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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

SUSANNA DVORTSIN As Next Friend of Hayam El Gamal, et al., FOR *Petitioner*, v. KRISTI NOEM, in her official capacity as Secretary of the Department of Homeland Security; TODD LYONS, in his official capacity as Acting Director of Immigration and Customs Enforcement; and JOHN FABRICATORE, in his official capacity as ICE Denver Field Office Director, *Respondents.*	Case No. 1:25-cv-01741-NYW MEMORANDUM IN SUPPORT OF PETITIONER'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION AND BACKGROUND

Petitioner Susanna Dvortsin ("Ms. Dvortsin") submits this Petition for a Writ of Habeas Corpus as next of friend of Hayam El Gamal ("Ms. El Gamal") and her five children, who have been detained by Respondents in an unlawful act of collective punishment for the alleged actions of Ms. El Gamal's husband, Mohamed Soliman ("Mr. Soliman"). On June 1, 2025, Mr. Soliman was arrested and charged for his alleged actions in an attack on a peaceful demonstration in Denver, Colorado. ECF No. 1, ¶ 1.

Respondents' detention of Ms. El Gamal and her children—aged 4, 4, 8, 15 and 17—offends fundamental rule-of-law principles that lie at the core of a democratic justice system. Collective punishment and punishment by association were features of the Dark Ages, and in modern times, only criminal regimes like Nazi Germany have enacted official policies based on family punishment.[1]

Upon information and belief,[2] law enforcement arranged for Ms. El Gamal and her children to stay in a Colorado Springs hotel on the nights of June 1 and 2, 2025, while law enforcement searched their home. On June 3, 2025, agents from DHS' Homeland Security Investigations office (HSI) informed Ms. El Gamal that they would be relocating her and her family to another hotel because the one at which they were

[1] "One of the more elusive forms of terror utilized by the Nazi regime against its own citizens was that of family liability punishment. Family liability punishment – or Sippenhaft – involved the families of racially acceptable individuals, considered to have acted against the state, being punished for the crime of their relative." ROBERT LOEFFEL, FAMILY PUNISHMENT IN NAZI GERMANY: SIPPENHAFT, TERROR AND MYTH 1 (Palgrave MacMillan 2012).

[2] The undersigned were only able to speak to Ms. El Gamal and her family on the afternoon of June 5, 2025, despite formally requesting an urgent attorney preparation call the prior day, on June 4. Two calls conducted on June 4, 2025 were cut off by the Detention Center after roughly 5 minutes each.

staying was unsafe. Believing the officers to be trying to help, Ms. El Gamal and her family went with them. Outside the hotel, they were met by ten to twenty plain-clothes law enforcement officers, with their badges obscured, believed to be ICE officers from the Denver Field Office. During an exchange with an officer in which Ms. El Gamal tried to get more information about what was happening, the officer told her, "You have to pay for the consequences of what you did."

The officers placed Ms. El Gamal and her children in two separate government vans and did not take them to another hotel, but took them to an ICE facility in Florence, Colorado, where they were finally informed that they were in ICE custody. Soon after their arrival, the children were forced to watch ICE facility personnel use physical force against another detainee while fingerprinting him. The four-year-old children cried, believing that they would be harmed when their turn for fingerprinting came.

Ms. El Gamal requested to contact her attorney. She was briefly and intermittently given access to her phone to call and send an email. Between 11:36 a.m. and 12:52 p.m. Mountain Time (10:36 a.m. and 11:52 a.m. Pacific Time), Ms. El Gamal wrote to her attorney, Ms. Dvortsin, "I need [you] to call me," "I need to call you urgently" and "Hi please call urgently Florence Colorado ice office." ECF No. 2, Exh. B. The phone was taken from Ms. El Gamal soon thereafter. At 12:18 p.m. Mountain Time (11:18 a.m. Pacific Time), Ms. Dvortsin emailed Ms. Gamal saying, "I'm calling ICE right now" and "Hayam I'm trying to call. No answer." *Id.* Minutes later, Ms. Dvortsin attempted to call both Ms. El Gamal's cell phone and the Florence facility. However, by then Ms. El Gamal's phone had been turned off, and Respondents neither

answered the facility's phone nor informed the family that their attorney had attempted to call them.

Later in the day on June 3, after this interaction, Respondents initiated the process of moving the family out of this District, making no effort to contact Ms. Dvortsin. Sometime on the evening of June 3, a group of four or five officers picked the family up from the Florence facility and drove them to the airport in Denver, roughly two hours away. Ms. El Gamal and her family were not told where they were going. One the way to the Denver airport, they stopped at a DHS office in Denver to pick up another two officers.

