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Application for PHV forthcoming

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Kai Lun ZHENG (aka Wai Keung Cheung)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Kai Lun ZHENG,

Petitioner-Plaintiff,

v.

Sergio ALBARRAN, Acting Field Office Director of San Francisco Office of Detention and Removal, U.S. Immigrations and Customs Enforcement; U.S. Department of Homeland Security;

Todd M. LYONS, Acting Director, Immigration and Customs Enforcement, U.S. Department of Homeland Security;

Kristi NOEM, in her Official Capacity, Secretary, U.S. Department of Homeland Security;

Pam BONDI, in her Official Capacity, Attorney General of the United States; and

Tonya Andrews, Facility Administrator at Golden State Annex Detention Center, McFarland, California;

Respondents-Defendants.

Case No.

EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER

POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Challenge to Unlawful Incarceration; Request for Declaratory and Injunctive Relief

NOTICE OF MOTION

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Rule 231 of the Local rules of this Court, Petitioner hereby moves this Court for an order that Respondents Department of Homeland Security ("DHS"), United States Immigration and Customs Enforcement ("ICE"), Pam Bondi, in her official capacity as the U.S. Attorney General, and Tonya Andrews, in her official capacity as Facility Administrator at Golden State Annex Detention Center, McFarland, California, be enjoined from continuing to detain Petitioner-Plaintiff Kai Lun Zheng ("Mr. Zheng" or "Petitioner") in custody, and, following his release, be enjoined from re-detaining him without first providing him with a hearing before a neutral adjudicator, as required by the Due Process clause of the Fifth Amendment. Petitioner additionally seeks to enjoin Respondents from removing Petitioner from the United States to any third country to which he does not have a removal order (i.e., any country other than China) without first providing him with constitutionally compliant procedures.

The reasons in support of this Motion are set forth in the accompanying Memorandum of Points and Authorities. This Motion is based on the concurrently filed Declaration of Zachary Nightingale with accompanying exhibits in support of the Petition for Writ of Habeas Corpus and Ex Parte Motion for Temporary Restraining Order. As set forth in the Points and Authorities in support of this Motion, Petitioner Mr. Zheng raises that he warrants a temporary restraining due to his weighty liberty interest under the Due Process Clause of the Fifth Amendment in remedying his unlawful re-detention, where that detention appears indefinite and which was imposed absent a pre-deprivation due process hearing, and in preventing his summary removal to a third country, other than China, without first providing him with notice and an opportunity to apply for fear-based relief as to that third country..

WHEREFORE, Petitioner prays that this Court grant his request for a temporary restraining order requiring ICE to immediately release him from custody (to enjoin the unlawful ongoing detention), enjoining Respondents from re-detaining him before providing him a hearing before a neutral adjudicator prior to any re-detention, and enjoining Respondents from removing him to any third country without first providing him with constitutionally-compliant procedures. The only

mechanism to ensure that he is not continuously unlawfully detained in violation of his due process rights is an ex parte temporary restraining order from this Court.

Dated: December 1, 2025

Respectfully Submitted

/s/ Zachary Nightingale
Zachary Nightingale
Attorney for Petitioner-Plaintiff

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I. INTRODUCTION

Petitioner-Plaintiff Mr. Zheng, by and through undersigned counsel, hereby files this motion for a temporary restraining order and preliminary injunction to enjoin the U.S. Department of Homeland Security's ("DHS") Immigration and Customs Enforcement ("ICE") from continuing to unlawfully detain him in their civil immigration custody and immediately release him because his removal to China is not foreseeable. Mr. Zheng also seeks an order enjoining Respondents from re-detaining him unless and until he is afforded notice and a hearing before a neutral adjudicator prior to any future re-detention where DHS bears the burden of demonstrating that his removal is reasonably foreseeable and otherwise whether circumstances have changed such that his re-detention would be justified (i.e., whether he poses a danger or a flight risk), and where the neutral adjudicator must further consider whether, in lieu of detention, alternatives to detention exist to mitigate any risk that DHS may establish. Finally, Mr. Zheng seeks an order enjoining Respondents from removing him to any third country without first providing him with constitutionally-compliant procedures.

Mr. Zheng has a removal order to China (and China only) from 2010 which Respondents have not been able to execute, and there is no credible evidence that they will ever be able to execute it. On information and belief, the Chinese government has refused to issue him a travel document despite several requests—both through ICE and by Mr. Zheng's own efforts—since 2010. In fact, in an effort to avoid the limbo in which he now finds himself, jailed with no foreseeable end, Mr. Zheng has personally spoken with Chinese consular officials, who have informed him that they are unable to issue him a travel document because he cannot prove his citizenship or nationality, as he does not have a copy of any prior passports or birth certificate, and the consulate does not have Mr. Zheng in its records. This is consistent with the fact that the Chinese government has historically not accepted deportees from the United States, especially when the individual left at a young age and does not have many remaining ties to China—as is the case for Mr. Zheng.[1] China has been classified by ICE itself as a recalcitrant country in that it

[1] Congressional Research Service, "Immigration: 'Recalcitrant' Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals" (July 10, 2020), available at https://www.congress.gov/crs-product/IF11025.

"systematically refuse[s] or delay[s] the repatriation of [its] citizens."[2] In fact, on July 11, 2024, several members of Congress sent a letter to the then-Secretaries of the U.S. Department of Homeland Security ("DHS") and the U.S. Department of State ("DOS") noting that "China is one of 13 countries considered uncooperative or 'recalcitrant,' systematically refusing or needlessly delaying the repatriation of their citizens." *See Declaration of Zachary Nightingale ("Nightingale Decl.")* at Exhibit C (Congressional Letter). This letter further describes how "roughly 100,000 Chinese nationals with final orders of removal remain in the [United States], as Beijing has been slow or outright refused to accept the repatriation of its citizens." *Id.*

Due to ICE's longstanding inability to remove him to China, Mr. Zheng was first released from ICE detention in 2014, which is when he began reporting to ICE on a regular basis pursuant to his Order of Supervision ("OSUP"). In or around May 2015, Mr. Zheng was unlawfully re-detained by ICE for approximately two months, but was again released in July 2015 due to the agency's continued inability to obtain a travel document for him from China. Mr. Zheng has been reporting to the ICE San Francisco Field Office on a regular basis pursuant to his OSUP since he was re-released from incarceration over ten years ago.

Mr. Zheng was suddenly and unlawfully detained once again by ICE on October 15, 2025 while attending his regular appointment. Nothing has changed since his last two ICE detentions, yet ICE is once again violating his constitutional rights. Because all evidence indicates that he still cannot be removed, his re-detention by ICE must be held unlawful as it is limitless in duration. He has also never been ordered removed to any third country or notified of such potential removal. Thus, Mr. Zheng's detention is both unconstitutional because it is indefinite, and illegal because it does not comport with the regulations, and he was otherwise not provided any pre-deprivation hearing before his recent detention by ICE. Based on these circumstances, he raises three ways in which his ongoing detention is unlawful and must be enjoined, and as well requests an injunction against removal to a third country in case that is pursued.

First, once a noncitizen is released, their re-detention is limited by regulation, statute and the constitution. By statute and regulation, only in specific circumstances (that do not apply here)

[2] *Supra* at fn.1.

does ICE have the authority to re-detain a noncitizen previously ordered removed. 8 U.S.C. § 1231; 8 C.F.R. §§ 241.13, 241.4(l)(1)–(2). The ability of ICE to simply re-arrest someone following their release from detention, however, is further limited by the Due Process Clause because it is well-established that individuals released from incarceration have a liberty interest in their freedom. In turn, due process requires that he be released from unlawful re-detention because he was not provided notice and a hearing before a neutral adjudicator.

Second, following Mr. Zheng's release, the same principles must apply, such that in the future he be provided with notice and a hearing, *prior to any re-detention*, at which DHS bears the burden of justifying his re-detention (to a neutral adjudicator, such as a neutral adjudicator who is not part of ICE or DHS) and at which Mr. Zheng will be afforded the opportunity to advance his arguments as to why he should not be re-detained.

