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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEX RIVERA GIORGES and SOKHA KHAN,

Petitioners-Plaintiffs,

v.

SERGIO ALBARRAN, et al.,

Respondents-Defendants.

RESPONSE TO ORDER TO SHOW CAUSE

Case No. 5:25-cv-7683-NW

INTRODUCTION

Petitioners—two noncitizens who have been "model citizens" and "built meaningful and law-abiding lives" for over five years since Respondents released them upon a federal judge's finding that they posed neither a flight risk nor danger—submit this response to address why this case is not moot. Dkt. No. 17 ("Order") at 11, 15. As a starting point, decisions on motions for preliminary injunctions "'do not conclusively resolve legal disputes.'" *Pablo Sequen v. Albarran*, No. 25-cv-06487-PCP, 2025 WL 2935630, at *4 (N.D. Cal. Oct. 15, 2025) (quoting *Lackey v. Stinnie*, 604 U.S. 192, 200 (2025)). Indeed, in rebutting the suggestion that a court's preliminary assessment of interim relief may "deter the Court from later making a different final decision," Justice Kavanaugh recently explained that judges "strive to make the correct decision based on current information notwithstanding any previous assessment of the merits earlier in the litigation." *Trump v. CASA, Inc.*, 606 U.S. 831, 877 (2025) (Kavanaugh, J., concurring); *see also id.* ("It is not uncommon to think and decide differently when one knows more.").

For several reasons, Petitioners believe the Court should provide relief in this case, notwithstanding the preliminary denial. First, the jurisprudence on the due process issues at the heart of this case has rapidly progressed in recent weeks. The parties and the Court should engage with the developing consensus of court decisions finding that the Constitution requires neutral review of the propriety of re-detention in the circumstances presented here. Second, there are both legal and factual points that were not aired in the litigation of the preliminary injunction motion that the Court should consider in ultimately deciding the merits of the case. For example, the Court has not had the opportunity to consider decisions applying the Supreme Court's decision in *Nielsen v. Preap*, 586 U.S. 392 (2019), which expressly left open constitutional challenges to the application of 8 U.S.C. § 1226(c) to individuals who have long

been released from custody. That is a significant issue, especially since—even prior to the current wave of litigation relating to the due process rights of *Zepeda Rivas* class members—courts in the Northern District of California "have taken the Supreme Court's invitation and found that an individual who enjoys a lengthy period of freedom after release from criminal custody may not be detained pursuant to 1226(c) without a hearing." *Duong v. Kaiser*, No. 25-cv-7598-JST, 2025 WL 2689266, at *8 (N.D. Cal. Sept. 19, 2025) (collecting cases). Third, even if the Court ultimately rules that due process does not require a hearing prior to re-detention to assess whether re-detention is necessary to serve a constitutionally valid purpose, the Court may find that due process requires some other form of procedural protection, such as a prompt post-deprivation hearing in the event of re-detention. *Cf. Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) ("The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.").

ARGUMENT

I. A Growing Consensus Holds That Due Process Requires a Hearing Prior to Re-detention to Determine Whether Re-detention Is Lawfully Justified.

When this case was filed, courts had scarcely begun to address the due process rights of members of the *Zepeda Rivas* class action who had been released by ICE upon a finding by a federal judge that they posed neither a danger nor a flight risk. Apart from the present case, there are now decisions by at least four judges of the Northern District of California and Eastern District of California, all recognizing that *Zepeda Rivas* class members retain a liberty interest in remaining free from detention that cannot be revoked absent constitutionally adequate process. *See Zelaya Alas v. Albarran,* No. 25-cv-8774-VC, 2025 WL 2952507 (N.D. Cal. Oct. 15, 2025) (granting TRO enjoining re-detention of class member absent "a pre-deprivation hearing before a neutral decisionmaker"); *Carballo v. Andrews*, No. 1:25-cv-0978-KES 2025

WL 2381464 (E.D. Cal. Aug. 15, 2025) (ordering bond hearing for *Zepeda Rivas* class member re-detained at his ICE check-in); *Qazi v. Albarran*, 2025 No. 2:25-cv-2791-TLN, 2025 WL 2769837, at *3 (E.D. Cal. Sept. 29, 2025) ("Petitioner was previously released pursuant to a finding that he was not at risk of fleeing or harming others, and as such, due process prevents him from being redetained except upon a showing of a material change in circumstances.") (temporarily enjoining re-detention of *Zepeda Rivas* class member absent pre-deprivation hearing and citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)), *preliminary injunction subsequently granted*, *id.*, Dkt. No. 15 (E.D. Cal. Oct. 10, 2025); *Duong v. Kaiser*, No. 25-CV-07598- JST, 2025 WL 2689266, at *4 (N.D. Cal. Sept. 19, 2025), (explaining that "an individual whose parole is revoked . . . has a 'valuable' liberty interest notwithstanding the 'indeterminate' nature of his freedom" and ordering pre-deprivation hearing for *Zepeda Rivas* class member) (quoting *Morrissey*, 408 U.S. at 482).

