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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AROLDO RODRIGUEZ DIAZ, Petitioner, v. POLLY KAISER, et al., Respondents.	Case No. 3:25-cv-05071-TLT **RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE; OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION; AND RETURN TO HABEAS PETITION** Date: July 29, 2025 Time: 2:00 p.m. Courtroom: 9, 19th Floor Hon. Trina L. Thompson

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I. INTRODUCTION

Petitioner Aroldo Rodriguez Garcia is no stranger to the courts. He has been in the immigration court system since 2011, the criminal court system since the same year, and in this District's system since 2020, when he filed his first petition for a writ of habeas corpus. He has received three bond hearings related to his immigration detention; at two of those, the Immigration Judge found he was a danger to the community due to his gang membership. At the third—ordered by his subsequently reversed habeas writ—the IJ switched the burden of proof to the government and heightened it to a "clear and convincing" standard, and Petitioner was released. The Ninth Circuit thereafter held that Petitioner's first habeas petition should not have been granted, that he had not been entitled to the third bond hearing he received, and that the burden should not have been switched to the government.

In other words, Petitioner has already received extensive process related to his immigration detention. By statute and regulation, ICE is now permitted to revoke Petitioner's bond, at which point he would be able to challenge his detention before an IJ again. The constitutionality of the immigration-detention system, including noncitizens' ability to seek IJ review once they are detained, has been repeatedly upheld by the Supreme Court and the lower courts.

Nevertheless, Petitioner believes the Constitution requires more in his case. Even though the Ninth Circuit has already held that Petitioner is not entitled to an additional bond hearing beyond those provided by regulation, and even though the Ninth Circuit has already rejected Petitioner's argument that the government should have the burden of supporting Petitioner's detention with clear and convincing evidence, Petitioner mounts those same arguments again to this Court. But they should meet the same fate they did previously: the Constitution does not require an extra bond hearing for Petitioner, because the hearings already available by regulation provide constitutionally adequate protection against the risk of an erroneous deprivation of liberty.

Nothing about Petitioner's circumstances since he previously made these failed arguments warrants a different result now. Petitioner emphasizes the fact that he was released, but the Ninth Circuit reversed the basis for that release. Petitioner has only remained free of custody because the government has not prioritized his re-detention in the meantime. But that does not mean that the Constitution would require additional layers of review if the government were to prioritize him in the

future. To the contrary, the Ninth Circuit's decision in Petitioner's prior case makes clear that the existing procedural safeguards are adequate.

If Petitioner is re-arrested, he could promptly challenge his detention at that time. Such detentions and challenges are a routine feature of the immigration system. The Constitution does not grant Petitioner the extra protection of an additional hearing before he is even arrested again. The Court should deny the motion for a preliminary injunction, and dismiss the habeas petition.[1]

II. FACTUAL BACKGROUND

A. Petitioner's Unlawful Entry and Subsequent Criminal History.

Petitioner is a native and citizen of El Salvador. Dkt. No. 1 ("Pet.") ¶ 29; *see also* Declaration of Jarvin Li ("Li Decl.") ¶ 4. Petitioner entered the United States unlawfully in 2006. *See* Pet. ¶ 29; Li Decl. ¶ 4. Petitioner's criminal history and prior immigration proceedings are described at length in the Ninth Circuit's published opinion reversing the 2020 order granting his first habeas petition. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1194-95 (9th Cir. 2022).

Specifically, "[o]n September 29, 2011, at age fifteen, Rodriguez Diaz was convicted of first-degree residential burglary, for which "[h]e spent about a month in state custody." *Id.* at 1194. "In the following years, Rodriguez Diaz accumulated a fairly lengthy criminal record." *Id.* "In 2014, he was charged with battery on a person on school, park, or other property, and battery resulting in serious bodily injury. These charges were later dismissed." *Id.* "In 2016, Rodriguez Diaz was charged with misdemeanor possession of burglary tools. While these charges were pending, he was also charged with possession of cocaine, to which he pleaded no contest in return for dismissal of the burglary tool charges." *Id.* "For the drug charge, Rodriguez Diaz was sentenced to 18 months of probation," although this conviction was later vacated. *Id.* at 1194-95. "Finally, in 2018, Rodriguez Diaz was arrested on seven felony counts relating to a domestic dispute involving his wife and child. He was convicted of spousal battery and intimidation of a witness, and was sentenced to 276 days in jail and 36 months of probation." *Id.* at 1194.