Third, the Supreme Court has limited the potentially indefinite detention of individuals with final orders of removal where removal is not reasonably foreseeable to a *maximum* of six months. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Because China has historically not accepted deportees from the United States[3] and for over ten years has refused to issue Mr. Zheng's travel document requests despite several attempts, and absent ICE's ability to obtain evidence that China will now reverse course and issue him a travel document, Mr. Zheng's removal is not reasonably foreseeable, and the government has not provided him with notice, evidence, or an opportunity to

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[3] The Washington Times, "New bill would punish China for refusing to take back deportees" ((Aug. 31, 2022), Available at: https://m.washingtontimes.com/news/2022/aug/25/new-bill-would-punish-china-for-refusing-to-take-b/; Newsweek, "China Among 'Uncooperative' Countries Refusing to Take Back Migrants: GOP Letter" (July 12, 2024), available at: https://www.newsweek.com/gop-letter-chinese-migrants-delays-deportation-1924109; Vox, "How Trump could try to deport immigrants to countries other than their own" (Dec. 10, 2024), available at: https://www.vox.com/politics/390533/trump-third-country-deportation-bahamas-panama-grenada-turks-caicos.

China has been classified by ICE as a recalcitrant country. *See* Congressional Research Service, "Immigration: 'Recalcitrant' Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals" (July 10, 2020), available at: https://www.congress.gov/crs-product/IF11025 ("According to DHS's Immigration and Customs Enforcement (ICE), most countries adhere to their international obligations to accept the timely return of their citizens. *Countries that systematically refuse or delay the repatriation of their citizens, however, are considered by DHS to be 'recalcitrant*....") (emphasis added).

be heard on this issue before arbitrarily and unilaterally re-detaining him. His continued detention is indefinite and thus unconstitutionally prolonged, and the only remedy is his immediate release.

Mr. Zheng meets the standard for a temporary restraining order. He will continue to suffer immediate and irreparable harm stemming from his unlawful re-detention absent an order from this Court enjoining the government from further unlawful detention by ordering his release from detention, and enjoining future re-detention unless and until he receives a hearing before a neutral adjudicator. He would also suffer immediate and irreparable harm if removed to a third country where his life could be in danger. For that reason, he also seeks an order enjoining Respondents from removing him to any third country without first being provided with constitutionally-compliant procedures providing him adequate notice and an opportunity to demonstrate if his life is in danger or he stands a high risk of torture—all of which are demanded by the Constitution. Since holding federal agencies accountable to constitutional demands is in the public interest, the balance of equities and public interest are also strongly in Mr. Zheng's favor.

II. STATEMENT OF FACTS AND CASE

Mr. Zheng was born in China in 1969. He left China as young man, and in approximately 1992, when Mr. Zheng was approximately 22 or 23 years old, he entered the United States. He became a lawful permanent of the U.S. in 1997.

Mr. Zheng was released from federal prison in January 2014 after completing his sentence for a conviction he sustained in 2009.[4]

On information and belief, DHS initiated removal proceedings against Mr. Zheng while he was serving his prison sentence, and those proceedings took place while he was incarcerated, as part of the Institutional Hearing Program (IHP)—which allows noncitizens to undergo removal proceedings while serving time in certain correctional facilities. On June 4, 2010, an Immigration Judge ordered Mr. Zheng deported to China. In January 2014, upon his release from prison at the conclusion of his sentence, he was transferred into ICE custody.

Mr. Zheng remained detained until August 2014, during which time he submitted an application for a travel document to China at the request of ICE. However, when it became

[4] In 2009, Mr. Zheng was convicted of 21 U.S.C. §§ 846, 841(b)(1)(C) and 26 U.S.C. § 7201.

apparent that China would not issue him the travel document, he was finally released from ICE detention after approximately nine months. The Chinese government has historically *not* accepted deportees from the United States.[5]

In August 2014, unable to remove Mr. Zheng to China, ICE released him from custody and placed him on a Form I-220B, Order of Supervision, pursuant to which he was scheduled to attend regular check in appointments in person at the San Francisco ICE Office. Through the OSUP, Mr. Zheng was permitted to remain free from custody following his removal proceedings because his removal was not reasonably foreseeable and he is otherwise neither a flight risk nor a danger to the community. The OSUP also permitted him to apply for work authorization. 8 C.F.R. § 241.5.

In or around May 2015, ICE unlawfully re-detained Mr. Zheng after informing him that ICE would be obtaining a travel document for him. At the time, Mr. Zheng had complied with the terms of his OSUP by attending his scheduled check-ins at the San Francisco ICE Field Office, had applied for work authorization, and had not sustained any further arrests or convictions. Mr. Zheng was again detained by ICE for almost two months. During this time, two individuals alleging to be Chinese consular officers visited and interviewed him inside of the detention facility. Mr. Zheng willingly spoke with them, and verified his identity and background information to them. However, no travel document was ever procured by ICE or produced by the consulate. Mr. Zheng was again released on an OSUP in July 2015.

In 2015 and again 2024, Mr. Zheng submitted two inquiries to the Chinese consulate to obtain his passport, but was denied both times. He provided the consulate with his name, background information, and information about his relatives in China. However, consulate officials informed Mr. Zheng that he was not found on the consular records and, absent a copy of his passport and/or birth certificate, both of which Mr. Zheng does not possess, the consulate informed him that it could not issue him a passport or any travel document.

Since his re-release in 2015, Mr. Zheng has continued to comply with the terms of his OSUP by regularly attending all his check-ins at the San Francisco ICE Field Office. He also applied for and received a work authorization document. He has had no further arrests or

[5] *See supra* n.1.

convictions. For over eleven years, since his initial release on his first OSUP, Mr. Zheng has worked hard to support himself and his U.S. citizen daughter, whom he has helped raise.

On information and belief, on January 25, 2025, officials in the new Trump administration directed senior ICE officials to increase arrests to meet daily quotas. Specifically, each field office was instructed to make 75 arrests per day.[6]

In July 2025, ICE contacted Mr. Zheng and asked him to fill out travel documents to China, and to provide the completed forms and passport-style photos at his check-in on October 15, 2025.

On October 15, 2025, when Mr. Zheng attended his check-in at the San Francisco ICE Field Office and provided the forms and photos requested, ICE officers detained him. Mr. Zheng requested an explanation for the sudden arrest, but ICE did not provide him with an explanation as to why he was being re-detained other than that he had a warrant for his arrest—presumably the same warrant related to his 2010 order of removal.

Later that same day, on October 15, 2025, ICE officers provided Mr. Zheng with a Notice of Revocation of Release and informed him that his OSUP had been revoked because the new administration could obtain a travel document for him. At some point, the officers asked him if he wanted to make a statement, and Mr. Zheng informed them that if removal was practicable due to a travel document, that he was willing to go back to China but also that if no travel document would be issued, that he should be released and not be held in ICE detention indefinitely. Despite this request and despite the fact that in the last ten years China had never issued a travel document, the officers continued to detain him as if nothing he said would make a difference in their (already made) decision.

Thereafter, ICE transferred Mr. Zheng to Golden State Annex Detention Facility, where he remains detained. He has not been able to speak further about his case with an ICE officer, and he has not had the opportunity to present evidence in support of the fact that his removal is not reasonably foreseeable. He also has not been asked to sign any additional documents. Mr. Zheng has been unlawfully detained since October 15, 2025, needlessly separated from his family and

[6] *See* "Trump officials issue quotas to ICE officers to ramp up arrests," *Washington Post* (Jan. 26, 2025), available at: https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/.

community in the United States. Following his unexpected detention, he has diligently sought legal representation to challenge his unlawful detention in court.

III. LEGAL STANDARD

Petitioner is entitled to a temporary restraining order if he establishes that he is "likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [his] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and temporary restraining order standards are "substantially identical"). Even if Petitioner does not show a likelihood of success on the merits, the Court may still grant a temporary restraining order if he raises "serious questions" as to the merits of his claims, the balance of hardships tips "sharply" in his favor, and the remaining equitable factors are satisfied. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). As set forth in more detail below, Petitioner overwhelmingly satisfies both standards.

IV. ARGUMENT

A. PETITIONER WARRANTS A TEMPORARY RESTRAINING ORDER

A temporary restraining order should be issued if "immediate and irreparable injury, loss, or irreversible damage will result" to the applicant in the absence of an order. Fed. R. Civ. P. 65(b). The purpose of a temporary restraining order is to prevent irreparable harm before a preliminary injunction hearing is held. *See Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City*, 415 U.S. 423, 439 (1974).

