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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JORGE RIVERA LARIOS, Petitioner, v. SERGIO ALBARRAN, et al., Respondents.	Case No. 3:25-cv-08799-AMO **RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED HABEAS PETITION** Hearing: TBD The Hon. Araceli Martínez-Olguín

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

This Court has already granted Petitioner a preliminary injunction, under which the government provided him with a bond hearing before an immigration judge ("IJ") to determine whether he posed a danger to the community or a flight risk. The IJ found that Petitioner was both, and the Department of Homeland Security thereafter took Petitioner into custody on that basis. The Court has already rejected Petitioner's argument that his re-detention violated the preliminary injunction. Nevertheless, having obtained the procedural relief he requested in his original habeas petition, Petitioner returns to this Court yet again, seeking leave to amend his habeas petition to add claims that his detention following the bond hearing violates the due process clause of the Constitution. The Court should deny leave to amend, because Petitioner's proposed amendments would be futile.

First, the Court lacks jurisdiction to hear Petitioner's proposed amended claims. Congress has stripped the federal courts of jurisdiction to review discretionary decisions related to carrying out orders of removal, including the detention decisions at issue here. To the extent Congress maintained jurisdiction to review constitutional questions and questions of law, it channeled those claims into the courts of appeals through petitions for review. Although this Court previously found it had jurisdiction for Petitioner's earlier claims, the government respectfully submits that decision was mistaken, and in any event it does not control for Petitioner's proposed new claims, which are not based on a decision to revoke his prior release under DHS regulations.

Second, Petitioner has failed to exhaust his administrative remedies. The Ninth Circuit has held that challenges to IJ bond decisions should first be raised to the Board of Immigration Appeals before seeking habeas review in district court. But Petitioner is now trying to take exactly the same shortcut that the Ninth Circuit has rejected. Nor is there any reason to excuse the exhaustion requirement here. Petitioner is simply wrong to argue that BIA review would be unavailable, and allowing that review to play out would allow for a more developed record, give the agency the chance to address Petitioner's claims in the first instance, and disincentivize premature habeas requests in the district courts.

Third, Petitioner's new substantive due process claim would fail. The Supreme Court has long recognized the constitutionality of detention during immigration proceedings, especially for individuals like Plaintiff who are subject to an administratively final order of removal. On top of that, Petitioner has

very recently received a bond hearing before an IJ, who found that he was both a danger and a flight risk. That decision was supported by substantial evidence. Petitioner would not be able to show that his detention at this point violates the Constitution.

Finally, Petitioner's new procedural due process claim would also fail. Again, Petitioner already received the process the Court found was due by virtue of his first habeas petition, and the Court has already rejected Petitioner's argument that the bond hearing violated the preliminary injunction. The fact that the IJ found against Petitioner does not mean that the bond hearing violated due process. Rather, the IJ properly carried out the role required by the preliminary injunction by evaluating whether Petitioner was a danger or a flight risk. And Petitioner cannot show that the IJ's weighing of Petitioner's criminal and immigration history—which includes multiple felony convictions from as recently as 2022—was so erroneous as to have violated the Constitution.

For all of these reasons, Petitioner's proposed amendments would be futile. The Court should therefore deny leave to amend.

II. RELEVANT BACKGROUND

A. Petitioner's Immigration and Criminal History.

Petitioner has entered the United States unlawfully at least six times. Since his most recent reentry in 2016, he has been arrested six times. *See* Dkt. 14-1 ("Ramirez Decl."), ¶¶ 12-23. Petitioner was convicted in 2019 of felony transport of a controlled substance. *See id.* ¶ 15 & Ex. 6. He was sentenced to participation in a work program, to pay a fine, and three years of probation, a condition of which included a firearm restriction. *See id.*

Following his conviction, Petitioner was twice arrested in 2021. First, in January, the Lake County Sheriff's Department arrested Petitioner on felony charges of being a felon in possession of a firearm and ammunition, and on misdemeanor charges of possession of a controlled substance and possession of a switchblade in a vehicle. *See id.* ¶ 16 & Ex. 6. Then, in July, the Lake County Sheriff's Department arrested Petitioner on a misdemeanor charge of use or being under the influence of a controlled substance. *See id.* ¶ 17 & Ex. 6. He was convicted on April 4, 2022, of a felony charge of being a felon in possession of a firearm, and was sentenced to 180 days in jail, two years of probation, and participation in a work program. *Id.* ¶ 21.

