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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GUILLERMO MEDINA REYES, Petitioner-Plaintiff, v. POLLY KAISER, et al., Respondents-Defendants.	No. 25-cv-05436-RFL **RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE AND OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER** Date: July 14, 2025 Time: 1:00 p.m. Courtroom: 15, 18th Floor Hon. Rita F. Lin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Rules

Regulations

I. INTRODUCTION

Petitioner Guillermo Medina Reyes is subject to a final order of removal. He was denied withholding from removal in September 2022, in a decision that was affirmed by the Board of Immigration Appeals ("BIA") in January 2023. Although his withholding-only proceedings have since been reopened, he remains subject to a final order of removal, and Respondent Immigration and Customs Enforcement ("ICE") is authorized to detain him pursuant to 8 U.S.C. § 1231(a) ("Section 1231(a)"), the detention authority for noncitizens whose removal proceedings have concluded.

Section 1231(a) does not require any pre-detention bond hearing. To the contrary, detention under Section 1231(a) is mandatory during an initial 90-day removal period, and permitted to continue, again with no statutory requirement of a bond hearing, for "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Petitioner, who was convicted in 2013 of attempted murder, was detained for more than a year under Section 1231(a)(6). He was released on a $5,000 bond after his admission into an intensive re-entry program in early 2023. But his release was subject to an important condition—that he not commit any crimes while on the Order of Supervision governing his release. And unfortunately, a little less than two months ago, Petitioner violated that provision: he was arrested for felony robbery and vandalism. Having failed to comply with the order of supervision, he "may no doubt be returned to custody," *Zadvydas*, 533 U.S. at 700, and his detention pursuant to Section 1231(a) would then resume. The regulatory scheme expressly contemplates re-detention where, as here, a released noncitizen violates an order of supervision, and no court has ever imposed a pre-detention bond hearing in these circumstances. The Court should reject Petitioner's request to rewrite the statute and regulations to impose additional, extra-regulatory procedures into the constitutionally sufficient detention scheme that Congress created.

II. FACTUAL BACKGROUND

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

Petitioner is a native and citizen of Mexico. Dkt. No. 1-1, Declaration of Victoria Sun ("Sun Decl.") ¶ 5. He entered the United States unlawfully in approximately 2000 or 2001, when he was about six years old. *Id.* ¶ 5; Declaration of Supervisory Detention and Deportation Office Douglas Plummer,

Dkt. No. 7 ("Plummer Decl.") ¶ 5.

[redacted] Plummer Decl. ¶ 5; Sun Decl. ¶ 6. He was charged as an adult and sentenced to thirteen years in prison. Sun Decl. ¶ 6. Upon his release from prison on December 9, 2021, he was arrested by ICE and detained at the Golden State Annex in McFarland, California pursuant to 8 U.S.C. § 1226(c). Sun Decl. ¶ 8; Supplemental Declaration of Supervisor Detention and Deportation Officer Douglas Plummer ("Suppl. Plummer Decl.") ¶ 1 & Ex. D.

B. Petitioner's Immigration Proceedings.

On December 28, 2021, ICE issued Petitioner a Final Administrative Removal Order pursuant to 8 U.S.C. § 1231(a)(6), finding him deportable due to an aggravated felony conviction. *Id.* ¶ 8; Suppl. Plummer Decl. ¶ 2 & Ex. E. Petitioner did not file a Petition for Review to challenge that removal order, but on February 10, 2022, he was placed in withholding-only proceedings following testimony that Petitioner provided about his fears of returning to Mexico. *Id.* ¶ 9. His application for protection under the Convention Against Torture ("CAT") was denied by an Immigration Judge on September 26, 2022, and the denial affirmed by the BIA on January 10, 2023. *Id.* ¶12. On March 3, 2023, ICE and Petitioner filed a Joint Motion to Reopen and Remand his withholding-only proceedings based on ICE's inadvertent disclosure of his personally identifiable information on ICE's website, to allow Petitioner to address any potential new claims arising from this disclosure, and later that month his motion was granted. *Id.* ¶¶ 16, 23. Petitioner remains in withholding-only proceedings, with an Individual Hearing currently scheduled for January 31, 2028 before the San Francisco Immigration Court. *Id.* ¶ 23 & Ex. C.[1]

C. Petitioner's Detention And Release

Following his initial arrest by ICE in December 2021, Petitioner remained detained at the Golden

[1] Petitioner's distant hearing date is due to the fact that he is currently on the non-detained docket The Executive Office for Immigration Review ("EOIR") prioritizes the detained docket for docketing and adjudication. *See* EOIR, *Case Management and Docketing Practices*, January 31, 2020, available at https://www.justice.gov/eoir/reference-materials/OOD2007/dl. "Proceedings for detained aliens are expedited." EOIR, *Immigration Court Practice Manual*, Ch. 9-1(e), available at https://www.justice.gov/eoir/reference-materials/ic/chapter-9/1.

