

The Honorable Grady J Leupold

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FERNANDO LEDESMA GONZALEZ,

Petitioner,

v.

DREW BOSTICK, et al.,

Respondents.

No. 2:25-cv-01404-JNW-GJL

RESPONSE IN SUPPORT OF HABEAS  
PETITION

Noting Calendar Date: September 19,  
2025<sup>1</sup>

**ORAL ARGUMENT AND EXPE-  
DITED CONSIDERATION RE-  
QUESTED**

**Introduction**

At 14 years old, Petitioner and his family entered the United States seeking asylum. For the last eight years, he has been compliant with his release conditions while actively pursuing his asylum claim. Yet, on July 1, 2025, he was arrested by Immigration and Customs Enforcement [“ICE”] agents during a routine check-in. For the first time in his life, he has been separated from his family and incarcerated for nearly three months. At the time of his arrest, ICE agents claimed it was pursuant to a removal order that had been issued by an immigration judge [“IJ”] the day prior, when Petitioner’s asylum claim had been denied. However, the removal order was not final until Petitioner’s time to appeal the decision had expired. Petitioner, with the assistance of an immigration attorney, has since filed a timely notice of appeal in his asylum case. That appeal is pending and there is no final order of removal.

<sup>1</sup> For the reasons discussed *infra* at argument sections B and C, the Court should reach these matters immediately.


1 Months after his arrest, ICE agents are now claiming that Petitioner’s detention is justi-  
2 fied because he is a flight risk. The evidence does not support this contention. In fact, the evi-  
3 dence is to the contrary, but Respondents have refused to allow Petitioner the opportunity to be  
4 heard on or to challenge his detention. If this habeas petition is not granted, Petitioner may sit in  
5 custody for years, while his appeal works its way through the immigration system, without an  
9 opportunity to be heard regarding his detention.



7 Because re-arrest without cause violates both the Administrative Procedure Act [“APA”]  
8 and the Fifth Amendment’s guarantee of due process, Petitioner, through counsel, petitioned this  
9 Court for a writ of habeas corpus ordering his release. The questions raised in the petition are  
10 fundamental to the rule of law, and to the rights enshrined in our Constitution. As one court re-  
11 cently stated, in a case involving a challenge to similar detention:  
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13 This case’s underlying question, then, asks whether parolees who  
14 escaped oppression will have the chance to plead their case within  
15 a system of rules. Or, alternatively, will they be summarily re-  
16 moved from a country that—as they are swept up at checkpoints  
17 and outside courtrooms, often by plainclothes officers without ex-  
planation or charges [ ]—may look to them more and more like the  
countries from which they tried to escape?

18 *Coalition for Humane Immigrant Rights, et al. v. Noem*, No. 25-cv-872 (JMC), 2025 WL  
19 2192986, at \*2 (D.D.C. Aug. 1, 2025). It is respectfully requested that this Court grant the ha-  
20 beas petition, and order Petitioner’s immediate release.

21 **Background**

22 Born in 2002, in Michoacán, Mexico, Petitioner and his family were targeted by 

23  Ex. A [Petitioner’s Decl.]  
24 at ¶¶ 2-3; Ex. B [Immigration Attorney’s Decl.] at ¶ 4. 

25 



1 tion judge the day prior.<sup>2</sup> *Id.* According to ICE agents, Petitioner was taken into custody “with-  
2 out incident.” ECF 14 at ¶ 10; ECF 30 at ¶ 10; ECF 31-4 at 4. According to the I-213 form, at the  
3 time of his arrest, Petitioner responded to officers’ questions honestly, willingly participated in  
4 the obtaining of his fingerprints, and did not deny his identity or otherwise try to flee. ECF 31-4  
5 at 3-4. Petitioner signed a Notice of Custody Determination. Ex. A at ¶ 10; ECF 31-5. The notice  
6 was also signed by Supervisory Detention and Deportation Officer [“SDDO”] Jason Weiss.  
7 ECF 31-5. However, that notice does not describe the reasons for detention. *Id.* Petitioner has not  
8 received any documentation notifying him of the reasons for his detention. Ex. A at ¶ 10; Ex. B  
9 at ¶ 17.

10  
11 The following day, on July 2, Petitioner, through counsel Raquel Hecht, filed a habeas  
12 petition in the District of Oregon challenging the constitutionality of Petitioner’s detention.  
13 ECF 1. Respondents argued that the petition should be dismissed for lack of jurisdiction or, in  
14 the alternative, transferred to the Western District of Washington. ECF 13 at 1. In support of  
15 their request, on July 14, 2025, Respondents filed a declaration for Officer Weiss. ECF 14. In the  
16 declaration, Officer Weiss claimed that Petitioner was taken into custody because “the OREC  
17 was cancelled pursuant to the removal order.” ECF 14 at ¶ 10. At the time, there was no mention  
18 of Petitioner being a flight risk.

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20 Petitioner’s immigration attorney did not receive written notice of the denial of his asy-  
21 lum claim until approximately a week after his detention. Ex. B at ¶¶ 11-13. She was unable to  
22 appeal the denial until that written notice was received. *Id.* Once received, Petitioner’s immigra-  
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26 <sup>2</sup> Notably, pursuant to 8 C.F.R. § 1241.1, an order of removal does not become final until 30  
days after its issuance and only if a notice of appeal is not filed within that timeframe.

1 tion attorney filed a timely notice of appeal. *Id.* Despite rejecting the appeal twice, the BIA fi-  
2 nally accepted the notice of appeal on July 15, 2025. *Id.* Petitioner’s appeal is pending and could  
3 potentially remain pending for several years.<sup>3</sup> Ex. B at ¶ 14. Moreover, because a timely notice  
4 of appeal was filed, there is no final order of removal pending against Petitioner. Ex. B at ¶ 15.

