Sarah R. Weinman
Alison Pennington
Claudia Valenzuela (appearing *pro hac vice*)
Immigrant Legal Defense
1301 Clay Street, # 70010
Oakland, CA 94612
Telephone: (415) 562-6512
sarah@ild.org

Attorneys for Mr. Doe

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOHN DOE,

Petitioner,

vs.

MOISES BECERRA, in his official capacity, Director for the San Francisco ICE Field Office; ALEJANDRO MAYORKAS, in his official capacity, Secretary of the Department of Homeland Security; PATRICK LECHLEITNER, in his official capacity, Deputy Director for U.S. Immigration and Customs Enforcement; and Merrick GARLAND, in his official capacity, Attorney General of the United States,

Respondents.

Case No. 5:23-cv-04767-PCP

TRAVERSE IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

ARGUMENT

I. This Court has jurisdiction over Mr. Doe's petition.

Mr. Doe's petition established that this Court has jurisdiction because "'the federal agent charged with overseeing the non-federal detention facility in which [Mr. Doe] is held'" is named as a respondent and resides in the Northern District of California. Pet. at ¶ 14 (quoting *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1185 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018)). Mr. Doe explained that he is detained at Golden State Annex, a private, for-profit immigration detention facility operated by GEO Group, Inc., in contract with the federal government. *See* Pet. at ¶ 5. He further explained that the Golden State Annex warden lacks actual authority over the noncitizens detained there and that this authority instead lies with Immigration and Customs Enforcement ("ICE") San Francisco Field Office Director Moises Becerra, a named respondent here. *See id*. at ¶¶ 15–16, 26. Because Respondent Becerra performs his official duties in the Northern District of California, this matter is properly filed in this District. *See id*. at ¶ 19.

Respondents counter the Golden State Annex warden is the proper respondent and that jurisdiction lies in the Eastern District of California, where the warden resides. *See* Resp. at 4–10 & n.2. Respondents therefore urge this Court to dismiss the petition for lack of jurisdiction. *See id*. This argument lacks merit.

Respondents rely principally on *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Brittingham v. United States*, 982 F.2d 378 (9th Cir. 1992), to argue that the Golden State Annex warden should be named as a respondent. *See* Resp. at 4–5. But Respondents ignore that these cases "do[] not resolve whether this Court has habeas jurisdiction over" noncitizens in immigration detention in private contract facilities. *Saravia*, 280 F. Supp. 3d at 1183–85. Since *Brittingham* and *Padilla*, "courts in this district repeatedly have held" that habeas petitions brought by detained noncitizens held in *private contract facilities* alter application of the immediate-custodian rule that *Brittingham* and *Padilla* applied. *Domingo v. Barr*, No. 20-cv-06089-YGR, 2020 WL 5798238, at *2 (N.D. Cal. Sept. 29, 2020) ("*Padilla* does not extend to

cases such as this one where the immediate custodian lacks any actual authority over the immigrant detainee"); *Ameen v. Jennings*, No. 22-cv-00140-WHO, 2022 WL 1157900, at *4–5 (N.D. Cal. Apr. 19, 2022) (holding that *Padilla* "did not . . . analyze or expressly address the jurisdiction issue raised in this case" and that the acting field director of the San Francisco ICE office "ha[s] ultimate control over the [Golden State Annex]," making jurisdiction proper in the Northern District) (citing cases); *Perera v. Jennings*, No. 21-cv-04136-BLF, 2021 WL 2400981, at *2 (N.D. Cal. June 21, 2021) (recognizing that *"Padilla* refused to decide who the proper respondent is in the immigration detention context").