State Annex. In June 2022, he had a custody redetermination hearing before an immigration judge pursuant to *Aleman Gonzalez*, at which the government bore the burden of establishing by clear and convincing evidence that he was a flight risk or danger. Sun Decl. ¶ 11. The government met its burden, and the IJ declined to release Petitioner on bond. *Id.* Approximately eight months later, Petitioner requested another custody redetermination hearing before an IJ, citing a material change in circumstances—specifically, his participation in an intensive re-entry program. *Id.* ¶ 14. On March 20, 2023, the IJ released Petitioner on a $5,000 bond. Sun Decl. ¶¶ 14, 17, 18. He was place on GPS monitoring and later enrolled in the Intensive Supervision Appearance Program ("ISAP")/ATD program. Declaration of Deportation Officer Michael Canning ("Canning Decl.") ¶ 6. In connection with his release, Petitioner was issued an Order of Supervision, which contained specified conditions of release that Petitioner was required to follow. *See* Dkt. No. 10. Among these conditions was a requirement that Petitioner "not commit any crimes while on this Order of Supervision." *Id.* at 3.

D. Petitioner's May 14, 2025 Arrest.

On May 14, 2025, Petitioner was arrested in Morgan Hill, California for felony robbery and vandalism. Sun Decl. ¶ 28; Suppl. Plummer Decl. ¶ 3; Dkt. No. 7-3 (Incident Report). According to the arrest report, [redacted] Petitioner was booked into Santa Clara County Jail, but to date no charges have been brought. Dkt. No. 1-1 at 35.

ICE learned about the arrest on May 15, 2025. Canning Decl. ¶ 7. After receiving this information, ICE determined that Petitioner had violated his Conditions of Release. Suppl. Plummer Decl. ¶ 3. On June 26, 2025, Petitioner's ISAP manager contacted Petitioner to direct him to report to the San Jose ISAP Office on July 1, 2025. Sun Decl. ¶ 30. Supervisory Officer Plummer confirmed with Petitioner's counsel that ICE intended to detain Petitioner. *Id.* ¶ 31. The following day, June 27,

2025, Officer Canning was able to obtain a copy of the police report, providing details about the incident. *Id.* ¶10.

E. Petitioner's Current Habeas Petition.

Petitioner filed the instant habeas petition on Sunday, June 29, 2025. Dkt. No. 1. Petitioner brings two causes of action, for procedural and substantive due process. Plaintiff's procedural due process claim seeks to prevent the government from re-detaining Petitioner unless the government first provides a hearing before a neutral adjudicator "who will decide first whether the government has shown by clear and convincing evidence that there has been a material change in circumstances since Mr. Medina Reyes['s] release, and second, assuming there is a material change, whether the government can show by clear and convincing evidence that Mr. Medina is a danger or a flight risk to warrant an alteration of his current custody status." Dkt. No. 1 ¶ 86. His substantive claim asserts that his "re-arrest without first being provided a hearing would violate the Constitution." *Id* ¶ 91.

Concurrently with his habeas petition, Petitioner filed a Motion for Temporary Restraining Order ("TRO"). Dkt. No. 2. Following a hearing on Monday June 30, 2025, this Court granted the TRO and enjoined Respondents from re-arresting Petitioner until July 14, 2025. Dkt. No. 9.

III. LEGAL STANDARDS

A. Detention of Noncitizens Under 8 U.S.C. § 1231(a).

Congress enacted a multi-layered statute that provides for the civil detention of aliens pending removal. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). Where an individual falls within this scheme affects whether his detention is discretionary or mandatory, as well as the kind of review process available. *Id.* at 1057. ICE's authority to detain noncitizens while removal proceedings are pending is generally governed by 8 U.S.C. § 1226. *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). The default rule, Section 1226(a), "authorizes the Attorney General to arrest and detain an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 847 (quoting Section 1226(a)). Section 1226(c) provides for the mandatory detention pending removal proceedings of specific categories of noncitizens, including those who have committed certain violent criminal offenses. 8 U.S.C. § 1226(c); *see Jennings*, 138 S. Ct. at 289.