5 On July 24, 2025, Petitioner’s habeas case was transferred to this Court. ECF 21. On Sep-  
6 tember 8, 2025, Respondents filed a return to Petitioner’s habeas petition. ECF 29. As an exhibit  
7 to the return, a declaration for SDDO Christopher Sica was included. ECF 30. According to Of-  
8 ficer Sica, Petitioner had been taken into custody back on July 1, because the Eugene Office of  
9 Enforcement and Removal Operations [“ERO”] “had determined Petitioner to be a flight risk af-  
10 ter the immigration judge’s removal order.” ECF 30 at ¶ 10. Officer Sica does not cite any rea-  
11 sons that led to the conclusion that Petitioner is a flight risk. In fact, over the last nearly eight  
12 years while on release, Petitioner has not missed a single immigration court hearing or check-in.  
13 Ex. A at ¶ 5; Ex. B at ¶ 9. Petitioner has continued to live with his family in the District of Ore-  
14 gon and he obtained a work permit that was renewed by the Department of Homeland Security  
15 [“DHS”] on September 5, 2025, while he has been incarcerated. Ex. A at ¶ 5. Before his incar-  
16 ceration, he was employed as a welder at Pioneer Truckweld in Silverton, Oregon where he has  
17 been well regarded for the last several years. *Id.* Furthermore, Respondents acknowledge that Pe-  
18 titioner “has no criminal history” (ECF 31-4 at 3) and was reporting the day of his arrest “in ac-  
19 cordance with his conditions of release” (*Id.*).

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<sup>3</sup> One reason for this significant delay is the fact that there are currently only about 20 BIA  
judges for the whole country. Ex. B at ¶ 14. This shortage of judges does not justify negating the  
rule of law.

1 What's more, despite Petitioner's request back on July 1 to have an immigration judge  
2 review the custody determination (ECF 31-5), he has not been given an opportunity to speak to  
3 any immigration officials, let alone a judge regarding his detention (Ex. A at ¶ 11; Ex. B at ¶ 18).  
4 According to a recent BIA decision that ignores decades of precedent, Petitioner is currently in-  
5 eligible for a bond hearing. Ex. B at ¶ 18.

### 9 Respondents' Position

7 In this habeas proceeding, the law requires that Respondents certify the "true cause" of  
8 detention. 28 U.S.C. § 2243 ("The person to whom the writ or order is directed shall make a re-  
9 turn certifying the true cause of the detention."). On September 8, 2025, Respondents certified  
10 that the true cause of Petitioner's executive detention is 8 U.S.C. § 1225 or § 1226(a). ECF 29 at  
11 3. Respondents assert that, because an IJ has denied Petitioner's asylum application, it has been  
12 determined that he is "a flight risk based on the IJ's order for removal." *Id.* at 5.

### 14 Argument

#### 15 A. The relevant statutory authority is 8 U.S.C. § 1226(a), and 8 U.S.C. § 1225 is 16 inapplicable.

17 When Petitioner was released on his own recognizance, Respondents placed him into re-  
18 moval proceedings under 8 U.S.C. § 1226. This is evidenced by the Order of Release on Recogn-  
19 izance, which stated that his release was "[i]n accordance with section 236 of the Immigration  
20 and Nationality Act and the applicable provisions of Title 8 of the Code of Federal Regulations."  
21 ECF 31-2. Section 236.1(c)(8) of the INA provides that:

22 Any officer authorized to issue a warrant of arrest may, in the of-  
23 ficer's discretion, release an alien not described in section  
24 236(c)(1) of the Act, under the conditions at section 236(a)(2) and  
25 (3) of the Act; *provided that the alien must demonstrate to the sat-  
26 isfaction of the officer that such release would not pose a danger to  
property or persons, and that the alien is likely to appear for any  
future proceeding.*

1 8 C.F.R. § 236.1(c)(8) (emphasis added).

2 This regulation governs the release decision contemplated in 8 U.S.C. § 1226(a). That  
3 section authorizes the arrest of an “alien” pending a removal decision, and provides that the At-  
4 torney General:

5 (1) may continue to detain the arrested alien; and

9 (2) may release the alien on—

7 A. bond of at least \$1,500 with security approved by, and contain-  
8 ing conditions prescribed by, the Attorney General; or

10 B. conditional parole, but

11 (3) may not provide the alien with work authorization (including an “em-  
12 ployment authorized” endorsement or other appropriate work permit),  
13 unless the alien is lawfully admitted for permanent residence or other-  
14 wise would (without regard to removal proceedings) be provided such  
15 authorization.

16  
17 *See also Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1196 (9th Cir. 2022) (explaining that 8  
18 C.F.R. § 236.1(c)(8) governs the initial custody determination under 8 U.S.C. § 1226(a)); *Mar-*  
19 *tinez v. Hyde*, No. 25-cv-11613, 2025 WL 2084238 (D. Mass. July 24, 2025) (finding that an Or-  
20 der of Release which was “[i]n accordance with section 236 of the Immigration and Nationality  
21 Act” to be “explicitly premise[d] ... on section 1226.”); *Ortega-Cervantes v. Gonzales*, 501 F.3d  
22 1111, 1115 (9th Cir. 2007) (“It is apparent that the INS used the phrase ‘released on recogni-  
23 zance’ as another name for ‘conditional parole’ under § 1226(a).”). Accordingly, Petitioner’s re-  
24 lease falls under subsection 1226(a)(2)(B) or “conditional parole” and the procedures described  
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1 above, including arrest of a noncitizen present in the United States, are distinct from the Govern-  
2 ment's mandatory authority under 8 U.S.C. § 1225.

3 Once an officer has concluded that the non-citizen does not pose a danger or risk of flight  
4 and releases the person on their own recognizance under § 1226, ICE maintains cabined discre-  
5 tionary authority to revoke release and detain the noncitizen. *See* 8 C.F.R § 236.1(c)(9) (provid-  
6 ing that “release may be revoked at any time in the discretion of the district director, acting dis-  
7 trict director, deputy district director, assistant district director for investigations, assistant district  
8 director for detention and deportation, or officer in charge (except foreign), in which event the  
9 alien may be taken into physical custody and detained”). But the BIA has interpreted ICE’s rear-  
10 rest authority to be limited to circumstances where there has been a “material” change in circum-  
11 stance. *Vargas v. Jennings*, No. 20-cv-5785, 2020 WL 5074312, at \*2 (N.D. Cal. Aug. 23, 2020)  
12 (quoting *Matter of Sugay*, 17 I. & N. Dec. 637, 640 (BIA 1981)).

