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U.S. DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

RICARDO AGUILAR GARCIA, Petitioner, vs. POLLY KAISER, Acting Field Office Director of San Francisco Office of Detention and Removal, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security; TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, U.S. Department of Homeland Security; Kristi NOEM, Secretary, U.S. Department of Homeland Security; and PAM BONDI, Attorney General of the United States; Respondents.	Case No.: 3:25-cv-05070-JSC REPLY TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE

This Court should grant a Preliminary Injunction enjoining Immigration and Customs Enforcement ("ICE") from re-detaining Petitioner without notice and an opportunity to be heard on whether such detention would be lawful and justified. Such an order is consistent with Due Process and with the laws of this nation that repeatedly recognize that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)). It follows that, given the facts of Petitioner's specific case, the law requires ICE provide Petitioner with notice and a hearing prior to any re-detention.

A. Respondent's Reliance On Petitioner's 2018 Bond Hearing, Which Predates Facts Governing Any Analysis Over Whether He Presents A *Current* Danger or Flight Risk, Is Misplaced.

Respondents argue that "[t]he Due Process Clause does not prohibit ICE from re-arresting Petitioner *given* that he has already received a bond hearing" and been denied bond. Doc. 17 at 6 (emphasis added). The bond hearing Respondents refer to is Petitioner's first and only bond hearing, which took place in September of 2018. Doc. 17-1. Respondents' reliance on this bond hearing is curious, since that hearing predates *nearly all* key facts necessary for any determination as to whether Mr. Aguilar Garcia's *currently* presents a danger to the community or flight risk.

At the time of his 2018 bond hearing, Petitioner had two criminal cases pending in Alameda County, no decision had yet been made in his removal proceedings, and he was detained by the Department of Homeland Security ("DHS"). At that time Mr. Aguilar Garcia was 24 years old, was unmarried, and had no children. Tab A.

Since then, Petitioner has had one criminal case, fully dismissed; his second case resulted in a misdemeanor DUI conviction that has since been set aside pursuant to Cal. Penal Code 1203.4; he was found suitable for release by DHS; and he has spent *six years* and counting, out of custody without picking up any new criminal charges or convictions, while timely reporting to ICE and complying with the terms of his supervised release. Doc. 1-1, Exh. A. Petitioner is now married to a U.S. Citizen who suffers from a serious chronic illness and is a step-father to a

medically compromised US Citizen child. *Id.* He now plays a critical role in supporting his U.S. Citizen wife and child and has newly become eligible for relief in removal proceedings in the form of Cancellation of Removal. Tab A.

Additionally, the U.S. Court of Appeals has stayed issuance of a mandate in his case for the sole purpose of allowing him to seek reopening of his removal proceedings before the Board of Immigration Appeals ("BIA" or ("Board") based on his newfound eligibility for relief. Doc. 1-1, Exh. F. Finally, Petitioner has repeatedly checked in with both ISAP and ICE, most recently since having his case denied by the Ninth Circuit and *despite* the risk of re-detention, thereby fully undercutting any argument that he currently presents a risk of flight. Doc. 101, Exh. A, E.

As such, Petitioner's 2018 bond hearing plays no role in the current question pending before this Court as to whether or not Petitioner should be provided a pre-deprivation bond hearing before any *re-detention* since the facts giving rise to the liberty interest upon which such a hearing relies all took place *after* his custody case was last heard by the Immigration Judge.

B. Respondents Misunderstand *Morrissey* and Its Progeny, and Their Application to the Instant Case.

Respondents argue that Petitioner's reliance on *Morrisey v. Brewer*, 408 U.S. 471 (1972) and its progeny is misplaced" because *Morrissey* "arose from the due process requirement for a hearing for revocation of parole" and "did not arise in the context of immigration." Doc. 17 at 6. Effectively, Respondent argues that Petitioner does not have a liberty interest in avoiding re-incarceration. Fortunately, for Petitioner, the U.S. Constitution does not support such a finding.

