

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Douglas Menjivar,

Petitioner,

v.

Randall Tate, Warden, Montgomery Processing Center;  
Bret Bradford, Director of Houston Field Office, U.S.  
Immigration and Customs Enforcement; Kristi Noem,  
Secretary of the U.S. Department of Homeland Security;  
and Pam Bondi, Attorney General of the United States,  
in their official capacities,

Respondents.

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) Case No. 4:25-cv-02730  
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) **BRIEF IN SUPPORT**  
) **OF MOTION FOR A**  
) **TEMPORARY**  
) **RESTRAINING**  
) **ORDER AND A**  
) **PRELIMINARY**  
) **INJUNCTION**  
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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**INTRODUCTION**

On September 19, 2024, Petitioner Douglas Menjivar got the news that he hoped would come for the better part of a decade. The Board of Immigration Appeals had determined that his withholding-only hearing held in 2015 was constitutionally defective due to ineffective assistance of counsel and he would be getting a new hearing. (See Attached Exhibit A; Order of the Board of Immigration Appeals dated 9/19/2024.) This news lifted the cloud of uncertainty that had sat over him and his wife, U.S. citizen Monica Logan -- Douglas could not be deported without a further chance to prove that he would be persecuted or tortured if he were returned to El Salvador.

On June 10, 2025, Mr. Menjivar, who was last in the custody of Immigration & Customs Enforcement in March 2015, appeared at the Houston Office of ICE as per the terms of his order of supervision. (See Exhibit B; Order of Supervision) Rather than checking him in and asking him to return on another date, as they had done reliably for over ten years, ICE officials took Mr. Menjivar into custody and transferred him to the Montgomery Processing Facility in Conroe, Texas. ICE Officials informed Petitioner that they would deport him either today, June 11 or tomorrow, June 12, regardless of the Board's order for a new hearing. Petitioner's wife is also deep into treatment for metaplastic Stage 3 breast cancer. *See Exhibit C;*

This is all happening even though Mr. Menjivar is statutorily required to have a full and fair hearing on his claims to withholding of removal and protection under the Convention Against Torture. The Board of Immigration Appeals has already ruled that his previous such hearing was constitutionally deficient and has reopened his case. Yet, the Defendants seek to remove Mr. Menjivar despite the fact that he has never been provided with a constitutionally sound proceeding on his claim for withholding and protection under the Convention Against Torture.

Petitioner Menjivar faces immediate, irreparable harm as a direct result of the Defendants' actions. He seeks this court's emergency intervention to further prevent the harm he has incurred and continue to experience because of Defendants. Defendants' effort to deport him while he awaits a constitutionally sufficient hearing is directly responsible for the immediate harms Petitioner has and continues to sustain. It is for this reason that he is seeking a temporary restraining order and preliminary injunction in this matter.

### **LEGAL STANDARD**

The Fifth Circuit considers motions for preliminary injunctions and temporary restraining orders based on the following factors: (1) the threat of irreparable harm to the petitioner, (2) the likelihood that the petitioner will succeed on the merits, (3) the state of balance between the harms of the parties; and (4) the public interest. *Rest. L. Ctr. V. U.S. Dep't of Lab.*, 66 F.4<sup>th</sup> 593, 597 (5<sup>th</sup> Cir. 2023). The “first two factors of the traditional standard are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009).

### **ARGUMENT**

#### **I. Petitioner will suffer irreparable harm in the absence of an immediate injunction**

To satisfy the first element of the injunction analysis, Petitioner must demonstrate that, if the Court denies the grant of a injunction, irreparable harm will result. Irreparable harm exists where “there is no adequate remedy at law.” *Louisiana v. Biden*, 55 F.4th 1017, 1033–34 (5th Cir. 2022).

“The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.” *Weinberger v. Romero-Barceló*, 456 U.S. 305, 312, 102 S. Ct. 179 (1982 ) “[T]he concept of irreparable harm does not readily lend itself to definition.” *Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007).

Deporting Mr. Menjivar without providing him with the opportunity to have a constitutionally sound hearing on his claims to withholding of removal and protection under the Convention Against Torture would cause Mr. Menjivar an irreparable injury. Mr. Menjivar has expressed a fear that police officers allied with criminal gangs in El Salvador will conspire to kill

him if he returns to El Salvador. (*See* Exhibit D; Motion to Reopen by Douglas Menjivar and supporting materials dated January 26, 2024). In his reasonable fear interview, Mr. Menjivar described multiple instances of being accosted and threatened by police officers, judges, prosecutors and gang members related to his work as an informant to the police. (*See* Exhibit E; Reasonable Fear Determination dated August 26, 2013). In reopening his case, the Board of Immigration Appeals determined that the evidence presented in court, along with the evidence produced in support of the motion to reopen provided a reasonable probability that the outcome in his proceedings would have been different. (*See* Exhibit A.) Deporting Mr. Menjivar before he could have a constitutionally sound hearing on his fear of persecution could subject Mr. Menjivar to murder if he is returned to El Salvador.

The importance of not sending someone to a country where they would be the subject to persecution on account of a protected ground is a fundamental feature of immigration law. 8 USC §1231(b)(3). It is so fundamental to our immigration law that even individuals who do not qualify for the more generous asylum under 8 U.S.C. §1158 can still claim protection. This includes people who have been convicted of serious crimes. The law provides a mechanism for people like Mr. Menjivar to assert that he would be harmed if he were returned to his home country. 8 C.F.R. §208.2. The Immigration & Nationality Act has set up a substantial edifice to ensure that all those who assert a fear of harm get a constitutionally adequate process because the risk of irreparable harm is so high. *Id.* The risk of irreparable harm in this case is put very simply, that Mr. Menjivar will be murdered if he is sent to El Salvador.

