

1 Judah Lakin (SBN 307740)
judah@lakinwille.com
2 Amalia Wille (SBN 293342)
amalia@lakinwille.com
3 LAKIN & WILLE LLP
4 1939 Harrison Street, Suite 420
Oakland, CA 94612
5 Telephone: (510) 379-9216
Facsimile: (510) 379-9219
6

7 UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 GIOVANNY HERNAN ORTEGA,

10 Petitioner-Plaintiff,

11 v.

12 POLLY KAISER, in her official capacity, Acting
13 San Francisco Field Office Director, U.S.
14 Immigration and Customs Enforcement;

15 TODD M. LYONS, in his official capacity, Acting
16 Director, U.S. Immigration and Customs
Enforcement;

17 KRISTI NOEM, in her official Capacity, Secretary
18 of the U.S. Department of Homeland Security; and

19 PAMELA BONDI, in her official capacity,
20 Attorney General of the United States,

21 Respondents-Defendants.
22
23
24
25
26
27
28

Case No: 4:25-cv-05259-JST

**REPLY IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING
ORDER**

TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	ARGUMENT	2
3	I. THERE ARE NO JURISDICTIONAL BARS TO MR. ORTEGA’S CLAIMS.....	2
4	A. Habeas is the Proper Vehicle for Mr. Ortega’s Claims and Regardless, This Court	
5	Has Jurisdiction Under 28 U.S.C. § 1331	2
6	B. 8 U.S.C. § 1252(g) Does Not Bar Mr. Ortega’s Claims.....	3
7	C. Neither Section 1252(a)(5) nor (b)(9) Bars Mr. Ortega’s Claims.....	5
8	D. The Foreign Affairs Reform and Restructuring Act of 1998 Does Not Preclude	
9	Petitioner’s Claims	6
10	II. MR. ORTEGA’S CLAIMS ARE NOT FORECLOSED BY THE LITIGATION IN	
11	<i>DVD V. U.S. DEPARTMENT OF HOMELAND SECURITY</i>	7
12	A. Mr. Ortega’s Factual Allegations and Claims Are Distinct from those in <i>DVD</i>	8
13	B. Dismissal of Mr. Ortega’s Petition and Complaint Would Not Promote Judicial	
14	Economy and Would Undermine his Rights	9
15	III. MR. ORTEGA IS ENTITLED TO INJUNCTIVE RELIEF	10
16	A. Mr. Ortega is Likely to Succeed on the Merits of His Claims	10
17	B. Mr. Ortega Has Established That He Will Suffer Irreparable Harm.....	12
18	C. The Balance of the Hardships Tips Sharply in Mr. Ortega’s Favor.....	14
19	CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Aden v. Nielsen</i>	
409 F. Supp. 3d 998 (W.D. Wash. 2019)	3, 5
<i>Anderson v. California Dept. of Corrections & Rehabilitation</i>	
2016 WL 7013246 (N.D. Cal. Dec. 1, 2016).....	7
<i>Braden v. 30th Judicial Circuit Court of Kentucky</i>	
410 U.S. 484 (1973)	2
<i>Crawford v. Bell</i>	
599 F.2d 890 (9th Cir. 1979)	7, 8
<i>Diouf v. Napolitano</i>	
634 F.3d 1081 (9th Cir. 2011)	12
<i>Doe v. Garland</i>	
109 F.4th 1188 (9th Cir. 2024)	3
<i>DVD v. DHS,</i>	
2025 WL 1142968 (D. Mass. Apr. 18, 2025).....	4, 5, 7
<i>E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.</i>	
950 F.3d 177 (3d Cir. 2020)	5
<i>Hernandez v. Sessions</i>	
872 F.3d 976 (9th Cir. 2017)	10
<i>Herrera v. Birkholz</i>	
2022 WL 18396018 (C.D. Cal. Dec. 1, 2022).....	9
<i>Hogarth v. Giles,</i>	
5:22-cv-01809-DSF-MAR (C.D. Cal. Jan. 1, 2023).....	7, 10
<i>INS v. St. Cyr</i>	
533 U.S. 289 (2001)	4
<i>J.E.F.M. v. Lynch</i>	
837 F.3d 1026 (9th Cir. 2016)	5, 6
<i>Jama v. ICE</i>	
543 U.S. 335 (2005)	5
<i>Jennings v. Rodriguez</i>	
583 U.S. 281 (2018)	6
<i>Nasrallah v. Barr</i>	
590 U.S. (2020)	6
<i>Ortega v. Bonnar</i>	
415 F. Supp. 3d 963 (N.D. Cal. 2019).....	2, 13
<i>Osorio-Martinez v. Att'y Gen.</i>	
893 F.3d 153 (3d Cir. 2018)	4
<i>Pinson v. Carvajal</i>	
69 F.4th 1059 (9th Cir. 2023)	3
<i>Preiser v. Rodriguez</i>	
411 U.S. 475 (1973)	2, 9

