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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

Jorge RIVERA LARIOS,  
  
Petitioner,

Case No. 3:25-cv-8799-AMO

v.

SERGIO ALBARRAN, in his official capacity,  
San Francisco Field Office Director, U.S.  
Immigration and Customs Enforcement;

**PETITIONER'S REPLY TO  
RESPONDENTS' OPPOSITION  
TO MOTION FOR LEAVE TO  
AMEND HABEAS PETITION**

KRISTI NOEM, in her official capacity,  
Secretary of the U.S. Department of Homeland  
Security; and

Date: TBD  
Time: TBD  
Before: Honorable Judge Araceli  
Martinez Olguin

PAMELA BONDI, in her official capacity,  
Attorney General of the United States,

Respondents.

Immigration Habeas Case

1 **INTRODUCTION**

2 Petitioner, Jorge Rivera Larios (Mr. Rivera Larios) files the instant reply to Respondents'  
3 opposition to his motion to amend the habeas petition. First, Respondents argue that the Court  
4 lacks jurisdiction to hear Petitioner's proposed amended claims. However, as Respondents  
5 acknowledge, this Court already concluded it has jurisdiction over the matter, previously  
6 rejecting Respondents' arguments. Second, Respondents erroneously argue that Petitioner failed  
7 to exhaust administrative remedies where exhaustion is futile. Third, Respondents argue that  
8 Petitioner's new proposed substantive and procedural due process claims would fail. Last,  
9 Respondents ignore the liberal legal standard for amending a petition. *See* Fed.R.Civ.P. 15(a).

10 **ARGUMENT**

11 **I. THIS COURT HAS JURISDICTION OVER PETITIONER'S PROPOSED  
12 AMENDED CLAIMS**

13 Respondents argue that this Court lacks jurisdiction to consider Petitioner's proposed  
14 amended claims due to 8 U.S.C. § 1252(a)(2)(B)(ii), alleging that 8 U.S.C. § 1231(a)(6) provides  
15 the agency unreviewable discretion to indefinitely detain noncitizens beyond the 90-day removal  
16 period. Dkt. 38 at 5-6.1 Respondents' arguments are without merit.

17 Respondents rely, in part, on *Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024) to highlight  
18 that the term "may" connotes discretion. Dkt. 39 at 5. However, in *Bouarfa*, the Supreme Court  
19 emphasized that the statutory section at issue, 8 U.S.C. § 1155, contains "no conditions that the  
20 Secretary must satisfy before he can revoke the agency's approval." *Bouarfa*, 604 U.S. at 14.  
21 That is not the case here, where, Mr. Rivera Larios's proposed amended claims challenge the  
22 statutory and constitutional basis of his re-detention, where the circumstances under which ICE  
23 released him have not materially changed, and Mr. Rivera Larios is presently neither a flight risk  
24 nor a danger. The pre-deprivation hearing that Respondents purported to hold did not cure these  
25 violations. *See* Dkt. 22 at 18; Dkt. 36 at 2; Dkt 37-1 at 14-20.

26 Moreover, the statute provides that federal courts lack jurisdiction to review "any other  
27 decision or action of the Attorney General or the Secretary of Homeland Security the authority

28 <sup>1</sup> Respondents assert that they disagree with this Court's prior decision regarding its  
jurisdictional authority over Petitioner's claims. Dkt. 38 at 6 (*citing* Dkt. No. 22 at 4-5.)

1 for which is specified under this subchapter to be in the discretion of the Attorney General or the  
2 Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii). A decision regarding danger  
3 and/or flight risk in the context of detention is a mixed question of law and fact that is reviewable  
4 by this Court. *Wilkinson v. Garland*, 601 U.S. 209, 217 (2024); *Martinez v. Clark*, 124 F.4th 775,  
5 779 (9th Cir. 2024).

6 Respondents acknowledge that 8 U.S.C. § 1252(a)(2)(D) does not deprive federal courts  
7 of jurisdiction over mixed questions of fact and law. Dkt. 39 at 7. However, they incorrectly  
8 assert that such review is only available on petition for review. *Id.* (citing *Wilkinson v.*, 601 U.S.  
9 at 217; *Martinez*, 124 F.4th at 779). While *Wilkinson* sought judicial review of an application for  
10 relief on petition for review, *Martinez* appealed a district court order denying a habeas petition at  
11 the Ninth Circuit. *Wilkinson*, 601 U.S. at 216; *Martinez*, 124 F.4th at 781. In fact, the *Martinez*  
12 court specifically acknowledged that its earlier decision finding no jurisdiction to review a  
13 dangerousness determination in an immigration habeas petition challenging custody could not be  
14 squared with *Wilkinson*. *Martinez*, 124 F.4th at 779 (citing *Wilkinson*, 601 U.S. 209). Thus,  
15 Respondents’ arguments are directly undermined by *Martinez*, and this Court maintains  
16 jurisdiction over Petitioner’s proposed amended claims. Moreover, Respondents ignore that this  
17 Court retains authority to review challenges to detention under the Fifth Amendment to the U.S.  
18 Constitution. *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001).

