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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOSEFA HERNANDEZ BERNAL, Petitioner, v. SERGIO ALBARRAN, et al., Respondents.	CASE NO. 3:25-cv-09772-RS **PETITIONERS' REPLY TO RESPONDENTS' RESPONSE AND OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Respondents spend the majority of their opposition arguing that noncitizens like Petitioner are subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A), a position that has been overwhelmingly rejected by district courts across the nation. At issue, however, is whether Petitioner has a protected liberty interest under the Due Process Clause and is therefore entitled to a pre-deprivation bond hearing before her re-arrest, which she is. Although Respondents reference vague and unsupported allegations of violations of release conditions as the reason for the arrest, they do not even attempt to argue that Petitioner, *who was arrested while attending an ICE check-in* and has no criminal history, is a flight risk or danger, the only two constitutionally permissible reasons to detain a noncitizen. This case is actually a great example of why the Constitution requires pre-deprivation hearings in the first place – to protect against pretextual arrests. This Court should join a growing number of district courts and find that minor technical violations of release conditions are not a sufficient change in circumstances to warrant re-detention without a pre-deprivation bond hearing.[1]

ARGUMENT

I. The Due Process Clause Protects Petitioner's Liberty Interests.

The Due Process Clause applies to noncitizens regardless of whether they are "seeking admission" or are "admitted" under immigration law. *Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004), abrogated on other grounds by *Wilkie v. Robbins*, 551 U.S. 537 (2007). Notwithstanding

[1] *See, e.g., Vilela v. Robbins*, No. 1:25-cv-01393-KES-HBK, 2025 U.S. Dist. LEXIS 219172, at *20 (E.D. Cal., Nov. 6, 2025); *J.A.E.M. v. Wofford*, No. 1:25-cv-01380-KES-HBK, 2025 U.S. Dist. LEXIS 211728, at *21 (E.D. Cal., Oct. 27, 2025); *J.C.L.A. v. Wofford*, No. 1:25-cv-01310-KES-EPG, 2025 U.S. Dist. LEXIS 205300, at *20-21 (E.D. Cal., Oct. 17, 2025); *J.O.L.R. v. Wofford*, No. 1:25-cv-01241-KES-SKO, 2025 U.S. Dist. LEXIS 202706, at *15-16 (E.D. Cal., Oct. 14, 2025); *E.A.T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130, at *17 (W.D. Wash. Aug. 19, 2025; *F.M.V. v. Wofford*, No. 1:25-cv-01381-KES-SAB, 2025 U.S. Dist. LEXIS 217645, at *17 (E.D. Cal., July 17, 2025).

this well-established principal, Respondents claim that Petitioners have no due process rights beyond what is provided for her in § 1225. Opp. at 17. However, the case Respondents cite for this proposition, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139 (2020), was about a noncitizen seeking additional procedures under the credible fear interview process and not about a challenge to his physical custody. *See* 591 U.S. at 157. Numerous courts have already rejected the government's attempt to extend *Thuraissigiam* in this way. *See, e.g., Jaraba Olivero v. Kaiser*, No. 25-cv-07117-BLF, at *7-8 (N.D. Cal. Sept. 18, 2025) (accepting Respondents' request at the PI hearing to consider the applicability of *Thuraissigiam* and finding it does not apply); *Padilla v. U.S. Immigr. & Customs Enf't*, 704 F. Supp. 3d 1163, 1170 (W.D. Wash. 2023) ("The Court stands unconvinced that the Supreme Court's decision in *Thuraissigiam* requires dismissal of Plaintiffs' due process claim."); *Jatta v. Clark*, No. 19-cv-2086, 2020 WL 7138006, at *2 (W.D. Wash. Dec. 5, 2020) (finding *Thuraissigiam* "inapposite" to due process challenge to detention); *Leke v. Hott*, 521 F. Supp. 3d 597, 604 (E.D. Va. 2021) ("Quite clearly, *Thuraissigiam* does not govern here, as the Supreme Court there addressed the singular issue of judicial review of credible fear determinations and did not decide the issue of an Immigration Judge's review of prolonged and indefinite detention."); *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 844–48 (E.D. Va. 2020) (similar).

