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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Aroldo RODRIGUEZ DIAZ,

Petitioner-Plaintiff,

v.

Polly KAISER, et al.,

Respondents-Defendants.

Case No. 3:25-cv-05071-TLT

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: September 9, 2025
Time: 2:00 P.M.
Courtroom: 9, 19th Floor

Hon. Trina L. Thompson

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Respondents advance arguments that only underscore why judicial intervention is essential to protecting Petitioner's constitutional rights.[1] They misconstrue binding law, draw parallels to cases that share nothing in common with Petitioner's, and assert "facts" that are demonstrably false. Respondents even disclaim a representation made to another court in this District in 2017 regarding when ICE can re-arrest a noncitizen who has been released from custody, averring here that their authority to re-incarcerate is unbridled, even where there is no evidence that the noncitizen is a *current* danger or flight risk. ECF 15, Opposition (Opp.) at 6 ("regulations provide that 'such release may be revoked at any time in the discretion of' various ICE officials, without qualification."). This chilling argument fails, as numerous courts in this District and elsewhere have found. ECF 2 at 10 (collecting cases); ECF 4 at 4 (collecting cases).[2]

Respondents do not dispute that they intended to arrest Petitioner at his ISAP appointment on June 14 or that they intend to arrest him without notice or process if this Court does not grant a preliminary injunction (PI). The Court should therefore convert the temporary restraining order (TRO) to a PI for the duration of these proceedings, as Petitioner has clearly established a likelihood of success on the merits, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and, at the very least, serious questions going to the merits coupled with hardships tipping "sharply" in his favor, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

ADDITIONAL FACTUAL BACKGROUND

Petitioner has complied with ICE's reporting requirements and the record bears that out. *See* Declaration of Johnny Sinodis dated July 18, 2025 (Second Sinodis Decl.) at Tabs A-C. Respondents point to several alleged compliance failures that occurred before ICE made the decision to remove Petitioner's ankle monitor in April 2022, thus belying their assertion that

[1] Respondents seek to convert briefing on the PI Motion to briefing on the merits. ECF 15 at 7. Petitioner opposes this request, which was not sought via motion and has not been ordered. Petitioner intends to file a traverse to Respondents' Response to the OSC by July 30, as established by the local rules and the habeas statute.

[2] *See also Doe v. Becerra*, -- F. Supp. 3d --, 2025 WL 691664, *8 (E.D. Cal. Mar. 3, 2025); *Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 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, 2025 WL 1918679 (E.D. Cal. July 11, 2025); *Garcia v. Andrews*, No. 2:25-CV-01884-TLN-SCR, 2025 WL 1927596, at *6 (E.D. Cal. July 14, 2025); *Phan v. Becerra*, No. 2:25-cv-01757-DC-JDP, ECF 22 (E.D. Cal. July 16, 2025); *Hoac v. Becerra*, No. 2:25-cv-01740-DC-JDP, ECF 29 (E.D. Cal. July 16, 2025); *Guillermo M. R. v. Kaiser*, --- F.Supp.3d. ---, 2025 WL 1983677, at *1 (N.D. Cal. July 17, 2025).

Petitioner violated ICE's reporting requirements. ECF 15-1 at ¶¶ 27-28. Respondents also incorrectly assert that Petitioner failed to report to ICE in person on August 2, 2021, and March 21, 2024. *Id.* at ¶¶ 27, 31. Respondents appear to have conflated Petitioner with someone else. As Petitioner's Order of Supervision (OSUP) demonstrates, he appeared for his in-person appointments as ordered by ICE. ECF 2-1 at Tab B (OSUP Paperwork); Second Sinodis Decl. at Tabs A-B (Additional OSUP Paperwork). Had Petitioner missed an in-person appointment, there would be notes reflecting as much on his OSUP paperwork, but there are none. *Id.*

Petitioner has also never intentionally missed a "home visit," and immediately took steps to report to ICE and/or ISAP the same or very next day on the few occasions where he missed or did not receive an unexpected notification on his telephone's application. Second Sinodis Decl. at Tab C (Petitioner's Declaration) (explaining that he was unaware that a visit had been set and reported to ISAP in person the next day).[3] On those occasions when Petitioner reported to ICE and ISAP, ICE made the determination that re-arresting him was not warranted. *Id.* Because ICE repeatedly released Petitioner following his check-ins on May 3, 2021, November 30, 2021, June 1, 2022, May 30, 2023, and May 31, 2024, he reasonably believed that he would not be re-incarcerated because he continued to abide by ICE's requirements. Yet, after Donald J. Trump became President and senior ICE officials were directed to drastically ramp up immigration arrests[4]—ICE saw fit to "prioritize" Petitioner's re-detention, even though he has been free from physical confinement on an Immigration Judge (IJ) issued bond for five years.