## 19 II. EXHAUSTION IS FUTILE IN THIS CASE

20 Respondents contend that the Court should require that Mr. Rivera Larios exhaust his  
21 administrative remedies and appeal to the Board of Immigration Appeals (BIA). Dkt. 39 at 7-9.  
22 Courts may require exhaustion as a prudential matter when “(1) agency expertise makes agency  
23 consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of  
24 the requirement would encourage the deliberate bypass of the administrative scheme; and (3)  
25 administrative review is likely to allow the agency to correct its own mistakes and to preclude  
26 the need for judicial review.” *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir.  
27 2003) (citation omitted). The exhaustion requirement may be waived if “administrative remedies  
28 are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture,

1 irreparable injury will result, or the administrative proceedings would be void.” *Laing v.*  
2 *Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004).

3 Respondents rely on *Leonardo v. Crawford*, 646 F.3d 1157 (9th Cir. 2011) to support  
4 their argument that Mr. Rivera Larios must exhaust administrative remedies. Dkt. 39 at 7-8.  
5 Respondents assert that *Leonardo* is “on all fours with this case.” *Id.* at 8. They are wrong.  
6 Unlike in Mr. Rivera Larios’s case, in *Leonardo*, the IJ issued a conclusive decision that was  
7 appealable to the BIA. *Leonardo*, 646 F.3d at 1159 (“the IJ denied bond...”). As discussed *infra*,  
8 here, the IJ did not issue a conclusive order but rather, called the hearing “theoretical,” stated  
9 “there’s no appellate rights,” made a finding as to flight risk and danger, and then deferred to  
10 DHS to decide whether to detain Mr. Rivera Larios. Dkt. 37-2 ¶ 5, Ex. A at 45-47. The IJ issued  
11 no final ruling or order that is appealable to the BIA; to the contrary, the IJ purposefully declined  
12 to issue an order, stating, “[o]bviously, this was just a theoretical bonding hearing with no force  
13 and effect at this point, so there’s no appellate rights that are attaching to this.” Dkt. 37-2 ¶ 5, Ex.  
14 A at 45-46.

15 Contrary to Respondents’ arguments, because the IJ intentionally declined to issue an  
16 order and asserted on the record that there are no appeal rights, there are no remedies to exhaust  
17 as there is no decision to appeal to the BIA. A court may waive the prudential exhaustion  
18 requirement, even if the case weighs in favor of prudential exhaustion, if “administrative  
19 remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile  
20 gesture, irreparable injury will result, or the administrative proceedings would be void.”  
21 *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017); *Noriega-Lopez*, 335 F.3d at 881. Here,  
22 administrative remedies are inadequate, and exhaustion would be futile, as the IJ, per her own  
23 statement, did not issue a decision or order that can be appealed pursuant to the regulations.

24 Respondents allege that the IJ was not required to issue an order and that Mr. Rivera  
25 Larios should have requested a written decision. Dkt. 39 at 8-9. Respondents also point to a “pre-  
26 populated option on the ECAS<sup>2</sup> filing portal for a “Motion to Reissue Decision.” *Id.* at 9.<sup>3</sup>  
27 However, contrary to Respondents’ assertions, the regulations require that an IJ issue an order to

28 <sup>2</sup> ECAS is the EOIR Courts & Appeals System Online Filing.

<sup>3</sup> There is no decision to “reissue” here.

1 pursue an appeal, and, importantly, the IJ here purposefully declined to do so, as she called the  
2 hearing a “theoretical bonding hearing with no force and effect.” Dkt. 37-2 ¶ 5 Ex. A at 45-46.  
3 Moreover, Mr. Rivera Larios, through counsel, specifically asked the IJ to clarify whether she  
4 was ordering that DHS had the authority to re-detain him. *Id.* at 46. The IJ refused to clarify or  
5 render an order, instead leaving the decision up to DHS, confirming that she did not make a  
6 decision or issue an order. *Id.*; *see also* 8 C.F.R. § 1003.37(a) (“A decision of the immigration  
7 judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the  
8 immigration judge in the presence of the parties and *a memorandum summarizing the oral*  
9 *decision shall be served on the parties.* If the decision is in writing, it shall be served on the  
10 parties by personal service, mail, or electronic notification.”) (emphasis added)).

