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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RACHANA DUONG, Petitioner, v. POLLY KAISER, *et al.*, Respondents.	No. 4:25-cv-07598 JST **RESPONDENTS' RETURN TO HABEAS PETITION**

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I. INTRODUCTION

Petitioner Rachana Duong's petition for a writ of habeas corpus should be dismissed. Duong is subject to congressionally mandated detention during his removal proceedings under 8 U.S.C. § 1226(c). In November 1996, Duong was convicted of first-degree murder, in violation of California Penal Code § 187, and grand theft from a person, in violation of California Penal Code § 487(c), and was sentenced to twenty-five years to life. As a result of this aggravated felony conviction, and crime of moral turpitude, Duong became subject to congressionally mandated mandatory detention under 8 U.S.C. § 1226(c). On May 27, 2020, Judge Chhabria ordered Duong *temporarily* released in *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, a class action filed in response to the COVID pandemic and resulting conditions of confinement. *See Zepeda Rivas*, Dkt. No. 268. The protections from re-detention established for class members in *Zepeda Rivas*, which were always explicitly temporary, have now expired. Duong once again is subject to mandatory detention. As such, Duong is not entitled to habeas relief.

II. FACTUAL BACKGROUND

A. Duong's Criminal and Immigration History pre-*Zepeda Rivas*.

Duong is a native of Cambodia, who was admitted into the United States as a legal permanent resident retroactive to February 19, 1980. *See* Declaration of Jarvin Li ("Li Decl.") ¶ 6.) According to his lawyers, during his teenage years, Duong [redacted] Duong and his friends supported themselves through criminal activities, which became more serious as they got older. Dkt No. 1 ¶ 25. On September 7, 1994, Duong and two friends committed a robbery, which led to the death of an elderly woman. On November 18, 1996, Duong was convicted in a jury trial of first-degree murder, in violation of California Penal Code § 187, and grand theft from a person, in violation of California Penal Code § 487(c), and was sentenced to twenty-five years to life and three years prison respectively. Li Decl. ¶ 7. His conviction included a gang enhancement pursuant to California Penal Code § 186.22(b). *Id.* Duong had previously been convicted of unlawful control over a vehicle in the third degree in violation of Utah 41-1A-1314 in 1994 and sentenced to five years imprisonment. *See Zepeda Rivas*, Dkt No. 254-1. As a result of his murder conviction, Duong became removeable from the

1 United States. Li Decl. ¶¶ 8, 21.

2 In March 2020, after serving 26 years of his sentence for first degree murder, Duong was
3 paroled. Dkt No. 1 ¶ 26. On March 17, 2020, ICE served Duong with a Notice to Appear. Li Decl. ¶ 8.
4 He was released from CDCR custody and transferred to ICE custody at Yuba County Jail. *Id.* ¶¶ 8-10.

5 **B. *Zepeda Rivas* COVID Class Action.**

6 As a result of his detention at Yuba County Jail, Duong became a class member in *Zepeda Rivas*
7 *v. Jennings*, No. 20-cv-02731-VC. *Zepeda Rivas* was filed in response to the COVID pandemic. It
8 challenged the conditions of confinement at Mesa Verde and Yuba County jail resulting from the
9 challenges of the pandemic, including the inability of detainees to socially distance and the lack of
10 COVID testing. On April 29, 2020, Judge Chhabria provisionally certified a *Zepeda Rivas* class and
11 instituted a process for considering release requests from detainees. Under the standard conditions of
12 release, which were incorporated into every order granting release, Judge Chhabria specifically ordered
13 that: "[t]he Class Member's temporary release will expire upon the final adjudication of the habeas
14 petition in this case[.]" *See Zepeda Rivas,* Dkt. Nos. 108 (Standard Conditions of Release), 369
15 (Revised Standard Conditions of Release). Duong was temporarily released pursuant to the *Zepeda*
16 *Rivas* process on May 27, 2020. *See Zepeda Rivas*, Dkt. No. 268.

