

CRAIG H. MISSAKIAN (CABN 125202)

United States Attorney

KENNETH BRAKEBILL (CABN 196696)

Acting Chief, Civil Division

WENDY M. GARBERS (CABN 213208)

Assistant United States Attorney

450 Golden Gate Avenue, Box 36055

San Francisco, California 94102-3495

Telephone: (415) 436-6475

FAX: (415) 436-7234

wendy.garbers@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RACHANA DUONG,

Petitioner,

V.

POLLY KAISER, *et al.*,

Respondents.

No. 25-cv-07598 JST

UNITED STATE’S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: September 19, 2025

Time: 1:00 p.m.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	1
A.	Duong’s Criminal and Immigration History pre- <i>Zepeda Rivas</i>	1
B.	<i>Zepeda Rivas</i> COVID Class Action	2
C.	Post- <i>Zepeda Rivas</i> Proceedings	3
III.	LEGAL STANDARD	3
A.	Mandatory Detention Under 8. U.S.C. § 1226(c)	3
B.	Preliminary Injunctions	4
C.	Habeas Corpus	5
IV.	ARGUMENT	5
A.	Detention Under Section 1226(c) Is Mandatory And Constitutionally Permissible	5
B.	Because Duong’s Release Under <i>Zepeda Rivas</i> Was Always Temporary, Petitioner’s Due Process Claims Fail	7
1.	Duong Does Not Have A Protected Liberty Interest Entitling Him To Additional Process	8
2.	Under the <i>Mathews</i> Factors, No Additional Process Is Warranted Here	10
(i)	Petitioner’s history and status reduce his liberty interest	11
(ii)	The risk of erroneous deprivation is minimal	11
(iii)	The government has a strong interest in detention pending removal	12
C.	Petitioner Fails to Show Cognizable, Irreparable Harm	13
D.	Neither the Balance of Equities Nor Public Interest Favors Petitioner	13
V.	CONCLUSION	14

TABLE OF AUTHORITIES

CASES

PAGES

<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011)	5
<i>Black v. Decker</i> , 103 F.4th 133 (2d Cir. 2024)(c)	7
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952)	6
<i>Demore v. Kim</i> , 538 U.S. 510 (2003)	6, 7, 8, 11, 14
<i>Drakes Bay Oyster Co. v. Jewell</i> , 747 F.3d 1073 (9th Cir. 2014)	14
<i>Garcia v. Google, Inc.</i> , 786 F.3d 733 (9th Cir. 2015)	5
<i>In re Guerra</i> , 24 I. & N. Dec. 37–40 (BIA 2006)	4
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018)	6, 4, 5, 12
<i>Jorge M.F. v. Jennings</i> , 534 F. Supp. 3d 1050 (N.D. Cal. 2021)	10
<i>Keo v. Warden of the Mesa Verde Ice Processing Ctr.</i> , 2025 WL 1029392 (E.D. Cal. Apr. 7, 2025)	7
<i>Lopez v. Brewer</i> , 680 F.3d 1068 (9th Cir. 2012)	5
<i>Marin All. For Med. Marijuana v. Holder</i> , 866 F. Supp. 2d 1142 (N.D. Cal. 2011)	13
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976)	11
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	8, 11
<i>Matter of Adeniji</i> , 22 I. & N. Dec. 1102 (BIA 1999)	48, 11, 12, 13
<i>Mazurek v. Armstrong</i> , 520 U.S. 968 (1997)	5