11 The IJ’s failure to render a decision or issue an order, in conjunction with her statement  
12 that no appeal rights attach, render it futile to appeal the decision to the BIA. The regulation at 8  
13 C.F.R. § 1003.10(c) states, “[d]ecisions of immigration judges are subject to review by the Board  
14 of Immigration Appeals in any case in which the Board has jurisdiction.” Appellate jurisdiction  
15 over custody decisions at the BIA is defined in 8 C.F.R. § 1003.1(b)(7), “[d]eterminations  
16 relating to bond, parole, or detention of an alien as provided in 8 CFR part 1236, Subpart A.”  
17 Here, the IJ made no “determination”, instead, deferring to DHS.

18 Respondents point to the BIA Practice Manual (BPM) attempting to support their  
19 position. However, the BPM further affirms Petitioner’s position. Respondents first cite to BPM  
20 § 4.14, Interlocutory Appeals. Dkt. 39 at 9. Yet, BPM § 4.14(b) specifies that bond appeals are  
21 separate from interlocutory appeals and nowhere states that a written order is unnecessary.  
22 Respondents also cite to BPM § 7.1, which lacks any information about appealing a non-final  
23 “theoretical” finding by an IJ without a written order. *Cf.* Dkt. 39 at 9. Thus, the BPM fails to  
24 support Respondents arguments.<sup>4</sup> Furthermore, the regulations directly counter Respondents’  
25 position, where, pursuant to 8 C.F.R. § 1003.37(a), “A decision of the immigration judge may be  
26 rendered orally or in writing. If the decision is oral, it shall be stated by the immigration judge in

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26 <sup>4</sup> Respondents indicate that the government’s position is that Mr. Rivera Larios can appeal to the  
27 BIA and they would not argue otherwise. However, the government’s position in the instant  
28 litigation does not afford the BIA jurisdiction over a “theoretical” decision where the IJ states on  
the record that there are no appeal rights.

1 the presence of the parties and a memorandum summarizing the oral decision shall be served on  
2 the parties. If the decision is in writing, it shall be served on the parties by personal service, mail,  
3 or electronic notification.”

4 Finally, Respondents criticize Mr. Rivera Larios, stating, “in his haste, Petitioner did not  
5 obtain an audio recording or transcript of the IJ hearing.” Dkt. 39 at 9. However, Mr. Rivera  
6 Larios, in support of his proposed amended petition, filed a complete transcript of the audio  
7 recording from the pre-deprivation hearing. Dkt. 37-2 ¶5 Ex. A.

8 Additionally, Mr. Rivera Larios raises a constitutional challenge to Respondents’ re-  
9 detention without justification, where ICE previously released him and circumstances have not  
10 changed to warrant his re-detention. Exhausting his constitutional claim would be futile because  
11 the BIA does not have the authority to rule on constitutional questions. *See e.g., Wang v. Reno*,  
12 81 F.3d 808, 815–16 (9th Cir. 1996) (per curiam) (“[T]he inability of the INS to adjudicate the  
13 constitutional claim completely undermines most, if not all, of the purposes underlying  
14 exhaustion.”).

### 15 **III. MR. RIVERA LARIOS’S PROPOSED AMENDED CLAIMS MERIT 16 LEAVE TO AMEND THE PETITION FOR WRIT OF HABEAS CORPUS**

#### 17 **A. Mr. Rivera Larios’s Motion For Leave to Amend Meets the Requisite 18 Standard**

19 Generally, a court should liberally allow a party to amend its pleading. *See Fed.R.Civ.P.*  
20 *15(a)*; *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (“A  
21 district court shall grant leave to amend freely when justice so requires,” and “this policy is to be  
22 applied with extreme liberality.”) (internal quotation marks and citations omitted). Courts may  
23 decline to grant leave to amend only if there is strong evidence of “undue delay, bad faith or  
24 dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments  
25 previously allowed, undue prejudice to the opposing party by virtue of allowance of the  
26 amendment, [or] futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Courts  
27 may also decline to grant leave to amend when the new claims were not based on new or  
28 additional facts. *Herzog v. Property and Casualty Insurance Company of Hartford*, 244  
F.Supp.3d 1101, 1105 (W.D. WA 2017).

