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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11
12 PHIEN KHAMSAVANG,
13 Petitioner,
14 v.
15 TODD BLANCHE, et al.,
16 Respondents.
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Case No.: 26-cv-2750-TWR-AHG

**RESPONSE TO PETITION AND
MOTION FOR TEMPORARY
RESTRAINING ORDER**

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1 **I. INTRODUCTION**

2 Petitioner has filed a habeas petition under 28 U.S.C. § 2241, as well as a motion for
3 temporary restraining order and injunctive relief, seeking immediate release from
4 immigration custody. However, Petitioner is subject to mandatory civil immigration
5 detention under 8 U.S.C. § 1226(c). As Petitioner has only been detained since August, and
6 the majority of the delays in his removal proceedings are attributable to him, there is no
7 due process violation. Therefore, this Court should deny relief.

8 **II. FACTUAL BACKGROUND**

9 Petitioner is a native and citizen of Thailand, who entered the United States as a
10 lawful permanent resident on January 20, 1988. *See* Exh. 1 at 2 (I-213).¹ On February 22,
11 2019, Petitioner was convicted of Attempted Murder, in violation of California Penal Code
12 Sections 664/187. Exh. 2 at 1(Notice to Appear with Conviction Documents). Petitioner
13 was sentenced to nine (9) years imprisonment. *Id.* at 4. On August 19, 2025, an immigration
14 detainer was placed on Petitioner, who was serving a sentence for the above-referenced
15 conviction in a state penitentiary. Exh. 3 (I-247). Petitioner was transferred to immigration
16 custody and a Notice to Appear was issued charging Petitioner with removability under
17 Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as an aggravated felon.
18 Exh. 2.

19 The NTA scheduled Petitioner’s first master calendar hearing for October 9, 2025.
20 Exh. 2. The hearing was advanced to September 30, and then continued to November 13,
21 2025 to allow Petitioner to seek counsel. Exh. 4 (EOIR Adjournment History). The hearing
22 was continued on November 13, and December 2 due to insufficient time. *Id.* On December
23 4, 2025, and January 21, 2026, continuances were granted to allow Petitioner’s attorney
24 time to prepare. *Id.* On March 5, 2026, Petitioner refused to appear, and his case was
25 continued once again. *Id.* Three more continuances for preparation time for Petitioner’s
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27 ¹ The attached exhibits are true copies, with few redactions of private information, of
28 documents obtained from ICE counsel.

1 attorney were granted on March 19, March 26, and April 9, 2026. Petitioner once again
2 refused to appear for his court hearing on April 28, 2026.² Petitioner’s next master calendar
3 hearing is scheduled for June 4, 2026.

4 **III. ARGUMENT**

5 Petitioner has filed both a habeas petition and a motion for temporary restraining
6 order challenging his continued immigration detention. Both should be denied, as
7 Petitioner is subject to mandatory detention under 8 U.S.C. § 1226(c), and thus
8 Petitioner is not entitled to either form of relief. Petitioner’s arguments under *Zavydas v.*
9 *Davis*, 533 U.S. 678 (2001) are premature, as there is currently no final order of
10 removal. Further, Petitioner has presented zero evidence that ICE would be unable to
11 remove him to Thailand in the event of a final removal order.

12 **A. Legal Standard for Temporary Restraining Order**

13 In general, the showing required for a temporary restraining order is the same as
14 that required for a preliminary injunction. *See Stuhlberg Int’l Sales Co., Inc. v. John D.*
15 *Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a
16 temporary restraining order, a plaintiff or petitioner must “establish that he is likely to
17 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
18 preliminary relief, that the balance of equities tips in his favor, and that an injunction is
19 in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see*
20 *Nken v. Holder*, 556 U.S. 418, 426 (2009). Petitioner must demonstrate a “substantial
21 case for relief on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir.
22 2011). When “a plaintiff has failed to show the likelihood of success on the merits, we
23 need not consider the remaining three [*Winter* factors].” *Garcia v. Google, Inc.*, 786 F.3d
24 733, 740 (9th Cir. 2015). *See also Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002)
25 (movant seeking injunctive relief “must show either (1) a probability of success on the

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27 ² The information regarding the reasons for Petitioner’s two nonappearances are based
28 on representations from DHS counsel.

