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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

KHALID FAWZI ZAKZOUK,

Petitioner-Plaintiff,

v.

MOISES BECERRA, Acting Field Office Director of the San Francisco Immigration and Customs Enforcement Office;

TODD LYONS, Acting Director of United States Immigration and Customs Enforcement;

KRISTI NOEM, Secretary of the United States Department of Homeland Security;

PAM BONDI, Attorney General of the United States,

Respondents-Defendants.

CASE NO. 4:25-cv-06254-KAW

RESPONDENTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Date: October 2, 2025
Time: 1:30 p.m.
Courtroom: Oakland Courthouse
1301 Clay Street
Oakland, California 94612

Honorable Kandis A. Westmore
United States Magistrate Judge

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Respondents, Moises Becerra, Todd Lyons, Kristi Noem, and Pam Bondi (collectively, "Respondents"), respectfully submit the following opposition to oppose Petitioner, Khalid Fawzi Zakzouk's ("Petitioner"), motion for a temporary restraining order. *See* Pet.'s Mot. for TRO ("Mot."), ECF No. 2.

I. INTRODUCTION

In this habeas case, Petitioner, Khalid Fawzi Zakzouk ("Petitioner"), a stateless former resident of Saudi Arabia, seeks an order enjoining Respondents from re-arresting and re-detaining him pending further order of this Court. *See* Mot. at 1, 31. Following Petitioner's multiple arrests and incarcerations over several years for crimes pertaining to possessing illegal drugs, distributing illegal drugs, possessing firearms, receiving stolen property, and resisting or obstructing law enforcement, an Immigration Judge ordered Petitioner removed from the United States to Saudi Arabia, with Egypt as an alternative. An Immigration Judge later denied Petitioner's attempt to reopen his immigration proceedings. Petitioner is currently living in the United States with a final order of removal.

Yet Petitioner is not in custody and has not been re-detained by U.S. Immigration and Customs Enforcement ("ICE"). There is no evidence that ICE intended to re-arrest or re-detain him, and Petitioner cites nothing to the contrary in either his writ of habeas corpus or motion for a temporary restraining order. *See generally* Mot. and Pet. For Writ of Habeas Corpus ("Pet"), ECF No. 1. Notwithstanding this lack of evidence, Petitioner claims that there is a "strong likelihood" that he will be arrested, detained, and removed to a third country. *See* Mot. at 3, 9, 11. Petitioner's claims are speculative.

The Court should deny Petitioner's motion for a temporary restraining order for several reasons. First, this Court lacks jurisdiction. Petitioner's claim is not a cognizable habeas claim, as it seeks to enjoin his arrest or require a pre-deprivation hearing, not a release from custody. *See* Mot. at 1, 11, 31. Second, at least three provisions of the Immigration and Nationality Act ("INA") deprive this Court of jurisdiction over Petitioner's claims seeking to delay his removal while ICE complies with additional procedures. For instance, 8 U.S.C. § 1252(g) strips federal courts of jurisdiction over "any cause or claim" arising from the execution of removal orders, which Petitioner's claims plainly do. Likewise, this Court lacks jurisdiction under 8 U.S.C. §§ 1252(a)(5), (b)(9), and (a)(4) because, if Petitioner seeks to make a fear claim related to

his third country removal, he can and must bring that claim in immigration court and, if necessary, the appropriate Court of Appeals—not a District Court. The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") also independently forecloses Petitioner's claims seeking additional procedures not provided by Congress' implementation of the Convention Against Torture ("CAT").

Next, Petitioner has not shown a likelihood of success on the merits of his claims. Petitioner has no due process right to any further procedures, including a pre-detention hearing, regarding his removal from the United States. His detention is statutorily authorized by 8 U.S.C. § 1231(a)(6) to execute his removal from the United States. He will receive sufficient process during any such detention via the Post Order Custody Regulations in 8 C.F.R. § 241.4, which set forth specific criteria that should be weighed in considering whether to recommend further detention beyond the removal period set in 8 U.S.C. § 1231. There is simply no basis to conclude that Petitioner is entitled to any additional process during or before any hypothetical detention to execute his valid, final order of removal.

Finally, Petitioner's claims are speculative and not ripe for adjudication. Again, Petitioner is not in custody, and he has not been re-detained. There is no evidence that ICE intended to take him into custody on any of the days referenced in his motion or habeas petition. Petitioner has cited none.

II. LEGAL FRAMEWORK

A. Removal Proceedings.

Under the INA, several classes of aliens are "inadmissible" and therefore "removable." *See* 8 U.S.C. §§ 1182, 1229a(e)(2)(A). These include aliens that lack a valid entry document "at the time of application for admission," 8 U.S.C. § 1182(a)(7)(A)(i)(I), when they arrive at a "port of entry," or when they are found present in the United States, 8 U.S.C. §§ 1225(a)(1), (3). If an alien is inadmissible, the alien is subject to removal from the United States. In removal proceedings pursuant to 8 U.S.C. § 1229a, an alien may attempt to show that he or she should not be removed. Among other things, an eligible alien may apply for asylum on the ground that he or she would be persecuted on a statutorily protected ground if removed to a particular country. 8 U.S.C. §§ 1158, 1229a(b)(4); 8 C.F.R. § 1240.11(c).