13  
14 **B. The Court should grant Petitioner’s immediate release because his detention**  
15 **violates the Due Process Clause.**

16 The Due Process Clause of the Fifth Amendment to the United States Constitution pro-  
17 hibits the federal government from depriving any person of “life, liberty, or property, without  
18 due process of law.” U.S. Const. amend. V. The right to due process extends to “all ‘persons’  
19 within the United States, including [non-citizens], whether their presence here is lawful, unlaw-  
20 ful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Supreme  
21 Court’s due process decisions in the criminal context “provide useful guidance in determining  
22 what process is due non-citizens in immigration detention because [i]mmigration cases ... are set  
23 apart from mine run civil actions and involve the awesome authority of the State to take devastat-  
24 ingly adverse action—here, the power to remove individuals from their homes, separate them  
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1 from their families, and deport them to countries they may have last seen many years ago.” *Her-*  
2 *nandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) (cleaned up) (citing *Zadvydas*, 533 U.S. at  
3 690-91, and *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010), and quoting *M.L.B. v. S.L.J.*, 519  
4 U.S. 102, 125 (1996)).

5 Here, Petitioner and his family came to the United States where they were temporarily  
9 detained and were released after an immigration official determined they were not a danger to  
7 persons or property and were likely to appear at future court hearings. Petitioner’s sudden arrest,  
8 without sufficient notice, and without an opportunity to argue that he was not a flight risk or a  
9 danger to the community, violates his procedural due process rights. Additionally, his recent ar-  
10 rest and current detention violates his substantive due process rights because absent evidence that  
11 he is a risk of flight or a danger to the community, there is no legitimate government interest in  
12 his detention. Thus, he must be released forthwith.

14 **1. Petitioner’s detention violates his substantive due process rights.**

15 “[S]ubstantive due process prevents the government from engaging in conduct that  
16 shocks the conscience, or interferes with rights implicit in the concept of ordered liberty.” *United*  
17 *States v. Salerno*, 481 U.S. 739, 746 (1987) (cleaned up). “A due process violation occurs when  
18 detention becomes punitive rather than regulatory, meaning there is no regulatory purpose that  
19 can rationally be assigned to the detention or the detention appears excessive in relation to its  
20 regulatory purpose.” *United States v. Torres*, 995 F.3d 695, 708 (9th Cir. 2021); *accord Padilla*  
21 *v. U.S. Immigr. & Customs Enf’t.*, 704 F. Supp. 3d 1163, 1172 (W.D. Wash. 2023) (“Due process  
22 protects against immigration detention that is not reasonably related to the legitimate purpose of  
23 effectuating removal or protecting against danger and flight risk.”). The regulatory purpose of  
24 immigration detention is to hold a person that is a flight risk or a danger to the community. *In re*  
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1 *Guerra*, 24 I.&N. Dec. 37 (B.I.A. 2006). And the regulations governing Petitioner’s initial re-  
2 lease list only those two factors for consideration in the release decision. 8 C.F.R. § 236.1(c)(8).  
3 “[T]he government has no legitimate interest in detaining individuals who have been determined  
4 not to be a danger to the community and whose appearance at future immigration proceedings  
5 can be reasonably ensured by a lesser bond or alternative conditions.” *Hernandez*, 872 F.3d at  
9 994.

7 Petitioner’s arrest and detention stripped him of liberty without any legitimate counter-  
8 vailing government interest. While Respondents make the conclusory argument that Petitioner  
9 was a flight risk, they do not offer *any* evidence to support this except to say that Petitioner’s  
10 asylum claim was denied. But this is not the first time Petitioner’s asylum claim was denied. It  
11 was first denied in December 2021. Ex. B at ¶ 6. Yet, Respondents did not cancel Petitioner’s  
12 OREC at that time, nor did they claim he was a flight risk simply because a removal order was  
13 issued after he was denied relief. *Id.* Indeed, Petitioner did not flee. He continued to participate in  
14 his case by filing an appeal, attending court hearings, communicating with his immigration attor-  
15 ney, and continuing to adhere to the conditions of his release including his periodic ICE check-  
16 ins. Ex. B at ¶¶ 6-9. What’s more, after two years’ litigation, he ultimately succeeded in his first  
17 appeal. Ex. B at ¶ 7.

20 There has been no change in circumstances that support Respondents’ allegation that Pe-  
21 titioner is a flight risk. Although Petitioner’s asylum claim was recently denied by an IJ, he has  
22 since filed a timely notice of appeal. Ex. B at ¶¶ 12–15. Because of that, his order of removal is  
23 not final. *Id.* Moreover, like his first appeal, his current appeal may also take a couple years be-  
24 fore it is resolved. *Id.* In the meantime, Petitioner continues to have strong family connections in  
25 Oregon where his mother, father, and younger brother have lived since the family’s arrival to the  
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1 United States nearly eight years ago. Ex. A at ¶ 5. Petitioner’s immigration attorney also received  
2 notice during Petitioner’s incarceration that his request to extend his work permit was approved  
3 by DHS extending his work authorization another five years. *Id.*

4 Petitioner’s conduct while on release supports that he is *not* a flight risk. There is no alle-  
5 gation that Petitioner has ever participated in any criminal activity. ECF 31-4 at 3-4. Upon his  
9 arrival to the United States and after being released from detention, he appeared as required for  
7 his ICE check-ins, submitted his asylum application, and attended court hearings, even testifying  
8 at one. Ex. B at ¶¶ 5-10. He is earnestly pursuing an asylum claim as shown by his engagement  
10 of immigration attorneys over the years, his participation in proceedings, and his filings of ap-  
11 peals. Furthermore, Petitioner’s behavior during his recent arrest demonstrates his compliance  
12 with officers and respect for the rule of law. He was taken into custody without incident, he re-  
13 sponded to officers’ questions honestly, willingly participated in the obtaining of his fingerprints,  
14 and did not deny his identity or otherwise try to flee. ECF 31-4 at 3-4. Plainly, Petitioner’s deten-  
15 tion is not necessary either to protect the community or to assure his appearance at immigration  
16 proceedings.