The accepted rule in this context is that "instead of naming the individual in charge of the contract facility—who may be a county official or an employee of a private nonprofit organization—a petitioner held in federal immigration custody in a non-federal contract facility pursuant to a contract should sue the federal official most directly responsible for overseeing that contract facility when seeking a habeas writ." *Saravia*, 280 F. Supp. 3d at 1185. Indeed, strict application of the immediate-custodian rule in the context of private contract facilities could introduce conflicts of interest between non-federal employees and the federal government. *See id*. Moreover, a private employee "would not be in possession of information necessary to respond to the petition on behalf of federal immigration authorities, nor would he have any legitimate interest in litigating the claims." *Domingo*, 2020 WL 5798238, at *2. This Court should therefore reject Respondents' claim that the warden is the proper respondent.

Respondents alternatively claim that the acting assistant field office director of the ICE sub-office in Bakersfield is the proper respondent. *See* Resp. at 5 n.2. This claim, relegated to a bare assertion in a footnote, also fails on the merits. *See First Advantage Background Servs. Corp. v. Private Eyes, Inc*., 569 F. Supp. 2d 929, 935 n.4 (N.D. Cal. 2008) (stating that "a footnote is the wrong place for substantive arguments on the merits of a motion, particularly where such arguments provide independent bases for dismissing a claim"); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996) (holding that "the summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient").

Courts in this District have emphatically rejected the argument that the proper respondent in an immigration habeas action is a subordinate ICE officer rather than the San Francisco Field Office director. *See, e.g., Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *2 (N.D. Cal. Oct. 14, 2021) (stating that the government's "jurisdiction objection is not well taken," "overreads *Rumsfeld v. Padilla*," and fails to "demonstrate[] that [the field office director] in San Francisco is not a proper respondent," instead "tak[ing] the indirect tack of suggesting that a better candidate might be the assistant field director"); *Pham v. Becerra*, No. 23-cv-01288-CRB, 2023 WL 2744397, at *4 (N.D. Cal. Mar. 31, 2023) (stating that the government's "argument is unconvincing" as "both [Acting Assistant Field Office Director] Gonzalez and [Deputy Field Office Director] Cruz report to [Field Office Director] Becerra; thus Becerra, and not Gonzalez or Cruz, exercises control over [petitioner's] physical custody");. This is consistent with the regulations, which authorize the ICE field office director to make initial custody determinations and "to continue an alien in custody or grant release." 8 C.F.R. § 241.4(a); *see also id*. § 236.1(d)(1).

Acting Assistant Field Office Director Gonzalez's declaration supports naming the San Francisco ICE field office director as a respondent here. *See* Decl. of Nancy Gonzalez, Dkt. No. 20 (Oct. 2, 2023). Gonzalez avers that her "direct line supervisor is [Deputy Field Office Director] Cruz, who "directly reports to [Field Office Director] Moises Becerra." *Id*. at ¶ 7. Gonzalez's role is limited to "directly liais[ing] with the [Golden State Annex] Facility Administrator and other GEO personnel regarding the detainees." *Id.* at ¶ 6; *see Pham*, 2023 WL 2744397, at *4 (holding that "Gonzalez's declaration does not persuade the Court that she, or [deputy field office director] Cruz, is 'the federal official most directly responsible for overseeing' Golden State Annex") (quoting *Saravia*, 280 F. Supp. 3d at 1185); *Meneses*, 2021 WL 4804293, at *2. Given this "clear chain of command," Gonzalez is "not a sufficient substitute" for Respondent Becerra. *Ameen*, 2022 WL 1157900, at *4.

Finally, Respondents misconstrue *Lopez-Marroquin v. Barr*, 955 F.3d 759 (9th Cir. 2020), as confirming an ostensible bright-line rule in *Padilla* that a noncitizen petitioner "must

bring his petition in the district of confinement." *See* Resp. at 1; *see also id.* at 8. "But *Padilla* said no such thing," and "*Lopez-Marroquin* simply cited *Padilla* without any gesture at resolving the question the Supreme Court left open." *Meneses*, 2021 WL 4804293, at *2. In fact, "*Padilla* . . . emphasizes that the habeas writ is directed toward the respondent." *Saravia*, 280 F. Supp. 3d at 1187 n. 10. "Nothing in that opinion suggests that anything other than the respondent's location controls," even when "the custodian [i]s physically located in a different district than the petitioner." *Id*. As explained above, the proper respondent here is Respondent Becerra, who resides in this District. Jurisdiction is therefore proper here. This Court should thus reject Respondents' request to dismiss this petition for lack of jurisdiction.