"By this time, ICE had also received a report from local law enforcement that Rodriguez Diaz

[1] This Response serves as Respondents' return to the habeas petition. *See* 28 U.S.C. § 2243.

had admitted to being a gang member on two occasions." *Id.* Although Petitioner originally testified in immigration court "that he never belonged to a gang and that his tattoo, which read 'C.L.,' did not stand for the gang 'Carnales Locos' but rather 'California Life,'" he later "admitted that he used to be a member of Carnales Locos but claimed he had cut ties with the gang." *Id.* at 1194-95.

B. Petitioner's 2011 Immigration Proceedings.

ICE initiated removal proceedings against Petitioner in 2011, following his conviction for burglary. *Id.* at 1194; *see also* Li Decl. ¶ 5. In December 2018, after serving time in San Mateo County Jail for his convictions for spousal battery and witness intimidation, Petitioner was transferred to ICE custody. *Rodriguez Diaz*, 53 F.4th at 1194; Li Decl. ¶¶ 11, 45. Petitioner received a bond hearing before an Immigration Judge ("IJ") in February 2019, where he was represented by counsel. *See* 53 F.4th at 1194. The IJ found that Petitioner was not credible, "and denied bond on the ground that Rodriguez Diaz was a danger to the community based on his gang membership." *Id.* "On May 13, 2019, the IJ denied Rodriguez Diaz's application for CAT relief and ordered him removed." *Id.*

In February 2020, Petitioner "filed a motion for a new bond and custody redetermination hearing before the IJ," on the ground that the September 2019 "vacatur of his drug conviction and his efforts at rehabilitation constituted material changes in circumstances." *Id.* at 1195. "The IJ denied the motion on February 24, 2020, finding that Rodriguez Diaz's representations about his gang affiliation were not credible given his prior false testimony on the matter, and that Rodriguez Diaz was therefore still a danger to the community." *Id.*

C. Petitioner's 2020 Habeas Petition.

After the IJ denied his second request for a bond, Petitioner filed a habeas petition in this District, claiming that "his detention was unconstitutionally prolonged and that he should at minimum receive a new bond hearing as a matter of due process, with the government bearing the burden of proof." *Id.* The District Court, Judge Yvonne Gonzalez Rogers, "ruled that Rodriguez Diaz was constitutionally entitled to another bond hearing before the IJ. The court further ordered that the hearing deviate from ordinary agency procedures, in that the government should bear the burden of proving by clear and convincing evidence that Rodriguez Diaz was a flight risk or a danger to the community." *Id.*

"In response to the district court's order, the IJ conducted a new hearing using the district court's

prescribed procedures, after which the IJ granted Rodriguez Diaz bond in the amount of $10,000." *Id.*; *see also* Dkt. No. 2-1, Ex. A. Although Petitioner claims that the IJ "determin[ed] that he was neither a flight risk nor a danger to the community," Pet. ¶ 41, the IJ's order does not contain any such findings, *see* Dkt. No. 2-1, Ex. A. Again, the IJ's analysis was made pursuant to the District Court's habeas order, which had required the government to prove by "clear and convincing evidence" that Petitioner was a flight risk or danger to the community. *Rodriguez Diaz*, 53 F.4th at 1195.