1	<i>Nielsen v. Preap</i> ,	
2	586 U.S. 392, (2019)	7, 13
3	<i>Pinchi v. Noem</i> ,	
4	2025 WL 1853763 (N.D. Cal. July 4, 2025)	9
5	<i>Prieto-Romero v. Clark</i> ,	
6	534 F.3d 1053 (9th Cir. 2008)	4
7	<i>Reno v. Flores</i> ,	
8	507 U.S. 292 (1993)	6
9	<i>Stormans, Inc. v. Selecky</i> ,	
10	586 F.3d 1109 (9th Cir. 2009)	14
11	<i>Thomas v. Zachry</i> ,	
12	2017 WL 2174946 (D. Nev. May 17, 2017)	5
13	<i>Uc Encarnacion v. Kaiser</i> ,	
14	2022 WL 9496434 (N.D. Cal. Oct. 14, 2022)	10, 12
15	<i>United States v. Jennings</i>	
16	Jennings, 138 S. Ct.	7
17	<i>Weinberger v. Romero-Barcelo</i> ,	
18	456 U.S. 305 (1982)	14
19	<i>Winter v. Nat. Res. Def. Council, Inc.</i> ,	
20	555 U.S. 7 (2008)	5
21	<i>Zadvydas v. Davis</i> ,	
22	533 U.S. 678 (2001)	8
23	FEDERAL STATUTES	
24	8 U.S.C. § 1225(b), applies to	4
25	8 U.S.C. § 1226	4
26	8 U.S.C. § 1226(c)	1, 4, 6, 8, 12, 13
27	8 U.S.C. § 1226(c)(2)	4
28	8 U.S.C. § 1231(a)	10
	8 U.S.C. § 1252(a)(2)(B)	5
	28 U.S.C. § 2241(c)(3)	5
	California Penal Code § 186.22(b)	2, 3
	California Penal Code § 187	1, 2
	California Penal Code § 487(c)	1, 2

1 Federal Rule of Civil Procedure 65(a)(2) 5

1 **I. INTRODUCTION**

2 Petitioner Rachana Duong's motion for a preliminary injunction ("PI") should be denied. Duong
 3 is subject to congressionally mandated detention during his removal proceedings under 8 U.S.C.
 4 § 1226(c). In November 1996, Duong was convicted of first-degree murder, in violation of California
 5 Penal Code § 187, and grand theft from a person, in violation of California Penal Code § 487(c), and
 6 was sentenced to twenty-five years to life. As a result of this aggravated felony conviction, Duong
 7 became subject to congressionally mandated mandatory detention under 8 U.S.C. § 1226(c). Duong was
 8 temporarily ordered released on May 27, 2020, by Judge Chhabria in *Zepeda Rivas v. Jennings*, No. 20-
 9 cv-02731-VC, a class action filed in response to the COVID pandemic and resulting conditions of
 10 confinement. *See Zepeda Rivas*, Dkt. No. 268. The protections from re-detention established for class
 11 members in *Zepeda Rivas*, which were always temporary, have now expired. Duong once again remains
 12 subject to mandatory detention. As such, Duong cannot demonstrate that he is likely to succeed on his
 13 habeas claims.

14 **II. FACTUAL BACKGROUND**

15 **A. Duong's Criminal and Immigration History pre-*Zepeda Rivas*.**

16 Duong is a native of Cambodia, who was admitted into the United States as a legal permanent
 17 resident retroactive to February 19, 1980. *See Declaration of Jarvin Li ("Li Decl.")* ¶ 6.) According to
 18 his lawyers, during his teenage years, Duong became a member of a Southeast Asian youth gang. *See*
 19 https://www.aclusocal.org/sites/default/files/cacj_amicus/Asian_Law_Caucas.pdf. Duong and his
 20 friends supported themselves through criminal activities, which became more serious as they got older.
 21 Dkt No. 1 ¶ 25. On September 7, 1994, Duong and two friends committed a robbery, which led to the
 22 death of an elderly woman. On November 18, 1996, Duong was convicted in a jury trial of first-degree
 23 murder, in violation of California Penal Code § 187, and grand theft from a person, in violation of
 24 California Penal Code § 487(c), and was sentenced to twenty-five years to life and three years prison
 25 respectively. *Li Decl.* ¶ 7. His conviction included a gang enhancement pursuant to California Penal
 26 Code § 186.22(b). *Id.* Duong had previously been convicted of unlawful control over a vehicle in the
 27 third degree in violation of Utah 41-1A-1314 in 1994 and sentenced to five years imprisonment. *See*
 28 *Zepeda Rivas*, Dkt No. 254-1. As a result of his murder conviction, Duong became removeable from the

1 United States. Li Decl. ¶¶ 8, 21.

2 In March 2020, after serving 26 years of his sentence for first degree murder, Duong was
3 paroled. Dkt No. 1 ¶ 26. On March 17, 2020, ICE served Duong with a Notice to Appear. Li Decl. ¶ 8.
4 He was released from CDCR custody and transferred to ICE custody at Yuba County Jail. *Id.* ¶¶ 8-10.

