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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 Henri Ba,)
14)
15 Petitioner,)
16)
17 v.)
18)
19 Todd Lyons, Acting Director)
20 Immigration and Customs)
21 Enforcement;)
22)
23 Patrick Divver, San Diego)
24 Field Office Director,)
25 Immigration and Customs)
26 Enforcement Removal)
27 Operations;)
28)
29 and)
30)
31 Christopher J. LaRose,)
32 Warden, Otay Mesa)
33 Detention Center,)
34)
35 Respondents.)
36)
37)
38)

CASE NO: 5:24-cv-2871-CAB-BJW

PETITIONER'S RESPONSE TO
RESPONDENTS' HABEAS RETURN
AND OPPOSITION TO PETITIONER'S
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER

1 let alone one issued on or near August 19, 2025. Respondents concede that the
2 charging document in Petitioner’s case was executed in 2004. Resp’t Return &
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4 Opp to TRO, DKT. 10, p. 4. The administrative arrest warrant signed by Officer
5 Rogelio Nunez, is also inconsistent with the officer’s post-arrest declaration.
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7 Officer Nunez’s declaration states that “ERO San Diego” reviewed Petitioner’s
8 case and determined that he should be re-detained based on “two final orders of
9 removal since his release from ICE custody and ... the seriousness of the national
10 security inadmissibility findings” and a determination that “a material change in
11 circumstances occurred.” Resp’t Return & Opp to TRO Exhibit A, Nunez Decl.,
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13 DKT. 10-1, p. 5. Yet Officer Nunez states that Petitioner was remanded back to
14 ICE Custody pursuant to a Warrant of Arrest that identifies the reason for detention
15 as “the execution of a charging document to initiate removal proceedings.” Resp’t
16 Return & TRO Opp., Exhibit B, Warrant for Arrest of Alien, DKT 10-1, p. 8. It is
17 clear the arrest warrant is invalid and Officer Nunez’s reasons for re-detention set
18 forth in a declaration that was prepared more than two months after Petitioner’s
19 arrest are more likely an effort at a post-hoc justification relying on circumstances
20 that occurred at least twelve years ago and that have been known to Respondents
21 throughout this twelve-year period.
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1 **There Has Been No Material Change in Circumstances to Authorize**
2 **Re-Detention.**

3 Respondents point to the denial of Petitioner’s application for adjustment of
4 status based on inadmissibility findings that were made over twelve years ago as a
5 changed circumstance justifying re-detention today. Resp’t Return & Opp to TRO,
6 DKT. 10, p. 10. Respondents also contend that Petitioner’s asylum application that
7 was denied over eighteen years ago is a changed circumstance, but Respondents’
8 fail to acknowledge that the denial of Petitioner’s asylum application was reversed
9 by the Ninth Circuit. *See* Pet’r TRO Exhibit B, 9th Circuit Memorandum Decision,
10 DKT. 2-2, p. 11.
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13 Petitioner agrees that in the twenty-one years he has been free from
14 Government custody there have been changes to his immigration case, but there are
15 no new developments that constitute a material change in circumstances that would
16 support a finding that Petitioner poses a risk of danger to the community or that
17 Petitioner is a flight risk authorizing re-detention.
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20 If anything, the most recent change in circumstances that occurred on May 8,
21 2023, would deprive Respondents of the ability to detain Petitioner at all, because
22 the Immigration Judge (“IJ”) terminated Petitioner’s removal proceedings. *See*
23 Pet’r TRO Exhibit D, IJ Order Terminating Proceedings, DKT. 2-2, p. 21.
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26 There are significant limitations on Respondents ability to re-detain
27 Petitioner absent a pre-deprivation hearing. Only newly developed “material”
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1 changed circumstances justify re-detention. *See Saravia for A.H. v. Sessions*, 905
2 F.3d 1137 (9th Cir. 2018) (citing *Matter of Sugay*, 17 I. & N. Dec. 637, 640 (BIA
3 1981)). Respondents cite *Matter of Sugay* in support of their arguments, but *Matter*
4 *of Sugay* only demonstrates the unlawfulness of Respondents’ arrest and re-
5 detention of Petitioner. The “considerable change in circumstance” in *Matter of*
6 *Sugay* was “newly developed evidence” regarding criminal conduct and the
7 issuance of an order of deportation. 17 I. & N. Dec. at 640. Here Respondents cite
8 the denial of adjustment of status more than twelve years ago and the denial of
9 Petitioner’s asylum application over eighteen years ago as changed circumstances.
10 These occurrences are not “newly developed”, and they ignore the crucial fact that
11 the denial of Petitioner’s asylum application was subsequently overruled by the
12 Ninth Circuit and remanded to the IJ for further consideration. *See* Pet’r TRO
13 Exhibit B, 9th Circuit Memorandum Decision, DKT. 2-2, p. 11. In *Matter of*
14 *Sugay*, the BIA determined that the new material changes in circumstances were
15 Sugay’s criminal conviction record, the IJ’s denial of his only application for relief,
16 and the issuance of an order of deportation that made the likelihood that Sugay
17 would abscond “far greater” than at the time of his first bond redetermination. 17 I.
18 & N. Dec at 638. In contrast, in the instant case, the IJ did not deny Petitioner’s
19 asylum application but instead ordered that removal proceedings be terminated- the
20 very opposite of a removal order. *See* Pet’r TRO Exhibit D, IJ Order Terminating
21 Proceedings, DKT. 2-2, p. 21. Petitioner appealed that decision to the Board of
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1 Immigration Appeals because Petitioner wanted to pursue his asylum application,
2 but should Petitioner lose his pending appeal, the result would be that he would no
3 longer be in removal proceedings and would not be subject to a removal order.
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5 Further, Respondents' claim that a change in circumstances occurring over a
6 decade ago increases Petitioner's risk of flight, are overwhelmingly rebutted by
7 Petitioner's lack of criminal conduct and continued track record of complying with
8 the terms of ICE release and supervision for twenty-one years as established by
9 Respondents' own exhibits. *See* Resp't Return & TRO Opp., Exhibit D, Order of
10 Release on Recognizance, DKT 10-1, pp. 17–18; Exhibit F, Order of Supervision,
11 DKT 10-1, pp. 25–32; Exhibit A, DKT 10-1, p. 5 (noting that Petitioner was
12 complying with his reporting instructions when arrested). The foregoing clearly
13 distinguishes Petitioner's case from *Matter of Sugay* and demonstrates the absence
14 of a material change in circumstance that would authorize his arrest and re-
15 detention.
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20 **Respondents Do Not Address Petitioner's Argument That He Has Developed**
21 **Significant Liberty Interests Over the Past Twenty-One Years and His Arrest**
22 **and Re-Detention Without a Pre-Deprivation Hearing Violates His Right to**
23 **Due Process.**

