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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALI KANOUNO BABAE,

Petitioner,

v.

SERGIO ALBARRAN, Field Office Director of the San Francisco Immigration and Customs Enforcement Office; DAVID J. VENTURELLA, Acting Director of United States Immigration and Customs Enforcement; MARKWAYNE MULLIN, Secretary of the United States Department of Homeland Security; TODD BLANCHE, Attorney General of the United States, acting in their official capacities,

Respondents.

CASE No. 3:26-cv-11836-WHO

PETITIONER'S REPLY IN SUPPORT OF PRELIMINARY INJUNCTION AND PETITION FOR WRIT OF HABEAS CORPUS

Date: October 23, 2026
Time: 10:30 a.m.
Judge: Hon. William H. Orrick

INTRODUCTION

For nine years, the government knew exactly who Ali Kanouno Babae was and where to find him. It accepted the asylum application he filed affirmatively in 2017, collected his biometrics, and repeatedly granted him employment authorization. Babae Supp. Decl. ¶ 3; Johnson Supp. Decl. Exs. D–E. On October 13, 2026, Mr. Babae did what the government asked: he appeared at a USCIS Application Support Center for a scheduled biometrics appointment. ICE officers were waiting. They arrested him without notice, without a hearing, and, so far as the record shows, without any individualized determination that he posed a risk of flight or a danger to anyone. Only that same day did DHS issue a Notice to Appear, initiating removal proceedings for the first time in his eleven years in this country. Starrett Decl. Ex. 1.

Respondents' Response (Dkt. No. 9, "Resp.") confirms far more than it rebuts. Respondents concede that 8 U.S.C. § 1226(a) governs. Resp. at 7. They do not contend that Mr. Babae is a flight risk or a danger. They submit no declaration from any ICE officer, no custody determination, and no support for the "pending felony charge" that officers invoked on the day of the arrest and then refused to identify. Johnson Decl. Ex. B. Mr. Babae knows of no such charge, **Babae Supp. Decl. ¶ 14, and Respondents do not identify one.** Instead, Respondents argue that (1) a noncitizen who has overstayed a visa has no constitutionally protected liberty interest at all; (2) *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022), makes a post-detention bond hearing sufficient in every case; and (3) Mr. Babae must exhaust a bond process that is available only once he is back in a cell, which is why Respondents ask the Court to order him to "self-surrender to ICE." Resp. at 11.

Courts in this District, including this Court, have rejected each of these arguments when the government has advanced them in materially identical circumstances. *See J.A.M.C. v. Albarran*, No. 25-cv-09649-WHO, 2025 WL 3268816 (N.D. Cal. Nov. 24, 2025); *Wang v. Lyons*, No. 25-cv-10794-WHO, 2026 WL 147703 (N.D. Cal. Jan. 20, 2026); *Chaparro Ayala v. Albarran*, No. 26-cv-09430-CRB, 2026 WL 2722780 (N.D. Cal. Sept. 15, 2026). The Court should convert its temporary restraining order (Dkt. No. 4) into a preliminary injunction.

ARGUMENT

A. The Requested Injunction Preserves the Status Quo.

Respondents characterize the relief Mr. Babae seeks as a "particularly disfavored" mandatory injunction. Resp. at 2–3. It is not. The status quo that a preliminary injunction preserves is "the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (citation omitted). In the detention context, that "is the moment prior to Petitioner's likely illegal detention." *Carriollo v. Albarran*, No. 26-cv-05836-JSC, 2026 WL 1734895, at *3 (N.D. Cal. June 16, 2026). Mr. Babae was at liberty for eleven years before October 13, and he has been at liberty since October 14, when ICE released him under this Court's order. Dkt. No. 8. The injunction he seeks would simply prohibit Respondents from re-detaining him without first providing a hearing. It is Respondents who ask the Court to disturb the status quo by ordering Mr. Babae into custody. And even if a heightened standard applied, the law and facts clearly favor Mr. Babae.

B. Mr. Babae Is Likely to Succeed on His Procedural Due Process Claim.

***1.* Mr. Babae has a protected liberty interest in remaining free.**

Respondents assert that Mr. Babae "has not established an event in his immigration history that would give rise to a constitutionally protected liberty interest," so "the test from *Mathews* does not apply." Resp. at 5. That position cannot be squared with settled law. "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). That protection extends to all persons in the United States, "whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693. As Judge Breyer explained in rejecting the same argument from the same office, the government's view would make "a person's interest in being free . . . depend on the government first depriving them of that freedom," and "[t]hat cannot be right." *Chaparro Ayala*, 2026 WL 2722780, at *4.