1 Respondents argue that amending the petition would be futile, as Mr. Rivera Larios's  
2 proposed amended claims would fail. Dkt. 39 at 4-5, 10-14. Respondents cite *Johnson v.*  
3 *Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004), which states that "Futility alone can justify the  
4 denial of a motion to amend." Dkt. 39 at 4. In *Johnson*, the Ninth Circuit agreed with the district  
5 court's denial of the motion for leave to amend, finding the initial statutory section the plaintiffs  
6 relied on provided adequate relief and because the second amendment simply restated another  
7 allegation in the original complaint. *Johnson*, 356 F.3d at 1078. Respondents likewise cite to  
8 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) for the futility proposition.  
9 Dkt. 39 at 5. However, unlike in Mr. Rivera Larios's case, in *Steckman*, the court found that the  
10 plaintiff failed to state any claim. *Id.* Unlike in *Steckman*, here, the Court already found that Mr.  
11 Rivera Larios set forth meritorious claims when it granted his temporary restraining order (TRO)  
12 and preliminary injunction (PI). Dkt. 7, 22. Also, unlike in *Johnson* and *Steckman*, in this case,  
13 new facts have arisen since Mr. Rivera Larios filed the petition, wherein Respondents have  
14 committed repeated and ongoing violations of his rights, warranting the amendment of his  
15 petition. Thus, the Court should find that Mr. Rivera Larios's proposed amended claims have  
16 merit such that further briefing is warranted.

17 **B. The Court Should Grant Leave for Mr. Rivera Larios to Add a  
18 Substantive Due Process Claim to his Petition**

19 Respondents cite *Demore v. Kim*, 538 U.S. 510 (2003) for the proposition that  
20 detention during deportation proceedings is constitutionally valid. Dkt. 39 at 10. However,  
21 the constitutionality of detention during such proceedings has limits. The Due Process  
22 Clause protects "all 'persons'"—including all noncitizens—against arbitrary detention. *See*  
23 *Zadvydas*, 533 U.S. at 693. "Freedom from imprisonment—from government custody,  
24 detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due  
25 Process Clause protects. *Id.* at 690. Civil immigration detention is constitutionally justified  
26 only to the extent that it effectuates removal and safeguards the community. *See Zadvydas*,  
27 533 U.S. at 690. Neither purpose is satisfied here, where Mr. Rivera Larios was living in the  
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1 community for over three and a half years without violating the ICE imposed order of  
2 supervision at the time of his initial and second re-detention.

3 Respondents cite *Johnson v. Guzman Chavez*, 594 U.S. 523, 526 (2021) for the  
4 proposition that noncitizens detained under 8 U.S.C. § 1231 during withholding of removal  
5 determinations are not eligible for bond hearings. Dkt. 39 at 10. Yet, Mr. Rivera Larios's  
6 substantive due process claim does not suggest he is entitled to a bond hearing. Rather, Mr.  
7 Rivera Larios argues in his amended petition that his detention violates substantive due  
8 process because it cannot be justified to ensure his appearance at immigration proceedings,  
9 protect the community, or effectuate his potential removal at some time in the future, and  
10 therefore, his detention is punitive.<sup>5</sup> Dkt. 37 at 14. In fact, *Guzman Chavez* supports Mr.  
11 Rivera Larios's argument, as the Supreme Court, citing *Zadvydas*, states that there is an  
12 implicit limit on post-removal period detention "in light of the Constitution's demands."  
13 *Guzman Chavez*, 594 U.S. at 529. Respondents argue that because Mr. Rivera Larios's  
14 detention is not prolonged, his argument fails. Dkt. 39 at 10. However, detention need not be  
15 prolonged to be constitutionally suspect. Citing 8 U.S.C. § 1231(a)(3), the *Guzman Chavez*  
16 court reflected that if no exception applies, a noncitizen who is not removed within the 90-  
17 day removal period will be released. *Guzman Chavez*, 594 U.S. at 529. In Mr. Rivera  
18 Larios's case, the 90-day removal period ran before he was released from ICE custody in  
19 January 2022. Dkt. 37 at 2.<sup>6</sup> Moreover, Mr. Rivera Larios's detention is unjustified, as he  
20 was living at liberty for over three and a half years while complying with all terms of his  
21 order of supervision.