Under 8 U.S.C. § 1231(a)(5), the United States Department of Homeland Security ("DHS") may reinstate a prior order of removal for an alien it finds "has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." 8 U.S.C. § 1231(a)(5). When DHS reinstates a removal order, the "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." *Id.*

If an alien expresses fear of persecution or torture, the alien may seek withholding or deferral of removal under 8 U.S.C. § 1231(b)(3) or regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85—a treaty that addresses the removal of aliens to countries where they would face torture. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822; 8 C.F.R. 208.31, 241.8(e). "Torture" is defined as an "extreme form of cruel and inhuman treatment," which intentionally inflicts "severe pain or suffering" on another for an improper purpose, and is performed "at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity." 8 C.F.R. 208.18(a)(1) and (a)(2); *see, e.g., Del Carmen Amaya De Sicaran v. Barr*, 979 F.3d 210, 218-219 (4th Cir. 2020) (torture is a "high bar"). If an asylum officer determines that the alien has established a reasonable fear of persecution or torture, the alien is referred to the Immigration Judge for consideration of withholding of removal only (aliens with reinstated orders of removal are not eligible for asylum). 8 C.F.R. § 208.31(e). In withholding-only proceedings, the Immigration Judge is limited to consideration of eligibility for withholding and deferral of removal. 8 U.S.C. § 1231(a)(5) (providing that an alien subject to reinstatement "is not eligible and may not apply for any relief under [the INA]"); 8 C.F.R. § 1208.2(c)(3)(i) ("The scope of review in [withholding-only] proceedings . . . shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal."). Indeed, during withholding-only proceedings, "all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." *Id.*

CAT protection or withholding under Section 1231(b)(3) does not alter *whether* an alien may be removed; it affects only *where* an alien may be removed to. That is, a grant of CAT protection "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country." *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020). The United States remains free to remove that alien "at any time to another country where he or she is not likely to be tortured." *Id.* (citation omitted); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Thus, the alien remains removable as an alien with a final order of removal.

B. Third Country Removals.

Aliens subject to removal orders need not be removed to their native country. Generally, aliens ordered removed "may designate one country to which the alien wants to be removed," and DHS "shall remove the alien to [that] country[.]" 8 U.S.C. § 1231(b)(2)(A). In certain circumstances, however, DHS need not remove the alien to his or her designated country, including where "the government of the country is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(C)(iii). In such a case, the alien "shall" be removed to the alien's country of nationality or citizenship, unless that country "is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(D). If an alien cannot be removed to the country of designation, or to the country of nationality or citizenship, then the Government may consider other options, including "[t]he country from which the alien was admitted to the United States," "[t]he country in which the alien was born," or "[t]he country in which the alien last resided." 8 U.S.C. §§ 1231(b)(2)(E)(i), (iii)-(iv).

Where removal to any of the countries listed in subparagraph (E) is "impracticable, inadvisable, or impossible," then the alien may be removed to any "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(2)(E)(vii); *see Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). In addition, DHS "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). "The Judiciary is not suited to second-guess" determinations about "whether there is a serious prospect of torture at the hands of" a foreign sovereign. *Munaf v. Geren*, 553 U.S. 674, 702 (2008); *see Kiyemba v.*

Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) ("Under *Munaf*, . . . the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee.").

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). The custody requirement may be satisfied if a Petitioner is not actually confined, but is nonetheless subject to significant restraint on liberty "not shared by the public generally." *Jones v. Cunningham*, 371 U.S. 236, 239–40 (1963).

D. Temporary Restraining Orders and Preliminary Injunctions.

The substantive standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Preliminary injunctions are "never awarded as of right." *Id.* at 24.

"A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) and *Winter*, 555 U.S. at 20). Alternatively, a plaintiff can show that there are "'serious questions going to the merits' and the 'balance of hardships tips sharply towards' [plaintiff], as long as the second and third *Winter* factors are [also] satisfied." *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)). "[P]laintiffs seeking a preliminary injunction face a difficult task in proving that they are entitled to this 'extraordinary remedy." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Petitioner's burden is aptly described as a "heavy" one. *Id.*

The purpose of a preliminary injunction "is to preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). A preliminary injunction may not be used to obtain "a preliminary adjudication on the merits," but only to preserve the status quo before judgment. *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

Accordingly, where a petitioner seeks mandatory injunctive relief—seeking to alter the status quo—"courts should be extremely cautious." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319–20 (9th Cir. 1994). A mandatory injunction "goes well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored." *Id.* at 1320 (internal quotations and alteration omitted). A mandatory injunction "should not be issued unless the facts and law clearly favor the moving party." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Id.* at 1115. Accordingly, the party seeking a mandatory injunction "must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Garcia,* 786 F.3d at 740 (emphasis in original).

