

Magistrate Judge Grady J. Leupold

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANCISCO DIEGO FRANCISCO,

Petitioner,

v.

KRISTI NOEM, *et al.*,¹

Respondents.

Case No. 2:26-cv-00025-GJL

FEDERAL RESPONDENTS'
RETURN

Noted for Consideration:
January 26, 2026

I. INTRODUCTION

This Court should deny Petitioner Francisco Diego Francisco's Petition for Writ of Habeas Corpus. Dkt. 1 ("Pet."). U.S. Immigration and Customs Enforcement ("ICE") lawfully detains Petitioner, who is an alien subject to an order of removal, under Section 241 of the Immigration and Naturalization Act ("INA"). *See* 8 U.S.C. § 1231. There is no dispute that Petitioner is subject to a reinstated order of removal and detained pursuant to 8 U.S.C. § 1231(a), or that he does not have legal status to remain in the United States.

¹ Respondent Bruce Scott is not a Federal Respondent and is not represented by the U.S. Attorney's Office.

1 Accordingly, Federal Respondents respectfully request the Court deny the Petition. This
2 return is supported by the pleadings and documents on file in this case, the Declaration of
3 Deportation Officer Sheldon Benjamin (“Benjamin Decl.”) and the Declaration of Jennifer Wong
4 (“Wong Decl.”), with accompanying exhibits. Federal Respondents do not believe any hearing is
5 necessary.

6 II. FACTUAL AND PROCEDURAL BACKGROUND

7 A. Detention Authorities and Removal Procedures

8 The INA governs the detention and release of noncitizens during and following their
9 removal proceedings. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). The general
10 detention periods are generally referred to as “pre-order” (meaning before the entry of a final
11 order of removal) and, relevant here, “post-order” (meaning after the entry of a final order of
12 removal). *Compare* 8 U.S.C. § 1226 (authorizing pre-order detention) *with* § 1231(a) (authorizing
13 post-order detention).

14 When a final order of removal has been entered, a noncitizen enters a 90-day “removal
15 period.” 8 U.S.C. § 1231(a)(1). Congress has directed that the Secretary of Homeland Security
16 “shall remove the [noncitizen] from the United States.” *Id.* To ensure a noncitizen’s presence for
17 removal and to protect the community from noncitizens who may present a danger, Congress has
18 mandated detention while removal is being effectuated:

19 During the removal period, the [Secretary of Homeland Security] shall detain the
20 [noncitizen]. Under no circumstance during the removal period shall the
21 [Secretary] release [a noncitizen] who has been found inadmissible under section
1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or
1227(a)(4)(B) of this title.

22 8 U.S.C. § 1231(a)(2).

23 Section 1231(a)(6) authorizes U.S. Immigration and Customs Enforcement (“ICE”) to
24 continue detention of noncitizens after the expiration of the removal period. Unlike Section

1 1231(a)(2), Section 1231(a)(6) does not mandate detention and does not place any temporal limit
2 on the length of detention under that provision:

3 [A noncitizen] ordered removed who is inadmissible under section 1182,
4 removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or
5 who has been determined by the [the Secretary of Homeland Security] to be a risk
6 to the community or unlikely to comply with the order of removal, may be detained
7 beyond the removal period and, if released, shall be subject to the terms of
8 supervision in paragraph (3).

8 U.S.C. § 1231(a)(6) (emphasis added).

8 During the removal period, ICE is charged with attempting to effect removal of a
9 noncitizen from the United States. 8 U.S.C. § 1231(a)(1). Although there is no statutory time limit
10 on detention pursuant to Section 1231(a)(6), the Supreme Court has held that a noncitizen may
11 be detained only “for a period reasonably necessary to bring about that [noncitizen’s] removal
12 from the United States.” *Zadvydas*, 533 U.S. at 689. The Supreme Court has further identified six
13 months as a presumptively reasonable time to bring about a noncitizen’s removal. *Id.* at 701.