In any event, Mr. Babae's immigration history is full of the "events" Respondents say are missing. He affirmatively applied for asylum in 2017, as Respondents acknowledge. Resp. at 1. That application remains pending. Johnson Decl. Ex. A; Babae Supp. Decl. ¶ 3; Johnson Supp. Decl. Ex. D. When USCIS acknowledged receipt of the application, it told Mr. Babae in writing:

"You may remain in the U.S. until your asylum application is decided." Johnson Supp. Decl. Ex. D. Respondents nonetheless describe Mr. Babae as "living in this country without lawful status" since February 2020 and as having "overstay[ed] his permitted time." Resp. at 1, 4. But whatever label Respondents attach to his status, the government itself gave Mr. Babae written permission to remain in this country while his asylum application is pending. He did not "fail[] to depart the United States when required." Resp. at 1. He stayed because the government told him he could, and he did so in plain view of the agency. The government collected his biometrics and repeatedly granted him employment authorization on the basis of that application. Pet. ¶¶ 2, 25; Babae Supp. Decl. ¶ 3; Johnson Supp. Decl. Ex. E; *see* 8 C.F.R. § 274a.12(c)(8). Congress itself provides that time during which a noncitizen has a bona fide asylum application pending does not count as unlawful presence. 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Throughout, the government knew where Mr. Babae lived and chose not to detain him or even to initiate removal proceedings.[1]

Courts confronting these precise facts have held that the government's conduct creates a protected liberty interest. In *Gagik T. v. Chestnut*, the petitioner entered on a visitor visa, filed an affirmative asylum application before his authorized stay expired, received multiple employment authorization documents, and was arrested roughly six years later. No. 1:26-cv-04337-MWJS, 2026 WL 1837413, at *1 (E.D. Cal. June 25, 2026). The court held that "[b]y concluding that there was no need to detain Petitioner after his B-2 visitor visa had expired, and instead sanctioning his continued presence in the United States by granting and renewing his employment authorization, the government vested in Petitioner a liberty interest in his continued

[1] Respondents' account of Mr. Babae's status is internally inconsistent. The Response states that his F-1 status "was terminated on or about February 28, 2020," Resp. at 1, but also that he "was authorized to remain in the United States until 2017, when his F-1 visa expired," *id.* Mr. Babae states that he filed for asylum before his visa expired. Johnson Decl. Ex. B; Babae Supp. Decl. ¶ 3. The record bears him out: he was admitted as an F-1 student for "D/S"—duration of status—rather than until a fixed date, Johnson Supp. Decl. Ex. C, and USCIS received his asylum application as of September 5, 2017, Johnson Supp. Decl. Ex. D, more than two years before the February 28, 2020 termination date Respondents identify. Respondents' own Notice to Appear likewise alleges that he was admitted "for a temporary period not to exceed the duration of status" and that his F-1 status was terminated on or about February 28, 2020. Starrett Decl. Ex. 1 at 1. Whatever the precise date, it is undisputed that the government knew of Mr. Babae, allowed him to remain and work for roughly nine years while his asylum application was pending, and did not initiate removal proceedings until the day it arrested him.

freedom." *Id.* at *4. Likewise, in *Carriollo*, where a visa overstay with a pending asylum application was arrested at his asylum interview, Judge Corley held that the government's decision not to detain him while his applications were pending "reflects a determination by the government that he was neither a flight risk nor a danger to the community, and Petitioner has a strong interest in remaining at liberty unless he no longer meets those criteria." 2026 WL 1734895, at *2; *accord Jambwa v. Warden of the Desert View Annex Det. Facility*, No. 5:26-cv-04357-PD, 2026 WL 2449550, at *2 (C.D. Cal. Aug. 20, 2026) (liberty interest where government "did not detain him after his visa expired and instead granted him employment authorization while his asylum claim was pending"); *Kharitonova v. Albarran*, No. 26-cv-01362-JSC, 2026 WL 531441, at *2 (N.D. Cal. Feb. 25, 2026). Respondents address none of these decisions.