18 **2. Petitioner’s arrest and detention violate his procedural due process**  
19 **rights.**

20 “Procedural due process imposes constraints on governmental decisions which deprive  
21 individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of  
22 the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Proce-  
23 dural due process requires notice and an opportunity to be heard. *Id.* at 333-34. To state a claim  
24 for a violation of procedural due process rights, a petitioner must establish 1) a protected prop-  
25 erty or liberty interest, and 2) a denial of adequate procedural protections. *ASSE Int’l, Inc. v.*  
26 *Kerry*, 803 F.3d 1059, 1073 (9th Cir. 2015).

1 Where the government seeks to deprive an individual of a protected interest, the Supreme  
2 Court has directed that courts balance three factors to determine what process is due:

3 First, the private interest that will be affected by the official action;  
4 second, the risk of an erroneous deprivation of such interest  
5 through the procedures used, and the probable value, if any, of ad-  
6 ditional or substitute procedural safeguards; and finally, the Gov-  
7 ernment’s interest, including the function involved and the fiscal  
8 and administrative burdens that the additional or substitute proce-  
9 dural requirement would entail.

7 *Mathews*, 424 U.S. at 335. Applying this balancing test shows that Respondents provided inade-  
8 quate process when revoking Petitioner’s release, arresting him, and continuing to detain.

9  
10 *i. Petitioner has a protected interest in his liberty.*

11 The first *Mathews* factor considers “the private interest that will be affected by the offi-  
12 cial action.” *Mathews*, 424 U.S. at 335. Here, Petitioner’s protected interest is “the most ele-  
13 mental of liberty interests—the interest in being free from physical detention by one’s own gov-  
14 ernment.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Petitioner’s liberty has been unneces-  
15 sarily restrained for nearly three months, since July 1, 2025, and “[e]very day that a person is de-  
16 tained is a significant injury.” *Mahdawi v. Trump*, No. 2:25-cv-389, 2025 WL 1243135, \*39 (D.  
17 Vt. Apr. 30, 2025); *see also Rosales-Mireles v. United States*, 585 U.S. 129, 139-40 (2018)  
18 (“Any amount of actual jail time is significant, and has exceptionally severe consequences for  
19 the incarcerated individual and for society which bears the direct and indirect costs of incarcera-  
20 tion.”) (cleaned up).

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23 Petitioner’s liberty interest is constitutionally protected. Although immigration officials  
24 have discretion to either grant or revoke release, “the fact that a decision-making process in-  
25 volves discretion does not prevent an individual from having a protectable liberty interest.” *Or-  
26 tega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019) (granting petition for writ of habeas

1 corpus, rejecting the government argument that petitioner had no liberty interest in a benefit  
2 granted in the government's discretion, and finding the petitioner had a liberty interest in remain-  
3 ing out of immigration custody on bond) (citing *Young v. Harper*, 520 U.S. 143, 150 (1997)). As  
4 one district court explained: "Just as people on preparole, parole, and probation status have a lib-  
5 erty interest, so too does Ortega have a liberty interest in remaining out of custody on bond." *Or-*  
6 *tega*, 415 F. Supp. 3d at 969-70 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (parolee);  
7 *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation)). It is indisputable that "the govern-  
8 ment's discretion to incarcerate non-citizens is always constrained by the requirements of due  
9 process." *Hernandez*, 872 F.3d at 981.

11 *ii. There is a risk of an erroneous deprivation of Petitioner's liberty.*

12 The second *Mathews* factor considers "the risk of an erroneous deprivation of such inter-  
13 est through the procedures used, and the probable value, if any, of additional or substitute proce-  
14 dural safeguards." *Mathews*, 424 U.S. at 335. Essentially, the Court must consider whether the  
15 process used to arrest and detain Petitioner risked his unnecessary detention. The Court should  
16 find that there is such a risk here, because Petitioner was detained during a regular ICE check-in,  
17 while complying with his release conditions, without sufficient notice, and without an oppor-  
18 tunity to be heard on the matter.

19 The only written document Petitioner received regarding his detention was a Notice of  
20 Custody Determination, which wholly failed to describe the reason for his detention. ECF 31-5.  
21 The notice was issued the day of Petitioner's arrest. *Id.* But unlike Respondents' most recent fil-  
22 ings, this contemporaneous notice says nothing about Petitioner being a flight risk. *Id.* While the  
23 I-213 form mentioned the order of removal that was issued after Petitioner's request for asylum  
24 relief was denied (ECF 31-4), the order of removal is not a final order of removal and Petitioner  
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1 is in the process of appealing the decision ( Ex. B at ¶ 15). Furthermore, Petitioner did not flee or  
2 violate any other release conditions during the pendency of his last immigration appeal that  
3 lasted multiple years and that he won. Ex. B at ¶¶ 7-9.

4 These circumstances negate Respondents' argument that the denial of Petitioner's request  
5 for asylum is a material change in circumstance supporting a finding that Petitioner is now a  
9 flight risk. *See Matter of Sugay*, 17 I&N Dec. 637, 640 (BIA 1981) (recognizing "that where a  
7 previous bond determination has been made by an immigration judge, no change should be made  
8 by a District Director absent a change of circumstance"); *Saravia v. Sessions*, 280 F. Supp. 3d  
9 1168, 1197 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th  
10 Cir. 2018) (recognizing that (1) "DHS has incorporated" *Matter of Sugay*'s "holding into its  
11 practice, requiring a showing of changed circumstances both where the prior bond determination  
12 was made by an immigration judge and where the previous release decision was made by a DHS  
13 officer," and (2) "DHS generally only re-arrests an alien pursuant to § 1226(b) after a material  
14 change in circumstances").