14 **B. Petitioner Francisco Diego Francisco**

15 Petitioner is a native and citizen of Guatemala, who first entered the United States without
16 inspection or parole on or about January 13, 2015, near Sasabe, Arizona. Benjamin Decl. ¶¶ 4-5;
17 Wong Decl. at Ex. 1 (Form I-213). U.S. Customs and Border Patrol (“CBP”) took Petitioner into
18 custody and placed him in Expedited Removal Proceedings, and he was charged under 8 U.S.C.
19 § 1182(a)(7)(A)(i)(I) on January 14, 2015. Benjamin Decl. ¶ 5; Wong Decl. at Ex. 2 (Notice and
20 Order of Expedited Removal). He was removed to Guatemala on February 6, 2015. Benjamin
21 Decl. ¶ 5.

22 Petitioner entered the United States for a second time without inspection or parole on or
23 about April 16, 2019, near Lukeville, Arizona. *Id.* ¶ 6. He was served with a Notice of
24 Intent/Decision to Reinstate Prior Order, which noted his prior order from January 14, 2015.

1 Benjamin Decl. ¶ 6; Wong Decl. at Ex. 3 (Notice of Intent/Decision to Reinstate Prior Order). He
2 was released under an Order of Supervision (“OSUP”) on April 16, 2019, as a primary caretaker
3 for his minor son who had accompanied him. Benjamin Decl. ¶ 7; Wong Decl. at Ex. 4 (OSUP).

4 Petitioner was referred for an interview with U.S. Citizenship and Immigration Services
5 (“USCIS”) to determine if he had a reasonable fear of return and whether his case would be
6 referred to the Executive Office for Immigration Review (“EOIR”) for withholding only
7 proceedings. Benjamin Decl. ¶ 7. He received a Reasonable Fear interview on or about August 9,
8 2021. *Id.* ¶ 8. On August 20, 2021, USCIS concluded that Petitioner had a reasonable fear of
9 return to Guatemala and his case should be referred to the Executive Office for Immigration
10 Review (“EOIR”) for review by an Immigration Judge (“IJ”). *Id.* ¶ 9. Petitioner’s case was
11 referred for review by an IJ on August 23, 2021, and is still currently pending with the
12 Immigration Court due to the backlog of immigration cases. Benjamin Decl. ¶ 10; Wong Decl. at
13 Ex. 5 (Notice of Referral to IJ). The final hearing date for his case is set for February 6, 2026.
14 Benjamin Decl. ¶ 18.

15 On November 7, 2025, Petitioner was taken into federal custody and transferred to the
16 Northwest ICE Processing Center (“NWIPC”). *See id.* ¶¶ 10-16. ERO officers identified and
17 apprehended him in Beaverton, OR because immigration databases confirmed that he was
18 amendable to enforcement action. *Id.* ¶ 11. Petitioner was served with a notice that revoked his
19 OSUP, for the reason that he was no longer a primary caretaker of his son as his minor children
20 were in the custody of their mother. Benjamin Decl. ¶ 15; Wong Decl. at Ex. 6 (Notice of OSUP
21 Revocation).

22 Petitioner remains detained in the NWIPC pending completion of his removal
23 proceedings. *Id.* ¶ 16. He appeared before an IJ on January 7, 2026. His final hearing for this
24

1 withholding only proceedings, which were initiated in 2021, has been set for February 6, 2026.

2 *Id.* ¶ 18. Petitioner remains detained under 8 U.S.C. § 1231, or INA § 241. *See id.* ¶ 19.

3 III. ARGUMENT

4 A. Petitioner's continuing detention comports with substantive due process.

5 Petitioner's detention is constitutionally and statutorily lawful. Petitioner is detained
6 pursuant to 8 U.S.C. § 1231(a)(6). Petitioner is subject to an administratively final removal order.
7 *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-33 (9th Cir. 2017) (finding that detention during
8 withholding only proceedings is pursuant to Section 1231 and not Section 1226). Although there
9 is no statutory time limit on detention pursuant to Section 1231(a)(6), the Supreme Court has held
10 that a noncitizen may be detained only "for a period reasonably necessary to bring about that
11 [noncitizen's] removal from the United States." *Zadvydas*, 533 U.S. at 689.