17 The parties in *Zepeda Rivas* subsequently entered into a settlement. *See Zepeda Rivas*, Dkt. No.
18 1205-1. The settlement agreement was heavily negotiated and extremely detailed. Under the terms of
19 the settlement agreement, ICE generally agreed to forgo re-detaining released class members for three
20 years following approval of the settlement "unless they pose[d] a threat to public safety or national
21 security, and/or risk of flight." *See Zepeda* Rivas, Dkt. No. 1205-1, at 13 (Subsection III.A). But these
22 protections ended after three years, and the agreement specifically authorized ICE to re-detain class
23 members as before following the expiration of its three-year term:

24 At the conclusion of the three-year period set forth in Subsection III.A, ICE's rearrest and
re-detention practices for Class Members will occur pursuant to generally applicable law
25 and policy.

26 *Id.* at 16 (Subsection III.G). While the agreement specified certain conditions for re-detention *during*
27 the three-year period, *see id.* at 13–16, 18–19, it did not provide for any conditions, much less a pre-
28 detention hearing requirement, for re-detention following the expiration of that term.

1 Judge Chhabria finally approved the settlement on June 9, 2022. *See Zepeda Rivas*, Dkt. No.
2 1258. As such, class members, such as Duong, lost protection from re-detention on June 9, 2025, when
3 the *Zepeda Rivas* settlement expired. *See* https://www.aclunc.org/our-work/legal-docket/zepeda-rivas-v-
4 jennings-immigration-detention (notice that the *Zepeda Rivas* settlement expired on June 9, 2025).

5 **C. Post-*Zepeda Rivas* Proceedings.**

6 From 2020-2024, the immigration court, on its own motion, continued Duong's immigration
7 proceedings due to docketing backlogs related to the COVID pandemic. Li Decl. ¶ 15. On January 9,
8 2024, DHS filed a motion to advance Duong's immigration hearing, which was denied on January 25,
9 2024. *Id.* at ¶ 16. On March 25, 2024, Duong filed a motion to amend pleadings and terminate
10 proceedings due to an alleged defect in the notice to appear. *Id.* at ¶ 17. The immigration court granted
11 the motion without prejudice on May 21, 2024. *Id.* DHS remedied the alleged defect and filed a second
12 notice to appear on May 21, 2024. *Id.* at ¶ 18-19. On August 21, 2025, Duong appeared in immigration
13 court with counsel. Li Decl. ¶ 21. The Immigration Judge sustained all factual allegations in the charge
14 of removability. *Id.* On September 6, 2025, ICE arrested Duong outside of his residence. That same
15 day (a Saturday), Duong filed a motion for a temporary restraining order, which this Court granted
16 within hours, before the government was able respond. Dkt. No. 5. In accordance with the order, ICE
17 released Duong from custody that evening. *See* Dkt. No. 10. On September 19, 2025, this Court granted
18 Duong's motion for a preliminary injunction and enjoined Respondents from arresting, detaining, or
19 removing Duong without notice and a hearing to determine whether a material change of circumstances
20 justifies his re-detention. Dkt. No. 19.

21 **III. LEGAL STANDARD**

22 **A. Mandatory Detention Under 8. U.S.C. § 1226(c).**

23 The statutory authority to detain individuals who have been lawfully admitted into the United
24 States but are deportable and subject to removal proceedings is found in 8 U.S.C. § 1226, a multi-
25 layered statute that provides for the civil detention of individuals pending removal.[1] *See Prieto-Romero*
26
27
28

[1] A different statutory framework, found in 8 U.S.C. § 1225(b), applies to "applicants for admission" who have never been admitted into the United States. Detention under Section 1225(b) is not at issue in this case.

v. Clark, 534 F.3d 1053, 1059 (9th Cir. 2008). For a certain class of individuals—those detained under Section 1226(a)—detention is discretionary. "Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention," *Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018), and an individual may be released from detention following a bond hearing if the immigration judge determines that his or her release "would not pose a danger to property or persons, and that [he or she] is likely to appear at any future proceeding." *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112 (BIA 1999). Immigration judges have broad discretion in deciding whether to release an alien on bond. *Matter of Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for immigration judges to consider).