B. Petitioner's 2022 Release Due To The COVID Pandemic.

ICE arrested Petitioner in September 2021. *See id.* ¶ 18. In January 2022, Petitioner was released on an Order of Supervision. *See id.* ¶ 20 & Ex. 2. As Petitioner admits, he was released "pursuant to *Fraihat v. ICE*, 445 F.Supp.3d 709 (April 20, 2020 C.D. Cal.) as he was identified as having one or more risk factors for COVID-19, specifically, being a smoker." Pet. ¶ 32; *see also id.* ¶ 3; Mot. 4. There is no record that DHS (or an IJ) ever previously determined that Petitioner was not a flight risk or a danger to the community. *See* Dkt. 27 ¶ 16.

C. Petitioner's 2025 Arrest, Re-Detention, and Preliminary Injunction.

On August 17, 2025, local law enforcement officers arrested Petitioner for felony infliction of corporal injury to a spouse or cohabitant, a domestic violence offense. *See* Pet. ¶¶ 5, 22, 60; Ramirez Decl. ¶ 23 & Ex. 6. Local authorities released him without filing criminal charges.

On October 14, 2025, Petitioner attended a check-in appointment at the ICE Field Office in San Francisco. *See* Pet. ¶ 22. The ICE Field Office Director determined that Petitioner's August 2025 criminal arrest evidenced a violation of his conditions of supervision, and placed Petitioner in detention. *See* Ramirez Decl. Ex. 4; *see also* Pet.¶ 22.

Petitioner filed this habeas petition on October 14, and moved for a temporary restraining order on October 15. *See* Dkt. Nos. 1, 5. The Court granted Petitioner's request for a temporary restraining order as modified, and ordered Petitioner's release. *See* Dkt. No. 7. The government confirmed that Petitioner was released at approximately 7:00 a.m. on the morning of October 16. *See* Dkt. No. 9.

After subsequent briefing and a hearing, the Court granted Petitioner's motion for a preliminary injunction. The Court specifically ordered that "Respondents are ENJOINED AND RESTRAINED from re-detaining Rivera Larios without notice and a pre-deprivation hearing before an Immigration Judge to evaluate whether his re-detention is warranted based on flight risk or a danger to the community." Dkt. 22 at 18.

D. The Bond Hearing

Immigration Judge Samantha Begovich conducted the bond hearing ordered by the preliminary injunction on November 3, 2025. *See* Dkt. 27 ¶ 7 & Ex. A. Both parties submitted evidence in advance of the hearing, including Petitioner's responses to the IJ's legal and factual questions. *Id.* Exs. B, C.

That evidence included records of Petitioner's criminal and immigration history, *id.* Ex. B, as well as his statements that he previously worked for [redacted]muggling drugs into the United States, *see id.* Ex. B (ECF pp. 89, 105, 114-15). The IJ questioned Petitioner extensively. *See id.* ¶¶ 11-14. She heard closing arguments from both parties. *Id.* ¶¶ 15-16.

At the conclusion of the hearing, the IJ made alternate rulings. First, consistent with both parties' positions, she found that she lacked statutory authority to conduct the hearing, but would do so pursuant to the Court's order. *See id.* ¶¶ 10, 17. Second, she found that, based on his history of criminal arrests and convictions and immigration violations, Petitioner was both a danger to the community and a flight risk. *See id.* ¶¶ 17-18. The IJ ruled from the bench and has not issued a written order.[1]

Although the IJ found Petitioner to be both a flight risk and a danger, she did not expressly order that he be re-detained. Rather, she indicated that DHS could decide whether to re-detain him in light of her rulings. *See id.* ¶ 20.