24 Significantly, Respondents' ability to re-detain Petitioner "is always
25 constrained by the requirements of due process." *Ortega v. Bonnar*, 415 F. Supp. 3d
26 963, 969 (N.D. Cal. 2019) (citing *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th
27 Cir. 2017). That is because "[f]reedom from imprisonment—from government
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1 custody, detention, or other forms of physical restraint—lies at the heart of the
2 liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678,
3 690 (2001). Respondents do not address Petitioner’s Fifth Amendment Due
4 Process argument based on his development of significant liberty interests over the
5 twenty-one years he has been free from custody. Petitioner, like someone in
6 “preparole, parole, or probation”, is generally entitled to notice and a pre-
7 deprivation hearing. *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969–70 (N.D. Cal.
8 2019) (internal citations omitted), *see, e.g. Young v. Harper*, 520 U.S. 143, 148
9 (1997) (holding that summarily sending a parolee back to prison, even if the state
10 had discretion, violated due process where parolee had an interest in his continuing
11 liberty: “[he] kept his own residence; he sought, obtained, and maintained a job;
12 and he lived a life generally free of the incidents of imprisonment.”)

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17 Courts have consistently held that even when the Government retains
18 discretion to re-detain an individual, that discretion is not unfettered:

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20 . . . even when ICE has the initial discretion to detain or release a
21 noncitizen pending removal proceedings, after that individual is
22 released from custody she has a protected liberty interest in remaining
23 out of custody. *See Romero v. Kaiser*, No. 22-cv-02508, 2022 WL
24 1443250, at *2 (N.D. Cal. May 6, 2022) (“[T]his Court joins other
25 courts of this district facing facts similar to the present case and finds
26 Petitioner raised serious questions going to the merits of his claim that
27 due process requires a hearing before an IJ prior to re-detention.”);
28 *Jorge M. F. v. Wilkinson*, No. 21-cv-01434, 2021 WL 783561, at *2
(N.D. Cal. Mar. 1, 2021); *Ortiz Vargas v. Jennings*, No. 20-cv-5785,
2020 WL 5074312, at *3 (N.D. Cal. Aug. 23, 2020); *Ortega*, 415 F.
Supp. 3d at 969 (“Just as people on parole, parole, and probation
status have a liberty interest, so too does [a noncitizen released from

1 immigration detention] have a liberty interest in remaining out of
2 custody on bond.”).

3 *Pinchi v. Noem*, No. 5:25-CV-05632-PCP, __F. Supp. 3d__, 2025 WL
4 2084921, at *3 (N.D. Cal. July 24, 2025).