While Section 1226 governs the detention of a noncitizen whose removal proceedings are

pending, this case concerns a different detention authority: 8 U.S.C. § 1231(a). Section 1231(a) governs the detention of a noncitizen who has been ordered removed from the country—an individual subject to a "final order of removal." *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 578 (2022); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284 (2021). Section 1231(a)(2) provides that the government "shall detain" the noncitizen for a 90-day "removal period," the commencement of which can be triggered by various events in the noncitizen's proceedings. *See* 8 U.S.C. § 1231(a)(1)(B). Thereafter (the "post-removal period"), the noncitizen "may be detained beyond the [90-day] removal period" if, among other things, he is "inadmissible" (for example, because he reentered the country unlawfully, *see* 8 U.S.C. § 1182(a)(9)(C)), or removable on certain specified grounds, or if the government determines that he is "a risk to the community or unlikely to comply with the order of removal." *Id.* § 1231(a)(6); *Arteaga-Martinez*, 596 U.S. at 579; *Zadvydas v. Davis*, 533 U.S. 678, 688–89 (2001). A noncitizen detained beyond the removal period under Section 1231(a)(6) shall, if released, "be subject to [certain] terms of supervision." *Arteaga-Martinez*, 596 U.S. at 579.

However, Section 1231(a) does not permit indefinite detention; rather, the Supreme Court has held the government can detain noncitizens under Section 1231(a) only for "a period reasonably necessary to bring about that alien's removal from the United States"—presumptively six months. *Zadvydas*, 533 U.S. at 689. "After this 6–month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701; *see also* 8 C.F.R. § 241.13. Section 1231(a)(6) continues to authorize detention "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 at 701.

When removal is not reasonably foreseeable, continued detention is no longer authorized, but "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions." *Id.* at 700 (citing 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5); *see also Aleman Gonzalez v. Barr*, 955 F.3d 762, 769–70 (9th Cir. 2020), *rev'd and remanded on other grounds sub nom. Garland v. Aleman Gonzalez*, 596 U.S. 543, (2022). Continued detention and release during the post-removal period is governed by Post Order Custody Review ("POCR") Regulations. 8 C.F.R.

§241.4. The POCR Regulations provide for periodic custody reviews by ICE, at which the noncitizen is afforded certain protections, "including the rights to receive written notice of the review, to submit information in writing to support release and to be assisted by any individual of his or her choosing in preparing or submitting information in response to the notice." *Diouf v. Napolitano*, 634 F.3d 1081, 1089–90 (9th Cir. 2011)("*Diouf II*"); 8 C.F.R. § 241.4(h), (k). In addition, as often as once every three months between annual reviews, the detainee may submit a written request for release consideration based on a showing of material change. 8 C.F.R. §241.4(k)(2)(iii).

While Section 1231(a)(6) contemplates release pursuant to an order of supervision in appropriate cases, the POCR Regulations also authorize ICE to return to custody a noncitizen "who has been released under an order of supervision or other conditions of release who violates the conditions of release." 8 C.F.R. § 241.4(*l*)(1). Those regulations also require ICE to follow certain procedures when it seeks to revoke release. *See generally* 8 C.F.R. § 241.4(*l*). First, "the alien will be notified of the reasons for revocation of his or her release or parole," and "will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. § 241.4(*l*)(1). If the noncitizen is not released following the informal interview, the revocation determination is subject to a review process by the Headquarters Post-Order Detention Unit ("HQPDU") that includes a records review, an interview, "a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.4(*l*)(3). This process is ordinarily expected to commence within approximately three months after release is revoked, with annual custody reviews thereafter. *Id.*