Petitioner maintains that he retains a weighty liberty interest under the Due Process Clause of the Fifth Amendment in avoiding re-incarceration. *See Young v. Harper*, 520 U.S. 143, 146-47 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482-83 (1972); *see also Ortega v. Bonnar*, 415 F.Supp.3d 963, 969-70 (N.D. Cal. 2019) (holding that a noncitizen has a protected liberty interest in remaining out of custody following an IJ's bond determination). In all three cases, the Supreme Court determined that "a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—

has a liberty interest that entitles him to constitutional process before he is re-incarcerated." *Hurd v. D.C., Gov't*, 864 F.3d 671, 683 (D.C. Cir. 2017) (*citing Young*, 520 U.S. at 152; *Gagnon*, 411 U.S. at 782, and *Morrissey*, 408 U.S. at 482). *Morrissey* specifically rejected "the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable," *id.* at 483, which is exactly what Respondents argue here.

Respondents cite no authority even suggesting that *Morrissey* and its progeny do not apply here. The only controlling precedent Respondents cite—*Mathews v. Diaz*—did not address *Morrissey,* nor did it concern detention or incarceration. 426 U.S. 67, 81-85 (upholding statutory eligibility criteria for noncitizens to receive welfare benefits). If anything, that case undermines Respondents' due process argument; it explained that "[t]he Fifth Amendment … protects every one of the[] [millions of noncitizens in the United States] from deprivation of life, liberty, or property without due process of law." *Id.* at 77. Because this decision did not "raise or discuss" *Morrissey*'s application in the immigration context, it is not precedent on this issue. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985).

Moreover, Respondents fail to grapple with the decisions cited by the Court in its TRO order applying *Morrissey* and its progeny to bar immigration authorities from re-detaining noncitizens like Mr. Aguilar Garcia without a pre-deprivation hearing. *See* Dkt. 3 at 4 (citing *Ortega*, 415 F. Supp. 3d at 970; *Ortiz Vargas v. Jennings*, No. 20-CV-5785-PJH, 2020 WL 5074312, at *3 (N.D. Cal. Aug. 23, 2020); *Romero v. Kaiser*, No. 22-cv-02508, 2022 WL 1443250, *2 (N.D. Cal. May 6, 2022); *Jorge M. F. v. Wilkinson*, No. 21-CV-01434-JST, 2021 WL 783561, at *2 (N.D. Cal. Mar. 1, 2021). Since the date of that order – meaning in just the last month alone – courts in this district and the Eastern District of California have repeatedly applied *Morrisey* in the immigration context; with courts enjoining detention absent a pre-deprivation hearings or ordering the release of noncitizens detained without notice and hearing. *See Guillermo M.R. v. Kaiser*, No. 25-CV-05436-RFL, 2025 WL 1810076, at *1 (N.D. Cal. June 30, 2025); *Pinchi v. Noem*, No. 25-CV-05632-RMI (RFL), 2025 WL 1853763, at *1, *3 (N.D. Cal. July 4, 2025); *Singh v. Andrews*, No. 1:25-cv-801-KES-SKO (E.D. Cal. July 11, 2025).

Respondents' argument that noncitizens like Mr. Aguilar Garcia—with final orders or released by ICE (as opposed to by an IJ bond)— do not have cognizable liberty interests have been flatly rejected by courts in this circuit. *See Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 1771438, at *1, *4 (N.D. Cal. June 26, 2025) (granting TRO for noncitizen with final order, determining he had a "protectable liberty interest in remaining out of custody"); *Pinchi*, 2025 WL 1853763, at *1, *3 (granting TRO and ordering release of detained noncitizen who had previously been released by ICE) ("Her liberty interest is equally serious."); *Singh*, *supra,* Slip. Op. at 10 ("Petitioner's release from custody [by ICE] in January 2024 and ties to his community provide him with a protected liberty interest.") (ordering the petitioner's immediate release from immigration custody and enjoining the government from re-detaining petitioner without a pre-deprivation hearing). *See Diouf v. Napolitano*, 634 F.3d 1081, 1087 (9th Cir. 2011) ("The liberty interests of persons detained under § 1231(a)(6) are comparable to those of persons detained under § 1226(a).").