Following the hearing, DHS re-detained Petitioner. *See id.* ¶¶ 22, 24.

III. ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure states that, after an opposing party has filed a responsive pleading, a party may amend its complaint only with the opposing party's written consent or the court's leave. *See* Fed. R. Civ. P. 15(a)(2).[2] The court should "freely grant leave to amend when justice so requires." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (cleaned up). However, leave to amend is not to be granted automatically. *See id.*; *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

"Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (citation omitted); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). "Futility alone can justify the denial of a motion to amend." *Johnson*, 356 F.3d at 1077. Amending a pleading would be futile when the amended

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[1] There is no requirement that an IJ issue a written order following such a hearing. Either party may request a written order, but to the government's knowledge, Petitioner has not done so.

[2] Rule 15 is "made applicable to habeas proceedings by [28 U.S.C.] § 2242, Federal Rule of Civil Procedure 81(a)(2), and Habeas Corpus Rule 11." *Mayle v. Felix*, 545 U.S. 644, 655 (2005).

pleading would fail on the merits. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (citing *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991)).

Here, Petitioner requests leave to amend to add (1) a substantive due process claim based on his detention after an immigration judge found him to be both a danger to the community and a flight risk; and (2) a procedural due process claim based on the manner in which his pre-detention hearing was conducted. However, for the reasons discussed below, Petitioner's proposed amendments would be futile, and the Court should therefore deny leave to amend. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (dismissal without leave to amend is proper if amendment would be futile); *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1088 (9th Cir. 2002) ("Because any amendment would be futile, there is no need to prolong the litigation by permitting further amendment").

A. The Court Lacks Jurisdiction Over Petitioner's Proposed Amended Claims.

Congress has removed the federal courts' jurisdiction to review "any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). This provision applies to 8 U.S.C. § 1231, which is in the same "subchapter" (Subchapter II) of Title 8, Chapter 12, of the United States Code. Section 1231 governs the "Detention and removal of aliens ordered removed." 8 U.S.C. § 1231. As relevant here, § 1231(a)(6) provides that "[a]n alien ordered removed who is inadmissible . . . may be detained beyond the [initial 90-day] removal period." Congress has "specified" that DHS's decision whether to detain such an alien is "in the discretion of" the agency, and therefore the Court lacks jurisdiction to review it under § 1252(a)(2)(B)(ii).

Start with the text of the statute itself. Section 1231(a)(6) provides that an "inadmissible" alien such as Petitioner "*may* be detained beyond the removal period." (Emphasis added.) The operative word is "may." The Supreme Court "has repeatedly observed the word 'may' *clearly* connotes discretion." *Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024) (cleaned up; emphasis in original) (holding 1252(a)(2)(B)(ii) precludes review of visa revocation decisions). Because Congress has granted the Executive Branch discretion under § 1231(a)(6), § 1252(a)(2)(B)(ii) precludes judicial review of

determinations made by the Executive in the exercise of that discretion.

To be clear, the source of discretion here is Congress's provision that the government "may" detain inadmissible aliens after the 90-day removal period. 8 U.S.C. § 1231(a)(6). The Court previously ruled that it had jurisdiction over Petitioner's claim that the government improperly revoked his conditional release under the governing regulations. *See* Dkt. No. 22 at 4-5. The government respectfully disagrees with that ruling, and submits that the Court erred by focusing on the regulations, rather the Congress's grant of discretion in the relevant statute. *See* Dkt. No. 21 at 2 n.1. But in any event, the question is no longer about the revocation of Petitioner's release under the regulations; Petitioners' proposed amended claims concern the IJ's findings and DHS's subsequent decision to detain him. This case is fundamentally unlike *Kucana v. Holder*, in which the Supreme Court held that § 1252(a)(2)(B) did not strip courts of appeals of jurisdiction to review BIA decisions on motions to reopen. 558 U.S. 233, 236 (2010). The Court explained that "[t]he Board's discretionary authority to act on a motion to reopen . . . is 'specified' not in a statute, but only in the Attorney General's regulation." *Id.*; *see also id.* at 243 nn. 9 & 10. Here, by contrast, the relevant discretion comes in the statute itself: Congress specified that the Executive Branch "may" detain aliens in Petitioner's circumstances. 8 U.S.C. § 1231(a)(6); *see also Bouarfa v. Mayorkas*, 604 U.S. at 13.