II. Mr. Doe's detention violates his right to substantive due process.

The parties agree that detention remains constitutional only "so long as it continues to 'serve its purported immigration purpose.'" Resp. at 12 (quoting *Demore v. Kim*, 538 U.S. 510, 527 (2003)); *see also* Pet. at ¶¶ 80, 84. The parties also agree that the government's purported immigration purposes in detaining noncitizens are "ensuring a noncitizen's appearance for removal proceedings and preventing the noncitizen from committing further offenses." Resp. at 12; *accord* Pet. at ¶ 84 (purpose of § 1226(c) detention is to effectuate expeditious removal while safeguarding the community") (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Reid v. Donelan*, 17 F.4th 1, 8 (1st Cir. 2021)). Thus, when a person's detention no longer serves these twin interests, detention violates substantive due process. Put otherwise, when the duration and nature of civil confinement no longer bear "'some reasonable relation'" to the government's detention purposes, the detention is punitive and unconstitutional. *Jones v. Blanas*, 393 F.3d 918, 913 (9th Cir. 2004) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

Applying this test, Mr. Doe's petition establishes that his detention no longer serves the government's detention purposes. *See* Pet. at ¶¶ 79–106. Respondents are unlikely to effectuate removal in the foreseeable future, as Mr. Doe's removal case will likely take months or years to resolve. *See id.* at 98. Mr. Doe is not a flight risk or danger. *See id.* at ¶ 100–06. He has strong family and community ties in the United States and a solid release plan, which includes state

supervision on conditions. His sole criminal history—two serious but youthful offenses—occurred more than twenty years ago. He has fully served his custodial sentence for those offenses. His years as a firefighter with the CDCR Fire Camp program and excellent prison record demonstrate his uncontested rehabilitation. He has a strong incentive to attend future court appearances to obtain lawful status and obtain post-conviction relief. The duration of Mr. Doe's detention—more than two years—is unduly prolonged. *See id.* at ¶¶ 88–93. The nature of his detention is likewise unduly harsh. *See id.* at ¶¶ 94–96. And neither bears areasonable relation to the government's purposes for detention in this case. *See id.* at 107–09.

While Respondents acknowledge that the substantive due process test requires examining whether detention serves the government's purposes, they fail to apply the test or engage with the facts presented in Mr. Doe's petition concerning risk of flight and danger. Instead, Respondents suggest that this Court should apply the test only if it finds as a threshold matter that "there were [*sic*] an 'unreasonable delay by the [Government] in pursuing and completing detention proceedings.'" Resp. at 15 (quoting *Demore*, 538 U.S. at 532 (Kennedy, J., concurring)). Because "no such circumstances are present here," Respondents claim, it is not "necessary to ask" whether detention serves the government's purposes. *Id.* (internal quotation marks and citation omitted)). Respondents' argument in support of this threshold inquiry is based on a concurring opinion in *Demore* that discusses whether continued detention without a bond hearing is constitutional—a procedural issue. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Setting aside that this statement is not binding, the procedural issue it addresses is not relevant to the substantive due process claim at issue here. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (holding that statements contained in a concurrence do not constitute binding precedent); *see also Jones*, 393 F.3d at 913 (setting forth the substantive due process test and omitting any threshold inquiry). Indeed, Respondents fail to cite any substantive due process cases applying such a threshold inquiry. This Court should therefore reject Respondents' suggestion that it need not ask whether detention serves the government's purposes unless it first finds that the government unreasonably delayed proceedings.