1	<i>Pride v. Correa</i>	
2	719 F.3d 1130 (9th Cir. 2013)	7, 8, 10
3	<i>Rauda v. Jennings</i>	
4	55 F.4th 773 (9th Cir. 2022)	4
5	<i>Reno v. Am-Arab Discrimination Comm.</i>	
6	525 U.S. 471 (1999)	4
7	<i>Roman v. Wolf</i>	
8	977 F.3d 935 (9th Cir. 2020)	3
9	<i>Sanchez-Chavez v. Ponce</i>	
10	2022 WL 1433535 (C.D. Cal. Mar. 15, 2022).....	9
11	<i>Su Hwa She v. Holder</i>	
12	629 F.3d 958 (9th Cir. 2010)	5
13	<i>United States v. Hovsepian</i>	
14	359 F.3d 1144 (9th Cir. 2004)	4
15	<i>Wilkinson v. Dotson</i>	
16	544 U.S. 74 (2005)	3
17	<i>Zadvydas v. Davis</i>	
18	533 U.S. 678 (2001)	11

Statutes

13	6 U.S.C. § 202(3)	4
14	8 U.S.C. § 1226(c)	12
15	8 U.S.C. § 1231(a)(2).....	5
16	8 U.S.C. § 1231(a)(6).....	11, 12
17	8 U.S.C. § 1231(b)(2)	9
18	8 U.S.C. § 1252(a)(5).....	4, 5, 6
19	8 U.S.C. § 1252(b)(9)	4, 5, 6
20	8 U.S.C. § 1252(g)	3, 4
21	28 U.S.C. § 1391(e)(1).....	3

Regulations

21	8 C.F.R. § 241.4	12
----	------------------------	----

Other Authorities

23	U.S. Const. art. I, § 9, cl. 2.....	9
----	-------------------------------------	---

INTRODUCTION

Petitioner-Plaintiff Giovanny Hernan Ortega (“Mr. Ortega”) fears being ripped from his wife and community and removed to a country to which he has no ties, and where he fears torture. As articulated in the agency’s most recent memos on the issue, Respondent’s process for removing Mr. Ortega to a third country involves either (1) no individualized process at all, because the United States claims to have received a blanket diplomatic assurance that individuals will not be tortured in that country or, (2) only if Mr. Ortega affirmatively expresses a fear, providing a DHS screening interview, conducted remotely within 6 to 24 hours after notifying Mr. Ortega of the identity of the country they will remove him to. *See* Memorandum from Todd M. Lyons, Acting Director, U.S. Immigrations and Customs Enforcement, *Third Country Removals Following the Supreme Court’s Order in Department of Homeland Security v. D.V.D.*, No. 24A1153 (U.S. June 23, 2025) (July 9, 2025), Case No. 1:25-cv-10676-BEM, Docket No. 190-1 (“Lyons Memo”); Declaration of Amalia Wille (“Wille Decl.”) at Exh. Z (March 30, 2025 ICE memorandum). If DHS provides the screening interview, it will be conducted by a single DHS officer who will decide whether Mr. Ortega will more likely than not be tortured in the third country. *See id.* The determination will be made on a record that Mr. Ortega has had less than a day to prepare. If that single DHS officer determines that Mr. Ortega has failed to meet the standard, he will be removed without *any* review before a neutral arbiter. *Id.*

Without injunctive relief from this Court, this is the fate awaiting Mr. Ortega. Respondents claim this Court is powerless to stop them. This Court should reject Respondents’ arguments and grant Mr. Ortega’s Motion for a Temporary Restraining Order. *See* Dkt. 11.

//

//

//

ARGUMENT

I. THERE ARE NO JURISDICTIONAL BARS TO MR. ORTEGA'S CLAIMS

A. Habeas is the Proper Vehicle for Mr. Ortega's Claims and Regardless, This Court Has Jurisdiction Under 28 U.S.C. § 1331

Respondents do not seriously contest the “in custody” requirement, *see* Dkt. 18 at 12-13¹, nor could they given Mr. Ortega's placement on an Order of Supervision which restricts his liberty in numerous ways including “that [he] appear in person at the time and place specified, upon *each and every* request of the agency for identification . . .” (emphasis added). *See* Wille Decl. at Exh. D (Order of Supervision); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 968 (N.D. Cal. 2019). And, in fact, Mr. Ortega just appeared at an ICE check-in on July 9, which lasted ninety minutes, and, at which, he was ordered to appear again in five months, instead of the typical twelve months.

