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10 UNITED STATES DISTRICT COURT

11 SOUTHERN DISTRICT OF CALIFORNIA

12 FRANCOIS XAVIER OLIVIER
13 BARRE,

14 *Petitioner-Plaintiff,*

15 vs.

16 CHRISTOPHER J. LAROSE, et al.,

17 *Respondents-Defendants.*

Case No.: 3:26-cv-03088-JAO-VET

PETITIONER'S TRAVERSE

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I. Respondents’ Two-Page Response entirely fails to address Petitioner’s Due Process Claim.

Petitioner has a liberty interest under the Due Process Clause that mandates release from unlawful custody and a hearing before any re-arrest. Specifically, Petitioner’s liberty from immigration custody 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). After Respondents released Petitioner into the United States, Petitioner retained a weighty liberty interest under the Due Process Clause of the Fifth Amendment in not being incarcerated. *See Young v. Harper*, 520 U.S. 143, 146-47 (1997); *Morrissey v. Brewer*, 408 U.S. 471, 482-483 (1972); *Zinerman v. Burch*, 494 U.S. 113, 127 (1990); *Padilla v. U.S. Immigr. & Customs Enf’t*, 704 F. Supp. 3d 1163, 1175 (W.D. Wash. 2023).

At stake for Petitioner 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

1 Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). *See also Zadvydas*,
2 533 U.S. at 690 (“Freedom from imprisonment—from government custody,
3 detention, or other forms of physical restraint—lies at the heart of the liberty that
4 [the Due Process] Clause protects.”).

6 Meanwhile, Respondents have not alleged any circumstance that outweighs
7 Petitioner’s constitutionally-protected liberty interest. *See Exhibit A*, Letter of
8 Support, at 1. Here, Petitioner has a profound liberty interest, which must be
9 weighed heavily in determining what process he is owed under the Constitution.
10 *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Respondents concede that
11 Petitioner entered the United States through a Visa Waiver Program between the
12 U.S. and France. ECF No. 4, at 2. Yet, Respondents do not feign any attempt to
13 provide Petitioner with due process prior to detaining him on April 24, 2026.

17 **II. Petitioner was not given any procedural due process prior to being**
18 **deprived of his liberty interest.**

19 “Adequate, or due, process depends upon the nature of the interest affected.
20 The more important the interest and the greater the effect of its impairment, the
21 greater the procedural safeguards the [government] must provide to satisfy due
22 process.” *Haygood v. Younger*, 769 F.2d 1350, 1355-56 (9th Cir. 1985) (en banc)
23 (citing *Morrissey*, 408 U.S. at 481-82). This Court must “balance [Petitioner’s]
24 liberty interest against the [government’s] interest in the efficient administration
25 of” its immigration laws to determine what process he is owed to ensure that ICE
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1 does not unconstitutionally deprive him of his liberty. *Id.* at 1357.

2 Under the test set forth in *Mathews v. Eldridge*, this Court must consider
3 three factors in conducting its balancing test: “first, the private interest that will be
4 affected by the official action; second, the risk of an erroneous deprivation of such
5 interest through the procedures used, and the probative value, if any, of additional
6 or substitute procedural safeguards; and finally the government’s interest,
7 including the function involved and the fiscal and administrative burdens that the
8 additional or substitute procedural requirements would entail.” *Mathews*, 424 at
9 335.
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13 The *Mathews v. Eldridge* factors all favor Petitioner. The government’s
14 interest in keeping Petitioner in detention without a due process hearing is low, and
15 when weighed against Petitioner’s significant private interest in his liberty, the
16 scale tips sharply in favor of releasing Petitioner from custody. *See Kabatas v.*
17 *LaRose, et al.*, No. 26-CV-2933 JAO (MMP), 2026 WL 1405621, at *3 (S.D. Cal.
18 May 19, 2026) (“Respondents fail to point to any burdens on the Government if it
19 were to have provided proper notice, reasoning, and a pre-deprivation hearing.”);
20 *Pinchi v. Noem*, No. 5:25-CV-05632-PCP, 2025 WL 2084921, at *4 (N.D. Cal.
21 July 24, 2025) (noting a “significant” liberty interest held by a noncitizen after
22 release).
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1 **III. Respondents’ Visa Waiver Program Argument Fails.**