Here, Mr. Zheng has suffered an immediate and irreparable injury and loss through his unlawful, continuous, and indefinite detention, which violates his due process rights, and so too did his re-detention prior to receiving a hearing before a neutral adjudicator. Mr. Zheng has already suffered irreparable injury in the form of incarceration and will continue to suffer irreparable injury each day he remains detained without due process. He reached out to trusted loved ones to help him locate counsel, and then diligently retained counsel to challenge what he sees as the unlawful

and potentially indefinite detention which he specifically has tried to avoid by investigating definitively whether a travel document could be issued for him.

The Court should enjoin further detention because Mr. Zheng is likely to succeed on the merits of claims one, two, and three below, and should enjoin removal to a third country other than China without the constitutionally required procedures, because he is likely to succeed on the merits claim four below. Mr. Zheng asks the Court to grant all or part of the requested injunction.

1. Petitioner is Likely to Succeed on the Merits of His Claim That, in Violation of Clear Supreme Court Precedent, his Re-Detention is Unconstitutional Because it is Indefinite.

Mr. Zheng is likely to succeed on his claim that, in his particular circumstances, the Due Process Clause of the Constitution prevents Respondents from re-detaining Mr. Zheng because China has refused to issue him a travel document, and there are no changed circumstances to indicate that it will issue him one now. As a result, his indefinite detention is unconstitutional because there is no end in sight.

Following a final order of removal, ICE is directed by statute to detain an individual for ninety (90) days in order to effectuate removal. 8 U.S.C. § 1231(a)(2). This ninety (90) day period, also known as "the removal period," generally commences as soon as a removal order becomes administratively final. *Id.* at § 1231(a)(1)(A); § 1231(a)(1)(B).

It was pursuant to the statute and regulations that ICE continued to detained Mr. Zheng in 2014 following his release from criminal incarceration in an attempt to execute his 2010 order of removal. In his case, the removal period of 90 days ran in 2014 when he was first detained by ICE. Following the end of that removal period, ICE continued to detain him even longer, as ICE continued to attempt to obtain the illusive travel document. Ultimately ICE released him because it could never procure a travel document for him from China. If ICE fails to remove an individual during the ninety (90) day removal period, the regulations require ICE to release the individual pursuant to OSUP. 8 U.S.C. § 1231(a)(3) ("If the alien . . . is not removed within the removal period, the alien, pending removal, shall be subject to supervision."). Limited exceptions to this rule exist. Specifically, ICE "may" detain an individual beyond ninety days if the individual was ordered removed on criminal grounds or is determined to pose a danger or flight risk. 8 U.S.C. §

1231(a)(6). However, ICE's legal authority to detain an individual beyond the removal period under such circumstances is not boundless. Rather, it is constrained by the constitutional requirement that detention "bear a reasonable relationship to the purpose for which the individual [was] committed." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Because the principal purpose of the post-final-order detention statute is to effectuate removal (and not to be punitive), the Supreme Court has held that such detention bears no reasonable relation to its purpose if removal cannot be effectuated. *Id.* at 697.

The Supreme Court has addressed the fact that the statute is silent regarding the limits on post-final order detention, and has definitively held that such detention has the potential to be indefinite and such indefinite detention would be unconstitutional. Thus, there must be constitutional limits on post-final order detention. Specifically, the Supreme Court held that post-final order detention is only authorized for a "period reasonably necessary to secure removal," a period that the Court determined to be presumptively six months. *Id.* at 699–701. After this six month period, if a detainee provides "good reason" to believe that his or her removal is not significantly likely in the reasonably foreseeable future, "the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. If the government cannot do so, the individual must be released. Notably, the six-month period does not reset or restart if the government decides to re-detain a noncitizen. *Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (citing cases); *Chen v. Holder*, No. CV 6:14-2530, 2015 WL 13236635, at *2 (W.D. La. Nov. 20, 2015); *Villanueva v. Tate*, No. H-25-3364, 2025 WL 2774610, at *9 (S.D. Tex. Sep. 26, 2025).

In light of the Supreme Court limitations imposed on the statutory scheme, the government updated the regulations to be consistent with those constitutionally required limitations on indefinite detention. Under those regulations, detainees are entitled to release even before six months of detention, as long as removal is not reasonably foreseeable. *See* 8 C.F.R. § 241.13(b)(1) (authorizing release after ninety days where removal not reasonably foreseeable). Further, under the Supreme Court's constitutional limitations on indefinite detention, as the period of post-final-

order detention grows, what counts as "reasonably foreseeable" must conversely shrink. *Zadvydas*, 533 U.S. at 701.

Here, Mr. Zheng's detention is unconstitutional because it is now clearly indefinite. China has historically refused to issue travel documents for deportees.[7] Currently, there is no evidence that the United States and China have a repatriation agreement in place. *Yan-Ling X. v. Lyons*, No. 1:25-cv-01412-KES-CDB (HC), 2025 WL 3123793, at *4 (E.D. Cal. Nov. 7, 2025). Moreover, China has repeatedly refused to issue Mr. Zheng travel documents despite his own several requests, as they cannot establish his citizenship or nationality. That Mr. Zheng "attempted for multiple years to secure travel documents to facilitate his return to China [] supports his contention that it is unlikely that he will be removed in the foreseeable future." *Yang v. Kaiser*, No. 2:25-cv-02205-DAD-AC (HC), 2025 WL 2791778, at *6 (E.D. Cal. Aug. 20, 2025). Nothing in the record evidences any change from the circumstances of the past 10 years. There is no evidence that China will agree to take him now that "removals to China are common," there is no evidence of what "considerations the Government of China might take into account when deciding whether to issue a travel document" to Mr. Zheng (or that this might be different now), and there is no evidence that China will look favorably upon his case (when it has not done so over the last 10 years when both ICE and Mr. Zheng asked them to do so). *Yan-Ling X.*, 2025 WL 3123793, at *4. Thus, Mr. Zheng's removal is not reasonably foreseeable in this case, and the government has not provided him with notice, evidence, or an opportunity to be heard on this issue on or before arbitrarily re-detaining him. His continued detention without any reasonably foreseeable end point is thus unconstitutionally prolonged in violation of clear Supreme Court precedent. Further, ICE has already held Mr. Zheng in detention before he was released in 2014 and again in 2015, and therefore not only is his release legally possible, but it is under these circumstances legally required. 8 C.F.R. § 241.13(b)(1).

Even where detention meets the *Zadvydas* standard for reasonable foreseeability, detention violates the Due Process Clause unless it is "reasonably related" to the government's purpose, which is to prevent danger or flight risk. *See Zadvydas*, 533 U.S. at 700 ("[I]f removal is reasonably

[7] *See supra* n.1.

foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period") (emphasis added); *Id.* at 699 (purpose of detention is "assuring the alien's presence at the moment of removal"); *Id.* at 690–91 (discussing twin justifications of detention as preventing flight and protecting the community). Thus, Mr. Zheng must be released from custody because he does not pose a danger or flight risk that warrants post-final-order detention, regardless of whether his removal can be effectuated within a reasonable period of time. *Sun v. Santacruz*, No. 5:25-cv-02198-JLS-JC, 2025 WL 2730235, at *6 (C.D. Cal. Aug. 26, 2025) (finding that neither risk was present where ICE first released the petitioner upon finding, at least implicitly, that the petitioner was neither a flight risk nor a danger to the community, and absent new facts to indicate risk of flight or to the community); *Singh v. Andrews*, No. 1:25-cv-00801-KES-SKO (HC), 2025 WL 1918679, at *7 (E.D. Cal. July 11, 2025) (reaching a similar conclusion where the petitioner "attended every check-in and court hearing since he arrived in the United States"); *Diaz v. Kaiser*, No. 3:25-cv-05071, 2025 WL 1676854, at *3 (N.D. Cal. June 14, 2025) (similar). This is especially so because the ICE *already* released Mr. Zheng from detention in 2014 and 2015, after necessarily determining then that he was neither a flight risk nor a danger to the community, and there is no suggestion from any party that that has changed.