Instead, Respondents aver that Mr. Ortega's claim is not cognizable in habeas because instead of seeking release from current custody, it requests injunctive relief against future arrest and detention. Dkt. 18 at 12-13. But the Supreme Court has stated that “habeas corpus relief is not limited to immediate release from illegal custody [and] the writ is available...to attack *future* confinement and obtain future releases.” *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (emphasis added); *see also Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-89 (1973) (explaining that the Supreme Court has disregarded the prematurity doctrine, which had permitted an individual “to attack on habeas corpus only his current confinement, and not confinement that would be imposed in the future”). The Ninth Circuit likewise has made clear that “an action sounds in habeas ‘no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit . . . *if* success in that action would necessarily

¹ The page numbers cited in this brief refer to the ECF page numbers.

1 demonstrate the invalidity of confinement or its duration.” *Pinson v. Carvajal*, 69 F.4th 1059,
 2 1071 (9th Cir. 2023) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005)).²

3 Here, as Mr. Ortega challenges his future confinement as violative of Due Process, his
 4 claims sound in habeas. District courts in this district regularly grant relief for individuals who
 5 are seeking to prevent future physical confinement. *See* Dkt. 14 at 5-6 (collecting cases). Thus, a
 6 habeas petition is the proper vehicle for Mr. Ortega’s claim.³

7 Even assuming *arguendo* that habeas relief were improper, Mr. Ortega’s claims are
 8 properly before this court because he also pleaded federal question jurisdiction, 28 U.S.C.
 9 § 1331, over his request for injunctive and declaratory relief. *See* Dkt. 16 at 4; *see also Roman v.*
 10 *Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (holding that because “Plaintiffs invoked 28 U.S.C.
 11 § 1331, [there was] subject matter jurisdiction [and authority for the district court to order
 12 injunctive relief] irrespective of the accompanying habeas petition.”).

13 **B. 8 U.S.C. § 1252(g) Does Not Bar Mr. Ortega’s Claims**

14 Despite Respondent’s assertions to the contrary, *see* Dkt. 18 at 13-15, Section 1252(g)
 15 does not apply to Mr. Ortega’s claim regarding the procedures necessary to effectuate a lawful
 16 third country removal. This is because he does not challenge any discretionary “decision or
 17 action by the Attorney General to *commence proceedings, adjudicate cases, or execute removal*
 18
 19
 20
 21

22 ² Respondents try and distinguish *Aden v. Nielsen*, 409 F. Supp. 3d 998 (W.D. Wash. 2019), but
 23 Petitioners do not rely on *Aden* for the notion that habeas is the proper vehicle to challenge a
 24 future detention as *Aden* does not evaluate such a claim. *See* Dkt. 18 at 13. Rather *Aden* supports
 the proposition that habeas is also the proper vehicle to challenge his claims regarding third
 country removal. *See* 409 F. Supp. 3d at 1006.

25 ³ Respondents third footnote, Dkt. 18 at 13, mischaracterizes Mr. Ortega’s claim, and therefore
 26 its citation to *Doe v. Garland*, 109 F.4th 1188 (9th Cir. 2024), is inapposite. Mr. Ortega is not
 27 “seeking release from his hypothetical future detention,” Dkt. 18 at 13 n.3, but rather seeking an
 28 injunction against his re-arrest and detention. Given that he lives in Arcata, California, and that
 his ICE check-ins are in San Francisco, CA, he faces arrest in the Northern District of California
 and therefore venue is proper in this Court. *See* 28 U.S.C. § 1391(e)(1).

orders[.]” 8 U.S.C. § 1252(g) (emphasis added).⁴ This narrow provision is tethered solely to the Attorney General’s decisions with respect to these “three discrete actions.” *Reno v. Am-Arab Discrimination Comm.*, 525 U.S. 471, 482 (1999). Section 1252(g) does not alter this Court’s jurisdiction to review “the many other decision or actions that may be part of the deportation process.” *Id.* at 483. As the en banc Ninth Circuit explained, “[t]he district court may consider a purely legal question that does not challenge the Attorney General’s discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority.” *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).

Here, Mr. Ortega’s claims do not arise from Respondents’ discretionary decision to execute his removal order. Nor, as Respondents mistakenly claim, does Mr. Ortega seek a stay of his removal order from this Court. *See* Dkt. 18 at 15. As such, Respondents reliance on *Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) is misplaced. *See* Dkt. 21 at 17-18. What Mr. Ortega challenges is Respondents’ authority to *depart from the removal order* by designating a new country for removal outside of immigration proceedings and, in doing so, circumventing his due process rights and the scheme that Congress has set forth. *See* Dkt. 10; *see also DVD v. DHS*, -- F. Supp. 3d --, 2025 WL 1142968, at *10-*11 (D. Mass. Apr. 18, 2025), *order stayed on other grounds by DHS v. DVD*, Case No. 24A1153, 2025 WL 1732103 (June 23, 2025). As numerous district courts around the country have recognized, Section 1252(g) “shield[s] only discretionary decisions concerning the three stages of the deportation process.” *Id.* at 11 (collecting cases). Thus, Section 1252(g) does not bar Mr. Ortega’s claim.⁵

⁴ This authority has been re-delegated, and is now exclusively exercised by the Secretary of Homeland Security, 6 U.S.C. § 202(3), such that 1252(g)’s reference to “Attorney General” now denotes the DHS Secretary.