5 **B. *Zepeda Rivas* COVID Class Action.**

6 As a result of his detention at Yuba County Jail, Duong became a class member in *Zepeda Rivas*
7 *v. Jennings*, No. 20-cv-02731-VC. *Zepeda Rivas* was filed in response to the COVID pandemic. It
8 challenged the conditions of confinement at Mesa Verde and Yuba County jail resulting from the
9 challenges of the pandemic, including the inability of detainees to socially distance and the lack of
10 COVID testing. On April 29, 2020, Judge Chhabria provisionally certified a *Zepeda Rivas* class and
11 instituted a process for considering release requests from detainees. Under the standard conditions of
12 release, which were incorporated into every order granting release, Judge Chhabria specifically ordered
13 that: “[t]he Class Member’s temporary release will expire upon the final adjudication of the habeas
14 petition in this case[.]” *See Zepeda Rivas*, Dkt. Nos. 108 (Standard Conditions of Release), 369
15 (Revised Standard Conditions of Release). Duong was temporarily released pursuant to the *Zepeda*
16 *Rivas* process on May 27, 2020. *See Zepeda Rivas*, Dkt. No. 268.

17 The parties in *Zepeda Rivas* subsequently entered into a settlement. *See Zepeda Rivas*, Dkt. No.
18 1205-1. The settlement agreement was heavily negotiated and extremely detailed. Under the terms of
19 the settlement agreement, ICE generally agreed to forgo re-detaining released class members for three
20 years following approval of the settlement “unless they pose[d] a threat to public safety or national
21 security, and/or risk of flight.” *See Zepeda Rivas*, Dkt. No. 1205-1, at 13 (Subsection III.A). But these
22 protections ended after three years, and the agreement specifically authorized ICE to re-detain class
23 members as before following the expiration of its three-year term:

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

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

Judge Chhabria finally approved the settlement on June 9, 2022. *See Zepeda Rivas*, Dkt. No. 1258. As such, class members, such as Duong, lost protection from re-detention on June 9, 2025, when the *Zepeda Rivas* settlement expired. *See* <https://www.aclunc.org/our-work/legal-docket/zepeda-rivas-v-jennings-immigration-detention> (notice that the *Zepeda Rivas* settlement expired on June 9, 2025).

C. Post-*Zepeda Rivas* Proceedings.

From 2020-2024, the immigration court, on its own motion, continued Duong's immigration proceedings due to docketing backlogs related to the COVID pandemic. Li Decl. ¶ 15. On January 9, 2024, DHS filed a motion to advance Duong's immigration hearing, which was denied on January 25, 2024. *Id.* at ¶ 16. On March 25, 2024, Duong filed a motion to amend pleadings and terminate proceedings due to an alleged defect in the notice to appear. *Id.* at ¶ 17. The immigration court granted the motion without prejudice on May 21, 2024. *Id.* DHS remedied the alleged defect and filed a second notice to appear on May 21, 2024. *Id.* at ¶ 18-19. On August 21, 2025, Duong appeared in immigration court with counsel. Li Decl. ¶ 21. The Immigration Judge sustained all factual allegations in the charge of removability. *Id.* On September 6, 2025, ICE arrested Duong outside of his residence. That same day (a Saturday), Duong filed a motion for a temporary restraining order, which this Court granted within hours, before the government was able respond. Dkt. No. 5. In accordance with the order, ICE released Duong from custody that evening. *See* Dkt. No. 10. Duong's next immigration court hearing is scheduled for October 29, 2025. Dkt. No. 4 at 11.

III. LEGAL STANDARD

A. Mandatory Detention Under 8 U.S.C. § 1226(c).

The statutory authority to detain individuals who have been lawfully admitted into the United States but are deportable and subject to removal proceedings is found in 8 U.S.C. § 1226, a multi-layered statute that provides for the civil detention of individuals pending removal.¹ *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). For a certain class of individuals—those detained under Section 1226(a)—detention is discretionary. “Federal regulations provide that aliens detained under

¹ A different statutory framework, found in 8 U.S.C. § 1225(b), applies to “applicants for admission” who have never been admitted into the United States. Detention under Section 1225(b) is not at issue in this case.

§ 1226(a) receive bond hearings at the outset of detention,” *Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018), and an individual may be released from detention following a bond hearing if the immigration judge determines that his or her release “would not pose a danger to property or persons, and that [he or she] is likely to appear at any future proceeding.” *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112 (BIA 1999). Immigration judges have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for immigration judges to consider).