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16  
17 What's worse, Petitioner has not been afforded an opportunity to challenge the allegation  
18 that he is a flight risk. Despite Petitioner's request back on July 1 to have an IJ review the cus-  
19 tody determination (ECF 31-5), he has not been given an opportunity to speak to any immigra-  
20 tion officials, let alone a judge regarding his detention. Ex. A ¶¶ 10-11; Ex. B at ¶¶ 17-18.

21 Under these circumstances the Court should find that the risk of erroneous deprivation of  
22 his protected liberty interest is high. *Valdez v. Joyce*, No. 25 CIV. 4627 (GBD), 2025 WL  
23 1707737, at \*4 (S.D.N.Y. June 18, 2025) (finding Petitioner's re-detention when Petitioner had  
24 made his immigration court dates and there was "no notice, explanation, or opportunity for Peti-  
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1 tioner to be heard” to establish a high risk of erroneous deprivation of his protected liberty inter-  
2 est); *E.A. T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130, at \*4 (W.D. Wash. Aug.  
3 19, 2025) (finding that even if petitioner is detained due to violations of his release conditions,  
4 this does not mean he “can be detained for those violations without a hearing.”); *M.S.L. v. Bos-*  
5 *tock et al.*, No. 6:25-cv-01204-AA, 2025 WL 2430267, at \*9-16 (D. Or. August 21, 2025) (grant-  
6 ing habeas relief when, like here, ICE did not afford M-S-L an opportunity to respond to the al-  
7 leged reasons for revocation of release).

8  
9 *iii. There is no legitimate government interest in the civil detention of a*  
10 *person who does not pose a risk of flight or danger to the community.*

11 “Turning to the third *Mathews v. Eldridge* prong, ‘the Attorney General’s discretion to  
12 detain individuals under 8 U.S.C. § 1226(a) is valid where it advances a legitimate government  
13 purpose.’ *Valdez*, 2025 WL 1707737 at \*4 (quoting *Velasco Lopez v. Decker*, 978 F.3d 842, 854  
14 (2d Cir. 2020)). ‘The Government has identified its regulatory interests in detaining noncitizens  
15 under § 1226(a) as (1) ensuring that noncitizens do not abscond and (2) ensuring they do not  
16 commit crimes.’ *Velasco Lopez*, 978 F.3d at 854. In considering the government interest, the  
17 Court should ask not just what interest the government may have in detaining a non-citizen under  
18 § 1226(a), but rather what interest the government may have in re-detaining a non-citizen previ-  
19 ously determined suitable for release under § 1226(a) without notice or process to determine  
20 whether there are material changes warranting the re-detention. *See Ortega*, 415 F. Supp. 3d at  
21 970 (“[T]he government’s interest in re-arresting Ortega without a hearing before an IJ is low.”).

22  
23 Accordingly, the Government’s interest in re-detaining Petitioner without process is low.  
24 Petitioner has not committed any crimes, was compliant with his release conditions, was actively  
25 participating in his immigration case, and was arrested during a scheduled check-in with ICE.  
26

1 See *Ramirez-Clavijo v. Kaiser*, No. 25-cv-06248-BLF, 2025 WL 2097467, at \*3 (N.D. Cal. July  
2 25, 2025) (the “government’s interest in re-detaining [Ramirez-Clavijo] without a hearing is  
3 ‘low,’ particularly in light of the fact that [Ramirez-Clavijo] has appeared for her prior immigra-  
4 tion hearings and she does not have a criminal record.”).

5 **3. The Court should order the Petitioner’s immediate release rather**  
6 **than some other remedy.**

7 The Court should order Petitioner’s immediate release, rather than a lesser remedy, such  
8 as a bond hearing. *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 656-57 (D. Mass. 2018) (finding it  
9 “most appropriate” for the federal court in habeas to “exercise its equitable authority to remedy  
10 the violations of petitioners’ constitutional rights to due process by promptly deciding itself  
11 whether each should be released”). Release, rather than a bond hearing, is the appropriate rem-  
12 edy because “[s]uch a hearing is no substitute for the requirement that ICE engage in a ‘delibera-  
13 tive process prior to, or contemporaneous with,’ the initial decision to strip a person of the free-  
14 dom that lies at the heart of the Due Process Clause.” *Chipantiza-Sisalema v. Francis*, No. 25  
15 CIV. 5528 (AT), 2025 WL 1927931, at \*3 (S.D.N.Y. July 13, 2025) (cleaned up). In *Chipantiza-*  
16 *Sisalema*, the court held that it “offends the ordered system of liberty that is the pillar of the Fifth  
17 Amendment” to suggest that “government agents may sweep up any person they wish, for any  
18 reason ... without consideration of dangerousness or flight risk so long as the person will, at  
19 some unknown point in time, be allowed to ask some other official for his or her release.” *Id.*  
20 Thus, this Court should order Petitioner’s release, and his return to the District of Oregon so that  
21 he may be “restored to the state of freedom [he] enjoyed [ ] just prior to [his] arrest.” *Martinez*,  
22 2025 WL 2084238, at \*9.  
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1           Additionally, a bond hearing will almost certainly be unfruitful given a recent BIA case  
2 that ignores decades of precedent and adopts the position that people who enter the country with-  
3 out inspection are ineligible for bond. *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).  
4 Because “DHS’s policies regarding detention pending removal and the procedures it will afford  
5 noncitizens in such proceedings are in flux and uncertain,” the Court should find that any “post-  
9 detention procedural safeguards” would be “inadequa[te] and unreliab[le].” *Pinchi v. Noem*,  
7 5:25-cv-05632, 2025 WL 2084921, at \*5 (N.D. Cal. July 24, 2025); *see also Vazquez v. Bostock*,  
8 3:25-cv-05240, 349 F.R.D. 333, 346-47, 364-65 (W.D. Wash. May 2, 2025) (certifying a class  
9 and describing the practice of Tacoma immigration judges to deny bond hearings for individuals  
10 who arrived in the United States without inspection and the low rate of bond grants for hearings  
11 that are held in Tacoma in comparison with other jurisdictions). Not only that, but it would be  
12 “particularly unfair” for Petitioner to suffer “unjustified loss of liberty for even one more day”  
13 “while ICE attempts to remedy its failure to follow its regulations and to provide [Petitioner] due  
14 process.” *Jimenez*, 317 F. Supp. 3d at 656-57.