12 Since Petitioner cannot claim a statutory entitlement to release, he must establish that his
13 detention has become indefinite as described by the Supreme Court in *Zadvydas*. Here,
14 Petitioner's detention has not become "indefinite" or unconstitutional. In *Zadvydas*, the Supreme
15 Court found that post-order detention could be potentially indefinite as authorized under the open-
16 ended terms of Section 1231(a)(6). Finding the possibility of indefinite detention troublesome,
17 the Supreme Court clarified that there is a point at which Congress's interest in detaining a
18 noncitizen to facilitate his removal may eventually give way to the noncitizen's liberty interest.
19 This shift occurs when detention becomes potentially indefinite. *Zadvydas*, 533 U.S. at 690 ("A
20 statute permitting indefinite detention of an [noncitizen] would raise a serious constitutional
21 problem.").

22 The Supreme Court determined that it is "presumptively reasonable" for DHS to detain a
23 noncitizen for six months following entry of a final removal order while it worked to remove the
24 noncitizen from the United States. *Zadvydas*, 533 U.S. at 701. The *Zadvydas* Court recognized

1 that as the length of detention grows, a sliding scale of burdens is applied to assess the continuing
2 lawfulness of a noncitizen's post-order detention. *Id.* (stating that "for detention to remain
3 reasonable, as the period of post-removal confinement grows, what counts as the 'reasonably
4 foreseeable future' conversely would have to shrink"). Thus, the Supreme Court implicitly
5 recognized that six months is the *earliest* point at which a noncitizen's detention could raise
6 constitutional issues. *Id.*

7 Here, Petitioner has been in federal custody for less than three months since his OSUP
8 revocation. *See* Benjamin Decl. ¶ 15.² While the Government does not concede that Petitioner's
9 presumptively reasonable period has ended,³ even assuming *arguendo* that it has, Petitioner fails
10 to demonstrate that there is good reason to believe that there is no significant likelihood of
11 removal in the reasonably foreseeable future. Petitioner has a final order of removal, and his final
12 hearing date for his withholding only hearings is set on February 6, 2026. *Id.* ¶ 18. Pending his
13 withholding only proceedings, as well as removal proceedings, there is a good faith basis to
14 believe that there is a significant likelihood of Petitioner's removal in the reasonably foreseeable
15 future.

16 Further, the fact that Petitioner does not yet have a specific date of anticipated removal
17 does not make his detention indefinite. *Diouf v. Mukasey*, 542 F. 3d 1222, 1233 (9th Cir. 2008).
18 Detention becomes indefinite in situations where the country of removal refuses to accept the
19

20 ² Based on the declaration, Petitioner was taken into federal custody on the same day that his OSUP was revoked on
21 November 7, 2025. Benjamin Decl. ¶ 15. He was removed to Guatemala on February 6, 2015, after his first entry
22 into the United States. *Id.* ¶ 5. He re-entered the United States on April 16, 2019, but was he released under an OSUP
23 on or about the same day as a primary caretaker for a minor son who had accompanied him. *Id.* ¶ 7. His prior removal
24 order from 2015 was reinstated and he is still awaiting withholding only proceedings. *See id.*

³ Federal Respondents acknowledge that Courts in this district disagree as to when the presumptively reasonable
period expires after a final order regardless of detention. *See, e.g., Tran v. Bondi*, No. 25-cv-01897-JLR, 2025 WL
3140462 (W.D. Wash. Nov. 10, 2025); *but see Thach Wana v. Bondi, et al.*, No. 2:25-cv-02321-RSL, 2025 WL
3628634, at *3, n.2 (W.D. Wash. Dec. 15, 2025). For the reasons set forth in their briefing in the *Tran* case, Federal
Respondents do not agree with that decision. In any event, Petitioner's detention is still lawful even past the
presumptively reasonable period for the reasons stated herein.

