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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

OSMAN A. AYALA, Petitioner, v. SERGIO ALBARRAN, *et al.*, Respondents,	No. 5:26-cv-03092-BLF **RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

Petitioner is not likely to succeed on the merits because he has not met his burden of providing good reason to believe that his detention is unlawful. Petitioner has a final order of removal, which was reinstated by the Department of Homeland Security ("DHS") On October 21, 2025. Therefore, he is subject to mandatory detention.

Petitioner is subject to regularly scheduled check-in appointments and missed their most recent appointment on February 13, 2026. As a result, U.S. Immigration and Customs Enforcement ("ICE") required Petitioner to appear at the San Francisco office on April 13, 2026. Petitioner was not told that ICE intended to arrest them at this appointment, and they did not. They sought, and received, from this Court a temporary restraining order ("TRO") to prevent their hypothetical future custody. A preliminary injunction at this stage exceeds the permissible scope of habeas relief and should be denied. If Petitioner is in fact detained at any future check-in and they claim that the arrest was improper, they can file a petition at that time, and the Court can then evaluate the basis for any detention.

Petitioner's motion should be dismissed for lack of jurisdiction. Petitioner lacks Article III standing because they have failed to allege any concrete, imminent injury. Additionally, this Court lacks jurisdiction to entertain the habeas petition as the Petitioner has not alleged that they meet the "in custody" requirement. In the alternative, the Court should not enter a preliminary injunction because Petitioner has failed to demonstrate that Petitioner is likely to suffer harm in the absence of preliminary relief. Petitioner has not "clearly demonstrated" that ICE is likely to arrest Petitioner at their future scheduled appointments. They do not meet the heavy burden required to obtain preliminary injunctive relief. They have not shown a likelihood of prevailing on the merits because the circumstances of any future detention, if it does occur, are not known, and accordingly there can be no determination at this juncture that any future detention would be unlawful. Petitioner has not shown that immediate and irreparable harm is *likely*, as they must.

II. FACTUAL BACKGROUND

Petitioner Osmin Antonio Ayala ("Petitioner") is a native and citizen of El Salvador who first entered the United States without inspection at or near Hidalgo, TX on March 28, 2019. Decl. of Deportation Officer Raymond Der ("Der Decl.") ¶ 5. On the same day, U.S. Customs and Border

Protection ("CBP") officers apprehended Petitioner. *Id.* On April 4, 2019, CBP processed Petitioner for Expedited removal pursuant to section 235(b)(1) of the Immigration and Nationality Act ("INA") [8 U.S.C. § 1225(b)(1)]. *Id.* ¶ 6, Ex. 1. On May 2, 2019, U.S. Citizenship and Immigration Services ("USCIS"), after conducting a Credible Fear interview and finding that Petitioner did not have a credible fear of persecution or torture in El Salvador, referred Petitioner's case to an Immigration Judge ("IJ") for review. *Id.*¶ 7, Ex. 2. On May 8, 2019, an IJ conducted a credible fear review, and affirmed USCIS's decision that Petitioner did not have a credible fear of torture or persecution in El Salvador. *Id* ¶ 8. The IJ returned the case to DHS for removal. *Id.*, Ex. 3. On July 25, 2019, ICE removed Petitioner from the United States from Laredo, TX, to El Salvador. *Id.* ¶ 9, Ex. 4.

On July 17, 2021, Petitioner re-entered the United States. On the same date, CBP encountered Petitioner in the Rio Grande Valley, Texas Border Patrol Sector and determined he had unlawfully entered the United States. *Id.* ¶ 10. CBP released Petitioner. *Id.* On or about November 24, 2021, ICE enrolled Petitioner in its Intensive Supervision Appearance Program ("ISAP"). *Id.* ¶ 11. On June 25, 2025 ICE placed Petitioner on an Order of Supervision ("OSUP") pursuant to INA § 241(a)(3) [8 U.S.C. § 1231(a)(3)]. *Id.* ¶ 12. On October 21, 2025, Petitioner reported to the San Francisco ERO Field Office pursuant to his OSUP requirements. *Id.* ¶ 13. ERO reinstated Petitioner's prior removal order pursuant to INA § 241(a)(5) [8 U.S.C. § 1231(a)(5)] and 8 C.F.R. § 241.8. *Id.* ¶ 13, Ex. 5. On November 12, 2025, ERO was alerted by ISAP that Petitioner had left his GPS zone. Petitioner told ISAP that he was making a delivery run to Nevada and had not informed his boss about the GPS zone. *Id.* ¶ 14. ISAP instructed Petitioner to report to the San Francisco ERO office for a violation follow-up upon his return to the San Francisco area. *Id.* On November 13, 2025, Petitioner reported to the San Francisco ERO office and was reminded that he needed to ger permission from ISAP prior to leaving the GPS zone, otherwise he would be taken into custody for non-compliance. *Id.* ¶ 15. ERO told Petitioner to report back to the ERO office on February 13, 2026. *Id.* On February 13, 2026, Petitioner failed to appear for his required check-in with ERO. *Id.* ¶ 16. Petitioner has not been detained since CBP released him in July 2021. *Id.* ¶ 17. Petitioner was scheduled for an ICE appointment on April 13, 2026. Dkt. No. 1 ¶ 10. Petitioner believed ICE was using this appointment to re-detain them. *Id.* ¶ 11.