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6 **Petitioner’s Legally Defective Bond Hearing Did Not Provide the Requested**
7 **Relief and Exhaustion Would be Futile.**

8 Respondents have violated Petitioner’s constitutional rights in re-arresting
9 him and re-detaining him and unjustly placing the burden on Petitioner to remedy
10 their harm through exhaustion of bond proceedings. At the bond hearing the IJ
11 unlawfully denied Petitioner’s request to be released on his own recognizance and
12 found changed circumstances creating a flight risk and ordered Petitioner not be
13 released unless he posted a \$5,000 bond and submit to monitoring pursuant to ICE
14 discretion. Pet’r Supp TRO Ex. M, IJ Bond Order. As such, Petitioner continues to
15 be unlawfully detained. Even if Petitioner could afford a \$5,000 bond – which he
16 personally cannot – or if Petitioner were to be able to raise the bond funds from
17 other sources, the imposition of more restrictive monitoring, such as a GPS bracelet
18 or more restrictive reporting conditions would be unlawful.

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22 The IJ’s bond determination was legally erroneous because the IJ found the
23 BIA’s denial of Petitioner’s asylum application in 2009 and adjustment of status
24 application in 2013 a changed circumstance going to flight risk. Ex. M, IJ Bond
25 Order, p. 2. As stated above, this is not a new development as contemplated in
26 *Matter of Sugay*. Further, the IJ did not consider or address evidence of the Ninth
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Circuit’s overruling the asylum denial in 2020 which was before the IJ. *See* Pet’r Supp TRO Exhibit L, Request for Reinstatement of O.R. Order, Tab D. The IJ also based his finding of risk of flight on the Petitioner failing to maintain his J-1 visa status and thus “indicating a willingness to violate immigration laws,” but that is not true and is not based on any evidence in the bond proceedings record. Petitioner converted his J-1 visa to F-1 visa status and while in F-1 status applied for asylum in compliance with immigration laws. *See* Resp’t Return & Opp. TRO, DKT 10, pp. 3–4 (noting Petitioner was in valid F-1 status when he affirmatively applied for asylum on or about March 9, 2001). Petitioner ultimately fell out of F-1 status after applying for asylum, but before receiving a decision on his asylum application, and was therefore lawfully permitted to remain in the U.S. during the adjudication of his asylum application by the asylum office and then during proceedings before the immigration court. *See Id.*, Resp’t Return & Opp. TRO, DKT 10, pp. 3–7. Finally, the IJ—who was the same IJ that had ordered Petitioner’s removal proceedings terminated—found Petitioner’s “potential for relief greatly diminished.” Pet’r Supp TRO Exhibit M, Immigration Judge Bond Order. This finding ignored significant evidence that Petitioner’s removal proceedings were terminated, and should Petitioner lose his appeal before the BIA, the result would not be a final removal order, the result would be that he would no longer be in removal proceedings and would not be subject to a removal order.

1 Petitioner’s claims do not require exhaustion. *See Iraheta-Martinez v.*
2 *Garland*, 12 F.4th 942, 949 (9th Cir. 2021) (noting “[a]n exception to the
3 exhaustion requirement has been carved for constitutional challenges to ... [DHS]
4 procedures.” (citing *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (per
5 curiam) (first alteration in original) (quoting *Rashtabadi v. INS*, 23 F.3d 1562, 1567
6 (9th Cir. 1994)) (citations modified). There is no administrative exhaustion
7 requirement for constitutional due process challenges where the due process claim
8 involves “more than mere procedural error that an administrative tribunal could
9 remedy.” *Chettiar v. Holder*, 665 F.3d 1375, 1379 n.2 (9th Cir. 2012). Here, the IJ
10 did not remedy the constitutional violations and instead imposed a greater burden
11 on Petitioner to pay a bond to secure release. Any appeal of the bond proceedings
12 to the BIA- which would take multiple months- would be futile as the BIA cannot
13 remedy the ongoing constitutional violation.
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18 For over twenty-one years, Petitioner has lived in the U.S. and has complied
19 with his immigration obligations in his lawful pursuit of asylum and other
20 immigration relief. Respondents cannot be allowed to violate Petitioner’s rights by
21 arresting him with an invalid administrative warrant and then creating a post-hoc
22 argument of changed circumstances when there are, in fact, no new changed
23 circumstances going to danger or risk of flight. Petitioner’s bond hearing was
24 legally flawed and does not remedy the irreparable harm he faces in the ongoing
25 violation of his constitutional rights.
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For the foregoing reasons, Petitioner respectfully requests that the Court issue a TRO and OSC as to why a preliminary injunction should not issue.

Dated: November 18, 2025

Respectfully submitted,

s/ Jean Reisz
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