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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BOVIN OKOTH MARCO,

Petitioner,

vs.

POLLY KAISER, et al.,

Respondents

Case No.: 1:25-cv-01936-KES-SAB

**PETITIONER'S OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS
AND REPLY IN SUPPORT OF EX PARTE
TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

Respondents' motion to dismiss mischaracterizes both the **nature of this habeas action** and the **constitutional injury at issue**. Petitioner **Bovin Okoth Marco** does not challenge removability, does not seek adjudication of bond merits, and does not ask this Court to substitute for the Immigration Judge. He challenges **how his liberty was taken** through a **summary arrest without notice or hearing during a scheduled marriage-based I-130/I-485 interview at a USCIS office**, and the government's continued detention of him **without constitutionally adequate process**.

On December 12, 2025, Petitioner appeared in good faith at a USCIS-scheduled adjustment interview, accompanied by counsel, in reliance on official government notice. He was arrested without warning, without a warrant, and without any individualized custody determination. That manner of arrest—executed at a federal benefits interview designed to

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1 facilitate lawful status—violates the Fifth Amendment and independently warrants habeas relief
2 and interim injunctive protection.

3 Respondents’ attempt to reframe this case as a routine § 236(a) detention cured by
4 a later bond hearing ignores binding Supreme Court and Ninth Circuit precedent recognizing that
5 due process violations occur at the moment liberty is taken without constitutionally required
6 procedure and are not retroactively cured by delayed process.

8 **II. THIS COURT HAS HABEAS JURISDICTION**

9 Respondents do not meaningfully dispute jurisdiction but imply dismissal is
10 appropriate because removal proceedings are pending and a bond hearing has been scheduled.
11 That is incorrect as a matter of law.

12 Federal courts retain habeas jurisdiction to review the constitutionality of
13 immigration detention, including the manner and process by which custody is imposed,
14 independent of removal proceedings. *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001);
15 *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006). Petitioner does not seek review
16 of a final order of removal; he challenges current detention and the process used to impose it.
17 That claim lies at the core of § 2241.

18 The availability of a future bond hearing does not divest this Court of jurisdiction
19 to remedy present constitutional violations.

20 **III. RESPONDENTS MISCHARACTERIZE PETITIONER’S CLAIM**

21 Respondents’ motion rests on a false premise: that Petitioner’s habeas claim rises
22 or falls on the length of detention or the availability of bond. It does not.

23 Petitioner’s claim is procedural, not temporal. He alleges that the government
24 revoked his conditional liberty without notice, without a pre-deprivation hearing, and without
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1 any individualized assessment, despite years of compliance and his lawful presence at a USCIS-
2 scheduled interview.

3 Courts have long recognized that individuals subject to immigration supervision
4 possess a form of conditional liberty protected by the Fifth Amendment. *Zadvydas*, 533 U.S. at
5 690; *Nadarajah*, 443 F.3d at 1079–80. The government may not revoke that liberty arbitrarily or
6 through surprise enforcement tactics that bypass basic procedural safeguards.
7

8 **IV. THE USCIS INTERVIEW ARREST VIOLATED DUE PROCESS**

9 **A. Arrest Without Notice or Pre-Deprivation Process**

10 The Due Process Clause prohibits the government from depriving any person of
11 liberty **without notice and a meaningful opportunity to be heard before a neutral**
12 **decisionmaker**, absent exigent circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481–82
13 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
14

15 Here, it is undisputed that:

- 16
- 17 a) Petitioner received **no advance notice** that he would be arrested.
 - 18 b) He was arrested **during a scheduled marriage-based adjustment interview**.
 - 19 c) No warrant or written notice was presented; and
 - 20 d) No individualized custody determination preceded the arrest.
- 21
22

23 Only after Petitioner was taken into custody was counsel told that the arrest was
24 based on an alleged visa overstay. Post-hoc explanations do not satisfy due process.

25 **B. Arrest at a Marriage-Based USCIS Interview Is Constitutionally** 26 **Significant**

1 Arresting a noncitizen at a USCIS benefits interview is not a neutral enforcement
2 choice. It converts a government-scheduled process intended to facilitate lawful status into an
3 **ambush detention**, heightening the risk of erroneous deprivation and undermining reliance on
4 official notice.
5

6 Courts have enjoined such **“bait-and-switch” arrests** at USCIS interviews,
7 recognizing that they bypass the individualized custody determinations due process requires.
8 See, e.g., *Claros v. Albarran*, No. 3:25-cv-09473-EMC, 2025 WL 4829103, at *3–4 (N.D. Cal.
9 Nov. 5, 2025); *Enamorado v. Kaiser*, No. 5:25-cv-04072-NW, 2025 WL 1382859 (N.D. Cal.
10 May 12, 2025).
11

12 Nothing in Respondents’ motion explains why Petitioner, who was not subject to
13 mandatory detention, could not have been provided notice or processed through ordinary §
14 236(a) procedures rather than arrested without warning at a federal benefits interview.
15

16 **V. A SUBSEQUENT BOND HEARING DOES NOT CURE THE** 17 **VIOLATION**

18 Respondents argue that any constitutional defect is cured because Petitioner has
19 been granted a bond hearing. That argument fails.
20

21 Due process violations occur **when liberty is taken without constitutionally**
22 **required procedure**, not when a later hearing is scheduled. *Carey v. Piphus*, 435 U.S. 247, 259
23 (1978). A delayed bond hearing cannot retroactively legitimize an unlawful arrest or the arbitrary
24 revocation of conditional liberty.

