CRAIG H. MISSAKIAN (CABN 125202)
United States Attorney
PAMELA T. JOHANN (CABN 145558)
Chief, Civil Division
MICHAEL J. STARRETT (NYBN 5444575)
Special Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7073
Fax: (415) 436-7000
Michael.starrett@usdoj.gov

Attorneys for Respondents

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOSE OSCAR ORDAZ GOMEZ,

Petitioner,

v.

SERGIO ALBARRAN, et al.,

Respondents.

Case No. 5:26-cv-06614-EKL

RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION (DKT. NO. 4)

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I. INTRODUCTION

Petitioner's arrest and detention by Immigration and Customs Enforcement ("ICE") did not violate the Immigration and Nationality Act ("INA") or the Due Process Clause of the Fifth Amendment.

As two U.S. Courts of Appeals have held, an alien such as Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) because he is physically present in the United States without having been admitted. And even if the Court finds 8 U.S.C. § 1226 applies to Petitioner and not § 1225(b)(2)(A), The expiration of the *Zepeda- Rivas* settlement and Mexico's issuance of a re-arrest order of Petitioner for Homicide constitute material changes of circumstances since his prior release that justifies his re-arrest.

His prior release from the custody of the Department of Homeland Security ("DHS") does not give rise to a constitutionally protected liberty interest. As an alien who entered the country illegally without admission, his due process rights are coextensive with the process afforded to him under the INA and its implementing regulations. Petitioner's re-arrest complied with the INA and the regulations, neither of which requires a pre-deprivation hearing. Under Supreme Court precedent, he has no constitutional entitlement to an extra-statutory pre-deprivation hearing. Petitioner was previously *temporarily* ordered released by Judge Chhabria in *Zepeda Rivas v. Jennings*, No. 3:20-cv-02731-VC (N.D. Cal. Apr. 20, 2020) (hereinafter "*Zepeda Rivas*"), a class action filed in response to the COVID pandemic and resulting conditions of confinement. *See Zepeda Rivas*, Dkt. No. 295. The protections from re-detention established for class members in *Zepeda Rivas*, which were always temporary, have now expired. Petitioner once again remains subject to detention. As such, Petitioner is not entitled to habeas relief.

Lastly, this Court cannot prohibit Respondents from removing Petitioner from the United States.

II. FACTUAL BACKGROUND

A. Petitioner's Immigration History pre-*Zepeda Rivas.*

Jose Oscar Ordaz Gomez ("Petitioner") is a native and citizen of Mexico who first illegally entered the United States in 1998. Declaration of Michael A. Caldwell Jr. ("Caldwell Decl.") ¶¶ 5, 6, Ex. 1. On August 1, 2006, Mexico issued a warrant for Petitioner noting he [redacted]

Id. ¶ 7, Ex. 2. On June 10, 2018, Petitioner came to the attention of U.S. Immigration and Customs Enforcement ("ICE") through a report by the U.S. Customs and Border Protection ("CBP"). Caldwell Decl. Ex. 1. On June 13, 2018, ICE arrested Petitioner because he was the subject of a warrant for [redacted]; Dkt. No. 3-1 at 9. ICE determined Petitioner would be held without bond due to the [redacted] Caldwell Decl. Ex. 1.

On June 14, 2018, ICE placed Petitioner in removal proceedings, as an "alien present in the United States without being admitted or paroled", and charged him with removability under INA § 212(a)(6)(A)(i) [8 U.S.C. § 1182(a)(6)(A)(i)]. Dkt. No. 3-2 at 2. On July 26, 2018, an immigration judge ("IJ") denied Petitioner's first request for release on bond because he was found to be a flight risk based on [redacted]. *Zepeda Rivas*, Dkt. No. 280-8 at 1 (courtesy copy attached for reference). He did not appeal. *Id.* On September 19, 2018, an IJ denied Petitioner's motion to reconsider the IJ's first bond determination.

On January 18, 2019, an immigration judge ("IJ") denied Petitioner's applications for relief from removal and ordered him removed. *Id.* Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), which affirmed the IJ's decision on July 2, 2019. *Id.* Petitioner also filed a motion to reopen with the BIA, and the BIA denied that motion on February 4, 2020. *Id.* Petitioner appealed both BIA decisions to the U.S. Court of Appeals for the Ninth Circuit by filing Petitions for Review ("PFRs"). *Id.* Sometime in 2019, according to communications ICE had with the Consulate in Mexico, the August 1, 2006 arrest warrant was cancelled. Caldwell Decl. ¶ 9.