2. Petitioner is Likely to Succeed on the Merits of His Claim That his Re-Detention is Unlawful Because it is in Violation of the Regulations.

Mr. Zheng's re-detention is separately unlawful because the controlling regulations specify the circumstances that permit his re-detention, and Respondents have not established that circumstances have changed regarding the foreseeability of his removal which is required under those regulations. Additionally, Respondents have not followed their own regulations in re-detaining Mr. Zheng, which mandate that he be provided with notice *and* an interview promptly after his detention at which he can respond to the purported reasons for revocation of his release.

By regulation, non-citizens with final removal orders who are released from detention after a post-order custody review are subject to an OSUP, which is documented on Form I-220B. 8 C.F.R. § 241.4(j). After an individual has been released on an order of supervision, the regulations

further specify that ICE cannot revoke such an order without cause or adequate legal process. 8 C.F.R. § 241.13(i)(2)-(3).

Under the regulations, ICE has the authority to re-detain a noncitizen previously ordered removed *only* in specific circumstances, such as where an individual violates any condition of release or there are changed circumstances regarding the reasonable foreseeability of removal. 8 U.S.C. § 1231; 8 C.F.R. § 241.4(l)(1)-(2); 8 C.F.R. § 241.13(i). ICE must also provide adequate legal process on revocation. *See* 8 C.F.R. § 241.13(i)(2)–(3) (requiring notice of the reason for revocation of release, and an interview at which an individual has an opportunity to respond to the reasons given for revocation and submit evidence and information on his behalf, including to show that there is no significant likelihood[8] of removal in the reasonably foreseeable future). Here, because (1) Mr. Zheng has not been provided with an informal interview where he had the opportunity to contest the reasonable foreseeability of his removal, (2) there is no indication that Mr. Zheng violated a condition of release, and (3) there is no indication that there are changed circumstances such that a travel document has been issued or that he is now a danger or flight risk, Respondents did not properly follow the regulatory procedures to re-detain Mr. Zheng. 8 C.F.R. § 241.13(i); *see also Tran v. Noem*, No. 25-cv-2391BTM-BLM, 2025 WL 3005347, at *2 (S.D. Cal. Oct. 27, 2025) (The determination of changed circumstances, pursuant to 8 C.F.R. § 241.13(i)(2), must be made *on or before* the revocation).

In this case, Mr. Zheng was released on an OSUP. It specified the conditions imposed on him, and he has complied with all those conditions for many years. In October 2025, ICE re-arrested Mr. Zheng on the premise that there are "changed circumstances" to revoke his OSUP by only merely alleging that the new administration would be able to obtain his travel document. Notably, ICE only issued Mr. Zheng his Notice of Revocation without any evidence that a travel request was in fact pending for him or an adequate opportunity to respond to ICE's allegations or

[8] This Court has held that a "significant likelihood" requires something more than a mere possibility that removal will occur. *Yan-Ling X.*, 2025 WL 3123793, at *4. Evidence that "there is at least some possibility that" the designated country of removal "will accept the petitioner at some point . . . is not the same as a significant likelihood that the petitioner will be accepted in the reasonably foreseeable future." *Id.* at *12 (cleaned up).

evidence that it was foreseeable that they could in fact obtain travel documents for him after repeatedly failed attempts throughout over 10 years. Since the date of his arrest, Mr. Zheng has not been given a prompt interview to respond to the reasons for revocation, or any other evidence in support the Notice of Revocation.

However, wishful thinking does not make it so—there is no evidence of changed circumstances to indicate that there is a significant likelihood that China will issue his travel document and that his removal is therefore reasonably foreseeable. Although ICE requested the travel document forms from Mr. Zheng, and he provided them to ICE, the factual evidence ends there. There is no evidence that ICE in fact filed Mr. Zheng's travel document request prior to the revocation (or at any time). Respondents' intent to file or obtain a travel document request "does not make it significantly likely" that Mr. Zheng will be removed. *Phan v. Becerra*, 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *5 (E.D.C.A. July 16, 2025). As in *Phan*, ICE has been attempting and has remained unable to obtain a travel document for Mr. Zheng since at least 2014, which led to his release on OSUP, and there is no evidence that China has ever changed its stance on issuing travel documents to individuals it cannot establish citizenship or nationality for, therefore nothing has changed to indicate a significant likelihood of removal in the reasonably foreseeable future. *Id.* ("Respondents have not provided any details about why a travel document could not be obtained in the past, nor have they attempted to show why obtaining a travel document is more likely this time around. Respondents' intent to eventually complete a travel document request for Petitioner does not constitute a changed circumstance."). In addition, as in *Yan-Lin X.*, ICE has not provided any evidence as to whether the United States and China have a repatriation agreement in place, whether removals to China are common to rise to "significant likelihood," or provided information regarding the considerations that the Government of China might take into account when deciding whether to issue Mr. Zheng travel document, and whether the Government of China will look favorably upon Mr. Zheng's case such that his removal is now reasonably foreseeable. *Yan-Ling X*, 2025 WL 3123793, at *4. Finally, that Mr. Zheng "attempted for multiple years to secure travel documents to facilitate his return to China [] supports his contention that it is unlikely that he will be removed in the foreseeable future." *Yang*, 2025 WL 2791778, at *6.

Hence, even if China has changed its repatriation policy in general, there is no evidence of a change with regards to Mr. Zheng specifically given his unique situation and specific requests.[9] Thus, absent individualized and specific evidence that China *will specifically accept* Mr. Zheng in the reasonably foreseeable future, Respondents cannot show that there is a significant likelihood that Mr. Zheng will be removed in the foreseeable future, and Respondents have violated their authority pursuant to the regulations.

Moreover, there is no evidence in the record that ICE made the changed circumstances determination *on or before* revoking Mr. Zheng's OSUP. *Tran*, 2025 WL 3005347, at *2. Yet, even if ICE were to obtain a travel document now, after Petitioner's unlawful re-detention, it would not mitigate ICE's legal error. No travel document existed at the time that Petitioner was re-detained, and therefore his unlawful re-detention is based on the October 15 revocation of his OSUP and not on new circumstances. *Tran*, 2025 WL 3005347, at *2-3 (ICE was unable to obtain travel documents for the petitioner during the petitioner's previous detention and in the 15 years that the petitioner was on OSUP, and did not submit the travel document until after the petitioner's re-arrest, and though ICE later obtained the travel document and alleged they "will have a plane reservation for [the petitioner] to depart in about two weeks," the court found that the petitioner was detained "on the June 18th revocation and not based on the new circumstances.").

Thus, Mr. Zheng's detention is further unlawful because Respondents squarely violated the controlling regulations by re-detaining him.

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[9] Even if there are instances where the United States has successfully removed others to China, that success does not necessarily bear on the likelihood of obtaining travel documentation for Mr. Zheng, absent some evidence specific to his case or "at least evidence concerning the obstacles to removal that have been overcome recently concerning those aliens on the recent repatriation flights. For example, . . . evidence that officials had had more success recently obtaining travel documents." *Liu v. Carter*, No. 25-cv-03036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025); *Qui v. Carter*, No. 25-3131-JWL, 2025 WL 2770502 (D. Kan. Sep. 26, 2025) ("the fact that only one document has been received may just as reasonably suggest that a travel document for this petitioner is *not* forthcoming.") (emphasis in original). Here, absent evidence of success in other cases that are so similar to Mr. Zheng's, including evidence that the previously-existing obstacles regarding his inability to establish nationality and citizenship have been overcome, ICE cannot establish that it will have any success in obtaining his travel document.

3. Petitioner is Likely to Succeed on the Merits of His Claim That Due Process Requires That He Should Have Been Afforded a Hearing Before a Neutral Adjudicator Prior to Any Re-Detention by ICE, and he is Entitled to Such a Hearing Prior to Any Future Re-Detention.

Mr. Zheng is also likely to succeed on his claim that fundamental principles of due process require that he cannot be re-detained by ICE without first being provided a pre-deprivation hearing before a neutral adjudicator where the government shows that his removal is reasonably foreseeable and that circumstances have changed since his release in 2014, including that Mr. Zheng is now a danger or a flight risk.

