. The Supreme Court has affirmed the constitutionality of detention pending removal proceedings even though the government has never borne the burden to justify such detention by clear and convincing evidence. *See, e.g., Demore*, 538 U.S. at 531; *Carlson*, 342 U.S. at 538; *Rodriguez Diaz*, 53 F.4th at 1211 ("We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of an alien, much less through an elevated 'clear and convincing' showing."). Even when considering potentially indefinite detention, the Supreme Court has placed the burden on the noncitizen to justify release. *See Zadvydas*, 533 U.S. at 701.

In support of his claim that the government should bear the burden by clear and convincing evidence, Petitioner cites *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). Petition ¶ 157. But *Singh* actually notes the opposite—that for Section 1226(c) detention, the *detainee* bears the burden of proof to show, by clear and convincing evidence, that he is *not* a danger or a flight risk. 638 F.3d at 1205 n.4.[5]

[5] While Section 1226(c) now prevents the government from releasing any criminal noncitizens subject thereto, when the statute was first enacted, Congress also provided for "Transition Period Custody Rules" where, for a limited transition period after Section 1226(c) went into effect, criminal noncitizens could continue to seek release. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 303(b)(2)-(3) (1996). During that time, criminal noncitizens

For a time, *Singh* reversed that burden of proof for certain bond hearings for detention under Section 1226(*a*), but *Singh*'s reversal of the burden of proof for Section 1226(a) was later abrogated by *Jennings*. *See Rodriguez Diaz*, 53 F.4th at 1196 ("*Singh*'s holding about the appropriate procedures for [*Casas*] bond hearings . . . was expressly premised on the (now incorrect) assumption that these hearings were statutorily authorized," and "*Singh* did not purport to establish a freestanding set of constitutionally mandated procedures that would apply to any detained alien."). And for detention under Section 1226(*c*), *Singh* has always recognized from the outset that the detainee bears the burden of proof. 638 F.3d at 1205 n.4; *see also Miranda v. Garland*, 34 F.4th 338, 353 (4th Cir. 2022) ("§ 1226(c) . . . expressly provides that the alien bears the burden of proof on detention, in contrast to § 1226(a)"). *Singh* thus provides no support for Petitioner's claim that the burden of proof should be reversed.

Finally, by way of comparison, the Bail Reform Act provides that for certain U.S. citizen pretrial detainees, the detainees—not the government—bear the burden of proof to establish that they are not a danger or flight risk to obtain release. 18 U.S.C. § 3142(e)(2)-(3). "If, in the criminal context, requiring citizens to bear the burden to show that they are not a danger to the community and a flight risk is not unconstitutional, it cannot be unconstitutional for the government to place a similar burden on an alien facing removal proceedings, especially considering the detention lasts only until removal." *Miranda*, 34 F.4th at 363. To the extent this Court orders a bond hearing, Petitioner should bear the burden of proof.

IV. Conclusion

For the foregoing reasons, Respondents respectfully submit that the Court should dismiss this petition for lack of jurisdiction (or, in the alternative, transfer it to the Eastern District of California). Should the Court reach the merits, Respondents respectfully request that the Court deny the petition.

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Respectfully submitted,

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/s/ Molly A. Friend
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(and not the government) bore the burden of establishing by clear and convincing evidence that they were not a danger or flight risk, which the Ninth Circuit cited with approval in *Singh*.