On February 27, 2020, an IJ conducted a second bond hearing and again denied Petitioner release on bond., finding that Petitioner was a flight risk based on a second warrant [redacted] and because an IJ and the BIA had denied all of his applications for relief from removal. *Zepeda Rivas*, Dkt. No. 280-8 at 1. On or about April 9, 2020[1], an IJ conducted a third bond hearing based on Petitioner's evidence that [redacted] had been withdrawn. *Zepeda Rivas*, Dkt. No 280-8 at 1. However, the IJ again denied Petitioner's request for release on bond,

[1] While the *Zepeda Rivas* filing represents the bond hearing occurred on April 9, 2020, DHS records indicate it actually occurred on April 8, and the bond order was served on DHS on April 9. Respondents believe this difference has no material impact on the issues in the instant case.

finding Petitioner to be a flight risk based on the denial of his applications for relief and that it was not likely that Petitioner would present himself for removal if his PFRs were denied. *Id.*

B. *Zepeda Rivas* COVID Class Action.

As a result of Petitioner's detention, he became a class member in *Zepeda Rivas v. Jennings*, No. 3:20-cv-02731-VC (N.D. Cal. Apr. 20, 2020). *Zepeda Rivas* was filed in response to the COVID-19 pandemic. It challenged the conditions of confinement at Mesa Verde and Yuba County jail resulting from the challenges of the pandemic, including the inability of detainees to socially distance and the lack of COVID testing. On April 29, 2020, Judge Chhabria provisionally certified a *Zepeda Rivas* class and instituted a process for considering release requests from detainees. *See Zepeda Rivas*, Dkt. No. 54; *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020). Under the standard conditions of release, which were incorporated into every order granting release, Judge Chhabria specifically ordered that: "[t]he Class Member's temporary release will expire upon the final adjudication of the habeas petition in this case[.]" *See Zepeda Rivas,* Dkt. Nos. 108 (Standard Conditions of Release), 369 (Revised Standard Conditions of Release). Petitioner was temporarily released pursuant to the *Zepeda Rivas* process on June 1, 2020. *See Zepeda Rivas*, Dkt. No. 295.

The parties in *Zepeda Rivas* subsequently entered into a settlement. *See Zepeda Rivas*, Dkt Nos. 1205-1, 1229. The settlement agreement was heavily negotiated and extremely detailed. Under the terms of the settlement agreement, ICE generally agreed to forgo re-detaining released class members for three years following approval of the settlement "unless they pose[d] a threat to public safety or national security, and/or risk of flight." *See Zepeda* Rivas, Dkt. No. 1205-1, at 13 (Subsection III.A). But these protections ended after three years, and the agreement specifically authorizes ICE to re-detain class members as before following the expiration of its three-year term:

> At the conclusion of the three-year period set forth in Subsection III.A, ICE's rearrest and re-detention practices for Class Members will occur pursuant to generally applicable law and policy.

Id. at 16 (Subsection III.G). While the agreement specified certain conditions for re-detention *during* the three-year period, *see id.* at 13–16, 18–19, it did not provide for any conditions, much less a pre-detention hearing requirement, for re-detention following the expiration of that term.

Judge Chhabria approved the settlement on June 9, 2022. *See Zepeda Rivas*, Dkt. No. 1258. As

such, class members, such as Petitioner, lost protection from re-detention on June 9, 2025, when the *Zepeda Rivas* settlement expired. *See Zepeda Rivas v. Jennings (Immigration Detention)*, ACLU of Northern California, https://www.aclunorcal.org/cases/zepeda-rivas-v-jennings-immigration-detention/ (notice that the *Zepeda Rivas* settlement expired on June 9, 2025).

C. Post-*Zepeda Rivas* Proceedings.

On June 1, 2020, Petitioner was granted bail subject to certain conditions. *See Zepeda Rivas*, Dkt. No. 295. Petitioner was released from custody on June 2, 2020, and placed on the ICE monitoring program, Alternatives to Detention ("ATD"). Caldwell Decl. ¶ 10. On June 25, 2021, Mexico issued a rearrest order for Petitioner noting he is wanted in Mexico for Aggravated Homicide. Caldwell Decl. Ex. 3.