The Ninth Circuit reversed the District Court's grant of the habeas petition. *See Rodriguez Diaz*, 53 F.4th at 1214. As discussed in more detail in the Argument below, the Ninth Circuit held that Petitioner had received constitutionally adequate due process by virtue of the multiple bond hearings he had previously received under the regulations. *See id.* at 1209-10. Because the process he did receive was constitutionally adequate, the Ninth Circuit held that the District Court erred by ordering yet another bond hearing at which the government had the burden to prove, by clear and convincing evidence, that Petitioner was either a flight risk or a danger to the community. *See id.* at 1212.

Although the Ninth Circuit reversed the District Court's order and "remand[ed] for dismissal of Rodriguez Diaz's habeas petition," *id.* at 1214, the government has not yet sought to re-detain Petitioner since that time.

D. Petitioner's Further Immigration Proceedings.

While his first habeas petition was pending, Petitioner also sought appellate review of the IJ's orders that he be removed from the country and denying his claims for relief from removal. After unsuccessfully appealing to the Board of Immigration Appeals ("BIA"), Petitioner petitioned for review at the Ninth Circuit. In 2024, the Ninth Circuit granted him limited relief, holding that the agency must consider whether the government's failure to serve his father with the Notice to Appear while Petitioner was still a minor was "conscience-shocking," and remanding for further consideration of Petitioner's expert declaration related to the risk of torture he would face if returned to El Salvador and his claim for ineffective assistance of counsel. *See Rodriguez Diaz v. Garland*, Nos. 19-72634, 21-70497, 2024 WL 3250371 (9th Cir. July 1, 2024).

Throughout these proceedings, Petitioner has been subject to ICE supervision pursuant to the IJ's 2020 order of release. From 2020 to 2022, Petitioner wore an ankle bracelet and was monitored through

ICE's Intensive Supervision Appearance Program ("ISAP"). *See* Pet. ¶¶ 2, 41. In April 2022, ICE removed the ankle monitor and began primarily supervising Petitioner with his phone. *See* Pet. ¶ 44.

Contrary to Petitioner's claims, he has not fully complied with his conditions of release. According to ICE records, Petitioner: failed to be present for his scheduled home visit on May 7, 2025; failed to be present for his scheduled home visit on November 19, 2024; failed to report to the ISAP office as instructed on March 21, 2024; failed to report using the ISAP phone application on September 5, 2023; failed to charge his GPS tracking device on October 4, 2021; and failed to report to the ISAP office as instructed on August 2, 2021. *See* Li Decl. ¶¶ 27, 28, 30, 31, 35, 36.

E. Petitioner's Current Habeas Petition.

Petitioner filed the instant habeas petition on June 14, 2025. *See generally* Pet. Petitioner claims that, on June 13, he "received a message from ISAP on his telephone" instructing him to report to the San Francisco ISAP officer on either June 14 or 15. *See id.* ¶ 5. Petitioner brings two causes of action, for procedural and substantive due process, both seeking to prevent the government from re-detaining Petitioner "unless and until a hearing can be held before a neutral adjudicator to determine whether his re-incarceration would be lawful because the government has shown that he is a danger or a flight risk by clear and convincing evidence." *Id.* ¶¶ 86-95 & p. 23.

Concurrently with his habeas petition, Petitioner filed an Emergency Motion for a Temporary Restraining Order. *See* Dkt. No. 2. Acting as the Duty Judge, Judge Beth Labson Freeman granted the TRO the same day it was filed, before the government had been served or responded. *See* Dkt. No. 4.

The parties stipulated that the TRO could remain in effect while the parties briefed Petitioner's Motion for a Preliminary Injunction. *See* Dkt. Nos. 12, 13.