For a different class of individuals, however—those detained under § 1226(c)—Congress made detention mandatory. Section 1226(c) applies to certain terrorist and “criminal aliens” who, like Duong, have been convicted of an aggravated felony. This provision mandates detention of these individuals until their removal proceedings have been completed. 8 U.S.C. § 1226(c). When Section 1226(c) governs detention, the Secretary “may release” the detainee “only if” release is “necessary” for witness-protection purposes and “the alien satisfies the [Secretary]” that he “will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.” 8 U.S.C. § 1226(c)(2). Outside of the narrow circumstances of release for witness-protection purposes, however, Congress has determined that these individuals must not be released from detention pending removal, even on bond. The Supreme Court in *Jennings* emphasized that § 1226(c) “mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings ‘only if’ the alien is released for witness-protection purposes.” 583 U.S. at 305-06.

B. Preliminary Injunctions.

“A preliminary injunction is an extraordinary and drastic remedy.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (internal quotation marks and citation omitted). “The Supreme Court has emphasized that preliminary injunctions are an ‘extraordinary remedy never awarded as of right.’” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citation omitted). To prove entitlement to a preliminary injunction, a petitioner must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit recognizes a sliding scale test, under which a preliminary injunction may issue if the petitioner demonstrates “‘serious questions going to the merits’ and a

1 hardship balance that tips sharply toward the plaintiff . . . assuming the other two elements of the *Winter*
 2 test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). The
 3 petitioner must adduce “substantial proof” and make a “‘clear showing’” that preliminary equitable
 4 relief is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original).

5 Under Federal Rule of Civil Procedure 65(a)(2), the Court may consolidate consideration of a
 6 motion for a preliminary injunction with the consideration of the merits of an action. “Consolidation is
 7 generally appropriate when it would (1) result in an expedited resolution of the case; (2) conserve
 8 judicial resources and avoid duplicative proceedings; (3) involves only legal issues based on uncontested
 9 evidence and public records; and (4) would not be prejudicial to any of the parties.” *Thomas v. Zachry*,
 10 No. 3:17-cv-0219-LRH, 2017 WL 2174946, at *1 (D. Nev. May 17, 2017) (citing cases).

11 C. Habeas Corpus.

12 Federal district courts may grant writs of habeas corpus if the petitioner is “in custody in
 13 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). In
 14 immigration cases, the federal courts’ habeas jurisdiction is limited by 8 U.S.C. § 1252(a)(2)(B), which
 15 provides that “no court shall have jurisdiction to review” “decision[s]” for which the statute grants
 16 “discretion” to the Attorney General.

17 IV. ARGUMENT

18 A. Detention Under Section 1226(c) Is Mandatory And Constitutionally Permissible.

19 Having been convicted of first-degree murder, an aggregated felony, Duong is subject mandatory
 20 detention under 8 U.S.C. § 1226(c). Accordingly, he is not eligible for a bond hearing or discretionary
 21 release. *A fortiori*, he is not entitled to a bond hearing *prior* to his re-arrest and detention, a judicial
 22 creation that is contained nowhere in the immigration statutes or regulations, much less in the context of
 23 mandatory detention under Section 1226(c).²

24
 25
 26 ² Notably, there is no claim here that Duong’s detention has been unreasonably prolonged. *See*
 27 Dkt No. 1. Nor could there be, as Duong was just arrested on September 6, 2025, and released the same
 28 day, and he was detained for only a few months in 2020 before his temporary release under *Zepeda Rivas*. Thus, prolonged detention cannot form a basis for Duong’s assertion that he should be given a
 bond hearing. *Cf. Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018).

Supreme Court precedent makes clear that aliens subject to Section 1226(c), like Duong, may be constitutionally detained without a bond hearing. “Detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.” *Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”). In *Demore*, the Court squarely rejected a Due Process Clause challenge to Section 1226(c), holding that “Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the petitioner in that case] be detained for the brief period necessary for their removal proceedings.” *Demore*, 538 U.S. at 513. The petitioner in *Demore* had already spent six months in custody (without a bond hearing) when the Court upheld the constitutionality of his mandatory detention. 538 U.S. at 531. As a result of the Court’s decision, he was returned to custody—after having been released by the district court and remaining released during the pendency of his appeal.³ The effect of the *Demore* decision was to sanction the continued mandatory detention of the petitioner under Section 1226(c), even after a period of release, without any additional process. *Demore*, 538 U.S. at 531. The *Demore* Court specifically rejected the challenge that detention was unconstitutional without a finding that the alien “posed either a danger to society or a flight risk.” *Id.* at 514.

