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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALEX RIVERA GIORGES and SOKHA KHAN,

Petitioners-Plaintiffs,

V.

SERGIO ALBARRAN, San Francisco Field
Office Director, U.S. Immigration and Customs
Enforcement,¹

Defendant.

No. 5:25-cv-07683-NW

RESPONDENTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

¹ Sergio Albarran is automatically substituted for Polly Kaiser as a defendant in this matter pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

RESPONDENTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
No. 5:25-cv-07683-NW

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INTRODUCTION

Petitioners' motion for a preliminary injunction ("PI") should be denied. Petitioners are subject to congressionally mandated detention during their removal proceedings under 8 U.S.C. § 1226(c). As a result of these aggravated felony convictions, Petitioners became subject to congressionally mandated mandatory detention under 8 U.S.C. § 1226(c). Petitioners were previously *temporarily* ordered released by Judge Chhabria in *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, a class action filed in response to the COVID pandemic and resulting conditions of confinement. *See Zepeda Rivas*, Dkt. No. 242 (Petitioner Georges), 448 (Petitioner Khan). The protections from re-detention established for class members in *Zepeda Rivas*, which were always temporary, have now expired. They once again remain subject to mandatory detention. As such, they cannot demonstrate that they are likely to succeed on his habeas claims.

BACKGROUND

A. Georges' Criminal and Immigration History pre-*Zepeda Rivas*.

Petitioner Georges is a native and citizen of El Salvador who was admitted to the United States at Los Angeles, California, on or about August 6, 1980, as a lawful permanent resident. Declaration of Jarvin Li, ¶ 6 & Exh. 1. On July 29, 1992, Petitioner was convicted in the California Superior Court at the Country of Los Angeles for the offense of second-degree murder in violation of California Penal Code section 187(a). He was sentenced to fifteen years to life, with the possibility of parole. *Id.* ¶ 7 & Exh. 1. On June 19, 2019, Petitioner came to the attention of ICE ERO pursuant to a referral from the California State Prison located in Solano, California. *Id.* ¶ 8 & Exh. 1. On June 25, 2019, Petitioner was placed in ICE custody as authorized by section 236(c) of the Immigration and Nationality Act (INA). *Id.* ¶ 9. On June 26, 2019, ICE ERO placed Petitioner into removal proceedings, as an alien, who at any time after admission, has been convicted of an aggravated felony as defined in INA § 101(a)(43)(G) and INA § 237(a)(2)(A)(iii). *Id.* ¶ 10 & Exh. 2. On August 28, 2019, Petitioner filed an application for relief with the Immigration Court. *Id.* ¶ 11. On March 2, 2020, an Immigration Judge denied Petitioner's applications for relief. *Id.* ¶ 12 & Exh. 3.

B. Khan's Criminal and Immigration History pre-*Zepeda Rivas*.

Petitioner Khan is a native of Thailand and citizen of Cambodia who arrived in the United States on June 15, 1983. His status was adjusted to that of a lawful permanent resident on November 29, 1989. *See* Declaration of Marlene Viramontes, Exh. 7. On January 4, 2006, Petitioner Khan was convicted of two crimes: (1) violation of section 212.5(A) (first degree robbery, a felony) of the California Penal Code (CPC) and sentenced to six years' confinement, and (2) violation of section 211 of the CPC (second degree robbery, a felony) and sentenced to fourteen years' confinement. *Id.* ¶ 6 & Exh. 1. On June 22, 2020, Petitioner came to the attention of ICE ERO pursuant to a referral from the California State Prison located in Folsom, California. *Id.* ¶ 7 & Exh. 1. On June 24, 2020, Petitioner was placed in ICE custody as authorized by INA § 236(c). *Id.* ¶ 8. On July 2, 2020, ERO ICE placed Petitioner Khan into removal proceedings as an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the INA—a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment of at least one year was imposed—under section 237(a)(2)(A)(iii) of the INA. *Id.* ¶ 9.

C. *Zepeda Rivas* COVID Class Action.

As a result of their detention, Petitioners became class members in *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC. *Zepeda Rivas* was filed in response to the COVID 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. Under the standard conditions of release, which were incorporated into ever 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). Petitioners were temporarily released pursuant to the *Zepeda Rivas* process on May 23, 2020 and July 21, 2020, respectively. *See Zepeda Rivas*, Dkt. No. 242 (Petitioner Giorges), 448 (Petitioner Khan).

The parties in *Zepeda Rivas* subsequently entered into a settlement. *See Zepeda Rivas*, Dkt Nos.