For a different class of individuals, however—those detained under § 1226(c)—Congress made detention mandatory. Section 1226(c) applies to certain terrorist and "criminal aliens" who, like Duong, have been convicted of an aggravated felony and a crime involving moral turpitude. This provision mandates detention of these individuals until their removal proceedings have been completed. 8 U.S.C. § 1226(c). When Section 1226(c) governs detention, the Secretary "may release" the detainee "only if" release is "necessary" for witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). Outside of the narrow circumstances of release for witness-protection purposes, however, Congress has determined that these individuals must not be released from detention pending removal, even on bond. The Supreme Court in *Jennings* emphasized that § 1226(c) "mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes." 583 U.S. at 305-06.

B. Habeas Corpus.

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). In immigration cases, the federal courts' habeas jurisdiction is limited by 8 U.S.C. § 1252(a)(2)(B), which provides that "no court shall have jurisdiction to review" "decision[s]" for which the statute grants "discretion" to the Attorney General.

IV. ARGUMENT

A. In 8 U.S.C. § 1226(c), Congress unequivocally intended to subject Petitioner, a convicted first-degree murderer, to mandatory detention.

Having been convicted of first-degree murder, which is an aggregated felony and a crime involving moral turpitude, Duong is subject mandatory detention under 8 U.S.C. § 1226(c). Accordingly, he is not eligible for a bond hearing or discretionary release. *A fortiori*, he is not entitled to a bond hearing *prior* to his re-arrest and detention. A pre-deprivation hearing is a judicial creation that is contained nowhere in the immigration statutes or regulations, much less in the context of mandatory detention under Section 1226(c).[2]

As the Supreme Court has long interpreted § 1226(c), Congress "adopted a special rule for aliens who have committed certain dangerous crimes": these aliens "must be arrested" when they are released from custody on state criminal charges, and they "must be detained without a bond hearing until the question of their removal is resolved." *Nielsen v. Preap*, 586 U.S. 392, 396 (2019) (emphasis added). More concisely, § 1226(c) imposes an "absolute prohibition on [Petitioner's] release from detention." *Demore v. Kim*, 538 U.S. 510, 523 (2003) (cleaned up).

Aliens subject to Section 1226(c), like Duong, may be detained without a bond hearing without running afoul of the Constitution. "Detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."). In *Demore*, the Court squarely rejected a Due Process Clause challenge to Section 1226(c), holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the petitioner in that case] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. The petitioner in *Demore* had already spent six months in custody (without a bond hearing) when the Court

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[2] Notably, there is no claim here that Duong's detention has been unreasonably prolonged. *See* Dkt No. 1. Nor could there be, as Duong was just arrested on September 6, 2025, and released the same day, and he was detained for only a few months in 2020 before his temporary release under *Zepeda Rivas*. Thus, prolonged detention cannot form a basis for Duong's assertion that he should be given a bond hearing. *See Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018).

upheld the constitutionality of his mandatory detention. 538 U.S. at 531. As a result of the Court's decision, he was returned to custody—after having been released by the district court and remaining released during the pendency of his appeal.[3] The effect of the *Demore* decision was to sanction the continued mandatory detention of the petitioner under Section 1226(c), even after a period of release, without any additional process. *Demore*, 538 U.S. at 531. The *Demore* Court specifically rejected the challenge that detention was unconstitutional without a finding that the alien "posed either a danger to society or a flight risk." *Id.* at 514.

Section 1226(c) reflects a determination by Congress that a certain class of criminal aliens *must* be detained, and that this detention must continue "'pending a decision on whether the alien is to be removed from the United States.'" *Jennings*, 138 S. Ct. at 846 (citing 8 U.S.C. § 1226(a)); *Nielsen v. Preap*, 586 U.S. at 396 ("Congress has decided, however, that [release] is too risky in some instances."). Section 1226(c) was part of a deliberate effort to constrain the Executive's discretion to release criminal aliens on bond. *See Demore*, 538 U.S. at 520-21. Section 1226(c) embodies Congress's categorical judgment that aliens who have committed the specified offenses pose an undue flight risk and danger to the community and that the risk of erroneous release among these criminal aliens is too high to permit the exercise of discretion through a bond hearing. Accordingly, Congress took this decision out of the hands of immigration judges. For this defined group of aliens, no individualized finding of flight risk and danger to the community is necessary.