Section 1226(c) reflects a determination by Congress that a certain class of criminal aliens *must* be detained, and that this detention must continue ““pending a decision on whether the alien is to be removed from the United States.”” *Jennings*, 138 S. Ct. at 846 (citing 8 U.S.C. § 1226(a)); *Nielsen v. Preap*, 586 U.S. 392, 396, (2019) (“Congress has decided, however, that [release] is too risky in some instances.”). Section 1226(c) was part of a deliberate effort to constrain the Executive’s discretion to release criminal aliens on bond. *See Demore*, 538 U.S. at 520-21. Section 1226(c) embodies Congress’s categorical judgment that aliens who have committed the specified offenses pose an undue flight risk and danger to the community and that the risk of erroneous release among these criminal

³ The petitioner in *Demore* was released on August 11, 1999, and remained undetained until the Supreme Court’s decision upholding the constitutionality of mandatory detention under Section 1226(c). After that decision in April 2003, he was taken back into mandatory custody under Section 1226(c). *See Kim v. Ridge*, No. 04-cv-0341-SI, Dkt. No. 2 ¶¶ 14–17 (N.D. Cal. Jan. 27, 2004).

1 aliens is too high to permit the exercise of discretion through a bond hearing. Accordingly, Congress
 2 took this decision out of the hands of immigration judges. For this defined group of aliens, the statute
 3 creates an irrebuttable presumption of flight risk and danger to the community.

4 It follows from this statutory framework, which *Demore* upheld as constitutionally permissible
 5 without *any* opportunity for a bond hearing, that due process does not require *pre-detention* bond
 6 hearings for criminal aliens mandatorily detained under Section 1226(c). *Keo v. Warden of the Mesa*
 7 *Verde Ice Processing Ctr.*, No. 24-cv-00919, 2025 WL 1029392, at *7 (E.D. Cal. Apr. 7, 2025); *see also*
 8 *Black v. Decker*, 103 F.4th 133, 142 (2d Cir. 2024) (The Supreme Court’s decisions in “*Demore* and
 9 *Jennings* instruct that (1) due process does not require an *initial* bond determination for those detained
 10 under section 1226(c), and (2) section 1226’s text cannot be construed to require a bond hearing after
 11 any particular fixed period of detention.”) (emphasis in original). Requiring a pre-detention bond
 12 hearing for an alien subject to Section 1226(c) would undermine the mandatory detention framework
 13 that *Demore* sanctioned as constitutionally sufficient and supplant Congress’s determination that
 14 discretionary release decisions are inappropriate for this class of aliens. As such, Duong cannot succeed
 15 on his claim that the Constitution requires a pre-deprivation hearing before he may be arrested and
 16 detained.

17 **B. Because Duong’s Release Under *Zepeda Rivas* Was Always Temporary, Petitioner’s**
 18 **Due Process Claims Fail.**

19 Duong was temporarily released from custody during COVID as a result of the *Zepeda Rivas*
 20 litigation. By its terms, this release was always temporary and of a finite duration. His initial release
 21 was subject to the mandatory, court-ordered condition that it would “expire upon the final adjudication
 22 of the habeas petition in this case[.]” *See Zepeda Rivas*, Dkt. No. 369. Under the settlement agreement
 23 negotiated between the parties and applicable to all class members, including Duong, ICE was
 24 specifically authorized to re-detain class members as usual after beginning three years following
 25 approval of the settlement. *See Zepeda Rivas* Dkt. No. 1205-1 at 16 (Subsection III(G)). The settlement
 26 was approved by the court on June 9, 2022. *See Zepeda Rivas* Dkt. No. 1258. As such, ICE was
 27 specifically authorized to re-detain temporarily release class members beginning June 9, 2025. Duong
 28 never had any reasonable expectation that his release would continue indefinitely, or that ICE would be

1 constrained from re-detaining him after the three-year term ended. Against this backdrop, Duong's re-
 2 arrest and detention on September 6, 2025, which simply returned him to the pre-*Zepeda Rivas* status
 3 quo, did not run afoul of the Due Process Clause.

