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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**

17 **LUIS GUILLERMO ORTEGA MACARIO,**

18 Petitioner,

19 v.

20 SERGIO ALBARRAN, Acting Field Office  
21 Director of the San Francisco Immigration and  
22 Customs Enforcement Office; TODD LYONS,  
23 Acting Director of United States Immigration  
24 and Customs Enforcement; KRISTI NOEM,  
25 Secretary of the United States Department of  
26 Homeland Security, PAMELA BONDI,  
27 Attorney General of the United States, acting in  
28 their official capacities,

Respondents.

Case No. 3:25-cv-10885-TLT

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITIONER'S EX PARTE  
MOTION FOR TEMPORARY  
RESTRAINING ORDER**

1 Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, Petitioner Mr. Luis  
2 Guillermo Ortega Macario (“Mr. Ortega”) hereby moves this Court for an order enjoining  
3 Defendants Department of Homeland Security (“DHS”), United States Immigration and Customs  
4 Enforcement (“ICE”), and Pam Bondi, in her official capacity as the U.S. Attorney General, to  
5 release Mr. Ortega until he is afforded a hearing, as required by the Due Process clause of the  
6 Fifth Amendment, to determine whether the government can justify the necessity of his  
7 reincarceration by clear and convincing evidence.  
8

9 The reasons in support of this Motion are set forth in the accompanying Memorandum of  
10 Points and Authorities. This Motion is based on the attached Declaration of Jennifer Friedman  
11 with Accompanying Exhibits in Support of Petition for Writ of Habeas Corpus and Ex-Parte  
12 Motion for Temporary Restraining Order. As set forth in the Points and Authorities in support of  
13 this motion, Mr. Ortega raises that he warrants a temporary restraining order due to his weighty  
14 liberty interest under the Due Process Clause of the Fifth Amendment in remedying his unlawful  
15 re-incarceration, which was imposed absent a pre-deprivation due process hearing.  
16

17 WHEREFORE, Mr. Ortega prays that this Court grant his request for a temporary  
18 restraining order enjoining ICE to release him from custody unless and until he is afforded a  
19 hearing before on the question of whether his re-incarceration would be lawful. The only  
20 mechanism to ensure that he is not continuously unlawfully detained in violation of his due  
21 process rights is a temporary restraining order from this Court.  
22

23  
24 Respectfully submitted this 22nd day of December, 2025.  
25

26 /s/ Jennifer Friedman  
27 Jennifer Friedman  
28

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## INTRODUCTION

Petitioner Luis Guillermo Ortega (“Mr. Ortega”), by and through undersigned counsel, hereby files this motion for a temporary restraining order and preliminary injunction to compel his immediate release from the custody of the Department of Homeland Security (“DHS”). Mr. Ortega was unlawfully re-detained today at a DHS check-in appointment in San Francisco without first being provided a due process hearing to determine whether his incarceration is justified. Mr. Ortega must be released from custody unless and until DHS proves to a neutral adjudicator by clear and convincing evidence that he presents a current danger and flight risk.

It is well-established that individuals released from custody have a protected liberty interest in their freedom. *Morrissey v. Brewer*, 408 U.S. 471, 482-483 (1972). A chorus of district courts across California have recognized that noncitizens released from ICE custody share this strong liberty interest. *See, e.g., Doe v. Becerra*, No. 2:25-CV-00647-DJC-DMC, 2025 WL 691664 (E.D. Cal. Mar. 3, 2025); *Garcia v. Andrews*, No. 2:25-CV-01884-TLN-SCR, 2025 WL 1927596 (E.D. Cal. July 14, 2025); *Galindo Arzate v. Andrews*, No. 1:25-CV-00942-KES-SKO (HC), 2025 WL 2230521 (E.D. Cal. Aug. 4, 2025); *Ortega v. Kaiser*, No. 25-cv-05259-JST, 2025 WL 1771438, at \*3 (N.D. Cal. June 26, 2025) (collecting cases).

Mr. Ortega enjoyed his liberty interest for over four years since released on his own recognizance by the Department of Homeland Security (“DHS”). Since his release from custody, Mr. Ortega has complied with all supervision requirements. He presented as required at check-ins, applied for asylum and fear-based relief, obtained work authorization, and maintains steady employment in home remodeling with a contractor. His asylum application was denied by the immigration judge in January, and he currently has a pending appeal with the Board of Immigration Appeals (“BIA”). Mr. Ortega has also supported and co-parented his three children, over whom he shares half legal and physical custody.

Mr. Ortega has two misdemeanor arrests, neither of which resulted in a conviction. In 2022, Mr. Ortega was arrested for misdemeanor domestic violence, but the charges were dismissed by the prosecution. He continued checking in with ICE and abiding by the terms of his release. In September 2025, Mr. Ortega was arrested for a misdemeanor DUI and promptly released. The

1 district attorney has so far declined to file charges. On November 21, 2025, he appeared for an  
2 ICE check-in, and was asked to return for another check-in on December 22, 2025.

3 When Mr. Ortega appeared today, ICE unilaterally decided to re-detain him without notice  
4 or a hearing. The basic principle—that individuals placed at liberty are entitled to neutral process  
5 before the government imprisons them—remains in force here. DHS necessarily determined in  
6 2021 that he was not a flight risk or danger when it granted him release from custody on his own  
7 recognizance. In the four years since then, he has formed the “enduring attachments to normal  
8 life” that strengthen his liberty interest. *See Morrissey*, 408 U.S. at 482. His misdemeanor arrests,  
9 for which there are no convictions, do not diminish his liberty interest. *See e.g., Guillermo M.R.*  
10 *v. Kaiser*, 791 F.Supp.3d 1021, 1036 (N.D. Cal. July 17, 2025); *Larrios v. Albarran*, No. 25-cv-  
11 08799-AMO, 2025 WL 3043391, at \*7-8 (N.D. Cal. Oct. 31, 2025). Due process still requires  
12 that he receive a neutral hearing *before* the government deprives him of his liberty. *See Zinermon*  
13 *v. Burch*, 494 U.S. 113, 127 (1990).

14 Mr. Ortega meets the standard for a temporary restraining order. He will suffer immediate  
15 and irreparable harm absent an order from this Court enjoining the government to release him  
16 from detention unless and until he receives a hearing before a neutral adjudicator, as demanded  
17 by the Constitution. Since ensuring federal officials’ fealty to the constitution is in the public  
18 interest, the balance of equities and public interest are also strongly in Mr. Ortega’s favor.

### 19 STATEMENT OF FACTS

20 Petitioner Luis Guillermo Ortega Macario (“Mr. Ortega”) is a 44-year-old national of  
21 Guatemala who came to the United States on a visa in 2007 and has resided in California ever since  
22 then. *See* Declaration of Jennifer T. Friedman (“Friedman Dec”), ¶ 4. He fled to the United States  
23 with his then-partner and their two young children, fleeing gang violence including multiple  
24 physical assaults and death threats. *Id.*

25 The family turned themselves in to immigration officials at or near the border on December  
26 20, 2021, who processed them for removal proceedings and released them within approximately  
27 two days. *Id.* ¶ 5.

1 Mr. Ortega and his family moved to San Francisco, California, where they lived with his  
2 sister and brother-in-law for a few months before moving to their own home. *Id.* ¶ 6. Their eldest  
3 child joined them in July 2023 after suffering additional threats in Guatemala. *Id.* ¶ 10.

4 On September 30, 2022, Mr. Ortega and his partner had a disagreement that resulted in the  
5 police coming and Mr. Ortega's arrest. *Id.* ¶ 7. The couple have been separated since that day. Mr.  
6 Ortega returned to his sister and brother-in-law's home in San Francisco, where he has lived ever  
7 since. *Id.* ¶ 10. On May 14, 2022, all criminal charges against Mr. Ortega were dismissed. *Id.* ¶ 8.

8 Since that time, Mr. Ortega and the mother of his children have been separated but remain  
9 committed co-parents who share legal and physical custody of their three children. *Id.* ¶ 10.

10 The couple's children are currently 12, 9, and 6 and split their time between their parents'  
11 homes. *Id.* ¶ 11. The three children are off of school this week and next for the holiday and the  
12 family was looking forward to spending time together over the holiday. *Id.* ¶ 11. Mr. Ortega's ex-  
13 partner was ultimately granted asylum and their three children were granted derivative asylum  
14 status. *Id.* ¶ 9.

15 Mr. Ortega has valid work authorization and works full-time in construction. *Id.* ¶ 12. He is  
16 currently working five days a week on home remodeling with a contractor. *Id.*

17 On November 21, 2025, Mr. Ortega reported to his regular ICE check-in as required. *Id.* ¶  
18 16. He was asked to return on December 22, 2025 with documentation regarding the September  
19 arrest demonstrating that no criminal charges are pending. *Id.*

20 On December 22, 2025, Mr. Ortega returned to ICE check-in with documentation from the  
21 San Francisco Criminal Clerk's Office showing that no charges were filed and no charges against  
22 him are pending. *Id.* ¶ 17.

23 Despite the fact that Mr. Ortega has no criminal convictions and no charges filed, he was  
24 detained today December 22, 2025. *Id.* ¶17. Undersigned pro bono counsel spoke with the  
25 Deportation Officer at 630 Sansome, who relayed that he understood that there were no charges  
26 and no conviction but that it was determined that he would be detained based solely on his "police  
27 contact". *Id.* If he is not promptly ordered released, he will miss spending the Christmas holiday  
28 with his children.

1 Mr. Ortega has always complied with ICE requirements, including ISAP. *Id.* ¶ 18. He was  
2 originally reporting through an app on this phone, and more recently was fitted with a GPS ankle  
3 monitor. *Id.* He has also attended all immigration court appearances and complied with all ICE  
4 reporting requirements. *Id.*

### 5 LEGAL STANDARD

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

### 17 ARGUMENT

18 To warrant a TRO, a movant must show (1) they are “likely to succeed on the merits,” (2)  
19 they are “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance  
20 of equities tips in [their] favor,” and that (4) “an injunction is in the public interest.” *All. for the*  
21 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Def.*  
22 *Council, Inc.*, 555 U.S. 7, 20 (2008)); *see Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240  
23 F.3d 832, 839 n.7 (9th Cir. 2001) (noting the analysis for issuing a temporary restraining order  
24 and a preliminary injunction is substantially the same). Even if the movant raises only “serious  
25 questions” as to the merits of their claims, the court can grant relief if the balance of hardships  
26 tips “sharply” in their favor. *All. for the Wild Rockies*, 632 F.3d at 1135. All factors here weigh  
27 decisively in Mr. Ortega’s favor.  
28

1 A temporary restraining order should be issued if “immediate and irreparable injury, loss,  
2 or irreversible damage will result” to the applicant in the absence of an order. Fed. R. Civ. P.  
3 65(b). The purpose of a temporary restraining order is to prevent irreparable harm before a  
4 preliminary injunction hearing is held. *See Granny Goose Foods, Inc. v. Bhd. Of Teamsters &*  
5 *Auto Truck Drivers Local No. 70 of Alameda City*, 415 U.S. 423, 439 (1974). As explained *infra*  
6 at Section A, when Mr. Ortega was re-arrested prior to receiving a hearing before a neutral  
7 adjudicator to determine the necessity of his continued detention, it clearly violated his due  
8 process rights. Mr. Ortega has already suffered irreparable injury in the form of incarceration and  
9 will continue to suffer irreparable injury each day he remains detained without due process.

10  
11 **I. MR. ORTEGA IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIM.**

12 Mr. Ortega is likely to succeed on his claim that, in his particular circumstances, the Due  
13 Process Clause of the Constitution prevents Respondents from re-arresting him without first  
14 providing a pre-deprivation hearing before a neutral adjudicator where the government justifies  
15 the necessity of his re-detention by clear and convincing evidence.

16  
17 **A. Mr. Ortega Has a Protected Liberty Interest in His Conditional Release.**

18 “Freedom from imprisonment—from government custody, detention, or other forms of  
19 physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”  
20 *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). For the past four years following his release on  
21 recognizance, Mr. Ortega exercised that freedom. He pursued his asylum application, complied  
22 with supervision requirements, and supported his family.

23 While that freedom may ultimately be revocable should circumstances materially change,  
24 *see Matter of Sugay*, 17 I&N Dec. 637, 640 (BIA 1981) and *Saravia v. Sessions*, 280 F. Supp. 3d  
25 1168 1196-97 (N. D. Cal. 2017), he nonetheless retains a weighty liberty under the Due Process  
26 Clause of the Fifth Amendment in avoiding re-incarceration. *See Young v. Harper*, 520 U.S. 143,  
27 146-47 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S.  
28 471, 482-483 (1972); *see also Ortega v. Bonnar*, 415 F.Supp.3d 963, 969-70 (N.D. Cal. 2019)

1 (holding that a noncitizen has a protected liberty interest in remaining out of custody following an  
2 IJ's bond determination); *Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 WL 5517277, at \*2  
3 (N.D. Cal. 2020) (same); *Jorge M.F. v. Jennings*, 534 F.Supp.3d 1050, 1054- 55 (N.D. Cal. 2021)  
4 (same).

5 In *Morrissey*, the Supreme Court examined the “nature of the interest” that a parolee has  
6 in “his continued liberty.” 408 U.S. at 481-82. The Court noted that, “subject to the conditions of  
7 his parole, [a parolee] can be gainfully employed and is free to be with family and friends and to  
8 form the other enduring attachments of normal life.” *Id.* at 482. The Court further noted that “the  
9 parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live  
10 up to the parole conditions.” *Id.* The Court explained that “the liberty of a parolee, although  
11 indeterminate, includes many of the core values of unqualified liberty and its termination inflicts  
12 a grievous loss on the parolee and often others.” *Id.* In turn, “[b]y whatever name, the liberty is  
13 valuable and must be seen as within the protection of the [Fifth] Amendment.” *Morrissey*, 408  
14 U.S. at 482.

15 This basic principle—that individuals have a liberty interest in their conditional release—  
16 has been reinforced by both the Supreme Court and the circuit courts on numerous occasions. *See*,  
17 *e.g.*, *Young v. Harper*, 520 U.S. at 152 (holding that individuals placed in a pre-parole program  
18 created to reduce prison overcrowding have a protected liberty interest requiring pre-deprivation  
19 process); *Gagnon v. Scarpelli*, 411 U.S. at 781-82 (holding that individuals released on felony  
20 probation have a protected liberty interest requiring pre-deprivation process).

21 As the First Circuit has explained, when analyzing the issue of whether a specific  
22 conditional release rises to the level of a protected liberty interest, “[c]ourts have resolved the  
23 issue by comparing the specific conditional release in the case before them with the liberty  
24 interest in parole as characterized by *Morrissey*.” *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887  
25 (1st Cir. 2010) (internal quotation marks and citation omitted). *See also, e.g.*, *Hurd v. District of*  
26 *Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017) (“a person who is in fact free of physical  
27 confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him  
28 to constitutional due process before he is re-incarcerated”) (citing *Young*, 520 U.S. at 152,

1 *Gagnon*, 411 U.S. at 782, and *Morrissey*, 408 U.S. at 482).

2 An individual maintains a protectable liberty interest even where she obtains liberty  
3 through a mistake of law or fact. *See id.*; *Gonzalez-Fuentes*, 607 F.3d at 887; *Johnson v.*  
4 *Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (noting that due process considerations support the  
5 notion that an inmate released on parole by mistake, because he was serving a sentence that did  
6 not carry a possibility of parole, could not be re-incarcerated because the mistaken release was  
7 not his fault, and he had appropriately adjusted to society, so it “would be inconsistent with  
8 fundamental principles of liberty and justice” to return him to prison) (cleaned up).

9 Moreover, because Mr. Ortega faces civil detention, “his liberty interest is arguably  
10 greater than the interest of the parolees in *Morrissey*.” *See Ortega v. Bonnar*, 415 F.Supp.3d 963,  
11 970 (N.D. Cal. 2019). Mr. Ortega was released on bond pending removal proceedings, unlike  
12 parolees or probationers, who have a diminished liberty interest given their underlying  
13 convictions. *See, e.g., U.S. v. Knights*, 534 U.S. 112, 119 (2001); *Griffin v. Wisconsin*, 483 U.S.  
14 868, 874 (1987). As someone at risk of civil detention, therefore, “it stands to reason that [Mr.  
15 Ortega] is entitled to protections at least as great as those afforded to an individual . . . accused  
16 but not convicted of a crime.” *See Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

17 District courts have overwhelmingly held that noncitizens released during their removal  
18 proceedings have a similar liberty interest to that articulated in *Morrissey*. *See, e.g., Meza v.*  
19 *Bonnar*, No. 18-cv-02708-BLF, 2018 WL 2554572 (N.D. Cal. June 4, 2018); *Ortega v. Bonnar*,  
20 415 F. Supp. 3d 963 (N.D. Cal. 2019); *Vargas v. Jennings*, No. 20-CV-5785-PJH, 2020 WL  
21 5074312, at \*3 (N.D. Cal. Aug. 23, 2020); *Jorge M. F. v. Wilkinson*, No. 21-CV-01434-JST,  
22 2021 WL 783561, at \*2 (N.D. Cal. Mar. 1, 2021); *Garcia v. Bondi*, No. 3:25-CV-05070, 2025  
23 WL 1676855, at \*4 (N.D. Cal. June 14, 2025); *Diaz v. Kaiser*, No. 3:25-CV-05071, 2025 WL  
24 1676854, at \*4 (N.D. Cal. June 14, 2025); *Guillermo M.R. v. Kaiser*, No. 3:25-cv-05436-RFL  
25 (N.D. Cal. June 30, 2025).

26 In recent months, two courts in this district have recognized the strength of a noncitizen’s  
27 protected liberty interest following release from ICE custody. *See Garcia v. Andrews*, No. 2:25-  
28 CV-01884-TLN-SCR, 2025 WL 1927596, at \*5 (E.D. Cal. July 14, 2025); *Galindo Arzate v.*

1 *Andrews*, No. 1:25-CV-00942-KES-SKO (HC), 2025 WL 2230521, at \*1 (E.D. Cal. Aug. 4,  
2 2025).

3 As in those cases, when this Court ““compar[es] the specific conditional release in  
4 [Petitioner’s case], with the liberty interest in parole as characterized by *Morrissey*,”” it is clear  
5 that they are strikingly similar. *See Gonzalez-Fuentes*, 607 F.3d at 887. Just as in *Morrissey*, Mr.  
6 Ortega’s release “enables him to do a wide range of things open to persons” who have never  
7 been in custody or convicted of any crime, including to live at home, work, and “be with family  
8 and friends and to form the other enduring attachments of normal life.” *Morrissey*, 408 U.S. at  
9 482.

10 Since his release in 2021, Mr. Ortega has continued with his meaningful life surrounded  
11 by his family and friends. He has a stable job in construction, working on home remodeling jobs.  
12 He is an involved father with his three children, ages 12, 19, and 6 years old who live with him  
13 about fifty per cent of the time. He applied for asylum and is anxiously awaiting a final decision  
14 on that application with the Board of Immigration Appeals. While released, he was able to  
15 participate in the “attachments of normal life,” *Morrissey*, 408 U.S. at 482, and as such, he has a  
16 protected liberty interest and his continued detention without adequate process violates his due  
17 process rights.

18  
19 **B. Mr. Ortega’s Liberty Interest Mandated a Hearing Before any Re-Arrest.**

20 Mr. Ortega asserts that, here, (1) where his detention is civil, (2) he has diligently  
21 complied with ICE’s reporting requirements on a regular basis, (3) has an asylum application  
22 pending before the Board of Immigration Appeals, (4) the only change in circumstances ICE  
23 could possibly point to is uncharged police contact, and (5) ICE has not indicated that the bond  
24 has been breached or provided any evidence that would support Mr. Ortega’s redetention.

25 “Adequate, or due, process depends upon the nature of the interest affected. The more  
26 important the interest and the greater the effect of its impairment, the greater the procedural  
27 safeguards the [government] must provide to satisfy due process.” *Haygood v. Younger*, 769 F.2d  
28 1350, 1355-56 (9th Cir. 1985) (en banc) (citing *Morrissey*, 408 U.S. at 481-82). This Court must

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

11 The Supreme Court “usually has held that the Constitution requires some kind of a  
12 hearing *before* the State deprives a person of liberty or property.” *Zinerman v. Burch*, 494 U.S.  
13 113, 127 (1990) (emphasis in original). This is so even in cases where that freedom is lawfully  
14 revocable. *See Hurd*, 864 F.3d at 683 (citing *Young*, 520 U.S. at 152 (re- detention after pre-  
15 parole conditional supervision requires pre-deprivation hearing)); *Gagnon*, 411 U.S. at 782  
16 (holding the same, in context of probation); *Morrissey*, 408 U.S. 471 (holding the same, in  
17 context of parole). Only in a “special case” where post-deprivation remedies are “the only  
18 remedies the State could be expected to provide” can post-deprivation process satisfy the  
19 requirements of due process. *Zinerman*, 494 U.S. at 985.

20 Because, in this case, the provision of a pre-deprivation hearing was both possible and  
21 valuable in preventing an erroneous deprivation of liberty, ICE was required to provide Mr.  
22 Ortega with notice and a hearing *prior* to any re-incarceration. *See Morrissey*, 408 U.S. at 481-82;  
23 *Haygood*, 769 F.2d at 1355-56; *Jones*, 393 F.3d at 932; *Zinerman*, 494 U.S. at 985; *see also*  
24 *Youngberg v. Romeo*, 457 U.S. 307, 321-24 (1982); *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir.  
25 1984) (holding that individuals awaiting involuntary civil commitment proceedings may not  
26 constitutionally be held in jail pending the determination as to whether they can ultimately be  
27 recommitted).

28 The decision in *Doe v. Becerra*, No. 2:25-CV-00647-DJC-DMC, 2025 WL 691664, at \*8

1 (E.D. Cal. Mar. 3, 2025), illustrates what due process requires prior to re-detention by ICE. There,  
2 Mr. Doe, a noncitizen from India, had been re-detained by ICE at a standard check-in more than  
3 five years after his release on a bond. *Id.* at \*1. In granting a preliminary injunction, the Court  
4 held that even with new adverse facts following release, Mr. Doe had established a strong  
5 likelihood of success in showing that he had an interest in his continued liberty and that  
6 mandatory detention, in that case, under 8 U.S.C. 1225(b)(1)(B)(ii) would violate this due process  
7 rights unless he was afforded adequate process. *Id.* at \*5. The Court further held that, after  
8 applying the three-factor test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), Mr. Doe was  
9 entitled to a hearing before an IJ to determine whether his detention is warranted. *Id.* at \*6, \*8. At  
10 this hearing, the government bore the burden of establishing, by clear and convincing evidence,  
11 whether Mr. Doe posed a danger or a flight risk.

12 As in Doe, Mr. Ortega has a protected liberty interest in his freedom, and before  
13 Respondents may deprive him of that, the Fifth Amendment requires they first prove that they  
14 have a lawful basis to do so. Thus, Mr. Ortega is entitled to release and a hearing to determine  
15 whether his re-detention would be unlawful. Here, that would mean a hearing in which a neutral  
16 judge can evaluate whether DHS can establish that Mr. Ortega presents a current danger or flight  
17 risk by clear and convincing evidence.

### 18 19 **C. Mr. Ortega’s Private Interest in His Liberty is Profound.**

20 Under *Morrissey* and its progeny, individuals conditionally released from serving a  
21 criminal sentence have a liberty interest that is “valuable.” *Morrissey*, 408 U.S. at 482. In  
22 addition, the principles espoused in *Hurd* and *Johnson*—that a person who is in fact free of  
23 physical confinement, even if that freedom is lawfully revocable, has a liberty interest that entitles  
24 him to constitutional due process before he is re-incarcerated—apply with even greater force to  
25 individuals like Mr. Ortega, who have been released pending civil removal proceedings, rather  
26 than parolees or probationers who are subject to incarceration as part of a sentence for a criminal  
27 conviction. Parolees and probationers have a diminished liberty interest given their underlying  
28 convictions. *See, e.g., U.S. v. Knights*, 534 U.S. 112, 119 (2001); *Griffin v. Wisconsin*, 483 U.S.

1 868, 874 (1987). Nonetheless, even in the criminal parolee context, the courts have held that the  
2 parolee cannot be re-arrested without a due process hearing in which they can raise any claims  
3 they may have regarding why their re-incarceration would be unlawful. *See Gonzalez-Fuentes*,  
4 607 F.3d at 891-92; *Hurd*, 864 F.3d at 683. Thus, Mr. Ortega retains a truly weighty liberty  
5 interest even though he was under conditional release prior to his re-arrest.

6 What is at stake in this case for Mr. Ortega is one of the most profound individual  
7 interests recognized by our legal system: whether ICE may unilaterally nullify a prior grant of  
8 release on recognizance and be able to take away his physical freedom, i.e., his “constitutionally  
9 protected interest in avoiding physical restraint.” *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir.  
10 2011) (internal quotation omitted). “Freedom from bodily restraint has always been at the core of  
11 the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).  
12 *See also Zadvydas*, 533 U.S. at 690 (“Freedom from imprisonment—from government custody,  
13 detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due  
14 Process] Clause protects.”); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *see also Doe*, 2025 WL  
15 691664, at \*5 (“It cannot be gainsaid that Petitioner has a substantial private interest in  
16 maintaining his out-of-custody status.”).

17 Thus, it is clear there is a profound private interest at stake in this case, which must be  
18 weighed heavily when determining what process Mr. Ortega is owed under the Constitution. *See*  
19 *Mathews*, 424 U.S. at 334-35.

20  
21 **D. The Government’s Interest in Keeping Mr. Ortega Detained Without a Hearing  
22 is Low and the Burden on the Government to Release Him from Custody Unless  
and Until he is Provided a Hearing is Minimal.**

23 The government’s interest in keeping Mr. Ortega in detention without a due process  
24 hearing is low, and when weighed against his significant private interest in his liberty, the scale  
25 tips sharply in favor of releasing him from custody unless and until the government demonstrates  
26 by clear and convincing evidence that he is a flight risk or danger to the community.

27 Immigration detention is civil and cannot be punitive in purpose or effect. The  
28 government’s only interests in holding an individual in immigration detention can be to prevent

1 danger to the community or to ensure a noncitizen’s appearance at immigration proceedings. *See*  
2 *Zadvydas*, 533 U.S. at 690. In this case, the government cannot have a sudden interest in  
3 detaining Mr. Ortega today based on conduct that the District Attorneys office has not charged  
4 and for which he was only briefly detained.

5 Moreover, the “fiscal and administrative burdens” that release from custody would pose—  
6 unless and until a pre-deprivation bond hearing is provided—are nonexistent. *See Mathews*, 424  
7 U.S. at 334-35. To the contrary, his release will save the government significant expenditure in  
8 resources until a neutral adjudicator decides whether his re-detention meets any valid civil  
9 purpose. As the Ninth Circuit noted, “[t]he costs to the public of immigration detention are  
10 ‘staggering’: \$158 each day per detainee, amounting to a total daily cost of \$6.5 million.”  
11 *Hernandez*, 872 F.3d 976, 996 (9<sup>th</sup> Cir. 2017).

12 The minimal administrative cost of providing a bond hearing pales in comparison to the  
13 costs of detaining Mr. Ortega for what will likely be years as he presents his application for relief  
14 from removal. *Black v. Decker*, 103 F.4th 133, 154 (2d Cir. May 31, 2024) (cleaned up) (when a  
15 noncitizen “poses no danger and is not a flight risk, all the government does in requiring detention  
16 is separate families and remove from the community breadwinners, caregivers, parents, siblings  
17 and employees”).

18 Giving Mr. Ortega a bond hearing before a judge is a routine procedure that the  
19 government provides to those in immigration jails on a daily basis. *See Doe* at \*6 (“The effort and  
20 cost required to provide Petitioner with procedural safeguards is minimal and indeed was  
21 previously provided in his case.”). At that hearing, the court would have the opportunity to  
22 determine whether Mr. Ortega’s arrest without charges, much less a conviction, merits his  
23 indefinite detention without a hearing. As the Supreme Court noted in *Morrissey*, even where the  
24 State has an “overwhelming interest in being able to return [a parolee] to imprisonment without  
25 the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of  
26 his parole. . .the State has no interest in revoking parole without some informal procedural  
27 guarantees.” 408 U.S. at 483.

28 **E. Without Release from Custody until the Government Provides a Due Process  
Hearing, the Risk of an Erroneous Deprivation of Liberty is High, and Process**

1                   **in the Form of a Constitutionally Compliant Hearing Where ICE Carries the**  
2                   **Burden Would Decrease That Risk**

3           Releasing Mr. Ortega from custody until he is provided a pre-deprivation hearing would  
4 decrease the risk of an erroneous deprivation of his liberty. Before Mr. Ortega can be lawfully  
5 detained, he must be provided with a hearing before a neutral adjudicator at which the government  
6 is held to show that there has been sufficiently changed circumstances such that his release from  
7 custody should be altered or revoked because clear and convincing evidence exists to establish that  
8 Mr. Ortega is a danger to the community or a flight risk. *See e.g. Diaz*, 2025 WL 1676854, at \*3  
9 (finding that “the three factors relevant to the due process inquiry set out in *Mathews*...support  
10 requiring a pre-detention hearing for [Mr. Ortega].”).

11           By contrast, the procedure Mr. Ortega seeks—release from custody and reinstatement of  
12 his prior bond until he is provided a hearing in front of a neutral adjudicator at which the  
13 government proves by clear and convincing evidence that circumstances have changed to justify  
14 his re-detention, *see Doe*, 2025 WL 691664, \*8—is much more likely to produce accurate  
15 determinations regarding factual disputes, such as whether a certain circumstance constitutes a  
16 “changed circumstance.” *See Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir.1989)  
17 (when “delicate judgments depending on credibility of witnesses and assessment of conditions not  
18 subject to measurement” are at issue, the “risk of error is considerable when just determinations are  
19 made after hearing only one side”); *see also Doe*, 2025 WL 691664, \*1. “A neutral judge is one of  
20 the most basic due process protections. *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001),  
21 *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). The Ninth  
22 Circuit has noted that the risk of an erroneous deprivation of liberty under *Mathews* can be  
23 decreased where a neutral decisionmaker, rather than ICE alone, makes custody determinations.  
24 *Diouf v. Napolitano* (“*Diouf IP*”), 634 F.3d 1081, 1091-92 (9th Cir. 2011).

25           There is no change in circumstances to justify Mr. Ortega re-detention, much less a material  
26 change. *Saravia*, 280 F. Supp. 3d at 1197, *aff’d sub nom. Saravia for A.H.*, 905 F.3d 1137 (DHS  
27 “generally only re-arrests [noncitizens] pursuant to § 1226(b) after a material change in  
28 circumstances.”). The district attorney’s office has declined to pursue charges. Further, no current

1 evidence suggests that Mr. Ortega is a danger to the community.

2 Nor is Mr. Ortega a flight risk. He has a large community of friends and is deeply connected  
3 to his church. He has a stable residence where he has lived with his sister and brother-in-law since  
4 December 2021 (but for a few months in 2022). He also has stable employment in construction. He  
5 has complied with his ICE check-ins and criminal court requirements. He is eligible for asylum and  
6 faces persecution if removed to Guatemala as someone who suffered physical assaults, death  
7 threats, and reported the gang's activities to law enforcement. He has complied with all ICE  
8 reporting requirements, including in November and December 2025 when he was concerned that  
9 he might face detention but still appeared. He has the support of undersigned pro bono counsel in  
10 his asylum case. All of these factors indicate that he is not a flight risk and that he is likely to present  
11 himself at any future hearings or ICE appearances. Indeed, Mr. Ortega presented to ICE today  
12 despite the likelihood of his arrest.

13 In any event, the proper place for any alleged facts regarding danger and flight risk to be  
14 adduced is at a hearing before a neutral arbiter. As the court in *Doe* held:

15  
16 Given that Petitioner was previously found to not be a danger or risk of flight  
17 and the unresolved questions about the timing and reliability of the new  
18 information, the risk of erroneous deprivation remains high. Moreover, the  
19 value in granting Petitioner procedural safeguard is readily apparent. At a  
20 hearing, a neutral decisionmaker can consider all of the facts and evidence  
21 before him to determine whether Petitioner in fact presents a risk of flight or  
22 dangerousness.

23 *Doe*, 2025 WL 691664, at \*5.

24 The same principles hold true here. Mr. Ortega has already been erroneously deprived of  
25 his liberty, and the risk that he will continue to be so deprived is high if ICE is permitted to keep  
26 him detained after making a unilateral decision to re-detain him. *See Diouf v. Napolitano*, 634 F.3d  
27 1081, 1091-92 (9th Cir. 2011) (observing that the risk of an erroneous deprivation of liberty is  
28 reduced where a neutral decisionmaker, rather than ICE, makes custody determinations). No  
statutory mechanism provides Mr. Ortega any process before a neutral adjudicator following his  
re-detention. As a result, absent this Court's intervention, the necessity of Mr. Ortega's re-detention  
would evade review by the IJ or any other neutral arbiter.

1 Due process also requires consideration of alternatives to detention and ability to pay at any  
2 custody redetermination hearing that may occur. *See e.g., Hernandez v. Sessions*, 872 F.3d 976,  
3 997 (9th Cir. 2017) (“Plaintiffs are likely to succeed on their challenge under the Due Process  
4 Clause to the government's policy of allowing ICE and IJs to set immigration bond amounts without  
5 considering the detainees’ financial circumstances or alternative conditions of release.”); *Walter*  
6 *A.T. v. Facility Administrator*, No. 1:24-CV-01513-EPG-HC, 2025 WL 1744133, at \*10 (E.D. Cal.  
7 June 24, 2025). The primary purpose of immigration detention is to ensure a noncitizen’s  
8 appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably  
9 related to this purpose if there are alternatives to detention that could mitigate risk of flight. *See*  
10 *Bell*, 441 U.S. at 538. Accordingly, alternatives to detention and ability to pay must be considered  
11 in determining whether Mr. Ortega’s re-incarceration is warranted.

12 It becomes abundantly clear that the *Mathews* test favors Mr. Ortega when the Court  
13 considers that the process he seeks—release from custody pending notice and a hearing regarding  
14 whether he should be redetained or a new bond amount should be set—is a standard course of  
15 action for the government. In the alternative, providing Mr. Ortega with a hearing before this Court  
16 (or a neutral decisionmaker) to determine whether there is clear and convincing evidence that Mr.  
17 Ortega is a flight risk or danger to the community would impose only a *de minimis* burden on the  
18 government, because the government routinely provides this sort of hearing to detained individuals  
19 like Mr. Ortega.

20 The government’s interest in detaining Mr. Ortega at this time is therefore low. Moreover,  
21 the “fiscal and administrative burdens” that release from custody, unless and until a pre-deprivation  
22 bond hearing is provided, would impose are nonexistent in this case. *See Mathews*, 424 U.S. at 334-  
23 35. Mr. Ortega does not seek a unique or expensive form of process, but rather his release from  
24 custody until a routine hearing regarding whether his bond should be revoked and whether he  
25 should be re-incarcerated takes place.

26 In the alternative, providing Mr. Ortega with an immediate hearing before this Court (or a  
27 neutral decisionmaker) regarding bond is a similarly routine procedure that the government  
28 provides to those in immigration jails on a daily basis. *See Doe*. 2025 WL 691664 at \*6 (“The effort

1 and cost required to provide Petitioner with procedural safeguards is minimal and indeed was  
2 previously provided in his case.”). At that hearing, the Court would have the opportunity to  
3 determine whether Mr. Ortega’s pending charges from 2017, and the eight years of subsequent  
4 compliance with all laws and court requirements, merits his indefinite detention without a hearing.  
5 But there was no justifiable reason to re-incarcerate Mr. Ortega while his asylum case remains  
6 pending in immigration court- and before he has an opportunity to have his guilt or innocence  
7 determined at trial by a jury of his peers on the criminal charges. As the Supreme Court noted in  
8 *Morrissey*, even where the State has an “overwhelming interest in being able to return [a parolee]  
9 to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide  
10 by the conditions of his parole . . . the State has no interest in revoking parole without some informal  
11 procedural guarantees.” 408 U.S. at 483.

12 Release from custody until ICE (1) moves for a bond re-determination before an  
13 Immigration Judge and (2) demonstrates by clear and convincing evidence that Mr. Ortega is a  
14 flight risk or danger to the community is far *less* costly and burdensome for the government than  
15 keeping him detained. As the Ninth Circuit noted in 2017, which remains true today, “[t]he costs  
16 to the public of immigration detention are ‘staggering’: \$158 each day per detainee, amounting to  
17 a total daily cost of \$6.5 million.” *Hernandez*, 872 F.3d at 996. If, in the alternative, the Court  
18 chooses to order a hearing for Mr. Ortega at which the government bears the burden of justifying  
19 his continued detention, the government would bear no additional cost if the hearing is scheduled  
20 within fourteen days, rather than allowing Mr. Ortega to sit in detention for what will likely be  
21 years as he presents his application for relief from removal. He remains motivated to pursue his  
22 application for asylum and any appeals available to him as necessary.

23 \* \* \*

24  
25 As the above-cited authorities show, Mr. Ortega is likely to succeed on his claim that the  
26 Due Process Clause requires required notice and a hearing before a neutral adjudicator *prior to*  
27 *any* re-incarceration by ICE. And, at the very minimum, he clearly raises serious questions  
28

1 regarding this issue, thus also meriting a TRO. *See Alliance for the Wild Rockies*, 632 F.3d at  
2 1135, *Doe*, 2025 WL 691664 at \*8.

3  
4 **II. MR. ORTEGA WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE**  
5 **RELIEF.**

6 Mr. Ortega will suffer irreparable harm were he to remain deprived of his liberty and  
7 subjected to continue incarceration by immigration authorities without being immediately  
8 released and provided the constitutionally adequate process that this motion for a temporary  
9 restraining order seeks. Detainees in ICE custody are held in “prison-like conditions.” *Preap v.*  
10 *Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016). As the Supreme Court has explained, “[t]he time  
11 spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job;  
12 it disrupts family life; and it enforces idleness.” *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972);  
13 *accord Nat’l Ctr. for Immigrants Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1369 (9th Cir. 1984).

14 Moreover, the Ninth Circuit has recognized in “concrete terms the irreparable harms  
15 imposed on anyone subject to immigration detention” including “subpar medical and psychiatric  
16 care in ICE detention facilities, the economic burdens imposed on detainees and their families as  
17 a result of detention, and the collateral harms to children of detainees whose parents are  
18 detained.” *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017).

19 Finally, the government itself has documented alarmingly poor conditions in ICE  
20 detention centers. *See, e.g.*, DHS, Office of Inspector General (OIG), Summary of Unannounced  
21 Inspections of ICE Facilities Conducted in Fiscal Years 2020-2023 (2024) (reporting violations of  
22 environmental health and safety standards; staffing shortages affecting the level of care detainees  
23 received for suicide watch, and detainees being held in administrative segregation in unauthorized  
24 restraints, without being allowed time outside their cell, and with no documentation that they  
25 were provided health care or three meals a day).<sup>1</sup>

26 In Mr. Ortega’s case, the irreparable harm flows to his right to a trial on any allegations of  
27 criminal conduct- a right that is moot at this time, since no criminal charges against him.

28 <sup>1</sup> Available at <https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-59-Sep24.pdf> (last accessed October 2, 2025).

1 Finally, as detailed *supra*, Mr. Ortega contends that his re-arrest absent a hearing before a  
2 neutral adjudicator violated his due process rights under the Constitution. It is clear that “the  
3 deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v.*  
4 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

5 As this Court put it in *Doe*:

6 Despite Petitioner previously remaining out of custody for many years prior to  
7 his rearrest, he is now in ICE custody and has not been afforded the opportunity  
8 to be heard by a neutral decisionmaker on whether detention is warranted.  
9 Absent such review, it appears that Petitioner will indefinitely remain in  
10 custody until final adjudication is reached on his asylum application. This  
violation of Petitioner's due process rights is sufficient to satisfy the irreparable  
harm requirement.

11 2025 WL 691664, at \*6. That same reasoning applies here. Thus, a temporary restraining order is  
12 necessary to prevent Mr. Ortega from suffering irreparable harm by remaining in unlawful and  
13 unjust detention.

14  
15  
16 **III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR  
GRANTING THE TEMPORARY RESTRAINING ORDER.**

17 Where the government is the opposing party, balancing the harm and the public interest  
18 merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of equities and the public  
19 interest undoubtedly favor granting this temporary restraining order.

20 First, the balance of hardships strongly favors Mr. Ortega. The government cannot suffer  
21 harm from an injunction that prevents it from engaging in an unlawful practice. *See Zepeda v.*  
22 *INS*, 753 F.2d 719, 727 (9th Cir. 1983) (“[T]he INS cannot reasonably assert that it is harmed in  
23 any legally cognizable sense by being enjoined from constitutional violations.”); *see also Doe*,  
24 2025 WL 691664, at \*6 (concluding that the balance and equities weigh in favor of noncitizen  
25 seeking a post-deprivation bond hearings, as the noncitizen “has a strong likelihood of success on  
26 the merits based on his constitutional claims”). Therefore, the government cannot allege harm  
27 arising from a temporary restraining order or preliminary injunction ordering it to comply with  
28

1 the Constitution.

2 Further, any burden imposed by requiring the DHS to release Mr. Ortega from custody  
3 until he is provided notice and a hearing before a neutral decisionmaker is both *de minimis* and  
4 clearly outweighed by the substantial harm he will suffer as long as he continues to be detained.  
5 *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (“Society’s interest lies on the side of  
6 affording fair procedures to all persons, even though the expenditure of governmental funds is  
7 required.”).

8 Finally, a temporary restraining order is in the public interest. First and most importantly,  
9 “it would not be equitable or in the public’s interest to allow [a party] . . . to violate the  
10 requirements of federal law, especially when there are no adequate remedies available.” *Ariz.*  
11 *Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). If a temporary restraining order  
12 is not entered, the government would effectively be granted permission to detain Mr. Ortega in  
13 violation of the requirements of Due Process. “The public interest and the balance of the equities  
14 favor ‘prevent[ing] the violation of a party’s constitutional rights.’” *Id.* at 1069; *see also*  
15 *Hernandez*, 872 F.3d at 996 (“The public interest benefits from an injunction that ensures that  
16 individuals are not deprived of their liberty and held in immigration detention because of bonds  
17 established by a likely unconstitutional process.”); *cf. Preminger v. Principi*, 422 F.3d 815, 826  
18 (9th Cir. 2005) (“Generally, public interest concerns are implicated when a constitutional right  
19 has been violated, because all citizens have a stake in upholding the Constitution.”).

20 Therefore, the public interest overwhelmingly favors entering a temporary restraining  
21 order and preliminary injunction.

## 22 CONCLUSION

23  
24 For all the above reasons, this Court should find that Mr. Ortega warrants a temporary  
25 restraining order and a preliminary injunction to restore the *status quo ante* that (1) orders that  
26 Respondents immediately release Mr. Ortega from custody and enjoins Respondents from re-  
27 detaining them absent further order of this Court; (2) in the alternative, immediately release Mr.  
28 Ortega from Respondents’ custody and enjoins Respondents from re-detaining them unless until

1 he is afforded a hearing that complies with due process, before a neutral adjudicator, at which  
2 Respondents must bear the burden of proof by clear and convincing evidence that Mr. Ortega is a  
3 flight risk or danger to the community such that his physical custody is required, and at which the  
4 adjudicator meaningfully consider ATDs as well as Mr. Ortega's ability to pay a new bond; and  
5 (3) prohibits the government from transferring him out of this District and/or removing them from  
6 the country until these habeas proceedings have concluded.

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8 Dated: December 22, 2025

Respectfully submitted,

9 /s/ Jennifer Friedman

10 Jennifer Friedman  
11 Attorney for Petitioner  
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