Furthermore, Petitioner did not receive three bond hearings before being released from custody. Opp. at 1. Petitioner was released on bond in May 2020 after filing a successful habeas petition challenging the IJ's order denying him a second bond *hearing* based on changed circumstances. *Rodriguez Diaz v. Barr*, No. 4:20-cv-01806-YGR, 2020 WL 1984301, *1 (N.D.

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[3] As *The Guardian* reports, there are myriad problems with ISAP's phone application, including that it "frequently malfunctions, causing immigrants to miss required check-ins" because "notifications didn't work, photos that failed to register, login troubles, and malfunctioning geotag software." *Id.* at Tab D.

[4] "Trump officials issue quotas to ICE officers to ramp up arrests," *Washington Post* (Jan. 26, 2025), https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/; "Stephen Miller's Order Likely Sparked Immigration Arrests And Protests," *Forbes* (June 9, 2025), https://www.forbes.com/sites/stuartanderson/2025/06/09/stephen-millers-order-likely-sparked-immigration-arrests-and-protests/.

Cal. Apr. 27, 2020). The Honorable Judge Gonzalez Rogers reasoned that the length of Petitioner's detention mandated a second hearing. At the second bond hearing, the IJ granted Petitioner release and ICE *did not* appeal to the BIA. *Id.* at *6. In fact, in April 2022, ICE decided to remove Petitioner's ankle monitor.[5] Second Sinodis Decl. at Tab C. Several months later, when Judge Gonzalez's order was reversed by the Ninth Circuit in a procedural decision—that did not address whether Petitioner was a danger or a flight risk—Respondents did not seek to re-detain Petitioner. *See Rodriguez Diaz v. Garland*, 53 F.4th 1126 (9th Cir. 2022)

Since then, Petitioner's legal circumstances have drastically improved and his liberty interest has only grown. Petitioner's two successful petitions for review (PFR) at the Ninth Circuit resulted in much more than what Respondents describe as "limited relief." Opp. at 4. The Ninth Circuit granted both PFRs and remanded because the IJ and BIA failed to, *inter alia*, consider uncontroverted expert testimony that Petitioner would be tortured if removed to El Salvador. Second Sinodis Decl. at Tab E (Memorandum Disposition). Given this type of clear legal error, Petitioner must be provided a new evidentiary hearing by an IJ. *Id.* at Tab F (Declaration of Stacy Tolchin) (explaining that Petitioner's immigration case will have to be sent back to the IJ). Respondents also ignore that Petitioner separately has a pending asylum application before the Immigration Court that also *requires* an evidentiary hearing. 8 C.F.R. § 1208.14(c). Petitioner's removal proceedings are thus years away from resolution, signifying that any potential future removal from the United States is not reasonably foreseeable. Second Sinodis Decl. at Tab F.

ARGUMENT

Despite statutory language granting ICE authority to revoke an immigration bond "at any time," 8 U.S.C. 1226(b), in *Matter of Sugay*, 17 I&N Dec. 647, 640 (BIA 1981), the BIA held that, "where a previous bond determination has been made by an immigration judge, no change should be made by [the DHS] absent a change of circumstance." *Id.* In representations made during subsequent litigation, ICE further limited its authority as described in *Sugay*, stating ICE

[5] Respondents make much of Petitioner's prior convictions, all of which predate his release on bond in May 2020, and several of which were from when he was a juvenile, rendering them not a "conviction" for immigration purposes. *In re Devison–Charles,* 22 I. & N. Dec. 1362, 1365 (BIA 2000); *see also Rodriguez Diaz*, 53 F.4th at 1221 (Wardlaw, J., dissenting) (describing Petitioner's extensive efforts at rehabilitation after his last conviction). Furthermore, Petitioner's youthful transgressions have absolutely nothing to do with whether he is a *current* danger.

"generally only re-arrests [noncitizens] pursuant to § 1226(b) after a *material* change in circumstances." *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1197 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018) (emphasis added). Now, Respondents seek to walk away from that precedent and that representation. Opp. at 6. Although this is a serious issue, it is not one which this Court needs to resolve at this juncture.