⁵ If this Court were to find that Sections 1252(g), (a)(5) or (b)(9) preclude Mr. Ortega’s claims, then constitutional principles relating to the Suspension Clause and the Due Process clause would arise and Mr. Ortega would request an opportunity for additional briefing. *See e.g., Osorio-Martinez v. Att’y Gen.* 893 F.3d 153, 166-79 (3d Cir. 2018) (finding portion of Section 1252 violative of the Suspension Clause); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

C. Neither Section 1252(a)(5) nor (b)(9) Bars Mr. Ortega's Claims

Respondents' arguments that Sections 1252(a)(5) and (b)(9) strip this Court of jurisdiction misconstrue Mr. Ortega's claims and advance an extreme interpretation of the statute foreclosed by Supreme Court and Ninth Circuit precedent. Dkt. 18 at 15-16.

As a threshold matter, Mr. Ortega does not seek "judicial review of an order of removal entered or issued," 8 U.S.C. § 1252(a)(5). Mr. Ortega's claims "are independent of his removal order" and "he does not challenge the IJ's determination that he is removable or claim any deficiency in the removal order itself." *See Aden v. Nielsen*, 409 F. Supp. 3d 998, 1006 (W.D. Wash. 2019). "Rather, he challenges DHS's [ability], outside of removal proceedings, to designate [a third country] without reopening his proceedings so that an IJ [can] make the designation in the first instance and/or determine whether petitioner's life or freedom would be threatened in that country." *See id*; *see also DVD*, 2025 WL 1142968, at *7. Unlike the right to counsel claim at issue in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), Mr. Ortega could not have brought these claims during his immigration proceedings, as they have arisen years after his removal proceedings concluded, and after Mr. Ortega's "removal period" ended. 8 U.S.C. § 1231(a)(2).

Respondents' assertion that Mr. Ortega should instead now file either a petition for review or a motion to reopen is both "legally insufficient and logistically impossible." *DVD*, 2025 WL 1142968, at * 7-8 (explaining, *inter alia*, that "until an individual receives notice of the country to which he is being deported, he has no basis for reopening his immigration case and no merits basis to seek withholding from a hypothetical third country"). As the Supreme Court and Ninth Circuit have explained, protection under the CAT is an "individualized determination," *Jama v. ICE*, 543 U.S. 335, 348 (2005), and Mr. Ortega is not "entitled to adjudication of a [CAT application] to a country that nobody is trying to send [him] to," *Su Hwa She v. Holder*, 629 F.3d 958, 965 (9th Cir. 2010). *See also* Dkt. 10 at 36-37; Dkt. 11 at 17-18.

Where, as here, a claim cannot be meaningfully reviewed via a petition for review, applying Section 1252(b)(9) to bar that claim would transform a channeling provision into a jurisdiction-stripping provision, defying the statutory structure. *E.O.H.C. v. Sec'y U.S. Dep't of*

1 *Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (“[T]he point of the provision is to channel
 2 claims into a single petition for review, not to bar claims that do not fit within that process.”). *Cf.*
 3 *J.E.F.M.*, 837 F.3d at 1038 (reiterating that sections (a)(5) and (b)(9) merely channel judicial
 4 review, and that right to counsel claims are “teed up for appellate review” through existing
 5 processes in immigration court and routinely litigated in petitions for review). The channeling-
 6 vs-stripping distinction is compelled by the Supreme Court’s narrow interpretation of what
 7 claims “arise from” proceedings. The Court has dismissed as “extreme” and “absurd” broad
 8 readings, such as Respondents’ here, that would render valid claims “effectively unreviewable.”
 9 *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018).

10 Finally, it merits underscoring that Mr. Ortega’s claims are consistent with Sections
 11 1252(a)(5) and (b)(9) as channeling provisions. The only relief Mr. Ortega seeks in this action
 12 vis-a-vis his removal is an order from this Court enjoining the government from executing a third
 13 country removal without reopening his proceedings *so that he can channel his challenges* to the
 14 country of removal and his third-country CAT claim through a petition for review of his removal
 15 order. Neither Section 1252(a)(5) nor (b)(9) bars the claims Mr. Ortega brings in this action.

