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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIMON ORTIZ VARGAS,

Petitioner,

v.

DAVID JENNINGS, et al.,

Respondents.

Case No. 20-cv-5785-PJH

**ORDER ISSUING PRELIMINARY
INJUNCTION**

On August 23, 2020, the court entered an order granting in part petitioner’s motion for a temporary restraining order to enjoin respondents from re-detaining petitioner unless and until he is afforded a pre-deprivation administrative hearing on the question of whether his re-detention would ultimately be lawful. Dkt. 15. The court denied the TRO motion in part with respect to petitioner’s request that re-arrest or re-detention would require a pre-deprivation judicial hearing. The court further ordered respondents to show cause why a preliminary injunction should not issue enjoining respondents from re-detaining petitioner without a pre-deprivation administrative hearing. Having reviewed the OSC response (“Resp.”) and petitioner’s reply (“Reply”), the court determines that the matter is suitable for decision without a hearing and issues a preliminary injunction for the reasons set forth in the order granting the motion for a TRO and as further discussed below.

Respondents filed a response to the OSC re: issuance of a preliminary injunction that purports to serve also as respondents’ return to the petition for writ of habeas corpus. Resp. at 1. While the OSC response addresses the various claims asserted in the

1 habeas petition, respondents do not squarely address the grounds articulated by the
 2 court in issuing the TRO under the sliding scale test, i.e., that petitioner has sufficiently
 3 demonstrated that serious questions have been raised going to the merits of his
 4 procedural due process claim that, having been released on bond, his re-detention
 5 without a pre-deprivation hearing would violate the due process clause of the Fifth
 6 Amendment; that the balance of hardships tips sharply in his favor; and that the Winter
 7 factors of likelihood of irreparable injury and public interest are satisfied. Dkt. 15 at 4–8.
 8 See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Alliance for the Wild
 9 Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

10 Repeating arguments made in opposition to the TRO motion, respondents contend
 11 that a preliminary injunction is not warranted because if petitioner were re-arrested,
 12 existing procedural processes would be sufficient to satisfy his due process rights. This
 13 conclusory assertion begs the question whether a non-citizen granted release on bond
 14 has a protectable liberty interest, see Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (“the
 15 liberty of a parolee, although indeterminate, includes many of the core values of
 16 unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on
 17 others”), and what process is due under the circumstances presented here, where a non-
 18 citizen conditionally released on bond seeks procedural protections if immigration officials
 19 seek to re-arrest him after the immigration judge subsequently issues a sua sponte order
 20 revoking the bond and finding the non-citizen subject to mandatory detention under
 21 § 1226(c). The authorities cited by respondents apply the well-established principle that
 22 detention during immigration proceedings is “a constitutionally valid aspect” of the
 23 removal process, see Demore v. Kim, 538 U.S. 510, 523 (2003), but do not weigh in on
 24 the questions whether non-citizens have a protected liberty interest against re-detention
 25 after initially being released on bond and whether due process requires a pre-deprivation
 26 hearing if respondents seek to re-arrest or re-detain him. See Hernandez v. Sessions,
 27 872 F.3d 976, 983 (9th Cir. 2017) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

28 Respondents also point out that “there is no statutory or regulatory requirement

1 that entitles Petitioner to a ‘pre-arrest’ hearing,” Resp. at 14, but petitioner asserts a
2 procedural due process claim, not a statutory or regulatory right, to a pre-deprivation
3 hearing. Respondents further cite Nielsen v. Preap, 139 S. Ct. 954, 967 (2019), as
4 authority to support their contention that petitioner is not entitled to continued release on
5 bond because the IJ determined that her initial assessment was incorrect and issued a
6 second order revoking the bond, but in Preap, the Supreme Court did not consider a
7 claim that release on bond may give rise to a protectable liberty interest, much less, as
8 respondents suggest, reject an argument that a non-citizen should be entitled to a
9 “windfall” from an erroneous decision to grant a request for release on bond. Resp. at
10 14. Rather, the Court in Preap held that mandatory detention under § 1226(c) is not
11 limited to situations where covered aliens are taken into immigration custody immediately
12 upon release from criminal custody, and the Court expressly narrowed the holding as a
13 matter of statutory interpretation that “does not foreclose as-applied challenges—that is,
14 constitutional challenges to applications of the statute as we have now read it.” 139 S.
15 Ct. at 972. In the absence of controlling authority on the issues whether non-citizens who
16 have been granted release on bond have a liberty interest in maintaining release to which
17 due process protections attach, the parties have raised serious questions going to the
18 merits of petitioner’s procedural due process claim.