As noted above, detention during the 90-day removal period is mandatory; there is no entitlement to a bond hearing or discretionary relief. Nor does Section 1231(a) provide for a bond hearing for the noncitizen to challenge his detention during the post-removal period. *See Johnson v. Guzman Chavez*, 141 S. Ct. at 2280; *Arteaga-Martinez*, 596 U.S. at 581. Noncitizens detained in the Ninth Circuit are currently subject to a preliminary injunction imposed by the Court in *Aleman Gonzalez v. Barr*, 955 F.3d 762, 766 (9th Cir. 2020), *rev'd and remanded on other grounds sub nom. Garland v. Aleman Gonzalez*, 596 U.S. 543, (2022), which requires individualized bond hearings before an

immigration judge at which the government bears the burden of establishing that the noncitizen is a flight risk or will be a danger to the community for all noncitizens facing prolonged detention under Section 1231(a)(6)—detention lasting six months and expecting to continue "more than minimally beyond six months." *See Diouf*, 634 F.3d at 1086, 1092 n.13. The Supreme Court has since clarified that such periodic bond hearings are not statutorily required, *Arteaga-Martinez*, 596 U.S. at 581, but the injunction in *Aleman Gonzalez* remains in place.

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

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 Claim Fails On The Merits.

Petitioner's claims rest on his argument that he cannot be returned to immigration detention unless the government first proves to an IJ by clear and convincing evidence that Petitioner is a flight risk or danger to the community. Much of Petitioner's argument relies on authorities that he argues have imposed limits on ICE's unilateral ability to revoke a bond issued under 8 U.S.C. § 1226(a).[2] *See* Dkt No. 2 at 14–15. But Petitioner is not detained pursuant Section 1226(a), and his bond was not issued under that provision, nor would it be revoked pursuant to 8 U.S.C. §1226(b). Rather, any detention of Petitioner would be governed by 8 U.S.C. §1231(a), a materially different detention framework that specifically authorizes re-detention without pre-deprivation process where, as here, a released individual subject to an order of supervision violates the conditions of release. The extra-regulatory, pre-detention hearing that Petitioner is asking this Court to engraft upon this framework has not been recognized by any other court and is not required by the Due Process Clause of the Constitution.

1. Any Re-Detention Of Petitioner Is Specifically Authorized By Federal Law.

Petitioner's detention authority is 8 U.S.C. § 1231(a). Petitioner acknowledges that he is subject to a Final Administrative Order of Removal, issued by ICE on December 28, 2021, pursuant to 8 U.S.C. § 1231(a)(6). Dkt. No. 1-1 ¶ 8. Although he is currently in reopened withholding-only proceedings, *see* Dkt. No. 1-1 at 21, "the finality of the order of removal does not depend in any way on the outcome of

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[2] Petitioner argues, and the Ninth Circuit and courts in this District have occasionally stated, that *In re Sugay*, 17 I. & N. Dec. 637, 639-40 (B.I.A. 1981), prevents ICE from re-arresting a noncitizen absent a change in circumstances. But this argument, even if correct, would apply only to bonds issued under Section 1226(a), not revocation of the bond in this case, In any event, Petitioner's argument 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, 2018 WL 6928794, at *16 n.19 (S.D.N.Y. Dec. 27, 2018).

the withholding-only proceedings." *Johnson*, 594 U.S. at 539. Accordingly, Petitioner remains in the post-order removal period, and any detention would be governed by Section 1231, not Section 1226. *Johnson*, 594 U.S. at 542.

Significantly, Section 1231(a), unlike Section 1226(a), not only authorizes but indeed mandates detention without a pre-detention bond hearing. Section 1231(a) detention—during both the 90-day removal period and during the post-removal period—is constitutionally permissible, without any pre-deprivation process. *Zadvydas*, 533 U.S. at 688–89; *Diouf II*, 634 F.3d at 1088. It is the *duration*, not the fact, of post-removal-period detention under Section 1231(a) that may raise constitutional concerns. *See Zadvydas*, 533 U.S. at 690; *Diouf II*, 634 F.3d at 1086. Even where removal is not reasonably foreseeable, the Supreme Court in *Zadvydas* recognized that release should be subject to appropriate conditions of release, "and the alien may no doubt be returned to custody upon a violation of those conditions." *Id.* at 700. Nothing in the *Zadvydas* Court's decision suggests that the noncitizen would be entitled to a pre-detention hearing before his Section 1231(a) detention could be resumed—indeed the Court's "no doubt" language signals just the opposite.