C. Administrative Inconvenience Is No Reason To Abandon Constitutional Principles.

Respondents argue that the value of Petitioner's proposed safeguards (namely pre-deprivation notice and a hearing) relative to the fiscal and administrative burdens that such safeguards would impose, favor Respondents under the third *Mathews* factor. Doc. 17 at 10. To support this argument, Respondents claim that such safeguards would "disrupt the removal proceedings system" due to "hurdles to efficiently scheduling a hearing," that "any delay…may result in further exacerbation of the flight risk or danger," and that a noncitizen would have "limited incentives to appear…at a hearing at which he could be rearrested." Doc. 17 at 10. Based on these unsupported claims, Respondent then concludes that Petitioner's proposed safeguard therefore "presents an unworkable solution to a situation already addressed by the current procedures." *Id.*

Respondents provide no evidence in support of their claim that there would be "hurdles to efficiently scheduling a hearing" to determine whether someone who is currently out of custody should be re-detained. Such an argument is especially concerning, because there could be few

hearings as important as one to determine whether or not a human being should be placed behind bars. Respondents do not point to any evidence for why such a hearing could not be scheduled by the Immigration Court. And to be clear, any administrative inconvenience caused by having to provide Petitioner a pre-deprivation hearing is unquestionably outweighed by Mr. Aguilar Garcia's right to due process and right to be free from re-incarceration – given his record of compliance and the facts of his particular case – until and unless a neutral decision maker finds that such re-incarceration would be lawful. *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977) (citing *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304, 57 S.Ct. 724, 81 L.Ed. 1093) ("True it is that administrative convenience or even necessity cannot override the constitutional requirements of due process."); *see also Hrdlicka v. Cogbill*, 2005 WL 8177464 (N. D. Cal, April 13, 2005) (finding that even "administrative inconvenience" in the form of "strain on valuable jail resources" suffered by defendants did not outweigh the harm to inmates caused by not receiving access to certain magazines while incarcerated).

In *Ohio Bell Telephone Co.*, a telephone company challenged the Public Utility Commission setting their service rates without a chance for an open and fair hearing. 301 U.S. at 294-5. There, the Supreme Court held that the denial of a hearing violated due process as such a hearing was one of the "rudiments of fair play" and that "[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Id.* at 304-305. Arguably, a hearing to determine whether or not Petitioner should be removed from his home, and placed behind bars, causing irreparable harm to him and his family members, deserves at least the same, if not greater protections that those found suitable by the Supreme Court in that case.

Respondents similarly do not provide any evidence as to why a delay in scheduling a pre-deprivation hearing would exacerbate flight risk and danger, let alone allege that Petitioner currently presents any such flight risk or danger. Nor would they prevail on such an argument given the specific facts of his case. Perhaps most importantly, any hearing delay caused by the

Department of Justice's own inefficiency cannot be used to justify deprivation of the process that Petitioner is due.

Respondents' additional theory that noncitizens would have "limited incentives to appear in court at a hearing at which [they] could be arrested" is similarly unsupported and inapplicable to Petitioner's case. It is also flatly contracted by the instant record. First, Respondents provide no support in their brief for their speculation that noncitizens would have limited incentives to present themselves. Secondly, the question before this Court is not whether "noncitizens" would have an incentive to appear, but whether Mr. Aguilar Garcia, would have such an incentive; or put differently, whether he is a current flight risk. Respondents do not allege any such flight risk on the part of Petitioner, let alone establish such a risk through submission of evidence.

Finally, Mr. Aguilar Garcia has repeatedly presented himself to immigration authorities as instructed since being released from ICE custody. In fact, at least two of those check-ins (March 19 and May 1) were *after* the Ninth Circuit denied his Petitions for Review, *after* the current administration published a record number of Executive Orders openly espousing prioritization of detention and deportation and aggressively committing to the expansion of immigration enforcement,[1] and *after* public threats by "Border Czar" Thomas Homan[2] that

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[1] Executive Order: Protecting the American People Against Invasion, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/ (January 20, 2025); Executive Order: Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-united-states-from-foreign-terrorists-and-othernational-security-and-public-safety-threats/ (January 20, 2025); Executive Order: Clarifying the Military's Role in Protecting the Territorial Integrity of the United States, https://www.whitehouse.gov/presidential-actions/2025/01/clarifying-the-militarys-role-in-protecting-the-territorial-integrity-of-the-united-states/ (January 20, 2025); *see also* Executive Order: Initial Recissions of Harmful Executive Orders and Actions – Rescinding Executive Order 14012 of February 2, 2021 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans), https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ (January 20, 2025).

