

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER AHN,
Petitioner,
v.
DAVID M. SINGER,
Respondent.

Case No. 2:22-cv-04320-FLA

**ORDER GRANTING PETITIONER
CHRISTOPHER AHN'S PETITION
FOR WRIT OF HABEAS CORPUS
[DKT. 1], FINDING LACK OF DUAL
CRIMINALITY [DKT. 36], AND
ENJOINING EXTRADITION**

RULING

“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. 1, § 9, cl. 2. “The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person’s restraint and to require justification for such detention.” *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring). “Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.” *Id.*

For the reasons stated herein, the court GRANTS Petitioner Christopher Ahn’s (“Petitioner” or “Ahn”) Petition for Writ of Habeas Corpus (“Petition,” Dkt. 1)¹ and ENJOINS Ahn’s extradition from the United States on the grounds that the Magistrate Judge clearly erred in finding: (1) there is probable cause to extradite Petitioner on the charges certified; and (2) the United States of America (the “government”) met its burden to establish dual criminality. The court additionally holds extradition would violate Petitioner’s substantive due process rights and is barred under the state-created danger doctrine and the humanitarian exception to extradition, if it exists.

Execution of this Order is STAYED for thirty-five (35) days from the date of the Order, to allow the government the opportunity to appeal this decision. If the government fails to file a notice of appeal timely, the Clerk of the court shall exonerate Petitioner’s bond.

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¹ The court cites documents by the page numbers added by the court’s CM/ECF system, rather than any page numbers listed on documents natively.

BACKGROUND

Ahn was among a small group of men, some or all of whom were part of an organization called Free Joseon, who are accused of entering unlawfully the Democratic People’s Republic of Korea’s (“North Korea”) embassy in Madrid, Spain, on February 22, 2019. *United States v. Ahn*, 2:19-cv-05397-FLA (JPRx) (“Case 19-5397”), Dkt. 233 (“Certification,” filed in this action at Dkt. 11-1) at 1–2. The government contends Ahn and others, including Adrian Hong Chang (“Hong Chang”), the apparent leader of Free Joseon, attacked the North Korean embassy, “breaking down doors, seizing electronic items, physically assaulting and restraining diplomats, and holding them and their families hostage for approximately four-and-a-half hours,” before escaping from the embassy and fleeing to the United States. Dkt. 30 at 15 (footnote omitted). Ahn asserts they were asked by certain residents of the embassy to aid their defection from North Korea by staging their departure as an involuntary kidnapping to protect their families from retaliation by the North Korean government. Dkt. 14 at 29–31.

On June 20, 2019, the government, acting on behalf of the Kingdom of Spain (“Spain”), filed a Request for Petitioner’s Extradition for six offenses under Spanish law: (1) breaking and entering, (2) making threats, (3) causing injury, (4) illegal restraint, (5) criminal organization, and (6) robbery with violence or intimidation. Case 19-5397, Dkt. 44. The extradition request came to hearing on May 25, 2021, at which time the Magistrate Judge denied certification as to the sixth offense of robbery with violence or intimidation while taking under submission the questions of whether probable cause existed as to the other five offenses, whether to admit and consider Petitioner’s declaration in making that judgment, and whether a humanitarian exception to extradition existed and was appropriate to invoke as to Petitioner. *Id.*, Dkt. 201 (Extradition Hr’g Minute Order) at 2, Dkt. 231 (Extradition Hr’g Tr.).

On May 9, 2022, the Magistrate Judge issued a Reluctant Certification of Extraditability (“Certification”), certifying Ahn’s extradition to Spain for the offenses

1 of: (1) breaking and entering, (2) making threats, (3) causing injury, and (4) illegal
2 restraint, while denying certification as to offenses of (5) criminal organization, and
3 (6) robbery with violence or intimidation. Certification at 1, 4 at 19–28, 50.² The
4 Magistrate Judge rejected Petitioner’s request to refuse certification on humanitarian
5 grounds, finding the extradition court was barred by clearly established law from
6 invoking the humanitarian exception to deny extradition. *Id.* at 34, 52.

7 On June 23, 2022, Petitioner filed the subject Petition for Writ of Habeas
8 Corpus (“Petition,” Dkt. 1), challenging the certification of his extradition on grounds
9 including: (1) the competent evidence presented was insufficient to support the
10 Magistrate Judge’s probable cause determination; (2) the Magistrate Judge erred in
11 finding dual criminality; and (3) Petitioner’s extradition would violate his Fifth
12 Amendment right to substantive due process and must be enjoined under the
13 humanitarian exception. Dkt. 1-1 at 1; Dkt. 14 at 42–64. The government opposes
14 the Petition. Dkt. 30. The Magistrate Judge’s denial of certification of the fifth and
15 sixth offenses are not at issue in this habeas proceeding. *See id.* at 35–43.

16 On January 9, 2023, the court ordered the parties to show cause (“OSC”)
17 whether the dual criminality requirement of the extradition treaty between the United
18 States and Spain (“Extradition Treaty,” Dkt. 11-14) was satisfied, in light of the
19 ongoing hostilities and unique circumstances surrounding the United States’
20 relationship with North Korea. Dkt. 36. The government and Petitioner responded to
21 the OSC timely. Dkts. 37, 38, 39. The Petition and OSC came to hearing on January
22 26, 2024 (the “January 2024 Hearing”). Dkt. 57.

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28 ² The Magistrate Judge’s findings of fact in the Certification (Dkt. 11-1 at 1–3, 7–19)
are incorporated into this Order by reference, except as specified otherwise herein.

DISCUSSION

I. Legal Standard

“[E]xtradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function.” *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006) (quotation marks and citations omitted). A United States citizen may be subject to extradition for offenses committed in another country, “provided that an extradition treaty exists between the United States and the country seeking extradition and the crime charged is covered by the treaty.” *Id.* (citing 18 U.S.C. § 3184). “After the warrant issues, the judicial officer conducts a hearing to determine whether there is ‘evidence sufficient to sustain the charge under the provisions of the proper treaty or convention,’ or, in other words, whether there is probable cause.” *Id.* (quoting 18 U.S.C. § 3184, citation omitted).

“If the judicial officer determines that there is probable cause, he is required to certify the individual as extraditable to the Secretary of State.” *Id.* (cleaned up). “After an extradition magistrate certifies that an individual can be extradited, it is the Secretary of State, representing the executive branch, who ultimately decides whether to surrender the fugitive to the requesting country.” *Id.* “The authority of a magistrate judge serving as an extradition judicial officer is thus limited to determining an individual’s eligibility to be extradited, which he does by ascertaining whether a crime is an extraditable offense under the relevant treaty and whether probable cause exists to sustain the charge.” *Id.*

As the party seeking extradition, the government bears the initial burden to establish extraditability. *Barapind v. Enomoto*, 400 F.3d 744, 747 (9th Cir. 2005) (*en banc*) (*per curiam*) (“Certification of extradition is lawful only when the requesting nation has demonstrated probable cause to believe the accused person is guilty of committing the charged crimes.”). A reviewing court defers to the extradition court’s factual findings unless they are clearly erroneous, and reviews legal questions and mixed questions of fact and law *de novo*. *Quinn v. Robinson*, 783 F.2d 776, 791–92

1 (9th Cir. 1986).

2 “There is no right of direct appeal to a district court or a court of appeals from
3 the extradition court’s certification of extraditability. Because the extradition court’s
4 order is not final for purposes of 28 U.S.C. § 1291, the only available avenue to
5 challenge an extradition order is through a habeas petition.” *Santos v. Thomas*, 830
6 F.3d 987, 1001 (9th Cir. 2016) (quotation marks and citations omitted). “The district
7 court’s habeas review of an extradition order is limited to whether: (1) the extradition
8 magistrate had jurisdiction over the individual sought, (2) the treaty was in force and
9 the accused’s alleged offense fell within the treaty’s terms, and (3) there is any
10 competent evidence supporting the probable cause determination of the magistrate.”
11 *Vo*, 447 F.3d at 1240 (quotation marks and citations omitted).

12 **II. The Magistrate Judge’s Probable Cause Determination**

13 **A. Probable Cause in Extradition Proceedings**

14 Pursuant to the Extradition Treaty, a request to extradite “a person who has not
15 yet been convicted” is to “be accompanied by ... such information as would justify the
16 committal for trial of the person if the offense had been committed in the requested
17 country.” Dkt. 11-14 at 14, art. X, § D. United States courts have interpreted this
18 provision in similar treaties as “requiring a showing by the requesting party that there
19 is probable cause to believe that the accused has committed the charged offense.”
20 *Quinn*, 783 F.2d at 783. “Probable cause to arrest exists when officers have
21 knowledge or reasonably trustworthy information sufficient to lead a person of
22 reasonable caution to believe that an offense has been or is being committed by the
23 person being arrested.” *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir.
24 2011). The government and the requesting nation bear the initial burden of
25 establishing the existence of probable cause. *Barapind*, 400 F.3d at 747.