Moreover, Respondents claim that the multi-factor "balancing test" of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) does not apply because the Supreme Court has not used the test to address mandatory detention challenges. Opp. at 17. However, the Ninth Circuit has "assume[d] without deciding" that *Mathews* applies in the immigration detention context. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1206-8 (9th Cir. 2022) (applying *Mathews* to § 1226(a) and explaining "it remains a flexible test"); *accord Pinchi v. Noem*, No. 5:25-cv-05632-PCP, F. Supp. 3d, 2025 WL 2084921, at *3 n.2 (N.D. Cal. July 24, 2025) (discussing *Rodriguez-Diaz*); *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (applying *Mathews* to due process challenge to immigration hearing

procedures). Courts in this circuit also regularly apply *Mathews* in due process challenges in identical or similar circumstances to those here. *Salcedo Aceros v. Kaiser*, No. 25-cv-06924-EMC, at *9. There is no reason this Court should not do the same.

Respondents also offer no principled reason for their assertion that "[Petitioner's] July 2024 conditional release is not analogous to the liberty interest of criminal defendants on parole and probation." *See* Opp. at 18. On the contrary, "[g]iven the civil context [of immigration detention], [the] liberty interest [of noncitizens released from custody] is arguably greater than the interest of parolees." *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019).

The Court should thus reject Respondents' unsupported claim that Petitioner does not have protected liberty interested in her continued freedom and, consistent with recent decisions in factually similar cases, grant the preliminary injunction. *See Pinchi v. Noem*, 2025 WL 2084921, at *7 (converting TRO requiring release of asylum seeker arrested at immigration court into preliminary injunction prohibiting Government from re-detaining her without hearing); *Singh v. Andrews*, 2025 WL 1918679, *8-10 (E.D. Cal. July 11, 2025); *Castellon v. Kaiser*, No. 1:2-cv-00968, 2025 WL 2373425, at *24 (N.D. Cal. Aug. 14, 2025).

II. Respondents' vague and unfounded allegations that Petitioner violated the terms of her release are not sufficient to overcome Petitioner's entitlement to a pre-deprivation bond hearing.

Respondents do not argue that Petitioner is a flight risk or danger, the only two constitutionally permissible reasons for civil detention. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Instead, they assert "ICE properly exercised its authority to re-detain Petitioner after she repeatedly violated the terms of her release." Opp. at 20. Specifically, Respondent claim that Petitioner failed to complete a self-report check-in with location services enabled on November 19, 2024 and was outside of an approved zone on February 11, 2025 and July 29, 2025. *Id.* at 20-21.

As an initial matter, Respondents' allegations that Petitioner violated the terms of her release are too vague and unsupported as to constitute changed circumstances sufficient to warrant re-detention without a pre-deprivation bond hearing. *See Guillermo M. R. v. Kaiser*, No. 25-CV-05436-RFL, 2025 WL 1983677, at *9 (N.D. Cal. July 17, 2025) ("*absent evidence of urgent concerns*, a pre-deprivation hearing is required to satisfy due process, particularly where an individual has been released on bond by an IJ"), emphasis added. The single source of the government's allegations is a declaration by Deportation Office Michael Silva. Opp., No. 8-1 at 2. However, in that declaration, Officer Silva merely writes three vague sentences alleging release violations. *See* Opp., No. 8-1 at 2. Officer Silva writes:

> 10. On November 19, 2024, Petitioner violated the terms of her release program by failing to complete a self-report check-in with location services enabled.
> 11. On February 11, 2025, Petitioner violated the terms of her release program for being outside of an approved zone.
> 12. On July 29, 2025, Petitioner violated the terms of her release program for being outside of an approved zone.

There is no additional information in the record to help clarify what Office Silva is talking about. There is also no evidence that Petitioner's release was conditioned upon staying in a certain zone, what the boundaries of that zone were, or whether Petitioner was aware of these purported conditions. In contrast, Petitioner states she has always complied with the terms of her release, was not told about these conditions, and was never informed of any alleged non-compliance. *See* Ex. 1, Declaration of Josefa Hernandez Bernal at 1. The Court should thus give no weight to the government's unsupported allegations that Petitioner violated the terms of her release. *See C.A.R.V. v. Wofford*, No. 1:25-CV-01395 JLT SKO2025 U.S. Dist. LEXIS 216277, at *7 (E.D. Cal., Nov. 1, 2025) (finding Respondents' "key factual assertions" were not supported because the deportation officer did not state the "basis for personal knowledge for the facts claimed" in his declaration.).