These decisions build on a substantial body of law protecting the due process rights of individuals subject to mandatory detention who have previously been released. *See, e.g.*, *Duong* 2025 WL 2689266, at *6 (collecting cases, including, *inter alia*, *Meza v. Bonnar*, No. 18-cv-2708-BLF, 2018 WL 2554572, at *3 (N.D. Cal. June 4, 2018) (where noncitizen was detained under Section 1226(c) and released, "due process would seem to require an administrative hearing to show a material change in circumstances" prior to re-detention)). Notably, these decisions discuss not only *Demore v. Kim*, 538 U.S. 510 (2003), which upheld 8 U.S.C. § 1226(c) against a facial challenge, but also the more apposite decision *Nielsen v. Preap*, which explicitly left open as-applied challenges to Section 1226(c) in circumstances where an individual has been at liberty prior to detention by ICE. *See Carballo*, 2025 WL 2381464, at *3-6 (discussing *Preap* as well as post-*Preap* cases finding that due process required hearings for

individuals subject to Section 1226(c) who had been at liberty for several years); *Duong*, 2025 WL 2689266, at *5, *8 (same).

Finally, the recent decision by Judge Chhabria (who presided over the *Zepeda Rivas* class action and ordered Petitioners Rivera and Khan released in 2020) directly addresses and distinguishes *Uc Encarnacion v. Kaiser*, No. 22-cv-4369-CRB, 2022 WL 9496434 (N.D. Cal. Oct. 14, 2022), explaining that there—unlike here—"a determination had already been made by the relevant agency (specifically, the Board of Immigration Appeals on appeal from a decision by an Immigration Judge) that the petitioner was a danger to the community." *Zelaya Alas*, 2025 WL 2952507, at *1. Judge Chhabria explains that the circumstances of previously released *Zepeda Rivas* class members are more analogous to those of scores of petitioners in recent decisions ordering that noncitizens previously released by DHS must be afforded a hearing prior to any re-detention. *Id. See, e.g., Cardenas Castellanos v. Albarran*, No. 25-cv-7962-NW, Dkt. No. 17 at 15 (N.D. Cal. Oct. 14, 2025) ("'[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty.'") (quoting *Morrissey*). Indeed, the due process analysis undergirding those orders applies with even greater force where a detention statute otherwise would withhold any neutral review process. *See Pablo Sequen*, 2025 WL 2935630, at *11 n.4 (explaining that even if the petitioners were subject to a mandatory detention statute, "that fact would, if anything, merely strengthen their due-process claim" since "[t]he risk that petitioners would be deprived of their liberty without any valid government justification would thus be significantly increased").

These analyses by courts in parallel litigation are instructive here. Petitioners respectfully submit that the Court should consider these decisions—and the authorities they in turn discuss—in issuing further rulings in this case.

II. Facts And Arguments Not Considered in Relation to the Preliminary Injunction Motion Support the Issuance of Relief in This Case.

The facts and arguments, as understood by the Court in ruling on preliminary relief, are not the universe of facts and arguments relevant to the relief sought in this case. Turning first to the facts, to clear up ambiguity that may have affected the Court's analysis: Neither petitioner here is subject to removal, now or in the near future. *Contra* Order at 12 ("To the Court, it does not appear there are any procedural hurdles on the horizon that would make it unlikely or impossible for the Government to successfully coordinate Rivera's removal to El Salvador . . . ."). Mr. Rivera has a motion to reopen pending before the Board of Immigration Appeals, and the Ninth Circuit has stayed removal pending the Board's decision. Supplemental Kavanagh Decl. ¶¶ 2-3. His case will either be remanded to the immigration court or subject to further review at the Ninth Circuit, during which time his removal would continue to be stayed. *Id.* ¶ 4. As for Mr. Sokha, he is challenging a noncompliant charging document, which will result either in the termination of removal proceedings or an interlocutory appeal from the denial of termination. Rodezno Decl. ¶¶ 2-9. Furthermore, if his case is reassigned due to re-detention, it would essentially have the effect of re-starting his case from the beginning. *Id.* ¶ 10. Petitioners emphasize these facts because they acknowledge that hypothetically, were circumstances such that their removal were imminent, that would present far different legal issues. But as things actually stand, they face the prospect, not of brief re-detention for the purpose of effectuating removal, but rather of prolonged detention while their proceedings continue to unfold.