[2] https://www.wbur.org/news/2025/02/22/trump-border-czar-homan-boston-police-hell

anyone present in the U.S. without permission was "not off the table" for enforcement action and open claims that he would be "bringing hell" to a city believed not to be cooperating with immigration officials. Despite the hostile atmosphere created by the current administration, Petitioner presented himself to immigration officials, because he understood that he was required to do so. He did so in the same way he has been doing since his release by ICE in 2019. For Petitioner in this case, pursuing his immigration claims within the bounds of the law, with the assistance of *pro bono* counsel *is itself* incentive to appear.

D. Respondents Incorrectly Assume Detention Is Necessary To Execute A Final Removal Order.

Respondents argue that "now that mandate is about to issue" Petitioner has little to no expectation of continued freedom. Doc. 17 at 8. The underlying of premise of Respondents' argument—that detention is necessary to effectuate removal—is incorrect.

DHS has regularly relied on a "bag and baggage letter"[3] to direct non-detained individuals whose removal orders have become final, to report for deportation. *See Nen Di Wu v. Holder*, 646 F.3d 133, 134 (2d Cir. 2011) (issuing a bag and baggage letter instructing noncitizen to report to immigration officer ready for deportation); *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007) ("Such an order issues once the government determines that there is

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Note: Petitioner's Counsel is unclear about Thomas Homan's official title. He is commonly referred to as "Border Czar" by the Federal Government– which is not a listed position within DHS (https://www.dhs.gov/leadership) or even ICE (https://www.ice.gov/leadership) leadership. He has also been introduced as the White House Executive Associate Director of Enforcement and Removal Operations (https://www.justice.gov/usao-dc/pr/white-house-border-czar-thomas-homan-visits-usao-dc).

[3] When a non-citizen has a final order of removal, ICE may issue Form I-166, Notice to Surrender for deportation, ordering them to appear on a specific date and time for removal.[3] Office of Enforcement and Removal Operations, ICE, DHS, Bond Management Handbook, https://www.ice.gov/doclib/foia/dro_policy_memos/eroBondManagementHandbook2018-ICFO-31476.pdf at 14. More commonly known as a "Bag and Baggage" letter, this notice "directs an individual to report to an immigration officer ready for deportation." *Matter of Nivelo Cardenas*, 28 I. & N. Dec. 68, 72 fn.3 (BIA 2020)

no further administrative relief available to [noncitizen] who is subject to an order of removal, and instructs the [noncitizen] to appear at a specified location and time for removal.").

Additionally, the ability for ICE to effectuate removal without re-detention in appropriate situations was recognized by this Court in a settlement agreement filed on January 27, 2022 in *Zepeda Rivas v. Jennings*. *See Zepeda Rivas v. Jennings*, 3:20-cv-02731-VC, Dkt. 1205-1, January 27, 2022 ("In the event that ICE has not re-detained a Class Member during the three-year period set forth in Subsection III.A, ICE will make one attempt to execute a final removal order that is not stayed without re-detention or to permit the Class Member to self-remove, including providing the appropriate documentation.").

As such, the idea that detention is the only way for ICE to reliably effectuate removal, is not only evidentiarily unsupported in Respondents' brief, but is contradicted by practices of the DHS itself.

E. A Post-Deprivation Bond Hearing Would Be Insufficient To Protect Petitioner's Right To Due Process.

Respondents concede that if Petitioner were re-detained now – before mandate issues in his Ninth Circuit case – his detention would be pursuant to 8 U.S.C. § 1226(a) which governs discretionary as opposed to mandatory detention. Doc. 17 at 1, 5. First, mandate has not issued in Petitioner's Ninth Circuit case.

Secondly, Respondents' assumption that mandate will issue on August 21, 2025 (Doc. 17 at 1, 7) is unfounded. On May 23, 2025, the U.S. Court of Appeals stayed issuance of mandate in Petitioner's Ninth Circuit case for 90 days to allow Petitioner to seek reopening before the BIA. On July 7, 2025, Petitioner filed his Motion to Reopen ("MTR") arguing that previously unavailable facts made him newly eligible for relief from removal. *See* Tab A (Jorjani Declaration), Tab B (Federal Express Receipts).