1 noncitizen or if removal is legally barred. *Id.* There is no reason to believe that is the situation
2 here. Consequently, Petitioner has failed to demonstrate a good reason to believe that there is no
3 significant likelihood of his removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at
4 701.

5 **B. Petitioner's re-detention is neither arbitrary nor in violation of due process.**

6 To the extent that Petitioner challenges his detention because he believes ICE provided
7 no lawful rationale for the decision to rearrest him, the record shows that Petitioner's OSUP had
8 been revoked and Petitioner received notice of his revocation.⁴ *See* Benjamin Decl. ¶ 15. The
9 cases that Petitioner invokes in urging application of the *Mathews* factors are inapposite. Each
10 arises in the context of pre-order detention or under regulatory schemes wholly distinct from the
11 post-order detention framework at issue here. Petitioner does not dispute that he is subject to an
12 administratively final order of removal. As such, the authorities cited in his Petition provide little
13 meaningful guidance and serve primarily as a distraction from the controlling standards under
14 *Zadvydas*. With Petitioner's next hearing date set for February 6, 2026, regarding his withholding
15 removal proceedings, Petitioner's removal is reasonably foreseeable satisfying the *Zadvydas*
16 standard and rendering his current detention lawful. None of Petitioner's authorities alter the
17 governing analysis, and none undermine the lawfulness of Petitioner's current detention.

18 With his removal pending, the government has significant legitimate interests in
19 Petitioner's continued detention to ensure he will appear for removal. Petitioner poses a risk of
20 flight because he alleges no avenue to seek relief from removal. Moreover, his detention has not
21
22

23 ⁴ Federal Respondents note that since Petitioner's second entry into the United States and the reinstatement of his
24 prior removal order, he had not been detained as he was released on or about the same day under an OSUP as a
primary caretaker for a minor son who had accompanied him. *See* Benjamin Decl. ¶ 6.

1 become “indefinite,” and his removal is significantly likely in the reasonably foreseeable future.
2 This Court should not order that he be released.

3 **C. Due process does not require a pre-deprivation hearing before re-detention.**

4 There is no statutory or regulatory requirement for a hearing prior to re-detention, and the
5 Supreme Court has warned courts against reading additional procedural requirements into the
6 INA. *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 582 (2022) (declining to read a specific
7 bond hearing requirement into 8 U.S.C. § 1231(a)(6) because “reviewing courts . . . are generally
8 not free to impose [additional procedural rights] if the agencies have not chosen to grant them”)
9 (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524
10 (1978) (cleaned up)).

11 While Petitioner is notably silent on any authority requiring a pre-deprivation hearing
12 before revocation of an OSUP, Federal Respondents further acknowledge that some opinions in
13 this District have recently found that the Due Process Clause requires a pre-deprivation hearing
14 before revocation of an OSUP. *See, e.g., Thach Wana v. Bondi, et al.*, No. 2:25-CV-02321-RSL,
15 2025 WL 3628634, at *5 (W.D. Wash. Dec. 15, 2025); *Sieng Kim Khim v. Bondi, et al.*, No. 2:25-
16 CV-02383-RSL, 2025 WL 3653724, at *4 (W.D. Wash. Dec. 17, 2025). Federal Respondents
17 respectfully submit, however, that in the context of a noncitizen with a final order of removal
18 already in place, pre-deprivation hearings are not mandated by the Due Process Clause where the
19 rationale for the detention is to effectuate the order of removal.