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It is also worth noting that Petitioner's wife, Monica will also suffer irreparable harm if Mr. Menjivar is deported. Monica is a U.S. citizen. She is suffering from Stage 3 metaplastic breast cancer. (*See* Exhibit C.) Her surgeons and oncologists have noted how Mr. Menjivar's

presence and safety is essential to Monica's emotional well-being, which is often a critical factor in successful cancer treatment. *Id.* With Monica facing surgery and recovery while her husband is adjusting to his new peril in El Salvador is an irreparable harm to this U.S. citizen.

## **II. Petitioner is Likely to Prevail on his Claim**

The next critical element in the injunction analysis is whether the Petitioner have "shown a substantial likelihood of ultimately succeeding on the merits, potential procedural hurdles notwithstanding." *Janvey v. Alguire*, 647 F.3d 585, 599 (5th Cir. 2011)(citation omitted).

"Substantial" likelihood of success on the merits does not mean "certain." *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988) (explaining that "the movant need not always show a probability of success on the merits") (quoting *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987); see also *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) ("Though there is no particular degree of likelihood of success that is required in every case, the party seeking a preliminary injunction must establish at least some likelihood of success on the merits before the court may proceed to assess the remaining requirements."). Some likelihood of success can be sufficient to support the issuance of a preliminary injunction. See *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) ("Where the other factors are strong, a showing of some likelihood of success on the merits will justify temporary injunctive relief.").

The Board of Immigration Appeals reopened Petitioner's case after finding that his hearing in withholding only proceedings was constitutionally deficient. The Board held that there was a "reasonable probability that the result of the removal proceedings would have been different had the alleged errors not occurred."

The facts here could not be more clear. A procedure exists for the adjudication of claims for protection for people with reinstated orders of removal, such as Mr. Menjivar. That procedure calls for referral to the asylum officer for a reasonable fear interview. 8 C.F.R. § 241.8(e). If the individual meets the standard of proof, the individuals are placed into withholding only proceedings before the immigration judge to have their fear of persecution and/or torture considered. 8 C.F.R. §208.31(e). That hearing is conducted under the procedures established in 8 C.F.R. §208.16

Proceedings under the Immigration & Nationality Act must comply with due process under the 5<sup>th</sup> Amendment. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Reno v. Flores*, 507 U.S. 292 (1993). The Fifth Circuit has required an applicant claiming ineffective assistance of counsel to “show both (1) that his counsel was constitutionally deficient; and (2) that he is prejudiced thereby, i.e. that there was a reasonable possibility that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Diaz v. Sessions*, 894 F3d 222, 228 (5<sup>th</sup> Cir. 2018) *quoting Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The Board made both findings in its September 2024 decision and reopened the case so that Mr. Menjivar could get a constitutionally-sound hearing in withholding-only proceedings. Mr. Menjivar’s habeas petition asks for nothing more than the constitutionally-sound hearing required by the 5<sup>th</sup> Amendment. In light of the Board’s finding that Mr. Menjivar’s previous proceeding was constitutionally deficient and that there is a reasonable probability that the result of those proceedings would be different absent ineffective assistance of counsel, Petitioner is likely to succeed on the merits of his claim.

**III. That Greater Injury Will Result From Denying The Temporary Restraining Order Than From Its Being Granted and The Balance of Hardships Favor Plaintiffs, and The Injunctive Relief Will Not Harm the Public Interest**

The next requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will serve the public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 1762, 173 L. Ed. 2d 550 (2009). In this assessment, the Court must weigh “the competing claims of injury and...consider the effect on each party of the granting or withholding of the requested relief,” while also considering the public consequences of granting injunctive relief. *Winter*, 555 U.S. at 24, 129 S. Ct. at 376.

In the instant matter, the balance of equities tips in the Petitioner’s favor because while there is a public interest in the prompt execution of orders of removal, there is a greater public interest in ensuring that individuals are not wrongly removed. *See Nken*, 556 U.S. at 436. In the current matter, since Petitioner can show that there is a substantial question as to whether his removal would be wrongful, that balance of hardship and the public interest tips sharply in favor of an injunction preventing his removal.

The government should not be allowed to come into this court and argue that prompt execution of removal orders is a significant interest. The government has allowed Mr. Menjivar to live in the United States since 2015, despite the final order of removal, and can not point to any negative consequences of their decision to allow him to remain on an order of supervision for ten years. The government cannot point to any change in circumstances that could justify such an abrupt departure, especially in light of the fact that the Board reopened the case so he could have a new hearing.

**CONCLUSION**

Balancing the four factors, the equities weigh in favor of granting an injunction to preserve the status quo. Petitioner has shown a likelihood of success on the merits, that he is and will suffer irreparable harm, there will be no harm to others, and the public interest will not be negatively impacted. Petitioner Menjivar respectfully requests this Court to enter a temporary restraining order granting his request for immediate injunctive relief.

June 11, 2025

Respectfully Submitted,

/s/ Brian Scott Green

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2025, a true and correct copy of the foregoing document was transmitted by electronic mail via the ECF system to all parties of record.

/s/ Brian Scott Green

Brian Scott Green