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

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

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

12 Judge Chhabria approved the settlement on June 9, 2022. *See Zepeda Rivas*, Dkt. No. 1258. As
 13 such, class members, such as Petitioners, lost protection from re-detention on June 9, 2025, when the
 14 *Zepeda Rivas* settlement expired. *See* [https://www.aclunc.org/our-work/legal-docket/zepeda-rivas-v-](https://www.aclunc.org/our-work/legal-docket/zepeda-rivas-v-jennings-immigration-detention)
 15 [jennings-immigration-detention](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).

16 **D. Post-*Zepeda Rivas* Proceedings.**

17 On June 4, 2020, Petitioner Giorges was released from ICE custody on his own recognizance in
 18 Bakersfield, California, after the U.S. District Court of Northern California granted the respondent’s
 19 request for bail. As part of the conditions of release, Petitioner was enrolled in ATD and placed on the
 20 Intensive Supervision Appearance Program. *Li Decl.*, ¶ 14. Petitioner filed a notice of appeal with the
 21 Board of Immigration Appeals (“Board”) on March 20, 2020. *Id.* ¶ 13. On December 31, 2020, the
 22 Board affirmed the Immigration Judge’s decision denying all applications for relief. *Id.* ¶ 15 & Exh. 4.
 23 In November 2022, Petitioner filed a motion to reopen removal proceedings with the Board, and on
 24 October 13, 2023, the Board denied that motion. *Id.* ¶ 16 & Exh. 5. In October 2023, Petitioner filed a
 25 petition for review with the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”). *Id.* ¶ 17. In
 26 November 2024, the government moved the Ninth Circuit to remand the Petitioner’s case to the Board.
 27 The Ninth Circuit granted the government’s motion. Petitioner’s case is currently pending before the
 28

1 Board. *Id.* ¶ 18 & Exh. 6.

2 On July 22, 2020, Petitioner Khan was released from ICE custody on his own recognizance in
3 Bakersfield, California, after the U.S. District Court of Northern California granted the respondent's
4 request for bail. Viramontes Decl., ¶10 & Exhs. 2, 3. On August 20, 2025, Petitioner filed a motion to
5 terminate removal proceedings. The government's response to Petitioner's motion is due on September
6 26, 2025. *Id.* ¶ 11 & Exh. 5. On September 8, 2025, the government requested the issuance of a
7 superseding Notice to Appear ("NTA") with a date and time of hearing for Petitioner. *Id.* ¶ 12.
8 Petitioner agreed to report to ERO on September 10, 2025. On this date, Petitioner was personally
9 served with a superseding NTA, which the Petitioner refused to sign. *Id.* ¶ 13. On August 29, 2025, an
10 Immigration Judge deferred the ruling on Petitioner's motion to terminate until the upcoming status
11 hearing before the Concord Immigration Court on December 23, 2025. *Id.* ¶ 14 & Exh. 6. Petitioner's
12 removal proceedings remain pending before the immigration court. *Id.* ¶ 15 & Exhs. 5, 6.

13 LEGAL STANDARDS

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

15 The statutory authority to detain individuals who have been lawfully admitted into the United
16 States but are deportable and subject to removal proceedings is found in 8 U.S.C. § 1226, a multi-
17 layered statute that provides for the civil detention of individuals pending removal.² *See Prieto-Romero*
18 *v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). For a certain class of individuals—those detained under
19 Section 1226(a)—detention is discretionary. "Federal regulations provide that aliens detained under
20 § 1226(a) receive bond hearings at the outset of detention," *Jennings v. Rodriguez*, 583 U.S. 281, 306
21 (2018), and an individual may be released from detention following a bond hearing if the immigration
22 judge determines that his or her release "would not pose a danger to property or persons, and that [he or
23 she] is likely to appear at any future proceeding." *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1114 (BIA
24 1999). Immigration judges have broad discretion in deciding whether to release an alien on bond. *In re*
25 *Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for immigration judges to consider).

26
27 ² A different statutory framework, found in 8 U.S.C. § 1225(b), applies to "applicants for
28 admission" who have never been admitted into the United States. Detention under Section 1225(b) is
not at issue in this case.

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

Under Federal Rule of Civil Procedure 65(a)(2), the Court may consolidate consideration of a

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

6 C. Habeas Corpus.

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

12 ARGUMENT

13 I. Petitioners Are Unlikely To Succeed On The Merits Of Their Due Process Challenge.

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

15 Having been convicted of aggravated felonies, Petitioners are subject mandatory detention under
 16 8 U.S.C. § 1226(c). Accordingly, they are not subject to a bond hearing or to discretionary release. *A*
 17 *fortiori*, they are not entitled to a bond hearing *prior* to their re-arrest and detention, a judicial creation
 18 that is contained nowhere in the immigration statutes or regulations, much less in the context of
 19 mandatory detention under Section 1226(c).