1 merits and the possibility of irreparable harm, or (2) that serious legal questions are
2 raised and the balance of hardships tips sharply in the moving party’s favor.”) (quoting
3 *Andrieu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001)).

4 ***1. Petitioner is Unlikely to Succeed on the Merits of the Habeas Petition***

5 Likelihood of success on the merits is a threshold issue. *See Garcia*, 786 F.3d at
6 740. Where the showing of likelihood of success on the merits is weak, the Court need
7 not consider the remaining *Winter* factors. *See Garcia*, 786 F.3d at 740.

8 Here, Petitioner is unlikely to succeed on the merits. Petitioner has not met his
9 burden of demonstrating that his detention under 8 U.S.C. § 1226(c) is unlawful under the
10 Fifth Amendment’s Due Process Clause. Section 1226(c) provides for the mandatory
11 detention of specific categories of aliens, including, as applicable here, “any alien who . . .
12 is deportable under section 1227(a)(2)(A) of this title on the basis of an offense for which
13 the alien has been sentence[d] to a term of imprisonment of at least one year.” Section
14 1227(a)(2)(A) provides that “[a]ny alien who is convicted of an aggravated felony at any
15 time after admission is deportable.” Title 8, United States Code, Section 1101(a)(43),
16 includes a list of enumerated aggravated felonies, to include murder, and states that an
17 attempt or conspiracy to commit an enumerated offense also qualifies as an aggravated
18 felony. According to Petitioner’s criminal history, Petitioner was convicted of Attempted
19 Murder under California Penal Code Sections 664/187.

20 Courts use the categorical and modified categorical approaches to determine
21 whether a specific state conviction qualifies as an aggravated felony. *Lopez-Aguilar v.*
22 *Barr*, 948 F.3d 1143, 1146 (9th Cir. 2020). First, the court compares the elements of the
23 state statute “with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly
24 understood.” *Descamps v. United States*, 570 U.S. 254, 257 (2013). “A state offense with
25 the same or narrower elements as the generic offense defined by federal law is a categorical
26 match.” *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1085 (9th Cir. 2020) (citing *Lopez-*
27 *Valencia v. Lynch*, 798 F.3d 863, 867 (9th Cir. 2015)). However, if the state statute

1 criminalizes conduct “that falls beyond the scope of the generic federal offense,” then the
2 statute is overbroad, and the court must determine whether the statute is divisible. *Gomez*
3 *Fernandez*, 969 F.3d at 1085-86 (quoting *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1119
4 (9th Cir. 2020)). “If the statute is divisible, [courts] apply the modified categorical
5 approach and ‘examine judicially noticeable documents of conviction to determine which
6 statutory phrase was the basis for the conviction.’” *Gomez Fernandez*, 969 F.3d at 1086
7 (quoting *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039 (9th Cir. 2017) (en banc)
8 (internal quotations and citations omitted)).

9 In *Gomez Fernandez*, the Ninth Circuit addressed whether a conviction for murder
10 under California Penal Code § 187(a) qualified as an aggravated felony under the INA. The
11 court first determined that § 187 was overbroad because it included conduct outside the
12 federal definition of murder, specifically the killing of an unborn fetus. 969 F.3d at 1088.
13 However, the court then determined that the statute “is divisible because it creates distinct
14 crimes for the killing of a human being and the killing of an unborn fetus.” *Id.* at 1090. The
15 court then looked to the conviction documents in the particular case and determined that
16 the count for which the petitioner was convicted was for unlawfully killing a human being,
17 and thus found that the conviction was an aggravated felony. *Id.* at 1091.