20 Federal Respondents recognize the “weighty liberty interests implicated by the
21 Government’s detention of noncitizens.” *Reyes v. King*, No. 19-cv-8674, 2021 WL 3727614, at
22 *11 (S.D.N.Y. Aug. 20, 2021). But while many courts have recognized that noncitizens released
23 from immigration detention have a protected liberty interest in remaining out of custody, the
24 weight of that liberty must be considered in the broader picture of the immigration system, which

1 has long acknowledged that a noncitizen has a lesser liberty interest than a citizen. After all,
2 “[t]he recognized liberty interests of U.S. citizens and aliens are not coextensive: the Supreme
3 Court has ‘firmly and repeatedly endorsed the proposition that Congress may make rules as to
4 aliens that would be unacceptable if applied to citizens.’” *Rodriguez Diaz v. Garland*, 53 F.4th
5 1189, 1206 (9th Cir. 2022) (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the Supreme
6 Court has explained, “[i]n the exercise of its broad power over naturalization and immigration,
7 Congress regularly makes rules that would be unacceptable if applied to citizens.” *Mathews v.*
8 *Diaz*, 426 U.S. 67, 79-80 (1976). Indeed, the Supreme Court has repeatedly “recognized detention
9 during deportation proceedings as a constitutionally valid aspect of the deportation process.”
10 *Demore*, 538 U.S. at 523.

11 The Government has a heightened interest in the immigration detention context.
12 *Rodriguez Diaz*, 53 F.4th at 1206. Invoking the Supreme Court’s 2003 *Demore* decision, the Ninth
13 Circuit in *Rodriguez Diaz* recognized that “the government clearly has a strong interest in
14 preventing aliens from ‘remain[ing] in the United States in violation of our law.’” *Rodriguez*
15 *Diaz*, 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). “This is especially true when it comes
16 to determining whether removable aliens must be released on bond during the pendency of
17 removal proceedings.” *Rodriguez Diaz*, 53 F.4th at 1208. Accordingly, due process does not
18 require a pre-deprivation hearing in all circumstances where individuals are detained after being
19 released, including for Petitioner here.

20 **C. Petitioner has failed to demonstrate that his OSUP revocation did not comport with**
21 **due process or was inconsistent with ICE’s procedural regulations.**

22 “Due process is flexible and calls for such procedural protections as the particular situation
23 demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Even if the Court were to apply the
24 *Mathews* test here, the *Mathews* test demonstrates that Petitioner’s detention is consistent with

1 his due process rights. Under *Mathews*, “[t]he fundamental requirement of due process is the
2 opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* at 333 (internal
3 quotation marks omitted). This calls for an analysis of (1) “the private interest that will be affected
4 by the official action,” (2) “the risk of an erroneous deprivation of such interest through the
5 procedures used, and probable value, if any, of additional or substitute procedural safeguards,”
6 and (3) the Government’s interest. *Id.* at 334-35.

7 **1. Petitioner’s liberty interest in remaining released on conditions is reduced.**

8 Respondents recognize the “weighty liberty interests implicated by the Government’s
9 detention of noncitizens.” *Reyes v. King*, No. 19-cv-8674, 2021 WL 3727614, at *11 (S.D.N.Y.
10 Aug. 20, 2021). However, Petitioner’s interest in his liberty *generally* does not mean that he
11 possesses a separate or heightened liberty interest in the continuation of his conditional release
12 on OSUP.⁵ The recognized liberty interests of U.S. citizens and aliens are not coextensive: the
13 Supreme Court has “firmly and repeatedly endorsed the proposition that Congress may make rules
14 as to aliens that would be unacceptable if applied to citizens.” *Rodriguez Diaz*, 53 F.4th at 1206
15 (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the Supreme Court has explained, “[i]n
16 the exercise of its broad power over naturalization and immigration, Congress regularly makes
17 rules that would be unacceptable if applied to citizens.” *Mathews v. Diaz*, 426 U.S. 67, 79-80
18 (1976).

19 Petitioner’s release on OSUP was always subject, in part, to his role as a primary caretaker
20 for his minor son. *See* Benjamin Decl. ¶ 7. However, Petitioner no longer has custody of his
21 children. *Id.* ¶ 15. He has since separated from the mother of his children in May 2025, and his
22 minor children reside in their mother’s custody. *Id.* Accordingly, Petitioner cannot now claim that

23
24 ⁵ Federal Respondents acknowledge that courts in this District have found that noncitizens have a liberty interest in their release on OSUP but respectfully disagree with those decisions.