On March 9, 2022, on joint request of the parties, the U.S. Court of Appeals for the Ninth Circuit remanded both appeals to the BIA. Dkt. No. 3-2 at 3.; *Ordaz Gomez v. Garland*, No. 19-71678, Dkt. No. 54 (9th Cir. Mar. 9, 2022). On September 3, 2024, the BIA remanded the case to the IJ for additional fact-finding on Petitioner's application for protection under the Convention Against Torture ("CAT"). Dkt. No. 3-2 at 3. Petitioner's next hearing before an IJ is scheduled for July 26, 2029. *See* Dkt. No. 3-2 at 3 (an apparent scrivener's error has the year of Petitioner's next hearing as 2019).

From December 2021 through November 2025, Petitioner committed a variety of ATD violations. Caldwell Decl. ¶ 11, Ex. 4. Specifically, Petitioner failed home visits on May 6, 2024, twice in 2023, twice in 2022, and on December 7, 2021. *Id.*

On June 30, 2026, ICE ERO was tasked to apprehend Petitioner at his ATD check-in. Caldwell Decl. Ex. 4. At the conclusion of Petitioner's interview at his check-in, ERO informed Petitioner that he was under arrest for immigration violations and due to a change in circumstances in his case. *Id.* ERO then arrested Petitioner. *Id.*

On the same day, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") and Motion For Temporary Restraining Order ("Motion"). Dkt. Nos. 1; 3. Later that evening, this Court (the Honorable Jacqueline Scott Corley presiding) issued a temporary restraining order ("TRO") ordering Petitioner's immediate release, and ordering Respondents to show cause why a preliminary injunction should not issue. Dkt. No. 4. On July 1, 2026, ICE released Petitioner pursuant to the TRO issued by this

Court. Dkt. No. 5. On July 2, 2026, Mexico confirmed Petitioner's rearrest warrant is still active. Caldwell Decl. ¶ 15, Ex. 5.

III. LEGAL STANDARD

A. The Preliminary Injunction Standard

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). To obtain relief, the moving party must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The purpose of a preliminary injunction is to preserve the status quo pending final judgment rather than to obtain a preliminary adjudication on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). "A preliminary injunction can take two forms." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). "A prohibitory injunction prohibits a party from taking action and 'preserves the status quo pending a determination of the action on the merits.'" *Id.* (internal quotation omitted). "A mandatory injunction orders a responsible party to take action," as Petitioner seeks here. *Id.* at 879 (internal quotation omitted). "A mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored." *Id.* "In general, mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Id.* Where plaintiffs seek a mandatory injunction, "courts should be extremely cautious." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (internal quotation omitted). The moving party "must establish that the law and facts *clearly favor* [their] position, not simply that [they are] likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis original).

B. Detention under 8 U.S.C. § 1225(b)(2)

The INA, as amended, contains a comprehensive framework governing the regulation of noncitizens, including the creation of proceedings for the removal of individuals who unlawfully enter the United States or are otherwise removable and requirements for when the Executive is obligated to detain

aliens pending removal. The INA provides for expedited removal and non-expedited "Section 240" proceedings and mandates that applicants for admission be detained pending either of those proceedings. 8 U.S.C. § 1225(b)(1)–(2).

Section 1225(b)(1) provides for so-called "expedited removal proceedings," *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109–113 (2020), which may be applied to a subset of aliens: those who (1) are "arriving in the United States," or (2) have "not been admitted or paroled into the United States" and have "not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." 8 U.S.C. § 1225 (b)(1)(A)(i)–(iii). As to these individuals, the immigration officer shall "order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." *Id.* § 1225(b)(1)(A)(i). In that event, the alien "shall be detained pending a final determination of credible fear or persecution and, if found not to have such fear, until removed." *Id.* § 1225(b)(1)(B)(iii)(IV); *see* 8 C.F.R. § 235.3(b)(4)(ii). An individual processed for expedited removal who does not indicate an intent to apply for asylum or a fear of persecution or who is determined not to have a credible fear is likewise detained until removed. 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(IV); *see* 8 C.F.R. § 235.3(b)(2)(iii).

Section 1225(b)(2) is a "catchall provision that applies to all applicants for admission not covered by [subsection (b)(1)]." *Jenning v. Rodriguez*, 583 U.S. 281, 287 (2018). It requires that those individuals be detained pending Section 240 removal proceedings:

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 1229a of this title [Section 240].

