CRAIG H. MISSAKIAN (CABN 125202)
United States Attorney
PAMELA T. JOHANN (CABN 145558)
Chief, Civil Division
MICHAEL T. PYLE (CABN 172954)
Assistant United States Attorney

60 South Market, Suite 1200
San Jose, California 95113
Telephone: (408) 535-5087
Email: michael.t.pyle@usdoj.gov

Attorneys for Respondents-Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ZHIYU YANG, Petitioner-Plaintiff, v. SERGIO ALBARRAN, Field Office Director of the San Francisco Immigration and Customs Enforcement Office[1] et al., Respondents-Defendants.	CASE NO. 3:25-cv-06323-JD **RESPONDENTS' OPPOSITION TO PRELIMINARY INJUNCTION MOTION** Date: December 18, 2025 Time: 10:00 a.m. Location: Courtroom 11, 19th Floor Judge: Hon. James Donato

[1] Sergio Albarran is automatically substituted for Polly Kaiser as a defendant in this matter pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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I. INTRODUCTION

Petitioner Zhiyu Yang has moved for a preliminary injunction ("PI") enjoining the government from detaining or arresting him absent a pre-detention hearing before a neutral decision maker where the government would have the burden to show by clear and convincing evidence that Petitioner is not a flight risk or danger to the community. Petitioner also seeks to enjoin the government from deporting him to any third country. *See* Petitioner's Motion for Ex Parte TRO/PI, ECF No. 3 ("Pet. Mot.") at p. 3.

Petitioner admits that he is subject to a final order of removal, and that he is an "aggravated felon" under the law due to his no contest plea to violations of California Penal Code Sections 207 (kidnapping), 273.5 (corporal injury on a spouse or cohabitant), and 273a(a) (child abuse). *Id* at p. 5.

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 beyond his concern about a July 31, 2025 appointment. *See generally* Pet. Mot. Notwithstanding this lack of evidence, Petitioner seeks to enjoin the government from detaining him without evidence that such an action is likely, much less imminent. Petitioner's claims are speculative.

The Court should deny Petitioner's motion. 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. 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.

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 would be statutorily authorized by 8 U.S.C. § 1231(a)(6) to execute his removal from the United States. He would 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.

The Court should deny Petitioner's motion for a preliminary injunction.

II. LEGAL FRAMEWORK

A. Removal Proceedings.

The INA governs the detention and release of aliens during and following their removal proceedings. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). The INA does not provide for a pre-detention hearing. *See, e.g.*, 8 U.S.C. § 1231. When a noncitizen receives a final removal order, their detention is mandatory for the following 90 days. 8 U.S.C. § 1231(a)(2). After that time, detention is within ICE's discretion under 8 U.S.C. § 1231(a)(6). Such detainees have due process protection; the Supreme Court has set forth the basic limitation, which is that after six months of post-removal order detention the burden then shifts to the government to show that removal is possible. *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

Under *Zadvydas*, if a detained noncitizen is not removed within six months, the burden then shifts to the government to show it will remove them in a reasonably foreseeable time. Although that burden of persuasion shifts after six months, the noncitizen still "may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*, 701. As noted above, the Ninth Circuit has explained that the *Zadvydas* language requires an alien to show that "he is stuck in a 'removable-but-unremovable limbo,' as the petitioners in *Zadvydas* were[;]" that is, the alien must show he "is unremovable because the destination country will not accept him or his removal is barred by our own laws." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1063 (9th Cir. 2008).

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). "

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).

B. Third Country Removals.

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.").

III. FACTUAL BACKGROUND

A. Petitioner Has a Final Order of Removal to China.

Petitioner is a native and citizen of the People's Republic of China who, on August 14, 2013, adjusted status to that of a lawful permanent resident of the United States. *See* Declaration of Jennifer Ramirez ("Ramriez Dec.") ¶ 4 & Exs. 1 & 2. On July 24, 2014, Petitioner was convicted for violations of California Penal Code Sections 207 (kidnapping), 273.5 (corporal injury on a spouse or cohabitant), and 273a(a) (child abuse). Pet. Mot. at p. 4-5.