Respondents also avoid engaging in the substantive due process inquiry by arguing that detention pending removal proceedings necessarily serves the government's purpose of preventing any risk of flight. *See* Resp. at 16. Respondents thus promote a bright-line rule that detention under § 1226(c) will never violate substantive due process because it always serves the government's detention purposes. Respondents rely on *Demore* for this point but fail to acknowledge here that *Demore* concerned detention periods of six months or less. *See* Resp. at 16. But Mr. Doe has been detained well beyond the brief period *Demore* discusses. And the Supreme Court has expressly left open the possibility that detention under § 1226(c) may become unconstitutionally prolonged. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (remanding for consideration of this issue). This is consistent with civil detention precedent. *See Jackson,* 406 U.S. at 738; *see also United States v. Salerno*, 481 U.S. 739, 747 (1987). It is also consistent with the Ninth Circuit's application of an individualized, flexible standard—not a bright-line rule—for substantive due process challenges in the civil detention context. *See Jones*, 393 F.3d at 932 (citing *Bell v. Wolfish*, 441 U.S. 520, 538, 539 n.20 (1979)); *Doe v. Kelly*, 878 F.3d 710, 714 (9th Cir. 2017) (applying *Bell* and its progeny to immigration detention). Moreover, contrary to Respondents' claim, *see* Resp., at 12–13, satisfaction of the government's detention purposes diminishes over time. *See* Pet. at ¶ 107. In fact, the government has elsewhere conceded that "at some point, regardless of the risk . . . due process will require that [a person subject to prolonged civil confinement] be released." *United States v. Torres*, 995 F.3d 695, 709–10 (9th Cir. 2021). This Court should therefore reject Respondents' suggestion that detention under § 1226(c) necessarily serves the government's purposes.

Rather than examine whether the government's purposes are satisfied here, Respondents focus on whether the duration of Mr. Doe's detention can be considered prolonged given that his former counsel requested continuances and Mr. Doe has exercised his right to appeal. *See* Resp. at 13–14. Respondents never acknowledge that Mr. Doe was the victim of ineffective assistance by former counsel, who sought a four-month continuance—without Mr. Doe's knowledge—during a period in which the State Bar of California suspended her license. *See* Pet. at ¶ 55.

Respondents also ignore that the immigration judge granted two additional continuances because the government late-filed evidence on the eve of Mr. Doe's merits hearings. *See id*. at ¶¶ 56, 57. And Respondents ignore that Mr. Doe exercised his right to appeal his case and seek review by the Ninth Circuit of his meritorious claims for relief because he fears that the alternative—accepting removal—will lead to his torture or death. *See id.* at ¶¶53, 103.

It is misleading at best, and cynical at worst, to frame the continuances and decisions to appeal as personal "litigation decisions" that Mr. Doe "voluntarily elected" under these circumstances. Resp. at 13, 16. Mr. Doe urges this Court to roundly reject Respondents' efforts to lay blame for the prolonged nature of his detention at his own feet. Resp. at 14–15. *Cf. Doe v. Garland*, No. 22-cv-03759-JD, 2023 WL 1934509, at *2 (N.D. Cal. Jan. 10, 2023) (granting habeas upon finding that "even if some of Doe's detention may be attributable to his requests for continuances before the immigration court, as the government suggests, . . . the portion is tiny and the fact remains that the has been detained for eighteen months without a bond hearing").

Having improperly urged this Court to apply a threshold inquiry, impart a bright-line rule, or fault Mr. Doe for his two years in detention, Respondents fail to grapple with whether the duration and nature of the Mr. Doe's detention bear some reasonable relation to the government's detention in this particular case? *See Jones*, 393 F.3d at 932. As Mr. Doe explains above and in his petition, it does not. *See* Pet. at ¶¶ 107–12. This Court should therefore find that continued detention violates Mr. Doe's right to substantive due process and order his release.