16 **D. The Foreign Affairs Reform and Restructuring Act of 1998 Does Not**
 17 **Preclude Petitioner’s Claims**

18 Respondents’ reliance on the Foreign Affairs Reform and Restructuring Act of 1998
 19 (“FARRA”) is misplaced. Respondents assert that “judicial review of any claim arising under
 20 CAT is available exclusively on an individualized basis ‘as part of the review of a final order of
 21 removal’ in the courts of appeals.” Dkt. 21 at 20. However, Mr. Ortega’s claims arise after
 22 removal proceedings concluded and concerns removal to countries that are not identified in any
 23 order of removal. His claims could not have been raised earlier and thus are not “reviewable ‘as
 24 part of the review of a final order of removal’ under 8 U.S.C. § 1252.” *Nasrallah v. Barr*, 590
 25 U.S. 582, 573 (2020) (emphasis added) (quoting FARRA § 2242(d)). Mr. Ortega is not
 26 challenging the outcome of a CAT claim; rather, he seeks adequate notice and an opportunity to
 27 present a fear-based claim before DHS can remove him to a third country.
 28

1 FARRA § 2242(d) bars review of “regulations adopted to implement [CAT]” but Mr.
 2 Ortega is not challenging the validity of any regulation promulgated to implement CAT.
 3 Respondents assert that Mr. Ortega “seeks additional procedures beyond what CAT provides,”
 4 but what Mr. Ortega seeks is for Respondents to *comply* with FARRA and the CAT regulations
 5 prior to executing any potential third-country removal in his case.

6 **II. MR. ORTEGA’S CLAIMS ARE NOT FORECLOSED BY THE LITIGATION IN**
 7 ***DVD V. U.S. DEPARTMENT OF HOMELAND SECURITY.***

8 Respondents request that “[t]his Court should dismiss [Mr. Ortega’s] claims . . . because
 9 those claims are already being adjudicated” in the pending *DVD* class action litigation. Dkt. 18 at
 10 17. Not so. Dismissal of a potentially duplicative suit is committed to the discretion of the district
 11 court, and here this Court should decline to exercise that discretion. *See Crawford v. Bell*, 599
 12 F.2d 890, 893 (9th Cir. 1979).

13 This Court’s discretionary decision requires two determinations. First, this Court must
 14 assess whether the individual suit is, in fact, duplicative of a class action. To do so, it analyzes
 15 three factors: whether (1) the individual is a member of the class action, (2) the suit duplicates
 16 the factual allegations of the class action, and (3) the suit duplicates the prayer for relief of the
 17 class action. *See Pride v. Correa*, 719 F.3d 1130, 1133-34 (9th Cir. 2013); *Crawford*, 599 F.2d at
 18 893. The party moving for dismissal bears the burden to demonstrate, with specific information,
 19 that the suit is duplicative. *See, e.g., Anderson v. California Dept. of Corrections &*
 20 *Rehabilitation*, 2016 WL 7013246, at *4 (N.D. Cal. Dec. 1, 2016) (explaining that it is not the
 21 Court’s duty to wade through the pleadings to determine whether the suit is duplicative).

22 Second, if this Court concludes that the suit is duplicative, it must then consider whether
 23 dismissal of the suit will promote judicial economy and ensure respect for the rights of the
 24 litigants. *See Crawford*, 599 F.2d at 893; *see also Hogarth v. Giles*, 5:22-cv-01809-DSF-MAR,
 25 Dkt. 20 at *8 (C.D. Cal. Jan. 1, 2023) (*report and recommendation adopted* on Feb. 23, 2023,
 26 Dkt. 24) (stating that *Crawford* “noted that the rights of an individual party operate as a limiting
 27 principle” on judicial economy.) Here, Respondents fail to apply the relevant legal tests and fail
 28 to acknowledge, let alone carry, their burden. *See* Dkt. 18 at 17-20.

A. Mr. Ortega's Factual Allegations and Claims Are Distinct from those in *DVD*

Discretionary dismissal of Mr. Ortega's petition and complaint is unwarranted because it does not "duplicate the [*DVD*] allegations and prayer for relief." *See Crawford*, 599 F.2d at 893. Whereas the *DVD* class asserts *categorical* allegations and seeks ongoing *systemic* relief—for a broad class that is comprised of individuals in varying procedural postures—Mr. Ortega alleges violation of *his* right to due process based on his unique circumstances and history. In addition, he requests a singular, personalized remedy, which goes beyond what the class members seek in *DVD*. *See Pride v. Correa*, 719 F.3d 1130, 1133-38 (9th Cir. 2013); *Compare* Dkt. 1 in Case No. 1:25-cv-10676 at 29-36, and Prayer for Relief *with* Dkt. 10, at 35-47, and Prayer for Relief.