8 U.S.C. § 1225 (b)(2)(A) (emphasis added); *see* 8 C.F.R. § 235.3(b)(1)(ii) (mirroring Section 1225(b)(2)'s detention mandate); *Jennings*, 583 U.S. at 302 (holding that Section 1225(b)(2) "mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin").

While Section 1225(b)(2) does not allow for detainees to be released on bond, the INA grants DHS discretion to exercise its parole authority to temporarily release an applicant for admission, but "only on a

case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). However, parole "shall not be regarded as an admission of the alien." *Id.*; *Jennings*, 583 U.S. at 288 (discussing parole authority). Moreover, when the Secretary determines that "the purposes of such parole . . . have been served," the "alien shall . . . be returned to the custody from which he was paroled" and be "dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A).

IV. ARGUMENT

A. Petitioner's Detention Does Not Violate the Orders in *Garro Pinchi v. Noem.*

Respondents actions were not enjoined or in violation of the *Pinchi* order staying an agency policy because Respondents determined that a material change in circumstances occurred since they were ordered to release Petitioner in 2020. *See Garro Pinchi v. Noem*. 813 F. Supp. 3d 973, 1026 (N.D. Cal. 2025). This Court ordered that "Respondents are DIRECTED to address in their response why their actions are not enjoined and in violation of the preliminary injunction issued in *Garro Pinchi v. Noem*, 813 F. Supp. 3d 973 (N.D. Cal. 2025)." Dkt. No. 4 at 6. While Petitioner would likely fit the plain language of the class definition, the Court in *Garro Pinchi* did not seem to consider the (admittedly rare) situation of the re-detention of a noncitizen who was temporarily released pursuant to a District Court order after the expiration of the period of time preventing re-detention. *Garro Pinchi*, 813 F.Supp.3d at 1010 ("Class: All noncitizens . . . [who] have been or will be released from DHS custody"). And due to the District Court-ordered release, Petitioner would certainly not fall into the subclass. *Id.* at 1015 ("And like every member of the subclass, the plaintiffs were all released pursuant to § 1226(a)."). However, regardless of Petitioner's membership in the class, ICE did not violate the *Pinchi* decision staying DHS's re-detention policy as there were material changes in circumstances.[2]

Here, Petitioner was released pursuant to the *Zepeda Rivas* class action. *Zepeda Rivas*, Dkt. No. 295. Prior to his release, both ICE and an IJ determined on several occasions that Petitioner should remain detained without bond. *See* Caldwell Decl. Ex. 1; *Zepeda Rivas*, Dkt. No. 280-8 at 1. Notably,

[2] Though the Court refers to the "preliminary injunction" issued in *Pinchi*, Respondents are unaware of any such preliminary injunction issued on the date cited. The *Pinchi* Court stayed an agency policy while the proceedings are pending.

DHS never made an individualized determination that Petitioner was *not* a flight risk or danger, particularly in light of the 2021 reissued Mexican arrest warrant. *See* Caldwell Decl. ¶ 11, Ex. 3. The *Zepeda Rivas* settlement expired on June 9, 2025, creating a material change in circumstances in Petitioner's release from ICE custody.

Additionally, Mexico's issuance of a rearrest order for Petitioner in 2021 based on allegations that [redacted] significant material change in circumstances. Mexico cancelled the 2006 arrest warrant for Petition in 2019. Caldwell Decl. ¶ 9. However, on June 25, 2021, after Petitioner's release, Mexico issued a rearrest order for Petitioner, noting he is wanted in Mexico for [redacted]

Finally, Petitioner's six failed ATD home visits are a material change showing flight risk. Caldwell Decl. ¶ 12, Exh. 4. "Courts have repeatedly rejected the argument that ICE can re-detain a noncitizen for [ATD] technical violations "without regard to whether that technical violation means that one is a flight risk or danger."'. *A.F.A.M. v. Albarran*, No. 25-cv-10492, 2025 WL 3752190, at *4 (N.D. Cal. Dec. 22, 2025) (quoting *J.C.L.A. v. Wofford*, No. 1:25-cv-1310, 2025 WL 2959250, at *4 (E.D. Cal. Oct. 17, 2025)). However, here, in combination with the active arrest warrant for Petitioner, these missed home check-ins are not mere technical violations, but support ICE's determination that Petitioner is a flight risk.