18 Here, Petitioner was convicted of attempted murder. A review of the conviction
19 documents shows that Petitioner was convicted of attempting to kill a human, not an unborn
20 fetus, and thus his crime qualifies as an aggravated felony. Petitioner pled to two counts:
21 attempted murder and resisting arrest/threatening officer. Exh. 2. The charging document
22 included in the conviction documents demonstrate that this case was initially charged as
23 attempted murder of a peace officer/firefighter/custodial officer, and describes the victim
24 as “a peace officer engaged in the performance of duty.” *Id.* It stands to reason that
25 Petitioner’s conviction was for the attempted murder of a human being, as opposed to an
26 unborn fetus. Thus, Petitioner was convicted of an aggravated felony and is subject to
27 mandatory detention under § 1226(c).

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1 The Supreme Court has held that mandatory detention under § 1226(c) does not
2 violate due process. *See Demore v. Kim*, 538 U.S. 510, 513 (2003). In so holding, it
3 recognized that for over a hundred years, the Supreme Court “has firmly and repeatedly
4 endorsed the proposition that Congress may make rules as to aliens that would be
5 unacceptable if applied to citizens.” *Id.* at 522 (collecting cases). Consequently, the
6 Supreme Court has, time and time again, “recognized [that] detention during deportation
7 proceedings [is] a constitutionally valid aspect of the deportation process.” *Id.* at 523; *see*
8 *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1217 (9th Cir. 2022) (Bumatay, concurring)
9 (“For over a century, whenever Congress has granted the Executive authority to detain
10 aliens pending removal proceedings, the Supreme Court has repeatedly upheld such
11 detention as consistent with the Constitution.”).

12 In addressing the constitutionality of § 1226(c), the *Demore* court deemed it
13 critically important to address the immigration purpose underlying Congress’s enactment
14 of the statute. *See* 538 U.S. at 527–31. In its analysis, the Supreme Court observed that
15 Congress “adopted [§ 1226(c)] against a backdrop of wholesale failure by the [government]
16 to deal with increasing rates of criminal activity by aliens.” *Id.* at 518. It noted that when
17 enacting § 1226(c), Congress had before it a multitude of evidence to support its
18 determination to mandate detention of criminal noncitizens, including: that (1) “criminal
19 aliens who were deported swiftly [had] reentered the country illegally in great numbers”;
20 (2) “[the] near-total inability to remove deportable criminal aliens imposed more than a
21 monetary cost on the Nation”; (3) “deportable criminal aliens who remained in the United
22 States often committed more crimes before being removed”; (4) “one of the major causes
23 of the [the government’s] failure to remove deportable criminal aliens was the agency’s
24 failure to detain those aliens during their deportation proceedings”; (5) “even with
25 individualized screening, releasing deportable criminal aliens on bond would lead to an
26 unacceptable rate of flight”; and (6) “evidence suggest[ed] that permitting discretionary
27 release of aliens pending their removal hearings would lead to large numbers of deportable
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1 criminal aliens skipping their hearings and remaining at large in the United States
2 unlawfully.” *Id.* at 518–33.

3 With the statute’s purpose in mind, the Supreme Court upheld the constitutionality
4 of § 1226(c), repeatedly noting, as it had several times before, that detention of a noncitizen
5 during ongoing removal proceedings is constitutional. *See id.* at 513 (“We hold that
6 Congress, justifiably concerned that deportable criminal aliens who are not detained
7 continue to engage in crime and fail to appear for their removal hearings in large numbers,
8 may require that [such] persons . . . be detained for the brief period necessary for their
9 removal proceedings.”). The Supreme Court, however, did not foreclose the possibility that
10 a noncitizen detained under § 1226(c) may establish a due process violation depending on
11 the circumstances of their case.

