

1 Christina Heakyung Lee (CA Bar#230883)

christina@ild.org

2 510-764-3714

Laura Polstein*(NY Bar #4962429)

3 laura@ild.org

510-457-1672

4 Immigrant Legal Defense

1301 Clay Street #70010

5 Oakland, California 94612

6 **Admitted pro hac vice*

7 *Pro Bono Attorneys for Petitioner*

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 Osmin Antonio AYALA,

12 *Petitioner,*

13 v.

14 Sergio ALBARRAN, in his official capacity,
15 San Francisco Field Officer Director,
16 Enforcement and Removal Operations, United
17 States Immigration and Customs Enforcement;

18 Markwayne MULLIN, in his official capacity,
19 Secretary, United States Department of
20 Homeland Security;

Todd BLANCHE, in his official capacity,
Attorney General of the United States,

21 *Respondents.*

Case No. 5:26-cv-03092-BLF

**PETITIONER'S REPLY TO
RESPONDENTS' RESPONSE TO
ORDER TO SHOW CAUSE**

April 23, 2026
9:00am

INTRODUCTION

Respondents contend that Petitioner, Osmin Ayala (“Mr. Ayala”) is subject to mandatory detention due to his final administrative order of removal and that the Court lacks jurisdiction over his claim. ECF No. 13 at 6. Alternatively, Respondents argue that Mr. Ayala has not demonstrated that he will suffer irreparable harm absent injunctive relief by the Court. *Id.* Respondents’ claim that this Court lacks jurisdiction ignore clear statutory language and dispositive precedent. Moreover, Mr. Ayala has proven that he will suffer the irreparable harm of unjustified detention. For reasons stated in Mr. Ayala’s Verified Petition for Writ of Habeas, and Motion for a Temporary Restraining Order, he asks the Court to grant relief.

ARGUMENT

I. The Court Has Jurisdiction Over Mr. Ayala’s Claims

Respondents argue that Mr. Ayala’s challenge lacks standing or ripeness for the purposes of Article III jurisdiction. They are wrong.

A. Mr. Ayala Can Demonstrate He Faces an Imminent Injury

Respondents argue that Mr. Ayala’s claimed injury is too speculative. ECF No. 13 at 12 But they ignore the escalating measures that ICE has taken in Mr. Ayala’s case, including Respondents’ own refusal to provide assurances that he will not be detained, their (erroneous) position that Mr. Ayala is subject to mandatory detention under 8 U.S.C. § 1231(a)(6), and the fact that they are pursuing this litigation.

From November 2021 to June 2025, Mr. Ayala was subject to smartphone-based monitoring via the Intensive Supervision Appearance Program (ISAP). ECF 13-1 at 2. He reported in-person at the Immigration and Customs Enforcement (ICE) Field Office three times in 2025. ECF 1 at 2-3. Twice, ICE advised that they “did not have his A-file”. *Id.* The third time,

1 ICE issued a purported Notice of Reinstatement,¹ advising Mr. Ayala and counsel that he no
2 longer had to present in-person at the ICE Field Office but instead would receive notice of a
3 Reasonable Fear Interview (RFI) via SmartLINK application. Decl. of Laura Polstein (“Polstein
4 Decl.”). When an in-person appointment at the ICE Field Office was scheduled for the same day
5 as the RFI, counsel concluded that Respondents intended to quickly and cursorily dispose of his
6 fear claim and then detain him for purported removal. ECF 1 at 4-5; Polstein Decl. Respondents
7 now say that Mr. Ayala’s claims “have not occurred and may not occur as they anticipate at all,”
8 ECF 13 at 12. But Respondents have declined to provide assurances that, absent this Court’s
9 order, Mr. Ayala will not be detained without due process. ECF 2-1; ECF 13-1; Polstein Decl. In
10 fact, Respondents’ declarant confirms that Mr. Ayala “*would be* taken into custody for non-
11 compliance” of his supervision conditions. ECF 13-1 at 3 (emphasis added). Moreover,
12 Respondents repeatedly assert (erroneously) that Mr. Ayala is subject to mandatory detention
13 and facing imminent removal. ECF 13 at 3-6. That Respondents have so far refrained from
14 violating this Court’s order does not make likelihood of future detention speculative.