22 \_\_\_\_\_  
23 <sup>5</sup> Respondents did not contest Mr. Rivera Larios's allegation that the method by which ICE re-  
24 detained Mr. Rivera Larios subsequent to the pre-deprivation hearing reflects the punitive nature  
25 of his detention. Dkt. 37 at 14. Thus, any argument against this point is waived. *See e.g., Shakur*  
26 *v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) ("We have previously held that a [party] has  
27 'abandoned ... claims by not raising them in opposition to [the movant's] motion for summary  
28 judgment.'") (*quoting Jenkins v. Cty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005)).

<sup>6</sup> Respondents' assertion that Mr. Rivera Larios cannot argue his removal is not reasonably  
foreseeable is erroneous, as Mr. Rivera Larios is actively challenging his removal in immigration  
court and has a right to pursue review at the BIA and the Ninth Circuit, a process that could last  
years.

1 Respondents suggest that Mr. Rivera Larios's substantive due process claim reflects  
2 a mere disagreement with the immigration judge's (IJ) danger and flight risk findings. Dkt.  
3 39 at 11. They are incorrect. A plain reading of the proposed amended petition reflects Mr.  
4 Rivera Larios's arguments that his detention violates due process specifically because his  
5 detention does not fulfill the purpose of immigration detention. Dkt. 37 at 14.<sup>7</sup> Respondents'  
6 citations to *Beqir v. Clark*, 220 Fed.Appx. 469, 471 (9th Cir. 2007) and several district court  
7 decisions are inapposite. *See* Dkt. 39 at 11. *Beqir* was detained under 8 U.S.C. § 1226(a) not  
8 1231, and the Court in *Beqir* concluded the agency's finding as to flight risk was supported  
9 by substantial evidence. 220 Fed.Appx. at 471. As set forth below, the IJ's finding in Mr.  
10 Rivera Larios's case was not based on the evidence of record. In any case, *Beqir* did not  
11 involve conditional liberty without any change in circumstances to warrant re-detention as  
12 here. Similarly, the petitioners in *Jimenez v. ICE*, No. 23-cv-03566-SVK, 2024 WL 714659  
13 (N.D. Cal. Feb. 21, 2024), *I.E.S. v. Becerra*, No. 23-cv-03783-BLF, 2023 WL 6317617  
14 (N.D. Cal. Sept. 27, 2023), and *Martinez Leiva v. Becerra*, No. 23-cv-02027-CRB, 2023  
15 WL 3688097 (N.D. Cal. May 26, 2023) were all detained under 8 U.S.C. § 1226(c) and  
16 were never at liberty prior to their petitions for writ of habeas corpus, rendering those cases  
17 distinguishable. Thus, this Court should grant leave for Mr. Rivera Larios to add a  
18 substantive due process claim.

19 **C. The Court Should Grant Leave for Mr. Rivera Larios to Amend his**  
20 **Procedural Due Process Claim**

21 1. The IJ Decision Reflected a Lack of Neutrality

22 In direct contradiction to their arguments regarding exhaustion, Respondents argue that  
23 the IJ was not required to make a final detention decision, and her deference to DHS was simply  
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26 <sup>7</sup> Respondents seem to conflate Mr. Rivera Larios's substantive due process arguments with the  
27 procedural due process arguments. Mr. Rivera Larios's challenges to the pre-deprivation hearing  
28 are included in the proposed amendments to his procedural due process claim. *See* Dkt. 37 at 15-  
20.

1 a result of the “unusual procedural posture” of the hearing. Dkt. 39 at 12.<sup>8</sup> This argument fails.  
 2 First, this Court’s PI ordered the IJ to determine whether re-detention was warranted based on  
 3 flight risk and danger, clearly instructing the IJ to make the detention determination. Dkt. 22 at  
 4 18. Moreover, the role of an IJ is to be a neutral and impartial adjudicator. *See Reyes-Melendez v.*  
 5 *INS*, 342 F.3d 1001, 1006-09 (9th Cir. 2003) (holding that “[a] neutral judge is one of the most  
 6 basic due process protections” and the IJ erred by failing to act as a neutral fact finder); *see also*  
 7 8 C.F.R. § 1003.10(b) (“In all cases, IJs shall seek to resolve the questions before them in a  
 8 timely and impartial manner consistent with the Act and regulations.”). The IJ reflected a lack of  
 9 neutrality, where she also called the hearing “theoretical” and indicated no appellate rights  
 10 attach. Dkt. 37-2, ¶ 5 Ex. A at 45-47.

