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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FULVIO CASTILLO GOMEZ, Petitioner, v. SERGIO ALBARRAN et al., Respondents.	CASE NO. 3:26-cv-01790-NW **PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISSOLVE**

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISSOLVE THE TRO

INTRODUCTION

This case asks what due process requires in the detention of a man who has lived in this country for twenty years, all the while with an "in absentia" removal order of which he had no knowledge. Does due process permit ICE to re-detain him without any pre-deprivation hearing or other process? Because due process cannot allow for such conduct, the Court's temporary restraining order should remain in place and Respondents' Motion to Dissolve should be denied.

* * *

On Monday afternoon, masked ICE agents arrested Petitioner in a shopping center in downtown Napa. They took him to the ICE office in downtown San Francisco, where he made a brief call to his wife, Alma, and then he was sent south, eventually to detention in Bakersfield. *See* Declaration of Petitioner (Ex. A).[1] Petitioner received no hearing before he was deprived of his liberty. He received no process. He did not know that there was a removal order entered against him. Ex. A. Petitioner does not read or write; he can only read and sign his name. Ex. A. When he first entered the country and was detained, ICE issued him a Notice to Appear, but he did not understand when or where to go. Ex. A. As noted in his declaration, he was not aware of the missed hearing, nor was he aware that a removal order had been entered against him. Ex. A. As recently as 2023, Petitioner sought assistance from a lawyer to understand his legal situation, but he was told that no records were found. Ex. A. Petitioner did not even know his A-number. Ex. A.

The first time Petitioner learned about this removal order was this week, when ICE arrested him while he was in the parking lot of a bank in Napa. Ex. A. For twenty years, this removal order has existed completely unbeknownst to Petitioner. Meanwhile, Respondents knew of this order. They knew that Petitioner was still in the country. They did not provide him

[1] Citations refer to the Declaration of Counsel (Abel Decl.) and to the Exhibits attached thereto.

with notice of the removal order. The order itself, which was attached to Respondents' court filing, does not indicated that it was mailed to Petitioner at any address or mailed at all. Now that Petitioner has learned about this removal order, he is in the process of filing a Motion to Reopen—an immigration court procedure that will entitle him to a stay of removal.[2]

Respondents' Motion to Dissolve the Temporary Restraining Order should be denied because their arguments do not disturb the fundamental due process concerns that formed the basis of Petitioner's requested relief. In their Motion, Respondents do not dispute that Petitioner was detained at the border and then released. They do not dispute that this release necessarily entailed an assessment that he was neither a danger nor flight risk. They do dispute that the release implicates a due process, but their contention is contrary to governing law. The crux of their claim is that an "in absentia" removal order from twenty years ago vitiates Petitioner's due process rights.

But Respondents' argument is deprived of force by the fact that Petitioner did not know of this removal order. Ex. A. (Nor did counsel. Decl. of Counsel.) Nor can Respondents show that there was legally sufficient notice to him of the order. Furthermore, Respondents have no explanation for why they allowed Petitioner to live for two decades in the United States, all the while knowing where he was, without informing him of this removal order or moving to execute it.

Had they taken the simple step of informing him of this removal order, they could have given him the opportunity to file a motion to reopen and, thus, resolve the underlying issues in his immigration case. Had they scheduled a pre-deprivation hearing, at which they provided him with notice of the removal order, they could have addressed the due process concerns. Had they provided access to counsel in the process of the arrest and re-detention—or shared relevant documents prior to their pending filing—they could have facilitated the gathering and presentation of factual and legal arguments. Instead, they chose to detain him and move him as

[2] 5.9 - Motions to Reopen In Absentia Orders, https://www.justice.gov/eoir/reference-materials/ic/chapter-5/9.

quickly as possible outside of the judicial district in which he resides. Respondents' choices and actions created a fast-moving, emergency situation that required a habeas petition and application for emergency relief.

Petitioner respectfully asks this Court to deny Respondents' motion and to adhere to the existing briefing schedule on the Preliminary Injunction.

1. Petitioner had no knowledge of the in absentia removal order.

Until his arrest this week, Petitioner did not know that he had been ordered removed. Ex. A. This lack of knowledge is a legal basis for a Motion to Reopen in immigration court and it is grounds for a stay of removal. *See* Footnote 2, *supra*. Now that Petitioner knows of his removal order, he is in the process of filing the Motion to Reopen. Abel Decl.

This raises a central flaw in Respondents' position. They claim that a removal order from 20 years ago destroys the liberty interest that was created when Petitioner was released from detention. But that presupposes that the removal order complied with due process and immigration law. The very nature of ordering a person removed *without their knowledge* raises the deepest concerns about due process. Respondents elide discussion of this in their filing.

Respondents fault Petitioner for not mentioning the removal order in his habeas and TRO filings. But it is obvious why he did not mention it: Petitioner was not aware that he had been removed. Ex. A. Counsel was not aware of this removal order, either, and had no ability to search for it, because Petitioner did not know his A-number. Abel Decl. For twenty years, Respondents were apparently aware of this removal order but took no action to alert Petitioner to it—or to execute it. Only this morning, as exhibits to their filings, did Respondents share the paperwork that forms the basis for their motion. Abel Decl.

This paperwork raises obvious concerns about the order. Respondents provide a copy of the Notice to Appear from 2006 and the "in absentia" removal order from 2006. They also provide a copy of the I-213. The removal order does not indicate that it was served on Petitioner. It does not have a mailing address or any proof that it was sent to him in another manner. The I-213 states that Petitioner was told that he could provide an address "so that notification of hearing or other correspondence" could be sent to him. ECF No. 9-2 at 3. Petitioner states that "I believe I provided my friend's address to immigration officers, but I do not remember for certain." Ex. A at ¶ 4. But there is no indication of what address the government had for him or where they sent the order.

Moreover—and of critical importance—Petitioner is illiterate. He knows how to read and sign only his name, nothing else. When he was being released from detention on his own recognizance, back in 2006, he heard the detention officer say something about "court," a word he recognized because it sounded similar in Spanish and English. Ex. A. But when he asked when the court appearance would be, "The officer held up six fingers, which, to my understanding, meant that my court date would be six months later. The officer did not tell me where the hearing would be." Ex. A. More recently, when he went to an immigration attorney in 2023 to ask about his immigration case, he did not learn about this removal order: "The lawyer did a search for my records and told me that no records appeared, which suggested that I was never given a court date. At this point, I did not know that I had a removal order." Ex. A.

The key point is that Petitioner did not know about this 20-year-old order. The government has not established that he knew about it. And Respondents opted not to engage in any process to inform him of this removal order. Instead, they opted to re-detain him on a public street in Napa on Monday, twenty years after the order entered *in absentia*. Respondents chose not to engage in any orderly process of holding a pre-deprivation hearing at which Petitioner could be informed of the factors that supposedly justify his detention. Instead of process, they chose detention. Now, they complain that Petitioner's emergency response to this detention lacked sufficient information—information that they alone possessed. This illustrates the very essential nature of a pre-deprivation hearing in the structure of due process.

2. Petitioner's Procedural Due Process rights were violated by the re-detention without process.

Petitioner has a procedural due process right to be free from the type of re-detention that Respondents undertook on Monday. This was at the heart of the Court's analysis on the

Temporary Restraining Order and it is not undermined by Respondents' revelation that he had a removal order. The fact remains that Petitioner was detained shortly upon crossing the border, he was assessed not to be a danger or a flight risk, and he was released on his own recognizance. This was back in 2006. Twenty years ago, Petitioner did not attend his first (and only) immigration court hearing—a hearing which he did not know about. Ex. A. The immigration judge promptly entered an order of removal. But Respondents did not move to detain Petitioner back then. And Petitioner did not know about the order, so did not seek to reopen it. Ex. A. For all these years, the government was well aware of the full picture. They knew about the *in absentia* order. They knew that it had not been executed. Year after year, decade after decade, Respondents knew about all the relevant facts and yet decided not to re-detain Petitioner, not to provide him notice of his removal order, and, effectively, to allow him to continue to enjoy the liberty interest that they created back in 2006. This lack of action on their part created a due process interest for Petitioner. And it could not be taken away without a hearing.