15 Respondents’ reliance on *J.P. v. Santacruz*, No. 25-cv-1640, 2025 WL 2998305, at *4
16 (C.D. Cal. Oct. 24, 2025) is misplaced. In *J.P.*, the petitioner sought injunctive relief prior to an
17 in-person appointment, just as Mr. Ayala did. *Id.* However, by the time of the ruling in *J.P.*, the
18 petitioner had attended two in-person appointments (one of which occurred after the initial TRO
19 had expired) and was not detained, facts the district court found “critical.” *Id.* In contrast, Mr.
20 Ayala has attended an in-person appointment without being detained, but (importantly) this
21 Court’s order restraining unlawful detention was in effect at the time. ECF 7 at 7. It is therefore
22 not speculative that Respondents would detain Mr. Ayala at a future in-person appointment (or at
23

24 ¹ Mr. Ayala does not contend that habeas jurisdiction extends to a challenge of the purported
25 reinstatement order and does not seek to raise such a challenge in this action.

1 any time or place given their 24-hour GPS monitoring of his location) in the absence of this
2 Court's order restraining them from doing so.

3 Moreover, courts in this circuit have found pre-detention claims to be ripe where, as here,
4 the government refuses to provide assurances that it does not plan to detain the non-citizen. *See*
5 *e.g. Jorge M.F. v. Jennings*, 534 F.Supp.3d 1050, 1056 (N.D. Cal. 2021). In *Jorge M.F.*, the
6 district court found that the lack of assurances combined with the fact that the respondents
7 actively pursued the litigation showed that the possibility of petitioner being re-detained without
8 a preliminary injunction was "far from remote." *Id.* In this regard, Mr. Ayala's case is factually
9 indistinguishable. *See also Ortega v. Bonnar*, 415 F.Supp.3d 963, 969 (N.D. Cal. 2019) (finding
10 claim ripe, noting lack of assurances by the government, combined in part with the government's
11 position that it has "unreviewable discretionary authority to re-arrest...").

12 **B. Mr. Ayala is "In Custody" for Purposes of Habeas**

13 Respondents also argue that Mr. Ayala is not "in custody" for habeas purposes. ECF No.
14 13 at 7-8. Respondents appear to base this contention in part on the Notice of Reinstatement that
15 ICE has purportedly issued in Mr. Ayala's case, per 8 U.S.C. § 1231(b)(5), though they offer no
16 clear argument as to why being subject to reinstatement renders an individual not in custody for
17 habeas purposes. *Id.* Further, Respondents overstate their position that "Courts in this Circuit are
18 generally split as to whether release conditions imposed by ICE, such as enrollment in ISAP and
19 the requirement to wear an ankle monitor, meet the requirements of 'custody' for purposes of
20 habeas relief." *Id.* at 14 (citing *Ba v. Lyons*, No. 3:25-cv-2871, 2026 WL 218936, at *1 (S.D.
21 Cal. Jan. 27, 2026)).

22 Respondents are simply wrong. Courts in this district have found that petitioners subject
23 to supervision properly meet the "in custody" requirement for habeas. *See Jorge M.F.* at 1056;
24 *Ortega* at 969; *Harrington v. Albarran, et al.*, No. 26-cv-1889, 2026 WL 800113, at *4 (N.D. Cal.