Petitioner's Order of Supervision specifically requires that he not "commit any crimes while on this Order of Supervision," and that "[a]ny violation of these conditions may result in you being taken into Service custody and you being criminally prosecuted." Dkt. No. 10 at 3. ICE's POCR Regulations similarly provide that a noncitizen may be returned to custody if he violates the conditions of release. 8 C.F.R. § 241.4(*l*).[3] ICE determined that Petitioner's arrest on May 14, 2025, violated a condition of hi release and warranted re-detention. Plummer Suppl. Decl. ¶ 3. After reviewing the details of the police report, Officer Canning—the Deportation Office responsible for supervising Petitioner, confirmed the presumptive determination that re-detention was appropriate. That charges had not been brought does not negate Officer Canning's conclusion that Petitioner had committed a crime; "prosecutors decline cases on numerous grounds having nothing to do with the merits of the case." *See Dirks v. Cnty. of Los Angeles*, No. 07-cv-2664, 2008 WL 11355528, at *1 (C.D. Cal. Dec. 10, 2008). "An arrest can be

[3] The re-detention here is not subject to the "changed circumstances" standard—even if viable, that requirement would apply to the revocation of a Section 1226(a) bond. But in any event, Petitioner's arrest here—which easily constitutes "reinvolvement with the criminal justice system"—would satisfy this standard. *See Panosyan v. Mayorkas*, 854 F. App'x 787, 788 (9th Cir. 2021).

considered in determining whether an immigrant should be detained—not only convictions, and not only arrests for crimes of moral turpitude." *United States v. Cisneros*, 2021 WL 5909407, at *4.

In these circumstances, Petitioner's re-detention would be warranted under Section 1231(a), as interpreted by the Supreme Court in *Zadvydas*, and by the POCR Regulations. Neither the statute nor the regulations contemplate a pre-detention hearing for a noncitizen who has violated a term of his conditions of release. "The law does not require a hearing before arrest" under an immigration detention statute where a noncitizen previously released from ICE custody was rearrested by ICE following a criminal arrest for a gang-related assault. *United States v. Cisneros*, No. 19-cr-00280-RS, 2021 WL 5908407, at *4 (N.D. Cal. Dec. 14, 2021).

A noncitizen seeking to challenge ICE's determination is not without procedural protections. ICE's POCR Regulations set forth detailed procedures that ICE must follow when it seeks to return a noncitizen to custody for violation of the conditions of release. 8 C.F.R. § 241.4(*l*). Specifically:

- "Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole." 8 C.F.R. § 241.4(*l*)(1)
- "The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. § 241.4(*l*)(1).
- The revocation will be subject to a review process commencing "with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.4(*l*)(3).

In arguing that he will be afforded "no process whatsoever" and that regulations "permit ICE to unilaterally nullify a bond order without oversight of any kind," Dkt. No. 2 at 22, Petitioner overlooks these regulations entirely and the meaningful procedural protections that they afford. Justice Sotomayor, in her Statement Respecting the Disposition of the Application in *Noem v. Abrego Garcia*, specifically identified 8 C.F.R. §241.4(*l*) as part of the "[f]ederal law governing detention and removal of immigration" that continues to be binding on ICE. *Abrego Garcia*, 145 S. Ct. 1017, 1019 (2025) (Statement of Sotomayor, J.). Describing these requirements, Justice Sotomayor wrote that "in order to revoke conditional release, the Government must provide adequate notice and 'promptly' arrange an 'initial informal interview . . . to afford the alien an opportunity to respond to the reasons for the

revocation stated in the notification." *Id.*

But significantly, these procedures do not require any pre-revocation hearing. And logically so: detention in these circumstances is a resumption of post-removal-period detention under Section 1231(a), which is constitutionally permitted without a pre-detention hearing. For this Court to find in favor of Petitioner on the merits, it would need to conclude that the procedural protections to which Petitioner would be entitled under 8 C.F.R. §241.4(*l*) are constitutionally insufficient—essentially a finding that the regulation is facially unconstitutional. In failing to discuss or even acknowledge this regulation in his motion, Petitioner has certainly not established as much. Respondents are aware of no case, in this District or elsewhere, so holding. And Justice Sotomayor's statement in *Abrego Garcia* signals just the opposite: her citation of 8 C.F.R. § 241.4(*l*) implies approval of these procedural protections. Notably missing from her description of the regulation was any suggestion that these procedures are insufficient or that an extra-regulatory pre-revocation hearing before an immigration judge would be constitutionally required.