First, while the class members in *DVD* challenge their detention pursuant to the February 18, 2025, memo, Mr. Ortega brings a constitutional challenge to his detention predicated on the specific facts of his case and his conduct since release from immigration detention. *Compare* Dkt.1 in Case No. 1:25-cv-10676 at 37 *with* Dkt. 10 at 38-44 (highlighting his positive conduct over the past 7.5 years), 45-46.⁶

Second, the *DVD* class requests that Defendants are enjoined from "failing to provide class members with written notice and a meaningful opportunity to present a fear-based claim under the Convention Against Torture to an immigration judge prior to deportation to a third country." Dkt.1 in Case No. 1:25-cv-10676 at 37. But the class members in *DVD* do not specify a process for how they present their case to an immigration judge nor make any claim as to how the designation of a third country needs to proceed, nor request an opportunity to challenge that designation. *See id.* Mr. Ortega, by contrast, seeks a specific remedy that is tailored to his own case and life history: an injunction that prevents Respondents from designating a third country "without reopening [his] removal proceedings so that an Immigration Judge can make the designation in the first instance and adjudicate Mr. Ortega's application the Convention Against

⁶ Count Five of the Complaint in *DVD* contains a constitutional challenge to re-detention, but it is limited to Plaintiffs E.F.D, D.V.D., and M.M.

1 Torture as to that country.” *See* Dkt. 10 at 47. Under the statutory scheme in 8 U.S.C.
 2 § 1231(b)(2), the only country to which Mr. Ortega could theoretically be removed is one that
 3 “will accept” him. 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* Dkt. 10 at 36. As a result, Mr. Ortega,
 4 unlike the *DVD* class, requests that an Immigration Judge make the designation—by evaluating
 5 the DHS’s evidence that a particular country will accept him. *Compare* Dkt. 10 at 47 *with* Dkt. 1
 6 in Case No. 1:25-cv-10676 at 36-37.

7 Respondents have failed to carry their burden to “identify the specific factual claims and
 8 relief requested by” *DVD* that are identical to those at issue here “that would bar [Mr. Ortega’s]
 9 Petition.” *Sanchez-Chavez v. Ponce*, 2922 WL 1423273 (C.D. Cal. May 5, 2022), *adopting*
 10 *report and recommendation*, *Sanchez-Chavez v. Ponce*, 2022 WL 1433535, at *3 (C.D. Cal.
 11 Mar. 15, 2022).

12 **B. Dismissal of Mr. Ortega’s Petition and Complaint Would Not Promote**
 13 **Judicial Economy and Would Undermine his Rights**

14 Even if this Court were to conclude that Mr. Ortega’s allegations and requested relief are
 15 duplicative of those in *DVD*, discretionary dismissal would not promote judicial economy and
 16 would be inconsistent with protecting Mr. Ortega’s rights.

17 The *DVD* action remains pending in district court. The federal government has not yet
 18 filed its answer, and discovery is under way. *See DVD*, No. 25-cv-10676-BEM (D. Mass. Mar.
 19 23, 2025), Dkt. 187. This is very different from the case on which Respondent relies, where the
 20 district court dismissed an individual’s habeas petition because it conflicted with the terms of a
 21 class-wide settlement agreement. *See* Dkt. 18 at 18 (citing *Herrera v. Birkholz*, No. 22-cv-07784-
 22 RSWL-JDE, 2022 WL 18396018, at *7 (C.D. Cal. Dec. 1, 2022), *report and recommendation*
 23 *adopted*, 2023 WL 319917 (C.D. Cal. Jan. 18, 2023)).

24 Mr. Ortega has no alternative pathway to seek the relief he requests while *DVD* remains
 25 pending. As such, dismissal would leave Mr. Ortega without effective access to judicial review
 26 and deprive him of the opportunity to vindicate his rights. *See Preiser*, 411 U.S. at 487; U.S.
 27 Const. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended,
 28 unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *see also*

1 *Hogarth*, 5:22-cv-01809-DSF-MAR, Dkt. 20 at *10-11 (“To the extent any judicial resources
2 would be conserved by the dismissal of Petitioner’s claims, it would not be consistent with
3 Petitioner’s right to seek Constitutional redress for his allegedly prolonged detention.”)

4 This Court’s discretionary dismissal of his petition would constitute an effective denial of
5 Mr. Ortega’s claims, and the stakes for Mr. Ortega are exceptionally high. Absent intervention
6 from this Court, Mr. Ortega can be detained and swiftly removed to a country to which he has no
7 ties. *See* Wille Dec. at Exhs. Y (February 18 Directive), Z (March 30 Memo); *see also* Lyons
8 Memo. In *Pride*, the Ninth Circuit cautioned against depriving individual litigants of their right
9 to vindicate their individual claims where no effective relief is available in the class action: “To
10 preclude an inmate from proceeding on a claim for injunctive relief for his individual medical
11 care would lead to unwarranted delay.” 719 F.3d at 1137.

12 In short, Respondents have failed to carry their burden to show that discretionary
13 dismissal is warranted because Mr. Ortega’s petition is not duplicative of the *DVD* action, and,
14 even if it were, dismissal would not promote judicial efficiency. Therefore, the Court should
15 decline to exercise its discretion to dismiss Mr. Ortega’s petition and complaint.