III. FACTUAL BACKGROUND

A. Petitioner Entered the United States and Committed Several Crimes Resulting in Multiple Incarcerations.

Petitioner is stateless with a last habitual residence of Saudi Arabia. *See* Declaration of Glorimar Alvarez ("Alvarez Decl.") at ¶ 5. In 1988, Petitioner entered the United States as a nonimmigrant student. *See id.* at ¶ 18, Ex. 2. Thereafter, Petitioner committed several serious crimes that resulted in him being incarcerated multiple times. *See id.* at ¶¶ 10-17.

On May 9, 1994, Petitioner was convicted of possessing drug paraphernalia in violation of Wisconsin Statute 161.573. *See id.* at ¶¶ 10, 18, Ex. 3. Petitioner was ordered to pay fines because of his conviction. *See id.* On November 17, 1994, Petitioner was arrested for possession with the intent to deliver non-narcotics in violation of Wisconsin Statute 161.41(1M)(B). *See id.* at ¶¶ 11, 18, Ex. 3. He was also arrested for possession with the intent to deliver or manufacture a controlled substance in violation of Wisconsin Statute 161.41(1M). However, it is unclear whether Petitioner was convicted of either arrest.

On July 16, 1997, Petitioner was convicted of possession of tetrahydrocannabinols in violation of Wisconsin Statute 961.41(3g)(e). *See id.* at ¶¶ 12, 18, Ex. 3. Petitioner was sentenced to two days in jail and ordered to pay fines. *See id.*

On November 8, 1998, Petitioner was arrested for theft in violation of Wisconsin Statute 943.20. *See id.* at ¶¶ 13, 18, Ex. 3. That same day, Petitioner was arrested for theft of movable property in violation of Wisconsin Statute 943.20(1)(a). *See id.* But the charges brought against Petitioner were eventually dismissed. *See id.*

On January 19, 2000, Petitioner was arrested for operating a vehicle after his license was suspended or revoked. *See id.* at ¶¶ 15, 19, Ex. 3. Less than six months later, Petitioner was arrested for loitering. *See id.* at ¶¶ 15, 18, Ex. 3. It is unclear whether Petitioner was charged or sentenced for those crimes. *See id.*

On June 2, 2001, Petitioner was convicted of receiving stolen property in violation of Wisconsin Statute 943.34(1)(a). *See id.* at ¶¶ 16, 18, Ex. 3. The same day, Petitioner was convicted of resisting or obstructing a law enforcement officer in violation of Wisconsin Statute 649.41(1). *See id.* Petitioner was sentenced to nine months in jail and 18 months of probation. *See id.*

On January 28, 2003, Petitioner was convicted of illegally possessing a firearm in violation of Wisconsin Statute 941.29(2). *See id.* at ¶¶ 17, 19, Ex. 3. Petitioner was sentenced to 261 days in jail and ordered to pay costs. *See id.*

B. The Immigration Judge Ordered Petitioner Removed from the United States.

On May 13, 1998, Respondents initiated removal proceedings against Petitioner. *See id.* at ¶¶ 6, 18, Ex. 2. On February 11, 1999, Petitioner requested an opportunity to apply for asylum and the cancellation of his removal. *See id.* But Petitioner failed to appear for his court hearing on those matters. *See id.*

On January 24, 2000, an Immigration Judge ordered Petitioner removed from the United States to Saudi Arabia or Egypt in the alternative. *See id.* at ¶¶ 5, 18, Ex. 1. As of that date, the Immigration Judge found that Petitioner's claims for asylum and withholding of removal were withdrawn. *See id.* After he

was ordered removed, Petitioner filed a motion to open his immigration proceedings with the immigration court. *See id.* at ¶¶ 6, 18, Ex. 2. The Immigration Judge denied Petitioner's motion. *See id.*

C. Respondents Had No Intention of Detaining or Arresting Petitioner at His Administrative Check-In Appointments.

Under his Order of Supervision, Petitioner must regularly check in with Enforcement and Removal Operations ("ERO"). *See* Mot. at 1. On July 17, 2025, Petitioner appeared at the ERO San Francisco Field Office for his yearly check-in. *See* Alvarez Decl. ¶ 7. ERO asked Petitioner to return to the office on July 21, 2025, to fill out a travel document request form. *See id.* ERO had no intention of taking Petitioner into ICE custody at his check-in appointment on July 17, 2025. *See id.*

On July 21, 2025, the date Petitioner was required to fill out a travel document, Petitioner's wife appeared for him at the ERO San Francisco Field Office. *See id.* at ¶ 8. Petitioner's wife told ERO that Petitioner's attorney was not present. *See id.* Petitioner asked to report to the ERO San Francisco Field Office on July 28, 2025. *See id.* ERO agreed to allow Petitioner to return on July 28, 2025. *See id.* ERO had no intention of taking Petitioner into ICE custody at his check-in appointment on July 21, 2025. *See id.*