III. Mr. Doe's detention violates his right to procedural due process.

A. This Court should presume that Mr. Doe is entitled to a bond hearing because he has been detained for more than two years.

Mr. Doe requests that this Court order a bond hearing because he has been detained longer than the six-month benchmark that the Supreme Court has used as a measure for "prolonged" civil detention. *See Demore*, 538 U.S. at 513; *Zadvydas*, 533 U.S. at 690; *McNeil v. Director, Patuxent Instit.*, 407 U.S. 245, 250 (1972). *See* Pet. at ¶¶ 116–22; *see also Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011), *Rodriguez v. Nielsen*, No. 18-cv-04187-TSH,

2019 WL 7491555, at *6 (N.D. Cal. Jan. 7, 2019)). Respondents protest on the ground that "no binding authority supports a 'bright-line' rule," but fail to address the facts of this case. Resp. at 17. ICE has detained Mr. Doe for more than two years—four times as long as the "brief" detention period discussed in *Demore.* Under these circumstances, Mr. Doe urges this Court to hold that due process requires a prompt, individualized hearing based on the length of his detention alone.

B. This Court alternatively should hold that a bond hearing is warranted under the *Mathews v. Eldridge* test.

Mr. Doe's petition established that a bond hearing is warranted under the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* Pet. at ¶¶ 123–24, 126–44. That test requires balancing (1) the private interest threatened by governmental action; (2) the risk of erroneous deprivation of such interest and the probable value of additional procedural safeguards; and (3) the government interest. *See Mathews*, 424 U.S. at 335.

Respondents argue as a threshold matter that because "the Supreme Court has never resolved immigration detention challenges under *Mathews* . . . , this Court should not do so here." Resp. at 18 (citation omitted). Respondents ignore that the Supreme Court has applied *Mathews* in considering a due process challenge to an immigration exclusion hearing. *See Landon v. Plasencia*, 459 U.S. 21, 103 (1982). Moreover, contrary to Respondents' suggestion, *see* Resp. at 19, the Ninth Circuit applied *Mathews* to a due process challenge in the immigration detention context. *See Rodriguez Diaz v. Garland* 53 F.4th 1189, 1206–07 (9th Cir. 2022) (assuming without deciding that *Mathews* applies). Other circuits have done the same. *See Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27–28 (1st Cir. 2021); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020). So have many courts in this District. *See, e.g., I.E.S. v. Becerra*, 23-cv-03783-BLF, 2023 WL 6317617,

at *8 (N.D. Cal. Sept. 27, 2023); *Ameen*, 2022 WL 1157900, at *6. These decisions recognize that *Mathews* offers a flexible test that balances both parties' interests and the risks and alternatives to a hearing. *See Rodriguez Diaz*, 53 F.4th at 1206. Respondents fail to acknowledge this ample authority or the substantial benefits of the flexible *Mathews* test. Nor do they propose an alternative test. This Court should follow the substantial weight of authority and apply *Mathews* to Mr. Doe's procedural due process challenge.

Mr. Doe's petition explains that the first *Mathews* prong, private interest threatened by governmental action, weighs overwhelmingly in his favor. *See* Pet. at ¶¶ 128–34. He has been detained under restrictive conditions for more than two years. *See id.* at ¶¶ 129, 131. Neither removal nor release under the available procedures is likely in the foreseeable future absent this Court's intervention. *See id.* at ¶ 129. He has a strong interest in rejoining his immediate family in the United States and in litigating his removal case. *See id.* at ¶ 132 (citing *Plasencia*, 459 U.S. at 34). Mr. Doe therefore "has an overwhelming interest here." *Perera v. Jennings*, No. 21-cv-04136-BLF, 2021 WL 2400981, at *4 (N.D. Cal. June 21, 2021).

Respondents concede that Mr. Doe has a private interest in "freedom from detention," which "'lies at the heart of the liberty that [the Due Process] Clause protects.'" Resp. at 19–20 (quoting *Zadvydas*, 533 U.S. at 690). But Respondents argue that Mr. Doe "overstates his interests." *Id.* at 19. This argument is unpersuasive.