Instead, this Court need only follow the decisions of numerous courts in this District and the Eastern District finding that noncitizens like Petitioner released on bond are entitled to notice and a hearing to determine whether circumstances have changed to justify their re-detention. *See Ortiz Vargas v. Jennings*, No. 20-cv-5785, 2020 WL 5074312, at *3 (N.D. Cal. Aug. 23, 2020); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019) ("Just as people on preparole, parole, and probation status have a liberty interest, so too does Ortega have a liberty interest in remaining out of custody on bond."); *Romero v. Kaiser*, No. 22-cv-02508, 2022 WL 1443250, at *2 (N.D. Cal. May 6, 2022) ("[T]his Court joins other courts of this district facing facts similar to the present case and finds Petitioner raised serious questions going to the merits of his claim that due process requires a hearing before an IJ prior to re-detention."); *Jorge M. F. v. Wilkinson*, No. 21-cv-01434, 2021 WL 783561, at *2 (N.D. Cal. Mar. 1, 2021); *Meza v. Bonnar*, 2018 WL 2554572, *1 (N.D. Cal. June 4, 2018).[6]

I. PETITIONER MERITS A PRELIMINARY INJUNCTION.

Petitioner overwhelmingly establishes a likelihood of success on the merits, *Winter*, 555 U.S. at 20, and, at the very last, "serious questions" as to the merits of his claims, *Alliance for the Wild Rockies*, F.3d 1127. Under either standard, the Court should issue a PI.

Contrary to Respondents' argument, *Rodriguez Diaz* analyzed only the narrow issue of whether a noncitizen detained under 8 U.S.C. § 1226(a) is entitled to a second bond hearing when detention had become prolonged. 53 F.4th at 1202. *Rodriguez Diaz* examined prolonged detention where a noncitizen has *not* been released from custody following ICE's *initial* decision to arrest a noncitizen for removal proceedings. *See id.* at 1208 (citing *Demore v. Kim*, 538 U.S. 510, 518

[6] *See also Doe*, 2025 WL 691664, *8; *Ortega*, No. 25-CV-05259-JST, 2025 WL 1771438; *Pinchi*, 2025 WL 1853763, at *1, *3; *Singh*, 2025 WL 1918679; *Garcia*, 2025 WL 1927596, at *6; *Phan*, No. 2:25-cv-01757-DC-JDP, ECF 22; *Hoac*, No. 2:25-cv-01740-DC-JDP, ECF 29; *Guillermo*, 2025 WL 1983677, at *1.

(2003)). But Petitioner does not challenge ICE's initial decision (from 2018) to arrest him for detention during removal proceedings, and Petitioner *has* been released from custody more than five years ago. The *Rodriguez Diaz* court also made clear that its decision was limited to the facts and circumstances at the time the petitioner filed his habeas petition in 2020. *Id.* at 1213 ("we do not foreclose all as-applied challenges to § 1226(a)'s procedures"). Simply put, *Rodriguez Diaz* has no bearing on the issue presented here—whether ICE can unilaterally revoke an IJ-issued bond and *re-arrest* Petitioner, without any notice, process, or reason whatsoever, when he has exercised his right to freedom for five years. For that reason, courts do not rely on *Rodriguez Diaz* when adjudicating the constitutional as-applied pre-deprivation claim presented here.

Respondents also rely heavily on stale facts that predate—by years—the requisite analysis of whether Petitioner is a *current* danger or flight risk. *See, e.g.*, *Obregon v. Sessions*, No. 17-CV-01463-WHO, 2017 WL 1407889, at *7 (N.D. Cal. Apr. 20, 2017). As the record shows, since May 2020, Petitioner has remained law-abiding, raised his minor U.S. citizen children, and litigated his immigration case—all inconvenient facts that Respondents conspicuously omit. Respondents also misconstrue *Morrissey v. Brewer*, 408 U.S. 471 (1972), and its progeny, and their application in these proceedings, notwithstanding the numerous decisions from this District favoring Petitioner. Respondents' faulty analysis of *Morrissey* is compounded by their failure to grasp the catastrophic harms that would be inflicted if Petitioner were re-arrested.

A. Petitioner has a substantial interest in his freedom from confinement that is not reduced by his "history and status."

Respondents contend Petitioner's liberty interest is diminished because: he is a noncitizen; he was found to warrant detention five years ago; the habeas decision that led to his release was overturned; and ICE claims authority to revoke his IJ-issued bond at any time for any reason under 8 C.F.R. § 236.1(c)(9). Opp. at 9. Each argument fails as a constitutional matter.

First, as numerous courts have already held in identical or substantially similar circumstances, Petitioner and noncitizens like him retain a weighty liberty interest under the Fifth Amendment's Due Process Clause. ECF 4 at 4 (collecting cases).[7] In fact, courts in this District

[7] *See also Pinchi*, 2025 WL 1853763, at *1, *3; *Singh*, 2025 WL 1918679; *Doe*, 2025 WL 691664, *8; *Ortega*, 2025 WL 1771438; *Garcia*, 2025 WL 1927596, at *6; *Phan*, No. 2:25-cv-01757-DC-JDP, ECF 22; *Hoac*, No. 2:25-cv-

have specifically rejected Respondents' argument that the vacatur of a district court decision requiring the provision of a bond hearing to a noncitizen, which led to the noncitizen's eventual release, permits ICE to re-arrest that noncitizen without any notice of process. *See, e.g., Meza*, 2018 WL 2554572, *2; *Ortega*, 415 F. Supp. 3d at 966-67. Precedent shows that, even if Petitioner's release was in error, he retains a weighty liberty interest in his freedom from confinement. *See* ECF 2 at 12.