On July 28, 2025, Petitioner appeared at the San Francisco Field Office to fill out the travel document request form. *See id.* at ¶ 10. ERO gave Petitioner the form and asked him to return the completed form on October 28, 2025. *See id.* ERO had no intention of taking Petitioner into ICE custody at his check-in appointment on July 28, 2025. *See id.*

IV. PROCEDURAL HISTORY.

Petitioner commenced this action on July 25, 2025, by filing a petition for writ of habeas corpus, ECF No. 1, and moving this Court *ex parte* for a temporary restraining order, ECF No. 2. The next day, on July 26, 2025, the Court granted Petitioner's *ex parte* temporary restraining order. ECF No. 3. The Court enjoined the Government from "re-detaining Petitioner-Plaintiff without notice and a pre-deprivation hearing before a neutral decisionmaker." *See id.* at 7. The Court scheduled an in-person hearing on August 6, 2025, for the Government to show cause why a preliminary injunction should not issue, and extended the order granting the TRO until 5:00 p.m. on the date of the hearing. *See id.* at 7-8.

On July 29, 2025, Petitioner and Respondents filed a stipulated joint request to set a briefing schedule for the temporary restraining order and continue the hearing for the temporary restraining order. *See* ECF No. 12. The next day, on July 30, 2025, the Court granted Petitioner and Respondents' stipulated joint request to set a briefing schedule and continued the in-person hearing on the temporary restraining order until September 4, 2025, at 1:30 p.m. in Oakland, California. *See* ECF No. 13. Petitioner and Respondents stipulated that the Court's prior order on the temporary restraining order will remain in effect until the Court issues a further order after briefing and a hearing. *See id.*

V. THE COURT LACKS JURISDICTION TO STAY PETITIONER'S REMOVAL.

A. Petitioner's Claim Is Not a Cognizable Habeas Petition Because It Does Not Seek a Release from Custody.

Habeas relief is an appropriate request when an individual is detained and requesting release from that detention. U.S. CONST. Art. 1, § 9, Cl. 2; 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody "); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117–18 (2020) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [] the traditional function of the writ is to secure release from illegal custody."). An individual does not need to be in actual physical custody to seek habeas relief; the "in custody" requirement may be satisfied where an individual's release from detention is subject to specific conditions or restraints. *See Dow v. Cir. Ct. of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (holding that release subject to mandatory attendance at alcohol rehabilitation classes constituted "custody" for habeas purposes). Even if Petitioner were to meet the "in custody" requirement because he is subject to certain conditions of release—such as reporting annually to an ICE office—this habeas petition does not purport to challenge that custodial arrangement or secure his release from any *present* "custody." Indeed, Petitioner has sworn that he has "always complied with ICE's reporting requirements and will continue to do so." *See* Mot. at 2, 4, 8. *Cf. Doe v. Garland*, 109 F.4th 1188, 1191–93 (9th Cir. 2024) (petition seeking individualized bond hearing sought conditional release from custody). In sum, Petitioner is not in physical custody and is not challenging restraints on his freedom. Thus, Petitioner does not seek a remedy that

sounds in habeas. Rather, Petitioner seeks an injunction to prevent his future arrest and the possibility of future detention.[1]

B. 8 U.S.C. § 1252(g) Bars Review of Petitioner's Challenges to the Execution of His Removal Order.

Petitioner's claim seeking a stay of removal pending the completion of extra-statutory procedures to remove him is barred by 8 U.S.C. § 1252(g). Congress spoke clearly that "no court" has jurisdiction over "any cause or claim" arising from the execution of removal orders, "notwithstanding any other provision of law," whether "statutory or nonstatutory," including habeas, mandamus, or the All Writs Act. 8 U.S.C. § 1252(g). Accordingly, by its terms, this jurisdiction-stripping provision precludes habeas review under 28 U.S.C. § 2241 (as well as review pursuant to the All Writs Act and Administrative Procedure Act) of claims arising from a decision or action to "execute" a final order of removal. *See Reno v. American-Arab Anti-Discrimination Committee* ("AADC"), 525 U.S. 471, 482 (1999).

Petitioner's claims arise from his concerns about the execution of his removal order. Indeed, his petition seeks to require ICE to provide him with additional procedures not authorized by statute or regulation prior to his removal or even any arrest to effectuate his removal. *See* Mot. at 1, 14, 17; *see also* Pet's Proposed Order Granting Mot. for TRO.