1 Mar. 23, 2026); *see also Meza v. Bonnar*, No. 18-cv-02708, 2018 WL 2554572 at * 4 (N.D. Cal.
2 June 4, 2018) (granting preliminary injunction pending hearing on habeas petition where
3 petitioner who had been released on a bond faced re-detention). Respondents' reliance on *Ba v.*
4 *Lyons* does not further their position. The district court in *Ba* rejected a challenge to the
5 amelioration of conditions of release set by DHS after the petitioner posted a bond. *Id.* at *1. The
6 district court opined that the conditions *Ba* challenged were like those challenged in *Munoz v.*
7 *Smith*, 17 F.4th 1237, 1239 (9th Cir. 2021) (holding that conditions of release must "severely and
8 immediately restrain" physical liberty to meet the "in custody" requirement). *See Ba* at *1.
9 However, as one court in this district has noted, there are significant distinctions between the
10 conditions challenged in *Munoz* and those challenged in *Ba*. *See Harrington* at *5. Importantly,
11 in *Harrington*, the district court cited the Ninth Circuit's reasoning that, "...without definitively
12 resolving the issue... the sex offender registration and tracking requirements 'could be regarded
13 as collateral consequences of conviction,' analogous to the loss of the right to vote, 'not
14 'custodial' requirements.'" *Harrington* at *5 citing *Munoz* at 1243, 1246. Further, as the district
15 court noted in *Harrington*, "[t]he *Munoz* court also drew an express contrast with more
16 burdensome measures that could rise to the level of custody, including requirements to register in
17 person with the police every three months and appear in person at a registration site before
18 leaving home for more than seven days, traveling internationally, or changing residence,
19 employment, or contact information." *Id.* at *5, citing *Munoz* at 1244. Here, conditions of Mr.
20 Ayala's release are not collateral consequences akin to losing the right to vote, but rather direct
21 and specific limitations on where he can and cannot go, amounting to custody. ECF 13-1 at 3.
22 Further, as Respondents have noted, ICE does not permit Mr. Ayala to leave the state of
23 California without advance permission. *Id.* Thus, "[i]n short, *Munoz* does not undermine but
24
25

1 rather supports the view that the conditions imposed by ICE here constitute custody.” *Harrington*
2 at *5.

3 But more to the point, Respondents’ alternative attempt to defeat Mr. Ayala’s habeas
4 claim on the basis that he does not challenge physical custody or the terms of his release simply
5 ignores Mr. Ayala’s claim: that once ICE released him on supervision, in the absence of a
6 material change in circumstances, ICE cannot re-detain him absent a hearing before a neutral
7 arbiter at which Respondents bear the burden of demonstrating a material change in
8 circumstances such that Mr. Ayala’s detention is now justified. *See e.g., Guillermo M. R. v.*
9 *Kaiser*, 791 F. Supp. 3d 1021, 1030 (N.D. Cal. 2025). Respondents’ circular reasoning on this
10 point is essentially the same as their argument that Mr. Ayala’s claim is speculative, and
11 therefore not ripe. Contrary to Respondents’ contention, Mr. Ayala does not seek “...an
12 insurance policy from the Court to guarantee that they will not be detained.” For the reasons
13 previously outlined, *supra* at 4-5, Respondents’ argument in this regard fails.

14 **II. Mr. Ayala’s Claim Meets the Test for Injunctive Relief**

15 Contrary to Respondents’ contention, Mr. Ayala meets the four-prongs for an injunction.

16 **A. Mr. Ayala is Likely to Succeed on the Merits of His Claims**

17 Respondents claim that Mr. Ayala is unlikely to succeed on the merits of his request for
18 injunctive relief “because the government has explicit statutory authority to re-detain him for the
19 purposes of effectuating his removal.” ECF 13 at 16. Respondents further contend that Mr. Ayala
20 is not entitled to a bond hearing under 8 U.S.C. § 1231, and specifically, that neither the statute
21 nor the regulatory framework at 8 C.F.R. § 241.4(l) provide for a pre-deprivation hearing.
22 Moreover, according to Respondents, once ICE re-detains Mr. Ayala, the regulations governing
23 the revocation of release provide adequate procedural protections. *Id.* at 17. This is incorrect.