Petitioner filed a petition for writ of habeas corpus on April 10, 2026, along with an *ex parte* motion for a temporary restraining order ("TRO"), seeking to enjoin Respondents from detaining Petitioner unless they provide a pre-deprivation hearing before a neutral adjudicator at which they show that there has been a material change in circumstances such that Petitioner is a danger or a flight risk. Dkt. No. 1 at 13. The request for TRO was more limiting, and Petitioner request that Respondents be enjoined from detaining Petitioner pending further order of this court. Dkt. Nos. 2 at 2; 2-2 at 11.

III. LEGAL STANDARD

A. The Preliminary Injunction Standard

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

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

B. Detention of Noncitizens Under 8 U.S.C. § 1231(a).

Congress enacted a multi-layered statute that provides for the civil detention of aliens pending removal. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). Where an individual falls within this scheme affects whether his detention is discretionary or mandatory, as well as the kind of review process available. *Id.* at 1057. ICE's authority to detain noncitizens while removal proceedings are pending is generally governed by 8 U.S.C. § 1226. *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). The default rule, Section 1226(a), "authorizes the Attorney General to arrest and detain an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 306 (quoting Section 1226(a)).

While Section 1226 governs the detention of a noncitizen whose removal proceedings are pending, this case concerns a different detention authority: 8 U.S.C. § 1231(a). Section 1231(a) governs the detention of a noncitizen who has been ordered removed from the country—an individual subject to a "final order of removal." *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 578 (2022); *Johnson v. Guzman Chavez*, 594 U.S. 523, 533 (2021). Section 1231(a)(2) provides that the government "shall detain" the noncitizen for a 90-day "removal period," the commencement of which can be triggered by various events in the noncitizen's proceedings. *See* 8 U.S.C. § 1231(a)(1)(B). Thereafter (the "post-removal period"), the noncitizen "may be detained beyond the [90-day] removal period" if, among other things, he is "inadmissible" (for example, because he reentered the country unlawfully, *see* 8 U.S.C. § 1182(a)(9)(C)), or removable on certain specified grounds, or if the government determines that he is "a risk to the community or unlikely to comply with the order of removal." *Id.* § 1231(a)(6); *Arteaga-Martinez*, 596 U.S. at 579; *Zadvydas v. Davis*, 533 U.S. 678, 688–89 (2001). A noncitizen detained beyond the removal period under Section 1231(a)(6) shall, if released, "be subject to [certain] terms of supervision." *Arteaga-Martinez*, 596 U.S. at 579.

However, Section 1231(a) does not permit indefinite detention; rather, the Supreme Court has held the government can detain noncitizens under Section 1231(a) only for "a period reasonably necessary to bring about that alien's removal from the United States"—presumptively six months. *Zadvydas*, 533 U.S. at 689. "After this 6–month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701; *see also* 8 C.F.R. § 241.13. Section 1231(a)(6) continues to authorize detention "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 at 701.

When removal is not reasonably foreseeable, continued detention is no longer authorized, but "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions." *Id.* at 700 (citing 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5).Continued detention and release during the post-removal period is governed by Post Order Custody Review ("POCR") Regulations. 8 C.F.R. § 241.4. The POCR regulations provide for periodic custody reviews by ICE, at which the noncitizen is afforded certain protections, "including the rights to receive written notice of the review, to submit information in writing to support release and to be assisted by any individual of his or her choosing in preparing or submitting information in response to the notice." *Diouf v. Napolitano*, 634 F.3d 1081, 1089–90 (2011) ("*Diouf II*").; 8 C.F.R. §§ 241.4(h), (k). In addition, as often as once every three months between annual reviews, the detainee may submit a written request for release consideration based on a showing of material change. 8 C.F.R. § 241.4(k)(2)(iii).

While Section 1231(a)(6) contemplates release pursuant to an order of supervision in appropriate cases, the POCR Regulations also authorize ICE to return to custody a noncitizen "who has been released under an order of supervision or other conditions of release who violates the conditions of release." 8 C.F.R. § 241.4(l)(1). Those regulations also require ICE to follow certain procedures when it seeks to revoke release. *See generally* 8 C.F.R. § 241.4(l). First, "the alien will be notified of the reasons for revocation of his or her release or parole," and "will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. § 241.4(l)(1). If the noncitizen is not released following the informal interview, the revocation determination is subject to a review process by the Headquarters Post-Order Detention Unit ("HQPDU") that includes a records review, an interview, "a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.4(l)(3). This process is ordinarily expected to commence within approximately three months after release is revoked, with annual custody reviews thereafter. *Id.*