26 “[E]xtradition courts do not weigh conflicting evidence in making their
27 probable cause determinations[.]” *Id.* at 750 (cleaned up). “The Federal Rules of
28 Evidence do not apply in an extradition hearing,” and “evidence is not incompetent

1 simply because it is hearsay.” *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir.
2 1999). “For information to amount to probable cause, it does not have to be
3 conclusive of guilt, and it does not have to exclude the possibility of innocence”
4 *Garcia*, 639 F.3d at 1209. “All that is required is a ‘fair probability,’ given the totality
5 of the evidence” “that a suspect has committed a crime.” *Id.*

6 “If the judicial officer determines that there is probable cause, [she] is required
7 to certify the individual as extraditable to the Secretary of State.” *Vo*, 447 F.3d at
8 1237 (cleaned up). This determination “serves only the narrow function of indicating
9 those items of submitted evidence on which the decision to certify extradition is
10 based.” *Quinn*, 783 F.2d at 791.³ “Because the magistrate’s probable cause finding is
11 ... not a finding of fact in the sense that the court has weighed the evidence and
12 resolved disputed factual issues, it must be upheld if there is any competent evidence
13 in the record to support it.” *Id.* (quotation marks and citations omitted).

14 **B. Competency of the Evidence Supporting the Determination**

15 Petitioner contends the Magistrate Judge committed clear error by: (1) finding
16 North Korean witness Cho Sun Hi’s (“Ms. Cho”)⁴ initial statements to the Spanish
17 police to be competent; and (2) excluding Petitioner’s declaration and medical records
18 as inadmissible contradictory evidence. Dkt. 14 at 60–64.

20 ³ In probable cause hearings under American law, the evidence taken
21 need not meet the standards for admissibility at trial. ... This is
22 because a preliminary hearing is not a minitrial of the issue of guilt;
23 rather, its function is the more limited one of determining whether
24 probable cause exists to hold the accused for trial. An extradition
25 hearing similarly involves a preliminary examination of the evidence
26 and is not a trial.

27 *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997) (quotation marks and
28 citations omitted).

⁴ For the sake of consistency and clarity, the court lists the Korean witnesses’ family
names before their given names, in accordance with the standard naming convention
in both North and South Korea.

1 **1. Ms. Cho’s Testimony**

2 In the underlying proceeding, Petitioner argued that the North Korean
3 witnesses’ statements regarding the events at the embassy were not competent because
4 they were coerced. Certification at 11. After considering the testimony of Professor
5 Lee Sung-Yoon (“Professor Lee”), a professor of Korean Studies at the Fletcher
6 School of Law and Diplomacy at Tufts University, the Magistrate Judge agreed in
7 large part and excluded all of the North Korean witness’ statements aside from Ms.
8 Cho’s initial statements to the Spanish police.⁵ *Id.* at 11–16.⁶

9 Professor Lee “testified that North Korean witnesses’ statements are ‘inherently
10 unreliable’” because “North Koreans abroad are ‘captives of the state whose loved
11 ones and associates back home are held hostage against their actions abroad.’”
12 Certification at 13–14 (citing Dkt. 11-7 at 11). Based on this testimony, the
13 Magistrate Judge found, “the North Koreans at the embassy would have had a
14 ‘compelling need to keep their story together’ for fear that officials back home might
15 think the intruders were there to help one or more of them defect,” since they would
16 “face the certainty of banishment to a gulag with their entire family and even
17 execution” “[i]f they were thought to have tried to defect[.]” *Id.* at 14.⁷

18 Because all excluded statements were made in the presence of and translated
19 into Spanish by the North Korean Acting Ambassador, So Yun Sok (“Ambassador
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22 ⁵ This witness is referred to by different names throughout the record. *See*
23 Certification at 10 n. 8. The court will follow the Magistrate Judge’s practice and
refer to her as “Ms. Cho.”

24 ⁶ The government did not present any evidence to contest Professor Lee’s testimony
25 regarding North Korea and the North Korean government.

26 ⁷ “Prof. Lee testified that the situation for those North Koreans who hold government
27 posts, and particularly those in foreign countries, is even more dire than for average
28 citizens. As an example, he noted that when a North Korean university professor
defected to South Korea in 1997, ‘5,000 of his friends, relatives, distant relatives,
[and] colleagues’ were ‘all killed’ in North Korea.” Certification at 14.

1 So”), who was superior in title to every single North Korean involved and deeply self-
2 interested in what was said, the Magistrate Judge found these statements were not
3 competent. *Id.* at 15, 18 (“As Prof. Lee testified, [Ambassador So] would have made
4 sure the other North Koreans’ statements matched his, whether by coercing them to
5 say what he wanted or simply translating them as he liked.”).

6 While noting “it was a close call,” the Magistrate Judge found Ms. Cho’s initial
7 statements to the Spanish police officers to be competent because they were
8 “translated by Google Translate and not Ambassador So.” *Id.* at 17. No evidence,
9 however, was presented to establish that Google Translate translated, or was even
10 capable of translating in February 2019 when the statements were made, Ms. Cho’s
11 statements from North Korean to a language understood by the Spanish police officers
12 accurately. The evidence in the record demonstrates clearly that Google Translate did
13 not.

14 The Spanish police officers noted Ms. Cho was disoriented, Case 19-5397, Dkt.
15 118-1 (“Suppl. Extradition Doc.”) at 17,⁸ and “didn’t speak Spanish at all,” *id.* at 48,
16 and that her translated statements “made no sense,” *id.*, and were “a little strange,” *id.*
17 at 19. One officer testified “the translation that came up ... said that some individuals
18 had entered the Embassy and they were killing people, they were eating people and
19 there were children there.” *Id.* at 19. He further testified they “changed [the program]
20 ... both from Korean to Spanish and from Korean to English,” “just in case maybe it
21 might change the context of what she meant a little bit,” because the translated
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25 ⁸ Excerpts of the Document Supporting the Request for Extradition (Case 19-5397,
26 Dkt. 226-3, “Extradition Docs.”) and Supplemental Extradition Document (*id.*, Dkt.
27 118-1) were filed in this action as Dkts. 11-15 and 11-16, respectively. Because these
28 exhibits were filed with the CM/ECF headers from Case 19-5397, the court will cite
these exhibits by the relevant page numbers of the documents from the underlying
extradition proceeding rather than Dkts. 11-15 and 11-16 in this action.

1 statements “seemed very strange.” *Id.* at 19.⁹ The Magistrate Judge noted similarly
2 that “[s]ome of [Ms.] Cho’s initial statements were fantastical – South Koreans had
3 entered the embassy and were ‘killing people’ and ‘eating’ them” Certification at
4 17 n. 12.¹⁰ The government also referred to Ms. Cho’s translated statements as
5 “fantastical” at the January 2024 Hearing. Dkt. 57 at 45.

6 In these circumstances, it was clear error for the Magistrate Judge to consider
7 Ms. Cho’s initial statements to the Spanish police, as they were clearly not competent
8 evidence. *See, e.g., Novelty Textile, Inc. v. Windsor Fashions, Inc.*, Case No. 2:12-cv-
9 05602-DDP (MANx), 2013 WL 1164065, at *3 (finding “a translation by Google
10 Translate is not sufficiently reliable to make it admissible,” and that “[t]he
11 translation’s unreliability is clear on its face,” given the “nonsensical” results
12 provided).¹¹

13 2. Petitioner’s Declaration

14 “The admission of evidence proffered by the fugitive at an extradition
15 proceeding is left to the sound discretion of the court, guided of course by the
16 principle that a fugitive’s right to introduce evidence rebutting probable cause is
17 limited to introducing evidence that is ‘explanatory,’ but not ‘contradictory.’” *Santos*,
18 830 F.3d at 992 (cleaned up). “The difference between ‘explanatory’ and
19 ‘contradictory’ evidence is easier stated than applied,” and “federal courts have
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21 ⁹ Tellingly, the police officers were unclear whether the translation stated “[Ms. Cho]
22 had hit her head or that her head had been hit[.]” Dkt. 11-16 at 48. There is no
23 evidence in the record to establish Ms. Cho actually stated what the officers believed
24 she was trying to say, based on the translation provided by Google Translate.

25 ¹⁰ It is undisputed that neither murder nor cannibalism occurred at the Embassy during
the events at issue.

26 ¹¹ This ruling is limited to the Spanish police officers’ testimony regarding Ms. Cho’s
27 statements and does not affect the competency of the portions of their testimony based
28 on statements made by Spanish-speaking witnesses and the officers’ personal
observations. *See* Suppl. Extradition Doc. at 17–18, 48.

1 struggled to distinguish between the two.” *Id.*

2 The Ninth Circuit “ha[s] generally settled on the principle that ‘explanatory’
3 evidence is evidence that ‘explains away or completely obliterates probable cause,’
4 whereas contradictory evidence is that which ‘merely controverts the existence of
5 probable cause, or raises a defense.’” *Id.* “In practice, this means that an individual
6 contesting extradition may not, for example, present alibi evidence, facts contradicting
7 the government’s proof, or evidence of defenses like insanity, as this tends to call into
8 question the credibility of the government’s offer of proof. However, the accused
9 may testify to things which might have explained ambiguities or doubtful elements in
10 the government’s case.” *Id.* at 993 (quotation marks and citations omitted)

11 The Magistrate Judge ruled Petitioner’s declaration was inadmissible evidence
12 because it contradicted the government’s version of events, as established by Ms.
13 Cho’s admitted initial statements to the Spanish police. Certification at 9–10. As
14 stated, however, Ms. Cho’s initial statements were not competent and cannot be
15 considered in determining whether Petitioner’s evidence was “explanatory” or
16 “contradictory.”