Once undersigned counsel receives a receipt notice from the BIA for the filed MTR, that receipt will be submitted to the U.S. Court of Appeals for the Ninth Circuit alongside a request to continue to stay the mandate to provide the Board with an opportunity to adjudicate the motion. Tab A. There is no reason to assume that mandate will issue on August 21, 2025, particularly

where the Court of Appeals has recognized the need to provide Petitioner with a reasonable opportunity to seek reopening before the BIA, and where, as is the case now, such a motion is now pending before the Board. Doc. 1-1, Exh. F.

Respondents' concession that Petitioner is not subject to mandatory detention supports Petitioner's claims that given the circumstances of his particular case, Due Process requires that he not be re-detained by ICE without notice and an opportunity to be heard on whether or not such detention is justified under the law. Respondent acknowledges that if re-detained, Petitioner "would be entitled to an initial bond hearing before an IJ following any detention." Doc. 17 at 1. Respondent does not disagree that a hearing would be provided; only that ICE should be free to deprive Petitioner of his liberty, thereby causing irreparable harm to him and his US Citizen family members, *before* having to legally justify that deprivation, even where Petitioner has complied with the terms of his supervised release *and* no exigent circumstances exist requiring such a detention. The U.S. Constitution and the principles of Due Process do not support such conduct by a federal government agency.

A post-deprivation bond hearing would be insufficient to protect Petitioner's right to due process. First, as established in Petitioner's Motion for Temporary Restraining Order, Petitioner's detention would result in irreparable harm, not only to him, but to his U.S. Citizen wife who suffers from a serious medical condition, and his U.S. Citizen five year old stepson who depends on his care and who suffers from health challenges of his own. Tab A. Secondly, a post-deprivation bond hearing does not put Petitioner in the same position as he would be in during a pre-deprivation bond hearing. For a pre-deprivation bond hearing, Petitioner would be out of custody and able to meet as needed with his counsel to prepare his defense. Once detained, Petitioner's ability to meaningfully participate in his own defense would be severely limited; namely, his ability to help identify supportive witnesses, to locate documentation and evidence needed to support his release, and to meet with and work with counsel as needed to prepare for his hearing. Also, Petitioner would likely be hundreds of miles away from his family and counsel since there are currently no operating ICE detention facilities in Northern California.

It is well documented that detention impacts a noncitizens ability to present their case. *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 363 (2011) ("The two most important variables affecting the ability to secure a successful outcome in a case . . . are having representation and being free from detention.") Indeed, "whether a detained immigrant is released critically affects their ability to defend against deportation." Stacy L. Brustin, *A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings*, 88 Brook. L. Rev. 163, 176 (2022). Even when represented by counsel, detained noncitizens face substantial difficulties in accessing critical evidence. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting detained noncitizens "have little ability to collect evidence"); Aditi Shah, Borchard Fellow, and Eunice Hyunhye Cho "*No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers*," ACLU (2022), *available at:* https://perma.cc/2VMT-LUJX (documenting difficulties detained noncitizens face, including delays in mail and failures to ensure access to legal telephone and video-teleconferencing calls, and concluding that "ICE detention facilities nationwide . . . have systematically restricted the most basic modes of communication that detained people need to connect with their lawyers and the outside world.").

Beyond these consequences, "the fact that the detainee is frequently brought to the courtroom in jail clothing, in handcuffs or otherwise in obvious custody—as opposed to entering freely with counsel and perhaps his family—often engenders subtle prejudices in the judge and jury that necessarily interfere with the detainee's right to a fair trial. *Van Atta v. Scott*, 27 Cal.3d 424, 436 (1980). As such, contrary to Respondent's representations, the procedural safeguards offered under 8 U.S.C. § 1226(a) neither address the prejudice to Petitioner of having to litigate the issue of custody from detention, nor account for the irreparable harm he will suffer if re-detained *before* there a finding by a neutral decision maker that such re-detention is required.

F. Respondents Argument That A Pre-Deprivation Hearing Adds "Little Value" To Existing Procedures Evidences A Callous Disregard for the Fundamental Right to Liberty.

The U.S. Supreme Court has explained, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Specifically, personal liberty is "a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta*, 27 Cal.3d at 435; *United States v. Salerno*, 481 U.S. 739, 750 (1987) (describing "the individual's … interest in liberty" as "fundamental").