2. Rodriguez Diaz does not authorize detention without pre-deprivation process.

Respondents' merits argument rests almost entirely on *Rodriguez Diaz*. But that case answered a different question. The petitioner there, who had "a fairly lengthy criminal record," was detained under § 1226(a), requested and received a bond hearing, was denied bond as a danger to the community, and did not appeal to the BIA. 53 F.4th at 1193–94. He later sought a second bond hearing at which the government would bear the burden of proof. *Id.* The Ninth Circuit held that § 1226(a)'s procedures satisfied due process "as applied to *Rodriguez Diaz*," while expressly declining to "foreclose all as-applied challenges to § 1226(a)'s procedures." *Id.* at 1213. It did not consider whether the government may jail a person it has allowed to live openly for years, with no prior process at all. Judge Breyer rejected the same reliance on *Rodriguez Diaz* for that reason. *Chaparro Ayala*, 2026 WL 2722780, at *5; *see also Gagik T.*, 2026 WL 1837413, at *1, *4.

The governing rule is that "the Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). Post-deprivation process can suffice when a deprivation is random and unpredictable, but "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so." *Id.* at 132. Nothing about this arrest was random or unpredictable. ICE

arrested Mr. Babae at an appointment the government itself scheduled. It knew in advance exactly when and where he would be. It had every opportunity to give him notice and a hearing first.

This Court has repeatedly applied these principles. In *Ortega v. Bonnar*, the Court rejected the government's argument that post-arrest review before an immigration judge made a pre-deprivation hearing unnecessary, holding that the noncitizen's liberty interest, the high risk of erroneous deprivation, and the government's low interest in proceeding without a hearing all required a hearing before re-arrest. 415 F. Supp. 3d 963, 969–70 (N.D. Cal. 2019). In *J.A.M.C.*, the Court enjoined re-detention of an asylum seeker arrested at a scheduled check-in, emphasizing that "the government failed to assert or offer evidence that detaining *J.A.M.C.* would curb any flight risk or to protect *J.A.M.C.*'s community." 2025 WL 3268816, at *4. And in *Wang*, the Court enjoined re-detention without "notice and a pre-deprivation hearing before a neutral decisionmaker in which an individualized determination is made that he poses a flight risk or danger." 2026 WL 147703, at *9. The same result follows here.

3. Carreno Ortiz and Respondents' other authorities are distinguishable.

Respondents rely heavily on this Court's order in *Carreno Ortiz v. Albarran*, No. 3:26-cv-08708-WHO, Dkt. No. 10 (N.D. Cal. Aug. 28, 2026). Resp. at 4. That order does not help them. By its terms, it addressed a petitioner who had overstayed a visa "absent any other circumstances," and it presupposed that "the government complies with all the procedural requirements within that statute." *Id.* And the order recognized that even such a petitioner has "a strong liberty interest in remaining free from custody," while denying relief on other grounds. *See Chaparro Ayala*, 2026 WL 2722780, at *4 (describing *Carreno Ortiz*). Here, there are substantial "other circumstances":

First, Mr. Babae is not simply a visa overstay. He has had an affirmative asylum application pending since 2017, and the government has repeatedly granted him work authorization on that basis. USCIS expressly told him that he "may remain in the U.S. until [his] asylum application is decided." Babae Supp. Decl. ¶ 3; Johnson Supp. Decl. Exs. D–E.

Second, the government arrested him while he was complying with its own directive to appear for biometrics. Babae Supp. Decl. ¶ 8. Arresting a person at the appointment

the government scheduled is the opposite of the conduct of someone who poses a flight risk.

Third, ICE's justification shifted on the day of the arrest from a visa overstay to an unidentified "pending felony charge" that officers refused to explain. Johnson Decl. Ex. B. Mr. Babae knows of no such charge, and Respondents now abandon the assertion entirely. Babae Supp. Decl. ¶ 14.

Fourth, Mr. Babae has a documented oral-sinus communication, an abnormal opening between the mouth and sinus that risks serious infection. Prior repairs failed, and surgical repair is scheduled for November 2, 2026. Johnson Decl. Ex. B; Babae Supp. Decl. ¶ 16.

Fifth, unlike in *Carreno Ortiz*, the record contains no evidence that the government complied with § 1226(a)'s procedural requirements, which contemplate an individualized custody determination. 8 C.F.R. § 236.1(c)(8). Respondents' only evidence is the Notice to Appear. Starrett Decl. Ex. 1.

Respondents' other authorities fare no better. *Nemiro v. Albarran*, No. 26-cv-07853, Dkt. No. 9 (N.D. Cal. Aug. 6, 2026), distinguished pre-detention-hearing cases because the petitioner there "simply overstayed his O-1 visa." Resp. at 5. Mr. Babae did not "simply overstay"; he sought asylum and spent nine years in a status the government affirmatively recognized through repeated grants of work authorization. And Respondents quote *Salcedo Aceros v. Kaiser*, No. 25-cv-06924, 2025 WL 2637503, at *12 (N.D. Cal. Sept. 12, 2025), for the proposition that post-deprivation process suffices because "detentions will only be made upon an initial DHS determination that an individual is a flight risk or poses a danger to society." Resp. at 5. No such determination appears in this record. And *Salcedo Aceros* granted relief to the petitioner. *See Wang*, 2026 WL 147703, at *5 n.3 (collecting cases).