Uc Encarnacion v. Kaiser is inapposite. No. 22-cv-04369-CRB, 2022 WL 9496434 (N.D. Cal. Oct. 14, 2022). There, after the IJ granted *Uc* bond, ICE appealed the merits of the IJ's decision to the BIA. *Id.* at *2. Once the BIA sustained ICE's appeal and ordered *Uc* to be re-incarcerated, ICE swiftly moved to re-arrest him within just three weeks. *Id.* ICE did no such thing here. ICE chose not to appeal the IJ's May 2020 bond decision and later made the determination to allow Petitioner to remain at liberty for three years following the decision in *Rodriguez Diaz*, which was issued on November 21, 2022. Each time Petitioner reported to ICE pursuant to his OSUP, ICE made the decision to not re-arrest him. Petitioner reasonably relied on ICE's actions and prior representation that it only rearrests noncitizens after a "material change in circumstances." That ICE now seeks to abandon that representation does nothing to diminish Petitioner's liberty interest. "The law requires a change in relevant facts, not just a change in [the government's] attitude." *Singh*, No. 1:25-cv-00801-KES, 2025 WL 1918679, at *7 (quoting *Valdez v. Joyce*, 25 Civ. 4627 (GBD), 2025 WL 1707737, at *3 n.6 (S.D.N.Y. June 18, 2025)).

Second, Respondents contend, without citing any authority, that this case is "fundamentally unlike" *Morrissey* and its progeny because Petitioner is a noncitizen. Opp. 9.[8] They are wrong, and their argument has already been roundly dismissed numerous times. "[D]ecisions defining the constitutional rights of prisoners establish a *floor* for the constitutional

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01740-DC-JDP, ECF 29; *Guillermo*, 2025 WL 1983677, at *1. Even *Rodriguez Diaz*, which Respondents distort throughout their Opposition, found that the first *Mathews* factor favored Petitioner back in 2020. 53 F.4th at 1207 ("The first *Mathews* factor…weighs in his favor.").

[8] *Mathews v. Diaz* did not address *Morrissey,* nor did it concern detention or incarceration. 426 U.S. 67, 81-85 (1976) (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).

rights of [noncitizens in immigration custody]," who are "most decidedly entitled to *more* considerate treatment than those who are criminally detained." *Singh*, No. 1:25-cv-00801-KES, 2025 WL 1918679, at *8 (quoting *Unknown Parties*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *5); *see also Ortega*, 415 F. Supp. 3d at 970 ("Given the civil context [of immigration detention], [petitioner's] liberty interest is arguably greater than the interest of parolees in *Morrissey*."). For this reason, courts in this circuit routinely hold that the liberty interest in remaining free from physical confinement is fundamental, including for noncitizens. *Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) ("the private interest at issue here is 'fundamental': freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'") (internal citations omitted); *Perera v. Jennings*, 598 F. Supp. 3d 736, 745 (N.D. Cal. 2022)); *see also Demore*, 538 U.S. at 553 (2003) (Souter, J., concurring in part and dissenting in part) (constitutionally protected liberty interest in avoiding physical confinement, even for noncitizens already ordered removed, is not conceptually different from the liberty interest of citizens) (discussing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). In short, "Respondents provide no principled reason for why Petitioner's liberty interest should be less than that of a U.S. citizen parolee or probationer."[9] *Guillermo M.R.*, 2025 WL 1983677, *6. Petitioner's specific liberty interest—as a gainfully employed, law-abiding father of two minor U.S. citizens who was released on bond five years ago and has complied with his release conditions ever since—entitles him to due process before his liberty is taken away, regardless of his status as a noncitizen.

Third, Respondents provide no authority for their insinuation that the Court should rely on the IJ's decision denying Petitioner bond in February 2019, because there is none. Whether Petitioner can lawfully be re-arrested and re-incarcerated focuses on whether he is a *current* danger or flight risk. *See, e.g.*, *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir.1999) ("The assessment of flight risk and danger to the community must be made on a current basis"). Petitioner's last arrest occurred seven years ago, and since then, he has dedicated himself to rehabilitation and his family. ECF 2-1 at Tab H. There is zero evidence to suggest his re-incarceration would be justified.

[9] "Although the Court 'must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature,' *Rodriguez Diaz*, 53 F.4th at 1208 (quotation omitted), this is no less true in the context of a state's interest over parolees." *Id.*

B. The risk of erroneous deprivation is high because Respondents assert they can re-arrest Petitioner for any reason at any time, and the post-deprivation framework is insufficient to protect Petitioner's constitutional rights.

