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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Pedro Yimi Cardin Alvarez,

Petitioner,

v.

David Rivas, et al.,

Respondents.

No. CV-25-02943-PHX-GMS (CDB)

RESPONDENTS' OBJECTIONS TO OCTOBER 7, 2025 REPORT AND RECOMMENDATION (Dkt. 26)

Respondents, by and through counsel, hereby file their Objections to the Report and Recommendation (R&R) dated October 7, 2025. Respondents maintain that the Petition and other relief claimed should be denied and incorporate by reference their Response to the Petition for Writ of Habeas Corpus (Dkt. 14), to preserve all defenses stated in the Response.

Respondents object to the R&R as addressed below, but note that they have not had adequate time to review the lengthy R&R and confer with the agency involved (DHS) and with subject matter experts at DOJ's Office of Immigration Litigation, many of whom are furloughed due to the lapse in appropriations, given that the Magistrate Judge ordered that objections be filed with 48 hours of delivery of the R&R. As such, these objections are preliminary, and Respondents respectfully request that the Court provide the parties with

the standard 14 days provided for by Fed. R. Civ. P. 72(b)(2) to file more complete objections.

I. A pre-detention hearing is an improper extra-statutory remedy to which Petitioner is not entitled and due process does not require.

The R&R erroneously recommends that the Court hold that the government should not be allowed to re-detain Petitioner without first holding a pre-deprivation bond hearing before a neutral arbiter pursuant to 8 U.S.C. § 1226(a) and its implementing regulations, with at least seven days' notice to Petitioner, and that at that hearing, the government will have the burden of justifying detention by "clear and convincing" evidence that Petitioner poses a flight risk or danger, and at which hearing the alien's eligibility for bond must be considered. Further, the R&R recommends that Respondents shall not re-detain Petitioner absent this pre-deprivation hearing.

Respondents object on several bases. First, as with other issues described in Section III below, Petitioner's habeas did not raise this issue or seek this relief. The R&R thus goes well beyond the relief requested and recommends relief on an issue the parties did not brief and so Respondents did not have an opportunity to address it.

Second, there is no statutory or regulatory requirement that entitles Petitioner to a "pre-deprivation" hearing, much less one involving burden-shifting against the government. *See generally* 8 U.S.C. §§ 1225; 1226; 1231. For this Court to read one into the immigration custody statute would be to create a process for which the statutory and regulatory scheme do not provide. *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 580-82 (2022).

The extra-statutory remedy directed by the R&R is both improper and superfluous. If Petitioner were to be re-arrested and detained by ICE, he is entitled to a review of custody determinations. "Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). Further, "'[e]xcept as provided in [§ 1226(c)]' the Attorney General 'may release' an alien detained under § 1226(a) 'on… bond' or 'conditional parole.'" *Id.*

1 Moreover, implementing the procedures directed by the R&R would be
2 unmanageable. The R&R extends relief indefinitely. If a Notice to Appear is issued that
3 subjects Petitioner to new removal proceedings that result in a removal order, ICE would
4 need to take him into custody to facilitate his removal. Similarly, if he is released but ICE
5 determines he has become a flight risk or danger, ERO would need to re-detain him. ICE
6 should not be—and is not—required to give Petitioner advance notice of its intention to re-
7 detain him under those circumstances, much less to prove that detention is warranted prior
8 to its occurrence. The Supreme Court has upheld the constitutionality of basic processes of
9 providing hearings post-detention. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 309 (1993)
10 (rejecting a procedural due process claim that "the INS procedures are faulty because they
11 do not provide for automatic review by an immigration judge of the initial deportability
12 and custody determinations"); *Abel v. United States*, 362 U.S. 217, 233-34 (1960) (noting
13 the "impressive historical evidence of acceptance of the validity of statutes providing for
14 administrative deportation arrest from almost the beginning of the Nation"). Instead of a
15 guarantee of pre-detention review by an Immigration Judge, aliens detained under
16 § 1226(a) are provided with multiple avenues to seek review of their detention once they
17 are in custody – a process which the Ninth Circuit has already held is constitutionally
18 sufficient. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1196-97 (9th Cir. 2022). The
19 Ninth Circuit held that that the "existing agency procedures" sufficiently protect liberty
20 interest of aliens and "mitigate the risk of erroneous deprivation." *Id.* at 1209. "In short,
21 the agency's decision to detain Rodriguez Diaz was subject to numerous levels of review,
22 each offering Rodriguez Diaz the opportunity to be heard by a neutral decisionmaker.
23 These procedures ensured that the risk of erroneous deprivation would be 'relatively
24 small.'" *Id.* (quoting *Yagman v. Garcetti*, 852 F.3d 859, 865 (9th Cir. 2017)).
25 Other courts, including those in this judicial circuit, have rejected the premise that
26 the Constitution requires an extra hearing before an alien can be arrested under 8 U.S.C.
27 § 1226(b). *See, e.g.*, *United States v. Cisneros*, No. 19-CR-00280-RS-5, 2021 WL
28 5908407, at *4 (N.D. Cal. Dec. 14, 2021) ("[t]he law does not require a hearing before