Ms. El Gamal, her children, and the same 4-5 officers who drove them from Florence to Denver, boarded a commercial flight to San Antonio, Texas on the evening of June 3, 2025. According to publicly available flight information, it appears the flight was United Airlines Flight 1464, departing Denver International Airport at 8:34 p.m. Mountain Time and arriving at San Antonio International Airport at 11:45 p.m. Central Time. At the Denver airport, the 4-5 officers from Colorado remained next to the family members at all times. During the flight, the officers from Colorado were seated next to the family and accompanied each family member when they sought to use the restroom, waiting outside the bathroom door and accompanying them back to their seats.

The officers from Colorado maintained a close physical distance as they escorted the family through the airport in San Antonio. The same officers escorted the family from the San Antonio airport to the Dilley Detention Center ("Dilley"), joined by a small number of new officers. The ICE officers from Colorado were seated with the

family in a single van, while the new officers, evidently from Texas, followed them in separate vehicles. The van had five rows of seats with Colorado ICE officers in the front passenger seat, and at least one officer in the three middle rows. The driver of the van was from Texas.

At 1:45 a.m. Central Time on June 4, 2025, while the family was in the van en route from the San Antonio International Airport to Dilley, a distance of approximately 90 miles, the undersigned filed a Petition for a Writ of Habeas Corpus in this Court. ECF No. 1. Shortly thereafter, the family arrived at Dilley between 2:00 and 2:30 a.m. Central Time. At this time, the Colorado ICE officers brought the family's bags to the Texas ICE officers and escorted Ms. El Gamal and her family from their custody into the custody of the officials at Dilley, who processed them into the facility.

The family's experience at Dilley has been traumatic, especially for Ms. El Gamal's two four-year-old children. Ms. El Gamal has not slept since their arrival, unable to remove her religious coverings because she is not permitted to close her cell's curtains to preserve her modesty while she sleeps. When Ms. El Gamal asked Dilley personnel if she could close the curtains, they replied, "You have to pay the consequences, you don't realize where you are." Ms. El Gamal and her children fear their situation will worsen after her daughter's ("H.S.") imminent eighteenth birthday on June 8, 2025, after which the facility has indicated it intends to separate H.S. from her family. The family wishes to remain together as long as they remain in ICE custody.

The White House previously stated its intention to remove Ms. El Gamal and her children from the United States as soon as possible. On June 3, 2025, at 2:12 p.m. mountain time, the official X account for the White House posted an update: "JUST IN:

The wife and five children of illegal alien Mohamed Soliman—the suspect in the antisemitic firebombing of Jewish Americans—have been captured and are now in ICE custody for expedited removal. THEY COULD BE DEPORTED AS EARLY AS TONIGHT." ECF No 1, ¶ 4. Then, at 2:42 p.m. Mountain Time, the White House Twitter/X account posted an update with the text: "Six One-Way Tickets for Mohamed's Wife and Five Kids. Final Boarding Call Coming Soon." *Id.* The text featured an image including the additional text: "Could Be Deported By Tonight." *Id.* On the afternoon of June 4, 2025, Respondent Noem stated: "There is NO room in the United States for the rest of the world's terrorist sympathizers. Anyone who thinks they can come to America and advocate for antisemitic violence and terrorism – think again. You are not welcome here. We will find you, deport you, and prosecute you to the fullest extent of the law."[3] [4]

The detention of Ms. El Gamal and her children violates the Equal Protection

[3] "CBP, ICE, and USCIS to Ramp Up Crackdown on Visa Overstays Following Boulder Terrorist Attack," USCIS Newsroom, (June 4, 2025), https://www.uscis.gov/newsroom/news-releases/cbp-ice-and-uscis-to-ramp-up-crackdown-on-visa-overstays-following-boulder-terrorist-attack.

[4] Subsequent to the filing of the petition for a Writ of habeas corpus, DHS issued Notices to Appear in Immigration Court pursuant to 8 U.S.C. §1229a alleging the family overstayed their visitor visas in 2023, rendering them potentially removable pursuant to 8 U.S.C. §1227(a)(1)(B) ("Any [non-citizen] who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable"). This would indicate that Respondents may not be subjecting Ms. El Gamal and her children to expedited removal. However, Respondents may dismiss the §1229a proceedings unilaterally. See e.g. Acting DHS Secretary, Memorandum, "Guidance Regarding How to Exercise Enforcement Discretion" (Jan. 23, 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf. Placing the family in Expedited Removal would clearly violate the statute because all six non-citizens entered the United States lawfully under valid B-2 visas in August 2022 and, upon information and belief, have resided continuously in the United States for over two years. Such individuals are not statutorily eligible for expedited removal and can only be removed after removal proceedings pursuant to 8 U.S.C. §1229a.