Indeed, the Supreme Court has held that the adjacent clause in § 1252(a)(2)(B)(i) "precludes judicial review of factual findings that underlie a denial of relief" of the types specified in that provision. *Patel v. Garland*, 596 U.S. 328, 331 (2022). And the Ninth Circuit has recognized that, "[a]lthough *Patel* addressed § 1252(a)(2)(B)(i), its reasoning applies to the neighboring subsection § 1252(a)(2)(B)(ii)." *Zia v. Garland*, 112 F.4th 1194, 1200 (9th Cir. 2024). "*Patel* makes clear that any underlying eligibility determination made in support of the ultimate discretionary decision is beyond judicial review—'[f]ederal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings.'" *Id.* at 1200-01. Thus, § 1252(a)(2)(B)(ii) applies to factual findings that underlie any other decision made discretionary by the statute, such as the decision to detain an inadmissible individual beyond the 90-day removal period. *See Patel*, 596 U.S. at 331; 8 U.S.C. § 1231(a)(6).[3]

[3] Although the title of § 1252(a)(2)(B) is "Denials of discretionary relief," that language does not limit the plain text of § 1252(a)(2)(B)(ii) to denials of relief *from removal*, as opposed to other forms of discretionary relief provided in the INA, such as conditional release from detention pending removal.

Moreover, even if Petitioner could obtain judicial review of the immigration judge's danger and flight-risk findings, this Court would not be the proper forum for such claims. Under 8 U.S.C. § 1252(a)(2)(D), "constitutional claims or questions of law" may only be considered "upon a petition for review filed with an appropriate *court of appeals*." This Court is not a court of appeals, and Petitioner's proposed amended habeas petition is not a petition for review. Indeed, the Supreme Court and Ninth Circuit cases holding that § 1252 does not strip jurisdiction to review "mixed question[s] of law and fact" arose in the context of PFRs filed with the courts of appeals. *See, e.g.*, *Wilkinson v. Garland*, 601 U.S. 209, 212 (2024); *Martinez v. Clark*, 124 F.4th 775, 782 (9th Cir. 2024). These cases do not stand for the proposition that § 1252 preserves the jurisdiction of district courts to consider such claims in a habeas petition. To the contrary, such an interpretation would run directly counter to the plain text of the statute stripping courts' jurisdiction for such "habeas corpus" claims, and only preserving them in "a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(2)(B), (D).

This Court therefore lacks jurisdiction to consider Petitioner's proposed amended habeas claims based on the immigration judge's determination that Petitioner is a danger and flight risk, and DHS's determination to re-detain him based on those findings.

B. Petitioner Failed To Exhaust His Proposed Amended Claims.

In addition to the jurisdictional problem above, Petitioner's proposed amended claims would fail for a straightforward procedural reason as well: he is seeking review of an IJ's decision, but he has not appealed to the BIA. "This short cut was improper. [Petitioner] should have exhausted administrative remedies by appealing to the BIA before asking the federal district court to review the IJ's decision." *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011).