Respondents first claim that Mr. Doe's interest in freedom from detention is "overstate[d]" because "'Congress regularly makes rules that would be unacceptable if applied to citizens.'" Resp. at 19–20 (quoting *Demore*, 538 U.S. at 522). That the government has statutory authority to detain a noncitizen does not diminish that person's private interest in being free from detention. If Respondents suggest that Mr. Doe's liberty interest is diminished because

Demore held that the six-month detention in that case was constitutional, this likewise does not follow logically. In any event, Mr. Doe has been detained more than four times as long as the "brief" period discussed in *Demore*. *See* 538 U.S. at 513; *see also Jennings*, 138 S. Ct. at 851 (recognizing that after a certain point, a noncitizen's detention may become unconstitutional). It is thus difficult to see how the mere existence of § 1226(c) and the fact-specific holding in *Demore* diminish Mr. Doe's personal liberty interest on the facts of his case.

Respondents next argue that Mr. Doe has "overstate[d]" his liberty interest because he does not contest that his 1997 and 2001 convictions are grounds of removal. *See* Resp. at 20. Respondents ignore the Supreme Court authority, cited in Mr. Doe's petition, stating that the weight of an individual's liberty interest is not "'offset'" by his criminal conviction. Pet. at ¶ 133 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality op.). Respondents likewise disregard that Congress created a statutory scheme ensuring that a person who concedes removability based on criminal convictions remains eligible to defend against removal based on family ties, rehabilitation and risk of persecution or torture. *See, e.g.*, 8 U.S.C. § 1181(h) (permitting individuals with removable criminal convictions to seek adjustment of status with a waiver); 8 C.F.R. § 1208.17 (permitting individuals with removable criminal convictions to obtain deferral of removal under CAT). In this case, Mr. Doe has asserted two defenses to removal: adjustment of status with a waiver and deferral of removal under CAT. These claims, pending before the Ninth Circuit, augment rather than diminish Mr. Doe's liberty interest because they provide an avenue for him to remain in the United States with his family and avoid torture if removed. Indeed, for individuals seeking to avoid harm, "the private interest could hardly be greater." *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013); *see also Plasencia*, 459 U.S. at 34 (recognizing that a person facing removal "stands to lose the right to stay and live and

work in this land of freedom") (cleaned up). Respondents' claim that the grounds of removability diminish Mr. Doe's liberty interest thus fails.

Relatedly, Respondents claim that Mr. Doe's liberty interest is diminished because of "his own litigation choices" to "pursu[e] relief." Resp. at 21. Respondents ignore that Mr. Doe's detention has been unduly prolonged due to the ineffective assistance of counsel he received, the government's repeated late filings before the immigration court, and his Hobson's choice to seek protection under the Convention Against Torture ("CAT"). *See supra* at 7. In any case, it simply does not follow that Mr. Doe's pending petitions for review by the Ninth Circuit diminish his interest in being free from confinement during the pendency of his proceedings.

Finally, Respondents contend that this Court should ignore the conditions of confinement in assessing Mr. Doe's liberty interest because the conditions "do not invalidate or vitiate the 'immigration purpose' that is served when a noncitizen is detained under Section 1226(c)." Resp. at 20–21. Respondents appear to confuse the inquiry under the first prong of the *Mathews* balancing test—whether petitioner has a strong liberty interest—with the substantive-due-process test described above—whether continued detention serves the government's detention purposes. Under the *Mathews* inquiry, Mr. Doe has a heightened interest in being free from detention because the conditions of confinement are deleterious to his physical and mental health. *See* Pet. at ¶¶ 71–75, 131; *see also id.* at ¶¶ 150–52. In applying the wrong test, Respondents fail to meaningfully address this point.