A person's imprisonment may not only result in an impairment in their ability to "prepar[e] a defense," but also the "heighten[ed] risk of losing a job, a home, or custody of a child." *In re Humphrey,* 11 Cal.5th 135, 147 (2021). Such imprisonment "severely hinders the detainee's ability to gather evidence and interview witnesses" and "[c]onsequently, the effectiveness of counsel's assistance and the detainee's right to a fair trial are generally impaired." *Van Atta*, 27 Cal.3d at 436. Outside of the courtroom, such imprisonment "may imperil [a detainee's] job, interrupt his source of income, and impair his family relationships." *Id.* As such, the impact of detention does not end with the detained individual, but spreads immediately to that individual's family, dependents, and community.

Respondents' proposition that requiring a pre-deprivation hearing in Petitioner's case "adds little value" to existing procedures evidences a callous disregard – or at least a complete lack of understanding – as to Petitioner's liberty interest. Petitioner has been released by ICE after a finding of non-dangerousness; was deescalated in 2022 by immigration authorities off of the ankle monitoring requirement to which he was previously subject; is married to a US Citizen (Doc. 1-1, Exh. I) diagnosed with Lupus who relies on him not only emotionally, psychologically, and physically, but also financially; is a stepfather to a US Citizen child with several ongoing health issues (including severe developmental articulation disorder and vision impairments) (Tab A); has repeatedly and reliably complied with reporting requirements for the last six years including presenting himself in person as recently as three weeks ago as instructed by immigration authorities; has a DACA application (Doc. 1-1, Exh. G) and an I-130 Petition

(Doc. 1-1, Exh. H) pending; and is now squarely eligible for and a strong candidate for relief from removal based on the exceptional hardships that his US Citizen immediate relatives will face if he is removed. The suggestion that a simple hearing to ensure that *this Petitioner* is not unnecessarily detained would be of "little value," is frankly irreconcilable with our most basic notions of due process and the rule of law.

Petitioner respectfully disagrees. One day of his life – let alone weeks of his life – is not of "little value." Nor can that be said of even one day of impact on his US Citizen wife and child, of his unnecessary detention. If the government can afford the costs associated with detaining Petitioner, then it can afford to provide him with a pre-deprivation hearing, where on these facts, such a hearing is required by due process.

Notably, despite indeed having an interest in *not* erroneously detaining those who need not be detained, the government does not acknowledge this interest in its briefing. Lest the government forget, the Department of Homeland Security has an interest in and claims a duty of protecting U.S. Citizens. That duty is inextricably linked to avoiding the unnecessary detention and effective disappearance of breadwinners, such as Petitioner, upon whom U.S. Citizens like Heaven Ramos and her five-year old son, undoubtedly rely.

G. Respondents Reliance On *Demore* Is Erroneous.

Respondents rely on the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003) to argue that the Supreme Court has found detention during immigration proceedings without a pre-deprivation hearing to be constitutional. Respondents' reliance on *Demore* is misplaced. Petitioner does not argue that his initial arrest and detention pursuant to DHS placing him in removal proceedings was unconstitutional. He argues that his *re-detention*, given his release by DHS, his compliance with reporting requirements, and the facts and circumstances of his family life create a liberty interest that entitles him to a notice and an opportunity to be heard as to the necessity and legality of his re-detention, before such re-detention can take place.

H. Respondents' Claim That Noncitizens Are Only Entitled To Review Of Custody Determinations "After Their Arrest" Is Contrary To BIA Caselaw.

Respondents' argument that noncitizens "are only entitled to a review of custody determinations, if at all, after their arrest," is contrary to BIA precedent. The Board has held in a published decision that where a noncitizen sought review of the terms of his release by DHS within 7 days of that release, the Immigration Judge (IJ) had jurisdiction to review and modify the conditions placed on the noncitizen's release. *Matter of Garcia-Garcia*, 25 I.&N. Dec. 93, 95 (BIA 2009). It is simply not the case that the law prohibits custody review hearings before an IJ for noncitizens released by DHS. Cases like *Matter of Garcia-Garcia* establish that even agency precedent accounts for the need for such hearings under particular circumstances, and that holding such hearings for out of custody individuals are not administratively prohibitive.