As noted above, detention during the 90-day removal period is mandatory; there is no entitlement to a bond hearing or discretionary relief. Nor does Section 1231(a) provide for a bond hearing for the noncitizen to challenge his detention during the post-removal period. *See Guzman Chavez*, 594 U.S. at 526; *Arteaga-Martinez*, 596 U.S. at 581. Noncitizens detained in the Ninth Circuit were, until recently, were subject to a preliminary injunction imposed by the Court in *Aleman Gonzalez v. Barr*, 955 F.3d 762, 766 (9th Cir. 2020), *rev'd and remanded on other grounds sub nom. Garland v. Aleman Gonzalez*, 596 U.S. 543, (2022), which required individualized bond hearings before an immigration judge at which the government bears the burden of establishing that the noncitizen is a flight risk or will be a danger to the community for all noncitizens facing prolonged detention under section 1231(a)(6)—detention lasting six months and expecting to continue "more than minimally beyond six months." *See Diouf II*, 634 F.3d at 1086, 1092 n.13. The Supreme Court has since clarified that such periodic bond hearings are not statutorily required, *Arteaga-Martinez*, 596 U.S. at 581, and the injunction in *Aleman Gonzalez* has been vacated.[1]

IV. ARGUMENT

Petitioner cannot show a substantial likelihood of success on the merits because the Court lacks jurisdiction. Because Petitioner is required to show all four factors and Petitioner cannot demonstrate a substantial likelihood of success on the merits, the Court need not consider the remaining three factors in its analysis.

Federal courts may only adjudicate actual "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Article III gives rise to four justiciability doctrines: ripeness, standing, mootness, and political question. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Both standing and ripeness are lacking here.

A. Petitioner Lacks Standing For Prospective Injunctive Relief.

Petitioner must establish Article III standing to seek prospective injunctive relief. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013). That means they must show a future injury that is "imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

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[1] On February 3, 2026, the Court granted a Stipulation to Vacate Preliminary Injunction and Stay Case. *See Aleman Gonzalez, et al, v. Bondi, et al.*, 3:18-cv-1869, Dkt. No. 155. (N.D. Cal. Mar. 27, 2018).

Petitioner cannot make that showing.

Petitioner lacks standing because they have suffered no injury in fact but instead seek relief for conjectural or hypothetical injuries that they believe may occur at some point in the future. Petitioner's claims are not ripe because the events of which they complain have not occurred and may not occur as they anticipate or at all. Both standing and ripeness are required for the Court to adjudicate Petitioner's claims. Because those are lacking, Petitioner's claim is not likely to prevail or even reach a merits analysis before this Court.

An injury in fact requires "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972); *see also Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'").

In light of the facts that Petitioner has presented, therefore, they cannot establish that any future injury is imminent and reasonably certain. *See J.P. v. Santacruz*, No. 25-cv-1640, 2025 WL 2998305, at *4 (C.D. Cal. Oct. 24, 2025) (dismissing petitioner's challenge to "his future detention and/or arrest at another physical appointment" because petitioner "fails to present sufficient allegations or evidence of the threat of future injury to confer Article III standing"). Because the "alleged threat of future injury is too speculative and unripe," *id.*, at *4, Petitioner does not have standing before this Court.

B. This Court Lacks Jurisdiction to Entertain Petitioner's Habeas Petition

Federal courts have the statutory authority to grant writs of habeas corpus to individuals "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c) (3). "[A] plaintiff must plausibly allege all jurisdictional elements" for the Court to have subject-matter jurisdiction over a claim. *Brownback v. King*, 592 U.S. 209, 217 (2021). It is a jurisdictional requirement that "the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989). The Courts are assigned the role of neutral arbiters to decide the arguments presented to them by the parties, not to craft arguments on a party's behalf. *See U.S. v. Sineneng-Smith*, 590 U.S. 371, 376 (2020).

Here, Petitioner makes no allegations that they meet the "in custody" requirement for this Court to entertain the habeas petition. *See* 28 U.S.C. § 2241(c)(3). As such, "it appears from the application that the applicant or person detained is not entitled" to issuance of a writ of habeas corpus. 28 U.S.C. § 2243.

Additionally, Petitioner's challenge of ICE's Notice of Reinstatement is both meritless and outside the scope of habeas. *See* Dkt. No. 1 ¶ 12. Contrary to Petitioner's assertion, nothing in the regulations requires DHS to serve the prior removal order on a noncitizen subject to reinstatement. *See* 8 C.F.R. § 241.8. Section 241.8(a)(1) requires an immigration officer to determine "[w]hether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien." 8 C.F.R. § 241.8(a)(1). If the officer determines that the noncitizen is subject to an order of removal, then "he or she shall provide the alien with written notice of his or her determination." 8 C.F.R. § 241(b). Additionally, this Court lacks jurisdiction to hear challenges to Petitioner's reinstatement of his expedited removal order. *See Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1139 (9th Cir. 2008). While the Court "does retain some limited jurisdiction to adjudicate a collateral attack on an underlying expedited removal order that has been reinstated", that jurisdiction is expressly limited "to habeas petitions alleging that the petitioner is not an alien or was never subject to an expedited removal order." *Id.* (citing 8 U.S.C. §§ 1252(a)(2)(A), 1252(e).