Turning to the law, the Court's order denying Petitioners' motion for preliminary injunction cited *Demore v. Kim* extensively. But, as the Court acknowledged, Petitioners are not in the generic position of a noncitizen facing mandatory immigration detention upon release

from criminal custody. *See* Order at 10 ("Admittedly, Petitioners are uniquely situated given their court-ordered release in *Zepeda Rivas*.") Thus, whereas *Demore* considered the constitutional propriety of mandatory detention under Section 1226(c) in general, its analysis ill-fits the circumstances of this case. *See Carballo* 2025 WL 2381464, at *4 (finding "a meaningful distinction between a challenge to an initial period of detention, at issue in *Demore*, and a challenge to *re-detention* after a court has previously granted release on bond," enabling the individual to "form the enduring attachments of normal life" and gain a "liberty interest that is valuable and must be seen as within the protection of the Due Process Clause") (cleaned up) (citing *Guillermo M.R. v. Kaiser*, No. 25-cv-5436-RFL, 2025 WL 1810076, at *1 (N.D. Cal. June 30, 2025) ("[T]he liberty interests of [an individual] who is re-arrested differ from the liberty interests of a detained person.")).

The parties did not brief—and therefore the Court had no occasion to consider—the Supreme Court's more relevant, recent decision in *Nielsen v. Preap*, which examined the propriety of applying Section 1226(c) to an individual who is detained after having been at liberty for some period, not upon release from criminal custody. While holding that Section 1226(c) nonetheless applies to those circumstances, the Supreme Court explicitly stated that its decision "on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute." 586 U.S. at 396, 420. Following *Preap*, several courts have granted requests for bond hearings by petitioners who were not detained under Section 1226(c) until well after their release from criminal custody. *See, e.g.*, *Pham v. Becerra*, No. 23-cv-1288-CRB, 2023 WL 2744397, at *1-2 (N.D. Cal. Mar. 31, 2023); *Perera v. Jennings*, No. 21-cv-4136-BLF, 2021 WL 2400981, at *1-2 (N.D. Cal. June 11, 2021).

Given that the petitioners in those post-*Preap* cases possessed a constitutionally protected liberty interest arising merely from their period of freedom following release from criminal custody, *Zepeda Rivas* class members released long ago by a federal judge *a fortiori* present an even *stronger* due process claim. *See Carballo* 2025 WL 2381464, at *6 ("[T]he petitioners in *Perera* and *Pham* were found entitled to a post-deprivation bond hearing even though they had not previously been granted release . . . . This case presents a stronger due process concern because there has already been a court determination that petitioner did not present a flight risk or danger to the community."); *accord Duong*, 2025 WL 2689266, at *8.

In sum, *Preap*—and especially its progeny in the Northern and Eastern Districts—are apposite authority strongly supporting Petitioners' claims in this case. While Petitioners focused their preliminary injunction presentation on other authorities, the Court can and should consider this line of cases and find that it counsels for granting relief here.

III. The Court Should Issue Relief Commensurate with the Court's Final Analysis of the Due Process Concerns at Issue Here.

Petitioners have a substantial, constitutionally protected interest in their continued liberty that is not outweighed by the government's interest in re-detention absent any prior neutral review. Thus, Petitioners urge the Court to examine the arguments in this case afresh—utilizing the additional light now shed by decisions in parallel litigation involving the due process rights of other *Zepeda Rivas* class members—and enjoin the government from re-detaining them without first demonstrating at a hearing before a neutral decisionmaker that such re-detention would serve a lawful purpose. That being said, if the Court's analysis of the issues presented by this case does not align with that of other courts, Petitioners nonetheless ask that the Court issue other relief commensurate with its final analysis that the Court deems just and proper. *Cf. Morrissey*, 408 U.S. at 481 ("[D]ue process is flexible and calls for such procedural

protections as the particular situation demands.").

Thus, even if the Court finds that due process does not require a hearing prior to any re-detention of Petitioners, it can and should find that due process requires a prompt post-deprivation hearing in the event of either Petitioner's re-detention. To be sure, that would offer less protection than the relief sought via the preliminary injunction motion. It would mean that Mr. Rivera and/or Mr. Khan would "already have suffered the injury he [sought] to avoid," *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1055 (N.D. Cal. 2021). But it at least would afford each Petitioner a meaningful opportunity to be heard. *Cf. Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is the opportunity to be heard . . . . which must be granted at a meaningful time and in a meaningful manner.") (internal citation omitted).

CONCLUSION

For these reasons, the case should not be dismissed as moot. Petitioners continue to seek a remedy that adequately protects their due process rights (including any interim remedy the Court may deem appropriate). Petitioners respectfully request that the Court provide Petitioners with an opportunity to traverse any return to their petition that Respondents may file.

Respectfully submitted,

Dated: October 24, 2025

/s/ Jordan Wells

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