On September 28, 2016, Petitioner was issued a Notice to Appear ("NTA") and charged with removability for, among other things, having been convicted of an aggravated felony crime of violence. *See* Ramirez Dec. ¶ 6 & Ex. 2. For his part, Petitioner admits that he was convicted an aggravated felony crime of violence. *See* Pet. Mot. at 5 ("given that Mr. Yang was sentenced to a term of two years in prison for his PC § 273.5 conviction, he is an 'aggravated felon' under the INA.").

On December 16, 2016, Petitioner appeared in immigration court with an attorney and, through counsel, admitted all the factual allegations and the two charges of removability alleged in the NTA. Ramirez Dec. ¶ 7. On January 31, 2017, the immigration court adjudicated Petitioner's applications for relief from removal, denied each of the applications, and ordered Petitioner removed from the United States to China. *Id.* ¶ 8. Petitioner reserved his right to appeal the removal order, but did not file a timely appeal. *Id.*

On January 22, 2018, ICE elected to release Petitioner on an Order of Supervision with several requirements, including, but not limited to, participation in an Alternatives to Detention Program. *Id.* ¶ 9 & Exs. 4 & 5. Petitioner's Release Notification states, among other provisions, "you are required by law to make good faith efforts to secure a travel document on your own and provide proof of your efforts to ICE. *Id.* ¶ 10 & Ex. 4. Petitioner was required to check-in with ICE approximately once a year, with the last two dates being August 1, 2024 and July 31, 2025. *Id.* ¶ 10

On July 31, 2025, Petitioner appeared at a San Francisco ICE office for his standard check-in and filled out a travel document application. *Id.* ¶ 15. Petitioner's next scheduled check-in with ICE is on January 29, 2026. *Id.* ¶ 16. Petitioner remains subject to mandatory detention. *Id.* ¶ 17.

B. Procedural Background

On July 28, 2025, Petitioner filed his habeas petition. ECF No. 1. Petitioner filed an ex parte motion for a temporary restraining order the next day. ECF No. 2. On July 30, 2025, the Court issued an order providing that: "Defendants, and all persons acting in concert with them who have notice of this order, are enjoined from arresting or detaining Yang on July 31, 2025." Respondents did not arrest or detain Petitioner on July 31, 2025 or any day thereafter. On October 20, 2025, the Court issued a new and different purported temporary restraining order that was not limited to the single day period of the July 30 order, providing that "Respondents are enjoined from arresting or detaining Yang before the hearing." ECF No. 15.

The Court's orders are inconsistent with the relevant rule. *See* Fed. Rule. Civ. Proc. 65(b)(2) (A TRO "order expires at the time after entry – not to exceed 14 days – that the court sets, unless before that time, the court, for good cause extends it for a like period or the adverse party consents to a longer extension.").

IV. ARGUMENT

A. Legal Standard

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). To obtain relief, the moving party must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The purpose of a preliminary injunction is to preserve the status quo pending final judgment rather than to obtain a preliminary adjudication on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). "A preliminary injunction can take two forms." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). "A prohibitory injunction prohibits a party from taking action and 'preserves the status quo pending a determination of the action on the merits.'" *Id.* (internal quotation omitted). "A mandatory injunction orders a responsible party to take action," as Petitioners seek here. *Id.* at 879 (internal quotation omitted). "A mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored." *Id.* "In general,

mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Id.* Where plaintiffs seek a mandatory injunction, "courts should be extremely cautious." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (internal quotation omitted). The moving party "must establish that the law and facts *clearly favor* [their] position, not simply that [they are] likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis original).

B. The Court Lacks Jurisdiction to Enjoin the Government.

1. 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 stresses that he has complied with the requirements about his release. *See* Pet. Mot. at 6. *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.

2. 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).

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 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.

3. 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. 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. That is precisely what the INA forbids. *See J.E.F.M.*, 837 F.3d at 1031. Petitioner is not detained and does not allege any 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 failure to do so does not vest this Court with jurisdiction

V. PETITIONER CANNOT ESTABLISH AN ENTITLEMENT TO AN INJUNCTION.

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

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

Petitioner's claim is premature, as he has not been re-arrested, 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. Petitioner even concedes that he has not been detained since 2018. *See* Pet. Mot. at p. 6.