But numerous courts of appeals, including the Ninth Circuit, have consistently held that claims seeking a stay of removal—even temporarily to assert other claims to relief—are barred by Section 1252(g). *See Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) (holding Section 1252(g) barred plaintiff's claim seeking a temporary stay of removal while he pursued a motion to reopen his immigration proceedings); *Camarena v. Dir., ICE*, 988 F.3d 1268, 1274 (11th Cir. 2021) ("[W]e do not have jurisdiction to consider 'any' cause or claim brought by an alien arising from the government's decision to execute a removal order. If we held otherwise, any petitioner could frame his or her claim as an attack on

[1] To the extent Petitioner's claim is considered a cognizable habeas claim based on the fiction of seeking release from his hypothetical future detention, this Court would not have jurisdiction to consider that claim because any such detention would not be in the Northern District of California. *See* https://www.ice.gov/detention-facilities (filtered by California, San Francisco Field Office) (last visited Aug. 22, 2025); *Doe*, 109 F.4th at 1199 ("core habeas petitions must be filed in the district of confinement").

the government's authority to execute a removal order rather than its execution of a removal order."); *E.F.L. v. Prim*, 986 F.3d 959, 964-65 (7th Cir. 2021) (rejecting plaintiff's argument that jurisdiction remained because petitioner was challenging DHS's "legal authority" as opposed to its "discretionary decisions"); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 297 (3d Cir. 2020) (observing that "the discretion to decide whether to execute a removal order includes the discretion to decide when to do it" and that "[b]oth are covered by the statute") (emphasis in original); *Hamama v. Adducci*, 912 F.3d 869, 874–77 (6th Cir. 2018) (vacating district court's injunction staying removal, concluding that § 1252(g) stripped district court of jurisdiction over removal-based claims and remanding with instructions to dismiss those claims); *Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017) (Section 1252(g) applies to constitutional claims arising from the execution of a final order of removal, and language barring "any cause or claim" made it "unnecessary for Congress to enumerate every possible cause or claim").

Petitioner's claims are similar to the alien plaintiff's claims in *Rauda* wherein the Ninth Circuit held that a district court lacked jurisdiction to stay removal while the plaintiff pursued a motion to reopen his immigration proceedings. *Rauda*, 55 F.4th at 775–78. In *Rauda*, like this case, a Salvadoran immigrant had pled guilty to charges of being involved in a gang shooting. *Id.* at 775-76. After he was released from prison, an immigration judge ordered him removed to El Salvador and denied him relief under the CAT. Id. at 776. After the political situation in El Salvador changed, he moved to reopen his immigration case and then filed a habeas petition in district court to obtain a stay of removal while his motion to reopen was being considered. *Id.* The district court denied his motion for a temporary restraining order on the grounds that 8 U.S.C. § 1252(g)'s jurisdictional limits barred his claims. *Id.* The Ninth Circuit affirmed and explained: "No matter how [plaintiff] frames it, his challenge is to the Attorney General's exercise of his discretion to execute Matias's removal order, which we have no jurisdiction to review." *Id.* at 778. Here, Petitioner also seeks to stay his removal pending further immigration court proceedings. The Court should follow the Ninth Circuit's *Rauda* decision and deny his claims.

C. 8 U.S.C. §§ 1252(a)(5) and (b)(9) Channel All Challenges to Removal Orders and Removal Proceedings to the Courts of Appeals.

Even if Section 1252(g) of the INA did not bar review—which it does—Sections 1252(a)(5) and 1252(b)(9) of the INA bar review in this Court. By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2). The statute explicitly excludes review via "section 2241 of Title 28, or any other habeas corpus provision." 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) then eliminates this Court's jurisdiction over Petitioner's claims by channeling "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien" to the courts of appeals. 8 U.S.C. § 1252(b)(9). Again, the law is clear that "no court shall have jurisdiction, by habeas corpus" or other means. *Id.* (emphasis added).

Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all" claims arising from deportation proceedings to a court of appeals in the first instance. *AADC*, 525 U.S. at 483. Under Ninth Circuit law, "[t]aken together, §[§] 1252(a)(5) and [(b)(9)] mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016); *see id.* at 1035 ("§§ 1252(a)(5) and 1252(b)(9) channel review of all claims, including policies-and- practices challenges, through the PFR process whenever they 'arise from' removal proceedings").

Here, the gravamen of Petitioner's habeas petition is that he seeks to prevent ICE from detaining him and removing him to a third country. Mot. at 1, 5, 31. Therefore, Petitioner's claims are barred under Sections 1252(a)(5) and (b)(9) because they "aris[e] from . . . proceeding[s] brought to remove an alien from the United States" and further challenge "any *action taken* . . . to remove an alien from the United States." 8 U.S.C. § 1252(b)(9) (emphasis added). Rather than petition the relevant court of appeals, Petitioner chose to file a habeas petition in this Court to challenge his removal. *See generally* Mot.; *see also* Pet. That is precisely what the INA forbids. *See J.E.F.M.*, 837 F.3d at 1031. Petitioner is not detained and under no imminent threat of being removed to a third country. He could, at any time, move to reopen

his immigration court proceedings claiming fear of removal to any third country. 8 C.F.R. § 1003.23; *Rubalcaba v. Garland*, 998 F.3d 1031, 1034–35 (9th Cir. 2021) (holding that the post-departure bar does not apply to the immigration court's sua sponte authority to reopen proceedings); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (allowing review of the denial of a *sua sponte* motion to reopen for "legal or constitutional error"). His refusal to do so does not vest this Court with jurisdiction.[2]

D. The Foreign Affairs Reform and Restructuring Act of 1998 Also Precludes Petitioner's Claims.

In addition, Petitioner's claims run afoul of Section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which implements Article 3 of CAT and provides that:

> Notwithstanding any other provision of law, and except as provided [by regulation], *no court shall have jurisdiction to review the regulations adopted to implement this section*, and *nothing in this section shall be construed as providing any court jurisdiction to consider or review* claims raised under the Convention or this section[.]

FARRA § 2242(d), codified at 8 U.S.C. § 1231 (note) (emphasis added). *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 959 (9th Cir. 2012) (concurrence, discussing same).

Any judicial review of any claim arising under CAT is available, if at all, exclusively on an individualized basis "as part of the review of a final order of removal" in the courts of appeals. *See* 8 U.S.C. § 1252(a)(4). *Cf. Nasrallah*, 590 U.S. at 580 (discussing FARRA). Under FARRA, "no court"—and certainly not a district court—has jurisdiction to review DHS's implementation of CAT. Yet that is precisely what Petitioner seeks here by asking the Court to order ICE to comply with additional procedures so that Petitioner may seek withholding of removal under CAT to a third country. *See* Mot. at 11, 24-28, 31. Notably, CAT is not self-executing. *See Borjas-Borjas v. Barr*, No. 20-cv-0417, 2020 WL

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[2] To the extent Petitioner argues that a motion to reopen proceedings would be unduly burdensome, while the Government does not endorse or vouch for the information contained in the following source, the Government notes that the National Immigration Litigation Alliance issued a practice advisory regarding the motion to reopen process for aliens like Petitioner including template motions to reopen and letters to DHS to assert fear of return to third countries. *See* National Immigration Litigation Alliance, New Advisory: Protecting Noncitizens Granted Withholding of Removal or CAT Protection Against Deportation to Third Countries Where They Fear Persecution/Torture, *available at* https://immigrationlitigation.org/new-advisoryprotecting-noncitizens-granted-withholding-of-removal-or-cat-protection-against-deportation-to-third-countries-where-they-fear-persecution-torture/, (last visited Aug. 22, 2025).

13544984, at *5 (D. Ariz. Oct. 6, 2020) (discussing same). Its effect, if any, depends on implementation via domestic law. Congress thus worked well within its authority to limit judicial review of CAT regulations and CAT claims. Because Petitioner seeks additional procedures beyond what CAT provides, he is challenging the implementation of CAT as applied to him—which FARRA bars—and this Court should dismiss his petition and deny his motion for a temporary restraining order.

VI. PETITIONER IS NOT ENTITLED TO INJUNCTIVE RELIEF.

A. Petitioner Is Not Likely to Succeed on the Merits, nor Has He Raised Serious Questions Going to the Merits of His Claims.

The Court should deny Petitioner's motion for a temporary restraining order because Petitioner has not demonstrated likelihood of success on the merits. Nor has Petitioner raised "serious questions" about the merits. Petitioner has not been detained, and he does not have the due process right to a pre-deprivation hearing. *See generally* Mot. Petitioner is asking the Court to create a procedure that does not exist in any statute or regulation by requiring a pre-deprivation hearing while he is not in custody.

1. Petitioner's Detention is Authorized by 8 U.S.C. § 1231(a)(6).

Petitioner's claim is premature, as he has not been re-arrested,[3] and, even if he were, it would be constitutional to re-detain him. The Supreme Court has unambiguously upheld detention pending an alien's removal. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (an alien is not entitled to habeas relief after the expiration of the presumptively reasonable six-month period of detention under § 1231(a)(6) unless he can show the detention is "indefinite"—*i.e.*, that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."). Here, Petitioner, who has not been detained, cannot show that he is subject to prolonged detention or that his removal is unlikely to occur in the reasonably foreseeable future. Petitioner even concedes that he has not been detained since 2008. *See* Mot. at 8.

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[3] To be reviewable under the APA, the decision under review must be a "final agency action." 5 U.S.C. § 704. This finality requirement is a "prerequisite to review" of any APA claim. *Dalton v. Specter,* 511 U.S. 462, 469 (1994). A district court lacks jurisdiction to review an APA claim absent final agency action. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2004). Petitioner has filed this action in anticipation of a possible future action; he has failed to identify any agency action or failure to act that has actually occurred.

The purpose of Section 1231(a)(6) detention is to effectuate removal. *See Demore v. Kim*, 538 U.S. 510, 527 (2003) (analyzing *Zadvydas* and explaining the removal period was based on the "reasonably necessary" time in order "to secure the alien's removal"). To the extent Petitioner ever had a procedural due process interest in his release, that interest terminated when the IJ ordered his removal. *See* Alvarez Decl. ¶¶ 6, 19, Ex. 1. Should ICE detain Petitioner in the future, which at this juncture remains speculative, his detention would be authorized under Section 1231(a)(6) to effectuate his removal to a third country unless and until there was "no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 690–92, 699.

Here, Petitioner is subject to *post*-final order detention under Section 1231(a)(6). The purpose of that detention is to effectuate removal—not to ensure presence at pending removal proceedings, as might be the case with other statutes. Therefore, Petitioner has no basis to assert a procedural due process right to his prior bond, or for an additional hearing, because he has a final order of removal, and any detention would be to effectuate his removal to a third country.

2. Petitioner Is Not Entitled to a Pre-Deprivation Hearing.

The Due Process Clause does not prohibit ICE from re-detaining Petitioner, and there is no statutory or regulatory requirement that entitles Petitioner to a "pre-deprivation" hearing. *See generally* 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4. The Supreme Court has warned courts against reading additional procedural requirements into the INA. *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 582 (2022) (declining to read a specific bond hearing requirement into 8 U.S.C. § 1231(a)(6) because "reviewing courts . . . are generally not free to impose [additional procedural rights] if the agencies have not chosen to grant them") (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (cleaned up)). Thus, Petitioner can cite no liberty or property interest to which due process protections attach.

Petitioner's reliance on *Morrisey v. Brewer*, 408 U.S. 471 (1972) and its progeny is misplaced. *See* Mot. at 15-21. *Morrissey* arose from the due process requirement for a hearing for revocation of parole. *Id.* at 472–73. It did not arise in the context of immigration. Moreover, in *Morrissey*, the Supreme Court reaffirmed that "due process is flexible and calls for such procedural protections as the particular situation

demands." *Id.* at 481. In addition, the "[c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function." *Id.* With respect to the precise nature of the government function, the Supreme Court has long held that "Congress regularly makes rules" regarding immigration that "would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). Under these circumstances, Petitioner does not have a cognizable liberty interest, or even assuming he had one, it would be reduced based on the immigration context.

The procedural process provided to Petitioner, if re-arrested, is constitutionally adequate in the circumstances and no additional process is required. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the [Fifth Amendment] Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

To determine whether procedural protections satisfy the Due Process Clause, courts consider three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The first *Mathews* factor favors Respondents. The Supreme Court has long recognized that due process as applied to aliens in matters related to immigration does not require the same strictures as it might in other circumstances. In *Mathews v. Diaz*, the Court held that, when exercising its "broad power over naturalization and immigration, Congress regularly makes rules [regarding aliens] that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79–80. In *Demore*, the Court likewise recognized that the liberty interests of aliens are subject to limitations not applicable to citizens. 538 U.S. at 522. Accordingly, while the Ninth Circuit has recognized the individuals subject to immigration detention possess at least a limited liberty interest, it has also recognized that aliens' liberty interests are less than

full. *See Diouf v. Napolitano*, 634 F.3d 1081, 1086–87 (9th Cir. 2011). Because Petitioner's liberty interest is less than that at issue in *Morrissey*, this factor does not indicate that Petitioner must be afforded a pre-re-arrest hearing. *See* Mot. at 1, 11, 14-17.

The second *Mathews* factor also favors Respondents. Under the existing procedures, aliens including Petitioner face little risk of erroneous deprivation. As explained above in § VI.A.1, there is no risk of erroneous detention because Petitioner is subject to a removal order, and Section 1231(a)(6) unquestionably authorizes Petitioner's detention to execute his final removal order to a third country.

And, if Petitioner were to be re-arrested and taken into custody, ICE would be required to apply additional procedural safeguards to prevent erroneous deprivation of rights under 8 C.F.R. § 241.4. These regulations require, among other things, periodic custody reviews in which Petitioner will have the opportunity to submit documents in support of his release to include documentation about flight risk and dangerousness. *See generally* 8 C.F.R. § 241.4(e)–(f) (listing factors to be considered in custody determinations). These procedures are more than adequate and unquestionably provide Petitioner notice and opportunity to be heard at the start of and throughout any future detention.

The third *Mathews* factor—the value of additional safeguards relative to the fiscal and administrative burdens that they would impose—weighs heavily in favor of Respondents. Petitioner's proposed safeguard—a hearing before a neutral adjudication or decisionmaker—adds little value to the system already in place in which he will receive periodic reviews to ensure his removal remains reasonably foreseeable and in which the entire purpose of his detention is to effectuate his removal.

Here, Petitioner is subject to a final order of removal. *See* Alvarez Decl. ¶¶ 6, 19, Ex. 1. The effect of the requested pre-deprivation hearing would be to delay execution of his final order of removal. Thus, Petitioner essentially posits that DHS must provide him a hearing before it may detain him to remove him. Petitioner essentially seeks a judicially created stay of the execution of a final removal order.

Accordingly, Petitioner's proposed safeguard would disrupt the removal process. Because the hearing Petitioner proposes would, by definition, involve a non-detained individual, there would be hurdles to efficiently scheduling a hearing. There is no administrative process in place for giving an alien with a final order of removal a hearing resembling a bond hearing before an immigration judge.

Petitioner's proposed safeguard presents an unworkable solution to a situation already addressed by the current procedures. *See* 8 C.F.R. § 241.4.