17 With the exclusion of Ms. Cho’s initial statements to the Spanish Police, only
18 the following competent evidence remains: (1) images showing Petitioner entering the
19 embassy along with other members of his group;¹² (2) images and documents
20 establishing that Petitioner’s group had purchased items found in the embassy; (3)
21 photographs of damage to the embassy, which were taken approximately one hour-

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23 ¹² In finding probable cause for the crimes certified, the Magistrate Judge “generally,
24 although not entirely,” avoided relying on images recorded by security cameras
25 located within the embassy that the government offered as evidence because “some of
26 the footage, particularly that taken after dark, [was] grainy and difficult to make out,”
27 and the time “between when the ‘so-called infiltrators’ left the embassy and when
28 Acting Ambassador So allowed Spanish police to enter,” provided “ample time [for
the North Koreans] to coordinate and to lay out ... damaging evidence.” Certification
at 20–21 n. 13 (internal quotation marks and citations omitted, ellipses in
Certification).

1 and-a-half after the incident and once the Spanish police were allowed to enter the
2 embassy; (4) statements by Spanish witnesses who were not present inside the
3 embassy during the incident; and (5) medical records of Ms. Cho and Ambassador So.
4 *See* Dkt. 14 at 19–20 (identification of admitted evidence); Dkts. 11-15, 11-16.

5 Petitioner’s declaration explains his motive for entering the embassy with the
6 items identified in the government’s evidence and details what occurred once they
7 were inside. Dkts. 10-1 (“Ahn Decl.” unredacted version) & 11-12 (redacted version).
8 This is explanatory evidence.

9 The government argues Petitioner’s declaration is contradictory evidence
10 because it contradicts the narrative Spain and the government have presented.¹³ The
11 court disagrees. The relevant standard is not whether evidence contradicts the
12 government’s theory or “narrative” of events, but whether the evidence contradicts the
13 government’s offer of proof. *See Santos*, 830 F.3d at 992. Petitioner’s declaration
14 does not contradict or challenge the credibility of any facts established by the
15 government’s competent evidence, and challenges only the inferences the government
16 draws from these facts by presenting supplemental facts regarding Petitioner’s
17 motives and the events that occurred outside the view of the Spanish witnesses and
18 images of security footage presented. This is explanatory evidence. *See Santos*, 830
19 F.3d at 1003.¹⁴

21 ¹³ When questioned at the January 2024 Hearing, the government was unable to
22 identify any specific evidence contradicted by Petitioner’s declaration and stated only
23 that the declaration “contradict[ed] the narrative that the Spanish have presented”
Dkt. 57 at 48–49. The Spanish government’s narrative is not evidence.

24 ¹⁴ The Magistrate Judge also found Petitioner’s declaration was not explanatory
25 because “Ahn’s statements ‘explain’ the government’s evidence only to the extent
26 they are true. And assessing that would require a prohibited credibility
27 determination.” Certification at 8. To the extent the Certification suggests a relator’s
28 testimony is contradictory if the government challenges the relator’s credibility, the
court disagrees. The relevant question is not whether the relator’s credibility can be

1 Accordingly, the court holds the Magistrate Judge clearly erred by excluding
2 Petitioner's declaration as contradictory evidence. *See* Certification at 9. The court
3 declines to address the Magistrate Judge's exclusion of Petitioner's medical records,
4 as unnecessary to the court's ultimate ruling on the Petition.

5 3. The Existence of Probable Cause after Evidentiary Rulings

6 The Magistrate Judge found probable cause existed to believe Petitioner
7 committed the offenses of breaking and entering, illegal restraint, causing injuries, and
8 threats under Spanish law. Certification at 23–26, 28, 50. After excluding Ms. Cho's
9 statement to the Spanish Police as incompetent and admitting Petitioner's declaration
10 as explanatory evidence, the competent evidence supporting the Magistrate Judge's
11 probable cause determination establishes the following facts:

12 Petitioner arrived in Spain on the morning of the embassy incident.
13 Certification at 20 (citing Extradition Doc. at 3). The prior day, "his compatriots
14 prepared for the operation by buying balaclavas, knives, imitation pistols, handcuffs,
15 flashlights, electrical tape, and a ladder ..., as shown by store receipts and video-
16 camera surveillance." *Id.* (citing Extradition Doc. at 51–56). "Ahn does not contest
17 that he went to and entered the embassy with the others, as surveillance footage seems
18 to show." *Id.*

19 "Two civilians who were waiting for a bus outside the embassy when Ahn and
20 the others entered heard 'screams' from inside the compound [Suppl. Extradition Doc.
21 at 77, 80–81, 101], and one of them testified that when she peeked through a hole in
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23 challenged or disputed—since the credibility of a witness' testimony can always be
24 questioned—but whether the relator's evidence: (a) "explains away or completely
25 obliterates probable cause" by "explain[ing] ambiguities or doubtful elements in the
26 government's case," or (b) "merely controverts the existence of probable cause or
27 raises a defense" by contesting facts established by the government's competent
28 evidence. *See Santos*, 830 F.3d at 993. If the government's challenge to the
truthfulness and credibility of a relator's testimony rendered that testimony
contradictory, then a relator could never provide explanatory testimony. That is not
the standard established under *Santos* and other relevant authority.

1 the compound's wall[,] she saw someone on the ground with three people on top [*id.*
2 at 80–81], one of them holding a pistol [*id.* at 81].” Certification at 21. “The other
3 witness saw people on top ‘grabbing the person who was on the ground.’” *Id.* (citing
4 Suppl. Extradition Doc. at 102). A student who was with this witness said, “I think
5 they’re practicing.” *Id.* at 21 n. 14; Suppl. Extradition Doc. at 81.

6 Two Spanish police officers were dispatched to assist the Madrid Municipal
7 Emergency Assistance and Rescue Service (SAMUR) with Ms. Cho after she was
8 discovered “walking along the public highway.” Suppl. Extradition Doc. at 17. The
9 Spanish police officers and a bystander testified Ms. Cho “was very scared and
10 appeared to be seriously injured.” Certification at 21 (citing Extradition Doc. at 7–8,
11 17, 39–41; Suppl. Extradition Doc. at 9, 18–19, 48, 65–66).

12 “Spanish police also testified that after they went to the embassy to investigate,
13 [Hong Chang] answered the door and pretended to be North Korean, telling the
14 officers nothing was wrong and that if they had heard noises inside[,] it was because
15 ‘he couldn’t open a door’ and had had to ‘give it a kick[.]’” *Id.* at 21–22 (citing
16 Suppl. Extradition Doc. at 21, 49). “Officers stationed outside the embassy saw Ahn
17 and his group leave in embassy cars ‘quite fast’ and ‘at great speed,’ one of those cars
18 with its lights off.” *Id.* at 22 (citing Suppl. Extradition Doc. at 24, 50–51). “They
19 took with them pen drives, computers, hard drives, and a mobile telephone belonging
20 to the North Koreans.” *Id.* (citing Extradition Doc. at 3, 9). “After police were
21 allowed to enter the compound, they found scattered about various accoutrements of
22 criminal activity, including restraints, handcuffs, knives, and replica guns, items
23 consistent with those Ahn’s cohorts had bought before the incident.” *Id.* (citing
24 Extradition Doc. at 9).

25 Ahn states the following facts in his declaration: “On a few occasions, [Hong
26 Chang] ... ask[ed] [him] to help on specific tasks related to helping with North
27 Korean defections,” in connection with Free Joseon. Ahn Decl. ¶ 4. “[Ahn’s]
28 involvement usually entailed making travel arrangements for people, escorting them

1 from one place to another, and making sure they ended up at the next leg of their
2 intended destination.” *Id.* ¶ 5.¹⁵ According to Petitioner, he was only “called upon to
3 assist ... to facilitate the defection of someone who had reached out to [Hong Chang]
4 for help,” and “never had any reason to believe that [Hong Chang] or his organization
5 were involved in forcing anyone to defect against their will.” *Id.* ¶ 6.