I. The Remaining Equitable Factors Weigh Strongly in Mr. Aguilar Garcia's Favor.

Respondents argue that Petitioner's contentions do not "rise to the level of immediate threatened injury that is required to obtain a preliminary injunction" without contending with the specific facts of his case; specifically the years he has been out of custody, his marriage to his U.S. Citizen wife, his new role as a father to a U.S. Citizen child, and the significant medical issues suffered by his immediate relatives. Doc. 17 at 11. Instead, Respondents only point to the fact that Petitioner would be entitled to a post-deprivation hearing and that his final removal order is imminent. These arguments fail for numerous reasons. First, a *post*-deprivation bond hearing is insufficient process as thoroughly established in Petitioner's pleadings and the instant reply. Secondly, Respondents admit that their position that Petitioner would be eligible for a bond hearing if detained only applies until mandate issues.

Finally, Respondents' assertion that a final removal order is "imminent" is at best speculative since the Ninth Circuit has – based on previously unavailable facts – stayed issuance of mandate to allow Petitioner to file a MTR before the BIA, which he did on July 7, 2025. Tab A. As that motion is now pending and Petitioner intends to seek an extension of the stay of mandate, his removal order cannot be said to be "imminent" in its current posture. *Id.*

The balance of the hardships and public interest also strongly support the issuance of a preliminary injunction. The government's interest in Mr. Aguilar Garcia's removal is premature, as he has a stay of removal from the Ninth Circuit and a Motion to Reopen pending with the BIA. *See* Doc. 1-1, Exh F; attached Tab A. Here, Mr. Aguilar Garcia filed his motion based on previously unavailable facts—his marriage to Ms. Ramos, a U.S. Citizen with Lupus, and his presence in her life and the life of her young son—that make him newly eligible and a strong candidate for relief from removal in the form of Cancellation of Removal for Nonpermanent Residents pursuant to 8 U.S.C. 1229b(b). Tab A. As recognized by the Supreme Court, "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition" of a noncitizen's claims: it is an "important safeguard" of the noncitizen's rights. *Dada v. Mukasey,* 554 U.S. 1, 18 (2008). Further, the government's interest in his removal does not necessitate Mr. Aguilar Garcia's detention; in many circumstances the government has permitted noncitizens to effectuate their removal on their own. *See supra* Section D.

Respondents next argue that any injunction preventing redetention may run afoul of the jurisdiction bar in 8 U.S.C. § 1252(g). *See* Op. at 12. That is incorrect. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (holding that § 1252(g) did not bar the district court's injunction barring removal "because the gravamen of Hovsepian's claim does not arise from the Attorney General's decision or action to commence proceedings, adjudicate cases, or execute removal orders.").

The government has *no* interest in wielding that authority to unconstitutionally detain Mr. Aguilar Garcia without any due process. The government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d. 719, 727 (9th Cir. 1983). Conversely, "the public has a strong interest in upholding procedural protections against unlawful detention." *Vargas v. Jennings*, 2020 WL 5074312, at *4 (N.D. Cal. 2020). And that interest is always served by ensuring that such "procedures comply with the Constitution." *Hernandez*, 872 F.3d at 996.

Lastly, public safety would not be furthered by Mr. Aguilar Garcia's redetention.

Respondents' reference to Mr. Aguilar Garcia's criminal history is not dispositive of danger to the community. *See* Op. at 13; *Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) ("[N]ot every criminal record would support a finding of dangerousness."). Especially here, given Mr. Aguilar Garcia's recent check-in with ICE on May 1, 2025, when he was released without issue. *See* ECF No. 1-1 at Exhibit E, Order of Supervision.

Because the balance of hardships tips sharply in [his] favor," Mr. Aguilar Garcia need only show "serious questions going to the merits," under the Ninth Circuit's "sliding scale test." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Yet, as described above, he has done more than that: he has established a strong likelihood of success on the merits of his due process claim. This Court should grant the TRO.

CONCLUSION

For the foregoing reasons, Mr. Aguilar Garcia respectfully requests that the Court enter a Preliminary Injunction enjoining ICE from re-arresting him pending further order of this Court.

Dated: July 11, 2025

Respectfully submitted,

/s/Raha Jorjani
Raha Jorjani
ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE