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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Jorge Alberto Borjas-Calix,  
10

CV-16-685-TUC-DCB

11 Plaintiff,

**ORDER**

12 vs.

13 Jeff B. Sessions, *et al.*,

14 Defendants.  
15

16  
17 Before the Court are the First Motion for Preliminary Injunction  
18 (Doc. 8) and Motion for Leave to File Amended Complaint (Doc. 11).  
19 Oral argument was conducted on March 27, 2017 and the matter was  
20 taken under advisement. The Court now rules.

21 **SUMMARY**

22 Plaintiff Jorge Alberto Borjas-Calix is a native and citizen of  
23 Honduras who is subject to an order of removal issued by the United  
24 States Department of Homeland Security (DHS). He filed a Complaint in  
25 federal court seeking Declaratory and Injunctive Relief in accordance  
26 with Federal Rules of Civil Procedure 8(a), 57, and 65. Plaintiff was  
27 ordered released by an immigration judge (IJ) in Florence, Arizona,  
28 pursuant to controlling authority in this Circuit, but the Department

1 of Homeland Security (DHS) appealed the IJ's decision to the Executive  
2 Office for Immigration Review (EOIR), Board of Immigration Appeals  
3 (BIA). The BIA reversed the IJ and vacated the IJ's decision granting  
4 Plaintiff's release on bond. The DHS, Immigration and Customs  
5 Enforcement (ICE), Enforcement and Removal Operations (ERO), now seeks  
6 to re-detain Plaintiff, which Plaintiff claims will deprive him of his  
7 due process right against unlawful deprivation of liberty.

#### 8 **PROCEDURAL BACKGROUND**

9 Plaintiff, a citizen of Honduras, first entered the United States  
10 without inspection on or about March 16, 1997. On March 20, 1997, an  
11 IJ ordered Plaintiff removed from the United States, which resulted in  
12 his deportation on March 25, 1997. Between June 16, 2008 and July 19,  
13 2011, the ICE reinstated Plaintiff's previous order of removal twice  
14 and deported him each time.  
15

16 On or about March 1, 2013, Plaintiff entered the United States  
17 without inspection near Nogales, Arizona. On March 25, 2015, he was  
18 taken into ICE custody. At that time, he indicated he had no fear of  
19 returning to Honduras.

20 On March 25, 2015, ICE-ERO issued Plaintiff a Form 1-871, Notice  
21 of Intent/Decision to Reinstate Prior Order, pursuant to Section  
22 241(a)(5) of the INA, 8 U.S.C. § 1231(a)(5), as an alien who has  
23 illegally reentered the United States after being previously removed.  
24 This Decision reinstated Plaintiff's March 25, 1997, order of removal.  
25

26 On or about April 22, 2015, Plaintiff was convicted of Illegal  
27 Entry, in violation of Title 8 U.S.C. § 1325(a)(1), and sentenced to  
28 75 days' incarceration. On or about June 6, 2015, Plaintiff returned

1 to ICE custody at the Florence Detention Center so he could be removed  
2 to Honduras.

3 On or about July 21, 2015, an Asylum Pre-Screening Officer found  
4 Plaintiff had a reasonable fear of persecution or torture, and  
5 referred Plaintiff's case to an IJ to allow Plaintiff to apply for  
6 withholding of removal under the Act and protection under the CAT.

7 On December 2, 2015, Plaintiff filed a motion with the IJ,  
8 requesting a custody redetermination hearing. The IJ denied the motion  
9 on January 12, 2016, finding that the immigration court lacked  
10 jurisdiction.

11 On January 27, 2016, Plaintiff filed a motion to reconsider the  
12 IJ's decision, which was granted on January 28, 2016.

13 On February 9, 2016, the IJ held a custody redetermination  
14 hearing and set a \$10,000 bond.

15 On February 11, 2016, Plaintiff posted bond for his release from  
16 the Florence Detention Center.

17 On February 22, 2016, the Department filed its Notice of Appeal  
18 with the BIA. The Department and Plaintiff filed appeal briefs with  
19 the BIA.  
20

21 On September 30, 2016, the BIA issued its decision finding that  
22 Plaintiff was not eligible for a custody redetermination hearing, and  
23 vacated the IJ's decision.