19 A preliminary injunction will serve to preserve the status quo by providing
20 procedural protections for petitioner’s conditional release until a final judgment on the
21 merits can be rendered, particularly in light of respondents’ contention that the IJ’s
22 mandatory detention “ruling would be controlling at any pre-deprivation hearing, absent a
23 BIA decision to the contrary,” which suggests that without the issuance of a preliminary
24 injunction, petitioner would not have a fair opportunity to maintain his conditional release
25 by challenging mandatory detention and revocation of his bond if he were re-arrested.
26 Resp. at 6. Respondents’ suggestion that petitioner’s pending appeal with the BIA “could
27 provide him the remedy he seeks,” id. at 23, fails to acknowledge that petitioner seeks
28 not only review of the IJ’s bond revocation decision, but also procedural protections for

1 his claimed liberty interest in conditional release to prevent irreparable harm that would
2 result if he were re-detained without an opportunity to challenge mandatory detention
3 under § 1226(c). While the government argues that petitioner’s hearing date in state
4 court has passed and he no longer faces the threat of being arrested at state court, Resp.
5 at 22, petitioner has sufficiently demonstrated the necessity to make future state court
6 appearances, with the next hearing set for September 30, and other non-speculative
7 concerns that he faces the risk of re-arrest, which would cause him and his family
8 economic hardship and loss of their primary caregiver. Reply at 11–12 (citations
9 omitted).

10 Petitioner suggests that if respondents seek to re-arrest him, a preliminary
11 injunction would require the IJ to consider all of petitioner’s challenges to re-detention,
12 including his constitutional challenges presented in the habeas petition, Reply at 9. Such
13 expansive inquiry is not required of a pre-deprivation administrative hearing to protect his
14 claimed liberty interest. Under the circumstances presented here, where petitioner was
15 conditionally released from detention and currently challenges the validity of the IJ’s sua
16 sponte bond revocation order on appeal to the BIA, due process only requires an
17 administrative hearing limited to the issue whether petitioner is subject to mandatory
18 detention under § 1226(c), which is the ground for seeking his re-detention that
19 respondents assert here. Resp. at 17.

20 On the present record, and for the reasons underlying issuance of the TRO, the
21 court determines that petitioner has sufficiently demonstrated that there are serious
22 questions going to the merits of his claim that he has a protectable liberty interest in his
23 conditional release under Morrissey and that he must be afforded a pre-deprivation
24 hearing if respondents seek to re-arrest him; that the balance of hardships tips sharply in
25 his favor; that irreparable injury is likely; and that the public interest is served by providing
26 due process safeguards for deprivation of liberty, to support the issuance of a preliminary
27 injunction. See Ortega v. Bonnar, 415 F. Supp. 3d 963, 969–70 (N.D. Cal. 2019), notice
28 of appeal filed, No. 20-15754 (9th Cir. Apr. 22, 2020); Meza v. Bonnar, 2018 WL

1 2554572, at *3 (N.D. Cal. June 4, 2018) (finding “serious questions going to the merits of
2 Petitioner’s claim that she has a vested liberty interest in her conditional release such that
3 she may not be re-detained absent due process”).

4 Having considered the parties’ papers, the evidence in the record, and the
5 applicable legal authority, the court issues a PRELIMINARY INJUNCTION as follows:

6 The court hereby ORDERS that respondents David Jennings, San
7 Francisco Field Office Director, U.S. Immigration and Customs
8 Enforcement, Matthew T. Albence, Deputy Director and Senior
9 Official Performing the Duties of the Director, U.S. Immigration and
10 Customs Enforcement, Chad Wolf, Acting Secretary of the U.S.
11 Department of Homeland Security, and William P. Barr, Attorney
12 General of the United States, are ENJOINED from re-arresting or re-
13 detaining petitioner Simon Ortiz Vargas unless and until an
14 administrative hearing, with adequate notice, is held to determine
15 whether petitioner is subject to mandatory detention under § 1226(c).

16 The court will set a case management conference in this matter by issuance of a
17 separate clerk’s notice.

18 **IT IS SO ORDERED.**

19 Dated: September 14, 2020

20 /s/ Phyllis J. Hamilton
21 PHYLLIS J. HAMILTON
22 United States District Judge
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