ICE failed to follow the controlling regulations by re-detaining Mr. Zheng but, even if they had complied with the procedures set forth in those regulations, ICE's regulatory authority to unilaterally re-detain Mr. Zheng is proscribed by the Due Process Clause because it is well-established that individuals released from incarceration have a liberty interest in their freedom. *See e.g.*, *Hurd v. District of Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017) ("a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated"). In turn, to protect that interest, on the particular facts of Mr. Zheng's case, due process required notice and a hearing, *prior to any re-arrest*, at which he was afforded the opportunity to advance his arguments as to why he should not be re-detained. This never occurred. from re-detaining petitioner unless there are material changed circumstances and a neutral decisionmaker determines that there is a significant likelihood of petitioner's removal in the reasonably foreseeable future, or respondents demonstrate by clear and convincing evidence at a pre-deprivation bond hearing before a neutral decisionmaker that petitioner is a flight risk or danger to the community such that his physical custody is legally justified. *J.L.R.P. v. Wofford*, No. 1:25-cv-01464-KES-SKO (HC), 2025 WL 3190589, at *10 (E.D. Cal. Nov. 14, 2025) (habeas granted enjoining and restraining the government from re-detaining the petitioner "unless there are material changed circumstances and a neutral decisionmaker determines that there is a significant likelihood of petitioner's removal in the reasonably foreseeable future...."); *Garcia-Ayala v. Andrews*, No. 2:25-CV-02070-DJC-JDP, 2025 WL 2597508, at *5 (E.D. Cal. Aug. 8, 2025) (TRO

prohibiting the government from re-detaining the petitioner without notice and a pre-deprivation hearing before a neutral decisionmaker); *Diaz*, 2025 WL 1676854 (TRO prohibiting the government from re-detaining the petitioner without notice and a hearing before a neutral adjudicator); *Pinchi v. Noem*, 792 F. Supp. 3d 1025, 1036 (N.D. Cal. 2025) ("If the government wishes to detain [the petitioner], it need only provide a hearing before a neutral decisionmaker.").

Courts analyze these procedural due process claims in two steps: (1) whether there exists a protected liberty interest, and (2) the procedures necessary to ensure any deprivation of that protected liberty interest accords with the Constitution. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

a. Petitioner Has a Protected Liberty Interest in His Release

Mr. Zheng's liberty from immigration custody, a form of civil detention, is protected by the Due Process Clause: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

For over eleven years preceding his re-detention on October 15, 2025, Mr. Zheng exercised that freedom under his prior release from ICE custody in 2014 and then in 2015. He thus retained a weighty liberty interest under the Due Process Clause of the Fifth Amendment in avoiding re-incarceration. *See Young v. Harper*, 520 U.S. 143, 146-47 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482-483 (1972). Moreover, the Supreme Court has recognized that post-removal order detention is potentially indefinite and thus unconstitutional without some limitation. *Zadvydas*, 533 U.S. at 701. In this case, in the absence of a repatriation agreement that make Mr. Zheng's removal to China reasonably foreseeable, or in the absence of any other evidence to indicate there is a "significant likelihood" that his removal is reasonably foreseeable, ICE fails to meet its burden to prove that Mr. Zheng's removal is reasonably foreseeable and that it did not violate its own regulations and Mr. Zheng's due process. *See Yan-Ling X.*, 2025 WL 3123793, at *4-5. However, ICE cannot meet that burden, as there are no changed circumstances. Therefore, Mr. Zheng's continued detention is unconstitutional.

Just as importantly, Mr. Zheng continued presenting himself before ICE for his regular in-person check-in appointments for over eleven years, and ICE did not seek to re-arrest him during this time. ICE instead gave him a future date and time to appear again, which he did. In fact, Mr. Zheng continued to comply even despite ICE's sudden and unwarranted re-scheduling him for an appointment to pick up his travel documents. On October 15, 2025, Mr. Zheng attended his check-in and fully complied in good faith that ICE would abide by its own regulations related to his OSUP.

Individuals—*including noncitizens*—released from incarceration have a liberty interest in their freedom. *Zadvydas*, 533 U.S. at 696 (recognizing the liberty interest of noncitizens on OSUPs); *Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994) (noting that "[i]t is well-established that the due process clause applies to protect immigrants"). This is further reinforced by *Morrissey*, in which the Supreme Court recognized the protected liberty rights under the Due Process Clause of a *criminal* detainee who was released on parole from incarceration. 408 U.S. at 481–82. The Court noted that, "subject to the conditions of his parole, [a parolee] can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life"—thus, those released on parole have a protected liberty interest, even where that liberty is subject to conditions. *Id.* at 482. *See also Young*, 520 U.S. at 152 (holding that individuals placed in a pre-parole program created to reduce prison overcrowding have a protected liberty interest requiring pre-deprivation process); *Gagnon*, 411 U.S. at 781–82 (holding that individuals released on felony probation have a protected liberty interest requiring pre-deprivation process).

In fact, so fundamental to due process is the concept of liberty that it is even well-established that an individual maintains a protectable liberty interest where the individual obtains liberty through a *mistake* of law or fact. *See id.*; *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887 (1st Cir. 2010); *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (noting that due process considerations support the notion that an inmate released on parole by mistake, because he was serving a sentence that did not carry a possibility of parole, could not be re-incarcerated because the mistaken release was not his fault, and he had appropriately adjusted to society, so it "would

be inconsistent with fundamental principles of liberty and justice" to return him to prison) (internal quotation marks and citation omitted).

Here, when this Court "'compar[es] the specific conditional release in [Petitioner's case], with the liberty interest in parole as characterized by *Morrissey*,'" it is clear that they are strikingly similar. *See Gonzalez-Fuentes*, 607 F.3d at 887. Just as in *Morrissey*, Mr. Zheng's release "enables him to do a wide range of things open to persons'" who have never been in custody or convicted of any crime, including to live at home, work with his community, and "be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. *Moreover, Mr. Zheng is not a criminal detainee, but a civil detainee, and thus the due process considerations of his liberty should be even weightier than the courts have already found to apply in the criminal context.*

Since his last release in 2015, Mr. Zheng has been focused on rebuilding his life, including by reconnecting with family and community, and developing strong ties to his community. He has not obtained any new arrests or convictions, other than his sole conviction from 2009. Precedents from the Supreme Court and the Ninth Circuit make clear that he has a strong liberty interest in his continued release from detention.

b. Petitioner's Liberty Interest Mandated a Due Process Hearing Before any Re-Detention, and Once Released, Mandates Such a Hearing Prior to Any Re-Detention

Mr. Zheng asserts that, here, (1) where his detention is civil, (2) where he has diligently complied with ICE's reporting requirements on a regular basis, and (3) where on information and belief ICE officers arrested Mr. Zheng. merely to fulfill an arrest quota because his removal is not reasonably foreseeable and potentially indefinite, due process mandates that he was required to receive notice and a hearing before a neutral adjudicator prior to any re-arrest.

"Adequate, or due, process depends upon the nature of the interest affected. The more important the interest and the greater the effect of its impairment, the greater the procedural safeguards the [government] must provide to satisfy due process." *Haygood v. Younger*, 769 F.2d 1350, 1355-56 (9th Cir. 1985) (en banc) (citing *Morrissey*, 408 U.S. at 481-82). This Court must

"balance [Petitioner's] liberty interest against the [government's] interest in the efficient administration of" its immigration laws in order to determine what process he is owed to ensure that ICE does not unconstitutionally deprive him of his liberty. *Id.* at 1357. Under the test set forth in *Mathews v. Eldridge*, this Court must consider three factors in conducting its balancing test: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Haygood*, 769 F.2d at 1357 (*citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (emphasis in original). Only in a "special case" where post-deprivation remedies are "the only remedies the State could be expected to provide" can post-deprivation process satisfy the requirements of due process. *Id.* at 129. Moreover, it is only where "one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue" that "the State cannot be required constitutionally to do the impossible by providing predeprivation process," and thus avoid providing pre-deprivation process. *Id.*

Because, in this case, the provision of a pre-deprivation hearing was both possible and valuable to preventing an erroneous deprivation of liberty, ICE was required to provide Petitioner with notice and a hearing *prior* to any re-incarceration and revocation of his OSUP. *See Morrissey*, 408 U.S. at 481–82; *Haygood*, 769 F.2d at 1355-56; *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004); *Zinermon*, 494 U.S. at 136-37; *see also Youngberg v. Romeo*, 457 U.S. 307, 321–24 (1982); *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984) (holding that individuals awaiting involuntary civil commitment proceedings may not constitutionally be held in jail pending the determination as to whether they can ultimately be recommitted). Under *Mathews*, "the balance weighs heavily in favor of [Petitioner's] liberty," *Haygood*, 769 F.2d at 1357, and required a pre-deprivation hearing before a neutral adjudicator, such as this Court, which ICE failed to provide.