In arguing that ICE cannot revoke his conditional release without a pre-deprivation hearing, Petitioner relies on a handful of cases from this District in which courts have granted a pre-detention hearing under different circumstances than those presented here. Significantly, none of these cases involved petitioners who, like Petitioner here were subject to a final order of removal and faced re-detention under 8 U.S.C. §1231(a)(6) because they had violated a term of their release. None of those decisions mentioned the regulatory authority of 8 C.F.R. 241.4(*l*) or held that the procedural protections in that provision to be constitutionally inadequate. Most of the cases involved petitioners subject to discretionary detention under 8 U.S.C. § 1226 for noncitizens in pending removal proceedings, *not* detention under § 1231(a) for noncitizens subject to a final order of removal. *See, e.g.*, *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 966 (N.D. Cal. 2019); *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1053 (N.D. Cal. 2021); *cf. Romero Romero v. Kaiser*, No. 22-cv-02508-TSH, 2022 WL 1443250, at **3–4 (N.D. Cal. May 6, 2022) (following Section 1226(a) cases); *Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 WL 5517277, at *3 (N.D. Cal. Sept. 14, 2020) (ordering limited hearing as to whether petitioner is subject to detention under Section 1226(a) or Section 1226(c)). This distinction is significant because "the nature of [due process] protection may vary depending on status and circumstance." *Zadvydas*, 533

U.S. at 694; *Rodriguez Diaz v. Garland*, 53 Cal. 4th 1189, 1202 (9th Cir. 2022) ("As our own precedents demonstrate, § 1226(a) stands out from the other immigration detention provisions in key respects."). Among other differences, the government has greater authority to detain noncitizens subject to a final order of removal under 8 U.S.C. §1231(a)(6), which does not, on its face, provide the right to a bond hearing. And of course the government has specific authority to re-detain noncitizens subject to a final order of who have violated a term of their release, a fact absent in all of the cases cited by Petitioner. The more recent cases cited by Petitioner were all ex parte TRO orders issued before the government had a chance to respond, and two of the three also arose in the context of Section 1226(a) detention. *See, e.g.*, *Diaz v. Kaiser*, No. 25-cv-05071, 2025 WL 1676854, at *1 (N.D. Cal. June 14, 2025) (detention under 8 U.S.C. F. Supp. 2d § 1226(a)); *Garcia v. Kaiser*, No. 25-cv-05071 (N.D. Cal. June 14, 2025) (same); *Enamorado v. Kaiser*, No. 25-cv-04072-NW, 2025 WL 1382859 (N.D. Cal. May 12, 2025). The only Section 1231(a) case that Petitioner cites, *Enamorado*, did not involve a petitioner who violated a term of his release, and the order does not mention 8 C.F.R. § 241.4(*l*) at all, much less find it constitutionally insufficient. *See* 2025 WL 1382859, at *1.

In short, the Supreme Court has held that detention of noncitizens subject to a final order of removal under 8 U.S.C. §1231(a)(6) is constitutional, without any pre-detention process. It has also acknowledged that noncitizens who violate a condition of their release should be re-detained. And if ICE were to return Petitioner to custody for having violated a condition of his release, the existing regulatory process would provide him with a meaningful opportunity to be heard to prevent erroneous deprivation. The absence of any additional process is a policy decision, not a constitutional defect. The Court should decline Petitioner's invitation to write an additional procedural step into the existing process.

2. Under The Traditional *Mathews* Factors, No Additional Process Is Warranted Here.

Zadvydas establishes that detention under Section 1231(a)(6) without any pre- or post-custodial bond hearing is constitutionally permissible. The Court in *Arteaga-Martinez* reaffirmed this basic framework of Section 1231(a)(6) detention, roundly rejecting any attempt to engraft an extra-statutory bond requirement onto the clear statutory language. Although Petitioner urges this Court to evaluate this

case under the traditional *Mathews* factors, there is no need to undertake a *Mathews* analysis here, where Supreme Court's jurisprudence and other case law make clear that no additional process is necessary. Indeed, the Supreme Court has *never* utilized the *Mathews* multi-factor "balancing test" in addressing due process claims raised by noncitizens held in civil immigration detention, despite multiple opportunities to do so since the Supreme Court's *Mathews* decision in 1976. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1206 (9th Cir. 2022) ("[T]he Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*.") (citations omitted); *id.* at 1214 ("In resolving familiar immigration-detention challenges, the Supreme Court has not relied on the *Mathews* framework.") (Bumatay, J., concurring). Nor has the Ninth Circuit embraced the *Mathews* multi-factor "balancing test"; while leaving open the question of whether the *Mathews* test applies to a constitutional challenge to immigration detention, *see Rodriguez Diaz*, 53 F.4th at 1207, the Ninth Circuit has emphasized that "*Mathews* remains a flexible test that can and must account for the heightened governmental interest in the immigration detention context." *Id.* at 1206.