4 **1. Duong Does Not Have A Protected Liberty Interest Entitling Him To**
 5 **Additional Process.**

6 Duong does not have a protected liberty interest in making permanent a release that was, by its
 7 terms, only temporary. Duong was convicted of first-degree murder and is subject to mandatory
 8 detention under 8 U.S.C. § 1226(c). Given this mandatory detention framework, Duong's reliance on
 9 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in asserting that he should be protected from re-
 10 detention absent a custody hearing is misplaced. As discussed above, the Supreme Court in *Demore*
 11 upheld mandatory civil immigration detention under Section 1226(c), and did so without utilizing the
 12 multi-factor "balancing test" of *Mathews*. See *Demore*, 538 U.S. 510; cf. *Zadvydas v. Davis*, 533 U.S.
 13 678 (2001) (upholding mandatory detention under 8 U.S.C. § 1231(a)(6) for six months after the 90-day
 14 removal period).⁴ The additional process that Duong seeks here is fundamentally incompatible with this
 15 congressionally ordained, constitutionally permissible framework.

16 That Duong had been temporarily released under *Zepeda Rivas* does not create a new liberty
 17 interest that takes him out of the *Demore* paradigm. Indeed, the petitioner in *Demore* was returned to
 18 custody following the Supreme Court's decision in that case after having been released nearly four
 19 years, yet the Court imposed no requirement of a pre-detention hearing. Any expectation of continued
 20 liberty here, moreover, would not be reasonable. Duong was released from detention *temporarily*, in
 21 response to the extraordinary circumstances of the COVID pandemic. By its own terms and by court
 22 order, that release was always finite and non-permanent, with a definite termination point of June 9,
 23 2025.

24
 25 ⁴ Indeed, as the Ninth Circuit recognized in *Rodriguez Diaz*, "the Supreme Court when
 26 confronted with constitutional challenges to immigration detention has not resolved them through
 27 express application of *Mathews*." 53 F.4th at 1206 (citations omitted); *id.* at 1214 ("In resolving familiar
 28 immigration-detention challenges, the Supreme Court has not relied on the *Mathews* framework.")
 (Bumatay, J., concurring). Whether the *Mathews* test applies even to challenges to non-mandatory
 detention is an open question in the Ninth Circuit. See *Rodriguez Diaz*, 53 F.4th at 1207 (applying
Mathews factors to uphold constitutionality of Section 1226(a) procedures in a prolonged detention
 context; "we assume without deciding that *Mathews* applies here").

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

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

16 The cases relied upon by Duong are inapposite. See Dkt. No. 4 at 15. In *Pinchi v. Noem*, No.
17 25-cv-05632, 2025 WL 1853763, at *1 (N.D. Cal. July 4, 2025), for example, the petitioner had no
18 criminal history and thus was not subject to mandatory detention under § 1226(c). Her initial release
19 was indefinite, not temporary by its terms, like Duong's. This Court's decision in *Jorge M.F. v.*
20 *Jennings*, 534 F. Supp. 3d 1050 (N.D. Cal. 2021), is similarly inapplicable. The petitioner's release in
21 *Jorge M.F.* was, at the time of release, indefinite; its potential termination arose only later, following
22 subsequent appellate review. Moreover, unlike Duong, the petitioner in *Jorge M.F.* was not subject to
23 mandatory detention under Section 1226(c), and was instead subject to discretionary detention under
24 Section 1226(a), such the government acknowledged that a bond hearing would be required. This
25 Court's order in *Jorge M.F.* prohibiting re-detention without a bond hearing, therefore, merely changed
26 *when* the required bond hearing would occur and did not supplant the congressional scheme mandating
27 detention without an individualized determination of danger or risk of flight.

28 In this regard, the recent case of *Uc Encarnacion v. Kaiser*, No. 22-cv-04369-CRB, 2022 WL

9496434, at *3 (N.D. Cal. Oct. 14, 2022), is more instructive. The petitioner in that case 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 redetained following the BIA’s order reversing his release on bond.” *Id.* at *5. The court distinguished *Jorge M.F.*, finding it significant that the governing detention authority, 8 U.S.C. § 1231(a), did not provide a statutory right to a bond hearing. *Uc Encarnacion*, 2022 WL 9496434, at *4. The liberty interest in additional process is even weaker here than in *Uc Encarnacion*. Unlike Section 1231(a)(6) detention, which is discretionary, the governing detention authority here not only does not provide for a right to a bond hearing, it expressly *mandates* detention without an individualized consideration of flight risk or danger. Moreover, the petitioner in *Uc Encarnacion* was not subject to a similarly temporary release of a specified finite duration.