6 When Petitioner arrived in Madrid, “[Hong Chang] explained [REDACTED]
7 [REDACTED] had asked for
8 help defecting [REDACTED]. [Hong Chang] also told [Ahn] [REDACTED]
9 [REDACTED]
10 [REDACTED].” *Id.*

11 ¶ 8. “[Hong Chang] said [REDACTED] asked [them] to stage the defection as a
12 kidnapping to protect against any retaliation.” *Id.* “Knowing North Korea to be a
13 surveillance state, [they] had every expectation that the embassy would be covered
14 with security cameras and that the North Korean government would be able to see
15 everything [they] were doing.” *Id.* ¶ 11. Accordingly, they brought the items later
16 retrieved from the embassy, which included fake guns, “to make the ‘kidnapping’ look
17 real, not to hurt anybody.” *Id.* [REDACTED]

18 [REDACTED] *Id.*

19 “When [they] arrived at the embassy, one of the North Korean officials let
20 [Hong Chang] in and left the door open,” which Petitioner believes was “done on
21 purpose to allow [the group] to enter.” *Id.* ¶ 12. “[The group] then entered the
22 embassy, and several members of [the] group went through the motions of tying
23 people up.” *Id.* “[Petitioner] did not hit anyone or commit any violence or take any
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25 ¹⁵ In 2017, Hong Chang and Ahn, in connection with Free Joseon, helped Kim Han-
26 Sol, the nephew of North Korea’s dictator and supreme leader, Kim Jong-Un,
27 “disappear” after his father, Kim Jong-Nam, the dictator’s brother, whom many
28 considered to be the rightful heir, was assassinated by North Korea and Han-Sol’s life
appeared also to be in danger. Certification at 37.

property while in the embassy,” and “[b]ased on what [he] saw, the others were taking great pains to make the restraining look real without actually hurting anyone.” *Id.* According to Petitioner, “[he] believed any resistance from the North Koreans was being performed due to North Korean surveillance.” *Id.*

“A little less than an hour after [they] arrived, the Spanish police rang the doorbell. [Hong Chang] went to the door to speak to them, and they told [the group] a woman had jumped out of the window and reported a disturbance at the embassy.” *Id.*

¶ 13.¹⁶ “The police left after a few minutes. After this incident, the energy in the embassy changed, and the North Koreans grew increasingly distressed.” *Id.* “[Hong Chang] and a few others [REDACTED]

[REDACTED].” *Id.* ¶ 14. “The phone in the embassy kept ringing during this time,” which “seemed to terrify the North Koreans, who were viscerally upset and seemed to be convinced the phone ringing was proof that they were all being monitored.” *Id.*

“Eventually, [Hong Chang] came out and told [Petitioner] [REDACTED] [REDACTED] did not want to go through with the defection.” *Id.* ¶ 15.

[REDACTED] and departed the embassy. *Id.* ¶¶ 15–16. Petitioner further states they were very concerned about the safety of the North Koreans and “[he] understand[s] someone from the group sent an email to the Spanish government to let them know that the people inside the embassy might be in danger from the North Korean government.” *Id.* ¶ 17.

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¹⁶ The Magistrate Judge’s observation that Hong Chang’s appearance at the embassy door “suggest[s] that the real North Koreans were all restrained or unwilling to play along,” Certification at 24, is *dicta* and does not constitute a finding of fact. The court notes, without making credibility determinations or findings, that a reasonable factfinder could find alternatively that Hong Chang appeared in *lieu* of the North Koreans to allow them to maintain the fiction of a kidnapping rather than revealing the attempted defection, as Petitioner maintains in his declaration.

1 Based on the totality of the competent evidence presented, the court finds the
2 Magistrate Judge clearly erred in finding the government met its burden to establish
3 probable cause for the crimes certified. It is undisputed that Ahn, Hong Chang, and
4 members of Free Joseon aided high-profile North Koreans in defecting previously.
5 The government did not present any evidence to establish or even suggest that Ahn,
6 Hong Chang, or members of Free Joseon had ever engaged in acts of violence or
7 aggression against the North Korean government or governmental officials similar to
8 what the government contends occurred here.

9 Petitioner does not contest the government's competent evidence or dispute he
10 entered the North Korean embassy with the other members of the group. *See*
11 Certification at 20–22 & n. 13. Instead, Ahn explains they acted [REDACTED]
12 [REDACTED] with the understanding that they were staging a
13 performance to allow the embassy staff to defect while minimizing harm and danger
14 to their family, relatives, and friends in North Korea.¹⁷ If [REDACTED] Free
15 Joseon and Ahn to assist the embassy staff in defecting by staging a kidnapping as
16 Petitioner attests—and there is no competent evidence to establish otherwise—there
17 can be no probable cause for the crimes certified, since all conduct occurred [REDACTED]
18 [REDACTED] without the requisite intent.¹⁸

19
20 ¹⁷ The fact that the North Korean embassy officials allowed individuals with South
21 Korean accents to enter the embassy without taking any security precautions, *see* Dkt.
22 11-16 at 114–20 (images of an individual inside the embassy opening the front door
23 and allowing the group to enter the embassy over a 5-minute period, without any
24 request for identification, supervision, security presence, or resistance), further
25 supports Ahn's testimony that they entered the embassy [REDACTED]
26 [REDACTED] to stage the North Koreans' attempted defection as a kidnapping to
27 protect against retaliation by the North Korean government.

28 ¹⁸ The government's narrative—that members of an organization that aided high-
profile North Koreans defect, which had no established history of violence, decided to
stage an assault on the North Korean embassy in Spain with knives and fake pistols in
an effort to convince the unsuspecting embassy staff to defect, [REDACTED]

1 Ambassador So's testimony and his translations of the other North Korean
2 witnesses' statements are not competent evidence because the singularly repressive,
3 draconian, and murderous nature of the North Korean government put Ambassador So
4 under "enormous pressure" to say whatever he believed was necessary ensure that the
5 North Korean government would not blame him for the incident or accuse him of
6 attempting to defect. *See* Certification at 14–15. The Spanish witnesses' testimony
7 and other competent evidence submitted by the government do not shed any light on
8 Ahn and his group's motives and interactions with the embassy staff inside the
9 embassy. It is clear the Spanish witnesses, who were mere bystanders on a public
10 street outside the embassy, had no personal knowledge regarding the truth of
11 Petitioner's testimony.

12 The competent evidence in the record, thus, is insufficient to establish probable
13 cause for the offenses of breaking and entering, illegal restraint, and threats under
14 Spanish law. The Magistrate Judge certified the remaining offense of causing injuries
15 finding: (1) Ms. Cho suffered sufficiently serious injuries "from when she jumped off
16 the terrace to escape the strangers in the embassy" were foreseeable; and (2)
17 extradition would be appropriate based on Ambassador So's "only marginal 'injuries'
18 because the other offenses certified carry potential punishments of more than one
19 year. Certification at 24–25. After Ms. Cho's initial statements to the Spanish police
20 are excluded from, and Petitioner's declaration is included in, the evidence
21 _____

22 _____ and no
23 knowledge of what security or armed resistance they may face inside—is illogical and
24 implausible. Based on their prior experience aiding North Korean defectors, Ahn,
25 Hong Chang, and the other members of Free Joseon would have known that the North
26 Korean embassy staff would be highly unlikely to defect spontaneously, given the
27 extreme and deadly consequences their family and friends in North Korea would
28 inevitably suffer if they did defect. This observation does not constitute findings of
fact or credibility determinations regarding the government's evidence and is intended
only to highlight the unreasonableness of the government's theory, based on the
totality of the evidence in the record.

1 considered, the court finds there is insufficient competent evidence to establish
2 probable cause that Petitioner or the other members of his group caused injury to Ms.
3 Cho. The remaining “marginal ‘injuries’ suffered by Ambassador So are alone
4 insufficient to support extradition. *See id.* at 25.

5 Accordingly, the court finds the Magistrate Judge erred clearly in finding there
6 was probable cause for the crimes charged, and GRANTS habeas relief on this basis.

7 **III. Dual Criminality**

8 “[U]nder the doctrine of ‘dual criminality,’ an accused person can be extradited
9 only if the conduct complained of is considered criminal by the jurisprudence or under
10 the laws of both the requesting and requested nations.” *Quinn*, 783 F.2d at 783. This
11 doctrine is incorporated in the extradition treaty between the United States and
12 Spain.¹⁹ “[T]o satisfy the ‘dual criminality’ requirement, each element of the offense
13 purportedly committed in a foreign country need not be identical to the elements of a
14 similar offense in the United States.” *In re Extradition of Russell*, 789 F.2d 801, 803
15 (9th Cir. 1986). “It is enough if the particular variety of conduct was criminal in both
16 jurisdictions.” *Id.* (quoting *Kelly v. Griffin*, 241 U.S. 6, 14 (1916)) (cleaned up).

17 **A. The United States’ Hostile Relationship with North Korea**

18 As stated in the OSC, which the court incorporates into this Order by reference,
19 the United States has been involved in a military conflict with North Korea since
20 President Truman committed American troops to Korea in June 1950, in support of
21 United Nations Security Council Resolutions during the Korean War. Although
22 officers of the United States and North Korean armies signed the Armistice

23
24 ¹⁹ Article II of the Extradition Treaty states in relevant part: “A. An offense shall be an
25 extraditable offense if it is punishable under the laws in both Contracting Parties by
26 deprivation of liberty for a period of more than one year or by a more severe penalty
27 B. Extradition shall also be granted for participation in any of these offenses, not
28 only as principals or accomplices, but as accessories, as well as for attempts to commit
or conspiracy to commit any of the aforementioned offenses, when such participation,
attempt, or conspiracy is subject, under the laws of both Parties, to a term of
imprisonment exceeding one year.” Dkt. 11-14 at 3.