B. Petitioner's Detention Is Mandated By 8 U.S.C. § 1225(b)(2)(A)

Petitioner is subject to mandatory detention under § 1225(b)(2)(A) because he is an applicant for admission who is present in the United States without being admitted or paroled and is thus also "seeking admission." *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 228 (B.I.A. 2025).[3]

[3] The government also acknowledges that two district courts within the Ninth Circuit have recently vacated or stayed the Department of Homeland Security's July 8, 2025 "Interim Guidance Regarding Detention Authority for Applicants for Admission," which takes the position that all applicants for admission within the meaning of 8 U.S.C. § 1225(a) are subject to mandatory detention under 8 U.S.C. § 1225(b), as contrary to law under the Administrative Procedures Act. *See Garro Pinchi v. Noem*, No. 25-cv-05632, 2025 WL 3691938 (N.D. Cal. Dec. 19, 2025) (staying the guidance within ICE's San Francisco area of responsibility, pending final resolution of the APA claim). The government has appealed that order to the Ninth Circuit. *See Pinchi*, No. 25-cv-05632, ECF No. 98.

On February 18, 2026, the U.S. District Court for the Central District of California vacated the Board of Immigration Appeals' decision in *Yajure Hurtado* under the Administrative Procedure Act. *See Bautista v. Santacruz*, 5:25-cv-1873, 2026 WL 468284 at *12 (C.D. Cal. Feb. 18, 2026). The government appealed that decision, and on March 31, 2026, the U.S. Court of Appeals for the Ninth

Respondents acknowledge that the majority of the district courts addressing this issue, including "[e]very court in this district to have considered these questions," have similarly rejected Respondents' position. *Bautista Pico v. Noem,* No. 25-cv-08002, 2025 WL 3295382 (N.D. Cal. Nov. 26, 2025), *appeal docketed,* No. 26-459 (9th Cir. Jan. 22, 2026).

Nevertheless, Respondents bring to this Court's attention the decisions of several district courts, including courts within the Ninth Circuit, that have reached a contrary conclusion, finding that analogous petitioners had not established a likelihood of success on the merits of their claim that their detention was governed by § 1226(a) rather than § 1225(b)(2). *See, e.g., Altamirano Ramos v. Lyons*, No. 25-cv-9785, 2025 WL 3199872, at *4 (C.D. Cal. Nov. 12, 2025) (acknowledging that the court had previously rejected the government's interpretation of § 1225(b)(2), but "after additional research and analysis, the court has concluded that Petitioner is subject to mandatory detention under § 1225(b)(2)(a), and that Petitioner is not eligible for a bond hearing under 8 U.S.C. § 1226(a)"); *Sixtos Chavez v. Noem*, No. 25-cv-2325, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025), *appeal docketed*, No. 25-7077 (9th Cir. Nov. 7, 2025); *Valencia v. Chestnut*, No. 25-cv-1550, 2025 WL 3205133 (E.D. Cal. Nov. 17, 2025); *see also Weng v. Genalo*, No. 25-cv-9595, 2026 WL 194248, at *7 (S.D.N.Y. Jan. 25, 2026) (denying petition and finding that the petitioner was lawfully detained pursuant to § 1225(b)(2)).

Indeed, two circuit courts faced with the same issues agreed with the position taken by the government. Specifically, in *Buenrostro-Mendez v. Bondi, et al.*,166 F.4th 494 (5th Cir. 2026) and *Avila v. Bondi*, 170 F.4th 1128, 1133 (8th Cir. 2026), the Fifth Circuit and Eighth Circuits concluded that most noncitizens apprehended anywhere in the United States are "applicants for admission" who are "seeking admission" and subject to mandatory detention and not eligible for release on bond. *But se*; *Cunha v. Freden*, No. 25-3141, 2026 WL 1146044, at *23 (2d Cir. Apr. 28, 2026); *Hernandez Alvarez v. Warden, Fed. Det. Ctr. Miami*, No. 25-14065, 2026 WL 1243395, at *21 (11th Cir. May 6, 2026); *see also Castanon-Nava v. U.S. Dep't of Homeland Sec.*, 161 F.4th 1048, 1060 (7th Cir. 2025).

The Ninth Circuit currently has before it a pending appeal on this same issue. *See Rodriguez*

Circuit granted the government's motion for a stay of the District Court decision pending appeal. *See Bautista v. U. S. Dep't of Homeland Sec.*, No. 26-1044, Dkt. No. 17 (9th Cir. Mar. 31, 2026). As such, *Yajure Hurtado* is still good law outside of the Central District of California.

Vasquez v. Bostock, et al., No. 25-6842 (9th Cir.). The parties have completed briefing and oral argument. In the event the Ninth Circuit issues a decision in *Rodriguez Vasquez* while the instant case remains pending, Respondents respectfully request leave to provide additional briefing regarding the impact of any such decision. *See Valencia Zapata v. Kaiser, et al.*, No. 25-cv-7492, Dkt. No. 30 (N.D. Cal. Jan. 15, 2026) ("[T]he Ninth's Circuit's decision in *Rodriguez Vasquez* may provide clarity regarding the difficult legal questions raised in Petitioners' habeas petitions.").

C. Petitioner's Previous Release Under *Zepeda Rivas* Does Not Entitle Him To A Constitutionally Protected Liberty Interest

That Petitioner had been temporarily released under *Zepeda Rivas* does not create a new liberty interest. Petitioner was released from detention *temporarily,* in response to the extraordinary circumstances of the COVID pandemic. By its own terms and by court order, that release was always finite and non-permanent, with a definite termination point of June 9, 2025.

Any expectation of continued liberty here, moreover, would not be reasonable. Petitioner was released from detention *temporarily,* in response to the extraordinary circumstances of the COVID pandemic. By its own terms and by court order, that release was always finite and non-permanent, with a definite termination point of June 9, 2025. *See Giorges v. Kaiser*, 25-cv-7683, 2025 WL 2898967, *8 (N.D. Cal. Oct. 10, 2025) (petitioner released under *Zepeda Rivas* could not reasonably claim that such release created a liberty interest).

In *Giorges*, the Court analogized *Zepeda Rivas* petitioners to the petitioner in *Uc Encarnacion v. Kaiser*, No. 22-cv-4369, 2022 WL 9496434 (N.D. Cal. Oct. 14, 2022). *See Giorges*, 2025 WL 2898967, at *7. In *Uc v. Kaiser*, petitioner in was released from detention by an IJ after a bond hearing, where the IJ found that ICE had not met its burden. ICE appealed to the BIA, which reversed. Uc then sought a TRO to enjoin his re-detention without further process before an IJ. Judge Breyer denied this request. Although the court noted that "Uc's conduct while on bond was beyond reproach," it also observed that "Uc's release on bond 'was always subject to direct review and, therefore, the possibility of reversal.'" 2022 WL 9496434, at *2. Accordingly, the court found that the petitioner's liberty interest was less weighty and "did not entitle him to an additional bond hearing with an IJ before he [could] be re-detained following the BIA's order reversing his release on bond." *Id.* at *5. The Court in *Giorges* found

that the same reasoning applied to the *Zepeda Rivas* class, where the settlement agreement had an expiration date and, therefore, release was always temporary. *Giorges*, 2025 WL 2898967, at *8.

The *Zepeda Rivas* class, which included Petitioner, was represented by a team of lawyers, and the terms of the settlement agreement were rigorously negotiated. That agreement could have specified that detention following the three-year period would require a pre-detention hearing. But it did not. No conditions whatsoever were imposed on DHS's ability to re-detain class members following the termination of the three-year term. The only conditions on re-detention were imposed *during* the three-year term—and even those conditions did not include any *pre-detention* process. *See Zepeda Rivas*, Dkt. No. 1205-1, at 13–14, 18–19.

Petitioner always knew that this release would not be permanent, that he was subject to detention following the expiration of the settlement, and that DHS would not be constrained from re-detaining him after the end of the three-year settlement term. Accordingly, Petitioner could have had no reasonable expectation of continued release after the termination of the three-year period. The government recognizes that any form of detention could be said to implicate an individual's liberty interests, and that Petitioner, like virtually everyone subject to detention, has reasons for wanting to remain out of custody. But those reasons do not create a protectible liberty interest in Petitioner's continued release here, in light of the specific circumstances and terms of his temporary release.

D. Any Relief Besides Release from Custody Is Inappropriate in Habeas

The only relief available in habeas is release from custody. The Supreme Court has long held that "the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). In *Dep't of Homeland Sec. v. Thuraissigiam*, the Supreme Court denied a habeas petition from an alien in immigration detention because he "seeks to use habeas to obtain something far different from simple release." 591 U.S. 103, 121 (2020); *see also Munaf v. Geren,* 553 U.S. 674, 694 (2008) (denying a habeas petition because petitioners sought relief other than "simple release"). Any relief granted to Petitioner beyond "simple release" should be denied because "[c]laims so far outside the 'core' of habeas may not be pursued through habeas." *Thuraissigiam*, 591 U.S. at 119.