B. Duong's Previous Release Under Zepeda Rivas Does Not Entitle Him To A Constitutionally Protected Liberty Interest.

It follows from this statutory framework, which *Demore* upheld as constitutionally permissible without any opportunity for a bond hearing, that due process does not require *pre-detention* bond hearings for criminal aliens mandatorily detained under section 1226(c). *See Giorges v. Kaiser*, No. 25-CV-07683-NW, 2025 WL 2898967, at 6* (N.D. Cal. Oct. 10, 2025) ("The only question currently before the Court is whether the Government may re-detain Petitioners without a bond hearing. Under

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[3] The petitioner in *Demore* was released on August 11, 1999, and remained undetained until the Supreme Court's decision upholding the constitutionality of mandatory detention under Section 1226(c). After that decision in April 2003, he was redetained under Section 1226(c). *See Kim v. Ridge*, No. 04-cv-0341-SI, Dkt. No. 2 ¶¶ 14–17 (N.D. Cal. Jan. 27, 2004).

current Supreme Court and Ninth Circuit jurisprudence, the Government may do so without running afoul of the Constitution.");[4] *see also Keo v. Warden of the Mesa Verde Ice Processing Ctr.*, No. 24-cv-00919, 2025 WL 1029392, at *7 (E.D. Cal. Apr. 7, 2025); *Black v. Decker*, 103 F.4th 133, 142 (2d Cir. 2024) (The Supreme Court's decisions in "*Demore* and *Jennings* instruct that (1) due process does not require an *initial* bond determination for those detained under section 1226(c), and (2) section 1226's text cannot be construed to require a bond hearing after any particular fixed period of detention.") (emphasis in original). Requiring a pre-detention bond hearing for an alien subject to Section 1226(c) would undermine the mandatory detention framework that *Demore* sanctioned as constitutionally sufficient and supplant Congress's determination that discretionary release decisions are inappropriate for this class of aliens. As such, Duong cannot succeed on his claim that the Constitution requires a pre-deprivation hearing before he may be arrested and detained.

Duong was temporarily released from custody during COVID as a result of the *Zepeda Rivas* litigation. By its terms, this release was always temporary and of a finite duration. His initial release was subject to the mandatory, court-ordered condition that it would "expire upon the final adjudication of the habeas petition in this case[.]" *See Zepeda Rivas*, Dkt. No. 369. Under the settlement agreement negotiated between the parties and applicable to all class members, including Duong, ICE was specifically authorized to re-detain class members as usual beginning three years after the approval of the settlement. *See Zepeda Rivas* Dkt. No. 1205-1 at 16 (Subsection III(G)). The settlement was approved by the court on June 9, 2022. *See Zepeda Rivas* Dkt. No. 1258. As such, ICE was specifically authorized to re-detain temporarily release class members beginning June 9, 2025. Duong never had any reasonable expectation that his release would continue indefinitely, or that ICE would be constrained from re-detaining him after the three-year term ended. Against this backdrop, Duong's re-arrest and detention on September 6, 2025, which simply returned him to the pre-*Zepeda Rivas* status quo, did not run afoul of the Due Process Clause.

[4] *But see Doe v Albarran,* No. 25-CV-08774-VC, 2025 WL 3141224 (N.D. Cal. Nov. 10, 2025) (holding that a pre-deprivation bond hearing is necessary to redetain a criminal alien previously released under *Zepeda Rivas*).