20
 21 ³ The Petition joins two separate petitioners with two sets of underlying factual circumstances in
 22 a single habeas petition. Petitioners do not cite any authority for bringing a group petition with multiple
 23 petitioners, and Respondents are unaware of any authority that would permit joinder of separate
 24 petitioners. *Cf. Acord v. California*, No. 17-cv-01089, 2017 WL 4699835, at *1 (E.D. Cal. Oct. 19,
 25 2017) (“There is no authority for permitting multiple petitioners to file a single habeas petition under 28
 26 U.S.C. § 2254, and doing so generally is not permitted.”). Indeed, this request for relief for multiple
 27 individual aliens would appear to contravene the prohibition contained in 8 U.S.C. § 1252(f)(1), which
 28 states that “no court (other than the Supreme Court) shall have the jurisdiction or authority to enjoin or
 restrain . . . other than with respect to the application of such provisions to an individual alien against
 whom proceedings under such part have been initiated.” Respondents reserve their right to move to
 sever the petition. *See Acord*, 2017 WL 4699835, at *1; *see also Buriev v. Warden, Geo. Broward*
Transitional Ctr., No. 25-cv-60459, 2025 WL 1906626, *1 (S.D. Fla. Mar. 18, 2025) (denying motion
 for joinder of two habeas petitions); *Rubinstein v. United States*, No. 23-cv-12685, 2024 WL 37931, *3
 (E.D. Mich. Jan. 3, 2024) (finding misjoinder of multiple parties in a single habeas petition).

Supreme Court precedent makes clear that aliens subject to Section 1226(c), like Petitioners, 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.⁴ 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

⁴ 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 flight risk and danger to the community and that the risk of erroneous release among these criminal
 2 aliens is too high to permit the exercise of discretion through a bond hearing. Accordingly, Congress
 3 took this decision out of the hands of immigration judges. For this defined group of aliens, the statute
 4 creates an irrebuttable presumption of flight risk and danger to the community.

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

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

20 Petitioners were temporarily released from custody during COVID as a result of the *Zepeda*
 21 *Rivas* litigation. By its terms, this release was always temporary and of a finite duration. Their initial
 22 release was subject to the mandatory, court-ordered condition that it would “expire upon the final
 23 adjudication of the habeas petition in this case[.]” *See Zepeda Rivas*, Dkt. No. 369. Under the
 24 settlement agreement negotiated between the parties and applicable to all class members, including
 25 Petitioners, ICE was specifically authorized to re-detain class members as usual after beginning three
 26 years following approval of the settlement. *See Zepeda Rivas* Dkt. No. 1205-1 at 16 (Subsection III(G)).
 27 The settlement was approved by the court on June 9, 2022. *See Zepeda Rivas* Dkt. No. 1258. As such,
 28 ICE was specifically authorized to re-detain temporarily release class members beginning June 9, 2025.

Petitioners never had any reasonable expectation that his release would continue indefinitely, or that ICE would be constrained from re-detaining him after the three-year term ended.

1. Petitioners Do Not Have A Protected Liberty Interest Entitling Them To Additional Process.

Petitioners do not have a protected liberty interest in making permanent a release that was, by its terms, only temporary. Petitioners are both subject to mandatory detention under 8 U.S.C. § 1226(c). Given this mandatory detention framework, Petitioners' reliance on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in asserting that they should be protected from re-detention absent a custody hearing is misplaced. As discussed above, the Supreme Court in *Demore* upheld mandatory civil immigration detention under Section 1226(c), and did so without utilizing the multi-factor "balancing test" of *Mathews*. See *Demore*, 538 U.S. 510; cf. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (upholding mandatory detention under 8 U.S.C. § 1231(a)(6) for six months after the 90-day removal period).⁵ The additional process that Petitioners seek here is fundamentally incompatible with this congressionally ordained, constitutionally permissible framework.

That Petitioners had been temporarily released under *Zepeda Rivas* does not create a new liberty interest that takes him out of the *Demore* paradigm. Indeed, the petitioner in *Demore* was returned to custody following the Supreme Court's decision in that case after having been released nearly four years, yet the Court imposed no requirement of a pre-detention hearing. Any expectation of continued liberty here, moreover, would not be reasonable. Petitioners were 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.

⁵ Indeed, as the Ninth Circuit recognized in *Rodriguez Diaz*, "the Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*." 53 F.4th at 1206 (citations omitted); *id.* at 1214 ("In resolving familiar 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 Petitioners, was represented by a team of lawyers, and
2 the terms of the settlement agreement were rigorously negotiated. That agreement could have specified
3 that 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, 18–19.