In the event that the Court elects to analyze Petitioner's claim under *Mathews*, the Court should find, consistent with the analysis above, that Petitioner is not entitled to relief. Under *Mathews*, the Court considers 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. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). All three factors weigh against the additional process requested here.

(i) Petitioner Has No Heightened Liberty Interest In His Conditional Release.

Respondents recognize the "weighty liberty interests implicated by the Government's detention of noncitizens." *Reyes v. King*, No. 19-cv-8674, 2021 WL 3727614, at *11 (S.D.N.Y. Aug. 20, 2021). However, Petitioner's interest in his liberty *generally* does not mean that he possesses a separate or heightened liberty interest in the continuation of his conditional release.

First, as a general matter, Petitioner's liberty interest is reduced by the fact that he is a noncitizen subject to a final order of removal. "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.'" *Rodriguez Diaz*, 53 F.4th 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.

Second, Petitioner's conditional release was always subject to conditions of release, and he knew that he could be redetained if he violated those conditions. The circumstances that could lead to the revocation of Petitioner's release were both foreseeable and within his control. He was told as much at the time he was released. *See* Dkt. No. 10 at 3. From the day he was released, therefore, there could be "no doubt" that Petitioner could be returned to custody in these circumstances. *See Zadvydas*, 533 U.S. at 700. Accordingly, Petitioner cannot claim that the government promised him ongoing freedom or that he reasonably believed he would remain at liberty even if he engaged in criminal conduct. *Cf. 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"). 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 the Constitution does not require the government to acquiesce to an individual's unreasonable expectations.

(ii) The Existing Procedures Are Constitutionally Sufficient.

Turning to the second *Mathews* factor, the risk of a constitutionally significant deprivation of Petitioner's liberty here is minimal. First, as a general rule, noncitizens have no right to a hearing before an immigration judge *before* they are detained under Section 1231(a)(6). The constitutionality of that provision—which, as interpreted by the Ninth Circuit, permits detention without any bond hearing for six months, is well established.

Second, as described above, Petitioner will have an opportunity to respond to the reasons for the revocation at an initial informal interview, which will be held "promptly" after his return to custody, and

a second interview, together with a custody review that will include a final evaluation of any contested facts relevant to the revocation, approximately three months after release is revoked. 8 C.F.R. § 241.4(*l*). This procedure provides both a timeline for the review of Petitioner's detention and an opportunity for Petitioner to challenge his detention in the near future.[4]

Third, Petitioner would be entitled to a 90-day and 180-day custody review. 8 C.F.R. § 241.4(k). In connection with the review, a detainee would have the right "to receive written notice of the review, to submit information in writing to support release and to be assisted by any individual of his or her choosing in preparing or submitting information in response to the notice." *Diouf II*, 634 F.3d at 189 (citing 8 C.F.R. § 241.4(h)(1)–(2)). Thereafter, Petitioner would be entitled to annual custody reviews, and may additionally request custody review as often as once every three months upon a showing of material change in circumstances. 8 C.F.R. § 241.4(k)(2)(iii).

Fourth, if Petitioner is detained, he would be entitled to a prolonged detention bond hearing after six months of detention as a member of the *Aleman Gonzalez* class. 955 F.3d at 790. If the *Aleman Gonzalez* injunction is vacated and petitioner remains detained but is not otherwise afforded a bond hearing, he would be able to file an individual habeas petition at that point if he believes that his continued detention without a hearing is constitutionally infirm.