arrest" where a noncitizen released from ICE custody had been picked up by the San Francisco Police Department for assault). Other courts have also recognized that there is no "due process right to a pre-detention hearing where a noncitizen, subject to pending removal proceedings...is at risk of being re-detained after being at liberty for more than two years." *Reyes v. King*, No. 19 CIV. 8674 (KPF), 2021 WL 3727614, at *11 (S.D.N.Y. Aug. 20, 2021); *accord Salvador F.-G. v. Noem*, No. 25-CV-0243-CVE-MTS, 2025 WL 1669356, at *8 (N.D. Okla. June 12, 2025) ("On careful consideration of the statute, the implementing regulations, and the BIA's decisions in *Sugay* and *Valles-Perez*, the Court rejects petitioner's claim that the DHS has no authority to revoke a bond issued by an immigration judge.").

Moreover, it is well established that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also Reno*, 507 U.S. at 306; *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."). In every case in which detention incident to removal proceedings has arisen, the Supreme Court has concluded that it is constitutional. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). Moreover, the Ninth Circuit also held in *Rodriguez Diaz* that the Due Process Clause does not require a second bond hearing when a petitioner is subject to ongoing detention. *Rodriguez Diaz*, 53 F.4th at 1203. The procedural process provided to Petitioner, if he is re-arrested, is constitutionally adequate and no additional process should be required, much less the process required by the R&R.

II. Regardless of Petitioner's dismissed asylum application, under 8 U.S.C. § 1225(b)(1)(A), Petitioner had the statutory obligation to express a credible fear and request a credible fear interview in expedited removal proceedings.

The R&R does not provide any authority for its determination that an alien who is paroled on recognizance into the United States and files an application for asylum "does not need" to then specifically request a credible interview if he is later placed into expedited

removal proceedings. Dkt. 26 at 26. The R&R overlooks the plain language of the statute and regulation.

The record shows that Petitioner did not indicate a fear which would trigger a credible fear interview or otherwise request a credible fear interview. U.S.C. § 1225(b)(1)(A). His asylum application was dismissed by USCIS for lack of jurisdiction because he was in regular removal proceedings a year before he was placed in expedited removal proceedings. His prior statements of fear of returning to Cuba do not apply to his subsequent expedited removal proceedings under the plain language of § 1225(b) and its implementing regulations.

The R&R notes that the record reflects that USCIS lacked jurisdiction over Petitioner's affirmative asylum application case which resulted in its dismissal, and that USCIS forwarded Petitioner's application to EOIR. Dkt. 26 at 6. However, 8 U.S.C. § 1225(b)(1) and 8 C.F.R. § 235.3(b)(4) only require that an immigration officer provide a credible fear interview when an alien in expedited removal proceedings expresses an intention to apply for asylum or a fear of persecution. That Petitioner expressed an intention or fear years before in a different proceeding and/or context does not require that he be given a fear interview in his expedited removal proceedings if he does not express an intention or fear at that time in that proceeding. Further, while the R&R cites the Huffman Memorandum, stating that expedited removal includes asylum screening which is sufficient to protect the reliance interests of any alien who has applied for asylum, that guidance does not act to replace a credible interview process referenced in the statute. The R&R thus inappropriately relies on guidance from DHS, and not statutory language, to conclude that Petitioner's prior request for asylum and statements are the functional equivalent of a credible fear asserted during expedited removal proceedings.

It is error to rely on Petitioner's prior asylum application, which was terminated even before the termination of the § 240 removal proceedings. *See, e.g.*, 8 C.F.R. § 235.3(b)(4) (entitled "Inadmissible aliens and expedited removal"):

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> if an alien subject to the expedited removal provisions indicated an intention to apply for asylum or expresses a fear of persecution or torture or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with 8 C.F.R. § 208.30.