III. LEGAL STANDARDS

A. Detention of Noncitizens Under 8 U.S.C. § 1226.

The detention of a noncitizen[2] pending removal proceedings is governed by 8 U.S.C. § 1226. *See Rodriguez Diaz*, 53 F.4th at 1196 (citing, *e.g.*, *Jennings v. Rodriguez*, 583 U.S. 281 (2018)). "Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and

[2] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

detention of an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Jennings*, 583 U.S. at 288 (quoting 8 U.S.C. § 1226(a)). "'Except as provided in [§ 1226(c)]' the Attorney General 'may release' an alien detained under § 1226(a) 'on . . . bond' or 'conditional parole.'" *Id.*[3]

By regulation, a detainee has specific procedural rights while detained under § 1226(a). "When a person is apprehended under § 1226(a), an ICE officer makes the initial custody determination. The alien will be released if he 'demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.'" *Rodriguez Diaz*, 53 F.4th 1196 (quoting 8 C.F.R. § 236.1(c)(8)) (internal citation omitted). Thereafter, "a detainee may request a bond hearing before an IJ at any time before a removal order becomes final." *Id.* (citing 8 C.F.R. §§ 236.1(d)(1), 1003.19). "On top of this, an individual detained pursuant to § 1226(a) may request an additional bond hearing whenever he experiences a material change in circumstances." *Id.* (citing 8 C.F.R. § 1003.19(e)).

When a noncitizen has been released on bond while their removal proceedings are pending, § 1226(b) provides that "[t]he Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien." The implementing regulations provide that "such release may be revoked at any time in the discretion of" various ICE officials, without qualification. 8 C.F.R. § 236.1(c)(9); *see also In re Valles-Perez*, 21 I. & N. Dec. 769, 772 (B.I.A. 1997) ("[W]hen an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision.").

Once a noncitizen has had their bond or parole revoked under § 1226(b) and they are taken into custody, their detention is once again governed by § 1226(a) and its implementing regulations. Thus, until they are subject to a final order of removal, such an individual can request a bond hearing before an IJ, and appeal an adverse bond decision to the BIA. *See In re Sugay*, 17 I. & N. Dec. 637, 639-40 (B.I.A. 1981) ("The alien may, as he did in this case, again appeal the amount of bond set by the District

[3] Section 1226(c), which mandates the detention of noncitizens who have committed certain offenses, is not at issue here.

Director, thus assuring that the District Director does not act arbitrarily or capriciously.").[4]

B. Preliminary Injunctions.

"A preliminary injunction is an extraordinary and drastic remedy." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (internal quotation marks and citation omitted). "The Supreme Court has emphasized that preliminary injunctions are an 'extraordinary remedy never awarded as of right.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citation omitted). To prove entitlement to a preliminary injunction, a petitioner must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit recognizes a sliding scale test, under which a preliminary injunction may issue if the petitioner demonstrates "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff . . . assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). The petitioner must adduce "substantial proof" and make a "'*clear showing*'" that preliminary equitable relief is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original).

Under Federal Rule of Civil Procedure 65(a)(2), the Court may consolidate consideration of a motion for a preliminary injunction with the consideration of the merits of an action. "Consolidation is generally appropriate when it would (1) result in an expedited resolution of the case; (2) conserve judicial resources and avoid duplicative proceedings; (3) involves only legal issues based on uncontested evidence and public records; and (4) would not be prejudicial to any of the parties." *Thomas v. Zachry*, No. 3:17-cv-0219-LRH, 2017 WL 2174946, at *1 (D. Nev. May 17, 2017) (citing cases).

C. Habeas Corpus.

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in

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[4] Petitioner argues, and the Ninth Circuit and courts in this District have occasionally stated, that *Sugay* prevents ICE from re-arresting a noncitizen absent a change in circumstances. That is not correct; the relevant portion of *Sugay* merely "recognize[d] counsel's argument" in this regard, but did not hold that such changed circumstances were a requirement for re-arrest. *See* 17 I. & N. Dec. at 640; *see also Saravia v. Sessions*, 905 F.3d 1137, 1145 n.10 (9th Cir. 2018) ("[T]he district court never held that *Sugay* requires these hearings."). Other courts have recognized that *Sugay*'s dicta is not "binding on ICE." *Bermudez Paiz v. Decker*, No. 18-cv-4759 (BCM), 2018 WL 6928794, at *16 n.19 (S.D.N.Y. Dec. 27, 2018).

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). In immigration cases, the federal courts' habeas jurisdiction is limited by 8 U.S.C. § 1252(a)(2)(B), which provides that "no court shall have jurisdiction to review" "decision[s]" for which the statute grants "discretion" to the Attorney General.

IV. ARGUMENT

A. Petitioner's Due Process Claims Fail On The Merits.

Petitioner's claims rest on his argument that he cannot be returned to immigration detention unless and until the government first proves to an IJ by clear and convincing evidence that Petitioner is a flight risk or danger to the community. But as explained below, the Constitution does not require this extra-regulatory process, especially where, as here, Petitioner has already twice been found to warrant detention, and the existing procedures would allow him to promptly challenge his detention if he is ever taken into custody again.

Petitioner has already received three bond hearings related to his detention. At the first two, the IJ found that Petitioner was not credible because he lied about his gang membership, and that he should remain in custody because his gang connections made him a danger to the community. At the third, the IJ ruled that the government had not proven by clear and convincing evidence that Petitioner remained a flight risk or danger—but the Ninth Circuit has held that it was error to place the burden on the government in that way. *See Rodriguez Diaz*, 53 F.4th at 1203, 1210-12. The Constitution does not require that the government conduct yet another bond hearing—what would be Petitioner's fourth—*prior* to taking Petitioner into custody again, especially when all agree he could promptly seek review of his detention if he is ever actually re-arrested during his removal proceedings.

Petitioner has already repeatedly received an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" to challenge his detention—"[t]he fundamental requirement of due process." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). And the existing regulatory process would provide him with a meaningful opportunity to be heard again, if in fact he is ever returned to detention. The Court should decline Petitioner's invitation to write an additional procedural step into the existing process.

Under *Mathews*, the Court must consider three factors in evaluating a procedural due process claim: the plaintiff's private interest, the risk of erroneous deprivation without additional procedures,

and the government's interest. These factors weigh against the additional process requested here.

1. Petitioner's history and status reduce his liberty interest.

First, the Ninth Circuit has already held that Petitioner's liberty interest is reduced by the fact that he is a noncitizen in removal proceedings. *See Rodriguez Diaz*, 53 F.4th at 1206-08. "The recognized liberty interests of U.S. citizens and aliens are not coextensive: the Supreme Court has 'firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.'" *Id.* at 1206 (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the Supreme Court has explained, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). Indeed, the Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523.

That is especially true in light of Petitioner's particular circumstances. Petitioner was twice previously found by an IJ to warrant detention. He was only released pursuant to a process that the Ninth Circuit has held was erroneous. And he always remained subject to ICE's statutory option to revoke his bond under § 1226(b). Each of these aspects of Petitioner's release further reduce his liberty interest here. *See Rodriguez Diaz*, 53 F.4th at 1206-08; *Uc Encarnacion v. Kaiser*, No. 22-cv-04369-CRB, 2022 WL 9496434, at *3 (N.D. Cal. Oct. 14, 2022) (holding released noncitizen had a reduced liberty interest where he "always knew that his release was subject to appellate review").

Petitioner wrongly argues that his liberty interest is actually heightened here because he was released following the (erroneous) grant of his first habeas petition. But Petitioner was only released because the IJ incorrectly shifted the burden to the government and then heightened that burden to a clear-and -convincing standard. *See Rodriguez Diaz*, 53 F.4th at 1210-13. Plaintiff's erroneous release does not somehow increase the strength of his liberty interest. *See Uc Encarnacion*, 2022 WL 9496434, at *3. This case is also fundamentally unlike cases like *Morrisey v. Brewer*, 408 U.S. 471 (1972) and its progeny, where U.S. citizens were released from custody in other contexts, such as post-sentence parole: "The recognized liberty interests of U.S. citizens and aliens are not coextensive." *Rodriguez Diaz*, 53 F.4th at 1206; *see also Uc Encarnacion*, 2022 WL 9496434, at *3 ("Morrissey involved subsequent

revocation of post-release parole for alleged violation of parole conditions, not appellate review of the original decision to parole the petitioner.").

The government recognizes that any form of detention will implicate an individual's liberty interests, and that Petitioner, like virtually everyone subject to detention, has personal reasons for wanting to remain out of custody. But those reasons do not change the fact that Petitioner's status and his history in immigration proceedings reduce his liberty interest here.

2. Petitioner could promptly challenge his detention under existing procedures.

Second, the risk of erroneous deprivation of Petitioner's liberty here is minimal. As a general rule, noncitizens have no right to an IJ hearing *before* they are detained for removal proceedings. Rather, "an ICE officer makes the initial custody determination," which the noncitizen can later request to have reviewed by an IJ. *Rodriguez Diaz*, 53 F.4th at 1196. The Supreme Court has long upheld the constitutionality of this basic process. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 309 (1993) (rejecting procedural due process claim that "the INS procedures are faulty because they do not provide for automatic review by an immigration judge of the initial deportability and custody determinations"); *Abel v. United States*, 362 U.S. 217, 233-34 (1960) (noting the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation"); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States,* 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

Thus, instead being guaranteed *pre*-detention IJ review, noncitizens detained under § 1226(a) are provided with multiple avenues to seek review of their detention *once they are in custody*—a process which the Ninth Circuit has already held is constitutionally sufficient as applied to Petitioner. *See Rodriguez Diaz*, 53 F.4th at 1196-97.

There is no dispute that, if Petitioner is again arrested by ICE, he can promptly request a hearing before an IJ. *See, e.g.*, 8 C.F.R. §§ 236.1(d)(1), 1003.19. "The only difference in the parties' positions is therefore whether a hearing to review Petitioner's custody determination would occur before or after detention." *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1055 (N.D. Cal. 2021). In other words,

Petitioner asks the Court to rule that the U.S. Constitution requires an additional round of pre-detention review in his case that is plainly not required for noncitizens generally.

The risk of erroneous deprivation of Petitioner's (already reduced) liberty interest that would result from allowing him to challenge his detention once detained, versus allowing him to challenge his detention in advance, would be minimal. The Ninth Circuit has already held that "the existing agency procedures sufficiently protected Rodriguez Diaz's liberty interest and mitigated the risk of erroneous deprivation." *Rodriguez Diaz*, 53 F.4th at 1209. "In short, the agency's decision to detain Rodriguez Diaz was subject to numerous levels of review, each offering Rodriguez Diaz the opportunity to be heard by a neutral decisionmaker. These procedures ensured that the risk of erroneous deprivation would be 'relatively small.'" *Id.* (quoting *Yagman v. Garcetti*, 852 F.3d 859, 865 (9th Cir. 2017)). "The process that Rodriguez Diaz received was substantially more extensive than in those cases in which [the court] (in error) invoked the doctrine of constitutional avoidance to require additional procedures." *Id.* And the fact that Petitioner was released in the meantime under an erroneous habeas petition does not mean he is constitutionally entitled to yet more process before the government can arrest him again.

In arguing to the contrary, Petitioner relies almost exclusively on district court cases decided before the Ninth Circuit reversed his prior habeas petition and clarified the law in this area. *See* Mot. 10. But these non-binding decisions have been thoroughly eroded by *Rodriguez Diaz*'s holdings that noncitizens in removal proceedings have lessened liberty interests, and that the existing procedures to challenge detention under § 1226(a) and its regulations are constitutionally adequate. And the only post-*Rodriguez Diaz* decisions Petitioner cites did not mention *Rodriguez Diaz* at all. *See Enamorado v. Kaiser*, No. 25-cv-04072-NW, 2025 WL 1382859 (N.D. Cal. May 12, 2025); *Doe v. Becerra*, No. 2:25-cv-00647-DJC, 2025 WL 691664 (E.D. Cal. Mar. 3, 2025). Indeed, the only recent case Petitioner cites from this District, *Enamorado*, was merely a TRO decided before the government had any chance to respond. *See* 2025 WL 1382859.[5]