Furthermore, that basic principle—that individuals placed at liberty are entitled to process before the government imprisons them—has particular force here, where Mr. Zheng was already released from detention after findings that his removal was not reasonably foreseeable and that he need not be incarcerated to prevent flight or to protect the community, and no circumstances have changed that would justify his re-arrest, as there is no current and valid travel document for Mr. Zheng and he has not violated any of his conditions under OSUP. In fact, ICE has been unable to secure a travel document for Mr. Zheng since at least 2014. Nothing has changed—ICE has failed to obtain a travel document since Mr. Zheng's detention in 2014 and again in 2015, Mr. Zheng also made at least two attempts to obtain his travel documents from China in 2015 and in 2024, then this year Mr. Zheng cooperated with ICE to once again obtain his travel document, and now since Mr. Zheng's re-detention on October 15, 2025, ICE has yet again failed to obtain a travel document.

As this Court has held, "significant likelihood" requires something more than a mere possibility that removal will occur. *Yan-Ling X.*, 2025 WL 3123793, at *4. Evidence that "there is at least some possibility that" the designated country of removal "will accept the petitioner at some point . . . is not the same as a significant likelihood that the petitioner will be accepted in the reasonably foreseeable future." *Id.* (citation omitted). Currently, there is no evidence that the United States and China have a repatriation agreement in place. *Id.* Moreover, China has repeatedly refused to issue Mr. Zheng travel documents despite his several requests, as they cannot establish his citizenship or nationality. There is no evidence that China will agree to take him now, that "removals to China are common," what "considerations the Government of China might take into account when deciding whether to issue a travel document" to Mr. Zheng, and there is no evidence that China will look favorably upon his case. *Id.*; *Liu*, 2025 WL 1696526, at *2 (finding that the respondents had not shown that removal was reasonably foreseeable where they did not provide evidence why seeking travel documentation was more likely to be successful this time around or describe other actions taken to make the petitioner's removal more likely); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *16 (W.D. Wash. Aug. 21, 2025) (determining that a mere possibility is insufficient to rise to the "significant likelihood" requirement under the regulations

to support reasonable foreseeability of removal); *Hoac v. Becerra*, 2:25-cv-01740-DC-JDP, 2025 WL 1993771 (E.D.C.A. July 16, 2025) (ordering the immediate release of petitioner who complied with an OSUP for years and was unlawfully re-detained at a routine check despite no changed circumstances); *Phan*, 2025 WL 1993735 (same). Thus, Mr. Zheng's removal is not reasonably foreseeable in this case, and the government has not provided him with notice, evidence, or an opportunity to be heard on this issue on or before arbitrarily re-detaining him. His continued detention without any reasonably foreseeable end point is thus unconstitutionally prolonged in violation of clear Supreme Court precedent.

Obtaining a travel document after Petitioner's unlawful detention would not mitigate the situation. No travel document existed at the time that Petitioner was re-detained, and therefore his unlawful re-detention is based on the October 15 revocation of his OSUP and not on new circumstances. *Tran*, 2025 WL 3005347, at *2-3 (ICE was unable to obtain travel documents for the petitioner during the petitioner's previous detention and in the 15 years that the petitioner was on OSUP, and did not submit the travel document until after the petitioner's re-arrest, and though ICE later obtained the travel document and alleged they "will have a plane reservation for [the petitioner] to depart in about two weeks," the court found that the petitioner was detained "on the June 18th revocation and not based on the new circumstances.").

i. Petitioner's Interest in His Liberty is Profound

Under *Morrissey* and its progeny, individuals conditionally released from serving a criminal sentence have a liberty interest that is "valuable." *Morrissey*, 408 U.S. at 482. In addition, the principles espoused in *Hurd* and *Johnson*—that a person who is in fact free of physical confinement, even if that freedom is lawfully revocable, has a liberty interest that entitles him to constitutional due process before he is re-incarcerated—apply with even greater force to individuals like Mr. Zheng, who have also been released from prior ICE custody and are facing civil (not criminal) detention. Parolees and probationers have a diminished liberty interest given their underlying convictions. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 119 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). Nonetheless, even in the criminal parolee context, the courts have held that the parolee cannot be re-arrested without a due process hearing in which they

can raise any claims they may have regarding why their re-incarceration would be unlawful. *See Gonzalez-Fuentes*, 607 F.3d at 891–92; *Hurd*, 864 F.3d at 683. This extends to noncitizens released from immigration detention on pre-parole, parole, or probation. *See Pinchi*, 792 F. Supp. 3d at 1032; *Diaz*, 2025 WL 1676854, at *2; *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099, at *12-13 (D. Ariz. Aug. 11, 2025). Thus, Mr. Zheng, as a civil detainee, retains a truly weighty liberty interest even though he was under conditional release prior to his re-arrest.

What is at stake in this case for Mr. Zheng is one of the most profound individual interests recognized by our legal system: whether ICE may unilaterally nullify a prior release decision and be able to take away his physical freedom, i.e., his "constitutionally protected interest in avoiding physical restraint." *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (internal quotation omitted). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). *See also Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

ii. The Government's Interest in Keeping Petitioner in Detention is Low and the Burden on the Government to Release Him from Custody is Minimal

The government's interest in keeping Mr. Zheng in detention without a due process hearing is low, and when weighed against his significant private interest in his liberty, the scale tips sharply in favor of releasing him from custody. It becomes abundantly clear that the *Mathews* test favors Petitioner when the Court considers that the process Petitioner seeks—release from custody after ICE *already* released Mr. Zheng from detention after being unable to remove him during the post-removal period, all of which occurred over *eleven years ago* and where nothing in the interim has changed to warrant re-detention after—is a standard course of action for the government. In the alternative, providing Petitioner with a hearing before this Court to determine whether there is evidence that Petitioner is a flight risk or danger to the community would impose only a *de minimis*

burden on the government, because the government routinely conducts these reviews for individuals in Petitioner's same circumstances. 8 C.F.R. § 241.4(e)–(f).

As immigration detention is civil, it can have no punitive purpose. The government's only interests in holding an individual in immigration detention can be to prevent danger to the community or to ensure a noncitizen's appearance at immigration proceedings. *See Zadvydas*, 533 U.S. at 690. Moreover, the Supreme Court has made clear that indefinite detention of noncitizens who cannot be removed to the country of the removal order, is unconstitutional. In this case, the government cannot plausibly assert that it had a sudden interest in detaining Petitioner due to alleged dangerousness, or due to a change in the foreseeability of his removal to China, as his circumstances have not changed since his release from ICE custody in 2014 and in 2015.

Moreover, Mr. Zheng has had a removal order since before his release and yet has continued to appear before ICE on a yearly basis for each and every appointment that has been scheduled. *See Morrissey*, 408 U.S. at 482 ("'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions on his release, than to his mere anticipation or hope of freedom'") (quoting *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.3d 1079, 1086 (2d Cir. 1971).

Thus, as to the factor of flight risk, Mr. Zheng's post-release conduct in the form of full compliance with his check-in requirements further confirms that he is not a flight risk and that he remains likely to present himself at any future ICE appearances, as he always has done. What has changed, however, it that ICE has a new policy to make a minimum number of arrests each day under the new administration -- but that does not constitute a material change in circumstances or increase the government's interest in detaining him.[10] Moreover, as discussed previously, nothing has changed regarding the lack of foreseeability of his removal to China.

Release from custody until ICE assesses and demonstrates to a neutral adjudicator that Mr. Zheng is actually a flight risk or danger to the community, or that his detention is not going to be indefinite, is far *less* costly and burdensome for the government than keeping him detained. As the

[10] *See* "Trump officials issue quotas to ICE officers to ramp up arrests," *Washington Post* (January 26, 2025), available at: https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/.