Here, ICE determined Petitioner was subject to a prior order of removal and obtained it. *See* Der. Decl., Ex. 1. ICE then served the Notice of Intent/Decision to Reinstate Prior Order on Petitioner on October 21, 2025. *Id.,* Ex. 5. As such, all the requirements of 8 C.F.R. § 241.8 were met regarding Petitioner's reinstated removal order. Additionally, Petitioner is not alleging that he is not an alien nor subject to an expedited removal order, so this Court lacks jurisdiction to hear Petitioner's challenge to the reinstatement.

C. Habeas Relief Is Both Inappropriate and Premature Because Petitioner Is Challenging Their Hypothetical Future Detention.

Habeas relief is an appropriate request when an individual is detained and requesting release from that detention. U.S. Const. Art. 1, § 9, Cl. 2; 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody "); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S.

103, 117–18 (2020) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [] the traditional function of the writ is to secure release from illegal custody."). An individual does not need to be in actual physical custody to seek habeas relief; the "in custody" requirement may be satisfied where an individual's release from detention is subject to specific conditions or restraints. *See Dow v. Cir. Ct. of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (holding that release subject to mandatory attendance at alcohol rehabilitation classes constituted "custody" for habeas purposes). The Supreme Court has "interpreted 'custody' to encompass circumstances in which the state has imposed 'significant restraints on [a] petitioner's liberty.'" *Munoz v. Smith*, 17 F.4th 1237, 1241 (9th Cir. 2021) (quoting *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)).

Courts in this Circuit are generally split as to whether release conditions imposed by ICE, such as enrollment in ISAP and the requirement to wear an ankle monitor, meet the requirements of "custody" for purposes of habeas relief. *See Harrington v. Albarran, et al.,* No. 26-cv-1889, 2026 WL 800113, at *4 (N.D. Cal. Mar. 23, 2026) (finding such conditions satisfy the definition of "custody"); *A.B.D. v. Wamsley*, No. 6:25-cv-2014, 2026 WL 178306, at *8 (D. Or. Jan. 22, 2026) (finding the "intensive supervision" measures constitute custody from which petitioners may be granted habeas relief); *but see Ba v. Lyons*, No. 3:25-cv-2871, 2026 WL 218936, at *1 (S.D. Cal. Jan. 27, 2026) (holding that requirements to "wear a GPS monitoring ankle bracelet, attend frequent in person office visits, and not travel outside 75 miles without permission" did not constitute custody).

If the Court were to construe Petitioner's facts as to present the argument that he is currently "in custody" for purposes of habeas relief, his Petition still fails. This habeas petition does not purport to challenge that custodial arrangement or secure their release from any present "custody." Petitioner is not in physical custody and is not challenging whatever restraints ICE has currently imposed. Rather, Petitioner seeks an injunction to prevent their hypothetical future arrest and the possibility of future detention. *See Maleng*, 490 U.S. at 490–91("the habeas petitioner be 'in custody' under the conviction or sentence *under attack* at the time his petition is filed.") (emphasis added). The habeas relief that they seek is not connected to the immigration custody on which they base their petition. Thus, Petitioner does not seek a remedy that sounds in habeas. *See J.P. v. Santacruz, et al.*, No. 25-cv-1640, 2025 WL 2633198 (C.D. Cal. Aug. 27, 2025). In *J.P.*, the court held that even assuming that ICE's order of supervision ("OSUP") satisfied the "in custody" requirement, "Petitioner fails to adequately demonstrate he is challenging his confinement." *Id.* at *3. The court specifically noted that challenges to *future* detention did not fall within habeas jurisdiction:

> Here, Petitioner does not challenge the lawfulness of his alleged custody. . . . Rather, Petitioner challenges his *potential* confinement absent a pre-deprivation hearing before a neutral adjudicator. . . . Petitioner's concern about re-detention stems from Respondents indication that they *may possibly* re-detain Petitioner at a future in-person appointment that the ISAP scheduled. . . . Based on the record in this case, the court would not find that Petitioner adequately demonstrates a challenge to his custody.

Id. Petitioner's claim here similarly challenges his hypothetical future confinement, not their present "custody," and therefore habeas jurisdiction is inappropriate.

Petitioner here does not know if they will be detained at their upcoming appointments. They are apparently unaware of any precipitating event that would cause ICE to re-detain them. *Cf. Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021, 1028 (N.D. Cal. 2025) (habeas petition filed after petitioner was instructed to go in for a "case review" with ICE, where he was advised that he would be detained).