1 Agreement for the Restoration of the South Korean State (“Armistice Agreement”) on
2 July 27, 1953, [https://www.archives.gov/milestone-documents/armistice-agreement-](https://www.archives.gov/milestone-documents/armistice-agreement-restoration-south-korean-state)
3 [restoration-south-korean-state](https://www.archives.gov/milestone-documents/armistice-agreement-restoration-south-korean-state), that agreement only ceased hostilities between the
4 armed forces involved in the conflict and established a demilitarized zone. The
5 United States has never declared peace or entered into a peace treaty with North
6 Korea, and the two countries do not maintain diplomatic relations. *See* Certification at
7 5–6 n. 6 (recognizing the United States “has no North Korean embassy nor any
8 diplomatic relations at all with that country.”).

9 In the intervening decades, North Korea has breached the Armistice Agreement
10 repeatedly, including through the capture of the *USS Pueblo* and her crew on January
11 23, 1968, the shooting down of a U.S. Navy EC-121 airplane on April 15, 1969, the
12 attempted assassination of the South Korean President in Rangoon, Myanmar on
13 October 9, 1983, the bombing of Korean Air Flight 858 on November 29, 1987, the
14 sinking of the *ROKS Cheonan* on March 26, 2010, and the shelling of the South
15 Korean island of Yeonpyeong-do on November 23, 2010. Dkt. 38 at 10–13. North
16 Korea and South Korea continue to exchange artillery and missile fire on a regular
17 basis.²⁰ North Korea has also repudiated the Armistice Agreement publicly on
18 multiple occasions, including in 2003, 2009, and 2013. Madison Park, *North Korea*
19 *Declares 1953 Armistice Invalid*, CNN (Mar. 11, 2013), [https://www.cnn.com/2013/](https://www.cnn.com/2013/03/11/world/asia/north-korea-armistice/index.html)
20 [03/11/world/asia/north-korea-armistice/index.html](https://www.cnn.com/2013/03/11/world/asia/north-korea-armistice/index.html). As recently as October 7, 2024,
21 North Korea warned it may use nuclear weapons in potential conflicts with the United
22 States and South Korea. *E.g.*, Hung-Jin Kim, *North Korea’s Kim Again Threatens to*
23

24 ²⁰ *E.g.*, *South Hits Back as North Korea Fires Most Missiles in a Day*, BBC (Nov. 2,
25 2022), <https://www.bbc.com/news/world-asia-63481183>; Choe Sang-Hun, *North*
26 *Korea Launches Two Ballistic Missiles: What to Know*, N.Y. TIMES (Dec. 23, 2022),
27 <https://www.nytimes.com/article/north-korea-missile-launches.html>; Hyung-Jin Kim
28 and Kim Tong-Hyung, *North Korea Test-Fires Ballistic Missiles ahead of Trump’s*
Asia Trip, ASSOCIATED PRESS (Oct. 21, 2025), [https://apnews.com/article/koreas-](https://apnews.com/article/koreas-ballistic-missile-d15e268cf071780b623a1dbac670f417)
[ballistic-missile-d15e268cf071780b623a1dbac670f417](https://apnews.com/article/koreas-ballistic-missile-d15e268cf071780b623a1dbac670f417).

1 *Use Nuclear Weapons against South Korea and US*, ASSOCIATED PRESS (Oct. 7,
2 2024), [https://apnews.com/article/north-korea-kim-nuclear-weapons-](https://apnews.com/article/north-korea-kim-nuclear-weapons-5812004982995598bd8c38e0b902dfae)
3 [5812004982995598bd8c38e0b902dfae](https://apnews.com/article/north-korea-kim-nuclear-weapons-5812004982995598bd8c38e0b902dfae).

4 On November 20, 2017, the United States designated the North Korean
5 government a State Sponsor of Terrorism. U.S. Dep't of State, State Sponsors of
6 Terrorism, <https://www.state.gov/state-sponsors-of-terrorism/>. The State Department
7 routinely issues statements condemning the North Korean regime and reaffirming our
8 nation's commitment to promoting human rights and supporting North Korean
9 refugees and defectors, along with the countries, organizations, and individuals who
10 aid them. *E.g.*, Press Statement, U.S. Dep't of State, Supporting Human Rights in
11 North Korea (Sept. 17, 2023), [https://2021-2025.state.gov/supporting-human-rights-](https://2021-2025.state.gov/supporting-human-rights-in-north-korea-2/)
12 [in-north-korea-2/](https://2021-2025.state.gov/supporting-human-rights-in-north-korea-2/); Press Release, U.S. Dep't of State, North Korea Freedom Week
13 (July 8, 2024), <https://2021-2025.state.gov/north-korea-freedom-week/>.

14 Congress has similarly recognized that the United States should provide support
15 to North Korean defectors and refugees, and encouraged the government to aid North
16 Koreans fleeing that country in the North Korean Human Rights Act of 2004, 22
17 U.S.C. §§ 7801–7846, which was most recently reauthorized in the North Korean
18 Human Rights Reauthorization Act of 2017, Pub. L. No. 115-198, 132 Stat. 1519.

19 In the OSC, the court asked the parties whether Petitioner committed acts that
20 would be considered criminal under United States law in light of the ongoing
21 hostilities and unique circumstances surrounding the relationship between the United
22 States and North Korea. Dkt. 36. The government does not dispute North Korea is a
23 hostile power, but argues that the status of relations between the United States and
24 North Korea has no bearing on the question of dual criminality. Dkt. 37 at 16.

25 **B. Waiver**

26 As an initial matter, the government contends Petitioner has waived any defense
27 related to the question presented in the OSC by failing to raise this objection in the
28 underlying proceeding. Dkt. 37 at 29–31. Petitioner responds there was no waiver

1 because he challenged dual criminality in the underlying proceeding, and, regardless,
2 this court may raise issues *sua sponte* in connection with the subject habeas
3 proceeding. Dkt. 38 at 26–27. The court agrees with Petitioner.

4 “The general rule is that ‘a federal appellate court does not consider an issue not
5 passed upon below.’” *Lo Duca v. United States*, 93 F.3d 1100, 1104 (9th Cir. 1996)
6 (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). “That rule, however, is one of
7 prudence and not appellate jurisdiction,” and a reviewing court “retain[s] broad
8 discretion to consider issues not raised initially in the [lower court].” *Id.* This is in
9 accord with the court’s supervisory authority to raise *sua sponte* matters that may
10 affect the rights of defendants in criminal actions. *United States v. Delgado-*
11 *Cardenas*, 974 F.2d 123, 126 (9th Cir. 1992).

12 In the underlying proceeding, Petitioner challenged the government’s request
13 for extradition on grounds including lack of dual criminality and the unique
14 relationship between the United States and North Korea. Case 19-5397, Dkt. 175 at
15 10–14, 29–33. Petitioner now seeks habeas relief on grounds including that the
16 Magistrate Judge clearly erred in finding there was dual criminality because the
17 conduct charged was not criminal under United States law. Dkt. 14 at 57.

18 In certifying Petitioner’s extraditability, the Magistrate Judge did not find
19 expressly that dual criminality was satisfied with respect to any crime certified. *See*
20 Certification at 3–5; Case 19-5397, Dkt. 231 (Extradition Hr’g Tr.) at 171–72
21 (summarizing court’s findings at extradition hearing).²¹ Although the Magistrate
22 Judge rejected Petitioner’s challenge to dual criminality based on lack of intent, she
23 did not discuss dual criminality otherwise or find the conduct charged would be
24 considered criminal under United States law. *See generally* Certification; Case 19-
25

26 ²¹ The Certification states, “[t]he court ... rejected Ahn’s dual-criminality argument
27 because any required intent, which he argued the government had no evidence of, may
28 be inferred from action, ... and the government’s evidence ... provided probable
cause of any necessary specific intent.” Certification at 4–5.

5397, Dkt. 231 (Extradition Hr’g Tr.).

The government bears the initial burden to establish extraditability. *Barapind*, 400 F.3d at 747.²² Because the Magistrate Judge did not find expressly that the crimes certified would be considered criminal under United States law, the court finds it is appropriate to consider whether dual criminality is satisfied on the subject Petition and will not discharge the OSC based on waiver.

C. Whether Petitioner’s Conduct Would Be Considered Criminal in the United States

“The question of whether an offense is extraditable involves determining: (1) whether it is listed as an extraditable crime in the relevant treaty; (2) whether the alleged conduct is criminalized in both countries; and[] (3) whether the offenses in both countries are substantially analogous.” *United States v. Knotek*, 925 F.3d 1118, 1128–29 (9th Cir. 2019). “These are purely legal questions that [are] review[ed] de

²² The government argues that, because “extradition treaties must be construed liberally,” Petitioner must demonstrate that his conduct would unambiguously not be criminal in the United States to defeat extradition based on a lack of dual criminality. Dkt. 37 at 28–29 (citing *United States v. Kaulukukui*, 520 F.2d 726, 731 (9th Cir. 1975) & *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933)). The court disagrees. It is undisputed that the Extradition Treaty requires dual criminality. Dkt. 37 at 15 (“the treaty establishes a requirement of dual criminality”). Whether Petitioner’s conduct would be criminal in the United States does not concern ambiguities within the Extradition Treaty, but the separate question of whether Petitioner’s conduct could be punishable under our country’s state and federal criminal laws. *Cf. Factor*, 290 U.S. at 294 (holding petitioner must be extradited because the crime with which he was charged was an enumerated crime under the treaty, “even though the act with which he [was] charged would not be a crime if committed in Illinois”). The government does not cite any legal authority that supports its assertion that courts must interpret our nation’s criminal statutes liberally in favor of finding a relator’s conduct would be criminal for purposes of extradition proceedings. Under the rule of lenity, “ambiguity concerning the ambit of [United States] criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 561 U.S. 358, 410 (2010). The court, therefore, rejects the government’s argument that the question of whether Petitioner’s conduct would be criminal under United States law must be resolved in favor of extradition.