Ninth Circuit noted in 2017, which remains true today, "[t]he costs to the public of immigration detention are 'staggering': $158 each day per detainee, amounting to a total daily cost of $6.5 million." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017).

iii. Without Release from Custody, the Risk of an Erroneous Deprivation of Liberty is High

Releasing Mr. Zheng from civil custody and ensuring he is provided with a pre-deprivation hearing in the future would decrease the risk of him being erroneously deprived of his liberty. Before he can be lawfully detained, he must be provided with a hearing before a neutral adjudicator at which the government is held to show that his detention will not be indefinite (that is, his removal is reasonably foreseeable), or that the circumstances have changed since his release in 2014 and 2015 such that evidence exists to establish that he is a danger to the community or a flight risk.

Under the process that ICE maintains is lawful—which affords Mr. Zheng no process whatsoever—ICE can simply re-detain him at any point if the agency desires to do so, as ICE did on October 15, 2025. Mr. Zheng has already been erroneously deprived of his liberty when he was detained during his check-in, and the risk he will continue to be deprived is high if ICE is permitted to keep him detention after making a unilateral decision to re-detain him. Thus, the regulations are insufficient to protect his due process rights, as they permit ICE to unilaterally re-detain individuals, even for an accidental error in complying with the conditions, for example. After re-arrest, ICE makes its own one-sided custody determination and can decide whether the agency wants to hold him. 8 C.F.R. § 241.4(e)–(f).

By contrast, the procedure Mr. Zheng seeks—release from custody, and that he be provided a future hearing in front of a neutral adjudicator prior to any re-detention at which the government that his detention will not be indefinite, or otherwise that the circumstances have changed since his release in 2014 to justify his detention—is much more likely to produce accurate determinations regarding these factual disputes. *See Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir.1989) (when "delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement" are at issue, the "risk of error is considerable

when just determinations are made after hearing only one side"). "A neutral judge is one of the most basic due process protections." *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). The Ninth Circuit has noted that the risk of an erroneous deprivation of liberty under *Mathews* can be decreased where a neutral adjudicator, rather than ICE alone, makes custody determinations. *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1091-92 (9th Cir. 2011).

Due process also requires consideration of alternatives to detention at any custody redetermination hearing that may occur. The primary purpose of immigration detention is to ensure removal *if* reasonably foreseeable. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if, as here, removal is not actually foreseeable. Accordingly, alternatives to detention must be considered in determining whether Mr. Zheng's re-detention is warranted.

4. Petitioner is Likely to Succeed on the Merits of His Claim That the Fifth Amendment Entitles him to Constitutionally Adequate Procedures Prior to Any Third Country Removal.

Finally, Mr. Zheng is likely to succeed on the merits of his claim that The Due Process Clause of the Fifth Amendment requires sufficient notice and an opportunity to be heard prior to the deprivation of any protected rights. U.S. Const. amend. V; *see also Louisiana Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243, 1252 (E.D. Cal. 1994) ("[D]ue process requires that government action falling within the clause's mandate may only be taken where there is notice and an opportunity for hearing.").

Mr. Zheng has a protected interest in his life. Thus, prior to any third country removal, he must be provided with constitutionally compliant notice and an opportunity to respond and contest that removal if he has a fear of persecution or torture in that country.

The Immigration and Nationality Act (INA), Foreign Affairs Reform and Restructuring Act (FARRA) of 1998, and implementing regulations further mandate meaningful notice and opportunity to present a fear-based claim to an IJ before ICE deports a person to a third country.

Under the INA, Respondents have a clear and non-discretionary duty to execute final orders of removal only to the designated country of removal. The statute explicitly states that a noncitizen "*shall* remove the [noncitizen] to the country the [noncitizen] . . . designates." 8 U.S.C.

§ 1231(b)(2)(A)(ii) (emphasis added). And even where a noncitizen does not designate the country of removal, the statute further mandates that DHS "shall remove the alien to a country of which the alien is a subject, national, or citizen. *See id.* § 1231(b)(2)(D); *see also generally Jama v. ICE*, 543 U.S. 335, 341 (2005).

As the Supreme Court has explained, such language "generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (quoting *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)); *see also Black's Law Dictionary* (11th ed. 2019). Accordingly, any imminent third country removal fails to comport with the statutory obligations set forth by Congress in the INA and is unlawful. "Other courts in this circuit have recognized that this policy is unconstitutional, and this Court agrees with those well-reasoned decisions." *Vu v. Noem*, No. 1:25-cv-01366-KES-SKO (HC), 2025 WL 3114341, at *9 (E.D. Cal. Nov. 6, 2025) (citation omitted).

Moreover, prior to any third country removal, ICE must provide Mr. Zheng with sufficient notice and an opportunity to respond and apply for fear-based relief as to that country, in compliance with the INA, due process, and the binding international treaty: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11] Currently, DHS has a policy of removing or seeking to remove individuals to third countries without first providing constitutionally adequate notice of third country removal, or any meaningful opportunity to contest that removal if the individual has a fear of persecution or torture in that country. *See Nightingale Decl.* at Exhibit D (DHS Policy Regarding Third Country Removal). The U.S. District Court for the District of Massachusetts previously issued a nationwide preliminary injunction blocking such third country removals without notice and a meaningful opportunity to apply for relief under the Convention Against Torture, in recognition that the government's policy violates due process and the United States' obligations under the Convention Against Torture. *D.V.D. v. U.S. Department of Homeland Security*, No. 25-10676-BEM, 2025 WL 1142968 (D. Mass. Apr.

[11] United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

18, 2025). The U.S. Supreme Court has since granted the government's motion to stay the injunction on June 23, 2025, just before the Court published *Trump v. Casa*, No. 24A884 (June 27, 2025) limiting nationwide injunctions. Thus, the Supreme Court's order, which is not accompanied by an opinion, signals only disagreement with the nature, and not the substance, of the nationwide preliminary injunction.

The policy squarely violates the INA because it does not take into account, *or even mention*, an individual's designated country of removal—thereby fully contravening the statutory instruction that DHS must only remove an individual to the designated country of removal. U.S.C. § 1231(b)(2)(A)(ii).

Further, the policy plainly violates the United States' obligations under the Convention Against Torture and principles of due process because it allows DHS to provide individuals with *no notice whatsoever* prior to removal to a third country, so long as that country has provided "assurances" that deportees from the United States "will not be persecuted or tortured." *See Nightingale Decl.* at Exhibit D (DHS Policy). If, in turn, the country has not provided such an assurance, then DHS officers must simply inform an individual of removal to that third country, but are not required to inform them of their rights to apply for protection from removal to that country under the Convention Against Torture. *Id.* Rather, noncitizens instead must already be aware of their rights under this binding international treaty, and must affirmatively state a fear of removal to that country in order to receive a fear-based interview to screen for their eligibility for protection under the Convention Against Torture. *Id.* Even so, the screening interview is hardly a meaningful opportunity for individuals to apply for fear-based relief, because the interview happens within 24 hours after an individual states a fear of removal to a recently-designated third country, which hardly provides for any time to consult with an attorney or prepare any evidence for the interview. *Id.* And, in actuality, the screening interview is not a screening interview at all, because DHS officers under the policy are instructed to determine at this interview "whether the alien would more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal"—which is the standard for protection under the Convention Against Torture that Immigration Judges apply after a full hearing in Immigration Court. *Id.* Then, if the officer

determines that the noncitizen has not met this standard, they will then be removed to the third country to which they claimed, and tried to demonstrate within 24 hours, a fear of persecution or torture. *Id.* Finally, there is no indication that any of this process will occur in an individual's native language, or a language that they understand. *Id.* This is nothing more than a fig leaf of due process meant to deprive individuals of the protection that the law and treaty are supposed to provide them.