This does not provide the basis for the extraordinary remedy of a preliminary injunction. Without any knowledge that their arrest is likely or imminent, Petitioner is seeking an insurance policy from the Court to guarantee that they will not be detained. That is not the purpose of a habeas petition, and it is not the purpose of a preliminary injunction. Thousands of individuals are subject to orders of supervision and are required to report to ICE on a periodic basis as part of those orders. If each such individual were entitled to bring a habeas petition in advance of every such appointment and secure a temporary restraining order to prevent ICE from undertaking hypothetical future actions, this would expand the Court's habeas jurisdiction into virtually unlimited territory and impose unreasonable burdens on both the Court and Respondents. The implicit requirement that ICE must in all instances inform individuals in advance of their check-in appointments what will transpire at those appointments, on penalty of being enjoined from undertaking hypothetical enforcement actions, is unwarranted, and would unduly interfere with ICE's enforcement mission. The sheer volume of check-ins every day, combined with the potential risk to officer safety, risk of flight of certain individuals, and need to maintain enforcement discretion and secrecy in some instances, makes any advance disclosure requirement both unreasonable and potentially dangerous.

In sum, this petition is premature. If Petitioner is in fact detained at some hypothetical future appointment and they believe that the detention is unwarranted, they can file a petition and TRO motion at that time. If the Court agrees that the standard for a TRO has been met, based on the actual facts presented by the arrest, it can issue an appropriate TRO.

D. Petitioner Is Unlikely To Succeed On The Merits Of His Claim

1. Petitioner Is Not Likely to Succeed On His Unlawful Detention Claims

Petitioner is not likely to succeed on his various unlawful re-detention claims because the government has explicit statutory authority to re-detain him for the purposes of effectuating his removal.

The statute governing detention in this case, 8 U.S.C. § 1231, expressly permits an alien like Petitioner, who is subject to a reinstated removal order, to be detained *See* 8 U.S.C. § 1231(a)(6). The constitutional limit to this detention is set forth in *Zadvydas*. *See also Guzman Chavez,* 594 U.S. at 535.

The Supreme Court has made clear that "there is no plausible construction of the text of section 1231(a)(6) that requires the Government to provide bond hearings before immigration judges after six months of detention, with the Government bearing the burden of providing by clear and convincing evidence" that a detained noncitizen poses a flight risk and a danger to the community. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 581 (2022). What applies to immigration judges certainly applies no less to district court judges.

Just as § 1231(a)(6) "does not address or even hint at the requirements," for a bond hearing following the six-month mark of immigration detention, *id.* at 580–81 (quotation omitted), it similarly does not require a hearing before immigration authorities can re-detain an alien who was previously on an order of supervision pending removal. *See* 8 U.S.C. § 1231(a)(6). Such an order would contradict the plain language of 8 C.F.R. § 241.8, which governs reinstatement of removal orders, and would deprive immigration authorities of their operational discretion and regulatory authority to take the actions necessary to effectuate the deportation of aliens illegally in the United States.

ICE's POCR regulations similarly provide that a noncitizen may be returned to custody if he violates the conditions of release. 8 C.F.R. § 241.4(l).[2] In these circumstances, Petitioner's re-detention would be warranted under Section 1231(a), as interpreted by the Supreme Court in *Zadvydas*, and by the POCR regulations. Neither the statute nor the regulations contemplate a pre-detention hearing for a noncitizen who has violated a term of his conditions of release. "The law does not require a hearing before arrest" under an immigration detention statute where a noncitizen previously released from ICE custody was rearrested by ICE following a criminal arrest for a gang-related assault. *U.S. v. Cisneros,* No. 19-cr-280, 2021 WL 5908407, at *4 (N.D. Cal. Dec. 14, 2021).

A noncitizen seeking to challenge ICE's determination is not without procedural protections. ICE's POCR regulations set forth detailed procedures that ICE must follow when it seeks to return a noncitizen to custody for violation of the conditions of release. 8 C.F.R. § 241.4(l). Specifically:

- "Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole." 8 C.F.R. § 241.4(l)(1)
- "The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. § 241.4(l)(1).
- The revocation will be subject to a review process commencing "with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.4(l)(3).

Justice Sotomayor, in her Statement Respecting the Disposition of the Application in *Noem v. Abrego Garcia*, specifically identified 8 C.F.R. §241.4(l) as part of the "[f]ederal law governing detention and removal of immigration" that continues to be binding on ICE. *Noem v. Abrego Garcia*, 145 S. Ct. 1017, 1019 (2025) (Statement of Sotomayor, J.). Describing these requirements, Justice Sotomayor wrote that "in order to revoke conditional release, the Government must provide adequate notice and 'promptly' arrange an 'initial informal interview . . . to afford the alien an opportunity to respond to the reasons for the revocation stated in the notification." *Id.*

But significantly, these procedures do not require any pre-revocation hearing. And logically so: detention in these circumstances is a resumption of post-removal-period detention under Section 1231(a), which is constitutionally permitted without a pre-detention hearing. For this Court to find in favor of Petitioner on the merits, it would need to conclude that the procedural protections to which

Petitioner would be entitled under 8 C.F.R. §241.4(l) are constitutionally insufficient—essentially a finding that the regulation is facially unconstitutional. In failing to discuss or even acknowledge this regulation in his habeas petition, Petitioner has certainly not established as much. Respondents are aware of no case, in this District or elsewhere, so holding.[3] And Justice Sotomayor's statement in *Abrego Garcia* signals just the opposite: her citation to 8 C.F.R. § 241.4(l) implies approval of these procedural protections since her description of the regulation noticeably lacks any suggestion that these procedures are insufficient or that an extra-regulatory pre-revocation hearing before an immigration judge would be constitutionally required.