Even if Petitioner had failed to complete a self-report check-in with location services enabled and was twice outside of an approved zone, these are not circumstances "that urgently require arrest." *See id. at* *28, citing *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). Courts in this circuit have repeatedly rejected the argument that ICE can re-detain a noncitizen for a purely technical violation "without regard to whether that technical violation means that one is a flight risk or danger." *J.C.L.A. v. Wofford*, No. 1:25-cv-01310-KES-EPG, 2025 U.S. Dist. LEXIS 205300, at *12 (E.D. Cal., Oct. 17, 2025), internal citations omitted; *Vilela v. Robbins*, No. 1:25-cv-01393-KES-HBK, 2025 U.S. Dist. LEXIS 219172, at *12 (E.D. Cal., Nov. 6, 2025) ("While respondents assert that ICE arrested petitioner for those technical violations…they do not argue that a missed check-in or failure to seek advance approval to move means that petitioner is a flight risk or danger to the community."); *J.A.E.M. v. Wofford*, No. 1:25-cv-01380-KES-HBK, 2025 U.S. Dist. LEXIS 211728, at *12 (E.D. Cal., Oct. 27, 2025) ("Respondents do not argue that petitioner's two late check-ins mean that he is a flight risk or danger to the community…[r]ather, respondents assert that ICE arrested petitioner for those technical violations."); *E.A.T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130, at *11 (W.D. Wash. Aug. 19, 2025) (Ultimately, even if Petitioner's arrest was not pretextual and was solely motivated by ICE's realization of his ATD violations, it would not necessarily follow that Petitioner can be detained for those violations without a hearing."). Here, there is no credible argument that Petitioner, who has no criminal history, attended all of her immigration court hearings, timely submitted an asylum application, and was detained *while appearing for her ICE check-in*, is a flight risk or danger. *See J.C.L.A. v. Wofford*, No. 1:25-cv-01310-KES-EPG at *12. A pre-deprivation bond hearing is thus especially important in cases like this because the risk of erroneous deprivation is high. *See Flores v. Albarran*, No. 25-cv-09302-AMO, 2025 U.S. Dist. LEXIS 228110, at *13 (N.D. Cal., Nov. 19, 2025). Accordingly, this Court should join the growing

number of district courts finding ICE's new trend of suddenly re-arresting people at ICE check-ins is unconstitutional and grant the requested relief. *See Vilela v. Robbins*, No. 1:25-cv-01393-KES-HBK, 2025 U.S. Dist. LEXIS 219172, at *20 (E.D. Cal., Nov. 6, 2025); *J.A.E.M. v. Wofford*, No. 1:25-cv-01380-KES-HBK, 2025 U.S. Dist. LEXIS 211728, at *21 (E.D. Cal., Oct. 27, 2025); *J.C.L.A. v. Wofford*, No. 1:25-cv-01310-KES-EPG, 2025 U.S. Dist. LEXIS 205300, at *20-21 (E.D. Cal., Oct. 17, 2025); *J.O.L.R. v. Wofford*, No. 1:25-cv-01241-KES-SKO, 2025 U.S. Dist. LEXIS 202706, at *15-16 (E.D. Cal., Oct. 14, 2025); *E.A.T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130, at *17 (W.D. Wash. Aug. 19, 2025); *F.M.V. v. Wofford*, No. 1:25-cv-01381-KES-SAB, 2025 U.S. Dist. LEXIS 217645, at *17 (E.D. Cal., July 17, 2025).