1 Federal Respondents promised him ongoing, limitless freedom from detention, especially when
2 he no longer has custody of his children.

3 **2. The existing procedures for OSUP revocation are constitutionally sufficient**
4 **and Petitioner has failed to demonstrate that his detention violates ICE's**
5 **regulations.**

6 Turning to the second *Mathews* factor, the risk of a constitutionally significant deprivation
7 of Petitioner's liberty here is minimal, and Petitioner fails to show that ICE did not comply with
8 procedural safeguards in this case. Petitioner presents no evidence for his claims that the agency
9 failed to give him both notice and an opportunity to be heard regarding his OSUP revocation.

10 As outlined above, Congress established a clear statutory framework in 8 C.F.R. §
11 241.13(i) that sets forth the requirements and process for affecting an OSUP revocation. When
12 an alien has violated any condition of their release, as Petitioner did many times over in
13 committing numerous criminal offenses, or ICE determines that there is a "significant likelihood"
14 an alien can be removed from the United States within the "reasonably foreseeable future," ICE
15 is clearly permitted to revoke the OSUP and take the alien into custody; nothing else is required
16 for revocation under these circumstances. *Id.* § 241.13(i)(1) and (2); *see also Nizar Esmail v.*
17 *Noem*, et al., 2025 WL 3030590, at *2 (C.D. Cal. Sept. 12, 2025).⁶ Additionally, when ICE's
18 revocation is based on an alien's violation of a condition of release, the statute does not require
19 that only certain officials may revoke the OSUP. *See generally* 8 C.F.R. § 241.13(i); *see also*
20 *Nizar Esmail*, 2025 WL 3030590, at *2, n.3 (distinguishing between Sections 241.4 and 241.13,
21 explaining that "Section 241.13 applies to cases where a petitioner is in revocation proceedings,
22 whereas Section 241.4 applies to routine custody reviews for aliens detained after the 90-day
23 removal period.").

24 ⁶ While ICE may also revoke an OSUP as an act of discretion if revocation is in the public interest, pursuant to 8
C.F.R. § 241.4(l)(2), this is not what ICE has chosen to do in this case.

1 8 C.F.R. § 241.13(i)(3) further outlines the OSUP revocation procedures and provides that
2 “upon revocation,” *i.e.*, not before revocation, “the alien will be notified of the reasons for the
3 revocation” and to conduct an “initial interview promptly after his or return to Service custody to
4 afford the alien an opportunity to respond to the reasons for revocation stated in the notification.”
5 *Id.* § 241.13(3).

6 Here, ICE took custody of Petitioner based on its determination that the purpose of
7 Petitioner’s release from ICE custody had been fulfilled. Benjamin Decl. ¶¶ 7, 15; Wong Decl. at
8 Ex. 6. Upon revocation, ICE provided Petitioner with written notice of the specific reasons for its
9 determination, being that Petitioner was “released as a primary caretaker for [his] juvenile son.
10 However, [his] children are now in the care and custody of their mother. The subject separated
11 from the mother of his children in May of 2025 and is no longer a FAMU unit.” *See* Wong Decl.
12 at Ex. 6. The Notice of Revocation of Release also indicates that pursuant to 8 C.F.R. § 241.13,
13 Petitioner will be afforded an informal interview at which he will be given an opportunity to
14 respond to the reasons for the revocation and he may submit any evidence or information he
15 wishes to be reviewed in support of his release. *See id.* As such, Petitioner has been provided
16 notice and will be given an opportunity to be heard regarding his OSUP revocation.

17 Accordingly, Petitioner fails to meet his burden to demonstrate his unevicenced
18 contentions that he was detained without cause, notice, and an opportunity to respond.