Leonardo is particularly instructive. The petitioner in that case had successfully filed a habeas petition, resulting in a bond hearing before an IJ. *See id.* at 1159. But "the IJ denied bond, concluding that Leonardo posed a danger to the community." *Id.* "Rather than appealing the IJ's adverse bond determination to the BIA, Leonardo filed a motion for review of the IJ's decision in his pending habeas

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See INS v. St. Cyr, 533 U.S. 289, 308 (2001) ("The title of a statute cannot limit the plain meaning of the text.") (cleaned up) (superseded by statute on other grounds). Indeed, the Supreme Court has recognized the application of § 1252(a)(2)(B)(ii) to the "exercise of discretion" in bond hearings under § 1231(a)(6). *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

case, arguing that the hearing failed to satisfy due process or conform to the district court's previous order." *Id.* The Ninth Circuit held that "the district court should have dismissed Leonardo's claims, without prejudice, for a failure to exhaust administrative remedies." *Id.* at 1160. And the Ninth Circuit expressly "reject[ed] Leonardo's contention that the district court should have addressed his challenges to the IJ's decision based on the court's authority to ensure compliance with its earlier habeas order." *Id.* at 1161. By "affording a bond hearing before an immigration judge," the government had "'complied exactly with'" the preliminary injunction. *Id.* "The district court was under no obligation to address Leonardo's new arguments under the ambit of ensuring compliance with the earlier order." *Id.*

Leonardo is on all fours with this case, and requires the Court to deny Petitioner's motion for leave to amend based on his failure to exhaust administrative remedies. Just as in that case, the government provided Petitioner with the bond hearing ordered by the preliminary injunction. And again, just as in that case, the IJ found Petitioner was a danger to the community, but Petitioner seeks to review that determination in the "pending habeas case," rather than appealing to the BIA. And, once more as in that case, the Court should dismiss the new claims due to Petitioner's failure to exhaust.

Like the Petitioner in *Leonardo*, Petitioner has not demonstrated good cause to forego the exhaustion requirement here. Courts may waive the exhaustion requirement under certain circumstances, but their "discretion to waive the exhaustion requirement when it is prudentially required . . . is not unfettered." *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Waiver may be appropriate "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Id.* at 1000. But there is no indication here that the BIA could not adequately review Petitioner's arguments, or that he would suffer an "irreparable injury" in the meantime. To the contrary, courts routinely enforce the exhaustion requirement in habeas cases notwithstanding that such petitioners remain detained pending BIA review. *See, e.g.*, *Leonardo*, 646 F.3d at 1160.

Petitioner previously argued that BIA review would be unavailable here, because the immigration judge never issued a written decision. *See* Dkt. No. 31 at 7. But as the government has explained, there is absolutely nothing stopping Petitioner from requesting a written decision. *See* Dkt. No. 30 at 3 n.2, 9. As a general matter, Petitioner can file any motion that is "appropriate to the facts

and law of each particular case." Immigration Court Practice Manual § 5.10(w). There is even a pre-populated option on the ECAS filing portal for a "Motion to Reissue Decision." Nor is there any requirement that an IJ's decision be in writing before it can be appealed to the BIA. Rather, the BIA considers both "Interlocutory Appeals" and "Bond Appeals," neither of which require a formal written order. *See* BIA Practice Manual §§ 4.14, 7.1.

Indeed, it is remarkable that Petitioner has failed to take even the ministerial step of requesting a written decision in the nearly two months since his bond hearing, when he has filed two motions in this Court challenging that hearing in the same time. *See* Dkt. Nos. 24, 36. And to the extent Petitioner (wrongly) believes he is foreclosed from even pursuing such relief within the agency, the government's position that Petitioner can do so is plainly on the record here, and it would not argue otherwise before the BIA.

Moreover, a "key consideration" in the exhaustion analysis is "whether 'relaxation of the requirement would encourage the deliberate bypass of the administrative scheme.'" *Laing*, 370 F.3d at 1000 (citation omitted). Waiving the exhaustion requirement for Petitioner, who has repeatedly come back to this Court after his bond hearing without ever filing an appeal to the BIA, would encourage other detainees to deliberately bypass the administrative scheme in favor of immediate judicial proceedings. It would essentially turn the district court into a court of appeals for IJ bond determinations, supplanting the BIA.