In short, the Supreme Court has held that detention of noncitizens subject to a final order of removal under 8 U.S.C. §1231(a)(6) is constitutional, without any pre-detention process. It has also acknowledged that noncitizens who violate a condition of their release should be re-detained. And if ICE were to return Petitioner to custody for having violated a condition of his release, the existing regulatory process would provide him with a meaningful opportunity to be heard to prevent erroneous deprivation. The absence of any additional process is a policy decision, not a constitutional defect. The Court should decline Petitioner's invitation to write an additional procedural step into the existing process.

The Due Process Clause does not prohibit Petitioner's detention.[4] Although the Fifth Amendment entitles aliens to due process of law, the Ninth Circuit interprets the Due Process Clause "consistent with longstanding precedent recognizing that the process due aliens must account for the

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[3] *See McSweeney v. Warden of Otay Mesa Det. Facility*, No. 3:25-cv-2488, 2025 WL 2998376, at *7 (S.D. Cal. Oct. 24, 2025) ("Both [8 C.F.R.] § 241.4 and § 241.13 were intended 'to provide due process protections to [noncitizens] following the removal period as they are considered for continued detention, release, and then possible revocation of release.'") (quoting *Orellana v. Baker*, Civil Action No. 25-1788, 2025 WL 2444087, at *6 (D. Md. Aug. 25, 2025)); *Alva v. Kaiser*, No. 25-cv-6676, 2025 WL 2419262, at *3–5 (N.D. Cal. Aug. 21, 2025) (holding that when a noncitizen released on OSUP is re-detained years later, the noncitizen is entitled to a pre-deprivation hearing prior to detention due to an accrued liberty interest, but failing to address due process implications of 8 C.F.R. § 241.4); *cf. Tiraturian v. Bondi*, No. 5-25-cv-3239, 2025 WL 4061563, at *2 (C.D. Cal. Dec. 19, 2025) (holding revocation of OSUP in violation of the regulatory safeguards amounts to a Fifth Amendment due process violation); *Rokhfirooz v. Larose*, No. 25-cv-2053, 2025 WL 2646165, at *4 (S.D. Cal. Sept. 15, 2025) (granting a habeas petition and ordering the petitioner's release where the Government failed to comply with 8 C.F.R. § 241.13); *but see Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021, 1034 (N.D. Cal. 2025) (finding extra protections needed over 8 C.F.R. § 241.4 when Petitioner was previously released on an *Aleman Gonzalez* bond by an IJ).

[4] In *Arteaga-Martinez*, the Supreme Court declined to decide whether a bond hearing is constitutionally required if detention is prolonged under § 1231(a)(6). *Arteaga-Martinez*, 596 U.S. at 583.

government's countervailing interests in immigration enforcement – considerations that do not apply to U.S. citizens." *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1205-06 (9th Cir. 2022). It is well-established that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003). This is true because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government, which are core sovereign powers." *Id.* To the extent that Petitioner asks this Court to apply Due Process rights afforded to incarcerated United States citizens to him, the Supreme Court has expressly stated that those precedents do not apply.[5] *Rodriguez Diaz*, 53 F.4th at 1205-06.

2. Petitioner Has Not Met His Burden to Show Likely Irreparable Harm Without Immediate Injunctive Relief

Petitioner has not articulated an irreparable harm that can only be remedied with immediate injunctive relief. The fact that ICE has operational discretion to detain Petitioner based on the reinstated removal order is not extraordinary—rather, it is an authorized part of the removal process. Immigration laws have long authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens pending removal. *Demore*, 538 U.S. at 523–26. "Detention is necessarily a part of [the] deportation procedure." *Carlson v. Landon*, 342 U.S. 524, 538 (1952); *see Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.").

3. The Balance of Equities and Public Interest

When the government is a party, the third and fourth preliminary injunction factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "The government's interest in

[5] *Young v. Harper*, 520 U.S. 143 (1997) (Dkt. No. 2 at 14); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (Dkt. No. 2 at 14-15); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (Dkt. No. 2 at 14-17, 19); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010) (Dkt. No. 2 at 15, 17); *Hurd v. Dist. of Columbia*, 864 F.3d 671 (D.C. Cir. 2017) (Dkt. No. 2 at 13, 17); *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (Dkt. No. 2 at 15); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985) (en banc) (Dkt. No. 2 at 16-17); *Zinermon v. Burch*, 494 U.S. 113 (1990) (Dkt. No. 2 at 16); *Youngberg v. Romero*, 457 U.S. 307 (1982) (Dkt. No. 2 at 17); *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984) (Dkt. No. 2 at 17); *United States v. Knights*, 534 U.S. 112 (2001) (Dkt. No. 2 at 17); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (Dkt. No. 2 at 17); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (Dkt. No. at 18).

efficient administration of the immigration laws" is "weighty," and "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Further, the government's interest in protecting the public and preventing deportable noncitizens from fleeing is strong and compelling. See, e.g., *Rodriguez Diaz*, 53 F.4th at 1208 (The government's interests in the prompt execution of removal orders are "interests of the highest order that only increase with the passage of time" and the "risk of a detainee absconding also inevitably escalates as the time for removal becomes more imminent."). The government's interest in deporting Petitioner and protecting the public in the meantime, is compelling in this case, given his prior removal order and illegal reentry. These interests outweigh any interest Petitioner may have in continuing on release for whatever limited time he has left before being removed from the United States.