A pre-deprivation hearing would be extremely valuable because Petitioner has strong arguments that he should remain free from confinement. Petitioner has reformed his life, having spent seven years now without any negative interaction with law enforcement. He is a caretaker for his two minor U.S. citizen children, who works full time in construction and has extensive family and community support. *Hurd v. Dist. Of Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017); *Young v. Harper*, 520 U.S. 143, 152 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey*, 408 U.S. at 482. Petitioner, his children, his community, and his employer would suffer immeasurable harm if he were re-arrested.

Respondents do not assert there has been a material change in circumstances justifying Petitioner's arrest. Instead, they seek to abandon their longstanding representation that ICE "generally only re-arrests [noncitizens] pursuant to § 1226(b) after a *material* change in circumstances." *Saravia*, 280 F. Supp. 3d at 1197. Respondents here assert they may arrest Petitioner at any time for any reason. Opp. at 6. They add that Petitioner could challenge their unfounded decision to re-arrest him from an immigration jail after he is separated from his U.S. citizen children and likely loses his employment. *Id.* at 8. But the regulatory framework that exists for noncitizens to seek bond is constitutionally inadequate for the facts and circumstances of this case, as explained in more detail below.

Any length of time in custody inflicts harm. *Hernandez*, 872 F.3d at 995. This is doubly so for individuals like Petitioner who are neither dangers nor flight risks and therefore do not fit the only two criteria for civil detention. *Id.* at 994. Nevertheless, Respondents have made clear their intention to arrest Petitioner if an order from this Court is not in place. In fact, on June 30, 2025, when Petitioner appeared for his previously scheduled in-person appointment at ICE, ICE improperly filed a notice of change of address for Petitioner with the San Francisco Immigration Court, wrongly informing the IJ that Petitioner had been detained and transferred to Golden State Annex, an immigration jail in McFarland, California. Second Sinodis Decl. at Tab H. Were it not for the TRO being in effect, ICE would have re-incarcerated Petitioner on June 30 and shipped

him away to a jail outside of this District, more than 250 miles from his U.S. citizen children.

1. There has been no material change in circumstances justifying ICE's intention to re-arrest Petitioner.

Respondents do not assert that materially changed circumstances exist here. Further, the insinuation that Petitioner failed to comply with his reporting obligations is factually incorrect. Moreover, even if there had been a material change in circumstances justifying his re-detention, due process requires that Respondents provide him with notice and a hearing where he can present arguments as to why he is neither a danger nor a flight risk *before* he is taken into custody. *See Hernandez*, 872 F.3d at 981 ("the government's discretion to incarcerate non-citizens is always constrained by the requirements of due process"); *Hurd*, 864 F.3d at 683 ("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.") (emphasis added).

2. Moving for a regular post-deprivation bond hearing before the IJ would be inadequate.

The INA's framework for bond is inadequate to protect Petitioner's rights, which can only be remedied with an order from this Court.[10] This is because: (1) absent an order from this Court, an IJ lacks authority to review the constitutionality of ICE's decision to re-arrest Petitioner; (2) in the last week, ICE has adopted a nationwide policy that anyone who entered the United States without a visa is subject to mandatory detention, which could present additional constitutional issues the IJ could not decide; (3) Petitioner would be forced to carry the burden to establish that he deserves bond; (4) Petitioner would already have been deprived of his liberty; and (5) ICE could invoke an automatic stay pending appeal of any favorable bond decision, 8 C.F.R. § 1003.19(i)(2), a process that could take years to conclude. Second Sinodis Decl. at Tab G (Declaration of Aaron Korthuis) (explaining extreme BIA delays in deciding bond appeals).

Although Respondents concede that ICE's new custody determination would be subject to IJ review, Opp. at 10, the actual *revocation* of Petitioner's bond would evade not be. Under current procedures, by the time Petitioner seeks redetermination of his custody status, the IJ would

[10] Despite Respondents' citation to *Rodriguez Diaz*, the Court there certainly did not, as Respondents contend, hold that 8 U.S.C. §1226(a) is "constitutionally sufficient as applied to Petitioner" in the context of the present dispute—i.e., whether ICE can unilaterally revoke an IJ-issued bond five years later even though Petitioner has remained law abiding and fully compliant with ICE's reporting requirements. Opp. at 10.

only be considering whether Petitioner has carried the burden to show that a new bond must be granted. *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). The IJ would not be considering whether ICE's re-arrest was, in fact, lawful, because the prior IJ's bond was unilaterally revoked and he would already have been deprived of his liberty interest. *See* 8 C.F.R. § 236.1(c)(9). The IJ lacks authority to decide constitutional claims, including those brought by Petitioner here. *See Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995) ("the agency does not have jurisdiction to review" constitutional claims). Moreover, forcing Petitioner to litigate from custody would impede his access to counsel, inhibit his ability to gather evidence, and drastically reduce the likelihood of a favorable outcome for reasons that have nothing to do with the merits of his case.[11] If, on the other hand, Petitioner's existing IJ-issued bond is maintained unless and until he receives a *pre-deprivation* hearing, the IJ could simply affirm or augment the existing bond, without any revocation or cancellation of the original bond.