Respondents alternatively argue that the proper remedy for unconstitutional conditions is a change in conditions or award of damages through a civil rights action rather than a bond hearing. *See* Resp. at 21 ("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.'") (quoting *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979)). But Mr. Doe does not challenge the constitutionality of the conditions of his detention *per se*. Rather, he argues that this Court, applying *Mathews*, should consider that his liberty interest is heightened by the restrictive nature of his detention. Other courts in this District have done the same. *See, e.g., Gonzalez v. Bonnar*, No.18-cv-05321-JSC, 2019 WL 330906, at *5 (N.D. Cal. Jan. 25, 2019) (holding that "courts consider the conditions of the [noncitizen's detention because noncitizens] held under § 1226(c) are subject to civil detention rather than criminal incarceration."). This Court should therefore reject Respondents' claim and find that the first *Mathews* factor weighs in Mr. Doe's favor.

The second *Mathews* prong also favors Mr. Doe's claim because there is a risk or erroneous deprivation of liberty without an bond hearing before a neutral arbiter. Pet. at ¶¶ 135–37. Given that Mr. Doe has never received a bond hearing, this risk is "substantial." *Diouf*, 634 F.3d at 1092. Moreover, "the probable value of additional procedural safeguards"—that is, an individualized bond hearing before an immigration judge—"is high, because Respondents have provided virtually no procedural safeguards at all." *Jimenez v. Wolf*, No. 19-cv-7996-NC, 2020 WL 510347, at *3 (N.D. Cal. Jan. 30, 2020.

Respondents suggest as a general matter that there can *never* be a risk of erroneous deprivation under Section 1226(c) detention because that statute does "not guarantee[] such bond hearings." Resp. at 22. This is incorrect. While the statute does not expressly mandate bond hearings, it does not bar them either. *See Jennings,* 138 S. Ct. at 851. Indeed, courts routinely exercise habeas authority to order bond hearings for individuals detained under § 1226(c), recognizing that a failure to do so would risk erroneously depriving the petitioner of an individualized inquiry before a neutral arbiter. *See, e.g., Jimenez*, 2020 WL 510347, at *3;

Perera, 2022 WL 1128719, at *4–7; *Marroquin Ambriz*, 420 F. Supp. 3d at 963; *Ameen*, 2022 WL 1157900, at *6 (same). Here, because Mr. Doe has not previously had a bond hearing, that risk is heightened and the value of additional procedures is high. This prong weighs in his favor.

The third *Mathews* prong, the government's interest, also weighs in Mr. Doe's favor. *See* Pet. at ¶¶ 138–44. For purposes of this prong, the scope of the government's interest is in *continuing to detain Mr. Doe without any individualized review*. *See id.* at ¶ 138 (citing *Marroquin Ambriz*, 420 F. Supp. 3d at 964; *Doe*, 2022 WL 2132919, at *5). As Mr. Doe established, this interest is weak given that the cost of providing an individualized inquiry is minimal. *See id.* at ¶ 139 (citing *Doe*, 2022 WL 2132919, at *5).

Respondents claim that the government's interest in not providing a hearing is significant. *See* Resp. at 22–23. But in making this claim, Respondents reassert the government's detention purposes as relevant to the substantive due process inquiry: "to ensure a noncitizen's appearance for removal proceedings and to protect public safety." *Id*. at 22. That's the wrong inquiry here. The government's interest for purposes of the *Mathews* procedural due process inquiry is whether the government has an interest in *not* providing a bond hearing. *See Marroquin Ambriz*, 420 F. Supp. 3d at 964; *Doe*, 2022 WL 2132919, at *5.