2. Under the *Mathews* Factors, No Additional Process Is Warranted Here.

Demore establishes that mandatory detention under Section 1226(c) without any pre- or post-custodial bond hearing is constitutionally permissible. The *Zepeda Rivas* settlement agreement preserved that framework, and contemplated that detention according to this generally applicable law would resume following the three-year settlement term. As discussed above, although Petitioner urges this Court to evaluate this case under the traditional *Mathews* factors, a *Mathews* analysis is not appropriate here, where Supreme Court jurisprudence and the terms of Duong’s release make clear that no additional process is necessary.

In the event that the Court elects to analyze Petitioner’s claim under *Mathews*, the Court should find, consistent with the analysis above, that Petitioner is not entitled to relief. Under *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), courts consider three factors in evaluating a procedural due process claim: the plaintiff’s private interest, the risk of erroneous deprivation without additional procedures, and the government’s interest. While leaving open the question of whether the *Mathews* test applies to a

1 constitutional challenge to discretionary immigration detention, *see Rodriguez Diaz*, 53 F.4th at 1207,
 2 the Ninth Circuit has emphasized that “*Mathews* remains a flexible test that can and must account for the
 3 heightened governmental interest in the immigration detention context.” *Id.* at 1206. Against this
 4 backdrop, the three factors weigh against the additional process Duong requests here.

5 **(i) Petitioner’s history and status reduce his liberty interest.**

6 As discussed above, while Duong, like any individual facing detention, has an interest in
 7 remaining released, the circumstances of his release do not give rise to a protectible liberty interest
 8 warranting additional process. To the extent he has a liberty interest here, that interest is reduced by the
 9 fact that he is an alien in removal proceedings. *See Rodriguez Diaz*, 53 F.4th at 1206 (“The recognized
 10 liberty interests of U.S. citizens and aliens are not coextensive: the Supreme Court has ‘firmly and
 11 repeatedly endorsed the proposition that Congress may make rules as to aliens that would be
 12 unacceptable if applied to citizens.’”) (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the
 13 Supreme Court has explained, “[i]n the exercise of its broad power over naturalization and immigration,
 14 Congress regularly makes rules that would be unacceptable if applied to citizens.” *Mathews v. Diaz*,
 15 426 U.S. 67, 79-80 (1976). Indeed, the Supreme Court has repeatedly “recognized detention during
 16 deportation proceedings as a constitutionally valid aspect of the deportation process.” *Demore*, 538 U.S.
 17 at 523. That is especially true in light of Duong’s particular circumstances, as an alien subject to
 18 mandatory detention who knew that his temporary release due to extraordinary circumstances would not
 19 be permanent. These aspects of Duong’s situation greatly reduce his liberty interest here. *See*
 20 *Rodriguez Diaz*, 53 F.4th at 1206–08; *cf. Uc Encarnacion*, 2022 WL 9496434, at *4 (finding the
 21 petitioner’s liberty interest less weighty than that of a Section 1226(a) detainee) (citing *Diouf v.*
 22 *Napolitano*, 634 F.3d 1081, 1086–87 (9th Cir. 2011)).

23 **(ii) The risk of erroneous deprivation is minimal.**

24 Second, there is no risk of erroneous deprivation of Petitioner’s liberty here. It is uncontested
 25 that Petitioner is an aggravated felon and thus subject to mandatory detention under 8 U.S.C. § 1226(c).
 26 Any deprivation of liberty, therefore, would not be *erroneous*: Congress has mandated that individuals
 27 convicted of aggravated felonies, like Petitioner, be subject to mandatory detention, without a pre-
 28 deprivation detention hearing, and without regarding to evidence of their risk of flight or danger to the

community. 8 U.S.C. § 1226(c); *Jennings v. Rodriguez*, 583 U.S. 281, (2018). The Supreme Court in *Demore* concluded that this mandatory detention pending removal serves an immigration purpose and therefore is constitutionally permissible. Neither the Court nor an immigration judge is empowered to substitute its views on this topic for Congress's.