19
20 **3. The Government has a strong interest in returning aliens to custody who
violate conditions of release.**

21 Turning to the third *Mathews* factor, the Ninth Circuit has emphasized that the *Mathews*
22 test “must account for the heightened government interest in the immigration detention context.”
23 *Rodriguez Diaz*, 53 F.4th at 1206. Invoking the Supreme Court’s 2003 *Demore* decision, the Ninth
24 Circuit in *Rodriguez Diaz* recognized that “the government clearly has a strong interest in

1 preventing aliens from ‘remain[ing] in the United States in violation of our law.’” *Rodriguez Diaz*,
2 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). The government likewise has an interest in
3 enforcing compliance with its orders of release and returning individuals to custody who violate
4 their terms. Petitioner has fulfilled the purpose of his OSUP as he is no longer the primary
5 caretaker for his juvenile son, meaning he is also no longer part of a FAMU unit. Petitioner no
6 longer satisfies all the conditions or the reason for his OSUP.

7 In sum, the three *Mathews* factors demonstrate that Petitioner’s detention comports with
8 procedural due process and that ICE adhered to its own regulations in revoking Petitioner’s
9 OSUP.

10 **D. Even if a hearing were required, due process does not require the Government to**
11 **bear a clear-and-convincing burden.**

12 No Supreme Court case has ever required the Government to justify immigration
13 detention by clear and convincing evidence. Even if this Court should order Petitioners’ release,
14 this Court should not grant their request to enjoin their re-detention “absent written notice and a
15 hearing prior to re-detention where Respondents must prove by clear and convincing evidence
16 that each Petitioner is a flight risk or danger to the community and that no alternatives to detention
17 would mitigate those risks.” Pet., Prayer for Relief ¶ (2).

18 The Constitution does not require the government to bear the burden of proof at a pre-
19 deprivation hearing. Simply put, the Supreme Court has *always* affirmed the constitutionality of
20 detention pending removal proceedings, notwithstanding that the government has *never* borne the
21 burden to justify such detention by clear and convincing evidence. *See, e.g., Demore v. Kim*, 538
22 U.S. 510, 522, 532 (2003); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1211 (9th Cir. 2022) (“We
23 are aware of no Supreme Court case placing the burden on the government to justify the continued
24 detention of [a noncitizen], much less through an elevated ‘clear and convincing’ showing.”). In

1 fact, even when considering a noncitizen subjected to potentially indefinite detention after the
2 conclusion of removal proceedings, the Supreme Court has placed the burden on the noncitizen,
3 as opposed to the Government, to justify release. *See Zadvydas v. Davis*, 533 U.S. 678, 701(2001).
4 Thus, the Court should not order ICE to bear the burden of proof at a pre-deprivation, if one were
5 to be ordered. At most, the Government should be required to demonstrate dangerousness or flight
6 risk by a *preponderance of the evidence* in line with the immigration officer's initial
7 determination. 8 C.F.R. § 1236.1(c)(8).

8 In addition to placing a heightened burden on the Government, Petitioners also seek to
9 unnecessarily require the Government to demonstrate that no "alternatives to detention" would
10 mitigate the danger or risk of flight at a pre-deprivation hearing. Pet., Prayer for Relief ¶ (2). But
11 even for criminal alien detainees subjected to prolonged mandatory detention, the Ninth Circuit
12 did not expand the procedural protections in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011),
13 which is considered "the high-water mark of procedural protections required by due process," to
14 include a consideration of alternatives to detention for those found to be a danger to their
15 community. *Martinez v. Clark*, 124 F.4th 775, 786 (9th Cir. 2024).

16 While due process does not require a pre-deprivation hearing, if this Court should find
17 otherwise, the Government should only be required to demonstrate that Petitioners are a danger
18 to the community or a flight risk by a *preponderance* of the evidence, consistent with 8 C.F.R. §
19 1236.1(c)(8).

20 IV. CONCLUSION

21 For the foregoing reasons, Federal Respondents respectfully request that this Court deny
22 the Petition.

23 //

24 //

1 DATED this 20th day of January, 2026.

2 Respectfully submitted,

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16 I certify that this memorandum contains 4,357
17 words, in compliance with the Local Civil Rules.