4. **The *Mathews factors require a hearing before re-detention.***

Each *Mathews* factor favors Mr. Babae. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Private interest. Mr. Babae's interest in freedom from confinement is the most fundamental liberty interest there is. *Zadvydas*, 533 U.S. at 690. He has lived here for eleven years, earned an associate degree, worked lawfully as a driver, and is an active member of his mosque. Pet. ¶¶ 23–26; Babae Supp. Decl. ¶¶ 4–5.

Risk of erroneous deprivation. No neutral decisionmaker considered whether detention was warranted before ICE arrested Mr. Babae. "[W]ithout a pre-deprivation hearing . . . neither party will have had an opportunity to determine whether there is any valid basis for the petitioner's detention." *Chaparro Ayala*, 2026 WL 2722780, at *4 (citation omitted). This record shows the danger. The only justification ICE offered beyond the overstay was a felony charge that no one has identified. And although the Notice to Appear certifies that it was personally served on October 13, it bears no signature from Mr. Babae—only the notation "RTS"—and Mr. Babae attests that he never received a copy. Starrett Decl. Ex. 1 at 3; Babae Supp. Decl. ¶ 15. Mr. Babae's sole criminal history is a 2023 misdemeanor for which he has received conviction relief under California Penal Code § 1203.425. Johnson Decl. Ex. A. And he was arrested while voluntarily appearing at a government appointment. Babae Supp. Decl. ¶ 8.

Government interest. Respondents invoke a general interest in enforcing the immigration laws. Resp. at 6. But the relevant question is the government's interest in proceeding without a hearing first, and that interest is minimal. Custody hearings in immigration court are routine; Respondents themselves report 58,790 bond hearings in fiscal year 2026 through July alone. Resp. at 7. Removal proceedings will go forward regardless. If the government believes detention is warranted, "[i]t need only provide [Mr. Babae] with a routine custody determination before a neutral adjudicator." *Chaparro Ayala*, 2026 WL 2722780, at *6.

C. Mr. Babae Is Likely to Succeed on His Substantive Due Process Claim.

Immigration detention must bear a reasonable relation to its permissible purposes: ensuring appearance and preventing danger. *Zadvydas*, 533 U.S. at 690–91; *see Rodriguez Vazquez v. Bostock*, 183 F.4th 1160, 1165 (9th Cir. 2026). Respondents do not contend that Mr. Babae is a flight risk or a danger. Their only response is that he should prove his non-dangerousness to an immigration judge after the fact. Resp. at 6. That is not a justification for the detention; it is a concession that none was made.

D. Exhaustion Is Not Required.

Respondents acknowledge that exhaustion is not jurisdictional here. Resp. at 7. None of the *Puga* factors supports requiring it. *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

First, agency expertise is not needed. Mr. Babae claims that the Constitution required a hearing before he was detained. That is "the sort of constitutional challenge that is 'beyond the competence of the [agency] to decide.'" *Norberto C.M. v. Warden, Cent. Valley Annex*, No. 26-cv-04674-MWJS, 2026 WL 1992747, at *4 (E.D. Cal. July 9, 2026) (quoting *Zamorano v. Garland*, 2 F.4th 1213, 1224 (9th Cir. 2021)); *see Matter of C-*, 20 I. & N. Dec. 529, 532 (BIA 1992) (immigration judges and BIA "lack jurisdiction to rule upon the constitutionality of the Act and the regulations"). Mr. Babae does not ask this Court to set bond. Second, there was no deliberate bypass. Mr. Babae filed within hours of his arrest, before any bond hearing could have occurred. Third, administrative review cannot correct the error. A post-deprivation bond hearing cannot cure the absence of a pre-deprivation hearing; it is the very procedure Mr. Babae contends is constitutionally insufficient.

Even if the *Puga* factors favored exhaustion, it would be excused because the administrative remedy is "inadequate or not efficacious" and "irreparable injury will result." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation omitted). An immigration judge's custody jurisdiction is triggered by DHS's custody determination after an arrest. 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). The regulations provide no way for a person at liberty to obtain a hearing before being jailed. Respondents' requested remedy proves the point: to "exhaust," Mr. Babae would first have to surrender to ICE "so that he may seek release through a custody hearing." Resp. at 11. Requiring a person to give up the liberty at stake in order to exhaust a remedy that can only consider whether to restore it is not exhaustion; it is the injury itself.