1. Duong Does Not Have A Protected Liberty Interest Entitling Him To Additional Process.

Duong does not have a protected liberty interest in making permanent a release that was, by its terms, only temporary. Duong was convicted of first-degree murder and is subject to mandatory detention under 8 U.S.C. § 1226(c). Given this mandatory detention framework, Duong's reliance on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in asserting that he should be protected from re-detention absent a custody hearing is misplaced. As discussed above, the Supreme Court in *Demore* upheld mandatory civil immigration detention under Section 1226(c), and did so without utilizing the multi-factor "balancing test" of *Mathews. See Demore*, 538 U.S. 510; *cf. Zadvydas v. Davis*, 533 U.S. 678 (2001) (upholding mandatory detention under 8 U.S.C. § 1231(a)(6) for six months after the 90-day removal period).[5] The additional process that Duong seeks here is fundamentally incompatible with this congressionally ordained, constitutionally permissible framework.

That Duong had been temporarily released under *Zepeda Rivas* does not create a new liberty interest that takes him out of the *Demore* paradigm. Indeed, the petitioner in *Demore* was returned to custody following the Supreme Court's decision in that case after having been released nearly four years, yet the Court imposed no requirement of a pre-detention hearing. Any expectation of continued liberty here, moreover, would not be reasonable. Duong was released from detention *temporarily,* in response to the extraordinary circumstances of the COVID pandemic. By its own terms and by court order, that release was always finite and non-permanent, with a definite termination point of June 9, 2025.

The *Zepeda Rivas* class, which included Duong, was represented by a team of lawyers, and the terms of the settlement agreement were rigorously negotiated. That agreement could have specified that detention following the three-year period would require a pre-detention hearing. But it did not. No

[5] Indeed, as the Ninth Circuit recognized in *Rodriguez Diaz*, "the Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*." 53 F.4th at 1206 (citations omitted); *id.* at 1214 ("In resolving familiar immigration-detention challenges, the Supreme Court has not relied on the *Mathews* framework.") (Bumatay, J., concurring). Whether the *Mathews* test applies even to challenges to non-mandatory detention is an open question in the Ninth Circuit. *See Rodriguez Diaz*, 53 F.4th at 1207 (applying *Mathews* factors to uphold constitutionality of Section 1226(a) procedures in a prolonged detention context; "we assume without deciding that *Mathews* applies here").

conditions whatsoever were imposed on DHS's ability to re-detain class members following the termination of the three-year term. The only conditions on re-detention were imposed *during* the three-year term—and even those conditions did not include any *pre-detention* process. *See Zepeda Rivas*, Dkt. No. 1205-1, at 13–14.

Duong always knew that this release would not be permanent, that he was subject to mandatory detention, and that DHS would not be constrained from re-detaining him after the end of the three-year settlement term. Accordingly, Duong could have had no reasonable expectation of continued release after the termination of the three-year period. The government recognizes that any form of detention could be said to implicate an individual's liberty interests, and that Duong, like virtually everyone subject to detention, has reasons for wanting to remain out of custody. But those reasons do not create a protectible liberty interest in Duong's continued release here, in light of the specific circumstances and terms of his temporary release.

Giorges is particularly instructive. There the court agreed that *Zepeda Rivas* does not entitle criminal aliens to a liberty interest that they otherwise would not have. Just as in *Giorges,* Duong's "release was the product of exigent circumstances—the text of the statute temporarily giving way in the face of a public health crisis. Those circumstances have no bearing on whether § 1226(c) applies to [Duong] now that the settlement agreement has lapsed. [Duong] remains a noncitizen convicted of an aggravated felony, and he is no longer protected by the terms of the *Zepeda Rivas* consent decree. He fits squarely into the population of noncitizens covered by § 1226(c)…[Duong] could not have had a reasonable expectation that his liberty was guaranteed so long as he maintained his good behavior." *Giorges v. Kaiser*, 2025 WL 2898967, at *8.

Carballo v. Andrews, on the other hand, is not persuasive and the Court should not rely on its reasoning.[6] The court in *Carballo* stated that "the government could have expedited petitioner's removal proceedings at any time during those five years [on release]. Instead, it chose to allow petitioner's proceedings to continue for five years." No. 1:25-CV-00978-KES-EPG (HC), 2025 WL 2381464, at *5

[6] *Perera v. Jennings*, 598 F. Supp. 3d 736, 739 (N.D. Cal. 2022), is inapposite because Perera had not been taken directly from criminal custody into immigration detention whereas Duong was immediately taken into custody by ICE. Li Decl. ¶¶ 8-10.