Another reason why a post-deprivation hearing is inadequate stems from new interim guidance issued by ICE on July 8, 2025, that dramatically shifts its official position on bond eligibility. The directive states that individuals present in the United States who historically have been eligible for bond are not anymore. Second Sinodis Decl. at Tab I (ICE Interim Guidance), Tab J (Washington Post Article). If an IJ did find that detention was mandatory under DHS's new policy, Petitioner would have to present a constitutional challenge to that finding, which only this Court could address. *See Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1058.[12]

Loathe to forthrightly assess Petitioner's arguments and circumstances, Respondents partially quote *U.S. v. Cisneros*, trying to imply to this Court that Chief Judge Seeborg has declined to order a pre-deprivation hearing for someone like Petitioner. Opp. at 10-11

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[11] "[W]hether 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 (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.").

[12] Noncitizens can bring as-applied constitutional challenges to mandatory immigration detention. *See, e.g., Nielsen v. Preap*, 586 U.S. 392, 972 (2019); *Rodriguez Diaz*, 53 F.4th at 1213.

(incompletely quoting, "the law does not require a hearing before arrest") (citing *U.S. v. Cisneros*, 2021 WL 5908407, *4 (N.D. Cal. Dec. 14, 2021)). Not true. A review of Cisneros reveals that Judge Seeborg merely found that "[t]he law does not require a hearing before arrest *in this circumstance*." 2021 WL 5908407, *4 (emphasis added). In Cisneros, the defendant's "circumstance" included several incidents for carrying out a gang assault on video, transporting a machete and a baseball bat in his car, and an "indictment [in February 2020] charging him with racketeering conspiracy, and one count of assault with a dangerous weapon in aid of racketeering." *Id.* at *1-2. ICE determined there had been a material change in circumstances that would justify defendant's arrest and effectuated his arrest within a month after his indictment. *Id.* at *4. Petitioner's circumstances here are nothing like *Cisneros*.[13]

Even if Petitioner were granted release under an immigration bond, ICE may invoke an automatic stay of release pending appeal to the BIA, under 8 C.F.R. § 1003.19(i)(2). ICE has used this regulation with increasing frequency in recent months.[14] Respondents' position therefore ignores the harm Petitioner would suffer if detained in violation of his constitutional rights—and separated from his family—as he litigates potentially lengthy bond proceedings and appeal before an agency without authority to address his claims. Unable to receive a resolution on the constitutional issues of his re-arrest or whether he is subject to mandatory detention, Petitioner would end up back in this Court challenging the propriety of his re-detention, after languishing for months in custody. Second Sinodis Decl. at Tab G (Declaration of Aaron Korthuis) (BIA bond appeals take 200 days on average to process); *see also Jorge M.F.*, 534 F. Supp. 3d at 1055 ("if Petitioner is detained, he will already have suffered the injury he is now seeking to avoid.").

In contrast, were ICE required to justify detention before re-arresting Petitioner, he could challenge that decision while remaining with his children and continuing to provide for them.

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[13] *Reyes v. King* is an out of district decision that similarly only held that, *based on the facts of that case*, the petitioner did not merit a pre-deprivation hearing. No. 19-cv-08674-KPR, 2021 WL 3727614, *11 (S.D.N.Y. Aug. 20, 2021). And *F.G. v. Noem* is completely irrelevant, as it addressed a facial statutory claim to 8 U.S.C. § 1226(b), rather than an as-applied constitutional claim challenging the revocation of an IJ-issued bond, which is what Petitioner presents here. No. 25-cv-0243-CVE, 2025 WL 1669356, at *8 (N.D. Okla. June 12, 2025).

[14] *See, e.g.*, *Günaydın v. Trump*, No. 25-CV-1151 (JMB) (DLM), 2025 WL 1459154, at *10 (D. Minn. May 21, 2025) (automatic stay regulation violated petitioner's due process rights); *Aditya v. Trump*, No. 25-CV-1976 (KMM) (JFD), 2025 WL 1420131, at *6, *13 (D. Minn. May 14, 2025); *Mohammed v. Trump*, No. 25-CV-1576 (JWB) (DTS), 2025 WL 1334847, at *6 (D. Minn. May 5, 2025) (substantial claim that automatic stay regulation violates due process).

There is simply no basis for depriving him of his liberty before ICE presents any reason to do so.

C. ICE's interest in re-incarcerating Petitioner without a hearing is nonexistent, and the burden on Respondents is far outweighed by Petitioner's interests.