In *Diouf II*, the Ninth Circuit considered whether the 90-day and 180-day custody review provide sufficient procedures to protect the liberty interests of individuals detained under Section 1231(a)(6). Recognizing that "[d]etention during [the first 180 days of confinement] certainly affects aliens' interests in freedom from confinement, and requires that adequate procedural safeguards be in place," the Court held that the process afforded by the initial 90-day review was sufficient to address any constitutional concerns under a *Mathews* analysis "given the relatively limited period of detention involved." *Diouf II*, 634 F.3d at 1091. Through the first 180 days, therefore, the Court concluded that "the process afforded by the DHS regulations is adequate." *Id.*

Diouf II recognized that a short period of detention under Section 1231(a)(6) without a bond

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[4] The regulatory provisions cited at the hearing, 8 C.F.R. §241.13(d)(1) and (j), address requests to review the separate issue of whether there is a significant likelihood of removing a detained noncitizen in the reasonably foreseeable future. Because it is the decision to revoke Petitioner's release that is at issue here, the relevant regulatory provision is 8 C.F.R. §241.4(*l*).

hearing is not constitutionally problematic. The additional review that Petitioner would receive here under 8 C.F.R. § 241.4(*l*), as a noncitizen subject to re-detention for violating the conditions of his release, only bolsters this conclusion. 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; "the Due Process Clause does not mandate procedures that reduce the risk of erroneous deprivation to zero." *Rodriguez Diaz*, 53 F.4th at 1213.

In addition, the specific additional procedures Petitioner requests—that the government would have the burden of proof, by clear and convincing evidence "that circumstances have changed to justify his detention"—are especially problematic. *See* Dkt. No. 2 at 23. First the only "changed circumstance" that is relevant is the fact that Petitioner has violated a condition of his release. The government need not otherwise establish that Petitioner is a flight risk or danger. *See Zadvydas*, 533 U.S. at 700; 8 C.F.R. § 241.4(*l*). Second, there is no basis to conclude that placing the burden of proof on the government "is constitutionally necessary to minimize the risk of error." *Rodriguez Diaz*, 53 F.4th at 1212. as the Ninth Circuit observed recently, "[w]e 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 1211.

(iii) The Government Has A Strong Interest In Returning To Custody Noncitizens Who Violate Conditions Of Release.

Turning to the third *Mathews* factor, the Ninth Circuit has emphasized that the *Mathews* test "must account for the heightened government interest in the immigration detention context." *Rodriguez Diaz*, 53 F.4th at 1206. Invoking the Supreme Court's 2003 *Demore* decision, the Ninth Circuit in *Rodriguez Diaz* recognized 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." *Rodriguez Diaz*, 53 F.4th at 1208. "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.*

The government likewise has an interest in enforcing compliance with its orders of supervision, and returning individuals to custody who violate their terms. Although the Court in this case previously cited the six-week delay between the date of Petitioner's criminal arrest and the decision to call Petitioner in for an ISAP appointment, it was not until the Deportation Officer was able to get a copy of the police report, on June 27, 2025, that ICE was able to determine that Petitioner had violated his conditions of release. In any event, even an eight-month delay between the criminal activity and the immigration arrest has been found insufficient to suggest a lack of concern as to dangerousness on the part of the government. *See United States v. Cisneros*, 2021 WL 5908407, at *4.

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 and interfere with the ability of the immigration courts to undertake its other important duties.[5] 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.

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) harm based on the conditions of confinement; (2) separation from his family, community activities, and job; and (3) alleged deprivation of constitutional rights. Dkt. No.2 at 24–25.

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[5] *See, e.g.*, Cong. Res. Serv., *U.S. Immigration Courts and the Pending Cases Backlog* 1, 17-18 (Apr. 25, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R47077 ("As a result of this [pending cases] backlog, some individuals must wait years to have their cases adjudicated.")

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. Petitioner was denied a release on bond in 2022, even though the Government bore the burden of proof by clear and convincing evidence. He was released in 2023, presumably because of his participation in the intensive reentry program, but it seems unlikely that he would be able to avoid an adverse determination following a third hearing in light of his history and his recent criminal activity.

The injury that Petitioner asserts from his future potential detention is also insufficient because it is well established that he would have the opportunity to promptly seek review of that detention during the first three months, and would be entitled to have a bond hearing after six months. *Diouf II* recognized that this relatively short period of detention is not constitutionally problematic. 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").

Petitioner is a noncitizen subject to a final order or removal, who is now subject to re-detention for violating the terms of his release. He 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 a pre-detention 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). Petitioner cannot dispute that he is subject to a final order of removal, and that he engaged in criminal activity in violation of his conditions of release. The public and governmental interest in upholding the existing regulatory scheme and permitting Petitioner to be re-detained without additional burdensome processes, while allowing Petitioner to challenge his detention once he is in custody, is significant.

CONCLUSION

For the foregoing reasons, the Court should dissolve the temporary restraining order and deny the motion for preliminary injunction.

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Respectfully submitted,

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