Moreover, the specific additional procedures that Petitioner requests—a pre-detention hearing before an immigration judge, at which the government would have the burden of proof, by clear and convincing evidence that Petitioner is neither a flight risk nor danger to the community—are unwarranted. As the Ninth Circuit announced in *Rodriguez Diaz*, “We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of an alien, much less through an elevated ‘clear and convincing’ showing.” 53 F.4th 1189, 1211. To the extent a bond hearing is ordered by the Court, there is no good reason to impose such a heightened requirement on the government, especially where this additional process would supplant a congressional determination that aliens like Duong should be detained without any individualized determination of danger or flight risk.

(iii) The government has a strong interest in detention pending removal.

Turning to the third *Mathews* factor, the Ninth Circuit has held that “the government clearly has a strong interest in preventing aliens from ‘remain[ing] in the United States in violation of our law.’” *Rodriguez Diaz*, 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). “This is especially true when it comes to determining whether removable aliens must be released on bond during the pendency of removal proceedings.” *Id.* “The government has an obvious interest in ‘protecting the public from dangerous criminal aliens,’” and “[t]hrough detention, the government likewise seeks to ‘increas[e] the chance that, if ordered removed, the aliens will be successfully removed.’” *Id.* (quoting *Demore*, 538 U.S. at 515 and 528). “Indeed, the Supreme Court has specifically recognized Congress’s determination that the government has been unable to remove deportable criminal aliens because of its initial failure to detain them.” *Id.* at 1209. “For all these reasons, the government’s interests in this case are significant.” *Id.*

In short, the three *Mathews* factors weigh decidedly against granting Petitioner the additional, pre-detention hearing he now requests.

C. Petitioner Fails to Show Cognizable, Irreparable Harm.

In addition to his failure to show a likelihood of success on the merits, Petitioner does not meet his burden of showing he will be cognizably harmed in the absence of a preliminary injunction. Even if the Court were to order an immigration judge to conduct a pre-detention hearing, that immigration judge would be bound by 8 U.S.C. § 1226(c). There is no escaping the fact that Congress has mandated that aggravated felons, like Petitioner, be detained for the pendency of their removal proceedings. *Nielsen v. Preap*, 586 U.S. 392, 396, (2019) (“Congress has decided, however, that [the bond hearing] procedure is too risky in some instances. Congress therefore adopted a special rule for aliens who have committed certain dangerous crimes.”). Petitioner’s detention is thus not cognizable harm.

In any event, the alleged infringement of Petitioner’s constitutional rights is insufficient when—as here—Petitioner fails to demonstrate “a sufficient likelihood of success on the merits of [his] constitutional claims to warrant the grant of a preliminary injunction.” *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc’d Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)).

Given his undisputed status as an aggravated felon, subject to § 1226(c), Petitioner cannot establish that congressionally mandated detention would cause him irreparable harm.

D. Neither the Balance of Equities Nor Public Interest Favors Petitioner.

When the government is a party, the last two factors that Petitioner must establish to obtain a preliminary injunction merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, for the same reasons that Petitioner has not shown the *Mathews* factors favor his requested additional process, Petitioner has not shown that a preliminary injunction barring his re-arrest and detention without a hearing is in the public interest. To the contrary, the public interest lies squarely in honoring Congress’s mandate that aggravated felons be detained. *See Demore*, 538 U.S. at 520; *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court “should give due weight to the serious consideration of the public interest” in enacted laws). Petitioner’s claimed harm to himself and his family cannot outweigh this public interest in application of the law, particularly since courts “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-*

1 *Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted).

2 **V. CONCLUSION**

3 Duong's release pursuant to the *Zepeda Rivas* order was, by its terms, temporary, and only
4 occurred as a result of the extraordinary challenges brought about by the COVID pandemic. The
5 pandemic, and the term of Duong's temporary release, are now over. Duong's detention during the
6 pendency of his immigration proceedings is mandated by § 1226(c) due to his first degree murder
7 conviction. The Court must follow this statute. Accordingly, Respondents respectfully request that the
8 Court deny Duong's motion for a PI and habeas petition.

9 DATED: September 12, 2025

Respectfully submitted,

11 CRAIG H. MISSAKIAN
United States Attorney

12 Wendy M. Garbers
13 WENDY M. GARBERS
Assistant United States Attorney