As Judge Freeman found when granting Petitioner a TRO, Respondents' "interest in re-detaining [him] without a hearing is 'low.'" ECF 4 at 5 (citing *Jorge M.F.*, 2021 WL 783561, at *3; *Ortega*, 415 F. Supp. 3d at 970). Petitioner does not seek to restrain Respondents from ever re-arresting him under any circumstances. Instead, the relief he seeks is far narrower—if ICE wishes to re-arrest him, ICE must demonstrate that circumstances have materially changed since his release, such that detention is warranted before any arrest because clear and convincing evidence establishes that he is a flight risk or danger. Respondents' argument that no such hearing is required disregards the principle that civil detention comports with due process only when a "special justification" outweighs the "*individual's* constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (emphasis added). It also runs counter to the weight of case law in this District and throughout the Ninth Circuit holding that ICE must demonstrate that a noncitizen's re-incarceration is justified because they are either a danger or a flight risk before re-arresting them. *See* ECF 2 at 10 (collecting cases).[15]

Respondents cannot seriously contend that ICE's interest in detaining Petitioner has increased since he was released on bond in May 2020. Respondents ignore that Petitioner has had no negative interactions with law enforcement since 2018, has successfully rehabilitated himself while caring for his U.S. citizen children, has become a productive member of the community, and has dramatically improved his legal circumstances by winning two PFRs at the Ninth Circuit. Further, Respondents ignore that, on numerous occasions since May 2020, Petitioner has appeared for check-ins with ICE and each time ICE determined that detention was not warranted. *Cf. Singh*, No. 1:25-cv-00801-KES, ECF 15 ("DHS, at least implicitly, made a finding that petitioner was not a flight risk when it released him.").

Respondents' interest in re-incarcerating Petitioner is even further reduced because

[15] *See also Doe*, -- F. Supp. 3d --, 2025 WL 691664, *8; *Ortega*, No. 25-CV-05259-JST, 2025 WL 1771438; *Pinchi*, 2025 WL 1853763, at *1, *3; *Singh*, 2025 WL 1918679; *Garcia*, 2025 WL 1927596, at *6; *Phan*, No. 2:25-cv-01757-DC-JDP, ECF 22; *Hoac*, No. 2:25-cv-01740-DC-JDP, ECF 29; *Guillermo*, --- F.Supp.3d. ---, 2025 WL 1983677, at *1.

removal is clearly not reasonably foreseeable. Petitioner's recent Ninth Circuit win necessitates continued removal proceedings in immigration court that will take years to resolve. Second Sinodis Decl. at Tabs E-F; *see also Zumel v. Lynch*, 803 F.3d 463, 475 (9th Cir. 2015) (BIA cannot make factual findings but instead must remand to the IJ for further factual findings).

Respondents nonetheless express concern about the administrative cost of a pre-deprivation hearing. Opp. at 13. Their apprehension is nonsensical. Respondents will have to provide Petitioner a bond hearing regardless—whether it is pre- or post-deprivation. And a "pre-deprivation hearing could reduce administrative costs by potentially avoiding an erroneous deprivation of liberty, which would save the costs of unnecessary detention." *Guillermo M.R.*, 2025 WL 1983677, at *10 (citing *Meza*, 2018 WL 2554572, at *4 (observing that "[t]he costs to the public of immigration detention are 'staggering'")). Courts have also long held that administrative inconvenience is not a reason to abandon constitutional rights.[16]

D. At any pre-deprivation hearing, ICE must bear the burden by clear and convincing evidence, as numerous courts have held post *Rodriguez Diaz*.

Respondents claim that *Rodriguez Diaz* forecloses Petitioner's argument that, prior to any re-arrest, ICE must bear the burden to establish flight risk or danger by clear and convincing evidence, but that decision does no such thing. Opp. at 12. *Rodriguez Diaz* only addressed the facts and circumstances of that dispute, which involved a challenge to 8 U.S.C. § 1226(a) brought by Petitioner more than five years ago *when he was detained*. The differences between *Rodriguez Diaz* and these proceedings could not be starker. To solidify this point, lower courts in this circuit—both before and after *Rodriguez Diaz*—have concluded that the government must bear the burden by clear and convincing evidence in circumstances identical or substantially similar to those presented by Petitioner. *See e.g.*, *Jorge M.F.*, 534 F. Supp. 3d at 1057; *Manpreet Singh*, 400 F. Supp. at 1018 (S.D. Cal. 2019); *Vargas v. Wolf*, No. 2:19-CV-02135-KJD-DJA, 2020 WL 1929842, at *8 (D. Nev. Apr. 21, 2020); *Rajnish*, 2020 WL 7626414 (N.D. Cal. Dec. 22, 2020); *Doe*, 2025 WL 691664, *8; *Singh*, 2025 WL 1918679, at *8; *Garcia* , 2025 WL 1927596, at *6.[17]

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[16] *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 (1937) ("True it is that administrative convenience or even necessity cannot override the constitutional requirements of due process.").