Other courts, including in this District, have rejected the premise that the Constitution requires an extra hearing before a noncitizen can be re-arrested under § 1226(b). For example, Chief Judge Seeborg

[5] The TRO issued in this matter is distinguishable for the same reasons. *See* Dkt. No. 4.

has held that "[t]he law does not require a hearing before arrest" where a noncitizen released from ICE custody had been picked up by the San Francisco Police Department for a gang-related assault. *United States v. Cisneros*, No. 19-cr-00280-RS-5, 2021 WL 5908407, at *4 (N.D. Cal. Dec. 14, 2021). Other courts around the country have similarly recognized that there is no "due process right to a pre-detention hearing where a noncitizen, subject to pending removal proceedings . . . is at risk of being re-detained after being at liberty for more than two years." *Reyes v. King*, No. 19 -cv-08674-KPF, 2021 WL 3727614, at *11 (S.D.N.Y. Aug. 20, 2021); *accord F.G. v. Noem*, No. 25-cv-0243-CVE, 2025 WL 1669356, at *8 (N.D. Okla. June 12, 2025) ("On careful consideration of the statute, the implementing regulations, and the BIA's decisions in Sugay and Valles-Perez, the Court rejects petitioner's claim that the DHS has no authority to revoke a bond issued by an immigration judge.").

Moreover, the specific additional procedures Petitioner requests for his novel hearing—that the government would have the burden of proof, by clear and convincing evidence—are especially problematic, considering that the Ninth Circuit has already rejected those exact same requirements *in Petitioner's own case*. *See Rodriguez Diaz*, 53 F.4th at 1203-13. As the Ninth Circuit said previously, "We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of an alien, much less through an elevated 'clear and convincing' showing." *Id.* at 1212. There is no good reason to impose such a requirement for Petitioner now, when the Ninth Circuit previously held that Petitioner was not entitled to that process.

In short, the Constitution does not require the extra-regulatory level of review that Petitioner seeks here to avoid the possibility of an erroneous deprivation of liberty. Supreme Court and Ninth Circuit caselaw make this result clear as a general matter, and Petitioner's particular circumstances make it especially so.

3. The government has a strong interest in detention pending removal.

Turning to the third *Mathews* factor, the Ninth Circuit has already held, in evaluating Petitioner's due process claims, that "the government clearly has a strong interest in preventing aliens from 'remain[ing] in the United States in violation of our law.'" *Rodriguez Diaz*, 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). "This is especially true when it comes to determining whether removable aliens must be released on bond during the pendency of removal proceedings." *Id.* "The government

has an obvious interest in 'protecting the public from dangerous criminal aliens,'" and "[t]hrough detention, the government likewise seeks to 'increas[e] the chance that, if ordered removed, the aliens will be successfully removed.'" *Id.* (quoting *Demore*, 538 U.S. at 515 and 528). "Indeed, the Supreme Court has specifically recognized Congress's determination that the government has been unable to remove deportable criminal aliens because of its initial failure to detain them." *Id.* "For all these reasons, the government's interests in this case are significant." *Id.*

Moreover, Petitioner's request for an additional level of review would impose administrative and resource burdens on the government that would frustrate its ability to make congressionally authorized detention decisions. Congress has determined that the Executive Branch may detain noncitizens in removal proceedings without a pre-detention hearing, while permitting those individuals to seek review of their detention from an IJ once in custody. Every extra hearing before an IJ adds further congestion to an already backlogged immigration-court system. It drains limited Executive Branch resources. The government has a significant interest in avoiding these extra-regulatory burdens.

Indeed, 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-0395-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"). These practical public-safety considerations are especially acute in this case, given Plaintiff's admitted past membership in a gang. *See Rodriguez Diaz*, 53 F.4th at 1194-95, 1208.