16 **III. MR. ORTEGA IS ENTITLED TO INJUNCTIVE RELIEF**

17 **A. Mr. Ortega is Likely to Succeed on the Merits of His Claims**

18 As a threshold matter, the government is mistaken that Mr. Ortega seeks a mandatory
19 injunction because he seeks to alter the status quo. *See* Dkt. 18 at 11. Mr. Ortega seeks to
20 *preserve* the status quo by obtaining a prohibitory injunction that would forbid the government
21 from detaining him or removing him to a third country absent certain procedural protections. An
22 injunction that “prevents future constitutional violations” is “a classic form of prohibitory
23 injunction”—even if it requires the government to take some action. *Hernandez v. Sessions*, 872
24 F.3d 976, 998 (9th Cir. 2017) (holding that injunction requiring immigration judges to consider
25 ability to pay at new bond hearings was prohibitory). Even if this Court deems the requested
26 injunction mandatory, Mr. Ortega has demonstrated that the law and facts clearly favor his
27 position and that very serious damage will result if he is not granted relief. *See generally* Dkts.
28 10, 11.

1 On the merits, as this Court noted in granting Mr. Ortega a TRO, Mr. Ortega presents two
2 claims: (1) that the Fifth Amendment Due Process Clause, the Immigration and Nationality Act
3 (“INA”), the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), and the
4 Administrative Procedure Act (“APA”) require the government to provide meaningful notice and
5 the opportunity to present a fear-based claim before removing him to a third country; and (2) that
6 the Fifth Amendment Due Process Clause and the INA foreclose his detention until his removal
7 is ‘reasonably foreseeable’—i.e., after he receives notice and opportunity to contest his
8 removal.” Dkt. 14 at 4. Respondents do not address the first claim on the merits at all, and as to
9 the second claim, they argue that the INA authorizes Mr. Ortega’s detention but do not discuss,
10 *at all*, Mr. Ortega’s constitutional claim. *See* Dkt. 18 at 20-25. Instead, Respondents devote three
11 and a half pages to Mr. Ortega’s pre-deprivation hearing claim, which is not briefed in his
12 Amended Motion for a Temporary Restraining Order and is only triggered if and when Mr.
13 Ortega’s proceedings are reopened. *Id*; *see also* Dkt. 10 at 44-45.

14 Respondents assert that 8 U.S.C. § 1231(a)(6) authorizes Mr. Ortega’s detention because
15 its “purpose . . . is to effectuate removal.” *See* Dkt. 18 at 21. But they ignore that “if removal is
16 not reasonably foreseeable . . . continued detention [is] unreasonable and no longer authorized
17 by statute.” *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). Given Mr. Ortega’s claims regarding
18 the procedures necessary to effectuate a third country removal in his particular case, and his
19 conduct over the last seven and a half years, he has “shown at least that there are serious
20 questions regarding whether his removal is reasonably foreseeable at this juncture or whether
21 detention by ICE would be reasonably necessary to secure his removal.” *See* Dkt. 14 at 6.

22 Finally, although Mr. Ortega did not brief his pre-deprivation hearing claim in his
23 Amended Motion for a Temporary Restraining order, to the extent this Court wants to consider
24 it, there is no question he has established serious questions as to that claim, as this Court already
25 found in granting him a TRO. *See* Dkt. 14 at 6 (collecting cases). Respondents’ main assertion
26 is that these cases are inapposite because they do not arise in the context of an individual whose
27 detention would purportedly be pursuant to 8 U.S.C. § 1231(a)(6). *See* Dkt. 18 at 21-22, 24.
28 While Mr. Ortega disputes that those cases are distinguishable on that fact, the government’s

argument misses the mark for another reason—Mr. Ortega only seeks a pre-deprivation hearing *once* his removal proceedings have been reopened. *See* Dkt. 10 at 44-45, 47. And once his removal proceedings are reopened, any authority to detain Mr. Ortega would be pursuant to 8 U.S.C. § 1226(c), not 8 U.S.C. § 1231(a)(6). *See id.* Until his proceedings are re-opened, it is Mr. Ortega’s contention that the government has *no* authority to detain him, as absent the government—(1) reopening his proceedings, (2) establishing that a third country will accept him, and (3) allowing him to put forth a CAT claim as to that country—his removal is not reasonably foreseeable and therefore his detention is not authorized by statute. *See* Dkt. 10 at 38-44; Dkt. 11 at 19-25. Moreover, given his conduct over the past seven and a half years since his release on bond, it would violate his due process rights for him to be detained while these procedures are ongoing. *See id.*⁷

As this Court already found in granting Mr. Ortega’s TRO, there are serious questions regarding Mr. Ortega’s claims regarding removal, and, in turn, whether his removal is reasonably foreseeable at this juncture, or whether detention by ICE would be reasonably necessary to secure his removal.” Dkt. 14 at 4-7. Respondents fail to grapple with Petitioner’s arguments or this Court’s prior reasoning, and, as a result, Mr. Ortega has established that he is likely to succeed on the merits, or at least has shown there are serious questions going to the merits of his two claims. *See* Dkt. 10 at 35-45; 11 at 16-25; Dkt. 14 at 4-7.