A throughline in all the procedural due process case law, both immigration and criminal, is that the *fact* of liberty creates a constitutional right. The fact that Respondents allowed Petitioner to remain free for two decades created a valuable liberty interest. This valuable liberty interest cannot be taken away without a pre-deprivation hearing. The logic of this position is confirmed by Supreme Court and circuit cases. For example, a prisoner who is accidentally released from prison cannot be returned to prison without a pre-deprivation hearing. *Hurd v. District of Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017); *Gonzalez-Fuentes*, 607 F.3d at 887; *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (noting that due process considerations support the notion that an inmate released on parole by mistake, because he was serving a sentence that did not carry a possibility of parole, could not be re-incarcerated because the mistaken release was not his fault, and he had appropriately adjusted to society, so it "would be inconsistent with fundamental principles of liberty and justice" to return him to prison) (internal quotation marks and citation omitted).

Likewise, a court in this district recently held that an immigrant who had never been detained at all, nonetheless had a due process right to a pre-deprivation hearing before she could be arrested. As the court explained, the basis for the procedural due process interest was the decision on the part of the government *not* to detain her over many years: "Although the government did not detain and then release her, *it made a decision not to detain her* in the first place; Petitioner thus has the same liberty interest in her continued freedom as an individual initially detained." *Kharitonova v. Albarran*, No. 3:26-cv-01362-JSC, 2026 U.S. Dist. LEXIS 39213, at *6 (N.D. Cal. Feb. 25, 2026) (emphasis added). Similarly, even those on post-removal Orders of Supervision cannot be re-detained without process. The constitution's due process clause does not dissolve with the entry of a removal order, especially not a removal order that was issued "in absentia" to a man who cannot read and that Petitioner never knew about.

Courts in this circuit and elsewhere have found procedural due process rights for individuals in similar circumstances to Petitioner. For example, in *Ordoñez v. Bondi*, No. 2:25-cv-02356-JHC-TLF, 2025 U.S. Dist. LEXIS 269568 (W.D. Wash. Dec. 19, 2025), the court dealt with a noncitizen who was ordered removed in absentia in 2020 for failing to appear at an immigration hearing. *Id.* at *7-8. There, as here, the noncitizen had originally been released on his own recognizance, but the government argued that "because he failed to appear for an immigration hearing and a final order of removal was issued *in absentia*, the Government was entitled to re-detain petitioner without any additional notice or process." *Id.* The magistrate judge, whose Report & Recommendation was adopted, applied the due process analysis and ordered the noncitizen's immediate release. The court in *Ordoñez v. Bondi* considered and rejected the very same arguments that Respondents make in the Motion to Dissolve:

> Even if petitioner's arrest and detention was motivated by the final removal order issued in absentia, it does not necessarily follow that petitioner can be detained without a hearing. Even if the Government might believe it has a valid reason to detain petitioner, this does not eliminate its obligation to effectuate the detention in a manner that comports with due process. *See Guillermo M.R. v. Kaiser*, 791 F.Supp.3d 1021, 1037-38, No. 25-cv-05436-RFL, (N.D. Cal. July 17, 2025) . . . *E.A. T.-B.*, 795 F. Supp. 3d at 1320-21 . . . .

> The Government argues because petitioner is subject to a final order of removal issued in absentia, he was not entitled to a hearing under the relevant statutes and regulations before he was re-detained and that he is properly detained under 8 U.S.C. 1231 because there is a final order of removal in petitioner's case. But even if a particular statute or regulation does not require a pre-arrest hearing in these specific circumstances, this does not mean such a hearing is not required by Due Process. *See, e.g.*, *Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 U.S. Dist. LEXIS 167842, 2020 WL 5517277, at *2 (N.D. Cal. Sep. 14, 2020) (noting that respondents' argument that petitioner is not entitled by statute or regulation to a pre-arrest hearing does not bear on whether a hearing is required for procedural due process).