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. 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 unless and until there was "no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 690–92, 699.

Even where an individual like Petitioner with a final removal order is released by ICE, the government is allowed to revoke for nearly any reason. "While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation "when, in the opinion of the revoking official ... [t]he purposes of release have been served ... [or] [t]he conduct of the alien, or *any other circumstance*, indicates that release would no longer be appropriate." *Rodriguez v. Hayes*, 578 F.3d 1032, 1044 (9th Cir. 2009), *opinion amended and superseded*, 591 F.3d 1105 (9th Cir. 2010), citing §§ 241.4(l)(2)(i), (iv) (emphasis in original). The government is thus broadly authorized to exercise its discretion to revoke such release pursuant to 8 C.F.R. § 241.1(l)(1), and 8 C.F.R. § 241.4(l)(2).

Here, Petitioner is subject to *post*-final order detention under Section 1231(a)(6). The purpose of any such detention would be 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.

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. *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).

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.

The second *Mathews* factor also favors Respondents. Under the existing procedures, aliens including Petitioner face little risk of erroneous deprivation. As explained above, 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.

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* 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. 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.

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. Therefore, considering all of the *Mathews* factors together, due process does not require a pre-deprivation hearing.

3. Petitioner Cannot Establish 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)).

In this case, Petitioner cannot show that denying his motion 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.

B. The Balance of Equities and Public Interest Do Not Favor an Injunction

When the government is a party, the balance of equities and public interest merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Further, where a moving party only raises "serious questions going to the merits," the balance of hardships must "tip sharply" in his favor. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

Here, the government has a compelling interest in the steady enforcement of its immigration laws. *See Noem v. Vasquez Perdomo*, 606 U.S. —, 2025 WL 2585637, at *4-5 (2025) (Kavanaugh, J., concurring) (finding that balance of harms and equities tips in favor of the government in immigration enforcement given the "myriad 'significant economic and social problems' caused by illegal immigration"); *Demore*, 538 U.S. at 523; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court "should give due weight to the serious consideration of the public interest" in enacted laws); *see also Ubiquity Press v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) ("the public interest in the United States' enforcement of its immigration laws is high"). Indeed, the government "suffers

a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.) (citation omitted).

C. Any Court Order Should Not Reverse the Burden of Proof

At any bond hearing, Petitioner should have the burden of demonstrating that he is *not* a flight risk or danger to the community. That is the ordinary standard applied in bond hearings. *Matter of Guerra*, 24 I&N Dec. 37, 40 (B.I.A. 2006) ("The burden is on the alien to show to the satisfaction of the [IJ] that he or she merits release on bond."). It would be improper to reverse the burden of proof and place it on the government. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1210-12 (9th Cir. 2022) ("Nothing in this record suggests that placing the burden of proof on the government was constitutionally necessary to minimize the risk of error, much less that such burden-shifting would be constitutionally necessary in all, most, or many cases.").

The Ninth Circuit previously held that the government bears the burden by clear and convincing evidence that an alien is not a flight risk or danger to the community for bond hearings in certain circumstances. *Singh v. Holder*, 638 F.3d 1196, 1203-05 (9th Cir. 2011) (bond hearing after allegedly prolonged detention). But following intervening Supreme Court decisions, the Ninth Circuit has explained that "*Singh's* holding about the appropriate procedures for those bond hearings . . . was expressly premised on the (now incorrect) assumption that these hearings were statutorily authorized." *Rodriguez Diaz*, 53 F.4th at 1196, 1200-01 (citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018) and *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022)). Thus, the prior Ninth Circuit decisions imposing such a requirement are "no longer good law" on this issue, *Rodriguez Diaz*, 53 F.4th at 1196, and the Court should follow *Rodriguez Diaz* and the Supreme Court cases.

VI. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court decline to enter a preliminary injunction.

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Respectfully submitted,

CRAIG H. MISSAKIAN
United States Attorney

/s/ Michael T. Pyle
MICHAEL T. PYLE
Assistant United States Attorney