Courts in this District and elsewhere have rejected the government's exhaustion argument in this setting. *Chaparro Ayala*, 2026 WL 2722780, at *7 n.5; *Gagik T.*, 2026 WL 1837413, at *1; *Norberto C.M.*, 2026 WL 1992747, at *4. Respondents' authorities involved detained petitioners who had received, or failed to seek, a bond hearing. *See* Resp. at 8–9; *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011). None involved a petitioner at liberty under court order who challenges the absence of pre-deprivation process. And in *Chateauneuf v. Chestnut*, No. 26-cv-01073, 2026 WL 523695, at *3 (E.D. Cal. Feb. 25, 2026), on which Respondents rely, the court waived exhaustion. Resp. at 9.

Nor does 8 U.S.C. § 1226(e) bar relief. Resp. at 6. "[A]lthough § 1226(e) restricts jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law." *Ortega*, 415 F. Supp. 3d at 968–69 (quoting *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011)); *see Jennings v. Rodriguez*, 583 U.S. 281, 295–96 (2018). Mr. Babae does not ask the Court to review a discretionary custody judgment; Respondents have identified none. Nor does he ask the Court to hold the hearing itself, the concern in *De La Garza v. Albarran*, No. 25-cv-10305, 2025 WL 3485157, at *6 (N.D. Cal. Dec. 4, 2025). He asks only that the hearing occur before, rather than after, he is jailed.

E. Mr. Babae Will Suffer Irreparable Harm Absent an Injunction.

Respondents' irreparable harm argument assumes its conclusion: that because the detention is lawful, its harms do not count. Resp. at 9–10. This Court rejected that argument in *J.A.M.C.*: the government's cases do not stand "for the proposition that 'unlawful deprivation of physical liberty' is an expectation of any detention. No case stands or could stand for that proposition." 2025 WL 3268816, at *5. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation omitted).

The harm here is also concrete. Mr. Babae's oral-sinus communication risks serious infection if untreated; prior repairs failed, and his surgery is scheduled for November 2, 2026. Johnson Decl. Ex. B; Babae Supp. Decl. ¶ 16. Respondents do not dispute this condition and offer no evidence that ICE could provide the surgery or the follow-up care it requires.

F. The Balance of Equities and the Public Interest Favor Mr. Babae.

These factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The requested injunction does not interfere with enforcement of the immigration laws. Mr. Babae's removal proceedings will continue, and Respondents remain free to seek his detention after establishing before a neutral decisionmaker that it is warranted. "The potential harm to the government is slight. It can promptly set a pre-deprivation hearing before an IJ if it has evidence that he is a

flight risk or a danger to the community." *J.A.M.C.*, 2025 WL 3268816, at *5. On the other side of the scale are the irreparable loss of liberty and the risk to Mr. Babae's health. The balance tips sharply in his favor. *Hernandez*, 872 F.3d at 996.

G. The Court Should Deny Respondents' Request for Self-Surrender and Place the Burden on the Government.

Respondents ask the Court not only to deny relief but to order Mr. Babae to surrender to ICE. Resp. at 11. They cite no authority for that request, and none exists. Ordering a habeas petitioner to report for the very detention he challenges, before the merits are resolved, would go far beyond restoring any status quo.

At any pre-deprivation hearing, the government should bear the burden of proving by clear and convincing evidence that Mr. Babae is a flight risk or a danger. This Court imposed that standard in *J.A.M.C.*, 2025 WL 3268816, at *6, and in its temporary restraining order in *Wang*, 2026 WL 147703, at *1. When the government seeks to take a person at liberty into civil confinement, due process requires it to justify the deprivation by clear and convincing evidence. *See Addington v. Texas*, 441 U.S. 418, 432–33 (1979). *Rodriguez Diaz*, which concerned a second bond hearing for a noncitizen already detained after a full hearing, does not control the burden at a hearing that precedes any deprivation.

CONCLUSION

The Court should grant a preliminary injunction (1) enjoining Respondents from re-detaining Mr. Babae without notice and a pre-deprivation hearing before a neutral decisionmaker at which the government proves by clear and convincing evidence that he is a flight risk or a danger to the community; (2) enjoining Respondents from transferring him outside this District or removing him from the United States while this action is pending; and (3) denying Respondents' request that he be ordered to surrender to ICE custody.

Dated: October 21, 2026

Respectfully submitted,

/s/ Jeremiah Johnson
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