In short, the three *Mathews* factors weigh decidedly against granting Petitioner the additional, pre-detention hearing he now requests.

B. Petitioner Fails to Show Irreparable Harm.

In addition to his failure to show a likelihood of success on the merits, Petitioner does not meet his burden of showing he will be irreparably harmed in the absence of a preliminary injunction.

Petitioner primarily claims two categories of injury if he is not afforded a hearing before he is arrested again: (1) separation from his family, and (2) alleged deprivation of constitutional rights. Mot. 19-20.

Petitioner's speculative claimed injuries are "too tenuous" to support a preliminary injunction. *See Goldie's Bookstore, Inc. v. Superior Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Petitioner's claimed injuries regarding harm to him and his family arise from possible *detention*, not from the absence of a bond hearing, which is what his Petition concerns. He thus offers no explanation for how those claimed injuries would be prevented by a preliminary injunction, which—even if granted—could still result in his re-detention following notice and a hearing.

The injury that Petitioner asserts from his future potential detention is also insufficient because it is well established that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523; *see also, e.g.*, *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. Again, even if Petitioner were re-arrested, he would have the opportunity to promptly seek review of that detention in front of an IJ. Petitioner therefore cannot show that any injury he might suffer from the specific absence of a *pre*-detention hearing is "irreparable."

Finally, the alleged infringement of Petitioner's constitutional rights is insufficient when—as here—Petitioner fails to demonstrate "'a sufficient likelihood of success on the merits of [his] constitutional claims to warrant the grant of a preliminary injunction.'" *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc'd Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); *see also Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021) (denying TRO where petitioner "assume[d] a deprivation to assert the resulting harm").

Given his undisputed status as a noncitizen in removal proceedings who was only released from custody pursuant to a prior habeas petition the Ninth Circuit has reversed, Petitioner cannot establish that lawfully authorized detention would cause him irreparable harm.

C. Neither the Balance of Equities Nor Public Interest Favors Petitioner.

When the government is a party, the last two factors that Petitioner must establish to obtain a preliminary injunction merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, for the same reasons that Petitioner has not

shown the *Mathews* factors favor his requested additional process, Petitioner has not shown that a preliminary injunction barring his re-arrest without a hearing is in the public interest. To the contrary, the public interest lies squarely in detaining an individual that the government has found to be a danger to the community. *See Martinez v. Clark*, 124 F.4th 775, 786 (9th Cir. 2024) ("Martinez was found to be a danger to the community and so his detention is clearly 'reasonably related' to the government's interest in protecting the public.").

Indeed, Petitioner's motion ignores the public interest in application of immigration laws that the Supreme Court has long upheld. *See, e.g.*, *Demore*, 538 U.S. at 523; *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court "should give due weight to the serious consideration of the public interest" in enacted laws). Petitioner's claimed harm to himself and his family cannot outweigh this public interest in application of the law, particularly since courts "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) (citation omitted). Recognizing the availability of a preliminary injunction under such circumstances would permit any noncitizen who had been released pursuant to an erroneous court order to petition a federal district court for additional review, circumventing the comprehensive statutory scheme that Congress enacted.

And Petitioner's reliance on his assumed constitutional entitlement to an extra bond hearing does not save his argument. While it is "always 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 public interest does not outweigh the competing public interest in enforcement of existing laws. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Though Respondents acknowledge Petitioner's recent efforts to support his family, he cannot dispute that he was repeatedly found to be a danger to the community after lying to the IJ about his gang connections, and that he remains in removal proceedings to this day. The public and governmental interest in upholding the existing processes and permitting Petitioner to be re-detained without additional burdensome processes, while allowing Petitioner to then challenge his detention once he is in custody, is significant.

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V. CONCLUSION

For the foregoing reasons, the Court should deny the preliminary injunction, dismiss the habeas petition, and enter judgment on the merits in Respondents' favor.

Respectfully submitted,

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Dated: June 30, 2025

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