CRAIG H. MISSAKIAN (CABN 125202)
United States Attorney
PAMELA T. JOHANN (CABN 145558)
Chief, Civil Division
CHRISTOPHER F. JEU (CABN 247865)
Assistant United States Attorney

60 South Market Street, Suite 1200
San Jose, California 95113
Telephone: (408) 535-5082
FAX: (408) 535-5066
Email: Christopher.Jeu@usdoj.gov

Attorneys for Federal Respondents-Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EDWIN YOBANI ENAMORADO, Petitioner-Plaintiff, v. POLLY KAISER, in her official capacity as Acting San Francisco Field Office Director, U.S. Immigration and Customs Enforcement, *et al.*, Respondents-Defendants.	Case No. 25-cv-04072-NW **FEDERAL RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO FILE FIRST AMENDED HABEAS PETITION (DKT. NO. 17)** Date: July 16, 2025 (Dkt. Nos. 19 and 20) Time: 2:30 p.m. Location: Courtroom 3 – 5th Floor Judge: Hon. Noël Wise

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. LEGAL FRAMEWORK 3

A. Removal Proceedings 3

B. Third Country Removals 4

C. Habeas Corpus 5

D. Temporary Restraining Orders and Preliminary Injunctions 6

III. FACTUAL BACKGROUND 7

IV. THE COURT SHOULD DENY PETITIONER'S MOTION FOR LEAVE TO AMEND 9

V. THE COURT LACKS JURISDICTION TO STAY PETITIONER'S REMOVAL 9

A. Petitioner's Claim Is Not A Cognizable Habeas Petition Because It Does Not Seek A Release From Custody 9

B. 8 U.S.C. § 1252(g) Bars Review of Petitioner's Challenges to the Execution of His Removal Order 11

C. 8 U.S.C. §§ 1252(a)(5) and (b)(9) Channel All Challenges to Removal Orders and Removal Proceedings to the Courts of Appeals 12

D. The Foreign Affairs Reform and Restructuring Act of 1998 Also Precludes Petitioner's Claims 14

VI. PETITIONER IS A *D.V.D.* CLASS MEMBER, SO HIS DUPLICATIVE CLAIMS ARE FORECLOSED BY THE PARALLEL CASE 14

VII. PETITIONER IS NOT ENTITLED TO INJUNCTIVE RELIEF 17

A. Petitioner Is Not Likely to Succeed on the Merits, nor Has He Raised Serious Questions Going to the Merits of His Claims 17

1. Petitioner's Detention is Authorized by 8 U.S.C. § 1231(a)(6) 17

2. Petitioner is Not Entitled to a Pre-Detention Hearing 19

B. Petitioner Cannot Meet His Burden to Show Irreparable Harm 22

C. The Equities and Public Interest Do Not Favor Petitioner 23

VIII. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 6
Anderson v. United States,
612 F.2d 1112 (9th Cir. 1979) 7
Armstrong v. Manzo,
380 U.S. 545 (1965) 20
Bell v. Wolfish,
441 U.S. 520 (1979) 23
Bohannan v. Muniz, No. 16-cv-1342-TLN-ACP,
2019 WL 414488 (E.D. Cal. Feb. 1, 2019) 9
Bonilla v. Lynch,
840 F.3d 575 (9th Cir. 2016) 13
Borjas-Borjas v. Barr, No. 20-cv-0417,
2020 WL 13544984 (D. Ariz. Oct. 6, 2020) 14
Camarena v. Dir., ICE,
988 F.3d 1268 (11th Cir. 2021) 11
Caribbean Marine Servs. Co. v. Baldridge,
844 F.2d 668 (9th Cir. 1988) 22
Clinton v. Jones,
520 U.S. 681 (1997) 14
Coal. for Econ. Equity v. Wilson,
122 F.3d 718 (9th Cir. 1997) 23
Crawford v. Bell,
599 F.2d 890 (9th Cir. 1979) 15
D.V.D. v. U.S. Dep't of Homeland Sec., No. 25-cv-10676 (BEM),
2025 WL 1142968 (D. Mass. Apr. 18, 2025) 2, 14, 16, 17
D.V.D. v. U.S. Dep't of Homeland Sec., Case No. 24A1153,
145 S. Ct. 2153 (2025) 9, 16, 20
Dalton v. Specter,
511 U.S. 462 (1994) 17
Del Carmen Amaya De Sicaran v. Barr,
979 F.3d 210 (4th Cir. 2020) 3, 4
Demore v. Kim,
538 U.S. 510 (2003) 18, 20
Dep't of Homeland Sec. v. Thuraissigiam,
591 U.S. 103 (2020) 9
Diouf v. Napolitano,
634 F.3d 1081 (9th Cir. 2011) 20
Disney Enters. v. VidAngel, Inc.,
869 F.3d 848 (9th Cir. 2017) 6
Doe v. Garland,
109 F.4th 1188 (9th Cir. 2024) 10

Dow v. Cir. Ct. of the First Circuit,
995 F.2d 922 (9th Cir. 1993) 10
E.F.L. v. Prim,
986 F.3d 959 (7th Cir. 2021) 11
Earth Island Inst. v. Carlton,
626 F.3d 462 (9th Cir. 2010) 6
Edmondson v. City of Boston, No. 89-cv-00395-Z
1990 WL 235426 (D. Mass. Dec. 20, 1990) 22
Farris v. Seabrook,
677 F.3d 858 (9th Cir. 2012) 6
Garcia v. Google, Inc.,
786 F.3d 733 (9th Cir. 2015) 6, 7
Garcia v. Thomas,
683 F.3d 952 (9th Cir. 2012) 14
Gillespie v. Crawford,
858 F.2d 1101 (5th Cir. 1988) 16
Goff v. Menke,
672 F.2d 702 (8th Cir. 1982) 16
Goldie's Bookstore, Inc. v. Superior Court of Cal.,
739 F.2d 466 (9th Cir. 1984) 23
Griffin v. Gomez,
139 F.3d 905 (9th Cir. 1998) 15
Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 11, 12
Hensley v. Mun. Court, San Jose Milpitas Judicial Dist.,
411 U.S. 345 (1973) 5, 10
Herrera v. Birkholz, No. 22-cv-07784-RSWL-JDE,
2022 WL 18396018 (C.D. Cal. Dec. 1, 2022) 15
Howard v. Aetna Life Ins. Co., No. 22-cv-01505,
2024 WL 1098789 (C.D. Cal. Feb. 27, 2024) 17
INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 4
J.E.F.M. v. Lynch,
837 F.3d 1026 (9th Cir. 2016) 13
Jama v. Immigr. & Customs Enf't,
543 U.S. 335 (2005) 5
Johnson v. Arteaga-Martinez,
596 U.S. 573 (2022) 18
Jones v. Cunningham,
371 U.S. 236 (1963) 5
Jorge M.F. v. Jennings,
534 F. Supp. 3d 1050 (N.D. Cal. 2021) 18
Kiyemba v. Obama,
561 F.3d 509 (D.C. Cir. 2009) 5
Lamoreaux v. Kalispell Police Dep't, No. 16-cv-0089,
2016 WL 6078274 (D. Mont. Oct. 17, 2016) 21, 22
Mackey v. Montrym,
443 U.S. 1 (1979) 22

Mathews v. Diaz,
426 U.S. 67 (1976) 19, 20
Mathews v. Eldridge,
424 U.S. 319 (1976) 19, 20, 21, 22
McNeil v. Guthrie,
945 F.2d 1163 (10th Cir. 1991) 15, 16
Morrisey v. Brewer,
408 U.S. 471 (1972) 19
Munaf v. Geren,
553 U.S. 674 (2008) 5
Nasrallah v. Barr,
590 U.S. 573 (2020) 4, 14
Nken v. Holder,
556 U.S. 418 (2009) 23
Ortega-Ramos v. Archambeault, No. 18-cv-2901-LAB-NLS,
2019 WL 265137 (S.D. Cal. Jan. 18, 2019) 5, 10
Preminger v. Principi,
422 F.3d 815 (9th Cir. 2005) 24
Rattlesnake Coal. v. EPA,
509 F.3d 1095 (9th Cir. 2004) 17
Rauda v. Jennings,
55 F.4th 773 (9th Cir. 2022) 11, 12
Reno v. American-Arab Anti-Discrimination Committee,
525 U.S. 471 (1999) 11, 12
Romero v. Kaiser, No. 22-cv-2508-TSH,
2022 WL 1443250 (N.D. Cal. May 6, 2022) 18
Rubalcaba v. Garland,
998 F.3d 1031 (9th Cir. 2021) 13
Sanderson v. Whoop, Inc., No. 23-cv-05477-CRB,
2025 WL 744036 (N.D. Cal. Mar. 7, 2025) 16
Sasso v. Milhollan,
735 F. Supp. 1045 (S.D. Fla. 1990) 23
Sierra On-Line, Inc. v. Phx. Software, Inc.,
739 F.2d 1415 (9th Cir. 1984) 6
Silva v. United States,
866 F.3d 938 (8th Cir. 2017) 12
Slaughter v. King County Corr. Facility, No. 05-cv-1693,
2006 WL 5811899 (W.D. Wash. Aug. 10, 2006), ... 22
Stanley v. Univ. of S. Cal.,
13 F.3d 1313 (9th Cir. 1994) 6
Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009) 24
Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,
240 F.3d 832 (9th Cir. 2001) 6
Sykes v. Friederichs,
2007 WL 841789 (N.D. Cal. Mar. 20, 2007) 15
Tazu v. Att'y Gen. U.S.,
975 F.3d 292 (3d Cir. 2020) 11

U.S. Philips Corp. v. KBC Bank N.V.,
590 F.3d 1091 (9th Cir. 2010) 6
United States v. Salerno,
481 U.S. 739, (1987) 23
Vaughn v. Shinn, No. 22-cv-01262-PHX-SRB,
2023 WL 6148115 (D. Ariz. Sept. 20, 2023) 9
Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 16
Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 23
Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 6, 23
Zadvydas v. Davis,
533 U.S. 678 (2001) 17, 18, 20

U.S. Constitution

U.S. CONST. Art. 1 9

Statutes

5 U.S.C. § 704 17
8 U.S.C. § 1229a 3
8 U.S.C. § 1231 ..... 2, 3, 4, 5, 8, 14, 17, 18, 19, 20, 21, 22
8 U.S.C. § 1252 ..... 2, 11, 12, 13, 14
8 U.S.C. § 1158 3
8 U.S.C. § 1182 3
8 U.S.C. § 1225 3
28 U.S.C. § 2241 ..... 5, 9, 11, 12

Rules

Fed. R. Civ. P. 23(b)(2) 16

Regulations

8 C.F.R. § 208.18(a) 3
8 C.F.R. § 208.31 ..... 3, 4, 8
8 C.F.R. § 241.4 ..... 19, 21
8 C.F.R. § 1003.23 13
8 C.F.R. § 1208.2(c) 4
8 C.F.R. § 1240.11(c) 3

I. INTRODUCTION

Pursuant to the Court's Order Setting an Expedited Briefing Schedule, Dkt. No. 19, Federal Respondents respectfully submit this Response to Petitioner's Motion for Leave to Amend. This Response also serves as the Respondents' Return to the Petition for Writ of Habeas Corpus. *See* Dkt. Nos. 1 and 16.

In this habeas case, Petitioner Edwin Yobani Enamorado ("Petitioner" or "Mr. Enamorado"), is subject to a removal order but is not in custody and has not been re-detained by U.S. Immigration and Customs Enforcement ("ICE"). In April 2025, ICE Enforcement and Removal Operations ("ERO") requested that Mr. Enamorado appear at the ERO San Francisco Field Office, for the purpose of placing Petitioner on an Order of Supervision and returning the delivery bond to Petitioner's obligor. Declaration of Deportation Officer Thomas Auer ("Auer Decl.") (Dkt. No. 15-1 at 2) ¶ 7. There was no intent to take Petitioner into custody. *Id.*

Nevertheless, Petitioner seeks an order "to enjoin Respondents-Defendants U.S. Immigration and Customs Enforcement . . . from re-detaining him while he proceeds with his claims before this Court." *See* Am. Motion for TRO ("Am. Motion") (Dkt. No. 18) at 2; Court's TRO Order (Dkt. No. 8) at 2. Petitioner's concern about possible re-detention is based on his being "aware" of other "individuals who have been re-detained." *See* Am. Motion at 10. Due to his fear of removal to a third country, Petitioner seeks a "TRO enjoining ICE from re-arresting him pending further order of this Court." *Id.* at 3, 18, 24. In addition, Petitioner posits that if "Mr. Enamorado's immigration court proceedings" were to re-open, then "due process would require that he not be re-detained absent a hearing," in which the government would need to "prove by clear and convincing evidence that his current release conditions should be modified." Am. Petition (Dkt. No. 16) ¶ 123.

In October 2003, the Board of Immigration of Appeals ("BIA") ordered Petitioner removed to Honduras. *See* Am. Motion at 4; Second Declaration of Heliodoro Moreno, Jr. ("2d Moreno Decl.")., Ex. F (Dkt. No. 16-2 at 37–39). In December 2018, after Petitioner fled Honduras and illegally re-entered the United States, Petitioner's prior October 2003 removal order was reinstated. *See* Am. Motion at 5; 2d Moreno Decl., Ex. G (Dkt. No. 18-2 at 41).

In April 2022, an Immigration Judge granted Petitioner's application of withholding of removal to Honduras. *See* Am. Motion at 6; 2d Moreno Decl., Ex. K (Dkt. No. 18-2 at 53). Accordingly, Petitioner may be removed to a third country. 8 U.S.C. § 1231(b)(2)(E).

The Court should deny Petitioner's Motion for multiple reasons. First, Petitioner's claim is not a cognizable habeas petition, as it seeks to enjoin his arrest and/or a pre-deprivation hearing, not a release from custody. *See* Am. Petition (Dkt. No. 16) ¶¶ 122–23. Additionally, multiple provisions of the Immigration and Nationality Act ("INA") deprive this Court of jurisdiction over Petitioner's claims seeking to delay his removal while ICE complies with additional procedures. For instance, 8 U.S.C. § 1252(g) strips federal courts of jurisdiction over "any cause or claim" arising from the execution of removal orders, which Petitioner's claims plainly do. Likewise, this Court lacks jurisdiction under 8 U.S.C. §§ 1252(a)(5), (b)(9), and (a)(4) because, to the extent Petitioner seeks to make a fear claim related to his third country removal, he can and must bring that claim through the administrative process and if necessary, the appropriate Court of Appeals. The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") also independently forecloses Petitioner's claims seeking additional procedures not provided by Congress' implementation of the Convention Against Torture ("CAT").

Second, Petitioner is a class member in the certified class action *D.V.D. v. DHS*, No. 25-cv-10676-BEM (D. Mass.) ("*D.V.D.*"), in which the district court is considering requiring supplemental procedures before removing class members to a third country. This Court should not invade on the purview of the district court in Massachusetts, which is already adjudicating the issues raised in this Petition: the procedures for removing an alien to a third country. Dismissal without prejudice is warranted.

Finally, Petitioner has not shown a likelihood of success on the merits of his claims. Petitioner has no due process right to any further procedures, including a pre-detention hearing, regarding his potential removal from the United States. His detention would be authorized by 8 U.S.C. § 1231(a)(6) to execute his removal from the United States. He will receive sufficient process during any such detention via the Post Order Custody Regulations in 8 C.F.R. § 241.4. There is no basis to conclude that Petitioner is entitled to any additional process during or before any hypothetical detention to execute his

valid, final order of removal. Therefore, this Court should deny his Petition.

II. LEGAL FRAMEWORK

A. Removal Proceedings

Under the INA, several classes of aliens are "inadmissible" and therefore "removable." *See* 8 U.S.C. §§ 1182, 1229a(e)(2)(A). These include aliens that lack a valid entry document "at the time of application for admission," 8 U.S.C. § 1182(a)(7)(A)(i)(I), when they arrive at a "port of entry," or when they are found present in the United States, 8 U.S.C. §§ 1225(a)(1), (3). If an alien is inadmissible, the alien is subject to removal from the United States. In removal proceedings pursuant to 8 U.S.C. § 1229a, an alien may attempt to show that he or she should not be removed. Among other things, an eligible alien may apply for asylum on the ground that he or she would be persecuted on a statutorily protected ground if removed to a particular country. 8 U.S.C. §§ 1158, 1229a(b)(4); 8 C.F.R. § 1240.11(c).

Under 8 U.S.C. § 1231(a)(5), DHS may reinstate a prior order of removal for an alien it finds "has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." 8 U.S.C. § 1231(a)(5). When DHS reinstates a removal order, the "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." *Id.*

If an alien expresses fear of persecution or torture, the alien may seek withholding or deferral of removal under 8 U.S.C. § 1231(b)(3) or regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85—a treaty that addresses the removal of aliens to countries where they would face torture. *See* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822; 8 C.F.R. §§ 208.31, 241.8(e). "Torture" is defined as an "extreme form of cruel and inhuman treatment," which intentionally inflicts "severe pain or suffering" on another for an improper purpose, and is performed "at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity." 8 C.F.R. §§ 208.18(a)(1) and (a)(2); *see, e.g., Del Carmen*

Amaya De Sicaran v. Barr, 979 F.3d 210, 218-219 (4th Cir. 2020) (torture is a "high bar"). If an asylum officer determines that the alien has established a reasonable fear of persecution or torture, the alien is referred to the IJ for consideration of withholding of removal only (aliens with reinstated orders of removal are not eligible for asylum). 8 C.F.R. § 208.31(e). In withholding-only proceedings, the IJ is limited to consideration of eligibility for withholding and deferral of removal. 8 U.S.C. § 1231(a)(5) (providing that an alien subject to reinstatement "is not eligible and may not apply for any relief under [the INA]"); 8 C.F.R. § 1208.2(c)(3)(i) ("The scope of review in [withholding-only] proceedings . . . shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal."). Indeed, during withholding-only proceedings, "all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." *Id.*

CAT protection or withholding under Section 1231(b)(3) does not alter *whether* an alien may be removed; it affects only *where* an alien may be removed to. That is, a grant of CAT protection "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country." *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020). The United States remains free to remove that alien "at any time to another country where he or she is not likely to be tortured." *Id.* (citation omitted); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Thus, the alien remains removable as an alien with a final order of removal.

B. Third Country Removals

Aliens subject to removal orders need not be removed to their native country. Generally, aliens ordered removed "may designate one country to which the alien wants to be removed," and DHS "shall remove the alien to [that] country[.]" 8 U.S.C. § 1231(b)(2)(A). In certain circumstances, however, DHS need not remove the alien to his or her designated country, including where "the government of the country is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(C)(iii). In such a case, the alien "shall" be removed to the alien's country of nationality or citizenship, unless that country "is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(D). If an alien cannot be removed to the country of designation, or to the country of nationality or citizenship, then the

Government may consider other options, including "[t]he country from which the alien was admitted to the United States," "[t]he country in which the alien was born," or "[t]he country in which the alien last resided." 8 U.S.C. §§ 1231(b)(2)(E)(i), (iii)-(iv).

Where removal to any of the countries listed in subparagraph (E) is "impracticable, inadvisable, or impossible," then the alien may be removed to any "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(2)(E)(vii); *see Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). In addition, DHS "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

"The Judiciary is not suited to second-guess" determinations about "whether there is a serious prospect of torture at the hands of" a foreign sovereign. *Munaf v. Geren*, 553 U.S. 674, 702 (2008); *see Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) ("Under *Munaf*, . . . the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee.").

C. Habeas Corpus

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The custody requirement may be satisfied if a Petitioner is not actually confined, but is nonetheless subject to significant restraint on liberty "not shared by the public generally." *Jones v. Cunningham*, 371 U.S. 236, 239–40 (1963) (state prisoner on parole). Habeas is an "extraordinary remedy" that is limited to cases of "special urgency." *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist.*, 411 U.S. 345, 351 (1973). "The custody requirement . . . is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." *Id.* More conventional remedies, if available, are appropriate in "cases in which the restraints on liberty are neither severe nor immediate." *Id. See also Ortega-Ramos v. Archambeault*, No. 18-cv-2901-LAB-NLS, 2019 WL 265137, at *2 (S.D. Cal. Jan. 18, 2019) (same), *aff'd*, 793 F. App'x 662 (9th Cir. 2020).

D. Temporary Restraining Orders and Preliminary Injunctions

The substantive standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Preliminary injunctions are "never awarded as of right." *Id.* at 24.

"A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) and *Winter*, 555 U.S. at 20). Alternatively, a plaintiff can show that there are "'serious questions going to the merits' and the 'balance of hardships tips sharply towards' [plaintiff], as long as the second and third *Winter* factors are [also] satisfied." *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)). "[P]laintiffs seeking a preliminary injunction face a difficult task in proving that they are entitled to this 'extraordinary remedy." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Petitioner's burden is aptly described as a "heavy" one. *Id.*

The purpose of a preliminary injunction "is to preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). A preliminary injunction may not be used to obtain "a preliminary adjudication on the merits," but only to preserve the status quo before judgment. *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

Accordingly, where a petitioner seeks mandatory injunctive relief—seeking to alter the status quo—"courts should be extremely cautious." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319–20 (9th Cir. 1994). A mandatory injunction "goes well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored." *Id.* at 1320 (internal quotations and alteration omitted). A mandatory

injunction "should not be issued unless the facts and law clearly favor the moving party." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Id.* at 1115. Accordingly, the party seeking a mandatory injunction "must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Garcia,* 786 F.3d at 740 (emphasis in original).

III. FACTUAL BACKGROUND

In 1999, Mr. Enamorado, who is a citizen of Honduras, first illegally entered the United States and was initially granted asylum by an Immigration Judge. *See* Am. Petition ¶¶ 45, 53; Auer Decl. ¶ 5 (Dkt. No. 15-1 at 2); Declaration of Edwin Y. Enamorado ¶ 5 ("Enamorado Decl.") (Dkt. No. 16-1 at 10); 2d Moreno Decl., Ex. I (Dkt. No. 16-1 at 46). In October 2003, the Board of Immigration Appeals reversed the grant of asylum and ordered Petitioner removed to Honduras. *See* Am. Petition ¶ 53; 2d Moreno Decl., Ex. F (Dkt. No. 16-1 at 37–19); Enamorado Decl. ¶ 5 (Dkt. No. 16-1 at 10).

Petitioner has multiple criminal convictions. For example, in July 2003, Petitioner was convicted of possession of marijuana. Auer Decl. ¶ 10, Ex. 2 (Dkt. No. 15-1 at 2, 10); (Dkt. No. 16-1); Enamorado Decl. ¶ 6 (Dkt. No. 16-1 at 10); *see* Am. Motion at 3. In December 2003, Petitioner was again convicted of possession of a controlled substance. Auer Decl. ¶ 11, Ex. 3 (Dkt. No. 15-1 at 2, 12); *see* Am. Motion at 3. In July 2005, he was convicted of possession of a false identification. Auer Decl. ¶ 12, Ex. 4 (Dkt. No. 15-1 at 2, 14); Enamorado Decl. ¶ 6 (Dkt. No. 16-1 at 10); *see* Am. Motion at 3. In August 2005, Petitioner was again convicted of possession of a controlled substance. Auer Decl. ¶ 13, Ex. 5 (Dkt. No. 15-1 at 2, 16). In 2005, Petitioner was deported to Honduras. Am. Petition ¶ 48; Am. Motion at 3; 2d Moreno Decl., Ex. I (Dkt. No. 16-1 at 47); Enamorado Decl. ¶ 7 (Dkt. No. 16-1 at 10). In 2018, Mr. Enamorado and his family fled Honduras; and in December 2018, they entered the United States. Am. Petition ¶¶ 14, 55; Am. Motion at 5; 2d Moreno Decl., Ex. I (Dkt. No. 3-1 at 47).

In December 2018, Petitioner's 2003 removal order was reinstated. Am. Motion at 5; 2d Moreno Decl., Ex. G (Dkt. No. 16-1 at 41). In January 2019, an asylum officer determined that Petitioner had a reasonable fear of persecution or torture if he returned to Honduras and referred Petitioner to an

Immigration Judge to apply for withholding of removal under 8 C.F.R. § 208.31(e). Am. Petition ¶ 56; 2d Moreno Decl., Exs. H and I (Dkt. No. 16-1 at 43, 47).

In July 2019, an Immigration Judge granted Petitioner's release from custody on an $8,000 bond. Am. Petition ¶ 57; 2d Moreno Decl., Ex. J (Dkt. No. 16-1 at 50); Auer Decl. ¶ 6 (Dkt. No. 15-1 at 2). In April 2022, an Immigration Judge granted Petitioner's application for withholding of removal. Am. Petition ¶ 59; 2d Moreno Decl., Ex. K (Dkt. No. 16-1 at 53). In April 2025, ICE sent a notice to Petitioner's bond obligor, setting a May 14, 2025 appointment at the San Francisco ICE Field Office. Am. Motion at 3; 2d Moreno Decl., Ex. N (Dkt. No. 16-1 at 60).

In April 2025, ICE requested the appearance so that it could place Petitioner on an Order of Supervision and return the delivery bond to Petitioner's obligor. Auer Decl. ¶ 7 (Dkt. No. 15-1 at 2). There was no intent to take Petitioner into custody at that time, whether or not a temporary restraining order prohibited arrest. *Id.* ICE rescheduled the appointment for May 28, 2025, and at that time, Petitioner was placed on an Order of Supervision. *Id.* ¶ 9, Ex. 1 (Dkt. No. 15-1 at 2, 5–8). That Order of Supervision notes that Petitioner is subject to a final order of removal, notes that he was issued a "W/H only grant," and places Petitioner on a yearly report cycle. *Id.*, Ex. 1 (Dkt. No. 15-1 at 2, 5, 6).

On May 11, 2025, Petitioner filed the original habeas petition seeking, *inter alia*, to enjoin his arrest and stay his removal. Petition at 36–37 (Dkt. No. 2). On July 3, 2025, Petitioner filed the Amended Habeas Petition, an Amended Motion for a Temporary Restraining Order, and a Motion for Leave to File an Amended. Dkt. Nos. 16, 17, and 18. In the Amended Habeas Petition, Mr. Enamorado seeks, *inter alia*, (1) to "[e]njoin Respondents-Defendants from designating a third country for Mr. Enamorado's removal without reopening Mr. Enamorado's removal proceedings so that an Immigration Judge can make the designation in the first instance and adjudicate Mr. Enamorado's application for withholding of removal under Section 1231(b)(3) and the Convention Against Torture as to that country," (2) a declaration that "Respondents-Defendants may not designate a third country for Mr. Enamorado's removal without reopening Mr. Enamorado's removal proceedings so that an Immigration Judge can make the designation in the first instance and adjudicate Mr. Enamorado's application for withholding of removal under Section 1231(b)(3) and the Convention Against Torture as to that

country," (3) an injunction prohibiting "Respondents-Defendants from re-arresting Mr. Enamorado unless and until his removal proceedings have been reopened," and (4) an injunction prohibiting "Respondents-Defendants from re-arresting Mr. Enamorado unless and until he has received a hearing in front of a neutral adjudicator at which the government must prove by clear and convincing evidence that Mr. Enamorado's current release conditions should be modified."

IV. THE COURT SHOULD DENY PETITIONER'S MOTION FOR LEAVE TO AMEND

As an initial matter, the Court should deny Petitioner's Motion to Amend the Habeas Petition. *See* Dkt. No. 17. Courts have regularly denied motions for leave to amend habeas petitions. *See, e.g., Bohannan v. Muniz*, No. 16-cv-1342-TLN-ACP, 2019 WL 414488, at *10 (E.D. Cal. Feb. 1, 2019), *report and recommendation adopted*, No. 16-cv-01342-TLN-AC, 2019 WL 1405597 (E.D. Cal. Mar. 28, 2019) (denying motion to amend habeas petition, inter alia, because petitioner's new claim was "not cognizable under federal law"); *Vaughn v. Shinn*, No. 22-cv-01262-PHX-SRB, 2023 WL 6148115, at *1 (D. Ariz. Sept. 20, 2023) (denying motion for leave to amend, *e.g.*, because claims were unexhausted and "not cognizable on federal habeas review"). As set forth in Section V.A, Petitioner's claim is not a cognizable habeas petition, because it does not seek release from actual custody.

In addition, Petitioner's basis for the Motion to Amend is the impact of the Supreme Court's *D.V.D.* decision. *See* Motion to Am. at 1–2 (citing *DHS v. D.V.D.*, Case No. 24A1153, 2025 WL 1732103 (June 23, 2025)). Petitioner could have addressed the effect of the *D.V.D.* decision in his Reply. Accordingly, the Court should deny the motion to amend.

V. THE COURT LACKS JURISDICTION TO STAY PETITIONER'S REMOVAL

A. Petitioner's Claim Is Not A Cognizable Habeas Petition Because It Does Not Seek A Release From Custody

Habeas relief is an appropriate request when an individual is detained and requesting release from that detention. U.S. CONST. Art. 1, § 9, Cl. 2; 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody "); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117–18 (2020) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [] the traditional function of the writ is to secure release from illegal

custody."). An individual does not need to be in actual physical custody to seek habeas relief; the "in custody" requirement may be satisfied where an individual's release from detention is subject to specific conditions or restraints. *See Dow v. Cir. Ct. of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993). Even if Petitioner were to meet the "in custody" requirement because he is subject to certain conditions of release, this habeas petition does not purport to challenge that custodial arrangement or secure his release from his present "custody." *Cf. Doe v. Garland*, 109 F.4th 1188, 1191–93 (9th Cir. 2024) (petition seeking individualized bond hearing sought conditional release from custody). For instance, Petitioner does not appear to challenge the annual reporting requirement. *See* 2d Moreno Decl. ¶ 4 (Dkt. No. 16-1 at 3) (discussing May 2025 appointment, in which the "Officer set Mr. Enamorado for annual, in-person reporting in San Francisco"). Thus, Petitioner does not seek a remedy that sounds in habeas. Rather, Petitioner seeks an injunction to prevent his future arrest and the possibility of future detention.[1]

In addition, the challenged conditions or restraints are not "severe" or "immediate," because Petitioner's claim is based on his generalized fear about removal to a third country. *See Hensley*, 411 U.S. at 351. *See also Ortega-Ramos*, 2019 WL 265137, at *2 (same). Petitioner's heightened concern about removal to a third-country is based on "aware[ness]" of other "individuals who have been re-detained in situations similar to his." Am. Motion at 10 (citing attorney declarations). But here, in Spring 2025, when it requested Mr. Enamorado's appearance in the San Francisco Field Office, ICE had no intent to take Mr. Enamorado into custody. Auer Decl. ¶ 7 (Dkt. No. 15-1 at 2). Indeed, the Order of Supervision places Petitioner on a yearly report cycle. *Id.*, Ex. 1 (Dkt. No. 15-1 at 2, 5, 6). Accordingly, the Court does not have jurisdiction over Petitioner based on his generalized concerns.

[1] To the extent Petitioner's claim is considered a cognizable habeas claim based on the fiction of seeking release from his hypothetical future detention, this Court would not have jurisdiction to consider that claim because any such detention would not be in the Northern District of California. *See* https://www.ice.gov/detention-facilities (filtered by California, San Francisco Field Office) (last visited July 9, 2025); *Doe*, 109 F.4th at 1198–1199.

B. 8 U.S.C. § 1252(g) Bars Review of Petitioner's Challenges to the Execution of His Removal Order

Petitioner's claim seeking a stay of removal pending the completion of extra-statutory procedures to remove him is barred by 8 U.S.C. § 1252(g). Congress spoke clearly that "no court" has jurisdiction over "any cause or claim" arising from the execution of removal orders, "notwithstanding any other provision of law," whether "statutory or nonstatutory," including habeas, mandamus, or the All Writs Act. 8 U.S.C. § 1252(g). Accordingly, by its terms, this jurisdiction-stripping provision precludes habeas review under 28 U.S.C. § 2241 (as well as review pursuant to the All Writs Act and Administrative Procedure Act) of claims arising from a decision or action to "execute" a final order of removal. *See Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471, 482 (1999).

Petitioner's clams arise from his concerns about the execution of his removal order; his petition seeks to require ICE to provide him with additional procedures prior to his removal and even to any arrest to effectuate his removal. *See* Am. Petition ¶¶ 4, 6 and Prayer for Relief; Am. Motion at 12–14.

But numerous courts of appeals, including the Ninth Circuit, have consistently held that claims seeking a stay of removal—even temporarily to assert other claims to relief—are barred by Section 1252(g). *See Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) (holding Section 1252(g) barred plaintiff's claim seeking a temporary stay of removal while he pursued a motion to reopen his immigration proceedings); *Camarena v. Dir., ICE*, 988 F.3d 1268, 1274 (11th Cir. 2021) ("[W]e do not have jurisdiction to consider 'any' cause or claim brought by an alien arising from the government's decision to execute a removal order. If we held otherwise, any petitioner could frame his or her claim as an attack on the government's *authority* to execute a removal order rather than its *execution* of a removal order."); *E.F.L. v. Prim,* 986 F.3d 959, 964-65 (7th Cir. 2021) (rejecting plaintiff's argument that jurisdiction remained because petitioner was challenging DHS's "legal authority" as opposed to its "discretionary decisions"); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 297 (3d Cir. 2020) (observing that "the discretion to decide *whether* to execute a removal order includes the discretion to decide *when* to do it" and that "[b]oth are covered by the statute") (emphasis in original); *Hamama v. Adducci*, 912 F.3d

869, 874–77 (6th Cir. 2018) (vacating district court's injunction staying removal, concluding that § 1252(g) stripped district court of jurisdiction over removal-based claims and remanding with instructions to dismiss those claims); *Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017) (Section 1252(g) applies to constitutional claims arising from the execution of a final order of removal, and language barring "any cause or claim" made it "unnecessary for Congress to enumerate every possible cause or claim").

Petitioner's claims are similar to the alien plaintiff's claims in *Rauda* wherein the alien plaintiff also sought to delay his removal while he sought relief in immigration Court. *Rauda*, 55 F.4th at 776–78. Here, Petitioner also seeks to stay his removal. The Court should follow the Ninth Circuit's *Rauda* decision.

C. 8 U.S.C. §§ 1252(a)(5) and (b)(9) Channel All Challenges to Removal Orders and Removal Proceedings to the Courts of Appeals

Even if Section 1252(g) of the INA did not bar review—which it does—Sections 1252(a)(5) and 1252(b)(9) of the INA bar review in *this* Court. By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2). This explicitly excludes "section 2241 of title 28, or any other *habeas corpus* provision." 8 U.S.C. § 1252(a)(5) (emphasis added). Section 1252(b)(9) then eliminates this Court's jurisdiction over Mr. Enamorado's claims by channeling "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien" to the courts of appeals. 8 U.S.C. § 1252(b)(9). Again, the law is clear that "no court shall have jurisdiction, by *habeas corpus*" or other means. *Id.* (emphasis added).

Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *AADC*, 525 U.S. at 483. Under Ninth Circuit law, "[t]aken together, §[§] 1252(a)(5) and [(b)(9)] mean that *any* issue— whether legal or factual—arising from *any* removal-related activity can be reviewed *only*

through the [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016); *see id.* at 1035 ("§§ 1252(a)(5) and 1252(b)(9) channel review of all claims, including policies-and-practices challenges through the PFR process whenever they 'arise from' removal proceedings").

Here, the gravamen of Petitioner's habeas petition is that he seeks to prevent ICE from detaining him and trying to remove him to a third country." Am. Petition ¶¶ 52, 64; Am. Motion at 14. In this case, Mr. Enamorado's claims are barred under Sections 1252(a)(5) and (b)(9) because they "aris[e] from . . . proceeding[s] brought to remove an alien from the United States" and further challenge "any *action taken* . . . to remove an alien from the United States." 8 U.S.C. § 1252(b)(9) (emphasis added). Rather than petition the relevant court of appeals, Mr. Enamorado chose to file a habeas petition in this Court to challenge his removal. That is precisely what the INA forbids. *See J.E.F.M.*, 837 F.3d at 1031. Petitioner is not detained and under no imminent threat of being removed to a third country. Indeed, in Spring 2025, when requesting Mr. Enamorado's appearance in the San Francisco Field Office, ICE had no intent to take Mr. Enamorado into custody. Auer Decl. ¶ 7 (Dkt. No. 15-1 at 2). Accordingly, Petitioner could, at any time, move to reopen his immigration court proceedings claiming fear to any third country. 8 C.F.R. § 1003.23; *Rubalcaba v. Garland,* 998 F.3d 1031, 1034–35 (9th Cir. 2021) (holding that the post-departure bar does not apply to the immigration court's *sua sponte* authority to reopen proceedings); *Bonilla v. Lynch,* 840 F.3d 575, 588 (9th Cir. 2016) (allowing review of the denial of a *sua sponte* motion to reopen for "legal or constitutional error"). His refusal to do so does not vest this Court with jurisdiction.[2]

[2] In fact, the National Immigration Litigation Alliance issued a practice advisory regarding the motion to reopen process for aliens like Petitioner including template motions to reopen and letters to DHS to assert fear of return to third countries. *See* National Immigration Litigation Alliance, New Advisory: Protecting Noncitizens Granted Withholding of Removal or CAT Protection Against Deportation to Third Countries Where They Fear Persecution/Torture, *available at* https://immigrationlitigation.org/new-advisoryprotecting-noncitizens-granted-withholding-of-removal-or-cat-protection-against-deportation-to-third-countries-where-they-fear-persecution-torture/, (last visited July 9, 2025).

D. The Foreign Affairs Reform and Restructuring Act of 1998 Also Precludes Petitioner's Claims

In addition, Petitioner's claims run afoul of Section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which implements Article 3 of CAT and provides that

> Notwithstanding any other provision of law, and except as provided [by regulation], *no court shall have jurisdiction to review the regulations adopted to implement this section*, and *nothing in this section shall be construed as providing any court jurisdiction to consider or review* claims raised under the Convention or this section[.]

FARRA § 2242(d), codified at 8 U.S.C. § 1231 (note) (emphasis added). *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 959 (9th Cir. 2012) (concurrence, discussing same).

Any judicial review of any claim arising under CAT is available exclusively on an individualized basis "as part of the review of a final order of removal" in the courts of appeals. *See* 8 U.S.C. § 1252(a)(4). *Cf. Nasrallah*, 590 U.S. at 580 (discussing FARRA). Under FARRA, "no court"—and certainly not a district court—has jurisdiction to review DHS's implementation of CAT. Yet that is precisely what Petitioner seeks here by asking the Court to order ICE to comply with additional procedures so that Petitioner may seek withholding of removal under CAT to a third country.

Notably, CAT is not self-executing. *See Borjas-Borjas v. Barr*, No. 20-cv-0417, 2020 WL 13544984, at *5 (D. Ariz. Oct. 6, 2020) (discussing same). Its effect, if any, depends on implementation via domestic law. Congress thus worked well within its authority to limit judicial review of CAT regulations and CAT claims. Because Petitioner seeks *additional* procedures beyond what CAT provides, he is challenging the implementation of CAT as applied to him which is barred by FARRA and this Court should dismiss his petition.

VI. PETITIONER IS A *D.V.D.* CLASS MEMBER, SO HIS DUPLICATIVE CLAIMS ARE FORECLOSED BY THE PARALLEL CASE

This Court should dismiss Petitioner's claims seeking additional, extra-statutory procedures prior to removal from the United States to a third country, because those claims are already being adjudicated in the nationwide *D.V.D.* class action. *See D.V.D. v. DHS*, No. 25-cv-10676 (D. Mass.); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) (noting that a district court "has broad discretion to stay proceedings as an incident to its power to control its own docket).

As part of district courts' discretion to administer their docket, courts have dismissed, without prejudice, suits brought by individuals whose claims are duplicative of class claims in other litigation. *See e.g., Griffin v. Gomez*, 139 F.3d 905 (9th Cir. 1998) (in habeas case, discussing prior stay of Fifth Amendment challenge pending completion of pending class action).

For example, a district court in the Central District of California recently dismissed without prejudice a habeas case brought by a federal prisoner. *Herrera v. Birkholz*, No. 22-cv-07784-RSWL-JDE, 2022 WL 18396018, at *7 (C.D. Cal. Dec. 1, 2022), *report and recommendation adopted*, 2023 WL 319917 (C.D. Cal. Jan. 18, 2023). The court reasoned that petitioner's claims were based, in part, on a duplicative class action and were "not property before the court." *Herrera*, 2022 WL 18396018, at *4–6. In the related class action case, Lompoc prisoners had alleged that the BOP had failed to take adequate safety measures against COVID-19. *Id.* at *5. Likewise, in the habeas case, the petitioner-plaintiff alleged that the Lompoc prison conditions created unreasonable COVID-19 risks, such as the alleged "contaminated surfaces" and the lack of "social distancing." *Id.* at *3. In the class action, the district court granted the plaintiffs-petitioners' motion for preliminary injunction and the parties reached settlement. *Id.* at *5.

The district court in *Herrera* explained that "Petitioner's allegations regarding the Prison's handling of COVID-19 are duplicative of the allegations in the *Torres* Class Action, of which Petitioner is a member seeking the same relief, and thus, Petitioner is barred from raising these claims by the terms of the settlement agreement." *Id.* at *6. In addition, "[t]o the extent Petitioner seeks to enforce the provisions of the settlement agreement, he must do so through the class representative or class counsel, and not in his own, separate case." *Id.* (citing *Sykes v. Friederichs*, 2007 WL 841789, at *6 n.12 (N.D. Cal. Mar. 20, 2007)). Accordingly, the district court dismissed the habeas claims that were based on the related class action. *See id.*

Multiple courts of appeals have upheld dismissals of cases where parallel class actions raise the same or substantially similar issues. *See, e.g., Crawford v. Bell*, 599 F.2d 890, 892–93 (9th Cir. 1979) (holding that a district court may dismiss "those portions of [the] complaint which duplicate the [class action's] allegations and prayer for relief"); *McNeil v. Guthrie*, 945 F.2d 1163, 1165–66 (10th Cir. 1991)

(finding that individual suits for injunctive and declaratory relief cannot be brought where a class action with the same claims exists); *Gillespie v. Crawford,* 858 F.2d 1101, 1103 (5th Cir. 1988) (once a class action has been certified, "[s]eparate individual suits may not be maintained for equitable relief"); *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) ("If a class member cannot relitigate issues raised in a class action after it has been resolved, a class member should not be able to prosecute a separate equitable action once his or her class has been certified").

Petitioner's claims seeking to delay or otherwise prohibit his removal to a third country until ICE complies with extra-statutory procedures substantially overlap with the nationwide class action, *D.V.D.* Indeed, on April 18, 2025, the court in *D.V.D.* certified, pursuant to Fed. R. Civ. P. 23(b)(2), a class of individuals defined as follows:

> All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) whom DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

D.V.D. v. U.S. Dep't of Homeland Sec., No. 25-cv-10676 (BEM), 2025 WL 1142968, at *11 (D. Mass. Apr. 18, 2025). Petitioner admits that he is "a *DVD* class member," as "he has a final removal order to Honduras." Am. Petition ¶ 82.

Because the *D.V.D.* class was certified pursuant Rule 23(b)(2), *see D.V.D*, 2025 WL 1142968, at *14, 18, and 25, membership in the class is mandatory with no opportunity to opt out. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (stating that Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the [d]istrict [c]ourt to afford them notice of the action"); *Sanderson v. Whoop, Inc.*, No. 23-cv-05477-CRB, 2025 WL 744036, at *15 (N.D. Cal. Mar. 7, 2025) (noting that "23(b)(2) class members have no opportunity to opt out").

The *D.V.D.* court entered a nationwide preliminary injunction requiring the Department of Homeland Security ("DHS") to comply with various procedures prior to removing a class member to a third country including. The U.S. Supreme Court stayed that preliminary injunction pending the disposition of an appeal in the First Circuit and a petition for a writ of certiorari. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). The case remains pending. As a member of the certified class,

Petitioner is entitled to and bound by any relief that the *D.V.D.* court ultimately grants, including any applicable injunctive relief.

Accordingly, this Court should dismiss his claims seeking additional procedures prior to his removal to a third country because they are subsumed within the issues being actively litigated in *D.V.D.* To do otherwise would undermine what Rule 23 was intended to ensure: consistency of treatment for similarly situated individuals. *See Howard v. Aetna Life Ins. Co.*, No. 22-cv-01505, 2024 WL 1098789, at *11 (C.D. Cal. Feb. 27, 2024). It would also open the floodgates of parallel litigation in district courts all over the country which could ultimately threaten the certification of the underlying class by creating differences among the class members. Another court is already considering Petitioner's alleged constitutional right to extra-statutory procedures before removal to a third country. This Court should therefore dismiss this case.

VII. PETITIONER IS NOT ENTITLED TO INJUNCTIVE RELIEF

A. Petitioner Is Not Likely to Succeed on the Merits, nor Has He Raised Serious Questions Going to the Merits of His Claims

The Court should deny Petitioner's motion for a TRO because Petitioner has not demonstrated likelihood of success on the merits. Nor has Petitioner raised "serious questions" about the merits. Petitioner has not been detained, and he does not have the due process right to a pre-detention hearing – much less one involving burden-shifting against the government. Petitioner is asking the Court to create a procedure that does not exist in any statute or regulation by requiring a pre-deprivation hearing while he is not in custody.

1. Petitioner's Detention is Authorized by 8 U.S.C. § 1231(a)(6)

Mr. Enamorado's claim is premature, as he has not been re-arrested,[3] and, even if he were, it would be constitutional to re-detain him. The Supreme Court has unambiguously upheld detention

[3] To be reviewable under the APA, the decision under review must be a "final agency action," 5 U.S.C. § 704. This finality requirement is a "prerequisite to review" of any APA claim. *Dalton v. Specter,* 511 U.S. 462, 469 (1994). A district court lacks jurisdiction to review a APA claim absent final agency action. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2004). Petitioner has filed this action in anticipation of a possible future action; he has failed to identify any agency action or failure to act that has actually occurred.

pending an alien's removal. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (an alien is not entitled to habeas relief after the expiration of the presumptively reasonable six-month period of detention under § 1231(a)(6) unless he can show the detention is "indefinite" – *i.e.*, that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."). Here, Petitioner, who has not been detained, cannot show that he is subject to prolonged detention or that his removal is unlikely to occur in the reasonably foreseeable future.

The purpose of Section 1231(a)(6) detention is to effectuate removal. *See Demore v. Kim*, 538 U.S. 510, 527 (2003) (analyzing *Zadvydas* and discussing explaining the removal period was based on the "reasonably necessary" time in order "to secure the alien's removal"). To the extent Petitioner ever had a procedural due process interest in his release while he was in ongoing withholding-only proceedings—which the government does not concede—that interest terminated when his withholding-only proceedings ended. Indeed, his withholding-only proceedings was the reason he received a bond hearing in the first instance. *See Johnson v. Arteaga-Martinez,* 596 U.S. 573, 580–81 (2022). Should ICE detain Petitioner in the future, which at this juncture remains speculative, his detention would be authorized under Section 1231(a)(6) to effectuate his removal to a third country unless and until there was "no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas,* 533 U.S. at 690–92, 699.

The cases Petitioner cites in support of his argument for a pre-detention hearing concern aliens subject to *pre-final removal order* detention in which the primary consideration is ensuring an alien's presence at their future removal proceedings and in which bond hearings are largely available by regulation. *See, e.g. Jorge M.F. v. Jennings,* 534 F. Supp. 3d 1050, 1053 (N.D. Cal. 2021) (undisputed that petitioner was awaiting Ninth Circuit review of removal order, so detention was governed by 8 U.S.C. § 1226(a)). *Cf. Romero v. Kaiser*, No. 22-cv-2508-TSH, 2022 WL 1443250, at *1 (N.D. Cal. May 6, 2022) (habeas case involving detention under 8 U.S.C. § 1226(c). Here, Petitioner is subject to post final order detention under Section 1231(a)(6). The purpose of that detention is to effectuate removal—not to ensure presence at removal proceedings. Accordingly, the reasoning underlying the cases Petitioner cites is distinguishable.

Therefore, Petitioner has no basis to assert a procedural due process right to his prior bond or for a pre-detention hearing because he has a final order of removal and any detention would be to effectuate his removal to a third country.

2. Petitioner is Not Entitled to a Pre-Detention Hearing

The Due Process Clause does not prohibit ICE from re-detaining Petitioner. Moreover, there is no statutory or regulatory requirement that entitles Petitioner to a "pre-deprivation" hearing, much less one involving burden-shifting against the government. *See generally* 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4. For this Court to read one into the immigration custody statute would be to create a process that the current statutory and regulatory scheme do not provide for. *See Arteaga-Martinez,* 596 U.S. at 580–82. Thus, Petitioner can cite no liberty or property interest to which due process protections attach.

Petitioner's reliance on *Morrisey v. Brewer*, 408 U.S. 471 (1972) and its progeny is misplaced. *Morrissey* arose from the due process requirement for a hearing for revocation of parole. *Id.* at 472–73. It did not arise in the context of immigration. Moreover, in *Morrissey*, the Supreme Court reaffirmed that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481. In addition, the "[c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function." *Id.* With respect to the precise nature of the government function, the Supreme Court has long held that "Congress regularly makes rules" regarding immigration that "would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). Under these circumstances, Petitioner does not have a cognizable liberty interest, or even assuming he had one, it would be reduced based on the immigration context.

The procedural process provided to Petitioner, if re-arrested, is constitutionally adequate in the circumstances and no additional process is required. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the [Fifth Amendment] Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).[4]

[4] While Respondents do not concede that *Mathews v. Eldridge* provides the correct framework, they acknowledge that courts in this district generally apply it.

"The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

To determine whether procedural protections satisfy the Due Process Clause, courts consider three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The first factor favors Respondents. The Supreme Court has long recognized that due process as applied to aliens in matters related to immigration does not require the same strictures as it might in other circumstances. In *Mathews v. Diaz*, the Court held that, when exercising its "broad power over naturalization and immigration, Congress regularly makes rules regarding aliens that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79–80. In *Demore*, the Court likewise recognized that the liberty interests of aliens are subject to limitations not applicable to citizens. 538 U.S. at 522 (citing *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting)). Accordingly, while the Ninth Circuit has recognized the individuals subject to immigration detention possess at least a limited liberty interest, it has also recognized that aliens' liberty interests are less than full. *See Diouf v. Napolitano*, 634 F.3d 1081, 1086–87 (9th Cir. 2011). Because Petitioner's liberty interest is less than that at issue in *Morrissey*, this factor does not indicate that Petitioner must be afforded a pre-detention hearing.

In asserting that Petitioner has a due process right to additional proceedings before he is detained, Petitioner relies on Justice Sotomayor's *dissent* in *D.V.D.* Am. Mot. at 15 (citing *D.V.D.*, 2025 WL 1732103, at *8–9). Petitioner cites no authority from the Supreme Court or the Ninth Circuit that required reopening Section 240 proceedings for a criminal alien with a valid removal order.

The second *Mathews* factor also favors Respondents. Under the existing procedures, aliens including Petitioner face little risk of erroneous deprivation. As explained above, there is no risk of

erroneous deprivation because Section 1231(a)(6) unquestionably authorizes Petitioner's detention to execute his final removal order to a third country.

And, in the event that Petitioner were to be re-arrested and taken into custody, ICE would be required to give Petitioner additional procedures under the Post Order Custody Review Regulations in 8 C.F.R. § 241.4. These regulations require, *inter alia,* periodic custody reviews in which Petitioner will have the opportunity to submit documents in support of his release to include documentation about flight risk and dangerousness. *See generally* 8 C.F.R. § 241.4(e)–(f) (listing factors to be considered in custody determinations). These procedures are more than adequate and unquestionably provide Petitioner notice and opportunity to be heard at the start of and throughout any future detention.

The third *Mathews* factor—the value of additional safeguards relative to the fiscal and administrative burdens that they would impose—weighs heavily in favor of Respondents. As previously explained, Petitioner's proposed safeguard—a pre-deprivation hearing—adds little value to the system already in place in which he will receive periodic reviews to ensure his removal remains reasonably foreseeable and in which the entire purpose of his detention is to effectuate his removal.

Here, Petitioner is subject to a final order of removal that has been reinstated under Section 1231. The purpose of the requested pre-deprivation hearing would be to impede execution of his final order of removal. Thus, Petitioner essentially posits that DHS must provide him a hearing before it may detain him in order to remove him. Accordingly, Petitioner essentially seeks a judicially created stay of the execution of a final removal order.

Accordingly, Petitioner's proposed safeguard would disrupt the removal process. Because the hearing Petitioner proposes would by definition involve a non-detained individual, there would be hurdles to efficiently scheduling a hearing. There is no administrative process in place for giving an alien with a final order of removal a hearing resembling a bond hearing before an immigration judge. Petitioner's proposed safeguard presents an unworkable solution to a situation already addressed by the current procedures. *See* 8 C.F.R. § 241.4.

Even in non-immigration contexts, courts have recognized that pre-deprivation process may be unwarranted, particularly where there is a need for prompt government action. "The necessity of quick

action can arise where the government has an interest in protecting public health and safety." *Lamoreaux v. Kalispell Police Dep't*, No. 16-cv-0089, 2016 WL 6078274, at *4 (D. Mont. Oct. 17, 2016) (citing *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)), *report and recommendation adopted,* 2016 WL 6634861 (D. Mont. Nov. 8, 2016). *Cf. Edmondson v. City of Boston*, No. 89-cv-00395-Z, 1990 WL 235426, at *2 (D. Mass. Dec. 20, 1990) (noting that "[i]n the context of an arrest . . . quick action is necessary and predeprivation process is, at best, impractical and unduly burdensome").

The INA does not provide for a pre-deprivation hearing. *See, e.g.*, 8 U.S.C. § 1231. Requiring a pre-deprivation hearing would impair law enforcement, including because it would increase the risk of flight. This is particularly true where the Petitioner already has a final order of removal.

Respondents recognize that Petitioner is making an individualized challenge here. However, the additional procedure he requests would have a significant impact on the removal system. It would require ICE and the Executive Office of Immigration Review to set up a novel administrative process for Petitioner who – for all intents and purposes – represents a large portion of the final order alien population. Therefore, considering all of the *Mathews* factors together, due process does not require a pre-deprivation hearing.

B. Petitioner Cannot Meet His Burden to Show Irreparable Harm

The Court should deny Petitioner's Motion, because Petitioner "must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). The "possibility" of injury is "too remote and speculative to constitute an irreparable injury meriting preliminary injunctive relief." *Id.* "Subjective apprehensions and unsupported predictions . . . are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Id.* at 675–76.

Petitioner's contentions regarding the possibility of detention and deportation to a third country does not "rise to the level of "'immediate threatened injury' that is required to obtain a preliminary injunction." *Slaughter v. King County Corr. Facility*, No. 05-cv-1693, 2006 WL 5811899, at *4 (W.D. Wash. Aug. 10, 2006), *report and recommendation adopted*, 2008 WL 2434208 (W.D. Wash. June 16, 2008) ("Plaintiff's argument of possible harm does not rise to the level of 'immediate threatened

injury'"). Moreover, while Petitioner argues that being detained would cause irreparable harm, "there is no constitutional infringement if restrictions imposed" are "but an incident of some other legitimate government purpose." *Id.* (citing, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). "In such a circumstance, governmental restrictions are permissible." *Id.* (citing *United States v. Salerno,* 481 U.S. 739, 747, (1987)). Indeed, Petitioner's concerns about removal to a third country are based on "aware[ness]" of other individuals who have been removed. Am. Motion at 10 (citing attorney declarations).

Petitioner argues that there are "only two legitimate purposes for immigration detention: mitigating flight risk and preventing danger to the community." Am. Petition ¶ 104. Petitioner disregards additional legitimate purposes of detention: to enforce a removal order.

In this case, Petitioner cannot show that denying the temporary restraining order would make "irreparable harm" the likely outcome. *Winter*, 555 U.S. at 22 ("[P]laintiffs . . . [must] demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original). "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Petitioner cannot establish irreparable harm if he does is not provided a pre-detention hearing.

C. The Equities and Public Interest Do Not Favor Petitioner

The third and fourth factors, "harm to the opposing party" and the "public interest," "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

An adverse decision here would negatively impact the public interest by jeopardizing "the orderly and efficient administration of this country's immigration laws." *See Sasso v. Milhollan*, 735 F. Supp. 1045, 1049 (S.D. Fla. 1990); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th

Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

The public has a legitimate interest in the government's enforcement of its laws. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal.").

While it is in the public interest to protect constitutional rights, if, as here, the Petitioner has not shown a likelihood of success on the merits of that claim, that presumptive public interest evaporates. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

Respondents acknowledge the Petitioner's submissions regarding his efforts to support his family. Given Petitioner's undisputed criminal history, it is evident that the public and governmental interest in permitting his potential detention is significant. Thus, Petitioner has not established that he merits a temporary restraining order.

VIII. CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's Motion for Leave to Amend and the Amended Motion for a Temporary Restraining Order.

Respectfully submitted,

DATED: July 9, 2025

CRAIG H. MISSAKIAN
United States Attorney

/s/ Christopher F. Jeu
CHRISTOPHER F. JEU
Assistant United States Attorney

Attorneys for Federal Defendants-Respondents