12 In addressing such due process claims (as here), the Court must be principally guided
13 by *Demore*. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions
14 remain binding precedent until we see fit to reconsider them[.]”); *Hart v. Massanari*, 266
15 F.3d 1155, 1171 (9th Cir. 2001) (“A decision of the Supreme Court will control that corner
16 of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the
17 inferior courts may voice their criticisms, but follow it they must.”); *see also Rodriguez*
18 *Diaz v. Garland*, 53 F.4th at 1214 (Bumatay, concurring) (The Supreme Court “has
19 recently backed away from multi-factorial grand unified theories for resolving legal
20 issues.”) (simplified, citing *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022)).
21 And *Demore* teaches that detention of noncitizens under § 1226(c) is constitutional so long
22 as detention serves its purported immigration purpose. *See* 538 U.S. at 527–28 (stating that
23 detention of such noncitizens “necessarily serves the purpose of preventing deportable
24 criminal aliens from fleeing prior to or during their removal proceedings, thus increasing
25 the chance that, if ordered removed, the aliens will be successfully removed” and that the
26 evidence Congress had before it in enacting § 1226(c) “certainly support[ed] the approach
27 it selected” in declining to afford such noncitizens bond hearings during removal
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1 proceedings).

2 Justice Kennedy’s concurring opinion provided further guidance on when a
3 noncitizen mandatorily detained under § 1226(c) may suffer a due process violation. *See*
4 *id.* at 532–33. He stated that “since the Due Process Clause prohibits arbitrary deprivations
5 of liberty, a lawful permanent resident alien [] could be entitled to an individualized
6 determination as to his risk of flight and dangerousness if the continued detention became
7 unreasonable or unjustified.” *Id.* at 532. He then explained what circumstances may meet
8 the unreasonable or unjustified standard: “Were there to be an unreasonable delay by
9 [DHS] in pursuing and completing deportation proceedings, it could become necessary
10 then to inquire whether the detention is not to facilitate deportation, or to protect against
11 risk of flight or dangerousness, but to incarcerate for other reasons.” *Id.* at 532–33.

12 Here, Petitioner has been in immigration custody since August of 2025. However,
13 most of the delays in Petitioner’s removal proceedings are attributable to Petitioner, not
14 DHS. Of the ten continuances of Petitioner’s master calendar hearing, eight are attributable
15 to Petitioner. Exh. 4. The evidence in the record shows no unreasonable delay in the
16 proceedings attributable to DHS.

17 ***2. The Remaining Winter Factors Weigh Against the Relief Requested***

18 Although the Court may end its inquiry upon a finding that Petitioner’s likelihood
19 of success on the merits is weak, the remaining factors also support a denial of relief in this
20 case.

21 *Harm to Petitioner.* This factor does not weigh heavily in Petitioner’s favor.
22 Petitioner contends that detention adversely impacts his ability to care for his mother and
23 children. However, these are the same hardships he suffered while serving his nine year
24 sentence for attempted murder, and the same hardship he will face if removed from the
25 United States.

26 *Balancing of the Harm to the Opposing Party and the Public Interest.* These
27 factors merge when the Government is the opposing party. *See Nken v. Holder*, 556 U.S.

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1 418, 435 (2009). ICE’s interest in detaining Petitioner pending efforts to remove and
2 resettle him is strong. The Supreme Court has specifically acknowledged that “[f]ew
3 interests can be more compelling than a nation’s need to ensure its own security.” *Wayte*
4 *v. United States*, 470 U.S. 598, 611 (1985); *see also United States v. Brignoni-Ponce*,
5 422 U.S. 873, 878-79 (1975) (“Whatever the number, these aliens create significant
6 economic and social problems, competing with citizens and legal resident aliens for jobs,
7 and generating extra demand for social services”); *Blackie’s House of Beef, Inc. v.*
8 *Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981) (referring to the “the seriousness of
9 the public interest in enforcement of the immigration laws.”).

10 The balancing of equities and the public interest weigh heavily against granting
11 Petitioner equitable relief.

12 **B. The Petition for Habeas Corpus Should Be Denied**

13 Respondents incorporate by reference the arguments related to Petitioner’s
14 likelihood of success on the merits. Because Petitioner has been convicted of an
15 aggravated felony, he is subject to mandatory detention under § 1226(c). There has been
16 minimal delay in Petitioner’s removal proceedings attributable to DHS. Thus, there is
17 no Due Process violation.

18 **IV. CONCLUSION**

19 For the reasons stated herein, Respondents respectfully request the Court to deny
20 this habeas petition and motion for temporary restraining order.

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22 DATED: May 8, 2026

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