Even in non-immigration contexts, courts have recognized that pre-deprivation process may be unwarranted, particularly where there is a need for prompt government action. "The necessity of quick action can arise where the government has an interest in protecting public health and safety." *Lamoreaux v. Kalispell Police Dep't*, No. 16-cv-0089, 2016 WL 6078274, at *4 (D. Mont. Oct. 17, 2016) (citing *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)), *report and recommendation adopted*, 2016 WL 6634861 (D. Mont. Nov. 8, 2016). *Cf. Edmondson v. City of Boston*, 1990 WL 235426, at *2 (D. Mass. Dec. 20, 1990) (noting that "[i]n the context of an arrest . . . quick action is necessary and predeprivation process is, at best, impractical and unduly burdensome").

The INA does not provide for a pre-deprivation hearing. *See, e.g.*, 8 U.S.C. § 1231. Requiring a pre-deprivation hearing for individuals with final removal orders would impair law enforcement, including because it would increase the risk of flight.

Respondents recognize that Petitioner is making an individualized challenge here. However, the additional procedure he requests would have a significant impact on the removal system. It would require ICE and the Executive Office for Immigration Review to set up a novel administrative process for Petitioner who—for all intents and purposes—represents a large portion of the final order alien population. Therefore, considering all of the *Mathews* factors together, due process does not require a pre-deprivation hearing.

B. Petitioner Cannot Meet His Burden to Show Irreparable Harm.

The Court should deny Petitioner's motion, because Petitioner "must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). The "possibility" of injury is "too remote and speculative to constitute an irreparable injury meriting preliminary injunctive relief." *Id.* "Subjective apprehensions and unsupported predictions . . . are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Id.* at 675–76.

Petitioner's contentions regarding the possibility of detention and deportation to a third country does not "rise to the level of "'immediate threatened injury' that is required to obtain a preliminary injunction." *Slaughter v. King County Corr. Facility*, No. 05-cv-1693, 2006 WL 5811899, at *4 (W.D. Wash. Aug. 10, 2006), *report and recommendation adopted*, 2008 WL 2434208 (W.D. Wash. June 16, 2008) ("Plaintiff's argument of possible harm does not rise to the level of 'immediate threatened injury'"). Moreover, while Petitioner argues that being detained would cause irreparable harm, "there is no constitutional infringement if restrictions imposed" are "but an incident of some other legitimate government purpose." *Id.* (citing, *e.g., Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). "In such a circumstance, governmental restrictions are permissible." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 747, (1987)).

Petitioner argues that there are "only two legitimate purposes for immigration detention: mitigating flight risk and preventing danger to the community." *See* Mot. at 4. But Petitioner disregards an additional legitimate purpose of detention: enforcement of a removal order. Section 1231(a) "authorizes the detention of noncitizens who have been ordered removed from the United States." *Arteaga-Martinez*, 596 U.S. at 575. Indeed, "[t]he statute provides that the Government 'shall' detain noncitizens during the statutory removal period." *Id.* at 578 (citing 8 U.S.C. § 1231(a)(2)).

In this case, Petitioner cannot show that denying the temporary restraining order would make "irreparable harm" the likely outcome. *Winter*, 555 U.S. at 22 ("[P]laintiffs . . . [must] demonstrate that irreparable injury is likely in the absence of an injunction.") (emphasis in original). "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Petitioner cannot establish that irreparable harm is likely to occur if he is not provided a hearing.

C. The Equities and Public Interest Do Not Favor Petitioner.

The third and fourth factors, "harm to the opposing party" and the "public interest," "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "In exercising their sound discretion, courts of equity 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).

An adverse decision here would negatively impact the public interest by jeopardizing "the orderly and efficient administration of this country's immigration laws." *See Sasso v. Milhollan*, 735 F. Supp. 1045, 1049 (S.D. Fla. 1990); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

The public has a legitimate interest in the government's enforcement of its laws. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal."). Respondents acknowledge Petitioner's submissions regarding his efforts to support his family. Given Petitioner's undisputed, extensive criminal history involving drugs, theft, resisting or obstructing law enforcement, the public and governmental interest in permitting his potential detention is significant. *See* Alvarez Decl. ¶¶ 11-19, Ex. 3.

While it is in the public interest to protect constitutional rights, Petitioner has not shown that the violation of any constitutional rights is likely to occur. Regardless, where, as here, Petitioner has not shown a likelihood of success on the merits, the marginal value of additional process must yield to the competing interest in law enforcement. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Because Plaintiffs have not shown a likelihood of success on the merits of their First Amendment claim, because the VA has a competing public interest in providing the best possible care . . . the public interest does not require us to reverse the district court" denial of an injunction.). Thus, Petitioner has not established that the public interest supports a temporary restraining order.

VII. CONCLUSION

For the aforementioned reasons, the Government respectfully requests that the Court deny Petitioner's motion for a temporary restraining order and not issue a preliminary injunction.

Dated: August 26, 2025

Respectfully submitted,

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