(E.D. Cal. Aug. 15, 2025), *appeal docketed* No. 25-6533 (9th Cir. October 16. 2025). It is unclear what mechanism the court was referring to when it said that the government could have "expedited removal proceedings at any time." The court does not specify, and Respondents are unaware what the court could be referring to. Duong's specific case was continued several times by the immigration courts due to the COVID pandemic. Li Decl. ¶ 15. The number of pending cases in Immigration Court grew from approximately 1.5 million cases in 2020, the year of Duong's release, to almost 3.8 million cases in 2025. *See* EOIR Adjudication Statistics, July 31, 2025, https://www.justice.gov/eoir/media/1344791/dl?inline. This is despite an increasing number of completed cases per year. *Id.* The five-year delay in removal proceedings is better explained, not by Respondents' failure to expedite, but by the growing backlog of immigration cases that was exacerbated by the COVID pandemic. Cases of detained aliens, however, are completed faster, with the median completion time reaching forty-two days in 2023. *See* EOIR Adjudication Statistics, October 12, 2023, https://www.justice.gov/eoir/page/file/1163621/dl?inline=.[7]

The court in *Carballo* also stated that, like Duong, the petitioner in *Carballo* "was released in 2020 based on criteria including that he did not pose a flight risk or a danger to the community." 2025 WL 2381464, at *5. While true, the court did not grapple with the fact that the 2020 criteria also included "the risk posed to the detainee by current conditions at the facilities," which depended "in every case to varying degrees based on an individual's specific health conditions." *Id.* at *2. But with the end of the COVID pandemic, the risk from COVID at immigration detention facilities has waned. Thus, the determination made under the 2020 criteria cannot control under conditions today and Petitioner's liberty interest is thereby diminished.[8]

2. *Morrissey v. Brewer* gives Petitioner no "as-applied" escape from *Demore*.

The criminal parole custody at issue in *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), is

[7] This is right around the constitutionally unproblematic duration of proceedings before the Supreme Court in *Demore*. 538 U.S. at 529.

[8] For this same reason, *Zelaya v. Albarran*, No. 25-CV-08774-VC, 2025 WL 2952507 (N.D. Cal. Oct. 15, 2025), is also not persuasive. There the court stated that "This Court granted Zelaya's bail application after determining that he was not a flight risk or a danger to the community" while leaving out that the court also weighed COVID pandemic specific conditions that no longer applied post-lapse of the *Zepeda Rivas* settlement. *Id.* at *1.

inapposite to the immigration-related custody at issue here. *See* Dkt. No. 18 at 6-7. The analogy with *Morrissey* fails as a matter of law. *Morrissey* explained that parole "enables the parolee to do a wide range of things open to persons" who have never been in custody or convicted of any crime, including to live at home, work, and "be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. *Morrissey* found this "wide range of things" and these "enduring attachments" sufficiently "valuable" to "be seen as within the protection of the Fourteenth Amendment." *Id.* Therefore, the "termination [of parole] calls for some orderly process." *Id.*

This "orderly process" serves several purposes. Whether viewed from the vantage point of the state or of the parolee, the interests are the same: "return[ing] the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole"; making "an appropriate determination that the individual has in fact breached the conditions of parole"; "not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions"; and assuring that "the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 483–84. In short, the purpose of providing orderly process prior to re-detaining parolees is to ensure that such detention is in fact justified under the law governing revocation of parole.

These purposes are not at play with criminal aliens like Duong. If there were any reasonable analogy between parolees and criminal aliens subject to redetention, it might suggest that orderly process is necessary to ensure that a targeted individual is in fact a criminal alien subject to § 1226(c), e.g., whether he is (like Duong) "inadmissible by reason of having committed any offense covered in section 1182(a)(2)." 8 U.S.C. § 1226(c)(1)(A). That Duong is subject to § 1226(c) is not seriously at issue in this case. In *Morrissey*'s terms, a bond hearing is wholly unnecessary to gain "accurate knowledge" of Petitioner's relevant behavior.