Moreover, Respondents do not address Mr. Ayala's claim that due process requires a hearing before they can remove him notwithstanding that they previously granted him deferred actions status. As such, they have waived any argument to the contrary. *See e.g., Min v. Santacruz*, No. 2:25-cv-10971, 2025 WL 3764071, at *1 (C.D. Cal. Dec. 23, 2025); *Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) ("We have previously held that a [party] has 'abandoned ... claims by not raising them in opposition to [the movant's] motion for summary judgment.'" (quotations omitted)).

i. Mr. Ayala's Detention is Not Mandated Under 8 U.S.C. § 1231

8 U.S.C. § 1231 governs the detention of individuals with final orders of removal. However, contrary to Respondents' contention, 8 U.S.C. § 1231(a)(6) does not mandate Mr. Ayala's detention. That provision specifically contemplates continued detention beyond the 90-day mandatory detention period at 8 U.S.C. § 1231(a)(1)(A), *only* where "an individual has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal...". This is not the case here. Rather, Respondents have repeatedly determined that Mr. Ayala is neither a danger nor a flight risk.

To reiterate, Mr. Ayala's claim is grounded in the liberty interest that he has, given that he has been living freely (subject to conditions) for nearly five years. Contrary to Respondents' suggestion, Mr. Ayala's claim that he is entitled to a pre-deprivation hearing is grounded in the U.S. Constitution and not in the statute. *See Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021 at 1030; *Meza v. Bonnar*, No. 18-cv-02708, 2018 WL 2554572 at *3 (citing *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1197 (N.D. Cal. 2017)).

Moreover, Mr. Ayala is not facing imminent removal. He is challenging the asylum office's recent finding that he does not have a reasonable fear of return to El Salvador. Polstein Decl. Should the Immigration Judge decline to reverse the asylum office's finding, Mr. Ayala

1 separately will challenge that decision before the Ninth Circuit. *Id.* Meanwhile, he is in lawful
 2 deferred action status based on his bona fide U Visa. ECF 1 at 2-3. Once a visa is available, one
 3 will likely be issued to Mr. Ayala, enabling him to apply for permanent residence and then
 4 citizenship. *See generally* 8 U.S.C. 1101(a)(15)(u). Thus, Respondents' claim that detention
 5 would be justified due to "imminent removal" is overstated. ECF 13 at 20.

6 **ii. ICE's Post-Order Regulatory Framework Does Not Sufficiently**
 7 **Safeguard Mr. Ayala's Due Process Rights in His Present Posture**

8 For similar reasons, Respondents' contention that the regulatory post-order custody
 9 review procedures will provide adequate due process to Mr. Ayala upon detention by ICE
 10 misapprehends Mr. Ayala's challenge. ECF 13 at 17-19. It is unclear whether Respondents
 11 consider Mr. Ayala to have violated the terms of his supervision. *See* ECF No. 13-1 at 3. As Mr.
 12 Ayala's counsel notes, the information that she and Mr. Ayala received from both ISAP and ICE
 13 was confusing. Polstein Decl. As noted, ICE has not made any assurances that it will not detain
 14 Mr. Ayala, on this basis or any other.

15 **iii. Mr. Ayala is Entitled to Due Process Before Respondents Can**
 16 **Remove Him Based on Their Grant of Deferred Action Status to Him**