## 11 2. The IJ Decision is Not Supported by the Record

12 Contrary to Respondents’ argument, the IJ’s finding that Mr. Rivera Larios is a flight risk  
 13 and danger is not supported by the record. Respondents assert that IJs are presumed to have  
 14 reviewed all the evidence before them and that the IJ is not required “to write an exegesis on  
 15 every contention...” Dkt. 39 at 13 *citing Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir.  
 16 2010). However, that presumption is rebutted where there is any indication that the agency did  
 17 not consider all the evidence before it, such as when the agency misstates the record or fails to  
 18 mention highly probative or potentially dispositive evidence. *Cole v. Holder*, 659 F.3d 762, 771-  
 72 (9th Cir. 2011).

19 Here, the IJ found Mr. Rivera Larios to be a danger to the community based *exclusively*  
 20 on the criminal history that predated his release from ICE custody, including arrests and charges  
 21 that did not result in convictions. Dkt 37 ¶ 5, Ex. A at 42-44. Likewise, she found Mr. Rivera  
 22 Larios to be a flight risk based exclusively on his immigration history that predated his release.  
 23 *Id.* at 44. On this basis alone, the IJ’s findings regarding flight risk and danger are erroneous.  
 24 Nonetheless, Respondents suggest that the IJ must have considered mitigating factors because  
 25 counsel for Mr. Rivera Larios was provided the opportunity to make arguments. Dkt. 39 at 13.

26  
 27 <sup>8</sup> Counsel for Respondents improperly provides his own presumption for the basis for the IJ’s  
 28 decision but provides no evidence in support. Dkt. 39 at 12 *citing* Dkt. 30 at 7. *See e.g. Garland*  
*v. Ming Dai*, 593 U.S. 357, 369 (2021).

1 This is belied by the record, in which the IJ failed to cite to Mr. Rivera Larios's three years and  
2 nine months of freedom, wherein he appeared at all required check-ins pursuant to his order of  
3 supervision, appeared at the pre-deprivation hearing in person, continued to pursue immigration  
4 relief, and maintained a law-abiding record, which the immigration courts are required to  
5 consider in assessing dangerousness and flight risk. *Matter of Guerra*, 24 I. & N. Dec. 37, 40  
6 (BIA 2006); *see also Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011) (abrogated on other  
7 grounds by *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)); *See* Dkt 37 ¶ 5, Ex. A.  
8 Respondents' contention that the IJ must have considered all the evidence and arguments is  
9 without merit, as the question before the IJ was Mr. Rivera Larios's *current* dangerousness and  
10 flight risk. This question is answered clearly in Mr. Rivera Larios's favor, following nearly four  
11 years of law-abiding freedom. The IJ's failure to consider relevant and dispositive evidence,  
12 including that Mr. Rivera Larios committed no immigration violations or crimes while at liberty,  
13 reflects her failure to fairly consider the record before her. *See Y.S.G. v. Andrews*, No. 2:25-cv-  
14 1884, 2025 WL 2979309, \*10 (E.D. Cal. Oct. 22, 2025) (finding the IJ erred in failing to  
15 consider the petitioner's post release evidence of rehabilitation); *Cole*, 659 F.3d at 771-72.

16 Finally, Respondents' assertion that no government official previously determined that  
17 Mr. Rivera Larios was not a flight risk or danger, relying on *Fraihat v. ICE*, is an incorrect  
18 interpretation of the *Fraihat* decision and the circumstances surrounding Mr. Rivera Larios's  
19 release in January 2022. Mr. Rivera Larios was released pursuant to *Fraihat v. ICE*, 445  
20 F.Supp.3d 709 (April 20, 2020 C.D. Cal.), as he was identified as having one or more risk factors  
21 for COVID-19. Dkt. 5-4 ¶ 8. Contrary to Respondent's suggestion, the *Fraihat* injunction did not  
22 require release for all individuals with risk factors but rather, required ICE to conduct custody  
23 determinations for at risk individuals. *Fraihat v. ICE*, 445 F.Supp.3d at 751. Thereafter, ICE  
24 repeatedly continued Mr. Rivera Larios's release on supervision for nearly four years. Thus, this  
25 Court should grant leave for Mr. Rivera Larios to amend his procedural due process claim.

### 26 CONCLUSION

27 For the foregoing reasons and those stated in Mr. Rivera Larios's motion for leave to file  
28 first amended habeas petition, the Court should grant the motion and consider the proposed  
amended petition.

1 Dated: December 24, 2025

/s/ Ilyce Shugall  
Ilyce Shugall

2 Attorney for Petitioner

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