B. Mr. Ortega Has Established That He Will Suffer Irreparable Harm

Respondents contend that Mr. Ortega’s motion should be denied because his claims do not rise to the level of immediate injury that is required to obtain injunctive relief. Dkt. 18 at 25-

⁷ Respondent is wrong that existing procedures under 8 C.F.R. § 241.4 are “more than adequate” to avoid an erroneous deprivation of Mr. Ortega’s liberty. The regulations provide for a custody review only after a minimum of three months of detention, and even then, “do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the [noncitizen] rather than the government and they do not provide for a decision by a neutral arbiter.” *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (abrogated on other grounds).

26. While Respondents aver that Mr. Ortega's detention is speculative, Dkt. 18 at 25, they fail to acknowledge the *copious* evidence that Mr. Ortega put forth establishing the targeting of individuals like him by the Trump Administration, including, but limited to, an agency directive and memos directing Respondents to do exactly what he fears. *See* Dkt. 10 at 22-35; *see also* Wille Decl. at Exhs. Y, Z and Lyons Memo.

Moreover, Respondents silence as to their intentions speaks volumes. As this Court noted in granting Mr. Ortega a TRO, Respondents failed to provide any assurances that they would not redetain Mr. Ortega pending resolution of this case. Dkt. 14 at 3. And nowhere in their opposition, or in any supporting documents, do Respondents state that they will not detain Mr. Ortega or are not seeking his removal to a third country. *See generally* Dkt. 18; Dkt. 18.1 (Declaration of Deportation Officer Kenny T. Louis). Instead, Respondents argue that they have the right to detain Mr. Ortega. *See generally* Dkt. 18; *see also* *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal.) (finding petitioner's claim ripe where the government "refused to provide assurance" that the petitioner would not be re-arrested.). Further, since Mr. Ortega filed this action, ICE has shortened his in-person reporting period. Whereas Mr. Ortega was previously on an annual reporting schedule, ICE has now directed him to return in-person to their office in December 2025. *See* Declaration of Judah Lakin.

Respondents also contend that Mr. Ortega will not suffer irreparable harm because "there is no constitutional infringement if restrictions imposed are but an incident of some other legitimate government purpose." Dkt. 18 at 26. Mr. Ortega acknowledges that as a general matter the government may detain noncitizens for the brief period necessary to lawfully execute a removal order. *See* Dkt. 10 at 39, n.23. However, Respondent's assertion that Mr. Ortega's detention meets this definition assumes Mr. Ortega's legal claims will fail. As Mr. Ortega has already demonstrated, and this Court has found, *see supra* and Dkt. 14, he has, at a minimum, raised serious questions on the merits of his claims.

Finally, Respondents fail to grapple with this Court's prior finding that Mr. Ortega will suffer irreparable harm. *See* Dkt. 18 at 25-26 (failing to address this Court's prior finding on irreparable harm in Dkt. 14).

1 **C. The Balance of the Hardships Tips Sharply in Mr. Ortega's Favor**

2 Respondents fail to meaningfully respond to Mr. Ortega's arguments regarding the
3 balance of hardships. Instead, they rely exclusively on their assertion that Mr. Ortega has not
4 shown a likelihood of success on the merits, and therefore there can be no public interest in
5 protecting Mr. Ortega's constitutional rights. Dkt. 18 at 26-27. As argued *supra*, and in his
6 Amended Motion for a Temporary Restraining order, and found by this Court, Respondents are
7 mistaken. *See* Dkts 10, 11, and 14. As articulated in his Amended Motion for a Temporary
8 Restraining Order, and previously found by this Court, the balance of hardships tip sharply in his
9 favor. *See* Dkt. 11 at 28-30; Dkt. 14 at 8.

10 Respondents conclude by arguing that Mr. Ortega's detention is permissible because of
11 his undisputed criminal history. Dkt. 18 at 26. But as articulated by the scores of declarations in
12 support of Mr. Ortega's petition, since his release from ICE custody over seven years ago, Mr.
13 Ortega has rehabilitated and lives peacefully and productively with his family and community in
14 Arcata. *See generally* Wille Dec. at Exhs. E-X. The government cannot credibly assert that
15 permitting Mr. Ortega's detention would serve the public interest.

16 **CONCLUSION**

17 For the reasons set forth above and in Mr. Ortega's Motion, Dkt. 11, this Court should
18 enjoin Respondents from re-arresting him pending further of this Court.

19
20 Dated: July 17, 2025

Respectfully submitted,

21 *s/Judah Lakin*

22 Judah Lakin

23 *s/Amalia Wille*

24 Amalia Wille

LAKIN & WILLE LLP

25 *Attorneys for Petitioner*

ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories. Executed on this 17th day of July 2025 in Oakland, California.

s/Judah Lakin
Judah Lakin
Attorney for Petitioner