Petitioner's rush to return to this Court demonstrates the wisdom of the exhaustion requirement. Again, in his haste, Petitioner did not obtain an audio recording or transcript of the IJ hearing, or request a written order from the IJ. These failures inhibit meaningful review of the IJ's decision. By contrast, adherence to the ordinary administrative review procedure would allow for the development of just such a record, and therefore support review of the IJ's decision based on more than a handful of hearsay paragraphs from Petitioner's counsel's declaration.

For all of these reasons, this Court should follow the ordinary course and uphold the administrative exhaustion requirement in this case. *See Jimenez v. Napolitano*, No. 12-cv-03558-RMW, 2013 WL 5442377, at *12 n.1 (N.D. Cal. Sept. 30, 2013).

C. Petitioner's Proposed Substantive Due Process Claim Would Fail.

The Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also, e.g.*, *Reno v. Flores*, 507 U.S. 292, 309 (1993) (rejecting procedural due process claim that "the INS procedures are faulty because they do not provide for automatic review by an immigration judge of the initial deportability and custody determinations"); *Abel v. United States*, 362 U.S. 217, 233-34 (1960) (noting the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation"); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

Indeed, the Supreme Court has squarely held that aliens in Petitioner's procedural posture—those subject to reinstated removal orders pending an immigration judge's withholding of removal determination—are subject to detention under § 1231 and "are not entitled to a bond hearing while they pursue withholding of removal." *Guzman Chavez*, 594 U.S. at 526; *see also, e.g.*, *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 581 (2022) (rejecting argument that § 1231(a)(6) "require[s] an initial bond hearing" "at the outset of detention"). And that textual holding is reinforced by the Supreme Court's prior determinations that, so long as it is not prolonged, detention to effectuate removal is generally constitutionally permissible.

True, noncitizens held under § 1231 may be able to obtain review of their detention after six months, including to avoid the constitutional problems with "prolonged" detention. *See Zadvydas*, 533 U.S. at 699; *but see Arteaga-Martinez*, 596 U.S. at 580-82 (rejecting claim that statutory text of § 1231(a)(6) required periodic bond hearings every six months). But Petitioner does not and cannot argue that his detention has become prolonged, or that his removal is not reasonably foreseeable at this time. *See generally* Pet. And even under *Zadvydas*, danger and flight risk findings remain sufficient justifications to detain a particular alien pending removal. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

Here, Petitioner *has* received a bond hearing, at which an immigration judge found that he was *both* a danger to the community and a flight risk. *See* Proposed Amended Pet. ¶¶ 41-45. These findings were based on Petitioner's criminal history, including five arrests and multiple felony and misdemeanor convictions from 2019 to 2022, and his immigration history, including five unlawful reentries after he was first removed. *See id.* ¶¶ 23, 42-45; *see also* Ramirez Decl. ¶¶ 12-23 & Ex. 6. Petitioner is subject to an administratively final order of removal; he is currently in withholding-only proceedings on the detained calendar, with a hearing set for February 11, 2026. *See* Proposed Amended Pet. ¶ 49. Petitioner's substantive due process claim challenging his detention in these circumstances therefore fails. *See Demore*, 538 U.S. at 531; *see also Zadvydas*, 533 U.S. at 701 (recognizing a "presumptively reasonable period of detention" to effectuate a final removal order).