24 On October 14, 2016, ICE issued a Notice to Obligor to Deliver  
25 Alien, directing the person who posted Plaintiff's bond to deliver him  
26 to ICE on November 18, 2016.

27 On October 24, 2016, Plaintiff filed his Complaint for Declaratory  
28

1 and Injunctive Relief, seeking to enjoin Defendants from proceeding with  
2 any further action that would result in Plaintiff being taken into ICE  
3 custody or detention. Plaintiff then filed a Motion for Preliminary  
4 Injunction and/or Temporary Restraining Order, seeking an order enjoining  
5 Defendants from detaining Plaintiff or taking him into custody until the  
6 motion for preliminary injunction and/or the Complaint may be  
7 adjudicated.

8 On December 27, 2017, based on a stipulation of the  
9 parties, this Court issued a Temporary Restraining Order enjoining  
10 Defendants from taking Plaintiff into custody or detaining him until the  
11 motion for preliminary injunction is adjudicated.

#### 12 STANDARD OF REVIEW

##### 13 A. Preliminary Injunction

14 Preliminary injunctions are intended to preserve the relative  
15 positions of the parties until a trial on the merits can be held.  
16 *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422  
17 (9th Cir. 1984). This Court should not grant a preliminary injunction  
18 unless Plaintiff shows: (1) a strong likelihood of his success on the  
19 merits; (2) that he is likely to suffer an irreparable injury absent  
20 preliminary relief; (3) the balance of hardships favors him; and (4)  
21 the public interest favors a preliminary injunction. *Winter v. Natural*  
22 *Res. Def. Council*, 555 U.S. 7, 20 (2008). . "To the extent prior cases  
23 applying the 'serious questions' test have held that a preliminary  
24 injunction may issue where the plaintiff shows only that serious  
25 questions going to the merits were raised and the balance of hardships  
26 tips sharply in the plaintiff's favor, without satisfying the other  
27 two prongs, they are superseded by *Winter*, which requires the  
28

1 plaintiff to make a showing on all four prongs. [Citation omitted.]  
2 But the 'serious questions' approach survives *Winter* when applied as  
3 part of the four-element *Winter* test. That is, 'serious questions  
4 going to the merits' and a balance of hardships that tips sharply  
5 towards the plaintiff can support issuance of a preliminary  
6 injunction, so long as the plaintiff also shows that there is a  
7 likelihood of irreparable injury and that the injunction is in the  
8 public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d  
9 1127, 1134 (9th Cir. 2011). To show harm, Plaintiff must allege that  
10 concrete, imminent harm is likely with particularized facts. See  
11 *Winter*, 555 U.S. at 20. This standard reflects the idea that a  
12 preliminary injunction is an "extraordinary remedy that may only be  
13 awarded upon a clear showing that the plaintiff is entitled to such  
14 relief." *Id.* at 22.

#### 15 **B. Amend Pleadings**

16 Rule 15, Fed.R.Civ.P., provides that a party may amend its  
17 pleading as a matter of course within (1) 21 days after serving the  
18 pleading or (2) 21 days after the earlier of service of a responsive  
19 pleading or service of a Rule 12(b) motion. Fed. R. Civ. P. 15(a)(1).  
20 Outside of this timeframe, "a party may amend its pleading only with  
21 the opposing party's written consent or the court's leave," though the  
22 court "should freely give leave when justice so requires." Fed. R.  
23 Civ. P. 15(a)(2). Although leave to amend is not granted  
24 automatically, "the rule should be interpreted with 'extreme  
25 liberality.'" *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir.  
26 1990) (citation omitted).  
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28

1 A court considers five factors in determining whether to grant leave  
2 to amend: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing  
3 party, (4) futility of amendment, and (5) whether plaintiff has  
4 previously amended his complaint1." *In re W. States Wholesale Nat. Gas*  
5 *Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (quotation omitted).  
6 "Not all of the factors merit equal weight. As this circuit and others  
7 have held, it is the consideration of prejudice to the opposing party  
8 that carries the greatest weight. Prejudice is the touchstone of the  
9 inquiry under Rule 15(a)." *Eminence Capital, LLC v. Aspeon, Inc.*,  
10 316 F.3d 1048, 1052 (9th Cir. 2003) (citation omitted). "Absent  
11 prejudice, or a strong showing of any of the remaining [ ] factors, there  
12 exists a *presumption* under Rule 15(a) in favor of granting leave to  
13 amend." *Id.*, 316 F.3d at 1052 (emphasis in original).  
14