Component of the Fifth Amendment, and the Fifth Amendment Due Process Clause. The U.S. Supreme Court has made abundantly clear that "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). This "guiding principle" was present from the early days of the American Republic. Professor Michael Grossberg has explained that "[b]eginning in Virginia in the 1780s, state after state rewrote its laws to express the new conviction that children should not be punished for the sins of their parents[.]"[5]

LEGAL STANDARD

Federal Rule of Civil Procedure 65 requires a movant for a temporary restraining order to show that: (i) they will suffer irreparable harm unless the injunction is issued; (ii) they have a substantial likelihood of prevailing on the merits; (iii) the threatened injury outweighs any harm that the preliminary injunction may cause the opposing party; and (iv) the injunction will not adversely affect the public interest. *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

Where a restraining order alters the status quo, movants must "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 237 F. Supp. 3d 1126, 1130 (D. Colo. 2017), *aff'd*, 916 F.3d 792 (10th Cir. 2019) (quotation omitted); *see Essien v. Barr*, 457 F. Supp. 3d 1008, 1012–13 (D. Colo. 2020) (dismissing the "mandatory versus prohibitory" distinction and agreeing that a

[5] Michael Grossberg, *Children and the Law* in Encyclopedia of Children and Childhood in History and Society (Paula S. Fass, ed., 2004), http://www.faqs.org/childhood/Ke-Me/Law-Children-and-the.html.

"strong showing" must be made for a detained immigrant to win a preliminary injunction). Courts cannot require that the factors weigh "heavily and compellingly" in a movant's favor; the Tenth Circuit "jettisoned the heavily-and-compellingly requirement over a decade ago." *Free the Nipple-Fort Collins*, 916 F.3d at 797 (citations and brackets omitted). Instead, a movant in this posture must merely make a "strong showing." *Id.*

The Court likewise has independent authority under habeas corpus, 28 U.S.C. § 2241, to order the immediate release of detained persons from unconstitutional confinement.

ARGUMENT

I. This Court Has Jurisdiction Over this Petition.

The federal habeas statute provides that the proper respondent to a habeas petition is "the person who has custody over [the petitioner]." 28 U.S.C. § 2242; *see also id.* § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."). These provisions have long been interpreted to refer to the "person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

The territorial location of the detainee is not the decisive question for determining which district court has jurisdiction to hear a petition for the Writ of Habeas Corpus. In *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), an Alabama prisoner sought the Writ in the District Court for the Western District of Kentucky, challenging a detainer issued against him in Kentucky state court. *Id.* at 485. The Supreme Court held that the Western District of Kentucky had jurisdiction

over the habeas action even though the prisoner was territorially located in Alabama, explaining that the prisoner was effectively "in custody" in Kentucky by virtue of that state court's detainer. *Id.* at 489 n.4. The *Braden* Court overturned *Ahrens v. Clark*, 335 U.S. 188 (1948), a case that "indicat[ed] that the prisoner's presence within the territorial confines of the district is an invariable prerequisite to the exercise of the District Court's habeas corpus jurisdiction." *Braden*, 410 U.S. at 495.

The *Braden* Court rejected the respondent's attempt to "limit a District Court's habeas corpus jurisdiction to cases where the prisoner seeking relief is confined within its territorial jurisdiction," explaining that such a position "is fundamentally at odds with the purposes of the statutory scheme." *Id.* at 494. It expressly rejected the view that § 2241(a) "limit[s] a District Court's habeas corpus jurisdiction to cases where the prisoner seeking relief is confined within its territorial jurisdiction." *Id.* Instead, The Court rooted its analysis in the fundamental purpose of the Writ: "The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95. The Court explained:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Id. at 495.

This analysis was not disturbed in *Rumsfeld v. Padilla*, 542 U.S. 426, 444 (2004), where the Court noted that "[p]rior to *Braden*, we had held that habeas jurisdiction depended on the presence of both the petitioner and his custodian within

the territorial confines of the district court." (Quoting *Ahrens*, 335 U.S. at 190–192). The *Padilla* Court explained that "*Braden* changed course and held that habeas jurisdiction requires only that the court issuing the writ have jurisdiction over the custodian." *Id.* (Quotation omitted). In short, *Padilla* does not undermine the basic immediate custodian-focused analysis of *Braden*. While the five-Justice majority in *Padilla* acknowledged that as a general matter, the "district of confinement" will normally be "synonymous with the district court that has territorial jurisdiction over the proper respondent," *id.* at 444, the two-justice concurrence makes clear that *Braden's* analytical approach remains sound. The concurrence, expressing the views of two of the five-Justice majority, explained that habeas petitions are properly filed in "some court . . . in whose territory the custodian may be found." *Id.* at 454 (Kennedy, J., concurring). The concurrence expressed the position that "the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue," a view which "is more in keeping with the opinion in *Braden* . . . ." *Id.* Moreover, in *Rasul v. Bush*, 542 U.S. 466 (2004)—decided the same day as *Padilla*—the Court rejected the argument that a territorial district of confinement rule is "require[d]" by §2241. *See id.* at 506 (Scalia, J. dissenting); *see id.* at 479 (majority op.) (explaining that a prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute") (quoting *Braden*, 410 U.S. at 495).