Ignoring these authorities, Petitioner argues that his detention violates substantive due process because he disagrees with the IJ's danger and flight-risk findings. *See* Proposed Amended Pet. ¶¶ 64-68. But the Court cannot and should not intervene to review those findings, as discussed above. Even setting those jurisdictional and procedural problems aside, however, Petitioner's bare disagreement with the IJ's findings does not support his claim that his detention pending his withholding-only claim violates the substantive due process component of the Constitution. Indeed, the Ninth Circuit and courts in this District have repeatedly rejected similar substantive due process claims. *See, e.g.*, *Beqir v. Clark*, 220 F. App'x 469, 471 (9th Cir. 2007) (holding that the petitioner's "detention meets substantive due process requirements" where, among other things, the "determination that he was a flight risk and should be detained is supported by substantial evidence"); *Jimenez v. ICE*, No. 23-cv-03566-SVK, 2024 WL 714659, at *10 (N.D. Cal. Feb. 21, 2024) (rejecting "argument that [alien's] detention had become punitive because he does not pose a risk of flight or danger," because a "bond hearing . . . gives Petitioner the opportunity to have a neutral arbitrator evaluate whether the government could prove that he poses such a risk"); *I.E.S. v. Becerra*, No. 23-cv-03783-BLF, 2023 WL 6317617, at *7 (N.D. Cal. Sept. 27, 2023); *Martinez Leiva v. Becerra*, No. 23-cv-02027-CRB, 2023 WL 3688097, at *5 (N.D. Cal. May 26, 2023) (rejecting claim that prolonged detention had "become punitive because he does not pose a risk of flight or a danger," because "that is what bond hearings are for").

The Court should therefore deny leave to amend to add a substantive due process claim.

D. Petitioner's Proposed Procedural Due Process Claim Would Fail.

The government complied with the preliminary injunction and provided Petitioner with a bond hearing, at which the immigration judge evaluated whether Petitioner was a danger to the community or flight risk. *See* Dkt. No. 34. Petitioner now claims that the bond hearing he was provided nevertheless failed to comport with procedural due process because (1) the IJ was not neutral, and (2) the record did not support the IJ's findings. *See* Proposed Amended Pet. ¶¶ 68-113. Both of these arguments would fail, and so the Court should deny leave to amend.

1. Petitioner's challenge to the IJ's neutrality would fail.

Petitioner offers no substantial reason to question the IJ's neutrality. He primarily argues that the IJ was biased because, even though the IJ found him to be both a flight risk and a danger to the community, the IJ ultimately "deferred" to DHS's decision whether to re-detain him in these circumstances. *See* Proposed Amended Pet. ¶ 71.

The argument is puzzling. Petitioner never bothers to explain why the IJ's determination that DHS could make the ultimate decision whether to detain him reflects bias in the IJ's weighing of the evidence. As the government previously explained, the IJ's decision seems most likely to be the result of the unusual procedural posture in which the hearing was conducted. *See* Dkt. No. 30 at 7. As Petitioner acknowledges, both parties agreed that the IJ lacked statutory authority to conduct the hearing, and the IJ expressly found that she lacked such authority to do so. *See* Proposed Amended Pet. ¶ 44; *see also* Dkt. 27 ¶¶ 8-10, 17. Rather, the IJ's authority was derived from the Court's preliminary injunction itself. *See id.* But the preliminary injunction did not order the IJ to make a final detention decision; rather, it enjoined the government from re-detaining Petitioner "without notice and a pre-deprivation hearing before an Immigration Judge to evaluate whether his re-detention is warranted based on flight risk or a danger to the community." Dkt. 22 at 18. The IJ performed the role she was asked to perform under the preliminary injunction; she found that Petitioner was both a flight risk *and* a danger to the community. Nothing about this reflects a lack of neutrality on the part of the IJ.

Indeed, Petitioner once again ignores that Congress vested DHS with wide discretion to make detention decisions in the post-removal period. *See* 8 U.S.C. § 1231(a)(3), (6); *see also* Dkt. 21 at 1-2 (explaining the discretionary nature of post-removal-period detention under § 1231(a)(6)). The

immigration courts are not typically involved in such post-removal-order detention decisions. *See generally* 8 C.F.R. § 241.4. Under the statute applicable to Petitioner, then, the IJ properly reserved to DHS the decision whether to re-detain him, after evaluating whether he was a flight risk or a danger to the community such that his detention could be supported by those grounds.

Petitioner also argues in passing that other procedural rulings by the immigration court somehow reflect a due process violation. *See* Proposed Amended Pet. ¶ 71. But courts have wide discretion to manage their dockets. Indeed, it is ironic that Petitioner first moved this Court for a bond hearing before an immigration judge on an emergency basis, and now argues that he received a bond hearing too quickly. In any event, none of the calendaring decisions Petitioner identifies reflect a due process violation.