2 Respondents argue that Petitioner is lawfully detained based on his entry
3 through the Visa Waiver Program. ECF No. 4, at 2. Not so. Indeed, “...most
4 federal courts that have directly addressed whether a noncitizen who has violated
5 the Visa Waiver Program can be detained pursuant to § 1187(c)(2)(E) have held
6 that § 1187(c)(2)(E) is not a valid basis for detention.” *Quispe v. Chestnut*, No.
7 1:25-CV-2002 CSK, 2026 WL 654577, at *2 (E.D. Cal. Mar. 9, 2026). In *Quispe*,
8 the noncitizen petitioner was admitted into the U.S. through the Visa Waiver
9 Program for a temporary period expiring in 2001. *Id.* at *1. The petitioner
10 overstayed and was detained by ICE decades later in 2025. The court concluded
11 that the petitioner was actually detained under 8 U.S.C. § 1226(a). *Id.* *3 (“The
12 statute governing the Visa Waiver Program, 8 U.S.C. § 1187 does not address
13 detention of noncitizens who violate the VWP, and the specific section relied upon
14 by the government, § 1187(c)(2)(E), does not refer to detention at all.”). The court
15 in *Quispe* additionally found that the petitioner was entitled to due process relief
16 and granted the habeas petition. *Id.* *5 (where the petitioner had already been
17 released pursuant to a temporary restraining order). Here, too, the Visa Waiver
18 Program does not prohibit Petitioner’s eligibility for relief, and the Court should
19 order Petitioner’s immediate release.
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2 **IV. This Court Should Exercise Its Equitable Authority.**

3 This Court should exercise its equitable authority to order the release of
4 Petitioner. The “equitable and flexible nature of habeas relief” affords district
5 courts significant discretion over the appropriate remedies for violations of law and
6 the Constitution. *Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020); see
7 also *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“[H]abeas corpus is, at its core, an
8 equitable remedy.”); *Boumediene v. Bush*, 553 U.S. 723, 728-29 (2008) (“habeas
9 privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is
10 being held pursuant to the erroneous application or interpretation of relevant law, .
11 . . and the habeas court must have the power to order the conditional release of an
12 individual unlawfully detained.”) (citations omitted).
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16 In the event that this Court orders yet another bond hearing for Petitioner in
17 immigration court, Petitioner respectfully requests that this Court not dismiss this
18 case unless he is released on bond by the immigration judge and that this Court
19 retain jurisdiction to review any bond denial for constitutional claims, legal error
20 and compliance with this Court’s order. Petitioner further requests that any order
21 for bond place the burden on Respondents to prove danger or flight risk by clear
22 and convincing evidence, and that Respondents maintain a contemporaneous
23 record of any bond hearing. This is crucial where Respondents have demonstrated
24 time and time again that their view is that compliance with federal court orders is
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1 optional—and that their war on the due process and statutory rights of noncitizens
2 will continue to take the valuable time and resources of the federal judiciary. *See*
3 Pratheek Rebala and Jeff Ernsthansen, *Immigrants Who Say Their Detention Is*
4 *Illegal Have Filed More Than 18,000 Cases*, PROPUBLICA AND THE TEXAS
5 TRIBUNE, Feb. 10, 2026, [https://www.propublica.org/article/habeas-petitions-](https://www.propublica.org/article/habeas-petitions-immigrant-detentions-trump)
6 [immigrant-detentions-trump](https://www.propublica.org/article/habeas-petitions-immigrant-detentions-trump).
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9 **V. Conclusion.**

10 For the foregoing reasons, and because Respondents detained Petitioner in
11 violation of his due process rights, the Court should grant the Petition and order
12 Petitioner’s immediate release.
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14 Dated: May 25, 2026

Respectfully Submitted,

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16 /s/ Mihret Getabicha

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