As the Supreme Court has held, individuals "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 8 (2003) (*citing relying on Reno v. Flores*, 507 U.S. 292, 308 (1993); *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989)).

Petitioner cannot make that showing. The only fact relevant under § 1226(c)(1)(A) is that Petitioner is "inadmissible by reason of having committed [an] offense covered in section 1182(a)(2)." Because whether Petitioner is also a flight risk or danger to the community is not relevant under the statutory scheme, he has no procedural due process right to a hearing to determine whether he is a risk or a danger, much less a hearing that restricts evidence to a material change of circumstances since his prior District Court ordered release. *See also Doe*, 538 U.S. at 4 ("due process does not require the opportunity to prove a fact that is not material to the [governing] statutory scheme"). Nothing in *Demore* or the text of 8 U.S.C. § 1226(c) contemplates a hearing to determine whether a material change of circumstances justifies re-detention.

C. Even Under the *Mathews* Factors, No Additional Process Is Warranted Here.

Demore establishes that mandatory detention under Section 1226(c) without any pre- or post-custodial bond hearing is constitutionally permissible. The *Zepeda Rivas* settlement agreement preserved that framework, and contemplated that detention according to this generally applicable law would resume following the three-year settlement term. As discussed above, although Petitioner urges this Court to evaluate this case under the traditional *Mathews* factors, a *Mathews* analysis is not appropriate here, where Supreme Court jurisprudence and the terms of Duong's release make clear that Duong lacks a constitutionally protected liberty interest.

In the event that the Court elects to analyze Petitioner's claim under *Mathews*, the Court should find, consistent with the analysis above, that Petitioner is not entitled to relief. Under *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), courts consider three factors in evaluating a procedural due process claim: the plaintiff's private interest, the risk of erroneous deprivation without additional procedures, and the government's interest. While leaving open the question of whether the *Mathews* test applies to a constitutional challenge to discretionary immigration detention, *see Rodriguez Diaz*, 53 F.4th at 1207, the Ninth Circuit has emphasized that "*Mathews* remains a flexible test that can and must account for the heightened governmental interest in the immigration detention context." *Id.* at 1206. Against this backdrop, the three factors weigh against the additional process Duong requests here.

(i) Petitioner's history and status reduce his liberty interest.

As discussed above, while Duong, like any individual facing detention, has an interest in

remaining released, the circumstances of his release do not give rise to a protectible liberty interest warranting additional process. To the extent he has a liberty interest here, that interest is reduced by the fact that he is an alien in removal proceedings. *See Rodriguez Diaz*, 53 F.4th at 1206 ("The recognized liberty interests of U.S. citizens and aliens are not coextensive: the Supreme Court has 'firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.'") (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the Supreme Court has explained, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). Indeed, the Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. That is especially true in light of Duong's particular circumstances, as an alien subject to mandatory detention who knew that his temporary release due to extraordinary circumstances would not be permanent. These aspects of Duong's situation greatly reduce his liberty interest here. *See Rodriguez Diaz*, 53 F.4th at 1206–08; *Giorges v. Kaiser*, 2025 WL 2898967, at *8-9; *see also Serban v. Becerra,* No. 1:25-CV-02065-DAD-EFB (HC), 2026 WL 89985, at *5 (E.D. Cal. Jan. 13, 2026) ("While petitioner has a private interest in freedom from prolonged detention, the court's consideration of the *Rodriguez Diaz* factors weighs against petitioner's showing under the first *Mathews* factor.").

(ii) The risk of erroneous deprivation is minimal.