[17] Courts have held the same in the context of prolonged detention. *Singh*, 2023 WL 5836048, *10-11 (the "'overwhelming majority of courts that have held that the government must justify the continued confinement of a

II. PETITIONER IS LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION AND THE BALANCE OF EQUITIES AND PUBLIC INTEREST TIPS SHARPLY IN HIS FAVOR.

The likelihood of irreparable harm in this case is high. Given that Petitioner is likely to succeed on the merits of his claim, and that his claim is constitutional in nature, he has sufficiently demonstrated that he will suffer harm absent immediate injunctive relief, as numerous other courts have found in identical or substantially similar cases. *See, e.g.*, *Pinchi*, 2025 WL 1853763, at *3; *Garcia*, 2025 WL 1676855, at *3; *Guillermo*, 2025 WL 1983677. Respondents do not contest the well-settled principle that a violation of constitutional rights constitutes irreparable injury. *Hernandez,* 872 F.3d at 995-96 ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *Baird v. Bonta*, 81 F.4th 1036 1040 (9th Cir. 2023) ("If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation.").

Here, Respondents ignore the concrete harms custody inflicts, and the specific harms Petitioner would suffer. *See Hernandez*, 872 F.3d at 995 ("noting irreparable harms imposed on anyone subject to immigration detention."). As explained in his PI motion and documented in the supporting exhibits, Petitioner is the sole caretaker for his young son and has just welcomed an infant daughter who is only three months old. It is clear that, absent a PI, he will suffer irreparable harm. *See also Ortega-Rangel v. Sessions*, 313 F.Supp.3d 993, 1003 (N.D. Cal. May 14, 2018) (explaining that because petitioner "is the primary caregiver for her 9-year old child, [she] (and her child) will be irreparably harmed" by any further unlawful detention) (collecting cases in the Northern District holding the same). Additionally, because Petitioner is neither a flight risk nor a danger to the community, as set forth in his motion, subjecting him to unnecessary detention as he litigates a bond determination from an IJ would be punitive.[18]

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noncitizen detainee under § 1226(c) by clear and convincing evidence"); *Eliazar*, 2025 at *9-10 (same); *Lopez v. Garland*, 631 F. Supp. 870, 882 n.9 (E.D. Cal. Sept. 29, 2022) (same).

[18] Respondents contend that the irreparable harm is detention, not detention without process. Opp. at 14. This is incorrect—the process Mr. Rodriguez seeks would allow him to challenge whether detention is necessary *before* he is detained. Petitioner does not challenge Respondents' ability to detain him if they can demonstrate materially changed circumstances exist such that detention is now warranted because clear and convincing evidence establishes that he is a danger or a flight risk.

"A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor." *Baird*, 81 F.4th at 1040. "[I]t would not be equitable or in the public's interest to allow [a party] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). If the TRO is not converted to a PI, Respondents would effectively be granted permission to detain Petitioner in violation of Due Process. "The public interest and the balance of the equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Id.* (quoting *Melendres*, 695 F.3d at 1002).

Petitioner has amply demonstrated that he faces enormous hardship absent intervention from this Court. *See* ECF No. 2 at 19-20. Respondents do not challenge his argument that the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from [statutory and] constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *see* ECF No. 2 at 21. Nor will Respondents be injured by an order requiring them to provide a bond hearing where the parties can fully litigate the legality of his re-incarceration prior to any arrest taking place.[19] Such a hearing is constitutionally mandated, and the government is not injured by being held to the Constitution. *Id.*; *Zepeda*, 753 F.2d at 727. As such, the balance of equities and public interest weigh heavily in favor of granting Petitioner injunctive relief.

CONCLUSION

This Court should enjoin Respondents from detaining Petitioner unless and until he receives a hearing before a neutral adjudicator on whether a change in bond amount or revocation of his bond is justified by clear and convincing evidence that he is a danger or a flight risk. Petitioner overwhelmingly met both standards for doing so, as he has shown a likelihood of success on the merits, or, at the very least, serious questions going to the merits of his claims and that the balance of hardships tips sharply in his favor.

Dated: July 18, 2025

Respectfully submitted,

/s/ Johnny Sinodis

[19] Respondents waive any argument that this Court should not conduct the bond hearing, which it can. *See, e.g., Leslie v. Holder*, 865 F. Supp. 2d 627 (M.D. Penn. 2012) ("[W]e are empowered to conduct bail proceedings in habeas corpus proceedings brought by immigration detainees. Indeed, the authority to conduct such hearing has long been recognized as an essential ancillary aspect of our federal habeas corpus jurisdiction.") (collecting cases).

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