E. Petitioner's Immediate Custodian Can Only Provide Release from Custody

Petitioner's immediate custody cannot provide any relief besides release from custody.

"Remedies…'operate with respect to specific parties.'" *California v. Texas*, 593 U.S. 659, 672 (2021) (quoting *Murphy* v. *National Collegiate Athletic Assn.*, 138 S.Ct. 1461 1486 (2018) (Thomas, J., concurring) (internal quotation marks omitted)). Ordering any other relief in this case, besides release from custody, would be inappropriate. Most relevant here, Petitioner's immediate custodian lacks the capability and authority to conduct a pre-deprivation bond hearing. Thus, the Court cannot order Petitioner's immediate custodian to conduct any such hearing.

F. Petitioner Cannot Claim Any Greater Due Process Rights Than What Is Afforded By Statute

Respondents acknowledge that Petitioner has the right to due process. The relevant question, though, is what process is due to Petitioner under the Constitution. As an alien physically present in the United States without having been admitted, Petitioner is treated for constitutional purposes as if stopped at the border. *See Thuraissigiam*, 591 U.S. at 139-140 . As an alien stopped at the border, his due process rights are coextensive with the process afforded to him under the immigration laws, which do not require a pre-deprivation hearing before his re-detention.

Petitioner has not established the necessary "connections" to earn a constitutional right to extra-statutory process. In support of its recognition of greater due process rights afforded to aliens with "established connections," *Thuraissigiam* cites to *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). That case states specifically that:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, *nor even been admitted into the country pursuant to law*, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

Id. (emphasis added). *Nishimura Ekiu* is thus explicit that as regards those aliens who have not "been admitted into the country pursuant to law…the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." *Id.* Thus, Petitioner is not the kind of alien the Supreme Court referred to in *Thuraissigiam* when it referred to aliens with "established connections in this country." Regardless of what Petitioner may have done with his life after illegally

entering the United States, that he entered without having been admitted means that he has no constitutional entitlement to process beyond the statutes.

Petitioner's prior release from custody does not give rise to a constitutionally protected liberty interest. Petitioner's supposed liberty interest in remaining out of immigration custody following his prior release is not analogous to the recognized liberty interest of U.S. citizens facing re-detention. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 482-483 (1972) (holding that a parolee has a protected liberty interest in his conditional release). The Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003) (citing to *Reno v. Flores*, 507 U. S. 292, 305-306 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathew v. Diaz*, 426 U.S. 67, 79-80 (1976); *United States v. Verdugo–Urquidez*, 494 U.S. 259, 273 (1990)). The Ninth Circuit has also acknowledged that it has "not previously held that cases involving heightened burdens of proof for the deprivation of liberty interests of U.S. citizens apply coextensively to alien detainees who have been subject to § 1226(a) and its procedures throughout the period of their detention." *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1211 (9th Cir. 2022); *see also Miranda* v. *Garland*, 34 F.4th 338, 359 & n.9 (9th Cir. 2022) (agreeing that the Supreme Court's civil commitment cases are inapposite because they "involved detention of United States citizens whereas § 1226(a) involves detention of aliens awaiting removal hearings"). Thus, the applicable line of authority is the Supreme Court's immigration cases, such as *Thuraissigiam,* which have long held that aliens not admitted lack a right to extra-statutory process.

Accordingly, Respondents may detain Petitioner without the necessity of conducting a pre-deprivation hearing.

G. To the Extent the Court Considers Petitioner Detained Under § 1226(a), It Should Order a Bond Hearing to be Held by an Immigration Judge Rather Than Immediate Release.

Should this Court determine that Petitioner's detention is subject to 8 U.S.C. § 1226(a), the appropriate remedy is to order a bond hearing before an immigration judge during which the immigration judge can properly determine, in light of changed circumstances, whether Petitioner is a flight risk or danger to the community. This bond hearing is appropriately held post-detention. At any bond hearing, Petitioner must bear the burden of demonstrating that he is not a flight risk or danger to

the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). *Rodriguez Diaz*, which is binding authority from the Ninth Circuit, endorsed the constitutional sufficiency of these procedures under § 1226(a). *See* 53 F.4th at 1203, 1213 (denying a facial challenge to the procedures contained in §1226(a)).