Second, there is no risk of *erroneous* deprivation of Duong's liberty here. Due to his first-degree murder conviction, Petitioner is an aggravated felon and has committed a crime involving moral turpitude. He is therefore subject to mandatory detention under 8 U.S.C. § 1226(c). Any deprivation of liberty, therefore, would not be "erroneous." Congress has mandated that individuals convicted of aggravated felonies, like Duong, be subject to mandatory detention, without a pre-deprivation detention hearing, and without regarding to evidence of their risk of flight or danger to the community. 8 U.S.C. § 1226(c); *Jennings v. Rodriguez*, 583 U.S. at 303-06. The Supreme Court in *Demore* concluded that this mandatory detention pending removal serves an immigration purpose and therefore is constitutionally permissible. Neither the Court nor an immigration judge is empowered to substitute its views on this issue for Congress's.

The specific additional procedures that this Court ordered in its preliminary injunction—a pre-detention hearing at which the government must show a material change in circumstances since Duong's prior release—are unwarranted. *See* Dkt. No. 18 at 13. Though Duong was released pursuant to *Zepeda Rivas* after an individualized determination, the binding effect of that determination was time bound by the explicitly temporary nature of the *Zepeda Rivas* settlement. *See Zepeda Rivas*, Dkt. No. 1205-1, at 16 (Subsection III.G). Circumstance have, in fact, materially changed since that prior determination: the pandemic has now ended and the *Zepeda Rivas* settlement has lapsed. This is reflected in one of the four factors weighed by the District Court in conducting the individualized bail request that Duong received pursuant to *Zepeda Rivas*: "the risk posed to the detainee by current conditions at the facilities," which depended "in every case to varying degrees based on an individual's specific health conditions." *Carballo v. Andrews*, 2025 WL 2381464, at *2. This factor is no longer relevant today due to the end of the COVID pandemic and, consequently, because current conditions at facilities have changed. The finding made at that bail determination was not solely about danger or flight, and thus it cannot hold today in the post-pandemic world.

Similarly, a hearing at which the government would bear the burden of demonstrating flight risk or danger to the community by clear and convincing evidence is also unwarranted. As the Ninth Circuit announced in *Rodriguez Diaz*, "We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of an alien, much less through an elevated 'clear and convincing' showing." 53 F.4th at 1211. To the extent a bond hearing is ordered by the Court, there is no good reason to impose such a heightened requirement on the government, especially where this additional process would supplant a congressional determination that aliens like Duong should be detained without any individualized determination of danger or flight risk.

(iii) The government has a strong interest in detention pending removal.

Turning to the third *Mathews* factor, the Ninth Circuit has held that "the government clearly has a strong interest in preventing aliens from 'remain[ing] in the United States in violation of our law.'" *Rodriguez Diaz*, 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). "This is especially true when it comes to determining whether removable aliens must be released on bond during the pendency of removal proceedings." *Id.* "The government has an obvious interest in 'protecting the public from

dangerous criminal aliens,'" and "[t]hrough detention, the government likewise seeks to 'increas[e] the chance that, if ordered removed, the aliens will be successfully removed.'" *Id.* (quoting *Demore*, 538 U.S. at 515 and 528). "Indeed, the Supreme Court has specifically recognized Congress's determination that the government has been unable to remove deportable criminal aliens because of its initial failure to detain them." *Id.* at 1209. "For all these reasons, the government's interests in this case are significant." *Id.*

In *Serban v. Becerra*, 2026 WL 89985, at *6, the court found that, in the § 1226(c) context, "the government's interest weighs heavily against the granting of petitioner's request for" relief. The court noted that "[t]he Supreme Court has ... specifically instructed that in a *Mathews* analysis, we 'must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Id.* (quoting *Rodriguez Diaz*, 53 F.4th at 1208 (in turn quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982))).

In short, the three *Mathews* factors weigh decidedly against granting Petitioner the additional, pre-detention hearing he requests.

V. CONCLUSION

Duong's release pursuant to *Zepeda Rivas* was, by its explicit terms, temporary, and only occurred as a result of the exigent circumstances brought about by the COVID pandemic. The pandemic and the term of Duong's temporary release are now over. Duong's detention during the pendency of his immigration proceedings is mandated by § 1226(c) due to his first-degree murder conviction. Accordingly, Respondents respectfully request that the Court deny Duong's requested relief and dismiss his habeas petition.

DATED: February 4, 2026

Respectfully submitted,

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