Clearly, this policy violates the Convention Against Torture, which instructs that the United States cannot remove individuals to countries where they will face torture, because the policy allows DHS to swiftly remove noncitizens to countries where they very well may face torture if those countries simply provide the United States with "assurances" that deportees will not be tortured. *Id.* Moreover, the policy puts the onus of individuals to be aware of their rights under the Convention Against Torture—which is a treaty that binds the United States *government*—instead of ensuring that DHS officials make individuals aware of their rights, which would more squarely comport with *DHS's obligations* under the treaty not to remove individuals to countries where they face torture. *Id.* For similar reasons, the policy also violates principles of due process, because it does not provide individuals with notice or any meaningful opportunity to apply for fear-based relief. *Id.* Again, the policy allows individuals to be removed to third countries *without any notice or an opportunity to be heard* if that country merely promises that deportees will not face torture there, and if individuals are otherwise unaware of their right to seek fear-based relief. *Id.*; *see also J.R. v. Bostock*, No. 2:25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. June 30, 2025) (TRO prohibiting the government from removing petitioner to "any third country in the world absent prior approval from this Court"); *Ortega v. Kaiser*, No. 25-cv-5259, 2025 WL 2243616 (N.D. Cal. Aug. 6, 2025) (TRO prohibiting the government from "arresting, detaining, or removing" the petitioner to a third country "without notice and a hearing."); *Vaskanyan v. Janecka*, No. 25-cv-1475, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025) (TRO prohibiting government from "removing the petitioner "to a third country, i.e., a country other than the countries designated as he countries of removal in Petitioner's final order of removal…without written notice to both Petitioner and Petitioner's counsel in a language the Petitioner can

understand. Following notice, Petitioner must be given a meaningful opportunity, and a minimum of ten (10) days, to raise a fear-based claim for protection under the Convention Against Torture prior to removal. If Petitioner demonstrates 'reasonable fear' of removal to the third country, Respondents must move to reopen Petitioner's removal proceedings. If Petitioner is not found to have demonstrated a 'reasonable fear' of removal to the third country, Respondents must provide a meaningful opportunity, and a minimum of fifteen (15) days, for the non-citizen to seek reopening of his immigration proceedings."). Regardless, ICE appears to be emboldened and intent to implement its campaign to send noncitizens to far corners of the planet—places they have absolutely no connection to whatsoever—in violation of individuals' due process rights.

Mr. Zheng's removal to a third country would violate his due process rights unless he is *first* provided with sufficient notice and a meaningful opportunity to apply for protection under the Convention Against Torture. Intervention by this Court is necessary to protect those rights.

By failing to implement a process or procedure to afford Mr. Zheng meaningful notice and opportunity to present a fear-based claim to an IJ before DHS deports a person to a third country and by re-detaining previously released individuals pursuant to the July 9, 2025 "Guidance," *see Nightingale Decl.* at Exhibit E (DHS Memo Following the Supreme Court's Order), Respondents would violate Mr. Zheng's substantive and procedural due process rights and are not implementing procedures required by the INA, FARRA, and the implementing regulations.

Accordingly, the Court should declare that Respondents would violate Mr. Zheng's constitutional right to due process and that the Due Process Clause affords him the right to a process and procedure ensuring that DHS provides meaningful notice and opportunity to present a fear-based claim to an IJ before DHS deports him to a third country.

The Court should enjoin Respondents from failing to provide Mr. Zheng with meaningful notice and opportunity to present a claim for protection to an IJ before DHS deports him to a third country.

For these reasons, Mr. Zheng's removal to any third country without adequate notice and an opportunity to apply for relief under the CAT would violate his due process rights, as well as her rights under the INA, FARRA, and the implementing regulations. The only remedy for this

violation is for this Court to order that he not be summarily removed to any third country unless and until he is provided with constitutionally adequate procedures.

5. Petitioner will Suffer Irreparable Harm Absent Injunctive Relief

Mr. Zheng will suffer irreparable harm were he to remain deprived of his liberty and subjected to continued and indefinite detention by immigration authorities without being immediately released and provided the constitutionally adequate process (a future pre-deprivation hearing before a neutral adjudicator) that this motion for a temporary restraining order seeks. Detainees in civil ICE custody are held in "prison-like conditions" which have real consequences for their lives. *Preap v. Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016). As the Supreme Court has explained, "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *accord Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Moreover, the Ninth Circuit has recognized in "concrete terms the irreparable harms imposed on anyone subject to immigration detention" including "subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained." *Hernandez*, 872 F.3d at 995. Finally, the government has documented alarmingly poor conditions in ICE detention centers.[12]

Mr. Zheng has spent over eleven years out of ICE custody. During that time, he has been reconnecting with his family and community. He has also been providing his family support in the form of financial, emotional, and educational support. If he remains detained, he will likely lose his job as he cannot work from detention. Importantly, he would also be ripped away from the

[12] *See, e.g.*, DHS, Office of Inspector General ("OIG"), Summary of Unannounced Inspections of ICE Facilities Conducted in Fiscal Years 2020-2023 (2024) (violations of health and safety standards; staffing shortages affecting suicide watch, and detainees held in unauthorized restraints, without being allowed time outside their cell,). U.S. Dep't of Homeland Security Office of Inspector General, OIG-24-23, Results of an Unannounced Inspection of ICE's Golden State Annex in McFarland, California (Sept. 24, 2024), available at https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-59-Sep24.pdf.

opportunity to reconnect with his family, rebuild his relationships and his life after spending so many years incarcerated, and continue to raise and provide for himself and his U.S. citizen child.

Further, Mr. Zheng will suffer irreparable harm were he to be removed to a third country without first being provided with constitutionally compliant procedures to ensure that his right to apply for fear-based relief is protected. Individuals removed to third countries under DHS's policy have reported that they are now stuck in countries where they do not have government support, do not speak the language, and have no network.[13] Others removed in violation of their prior grant of protection under the CAT have reported that they faced severe torture at the hands of government agents.[14] It is clear that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, a temporary restraining order is necessary to prevent Mr. Zheng from suffering irreparable harm by remaining in unlawful and unjust detention, and by being summarily removed to any third country where he may face persecution or torture.

6. The Balance of Equities and the Public Interest Favor Granting the Temporary Restraining Order

First, the balance of hardships strongly favors Mr. Zheng. His detention is potentially indefinite, and his summary removal to any third country where he may face persecution or torture would violate the INA, binding international treaty, and Mr. Zheng's due process rights. The government cannot suffer harm from an injunction that prevents it from engaging in an unlawful practice. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

Further, any burden imposed by requiring the Respondents to release Mr. Zheng. from custody (and provided notice and a hearing before a neutral adjudicator prior to any future re-detention) is both *de minimis* and clearly outweighed by the substantial harm he will suffer as long as he continues to be detained. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)

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[13] NPR, "Asylum seekers deported by the U.S. are stuck in Panama unable to return home (May 5, 2025), available at: https://www.npr.org/2025/05/05/nx-s1-5369572/asylum-seekers-deported-by-the-u-s-are-stuck-in-panama-unable-to-return-home.

[14] NPR, "Abrego Garcia says he was severely beaten in Salvadoran prison" (July 3, 2025), available at: https://www.npr.org/2025/07/03/g-s1-75775/abrego-garcia-el-salvador-prison-beaten-torture.

("Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required."); *Pinchi*, 792 F. Supp. 3d at 1036 ("If the government wishes to detain [the petitioner], it need only provide a hearing before a neutral decisionmaker."). Similarly, any burden of requiring Respondents *not* to remove Mr. Zheng to any third country is outweighed by the substantial harm he may suffer if removed to a country where he will face persecution or torture. *See id.*

Finally, a temporary restraining order is in the public interest. First and most importantly, "it would not be equitable or in the public's interest to allow [a party] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)). If a temporary restraining order is not entered, the government would effectively be granted permission to detain Mr. Zheng, and/or to summarily remove him to any third country, in violation of the requirements of Due Process. "The public interest and the balance of the equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act Coal.*, 757 F.3d at 1069 (quoting *Melendres*, 695 F.3d at 1002); *see also Hernandez*, 872 F.3d at 996 ("The public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process."); *cf. Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

V. CONCLUSION

For all the above reasons, Mr. Zheng warrants a temporary restraining order that Respondents release him from custody, not re-detain him unless he is afforded notice and a hearing before a neutral adjudicator on whether his re-detention is not indefinite, and further whether it is justified by evidence that he is a danger to the community or a flight risk, and not remove him to any third country without first providing him with constitutionally-compliant procedures.

Dated: December 1, 2025

Respectfully submitted,

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