H. The Court Must Lift the Prohibition On Petitioner's Removal

Respondents request that the Court limit any injunctive relief so that Respondents are not prohibited from removing Petitioner. *See* Dkt. No. 4 at 6 ("Respondents are PROHIBITED from removing Petitioner from the United States until these proceedings have terminated").

The Ninth Circuit has squarely held that courts sitting in habeas lack jurisdiction to enjoin removal. Under 8 U.S.C. § 1252(g), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This jurisdictional bar applies to section 2241 of title 28 and any other habeas provision. *Id.* The Ninth Circuit confirmed the reach of § 1252(g) when it ruled that habeas relief must not include a prohibition on the removal of petitioners. *See Rauda v. Jennings*, 55 F.4th 773, 776-79 (9th Cir. 2022) (holding that the district court lacked jurisdiction in habeas to issue TRO enjoining an alien's removal pursuant to his final order of removal). The Ninth Circuit noted that three other Courts of Appeals have reached the same conclusion. *See Camarena v. Dir., Immigr. & Customs Enf't*, 988 F.3d 1268, 1274 (11th Cir. 2021); *Tazu v. Att'y Gen. United States*, 975 F.3d 292, 297 (3d Cir. 2020); *Hamama v. Adducci*, 912 F.3d 869, 873 (6th Cir. 2018).

The Court also lacks jurisdiction to enjoin removal under 8 U.S.C. § 1252(b)(9). *See Khalil v. President, United States*, 164 F.4th 259, 273 (3d Cir. 2026). That subsection provides: "Judicial review of all questions of law and fact...arising from any action taken or proceeding brought to remove an alien from the United States ... shall be available only in judicial review of a final order [of removal]." 8 U.S.C. § 1252(b)(9). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Accordingly, the only proper way for Petitioner to enjoin any future removal is before the appropriate federal court of appeals

in the form of a petition for review of a final removal order. Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see also Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015) ("It is well established that this court's jurisdiction over removal proceedings is limited to review of final orders of removal.").[4] This Court, then, cannot enjoin removal through habeas.

Any ruling on this habeas petition must allow for re-detention upon a final order of removal. The Supreme Court has stated that "final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals." *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020). An indefinite injunction would interfere with Respondents' ability to execute a valid order of removal and would both exceed the Court's jurisdiction and contravene the Supreme Court's unambiguous holding in *Zadvydas v. Davis,* 533 U.S. 678, 682 (2001), that mandatory detention without a bond hearing during the removal period is constitutionally permitted. Petitioner's immigration proceedings will continue even after the Court rules on his habeas petition. At some point, Petitioner may be subject to a final order of removal. Assuming Petitioner becomes subject to a final order of removal, his detention is mandatory under the INA. *See* 8 U.S.C. § 1231(a)(2)(A) ("During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or

[4] The Ninth Circuit has held that, "By its terms, [§ 1252(b)(9)] does not apply to federal habeas corpus petitions that do not involve final orders of removal." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006). However, that decision predates and conflicts with *Jennings v. Rodriguez*, which noted that § 1252(b)(9) strips jurisdiction to "challeng[es] [to] the decision to detain [aliens] in the first place or to seek removal," challenges to "any part of the process by which... removability will be determined," and requests to "review... an order of removal." 583 U.S. 281, 294. Moreover, *Nadarajah* itself did not enjoin removal.

1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title"). The Supreme Court has upheld the constitutionality of both the mandatory 90-day detention during the removal period and the presumptively reasonable six-month discretionary detention period following the removal period, both without the requirements of any bond hearing. *See Zadvydas*, 533 U.S. at 701. Thus, if Petitioner becomes subject to a future final order of removal, his detention will be both constitutionally permissible and statutorily required. Any ruling by this Court, therefore, must allow for the detention of Petitioner to execute a final removal order. *See Aguilar Garcia v. Kaiser*, 2025 WL 2998169 at *4 (denying motion for preliminary injunction in petition seeking pre-detention hearing after petitioner's detention authority shifted to § 1231(a)(2)).

V. CONCLUSION

In light of the foregoing, Respondents request that the Court deny Petitioner's requested relief and dismiss the habeas petition.

Dated: July 28, 2026

Respectfully submitted,

CRAIG H. MISSAKIAN
United States Attorney

/s/ Michael J. Starrett
MICHAEL J. STARRETT
Special Assistant United States Attorney

Attorneys for Respondents