2. Petitioner's challenge to the IJ's findings would fail.

Finally, Petitioner claims that the IJ's determinations that he is both a danger to the community and a flight risk violated procedural due process. *See* Proposed Amended Pet. ¶¶ 72-82. But the IJ appropriately considered Petitioner's extensive history of criminal and immigration violations when she made those determinations. Her resulting decisions did not violate the Constitution.

Petitioner argues that the IJ "failed to consider" the supposed remoteness of Petitioner's arrests and immigration violations, "without regard for his conduct subsequent to his release." Proposed Amended Pet. ¶ 78. But it is unclear why Petitioner claims the IJ "failed to consider" those issues, since his counsel presented them directly to the IJ at the hearing. *See* Dkt. 27 at ¶ 15. In any event, the IJ is not required "to write an exegesis on every contention" or 'expressly parse or refute on the record each individual argument or piece of evidence offered by the petitioner.'" *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010) (citation omitted) (citing rule in the context of the BIA as the initial arbiter on a motion to reopen); *see also, e.g.*, *Calmo v. Sessions*, No. 17-cv-07124-WHA, 2018 WL 2938628, at *4 (N.D. Cal. June 12, 2018) (rejecting argument that IJ's written order must discuss each item of evidence submitted during the bond hearing). To the contrary, the IJ is presumed to have considered the relevant evidence submitted, and "[t]he agency's failure to mention specific evidence, by itself, does not overcome this presumption." *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000); *Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006) (same). There is no indication here that the IJ did not

carefully consider the full record, especially in light of the fact that Petitioner directly and explicitly raised the arguments he contends the IJ ignored.

In reality, the IJ plainly "considered" Petitioner's arguments, but found them unconvincing in light of the nature, volume, and recency of his criminal conduct. And the IJ certainly had discretion to do so. Petitioner was arrested five times between 2016 and 2022, for offenses ranging from carrying a concealed dagger, to driving under the influence, to possessing narcotics for sale. *See* Ramirez Decl. ¶¶ 12-17. He was convicted of a felony narcotics offense in 2019. *See id.* ¶ 15. He was repeatedly arrested after that conviction, leading to a second felony conviction in 2022—just three years ago—for being a felon in possession of a firearm. *See id.* ¶¶ 16-17. Moreover, Petitioner's admitted past drug-smuggling work for [redacted] was presented to the IJ. *See* Dkt. 27 ¶ 12 & Ex. B (ECF pp. 89, 105, 114-15). The IJ was well within her discretion to find a danger to the community based on this history of offenses and gang association. *See, e.g.*, *Calmo*, 2018 WL 2938628, at *5 (rejecting argument that IJ "failed to consider" petitioner's countervailing evidence and finding no legal error in conclusion that petitioner was a danger to the community).

Finally, Petitioner is wrong that the government must prove "changed circumstances" from his prior release. *See* Proposed Amended Pet. ¶ 94. Again, no government official ever previously determined that Petitioner was not a danger or a flight risk; this is not a case where an IJ previously ordered Petitioner's release, and the government now seeks to re-detain him in spite of that ruling. Rather, Petitioner was released in January 2022 for medical reasons under *Fraihat v. ICE* due to the COVID-19 pandemic. *See* Proposed Amended Pet. ¶ 3. At most, an unidentified ICE official may have concluded that medical and humanitarian concerns weighed in favor of releasing Petitioner during the pandemic in spite of the danger and flight risk he posed. But those medical and humanitarian considerations are no longer present. Thus, even if the government did need to show "changed circumstances," the relevant "circumstances" have indeed "changed." And none of this provides a reason to overturn the IJ's conclusion that Petitioner is currently both a flight risk and a danger.

Petitioner's proposed amended procedural due process claim would therefore fail. The Court should deny leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the motion for leave to file an amended habeas petition.

Respectfully submitted,

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