Moreover, months long court delays in getting pre-deprivation hearings even scheduled – *see Guillermo M.R. v. Kaiser*, 3:25-cv-5436, Dkt. No. 39 (N.D. Cal. Jun. 29, 2025) ("[O]n August 12, 2025, the Immigration Court granted the motion of Respondent Department of Homeland…to schedule a pre-deprivation bond hearing for Petitioner. The hearing was scheduled for January 20, 2026.") – means that the imposition of a pre-deprivation hearing requirement could functionally forever enjoin Petitioner's removal.

4. Under The Traditional *Mathews* Factors, No Additional Process Is Warranted Here

Zadvydas establishes that detention under Section 1231(a)(6) without any pre- or post-custodial bond hearing is constitutionally permissible. The Court in *Arteaga-Martinez* reaffirmed this basic framework of Section 1231(a)(6) detention, roundly rejecting any attempt to engraft an extra-statutory bond requirement onto the clear statutory language. Although Petitioner urges this Court to evaluate this case under the traditional *Mathews* factors, there is no need to undertake a *Mathews* analysis here, where the Supreme Court's jurisprudence and other case law make clear that no additional process is necessary. Indeed, the Supreme Court has *never* utilized the *Mathews* multi-factor "balancing test" in addressing due process claims raised by noncitizens held in civil immigration detention, despite multiple opportunities to do so since the Supreme Court's *Mathews* decision in 1976. *See Rodriguez Diaz*, 53

F.4th at 1206 ("[T]he Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*.") (citations omitted); *id.* at 1214 ("In resolving familiar immigration-detention challenges, the Supreme Court has not relied on the *Mathews* framework.") (Bumatay, J., concurring). Nor has the Ninth Circuit embraced the *Mathews* multi-factor "balancing test." Indeed, while leaving open the question of whether the *Mathews* test applies to a constitutional challenge to immigration detention, *see Rodriguez Diaz*, 53 F.4th at 1207, the Ninth Circuit instead has emphasized that "*Mathews* remains a flexible test that can and must account for the heightened governmental interest in the immigration detention context." *Id.* at 1206.

In the event that the Court elects to analyze Petitioner's claim under *Mathews*, the Court should find that the *Mathews* factors favor the Government. Under *Mathews*, the Court considers 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. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). All three factors weigh against the additional process requested here.

(i) Petitioner Has No Heightened Liberty Interest in His Conditional Release

Respondents recognize the "weighty liberty interests implicated by the Government's detention of noncitizens." *Reyes v. King*, No. 19-cv-8674, 2021 WL 3727614, at *11 (S.D.N.Y. Aug. 20, 2021). However, Petitioner's interest in his liberty *generally* does not mean that he possesses a separate or heightened liberty interest in the continuation of his conditional release.

First, as a general matter, Petitioner's liberty interest is reduced by the fact that he is a noncitizen subject to a final order of removal. "The recognized liberty interests of U.S. citizens and aliens are not coextensive: the Supreme Court has 'firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.'" *Rodriguez Diaz*, 53 F.4th at 1206 (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). As the Supreme Court has explained, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80. Indeed, the Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523.

Second, Petitioner's conditional release was always subject to conditions of release, and he knew that he could be re-detained if he violated those conditions. The circumstances that could lead to the revocation of Petitioner's release were both foreseeable and within his control. From the day he was released, therefore, there could be "no doubt" that Petitioner could be returned to custody in these circumstances. *See Zadvydas*, 533 U.S. at 700. Accordingly, Petitioner cannot claim that the government promised him ongoing freedom or that he reasonably believed he would remain at liberty even if he violated his conditions of release. *Cf. Uc Encarnacion v. Kaiser*, No. 22-cv-4369, 2022 WL 9496434, at *3 (N.D. Cal. Oct. 14, 2022) (holding released noncitizen had a reduced liberty interest where he "always knew that his release was subject to appellate review"). The government recognizes that any form of detention will implicate an individual's liberty interests, and that Petitioner, like virtually everyone subject to detention, has personal reasons for wanting to remain out of custody. But the Constitution does not require the government to acquiesce to an individual's unreasonable expectations.

(ii) The Existing Procedures Are Constitutionally Sufficient

Turning to the second *Mathews* factor, the risk of a constitutionally significant deprivation of Petitioner's liberty here is minimal. First, as a general rule, noncitizens have no right to a hearing before an immigration judge *before* they are detained under Section 1231(a)(6). The constitutionality of that provision—which, as interpreted by the Ninth Circuit, permits detention without any bond hearing for six months, is well established.