In this case, Petitioner's I-589 was withdrawn because USCIS had no jurisdiction due to Petitioner's original removal proceedings – a year before he was placed in expedited removal proceedings. Indeed, the R & R expressly points out that Petitioner never received a "credible fear screening" (Dkt. 26 at 28) to identify his potential eligibility for asylum (a positive determination would require that he be returned to § 240 removal proceedings pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii)), thus acknowledging that credible fear interviews are indeed necessary during expedited removal proceedings. A prior request made within the context of an asylum proceeding is not effective under the statute.

III. The R&R improperly goes outside the record on several points.

The R&R also inappropriately relied on matters outside the record before the Court and provided Respondents no opportunity to be heard on these points.

First, the R&R states that Petitioner's due process rights were violated because "there is no dispute" that he was in the United States for three years – from 2022 to 2025 before being placed in expedited removal proceedings. But Petitioner did not present any evidence supporting this alleged fact, even though Petitioner has the burden under 8 C.F.R. § 235.3(b)(ii) to show his continuous residency in the United States. Nor does the R&R point to anything on the record supporting this apparent assumption that Petitioner was physically and continuously present in the United States for over two years prior to the order for expedited removal proceedings.

Second, the R&R is based on an apparent extra-judicial investigation conducted by the Court. Neither party presented evidence of the conditions of the detention center where Petitioner is detained. However, the R&R includes statements alleging facts about conditions at San Luis Regional Detention Center, including its ownership and the demographics of its population, as well as visitation, search and contraband policies. All of this is apparently based on the Court's own independent investigation to determine those

putative facts. Petitioner did not challenge the conditions of his confinement, which is an improper claim in a habeas and one over which the Court would lack jurisdiction. *See Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) ("[T]he writ of habeas corpus is limited to attacks upon the legality or duration of confinement."). In *Crawford*, the Ninth Circuit held that "release from confinement" was not the appropriate remedy to address the petitioner's claims "alleg[ing] that the terms and conditions of [petitioner's] incarceration constitute[d] cruel and unusual punishment" and "violated his due process rights." *Id.* at 891-92. Such a claim must be brought as a civil rights claim, *Dohner v. Seifert*, 5 F.3d 535 (9th Cir. 1993), that if proven, would be remedied by "a judicially mandated change in conditions and/or an award of damages." *Crawford*, 599 F.2d at 892. *See also Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented" in civil-rights action) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)); *Nettles v. Grounds*, 830 F.3d 922, 934 n.11 (9th Cir. 2016) (Habeas relief is limited to claims that challenge the fact or duration of the prisoner's conviction or sentence or would necessarily result in immediate or speedier release from custody).

Although Fed. R. Evid. 201 allows the Court to take judicial notice of facts that are not subject to reasonable dispute, the R&R unilaterally assumes and legally concludes from its ex parte investigation that the contraband policy forbidding certain electronic devices necessarily impinges an alien's right to travel or be released from custody. *See* Dkt. 26 at 35 n.21. Respondents were not given the opportunity to be heard on the propriety of judicial notice of the putative impact of this detention center policy, which forms another basis of the R&R. Rule 201(e) allows any party the opportunity to be heard on any fact to be noticed. Further, the rule authorizes judicial notice only of facts, not interpretations of law—like whether a policy violates a detainee's rights. *See Tate v. Univ. Med. Ctr. of S. Nevada*, No. 209CV01748JADNJK, 2016 WL 7045711, at *7 (D. Nev. Dec. 2, 2016), *aff'd sub nom. Tate v. Univ. Med. Ctr.*, 773 F. App'x 405 (9th Cir. 2019)).

Third, the R&R putatively judicially noticed another issue, which was also not raised by Petitioner—specifically, the claim that the government has a policy of arresting 3000 aliens a day and that Petitioner was caught up in that policy. While the R&R cites other district court opinions on that issue, Respondents were provided no opportunity to rebut or otherwise explain the policy since that issue was not raised in the habeas petition.

For all the foregoing reasons, Respondents request that the Court accept the objections stated above, and reject the R&R and/or provide additional time for Respondents to supplement these objections.

RESPECTFULLY SUBMITTED October 9, 2025.

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