1 novo.” *Id.* at 1129. Determining whether a relator’s conduct would be punishable in
2 the United States involves “a fact-based inquiry into the conduct alleged in the
3 documents filed by the [requesting government], through the U.S. government, in
4 support of the extradition request.” *Id.*

5 Two offenses are “substantially analogous” if “the essential character of the
6 transaction is the same[] and made criminal by both statutes.” *Knotek*, 925 F.3d at
7 1131 (brackets omitted). “There is no need for the scope of criminal liability to be
8 coextensive or the same in both the United States and requesting country. Rather, it is
9 enough if the particular act charged is criminal in both jurisdictions. The elements of
10 one offense need not be identical to the elements of a similar offense in the United
11 States.” *Id.* (cleaned up). “It is immaterial whether one country’s law is broader than
12 the other, so long as ‘the essential character of the acts criminalized is the same.’” *Id.*
13 (cleaned up).

14 The government raises two primary arguments for why Petitioner’s conduct in
15 Spain would be considered criminal in the United States. First, the government notes
16 Spain charged Petitioner with general crimes against persons and property. Dkt. 37 at
17 12. According to the government, if Petitioner committed the charged conduct in the
18 United States, he could be charged with general crimes under federal and state
19 criminal statutes including: (1) assault resulting in serious bodily injury under 18
20 U.S.C. § 133(a)(6), (2) battery under California Penal Code § 242, (3) false
21 imprisonment under California Penal Code § 236, (4) forcible entry and detainer
22 under California Penal Code § 459, and (5) criminal threats under California Penal
23 Code § 422. *Id.* at 19–21.

24 Petitioner argues “it has historically been the case under international law that
25 ‘if an enemy alien entered a hostile country during time of war ... **any subject** may
26 seize them and gain a property in the goods, as a prize taken in open war,” unless the
27 government formally issues a “grant of safe conduct.” Dkt. 38 at 18–19 (citing *Al-*
28 *Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 743 (D. Md. 2010), *rev’d on other grounds*,

658 F.3d 413 (2011) (emphasis in Petitioner’s response); *see also Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603, 620 (1813) (“During [a] war, the property of alien enemies is subject to confiscation jure belli, and their civil capacity to sue is suspended.”); *The Santa Lucia*, 44 F. Supp. 793, 794 (S.D.N.Y. 1942) (“The principle is well-established that war suspends the rights of non-resident alien enemies to prosecute actions in our courts.”). These cases demonstrate that citizens of a hostile government may be treated differently under United States law during times of conflict than in times of peace.

The government contends the criminal statutes identified “do not depend on the identity of the victim or the nature of dwelling targeted,” Dkt. 37 at 19, “or take into account in any way, the nationality or diplomatic status of the victim,” Dkt. 39 at 12–13. The government, however, does not cite any legal authority to establish that the general state and federal criminal statutes identified apply to the conduct charged, when directed at the property or officials of a hostile nation like North Korea. *See* Dkt. 37 at 11–13, 18–21.²³ Similarly, the government does not identify any cases in which extradition was certified for, or a law enforcement agency or department within the United States and related territories brought criminal charges against, a United States citizen for similar conduct against the property or officials of a hostile power. This argument is non-responsive to the subject of the OSC and inapposite.

²³ On reply, the government cites *United States v. Noel*, 893 F.3d 1294, 1298 (11th Cir. 2018), to argue that a victim’s nationality or diplomatic status is irrelevant to the general criminal statutes cited. Dkt. 39 at 12–13. In *Noel*, 893 F.3d at 1297–98, the Eleventh Circuit held that a prosecutor need not prove knowledge that the victim is an American citizen to establish a violation of 18 U.S.C. § 1203, which contains a jurisdictional requirement that the victim be American. *Noel* does not support the government’s argument that an individual’s nationality and relationship with a hostile government are irrelevant to whether a general criminal statute is violated under these circumstances. Furthermore, the government has not identified 18 U.S.C. § 1203 as a substantially analogous crime to the Spanish crimes charged. *Noel*, therefore, is inapposite.

1 Alternatively, the government argues that North Korea’s conduct and its hostile
2 relationship with the United States are irrelevant because the Armistice Agreement
3 remains in force. Dkt 39 at 16–21. The government does not cite any legal authority
4 to establish that the representatives and officials of a nation like North Korea, with
5 whom the United States has only suspended open hostilities rather than formally
6 declaring peace, and which has breached and repudiated the Armistice Agreement
7 repeatedly and continues to engage in hostile actions against the United States and its
8 allies, should not be treated as enemy aliens who have not been granted safe-conduct
9 for purposes of our nation’s criminal laws and the Petition. *See* Dkts. 37, 39.

10 The court, therefore, finds the government has not met its initial burden to
11 establish the conduct charged is punishable under the general state and federal
12 criminal statutes identified, in the unique and specific factual circumstances present
13 here. This finding is intended to be narrow, limited to the specific circumstances of
14 this case, and based on the government’s failure to meet its burden of persuasion.

15 Second, the government argues Petitioner’s conduct would be considered
16 criminal in the United States based on federal statutes that protect diplomats, family
17 members, and employees attached to diplomatic missions in the United States,
18 including 18 U.S.C. §§ 112(a) & (b)(2), 970(a), and 1201(a)(4). Dkt. 37 at 21–22.
19 The government does not present any specific arguments to establish these federal
20 statutes are substantially analogous to, or have the same essential character as, the
21 Spanish general crimes certified, and appears to simply assume they are. *See id.* at
22 21–28; Dkt. 39 at 21–23. The government, however, notes expressly that these
23 statutes relate to the government’s obligations to other nations under international law,
24 *id.* at 21–28, whereas “Spain has charged Petitioner with general crimes against
25 person and property, and not crimes specifically against diplomatic personnel and
26 premises,” *id.* at 12.

27 In these circumstances, the court finds the government fails to meet its initial
28 burden to establish these federal statutes are sufficiently analogous to the Spanish

1 general crimes charged. *See United States v. Khan*, 993 F.2d 1368, 1373 (9th Cir.
2 1993) (finding dual criminality not satisfied where U.S. statutes identified by the
3 government were not sufficiently analogous to the foreign crimes charged).

4 The court, therefore, finds the government failed to meet its initial burden to
5 establish the acts charged by the Spanish government would be criminal in the United
6 States, in light of the ongoing hostilities and unique circumstances surrounding the
7 relationship between the United States and North Korea, and GRANTS the Petition
8 and habeas relief on this additional basis.

9 **IV. Constitutional Challenges to Extradition**

10 Petitioner additionally challenges his extradition for violation of his due process
11 rights under the Constitution. Dkt. 14 at 42–51. “The United States’ actions in
12 reviewing a request for extradition are, of course, subject to the constraints of the
13 Constitution. The constitutional rights of individuals, including the right to due
14 process, are superior to the government’s treaty obligations.” *Martin v. Warden*, 993
15 F.2d 824, 829 (11th Cir. 1993); *see also Reid v. Covert*, 354 U.S. 1, 17 (1957) (“[The
16 Supreme] Court has regularly and uniformly recognized the supremacy of the
17 Constitution over a treaty.”).²⁴

18 **A. The State-Created Danger Doctrine**

19 The Due Process Clause of the Fifth Amendment provides in relevant part: “No
20 person shall be ... deprived of life, liberty, or property, without due process of law[.]”
21 U.S. Const. amend. V. “Historically, [the] guarantee of due process has been invoked
22

23 ²⁴ As the Supreme Court explained: “It would be manifestly contrary to the objectives
24 of those who created the Constitution, as well as those who were responsible for the
25 Bill of Rights -- let alone alien to our entire constitutional history and tradition -- to
26 construe Article VI as permitting the United States to exercise power under an
27 international agreement without observing constitutional prohibitions. In effect, such
28 construction would permit amendment of that document in a manner not sanctioned
by Article V. The prohibitions of the Constitution were designed to apply to all
branches of the National Government and they cannot be nullified by the Executive or
by the Executive and the Senate combined.” *Reid*, 354 U.S. at 17.

1 only to remedy deliberate decisions of government officials to deprive a person of life,
2 liberty, or property.” *Estate of Imrie v. Golden Gate Bridge*, 282 F. Supp. 2d 1145,
3 1148 (N.D. Cal. 2003).

4 “As a general rule, the government is not liable for the actions of third parties.”
5 *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007). “This rule is modified by
6 two exceptions: (1) the ‘special relationship’ exception; and (2) the ‘danger creation’
7 exception,” which together comprise the state-created danger doctrine. *Id.* (quotation
8 marks and citations omitted). “In these limited circumstances, the [government] has
9 an affirmative duty under the Due Process Clause to protect individuals.” *Estate of*
10 *Imrie*, 282 F. Supp. 2d at 1148; *see also Morgan*, 495 F.3d at 1093 (“We have
11 repeatedly held that government agents may be liable for affirmative conduct placing
12 a party in a danger of the government’s creation even though the general rule is that
13 the [Due Process Clause] does not impose a duty on government officers to protect
14 individuals from third parties.”); *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996)
15 (recognizing the government has a “constitutional duty to protect a person when it
16 creates a special relationship with that person, or when it affirmatively places that
17 person in danger”).