Second, as described above, Petitioner will have an opportunity to respond to the reasons for the revocation at an initial informal interview, which will be held "promptly" after his return to custody, and a second interview, together with a custody review that will include a final evaluation of any contested facts relevant to the revocation, approximately three months after release is revoked. 8 C.F.R. §241.4(l). This procedure provides both a timeline for the review of Petitioner's detention and an opportunity for Petitioner to challenge his detention in the near future.[6]

Third, Petitioner would be entitled to a 90-day and 180-day custody review. 8 C.F.R. § 241.4(k).

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[6] The regulatory provisions cited at the hearing, 8 C.F.R. § 241.13(d)(1) and (j), address requests to review the separate issue of whether there is a significant likelihood of removing a detained noncitizen in the reasonably foreseeable future. Because it is the decision to revoke Petitioner's release that is at issue here, the relevant regulatory provision is 8 C.F.R. § 241.4(l).

In connection with the review, a detainee would have the right "to receive written notice of the review, to submit information in writing to support release and to be assisted by any individual of his or her choosing in preparing or submitting information in response to the notice." *Diouf II*, 634 F.3d at 189 (citing 8 C.F.R. § 241.4(h)(1)–(2)). Thereafter, Petitioner would be entitled to annual custody reviews, and may additionally request custody review as often as once every three months upon a showing of material change in circumstances. 8 C.F.R. § 241.4(k)(2)(iii).

Fourth, if Petitioner remains detained for a prolonged period of time, he would be able to file an individual habeas petition at that point if he believes that his continued detention without a hearing is constitutionally infirm.

In *Diouf II*, the Ninth Circuit considered whether the 90-day and 180-day custody review provide sufficient procedures to protect the liberty interests of individuals detained under Section 1231(a)(6). Recognizing that "[d]etention during [the first 180 days of confinement] certainly affects aliens' interests in freedom from confinement, and requires that adequate procedural safeguards be in place," the Court held that the process afforded by the initial 90-day review was sufficient to address any constitutional concerns under a *Mathews* analysis "given the relatively limited period of detention involved." *Diouf II*, 634 F.3d at 1091. Through the first 180 days, therefore, the Court concluded that "the process afforded by the DHS regulations is adequate." *Id.*

Diouf II recognized that a short period of detention under Section 1231(a)(6) without a bond hearing is not constitutionally problematic. The additional review that Petitioner would receive here under 8 C.F.R. § 241.4(l), as a noncitizen subject to re-detention for violating the conditions of his release, only bolsters this conclusion. The Constitution does not require the extra-regulatory level of review that Petitioner seeks here to avoid the possibility of an erroneous deprivation of liberty; "the Due Process Clause does not mandate procedures that reduce the risk of erroneous deprivation to zero." *Rodriguez Diaz*, 53 F.4th at 1213.

In addition, the specific additional procedures Petitioner requests—that the government would have the burden of proof, by clear and convincing evidence "that there has been a material change in circumstances"—are especially problematic. *See* Dkt. No. 1 at 13. First the only "changed circumstance" that is relevant is the fact that Petitioner has violated a condition of his release. The government need not otherwise establish that Petitioner is a flight risk or danger. *See Zadvydas*, 533 U.S. at 700; 8 C.F.R. § 241.4(l). Second, there is no basis to conclude that placing the burden of proof on the government "is constitutionally necessary to minimize the risk of error." *Rodriguez Diaz*, 53 F.4th at 1212. as the Ninth Circuit observed recently, "[w]e 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 1211.

(iii) The Government Has a Strong Interest In Returning To Custody Noncitizens Who Violate Conditions Of Release

Turning to the third *Mathews* factor, the Ninth Circuit has emphasized that the *Mathews* test "must account for the heightened government interest in the immigration detention context." *Rodriguez Diaz*, 53 F.4th at 1206. Invoking the Supreme Court's 2003 *Demore* decision, the Ninth Circuit in *Rodriguez Diaz* recognized that "the government clearly has a strong interest in preventing aliens from 'remain[ing] in the United States in violation of our law.'" *Id.* 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." *Rodriguez Diaz*, 53 F.4th at 1208. "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.*

Moreover, Petitioner's request for an additional level of review would impose administrative and resource burdens on the government that would frustrate its ability to make congressionally authorized detention decisions and interfere with the ability of the immigration courts to undertake its other important duties.[7] Every extra hearing before an IJ adds further congestion to an already backlogged

[7] *See, e.g.*, Cong. Res. Serv., *U.S. Immigration Courts and the Pending Cases Backlog* 1, 17-18 (Apr. 25, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R47077 ("As a result of this [pending cases] backlog, some individuals must wait years to have their cases adjudicated.")

immigration court system. It drains limited Executive Branch resources. The government has a significant interest in avoiding these extra-regulatory burdens.

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

V. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court should not issue a preliminary injunction.

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Respectfully submitted,

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