Id. at 11-12 (cleaned up). Indeed, the *Ordoñez v. Bondi* decision goes on to note that "the Government presents no evidence that petitioner was provided with the final order of removal" or "notice of the revocation of his release based upon the final order of removal." *Id.* at 13. In its extended analysis, the court also addresses the many ways in which the government's conduct, even after the most recent re-detention, did not comport with 8 U.S.C. § 1231's requirements. *Id.*

Another example of applying procedural due process to someone with an in absentia removal order can be seen in *Estrada-Samayoa v. Cruz*, where the court dealt with the case of person who was released on his own recognizance in 1998 and then ordered removed in absentia in January 1999—a fact pattern similar to Petitioner's case. *Estrada-Samayoa v. Cruz*, No. 1:25-CV-01565-EFB, 2026 WL 445347, at *1 (E.D. Cal. Feb. 17, 2026). The court in that case applied the *Mathews* test to evaluate the liberty interest that the noncitizen created over the years since his in absentia order. In that case, the noncitizen asserted improper notice but he did learn about the removal order years before ICE re-detained him. In Petitioner's case, he had no knowledge of the removal order and, thus, no ability to challenge it until ICE arrested him and served him with the order. Ex. A. The court's due process analysis in *Estrada-Samayoa* is instructive, in that it looks at the years and years of constructive, pro-social contacts that the noncitizen accumulated during his time in the country—*even years after he was ordered removed.* The fact that of a removal order existed did not somehow terminate the due process interests. *See also Donis v. Chestnut*, No. 1:25-CV-01228 JLT SAB, 2025 U.S. Dist. LEXIS 200565, at *4 (E.D. Cal. Oct. 9, 2025) (ordering immediate release, on procedural due process grounds, for noncitizen who was detained in 2006, released on his own recognizance, ordered removed in absentia in 2006 and then re-detained by ICE "[a]lmost two decades after an IJ ordered him removed in absentia.").

3. **Petitioner's Substantive Due Process rights were violated by the re-detention.**

In addition to his procedural due process rights, Petitioner has profound substantive due process right. As has been made abundantly clear, civil detention is not permitted without a showing that the noncitizen is either a danger or a flight risk. The government cannot show either danger or flight risk. Though the government mentions an arrest for DUI this past October, ECF No. 9 at 8-9, a search of the Napa County Superior Court records portal shows that this misdemeanor case is still pending and, indeed, that there is a motion to suppress the evidence in that case, Ex. B (Case Docket from Napa County). A mere arrest, which has not turned into a conviction, does not justify re-detention without process. Nor is Petitioner a flight risk. As his declaration in this filing and his wife's declaration in the TRO filings demonstrate, Petitioner is a committed family man who is integral to supporting his wife through her recovery from breast cancer and other illnesses. He is also the owner of a small business that employees four people. He has deep ties to the community. He has been in the country for more than 20 years. He is not a risk to flee. Absent a danger or flight risk assessment, substantive due process prohibits the detention of a 57-year-old man in Petitioner's circumstances.

4. **Petitioner does not have a pending U-visa application.**

On today's date, counsel for Respondents called undersigned counsel's attention to an error in the habeas petition. Abel Decl. Undersigned counsel inadvertently stated that Petitioner had a pending U-visa. *See* ECF No. 1 at ¶ 7; Abel Decl. This was a drafting mistake on the part of undersigned counsel to file the Petition in an expedited manner. Petitioner, through undersigned counsel, regrets this error and wishes to correct the record to make clear that there is no pending U-visa application.

CONCLUSION

Twenty years ago, Respondents vested Petitioner with a valuable liberty interest when they released him from detention. He used that liberty interest to do all the pro-social things that due process is intended to protect: forming a family, contributing to the economy, enjoying life free from fear of violence. For nearly 20 years, the government has known about an in absentia removal order, but has never served this order on Petitioner nor taken action to execute it. All of a sudden, on Monday, ICE agents arrested Petitioner in downtown Napa and took away his liberty without any pre-deprivation hearing. This deprivation of liberty—without a hearing—violates procedural due process. Petitioner's detention also violates substantive due process. Because Petitioner never knew of this in absentia order, neither he nor counsel were able to include it in the habeas petition and temporary restraining order that resulted in his immediate release. But now that he knows of the removal order—and is in the process of moving to have it reopened—Petitioner believes that his arguments for emergency relief apply with the same force. He respectfully asks this Court to deny Respondents' Motion to Dissolve the Temporary Restraining Order and to proceed along the existing briefing scheduled for the Preliminary Injunction hearing.

Date: March 4, 2026

Respectfully Submitted,

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