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)); *see Doe*, 878 F.3d at 718. Accordingly, the government has conceded elsewhere that the cost of providing an individual bond hearing is minimal. *See Singh v. Barr*, No. 18-cv-2471-GPC-MSB, 2019 WL 4168901, at *12 (N.D. Cal. Aug. 30, 2019); *Marroquin Ambriz*, 420 F. Supp. 3d at 964; *Lopez Reyez v. Bonnar*, 362 F. Supp. 3d 762, 777 (N.D. Cal. 2019). Respondents implicitly concede this point here as well given that

they never contest Mr. Doe's argument that the cost of providing a hearing is minimal. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012); *see also* Pet. at ¶ 138. Consequently, the third *Mathews* prong, like the first two, weighs in favor of a bond hearing.

C. This Court also should hold that a bond hearing is warranted under the test set forth in *German Santos*.

Mr. Doe urges that a bond hearing also is warranted under the multi-factor test set forth in *German Santos v. Warden Pike Correctional Facility*, 965 F.3d 203, 211 (3d Cir. 2020). *See* Pet. at ¶¶ 125, 145–153. Respondents complain in a footnote that Mr. Doe "provides no authority or justification for application of this out-of-circuit decision." Resp. at 19 n.4. But Mr. Doe's petition cites several cases in which courts in this District granted habeas petitions under the *German Santos* test. *See* Pet. at ¶¶ 145–52. As in those cases, this Court may order a bond hearing because the *German Santos* test as well as the *Mathew* test are satisfied here.

D. This Court should order Mr. Doe's release, or alternatively, order a hearing at which Respondents bear the burden.

Mr. Doe urges this Court to grant Mr. Doe's petition for a writ of habeas and order his release within fourteen days under any conditions of release this Court deems necessary to remedy the procedural due process violation here. Alternatively, this Court should set Mr. Doe's case for a bond hearing before the Court. In the further alternative, this Court should order the immigration judge to order a bond hearing. If this Court sets a hearing or orders one before the immigration court, , it should instruct that Respondents must bear the burden of justifying Mr. Doe's continued detention by clear and convincing evidence. *See* Pet. at ¶ 157 (citing *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011)).

Respondents contend that Mr. Doe should bear the burden of proof because, in their view, the Ninth Circuit's decision in *Rodriguez Diaz* overturned *Singh*. *See* Resp. at 24–25

(citing *Rodriguez Diaz*, 53 F.4th at 1202). Not so. *Rodriguez Diaz* concerned detention under § 1226(a)—not § 1226(c), as pertains here—and expressly limited its holdings to that context. *See* 53 F.4th at 1196–97. *Rodriguez Diaz* distinguished *Singh* as a case concerning prolonged detention under § 1226(c) and declined to apply the burden of proof required by *Singh* to § 1226(a) bond hearings. *See id*. at 1202, 1211. *see also Pham*, 2023 WL 2744397, at *7 (applying *Singh* post-*Rodriguez Diaz*); *Doe*, 2023 WL 1934509, at *2 (same). Respondents' claim that *Rodriguez Diaz* overruled *Singh* therefore lacks merit.

Respondents also try to re-litigate *Singh*'s holding itself, s*ee* Resp. at 24–25 & n.5, recycling arguments that courts in this District have repeatedly rejected. *See Henriquez v. Garland*, No. 22-cv-00869-EJD, 2022 WL 2132919, at *6 (N.D. Cal. June 14, 2022); *Romero Romero v. Wolf*, No. 20-cv-08031-TSH, 2021 WL 254435, at *5 (N.D. Cal. Jan. 26, 2021); *Gonzalez*, 2019 WL 330906, at *6. A long line of civil detention cases hold that the government should bear the burden of justifying continued detention implicating constitutional concerns. *See Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). This Court should follow this line of authority and hold Respondents to their burden here.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Doe's petition for a writ of habeas.

Dated: October 13, 2023

Respectfully submitted,
/s/ Sarah R. Weinman
Sarah R. Weinman
Alison Pennington
Claudia Valenzuela
Immigrant Legal Defense
1301 Clay Street, # 70010
Oakland, CA 94612
Telephone: (415) 562-6512
sarah@ild.org
Attorneys for Mr. Doe