25 Courts routinely grant TROs to prevent transfer or removal even where bond
26 proceedings are pending, precisely because delayed process does not remedy the initial
27 constitutional harm.

VI. RESPONDENTS' RELIANCE ON DEMORE v. KIM IS MISPLACED

Demore v. Kim, 538 U.S. 510 (2003), does not control this case.

- *Demore* involved **mandatory detention under § 1226(c)**, not discretionary detention under § 1226(a).
- It did not involve a **surprise arrest at a USCIS interview**, nor a claim based on **lack of notice and pre-deprivation process**.
- The Supreme Court emphasized the absence of procedural defects in the initiation of detention—facts not present here.

Petitioner does not challenge Congress's authority to authorize detention pending removal; he challenges the **arbitrary manner in which detention was imposed**.

VII. THE TEMPORARY RESTRAINING ORDER STANDARD IS SATISFIED

A. Likelihood of Success on the Merits

Petitioner has demonstrated a strong likelihood of success on the merits of his constitutional claim. The Fifth Amendment prohibits the government from depriving a person of liberty without due process of law. Here, ICE arrested Petitioner without notice, without a warrant, and without any pre-deprivation hearing, notwithstanding his years of compliance and his appearance at a scheduled USCIS marriage-based I-130/I-485 interview. The arrest occurred absent any exigency or individualized custody determination, rendering it an arbitrary revocation of Petitioner's conditional liberty in violation of settled Supreme Court and Ninth Circuit precedent.

B. Irreparable Harm

1 Unlawful physical detention constitutes irreparable harm as a matter of law. *Elrod*
2 *v. Burns*, 427 U.S. 347, 373 (1976). Each additional day Petitioner remains confined pursuant to
3 an unconstitutional arrest inflicts ongoing injury that cannot be remedied after the fact. Petitioner
4 also faces the risk of transfer or removal, which would frustrate meaningful judicial review and
5 defeat this Court's jurisdiction. These harms are immediate and irreparable, warranting interim
6 injunctive relief.
7

8 **C. Balance of Equities and Public Interest**

9 The balance of equities and the public interest weigh decisively in Petitioner's
10 favor. Maintaining the status quo imposes minimal burden on Respondents while protecting
11 fundamental constitutional rights. By contrast, denying relief would permit the continuation of
12 detention initiated through constitutionally deficient means.
13

14 Respondents argue that Petitioner's criminal history justifies his detention. That
15 contention is unavailing at the TRO stage. The government has been aware of Petitioner's
16 criminal history since at least 2001 and 2005, and the arrests cited by Respondents occurred
17 between 2014 and 2019. Despite this long-standing record, DHS did not seek to arrest or detain
18 Petitioner until December 2025, when he appeared in good faith for a scheduled USCIS
19 marriage-based adjustment interview. This prolonged delay confirms the absence of exigent
20 circumstances and underscores that no emergency justified a surprise arrest without notice or
21 pre-deprivation process.
22

23 The public interest further favors relief because the integrity of the immigration
24 system depends on predictability and fairness. Noncitizens must be able to rely on official
25 government notices to attend benefits interviews without fear that compliance will be met with
26 "bait-and-switch" enforcement tactics. Arresting individuals at interviews designed to facilitate
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1 lawful status undermines confidence in the administrative process and discourages voluntary
2 compliance—outcomes contrary to effective immigration enforcement.

3 Finally, the public interest is never served by constitutional violations. The
4 equities cannot favor a process that revokes conditional liberty through surprise tactics that
5 bypass individualized custody determinations. Ensuring compliance with the Fifth Amendment's
6 due process guarantees is itself a compelling public interest and strongly supports the issuance of
7 interim injunctive relief.
8

9 **VIII. CONCLUSION**

10 Respondents' motion to dismiss should be denied. Petitioner respectfully requests
11 that the Court:
12

- 13 1. Deny Respondents' motion to dismiss;
- 14 2. Grant the requested Temporary Restraining Order preventing transfer or removal; and
- 15 3. Issue an Order to Show Cause requiring Respondents to justify Petitioner's continued
16 detention.
17
18

19 Dated: December 30, 2025

20 Respectfully submitted,

21 /S/

22 Alieu M. Iscandari, Esq.
23 Attorney for Petitioner
ISCANDARI & ASSOCIATES
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