## 15 DISCUSSION

### 16 A. Preliminary Injunction

17 Plaintiff is likely to succeed on the merits of his claim because  
18 Ninth Circuit controlling authority unequivocally applies in this  
19 instance and requires his release from ICE detention. *See Rodriguez v.*  
20 *Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*,  
21 136 S.Ct. 2489 (2016); *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th  
22 Cir. 2011); *see also Guardado-Quevara v. Lynch, et al.*, No. CV-16-00800-  
23 PHX-PGR(JZB). Plaintiff can only be held under either 8 U.S.C. § 1226(a),  
24 or 8 U.S.C. § 1231(a). And, under either statute, Ninth Circuit  
25 controlling authority (e.g., *Rodriguez III*, *Diouf II*) unequivocally  
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1 mandates Plaintiff's release.<sup>1</sup>

2 Plaintiff explained in his motion that he is likely to suffer  
3 irreparable harm in the absence of preliminary relief," and that if he  
4 is re-detained "he will suffer irreparable harm due to his unlawful  
5 deprivation of liberty in violation of due process of law." The  
6 ability to file a petition for writ of habeas corpus does not  
7 ameliorate the hardship of physical incarceration in Florence or Eloy,  
8 a deprivation of liberty, separation from family and loss of  
9 employment. The balance of hardships and equities weighs in favor of  
10 the issuance of a preliminary injunction. No agent or official of the  
11 United States government stands to suffer any conceivable hardship in  
12 the event an injunction is issued.

13  
14 A primary argument advanced by Defendants is that they have a  
15 "significant interest in enforcing the statutory framework governing  
16 lawful immigration." That is true and this Court takes that mission  
17 seriously. But re-detaining Plaintiff in this fashion goes contrary to  
18 the rule of law in this Circuit and this Court has an interest in  
19 properly and uniformly applying the law of this Circuit.

20 **B. Amend Complaint**

21 Plaintiff moves to amend the Complaint to add various  
22 Administrative Procedures Act (APA) provisions, as well as a Petition  
23 for Writ of Habeas Corpus. Defendants' primary objection is directed  
24 to the issue of custody and ripeness.

25  
26 In the Ninth Circuit, it is well-established that, for the

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27 <sup>1</sup> This Order, granting the Motion to Amend the Complaint and add  
28 claims under the APA and habeas corpus, renders moot Defendants'  
jurisdiction and sovereign immunity arguments.






1 1. The Motion for Leave to File Amended Complaint (Doc. 11) is  
2 **GRANTED**, finding that Petitioner is "in custody" for the purpose  
3 of demonstrating standing to bring a habeas corpus claim pursuant  
4 to 28 U.S.C. § 2241(c). Plaintiff shall file his First Amended  
5 Complaint for Declaratory and Injunctive Relief and Petition for  
6 Writ of Habeas Corpus (Doc. 11-2) by **May 1, 2017**. Defendants are  
7 directed to file an Answer within **ten (10) days** after service of  
8 the First Amended Complaint; and,

9 2. The Motion for Preliminary Injunction (Doc. 8) is **GRANTED**,  
10 finding that Plaintiff is likely to succeed on the merits  
11 concerning his request for a Declaratory Judgment: controlling  
12 precedent in this Circuit supports the decision of the  
13 Immigration Judge (IJ) who released Plaintiff on bond and does  
14 not support the decision of the Board of Immigration Appeals  
15 (BIA) which reversed the IJ. Defendants are hereby **ENJOINED** from  
16 re-detaining Plaintiff based on the ruling of the BIA.  
17 Plaintiff's release from custody and the terms of the release as  
18 ruled by the IJ remain in effect.

19 Dated this 25th day of April, 2017.  
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25 Honorable David C. Bury  
26 United States District Judge  
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