18 The government creates a “special relationship” when it acts affirmatively to
19 “restrain[] [an] individual’s freedom to act on his own behalf -- through incarceration,
20 institutionalization, or other similar restraint of personal liberty[.]” *DeShaney v.*
21 *Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). “The danger
22 creation exception arises when affirmative conduct on the part of the [government]
23 places a party in danger he otherwise would not have been in.” *Morgan*, 495 F.3d at
24 1093 (quotation marks and citation omitted). The government’s awareness of dangers
25 is alone insufficient to create a duty if the government “played no part in their
26 creation, nor did ... anything to render [a person] more vulnerable to them.”
27 *DeShaney*, 489 U.S. at 201.

28 ///

1 At the January 2024 Hearing, the government argued that this court was not the
2 appropriate forum to consider Petitioner’s safety or what steps the Secretary of State
3 may take, if any, to ensure his safety after extradition. Dkt. 57 at 52–60. The court
4 disagrees. Petitioner’s constitutional due process right to be free from state-created
5 danger is a matter that does not fall within the Secretary’s discretion and which is
6 properly before this court. *See Wang*, 81 F.3d at 818.

7 Based on the evidence presented, the court finds extradition would violate
8 Petitioner’s substantive due process rights under the danger creation exception of the
9 state-created danger doctrine. As stated in the Certification, Petitioner’s life will be in
10 danger from North Korea if he is extradited, because of his actions here and for aiding
11 other high-profile defectors, including the North Korean dictator’s nephew, Kim Han-
12 Sol. Certification at 36–39. The government not only acknowledges Ahn is at risk of
13 assassination by North Korea if extradited, but has warned him on at least two
14 separate occasions through the Federal Bureau of Investigation (“FBI”) that he faces
15 credible threats of death from North Korean agents and should not leave the United
16 States for his safety. Dkt. 11-6 (Rim Decl.) ¶¶ 2–3; Ahn Decl. ¶ 18; Certification at
17 31 (“The truly significant difference here from [prior] cases is that the [c]ourt needn’t
18 make any messy inquiry into just how real the threat is: the FBI has conceded that
19 North Korea wants to kill Ahn and that that threat is easier to carry out in Spain than
20 here in the United States.”).²⁵

21 This warning is consistent with the State Department’s finding that North Korea
22 has engaged in politically motivated reprisals and “attempted to target, harass, and
23 threaten defectors and other perceived enemies resident outside of the country.” U.S.

24
25 ²⁵ Petitioner’s counsel also states she was warned “the U.S. government had recently
26 learned that [North Korea] plans to approach [her] personally as Christopher Ahn’s
27 attorney to determine what [she] know[s] about [Hong Chang’s] location and
28 whereabouts.” Dkt. 11-6 (Rim Decl.) ¶ 4. This suggests North Korea may also
attempt to kidnap and torture Petitioner to obtain information about Hong Chang, Free
Joseon, and the individuals Petitioner has previously helped defect.

1 Dep't of State, *2020 Country Reports on Human Rights Practices: North Korea* at 12
2 (Mar. 30, 2021), [https://www.state.gov/wp-content/uploads/2021/10/KOREA-DEM-](https://www.state.gov/wp-content/uploads/2021/10/KOREA-DEM-REP-2020-HUMAN-RIGHTS-REPORT.pdf)
3 [REP-2020-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2021/10/KOREA-DEM-REP-2020-HUMAN-RIGHTS-REPORT.pdf).²⁶ The North Korean government has
4 indicated through public statements that it is watching these proceedings closely and
5 awaits Petitioner's extradition to Spain.²⁷ E.g., Certification at 43; Press Release of
6 DPRK Embassy in Spain (Apr. 4, 2023), translation available at:
7 [https://kcnawatch.org/newstream/1680559585-998031369/press-release-of-dprk-](https://kcnawatch.org/newstream/1680559585-998031369/press-release-of-dprk-embassy-in-spain/)
8 [embassy-in-spain/](https://kcnawatch.org/newstream/1680559585-998031369/press-release-of-dprk-embassy-in-spain/); Yi Wonju, *N. Korea Demands U.S. Extradite 2019 Embassy*
9 *Suspects to Spain* (Apr. 4, 2023), <https://en.yna.co.kr/view/AEN20230404001200325>.

10 Despite acknowledging and warning Petitioner that his life would be in danger
11 if he left the country, the government divulged Petitioner's name to the Spanish
12 government without requesting Spain investigate and prosecute Petitioner
13 confidentially. See Dkt. 11-15 at 10 (stating Hong Chang revealed Petitioner's
14 identity in a statement made before FBI agents on March 14, 2019), 81 (stating the
15

16 ²⁶ Courts have similarly held that North Korea tortures and kills its political enemies,
17 including individuals who aid and provide services to defectors and refugees who flee
18 the country to seek asylum. *Kim v. Democratic People's Republic of Korea*, 774 F.3d
19 1044, 1045–46 (D.C. Cir. 2014) (“Admissible record evidence demonstrates that
20 North Korea abducted Reverend Kim [after finding out about his activities providing
21 humanitarian and religious services to North Korean defectors and refugees who fled
22 to China seeking asylum], that it invariably tortures and kills political prisoners, and
23 that through terror and intimidation it prevents any information about those crimes
24 from escaping to the outside world.”); *Warmbier v. Democratic People's Republic of*
25 *Korea*, 356 F. Supp. 3d 30, 48 (D.C. Cir. 2018) (recognizing North Korea considers
26 acts that challenge the dictator and regime, such as removing a poster that said, “Let’s
arm ourselves strongly with Kim Jong-il patriotism!” to be the “ultimate crime in
North Korea,” punishable by “particularly brutal treatment” and deportation without
judicial process to a political prison camp where torture, mistreatment, and disregard
of human rights are routine).

27 ²⁷ See *Warmbier*, 356 F. Supp. 3d at 60 (recognizing “North Korea is ‘keenly aware’
28 of the ‘political environment’ in the United States, including judgments issued by
United States courts”).

1 Spanish government received information from the FBI the following day).

2 Having acted affirmatively in a manner that increased the known dangers to
3 Petitioner of kidnapping, torture, and assassination by North Korea, the government
4 cannot render him more vulnerable to these known dangers by taking the very steps it
5 warned him against—removal from the United States to Spain. *See Wang*, 81 F.3d at
6 818–19 (finding the government affirmatively placed petitioner in danger by
7 interfering with his transfer to the Chinese courts, paroling him into this country, and
8 subjecting him to a life-or-death choice that caused him to lose the possibility of
9 lenient treatment by the Chinese courts, and affirming district court’s issuance of a
10 permanent injunction barring his removal from the United States).

11 The court, therefore, finds Petitioner’s extradition is barred under the danger
12 creation exception of the state-created danger doctrine and GRANTS habeas relief on
13 this additional basis.

14 **B. The Humanitarian Exception to Extradition**

15 “Under the rule of non-inquiry, an extraditing court will generally not inquire
16 into the procedures or treatment which await a surrendered fugitive in the requesting
17 country because such determinations are to be made solely by the executive branch.”
18 *Mainero*, 164 F.3d at 1210 (quotation marks and citation omitted). “The rule of non-
19 inquiry is based on the principle that the Secretary of State’s exercise of discretion
20 regarding whether to extradite an individual may be based not only on considerations
21 individual to the person facing extradition but may be based on foreign policy
22 considerations instead.” *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005)
23 (quotation marks and citation omitted).

24 The Ninth Circuit has recognized a humanitarian exception to this rule may
25 exist in “situations where the relator, upon extradition, would be subject to procedures
26 or punishment so antipathetic to a federal court’s sense of decency as to require
27 examination of the general principle upholding extradition,” but has “never relied on it
28 to create a humanitarian exception to extradition.” *Mainero*, 164 F.3d at 1210

1 (cleaned up); *see also* *Prasoprat*, 421 F.3d at 1016 (“We have, on occasion, cited the
2 possibility of a humanitarian exception to extradition; however, we have never
3 actually relied on it to create such an exception.”) (quotation marks omitted, collecting
4 cases). The humanitarian exception is similar and related to the doctrine of state-
5 created danger, except that the latter focuses on affirmative acts taken by the United
6 States government to place an individual in danger, while the humanitarian exception,
7 to the extent it exists, is an equitable doctrine that focuses more on the severity and
8 certainty of the dangers the relator may face after extradition, along with other
9 equitable considerations, than the United States government’s conduct in bringing
10 about those dangers.

11 Petitioner argues his extradition would violate his Fifth Amendment right to
12 substantive due process and must be enjoined under the humanitarian exception. Dkt.
13 14 at 42. The government responds that the decision whether to surrender Petitioner
14 to Spain “is properly placed in the hands of the Secretary [of State,] given the
15 Executive’s powers to conduct foreign affairs, which include the ability to make
16 confidential diplomatic inquiries and receive confidential diplomatic assurances about
17 the treatment of an extraditee,” and that this court “should not be the first to violate
18 the rule of non-inquiry by applying a purported ‘humanitarian exception.’” Dkt. 30 at
19 63–64 (cleaned up).