17 Mr. Ayala is currently in deferred action status, preventing his removal. *See, e.g., Reno v.*
 18 *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484, 119 S.Ct. 936, 944 (1999)
 19 (defining deferred action to mean that "no action will thereafter be taken to proceed against an
 20 apparently deportable alien, even on grounds normally regarded as aggravated"); *Lee v. Holder*,
 21 599 F.3d 973, 974-75 (9th Cir. 2010); *De Sousa v. Dir. of U.S. Citizenship and Immigr. Servs.*,
 22 755 F.Supp.3d 1266, 1268 (N.D. Cal. 2024). Therefore, detaining him before holding a pre-
 23 deprivation hearing before a neutral arbiter would violate due process. *See Sepulveda Ayala v.*
 24 *Bondi*, 2025 WL 2084400, *1, 7-9 (W.D. Wash. 2025) (granting preliminary injunction where
 25 petitioner had been issued a bona fide determination notice in connection with his U-visa

1 application and granted deferred action and an employment authorization document, therefore
2 demonstrating a likelihood of success on the claim that his deferred action status made his
3 continued detention unlawful)

4 **B. Mr. Ayala's Request Meets the Additional Prongs for Injunctive Relief**

5 Respondents' contention that Mr. Ayala cannot demonstrate that the remaining prongs for
6 injunctive relief - irreparable harm, the balance of equities and the public interest – do not weigh
7 in his favor rests on the fact that ICE has reinstated Mr. Ayala's 2019 removal order. ECF No. 13
8 at 14. According to Respondents, this means that they can detain Mr. Ayala until such time as he
9 is removed. ECF No. 13 at 20. In Respondents' view, requiring a pre-deprivation hearing before
10 Mr. Ayala can be detained will have the result that his removal will be permanently enjoined,
11 given court backlogs in providing such hearings. *Id.*

12 Respondents' position, again, ignores crucial points. First, Mr. Ayala has yet to exhaust
13 his challenge to Respondents' reinstatement notice and finding of no reasonable fear. As noted,
14 he intends to challenge the reinstatement notice via a petition for review to the Ninth Circuit,
15 which can take many more months if not years to conclude.

16 Additionally, as noted, Respondents simply ignore that they have granted deferred action
17 status to Mr. Ayala, based on a bona fide U visa application. ECF No. 1 at 2-3. This is not an
18 insignificant factor, as Respondents' deferred action grant protects Mr. Ayala from removal and
19 further, reflects a consideration that the public interest would not be served by his removal.
20 Respondents' contradictory actions only reinforce the need to safeguard Mr. Ayala's due process
21 rights, and protection against erroneous detention and removal only serves the public interest.

22 Regarding Respondents' argument that the *Mathews* balancing test does not apply here,
23 countless courts have determined otherwise and applied these factors to conclude a pre-
24
25

deprivation hearing is warranted in circumstances like Mr. Ayala's. *See e.g. Ortega v. Kaiser*, No. 25-cv-05259-JST, 2025 WL 2243616 at * 5-6 (N.D. Cal. August 6, 2025).

Respondents' alternative argument, that the *Mathews* factors, which mirror the prongs for injunctive relief, do not weigh in Mr. Ayala's favor, fail for the same reasons that their arguments against injunctive relief fail. First, when Respondents released him on supervision and granted deferred action to him, he incurred a weight liberty interest. Second, the risk of erroneous deprivation of this weight interest is high, where, as here, Respondents take the mistaken position that Mr. Ayala is subject to mandatory detention and that his removal is imminent, and have been equivocal regarding whether he has violated the conditions of his release and wholly ignore the import of the deferred action status that they have granted him. Additionally, the Court should find that procedural due process requires Respondents to bear an evidentiary burden of "clear and convincing" to justify any re-detention of Mr. Ayala. Last, requiring Respondents to provide Mr. Ayala with a pre-deprivation hearing is a minimal burden. Mr. Ayala has not violated the conditions of his supervised release, he has no criminal record, his removal is not in fact imminent, and he is currently in deferred action status.

CONCLUSION

For the foregoing reasons, Mr. Ayala respectfully urges the Court to grant his motion for a temporary restraining order.

DATE: April 20, 2026

Respectfully submitted,

/s/ Laura Polstein*

Laura Polstein

Pro Bono Counsel for Mr. Ayala

**Admitted pro hac vice*