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17           The Court should also order that the Respondents may not re-arrest Petitioner, “unless  
18 and until a hearing, with adequate notice, is held in Immigration Court to determine whether his  
19 [conditional release] should be revoked or altered.” *Ortega*, 415 F. Supp. 3d at 970; *see also Y-Z-*  
20 *L-H v. Bostock*, No. 3:25-CV-965-SI, 2025 WL 1898025, at \*14 (D. Or. July 9, 2025) (ordering  
21 that the Respondents “shall not cause Petitioner to be re-detained during the pendency of his re-  
22 moval proceedings without prior leave of this Court”).  
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1           **C.     The Court should grant Petitioner’s immediate release because Petitioner’s**  
2           **re-arrest and detention violates the Administrative Procedure Act.**

3           The revocation of Petitioner’s release was arbitrary and capricious and inconsistent with  
4           existing agency regulations and rules. Therefore, in addition to a violation of Petitioner’s due  
5           process rights, his detention violates the APA.

6                           **1.   The APA limits an agency’s ability to exceed its statutory authority,**  
7                           **abuse its discretion, or act arbitrarily and capriciously.**

8           “The APA ‘sets forth the procedures by which federal agencies are accountable to the  
9           public and their actions subject to review by the courts.’” *Dep’t of Homeland Sec. v. Regents of*  
10           *the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796  
11           (1992)). The APA “requires agencies to engage in ‘reasoned decisionmaking,’” and agency ac-  
12           tions are to be “‘set aside’ if they are ‘arbitrary’ or ‘capricious.’” *Id.* (quoting *Michigan v. EPA*,  
13           576 U.S. 743, 750 (2015) and 5 U.S.C. § 706(2)(A)). Agency action is

14                           arbitrary or capricious if the agency relied on factors which Con-  
15                           gress has not intended it to consider, entirely failed to consider an  
16                           important aspect of the problem, offered an explanation for its de-  
17                           cision that runs counter to the evidence before the agency, or is so  
                              implausible that it could not be ascribed to a difference in view or  
                              the product of agency expertise.

18           *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43  
19           (1983). For an agency action to survive arbitrary and capricious review, it must have “articulated  
20           a satisfactory explanation for its action including a rational connection between the facts found  
21           and the choice made.” *Alliance for the Wild Rockies v. Petrick*, 68 F.4th 475, 493 (9th Cir. 2023)  
22           (cleaned up). Furthermore, “an administrative agency is not allowed to change direction without  
23           some explanation of what it is doing and why.” *Int’l Union, UAW v. NLRB*, 802 F.2d 969, 973-  
24

1 74 (7th Cir. 1986). An “unexplained inconsistency between agency actions” is a reason for hold-  
2 ing an agency’s action “to be an arbitrary and capricious change.” *Organized Vill. Of Kake v.*  
3 *U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (cleaned up).

4 Agencies are bound to follow their own rules that affect the fundamental rights of indi-  
5 viduals, even self-imposed policies and procedures. *See Morton v. Ruiz*, 415 U.S. 199, 235  
9 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow  
7 their own procedures ... even where the internal procedures are possibly more rigorous than oth-  
8 erwise would be required.”). Additionally, “[i]t is a ‘foundational principle of administrative  
9 law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked  
10 when it took the action.’” *Regents of the Univ. of Cal.*, 591 U.S. at 20 (quoting *Michigan*, 576  
11 U.S. at 758). Accordingly, in review of the agency decision to revoke Petitioner’s release, the  
12 Court must consider the agency’s reasons at the time of his arrest, not “impermissible *post hoc*  
13 rationalizations.” *Id.* at 21 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.  
14 402, 420 (1971)).

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17 **2. The revocation of Petitioner’s release was arbitrary and capricious and**  
**failed to comply with agency regulations and policy.**

18 In 2017, when ICE released Petitioner on his own recognizance, an immigration official  
19 made an individualized determination that Petitioner was not a flight risk or a danger. *See* 8  
20 C.F.R. § 236.1(c)(9). ICE’s decision to change their initial position and revoke Petitioner’s re-  
21 lease, without an individualized determination that changed circumstances show that he is a  
22 flight risk or a danger to the community, lacks the reasoned decision-making necessary to sur-  
23 vive arbitrary and capricious review.

24  
25 Respondents’ asserted justifications for re-arrest amount to arbitrary and capricious  
26 agency action for several reasons. First, the agency justification for Petitioner’s detention has

1 evolved since the filing of his habeas petition. Over two months after Petitioner’s arrest, Re-  
2 spondents alleged for the first time that Petitioner is a flight risk. ECF 29 at 5. The I-213 report  
3 of Petitioner’s arrest was drafted on July 1, 2025, the same day as his arrest. ECF 31-4. Nowhere  
4 in this contemporaneous document does it allege that Petitioner is a flight risk. *Id.* In fact, the  
5 only rationale the document provides regarding Petitioner’s arrest is that “the Order of Release  
9 on Recognizance was cancelled and he was [placed] under arrest pursuant to the order of re-  
7 moval issued on June 30, 2025.” *Id.* at 4. Yet, in a declaration drafted by SDDO Christopher  
8 Sica, on September 8, 2025, Respondents now claim, *post hoc*, that Petitioner was arrested be-  
9 cause the ERO determined he was “a flight risk.” ECF 30 at ¶ 10. Tellingly, in a declaration  
10 drafted by SDDO Jason Weiss,<sup>4</sup> on July 14, 2025, only a couple weeks after Petitioner’s arrest,  
11 there is no mention that Petitioner had been determined to be a flight risk. Officer Weiss simply  
12 stated that the ERO cancelled Petitioner’s OREC and took him into custody “pursuant to the re-  
13 moval order.” ECF 14 at ¶ 10.