20 In the Certification, the Magistrate Judge stated in detail why extradition should
21 be denied under the humanitarian exception, Certification at 28–49, while
22 acknowledging that “the Ninth Circuit’s no-exceptions, couldn’t-be-clearer language”
23 barred magistrate judges from invoking the humanitarian exception to deny
24 certification, *id.* at 34. After reviewing and considering the Certification, the parties’
25 briefs and arguments at the January 2024 Hearing, and all relevant portions of the
26 record, this court agrees with the Magistrate Judge that the humanitarian exception to
27 the rule of non-inquiry must apply under the unique facts of this case. The court
28 incorporates by reference the Magistrate Judge’s reasoning in the Certification at

1 pages 36 to 47, while emphasizing the following key facts and considerations.

2 As stated, it is undisputed Petitioner will be at high risk of kidnapping, torture,
3 and assassination by the North Korean government if extradited to Spain.²⁸ If the
4 humanitarian exception exists, it must apply here, where: (1) Congress and the State
5 Department have made findings regarding the North Korean government's treatment
6 of defectors and attempted defectors;²⁹ (2) the United States government has
7 supported North Korean defectors and those who aid defectors with Congress'
8 authorization and approval; (3) the undisputed evidence establishes Petitioner was a
9 member of and/or acting with Free Joseon, which is a group that helps North Koreans
10 defect; (4) no evidence was presented to suggest Petitioner or Free Joseon ever
11 engaged in acts of violence in connection with their activities or forced any North
12 Koreans to defect; (5) Petitioner testified he was present at meetings with U.S.
13 government officials in connection with his work with Free Joseon, which the
14 government has not denied;³⁰ (6) all three branches of the United States government
15

16 ²⁸ As stated in the Certification at 36–40, Petitioner is at far greater risk in Spain than
17 in this country, because North Korea maintains diplomatic ties with Spain and other
18 European countries, while our country does not.

19 ²⁹ The State Department and Congress have found specifically that “the North Korean
20 Penal Code is draconian, stipulating capital punishment and confiscation of assets for
21 a wide variety of ‘crimes against the revolution,’ including defection, attempted
22 defection, [and] slander of the policies of the Party or State[.]” 22 U.S.C. § 7801(5)
(cleaned up).

23 ³⁰ Ahn states in his declaration: “In 2011, while I was visiting Washington D.C., I
24 attended a meeting between [Hong Chang] and several U.S. government officials.
25 During this meeting, [Hong Chang] and the U.S. officials spoke collaboratively about
26 ways to further empower North Koreans and improve defection efforts. ... [I]n 2017,
27 ... two agents from the United States Central Intelligence Agency showed up in a
28 different country to assist me in the process of helping several North Koreans proceed
to their next destination during a highly sensitive defection.” Ahn Decl. ¶ 7.

The government does not deny Petitioner's testimony that government officials met
with Hong Chang and Ahn previously to discuss improving defection efforts and

1 have recognized and made factual findings that the North Korean government abducts,
2 tortures, and kills those it designates as its enemies; (7) the government acknowledges
3 and even warned Petitioner on multiple occasions that his life will be at risk if he
4 leaves the United States;³¹ (8) the North Korean government has stated through press
5 statements that it is aware of Petitioner's identity and is awaiting his extradition to
6 Spain; (9) the government has refused to address Petitioner's concerns regarding
7 safety and has instead disclaimed any and all interest in Petitioner's safety if and when
8 he is extradited;³² and (10) it appears highly unlikely Petitioner could be brought to
9

10 assist Free Joseon with prior defections, and argues only that these assertions are
11 irrelevant and not supported by corroborating evidence. *See* Dkt. 30 at 51–54. At the
12 January 2024 Hearing, the government stated it had “checked with the FBI” regarding
13 Petitioner's request for relevant evidence in the government's possession and was not
14 aware of any exculpatory information. Dkt. 57 at 84. The government, however, did
15 not provide any specifics regarding what had been requested and received, stating
16 there were portions of the response the government could not discuss in open court.
17 *Id.* at 87–88. The government's representations are too vague and conclusory to
refute Petitioner's testimony that, at a minimum, the government was aware generally
of, and approved tacitly, Hong Chang and Free Joseon's efforts to aid North Korean
defectors.

18 ³¹ The government cites *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir.
19 1980), to argue “the degree of risk to the fugitive's life from extradition is an issue
20 that properly falls within the exclusive purview of the executive branch.” Dkt. 30 at
21 66 n. 51 (cleaned up). To the extent the government argues the executive branch has
22 the sole authority to determine whether Petitioner should be extradited despite the
23 known and acknowledged risk of assassination by North Korea, the court disagrees for
24 the reasons stated in connection with the state-created danger doctrine. *See also*
25 *Munaf v. Green*, 553 U.S. 674, 706 (2008) (Souter, J., concurring) (stating that it
would be appropriate “to ask whether substantive due process bars the Government
from consigning its own people to torture” in “an extreme case in which the Executive
has determined that a detainee in United States custody is likely to be tortured but
decides to transfer him anyway”) (cleaned up).

26 ³² At the January 2024 Hearing, the court asked the government why Petitioner could
27 not be tried in the United States, where it would be substantially safer for Petitioner,
28 as Article IV of the Extradition Treaty expressly allows. Dkt. 57 at 60; *see also* Dkt.

1 trial in Spain since North Korea has never made its citizens available to serve as
2 witnesses at foreign trials.³³

3 In these unique circumstances, where a hostile foreign government which has
4 been declared a state sponsor of terrorism, routinely engages in hostilities with the
5 United States, and has both the means and an established history of kidnapping,
6 torturing, and executing its enemies (including defectors and those who aid them) has
7 indicated its clear interest in the extradition of a U.S. citizen who is before this court,
8 and the U.S. government has disclaimed any interest in protecting that citizen after
9 acknowledging and warning him expressly that his life and safety are at risk if he
10 leaves the country, the court finds that the humanitarian exception must apply. To do
11 otherwise would be “antipathetic to [this] federal court’s sense of decency.” *Mainero*,
12

13 11-14 at 11 (“If extradition is refused solely on the basis of the nationality of the
14 person sought, the requested Party shall, at the request of the requesting Party, submit
15 the case to its authorities for prosecution.”). The government disclaimed any interest
16 in bringing such a request, stating “it really is up to how Spain wants to handle this
case.” *Id.* at 62–63.

17 ³³ “Spain apparently requires in criminal trials that the evidence will be heard first-
18 hand through the testimony of witnesses, rather than through the reading of
19 documents,” and “[p]retrial statements are generally not admissible if the witness was
20 not subjected to adversarial cross-examination when they were made.” Certification
21 at 41 (quotation marks and citations omitted). “Prof. Lee testified that North Korea
22 was extremely unlikely to make its witnesses available to testify in any trial, much
23 less allow them to be cross-examined” since, “[t]o his knowledge, the statements the
24 North Koreans gave to the Spanish authorities marked the first time the country had
25 ever participated in any judicial proceeding in any other country.” *Id.* at 40–41; *see*
26 *also Kim*, 774 F.3d at 1048 (noting North Korea “refused to appear in court and
27 subject itself to discovery, and is known to intimidate defectors and potential
28 witnesses”); *Warmbier*, 356 F. Supp. 3d at 36, 60 (recognizing “North Korea never
entered an appearance in, or defended against, [the] action,” despite being “‘keenly
aware’ of the ‘political environment’ in the United States, including judgments issued
by United States courts”). At the January 2024 Hearing, Petitioner stated that the
North Korean embassy in Madrid had closed in October 2023, further reducing the
already negligible likelihood that North Korea would make its witnesses available to
testify at a trial in Spain. Dkt. 57 at 98.

1 164 F.3d at 1210.

2 The court, therefore, GRANTS the Petition and habeas relief on this additional
3 basis.

4 **CONCLUSION**

5 For the aforementioned reasons, the court GRANTS Petitioner Christopher
6 Ahn's Petition for Writ of Habeas Corpus and ENJOINS Petitioner's extradition from
7 the United States on the grounds that the Magistrate Judge clearly erred in finding: (1)
8 there is probable cause to extradite Petitioner on the charges certified; and (2) the
9 government met its burden to establish dual criminality. The court additionally holds
10 extradition would violate Petitioner's substantive due process rights and is barred
11 under the state-created danger doctrine and the humanitarian exception to extradition,
12 if it exists. Having granted the Petition on this basis, the court need not consider the
13 parties' remaining arguments.

14 The court STAYS execution of this Order for thirty-five (35) days from the date
15 of the order to allow the government the opportunity to appeal this ruling. If the
16 government fails to file a notice of appeal timely, the Clerk of the court shall
17 exonerate Petitioner's bond.

18
19 IT IS SO ORDERED.

20
21 Dated: March 31, 2026

22 
23 FERNANDO L. AENLLE-ROCHA
24 United States District Judge
25
26
27
28