III. Petitioner is not subject to mandatory detention 8 U.S.C. § 1225.

Although not necessary to grant relief in this case, if the court chooses to reach the detention statute question, it should find Petitioner is subject to 8 U.S.C. § 1226(a) and not § 1225(b)(2), as Respondents now claim. Opp. at 7-17. It is undisputed that Petitioner was issued Form I-220A, Order of Release on Recognizance at the border. *Id.* at 5. Form I-220A states the detention authority as Section 236 of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1226. *See Jimenez Garcia v. Kaiser*, No. 4:25-cv-06916-YGR at *2 (taking judicial notice of the fact that Form 1-220A, Order of Release on Recognizance cites release subject to 8 U.S.C. Section 1226). However, Respondents now seek to "unilaterally reclassify" Petitioner "as 'detained' pursuant to Section 1225(b)(2))" after making an initial determination that she was detained under Section 1226(a). *See id.* at *9. Courts in this district have overwhelmingly concluded that the government cannot simply "switch[] tracks" mid-litigation without regard for a noncitizens' liberty interest. *Salcedo Aceros v. Kaiser*, No. 25-CV-06924-EMC, 2025 U.S. Dist. LEXIS 179594, at *213 (N.D. Cal. Sept 12, 2025); s*ee also Flores v. Albarran*, No. 25-cv-09302-AMO,

2025 U.S. Dist. LEXIS 228110, at *10-11 (N.D. Cal., Nov. 19, 2025) ("The Court is persuaded by the many district courts that have found Section 1225 inapplicable to noncitizens who were conditionally released in the past under Section 1226"). To do so would amount to an impermissible post hoc rationalization. *Lopez Benitez v. Francis*, No. 25-cv-5937, 2025 WL 2371588, at *13–14 (S.D.N.Y. Aug. 13, 2025).

Even if Petitioner were not initially released section 1226(a), districts courts across the nation have uniformly rejected the government's novel application of § 1225(b)(2) to people arrested in the interior of the United States, like Petitioner. *See, e.g.*, *Martinez v. Hyde*, No. 25-cv-11613, 2025 WL 2084238, at *5-9 (D. Mass. July 24, 2025)); *Rodriguez v. Bostock*, No. 3:25-cv-5240-TMC, 2025 WL 1193850, at *14 (W.D. Wash. Apr. 24, 2025); *Cuevas Guzman v. Andrews*, No. 1:25-cv-01015-KES-SKO, 2025 U.S. Dist. LEXIS 176145 at *9-12 (E.D. Cal. Sep. 9, 2025); *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 U.S. Dist. LEXIS 156344, at *8-32 (D. Ariz. Aug. 11, 2025). Respondents offer no new arguments that have not already been addressed and rejected by courts in this district. For example, Respondents raise the use of the phrase "or otherwise" in § 1225(a)(3), Opp. at 12-13; other statutory uses of the phrase "seeking admission", *id.* at 8-10; and the implementing regulation for § 1225(b), *id.* at 11. However, those arguments have already been refuted in *Cordero Pelico v. Kaiser*, No. 25-cv-07286-EMC, 2025 U.S. Dist. LEXIS 197865, at *38-39, 26-27, 29 (N.D. Cal. Oct. 3, 2025). Courts have also given little deference to the Board of Immigration Appeal's recent decision in *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216, 219 (BIA 2025) as the authority for the government's reinterpretation of § 1225(b)(2). *See, e.g., Flores v. Albarran*, No. 25-cv-09302-AMO, 2025 U.S. Dist. LEXIS 228110, at *11 (N.D. Cal., Nov. 19, 2025) ("The Court finds that *Yajure Hurtado* 'merit[s] little deference due to its inconsistency with earlier BIA decisions' and because 'its reasoning is [] at odds with the text of sections 1225 and 1226'", citing *Valencia Zapata v. Kaiser*, No. 25-CV-07492-RFL,

2025 WL 2741654, at *10 (N.D. Cal. Sept. 26, 2025).

Thus, petitioner, who has no criminal history, is subject to discretionary detention. In line with the reasoned analysis of these authorities, this Court should reject the government's contrary new statutory interpretation.

IV. The Balance of the Equities and the Public Interest Weigh Strongly in Petitioner's Favor.

Respondents do not rebut Petitioner's showing that the remaining factors weigh in her favor. She faces irreparable injury in the form of constitutional harm of the highest order if the preliminary injunction is not granted. *See Pinchi*, 2025 WL 2084921, at *7 (collecting cases). The public interest likewise weighs strongly in Petitioner's favor. *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the preliminary injunction.

Date: November 22, 2025

Respectfully Submitted,

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