15 If the Court chooses to consider the declarations submitted by immigration officers as  
16 substantive evidence, they should be “viewed critically” to ensure that the agency’s action “is not  
17 upheld on the basis of impermissible *post hoc* rationalization.” *Regents of the Univ. of Cal.*, 591  
18 U.S. at 21 (cleaned up). The Supreme Court has cautioned that agencies or their lawyers should  
19 not be able to “invoke belated justifications” as “convenient litigating positions.” *Id.* at 23  
20 (cleaned up); *see also M.S.L. v. Bostock et al.*, 2025 WL 2430267, at \*13 (finding that the gov-  
21 ernment’s “shifting justifications for detaining Petitioner appear to be post-hoc rationalizations  
22 for agency action.”). The Respondents have not produced any evidence supporting their claim  
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<sup>4</sup> This is the same officer who signed the Notice of Custody Determination. ECF 31-5.

1 that Petitioner is a flight risk, much less any piece of evidence that predates or is contemporane-  
2 ous to his arrest.

3 Second, the Respondents' justification that Petitioner was arrested because he is a flight  
4 risk "runs counter to the evidence." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Since his release eight  
5 years ago, Petitioner has been compliant with his release conditions. In addition to his periodic  
9 ICE check ins, Petitioner has appeared and even testified at his immigration court proceedings.  
7 Ex. A ¶ 5; Ex. B at ¶¶ 6, 9. He has always lived in Oregon, obtained a work permit, and main-  
8 tained employment. Ex. A ¶ 5. He continues to participate heavily in his asylum case as evi-  
9 denced by his recent filing of a notice of appeal. *See* Ex. A ¶ 12; Ex. B at ¶¶ 12–13. By changing  
10 course and now asserting Petitioner is a flight risk, the agency has not "articulated a satisfactory  
11 explanation for its action including a rational connection between the facts found and the choice  
12 made." *Alliance For the Wild Rockies*, 68 F.4th at 493 (cleaned up).

14 Third, an agency decision to detain Petitioner as he seeks review of denial of his asylum  
15 application is also arbitrary and capricious because it involved an unexplained change in agency  
16 policy with no individualized consideration of the factors that the ICE regulations direct immi-  
17 gration officials to consider when determining release—danger and risk of flight. 8 C.F.R.  
18 § 236.1(c)(8); *Y-Z-L-H*, 2025 WL 1898025, at \*7 ("Common sense suggests ... that parole given  
19 only on a case-by-case basis is to be terminated only on such basis."). The order of removal is-  
20 sued on June 30, 2025, was not the first order of removal issued by an IJ in Petitioner's immigra-  
21 tion case. In December 2021, Petitioner and his family were ordered removed when, like on  
22 June 30, 2025, an IJ denied their asylum claim. Ex. B at ¶ 6. Rather than revoke Petitioner's  
23 OREC in 2021, Respondents permitted Petitioner to remain out of custody while he pursued his  
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1 appellate rights. *Id.* There is no change of circumstance between this most recent order of re-  
2 moval and the one issued in 2021 that would justify Petitioner’s detention. In fact, he now has  
3 more ties to the community and, arguably, is less likely to flee because of that. Respondents have  
4 provided no evidence of an “articulation by the agency of *any* reason” for this change of policy,  
5 “let alone a ‘rational basis for its decision.’” *Y-Z-L-H*, 2025 WL 1898025, at \*14. “The law re-  
9 quires a change in relevant facts, not just a change in attitude.” *Valdez*, 2025 WL 1707737, at \*3  
7 n.6 (rejecting the respondents’ argument that a change in government administration, with the  
8 present administration taking on different enforcement priorities, was sufficient to make the peti-  
9 tioner a flight risk). This “unexplained inconsistency” between the agency’s actions related to  
10 Petitioner in 2017 when he was first released on his own recognizance, in 2021 when the IJ de-  
11 nied his asylum request the first time, and on July 1, 2025, when his release was revoked, is an  
12 additional reason to hold that the decision to detain Petitioner is arbitrary and capricious. *See Or-*  
13 *ganized Vill. Of Kake*, 795 F.3d at 966-67 (9th Cir. 2015) (concluding that an unexplained and  
14 conflicting position by the agency was arbitrary and capricious).  
15

16  
17 Finally, Respondents’ revocation of Petitioner’s release is inconsistent with their own in-  
18 ternal regulations and policies. Pursuant to 8 C.F.R. § 236.1(c)(9), a non-citizen’s release under  
19 § 1226(b) “may be revoked” at the discretion of certain explicitly enumerated officers, specifi-  
20 cally, “the district director, acting district director, deputy district director, assistant district direc-  
21 tor for investigations, assistant district director for detention and deportation, or officer in charge  
22 (except foreign).” Petitioner’s Notice of Custody Determination was signed by a SDDO (Super-  
23 visory Detention and Deportation Officer). ECF 31-5. The SDDO is not one of the enumerated  
24 agency actors with authority to revoke Petitioner’s release under the regulations. *See United*  
25  
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1 *States v. Gemmill*, 535 F.2d 1145, 1152 (9th Cir. 1976) (holding that an agency actor not explic-  
2 itly granted authority in an enumerated list of agency actors in the regulation could not be  
3 deemed to have implicit authority to act); *see also United States v. True*, 946 F.2d 682, 686-87  
4 (9th Cir. 1991) (declining to find that subordinate officials had authority absent explicit delega-  
5 tion); *M.S.L. v. Bostock et al.*, 2025 WL 2430267, at \*10 (“In the absence of any evidence that  
9 [Deputy Field Office Director] Johnson had the authority to revoke Petitioner’s release, other  
7 than Johnson’s breezy assertion that he possesses the authority, the Court concludes that Peti-  
8 tioner’s release was not lawfully revoked and that she is entitled to release on that basis alone.”).  
9 ICE acted outside its authority by revoking Petitioner’s release at the discretion of an officer who  
10 has not been explicitly designated the authority to so act. This amounts to a further violation of  
11 the APA.  
12

13 Therefore, in addition to a violation of Petitioner’s due process rights, his detention vio-  
14 lates the Administrative Procedures Act.