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

16 The cases relied upon by Petitioner are inapposite. Significantly, none of them appears to
17 involve a release from detention that was, by its terms, temporary and of a finite duration, with a
18 specified end date after which re-detention was contemplated. For example, the decision in *Jorge M.F.*
19 *v. Jennings*, 534 F. Supp. 3d 1050 (N.D. Cal. 2021), is inapplicable. The petitioner's release in *Jorge*
20 *M.F.* was, at the time of release, indefinite; its potential termination arose only later, following
21 subsequent appellate review. Moreover, unlike Petitioners, the petitioner in *Jorge M.F.* was not subject
22 to mandatory detention under Section 1226(c), and was instead subject to discretionary detention under
23 Section 1226(a), such the government acknowledged that a bond hearing would be required. This
24 Court's order in *Jorge M.F.* prohibiting re-detention without a bond hearing, therefore, merely changed
25 *when* the required bond hearing would occur and did not supplant the congressional scheme mandating
26 detention without an individualized determination of danger or risk of flight.

27 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)(6), 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 Petitioners’ release make clear that no additional process is necessary.

In the event that the Court elects to analyze Petitioners’ 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,

1 and the government's interest. While leaving open the question of whether the *Mathews* test applies to a
 2 constitutional challenge to discretionary immigration detention, see *Rodriguez Diaz*, 53 F.4th at 1207,
 3 the Ninth Circuit has emphasized that "*Mathews* remains a flexible test that can and must account for the
 4 heightened governmental interest in the immigration detention context." *Id.* at 1206. Against this
 5 backdrop, the three factors weigh against the additional process Petitioners requests here.

6 **(i) Petitioners' history and status reduce their liberty interest.**

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

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

25 Second, there is no risk of erroneous deprivation of Petitioners' liberty here. It is uncontested
 26 that Petitioners are aggravated felons and thus subject to mandatory detention under 8 U.S.C. § 1226(c).
 27 Any deprivation of liberty, therefore, would not be *erroneous*: Congress has mandated that individuals
 28

convicted of aggravated felonies, like Petitioners, be subject to mandatory detention, without a pre-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.” *Id.* at 1212. 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 Petitioners 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.* “For all these reasons, the government’s interests in this case are significant.” *Id.*

1 In short, the three *Mathews* factors weigh decidedly against granting Petitioners the additional,
2 pre-detention hearing they now requests.

3 **II. Petitioners Fail to Show Cognizable, Irreparable Harm.**

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

13 In any event, the alleged infringement of Petitioners’ constitutional rights is insufficient when—
14 as here—Petitioners fail to demonstrate “‘a sufficient likelihood of success on the merits of [his]
15 constitutional claims to warrant the grant of a preliminary injunction.’” *Marin All. For Med. Marijuana*
16 *v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc’d Gen. Contractors of Cal., Inc.*
17 *v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); *see also Meneses v. Jennings*, No. 21-
18 cv-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021) (denying TRO where petitioner
19 “assume[d] a deprivation to assert the resulting harm”).

20 Given their undisputed status as aggravated felons, subject to § 1226(c), Petitioners cannot
21 establish that congressionally mandated detention would cause him irreparable harm.

22 **III. Neither the Balance of Equities Nor Public Interest Favor Petitioners.**

23 When the government is a party, the last two factors that Petitioners must establish to obtain a
24 preliminary injunction merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)
25 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, for the same reasons that Petitioners have not
26 shown the *Mathews* factors favor his requested additional process, Petitioners have not shown that a
27 preliminary injunction barring his re-arrest and detention without a hearing is in the public interest. To
28

1 the contrary, the public interest lies squarely in honoring Congress's mandate that aggravated felons be
2 detained. *See Demore*, 538 U.S. at 520; *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th
3 Cir. 2009) (holding that the court "should give due weight to the serious consideration of the public
4 interest" in enacted laws). Petitioners' claimed harm to themselves cannot outweigh this public interest
5 in application of the law, particularly since courts "should pay particular regard for the public
6 consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*,
7 456 U.S. 305, 312 (1982) (citation omitted).

CONCLUSION

10 Petitioners' release pursuant to the *Zepeda Rivas* order was, by its terms, temporary, and only
11 occurred as a result of the extraordinary challenges brought about by the COVID pandemic. The
12 pandemic, and the term of Petitioners' temporary release, are now over. Petitioners' detention during
13 the pendency of their immigration proceedings is mandated by § 1226(c). The Court must follow this
14 statute. Accordingly, Respondents respectfully request that the Court deny the motion for a preliminary
15 injunction and habeas petition.

16 DATED: September 12, 2025

Respectfully submitted,

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