15 **D. Recently, many district courts across the country have confronted similar**  
16 **facts and found the re-detention of individuals who had been deemed previ-**  
17 **ously suitable for release by immigration officials to violate the Due Process**  
18 **Clause or the Administrative Procedure Act.**

19 Unfortunately, Petitioner is one of many non-citizens, recently arrested without notice  
20 and without due process, after being determined earlier as suitable for release. The Court should  
21 join district courts across the country and find that Petitioner’s detention is unlawful, and order  
22 his immediate release. Recent cases include:

- 23 • *Jimenez v. Bostock*, 3:25-CV-00570-MTK, 2025 WL 2430381 (D. Or. Aug. 22,  
24 2025): Granting habeas petition and concluding that the revocation of Petitioner’s  
25 conditional parole without an individualized determination was unlawful.  
26

- 1 • *M.S.L. v. Bostock et al.*, No. 6:25-cv-01204-AA, 2025 WL 2430267 (D. Or. Au-  
2 gust 21, 2025): Granting habeas relief when Petitioner’s release was revoked  
3 without adequate notice or an opportunity to be heard and finding the government  
4 violated both due process and the APA.
- 5 • *E.A. T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130 (W.D. Wash.  
6 Aug. 19, 2025): After review of the *Mathews* factors in a case where petitioner  
7 had originally been released under § 1226, the Court granted habeas relief reason-  
8 ing “that Petitioner has a protected liberty interest in his continuing release from  
9 custody, and that due process requires that Petitioner receive a hearing before an  
10 immigration judge before he can be re-detained.”
- 11 • *Lopez Benitez v. Francis*, 25-CV-5937 (DEH), 2025 WL 2371588 (S.D.N.Y. Au-  
12 gust 13, 2025): Granting habeas petition after concluding that ICE violated the  
13 due process rights of petitioner who had originally been released under § 1226 in  
14 2023 but was then rearrested without an individualized determination of why re-  
15 lease should be revoked.
- 16 • *Ramirez-Clavijo v. Kaiser*, No. 25-CV-06248-BLF, 2025 WL 2097467 (N.D. Cal.  
17 July 25, 2025): The *Mathews* balancing tests “require that Petitioner be immedi-  
18 ately released from custody, and that she be given notice and a pre-detention hear-  
19 ing before a neutral decisionmaker before being taken back into custody.”
- 20 • *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238 (D. Mass. July 24,  
21 2025): Denying motion for reconsideration of its order, that the Petitioner, who  
22 had been released on her own recognizance and then arrested after immigration  
23 court, be released with no additional conditions beyond those imposed by the im-  
24 migration judge, in order to “make clear the Petitioner was to be restored to the  
25 state of freedom she enjoyed immediately following the June 3, 2025 hearing, just  
26 prior to her arrest.”
- *Mata Velasquez v. Kurzdorfer*, No. 25-CV-493-LJV, 2025 WL 1953796  
(W.D.N.Y. July 16, 2025): Granting preliminary injunction and ordering release  
after concluding that petitioner was likely to succeed on the merits of his claim  
that, after having been lawfully granted parole, his detention by “about-face” pol-  
icy violates his rights to procedural due process.
- *O-J-M v. Bostock*, No. 3:25-cv-944-AB, 2025 WL 1943008 (D. Or. July 14,  
2025): Granting release after concluding that petitioner’s detention under § 1226,  
after having previously been released under § 1226, violated the due process  
clause.

- 1 • *Chipantiza-Sisalema v. Francis*, No. 25 CIV. 5528 (AT), 2025 WL 1927931  
2 (S.D.N.Y. July 13, 2025): Granting the immediate release of twenty-year-old high  
3 school student arrested after her immigration hearing, holding that “because Re-  
4 spondents’ ongoing detention of Chipantiza-Sisalema with no process at all, much  
5 less prior notice, no showing of changed circumstances, or an opportunity to re-  
6 spond, violates her due process right, her petition must be granted.” (Cleaned up).
- 7 • *Y-Z-L-H v. Bostock*, No. 3:25-CV-965-SI, 2025 WL 1898025 (D. Or. July 9,  
8 2025): Granting habeas petition and ordering release after concluding that ICE’s  
9 arrest and unlawful revocation of petitioner’s parole violated the APA.
- 10 • *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299 (D. Mass. July 7,  
11 2025): Granting habeas petition for noncitizen detained after having previously  
12 been released under § 1226 and ordering a bond hearing where government must  
13 prove that the petitioner poses a danger to the community or a flight risk if it  
14 seeks to continue detaining him.
- 15 • *Valdez v. Joyce*, No. 25 CIV. 4627 (GBD), 2025 WL 1707737 (S.D.N.Y. June 18,  
16 2025): Ordering the immediate release of a man who, after he entered the country  
17 without inspection, was released on his recognizance and ordered to appear at im-  
18 migration court. The Court found his subsequent arrest, after he voluntarily ap-  
19 peared at immigration court, without notice or process, violated the Due Process  
20 Clause.

### 21 Conclusion

22 Petitioner, a 22-year-old asylum seeker with no criminal history, was arrested during a  
23 regular ICE check-in and after nearly eight years of compliance with his release conditions. He  
24 has now been in custody for nearly three months without an opportunity to be heard. In 2017,  
25 when Petitioner entered the United States, ICE determined that he was not a flight risk or a dan-  
26 ger to the community, and his actions since then only provide more support for this fact. Peti-  
tioner’s detention violates the Due Process Clause and the APA. This Court should grant the pe-  
tition, and order Petitioner’s immediate release.

Dated: September 19, 2025.

/s/ Kurt Hermansen

Kurt David Hermansen, CA SBN 166349

/s/ Kara A. Sagi

Kara A. Sagi, AZ SBN 032250

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/s/ J. Leonardo Costales  
J. Leonardo Costales, LA SBN 35721

**Attorneys for Petitioner**

*I certify that this Reply in Support of Amended Habeas Petition contains 7,934 words in compliance with the Local Civil Rules.*