A. The Denver ICE Field Office Was the Immediate Custodian of Ms. El Gamal and Her Children at 12:45 AM Mountain Time, the Time this Petition Was Filed.

This Court has jurisdiction over this petition. Upon information and belief, Ms. Gamal and her children's immediate custodians from the time of their removal from

the ICE facility in Florence, Colorado, if not earlier, until the moment they were booked into Dilley, were officers from the Denver ICE Field Office. The family was booked into Dilley sometime between 2:00 a.m. and 2:30 a.m. Central Time. This petition was filed at 12:45 a.m. Mountain Time, or 1:45 a.m. Central Time, before the Denver Field Office relinquished custody of the family to officers at Dilley and when officers from the Denver Field Office were seated next to the family members in the van conveying them from the San Antonio Airport to Dilley. Because the Denver Field Office and its agents retained custody at the time the petition was filed, this Court has jurisdiction.

The subsequent transfer of custody of the Denver Field Office to the authorities at Dilley does not strip this Court of jurisdiction because jurisdiction is determined at the time the habeas petition is filed. *Serna v. Commandant, USDB-Leavenworth*, 608 F. App'x 713, 714 (10th Cir. 2015). "[W]hen the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." *Padilla*, 542 U.S. at 441. *See also Anariba v. Director*, 17 F.4th 434, 446–47 (3d Cir. 2021) (holding that "District Court retained jurisdiction" over ICE detainee's § 2241 habeas corpus case even after petitioner's "transfer out of New Jersey because . . . [the district court] already had acquired jurisdiction over [petitioner's] properly filed habeas petition that named his then-immediate custodian, the director of the Hudson County Correctional Facility.") Moreover, this Circuit has emphasized the importance of the act of custodial change, in distinction from the question of territoriality at time of filing: "It is well established that jurisdiction attaches on the initial filing for habeas corpus relief, and it

is not destroyed by a transfer of the petitioner and the accompanying custodial change." *Santillanes v. U.S. Parole Comm'n.*, 754 F.2d 887, 888 (10th Cir. 1985) (emphasis added). To the extent this Court believes jurisdiction may be proper in the district where Ms. Gamal and her family were territorially located at the time the petition was filed, that would not undermine this Court's concurrent jurisdiction based on the immediate custodian rule. *See Braden*, 410 U.S. at 499, n.15 (acknowledging that multiple courts may simultaneously have "concurrent habeas corpus jurisdiction over the petitioner's claim").

There can be no concern over petitioner forum-shopping here, as the instant petition was filed in the district where the undersigned understood Ms. El Gamal and her children to be. Ms. El Gamal emailed Ms. Dvortsin at 10:36 a.m. on June 3, 2025: "Hi please call urgently Florence Colorado ice office." *See* ECF No. 2, Exh. B.

It appears that at the time this petition was filed—at 12:45 a.m. Mountain Time (1:45 a.m. Central Time), Ms. El Gamal and her family were in the immediate custody of agents from the Denver Field Office operating under the direction of Respondent Field Office Director in Denver. The mere fact that the family had been spirited out of Colorado in the middle of the night and was within the territory of the state of Texas at that time this petition was filed does not undermine this Court's jurisdiction.

B. This Court Has Habeas Jurisdiction Over the Petition Because this Case Meets the Exceptions Described in Justice Kennedy's Padilla Concurrence.

If this Court were to reject the arguments above, it should still find it has jurisdiction, because this is the rare case in which exceptions discussed by Justice Kennedy's concurrence and acknowledged by the majority in *Padilla* excuse non-conformance with the immediate custodian and district of confinement rules in habeas cases.

In *Padilla*, the Supreme Court considered where a petition seeking habeas relief should be filed. Looking to the "plain language" of the federal habeas statute, which limits district courts to granting relief "within their respective jurisdictions," 28 U.S.C. § 2241, the Court concluded that a habeas petition naming a prisoner's custodian should be filed in only one district: "the district of confinement." *Padilla*, 542 U.S. at 442. But the Supreme Court in *Padilla* also accepted that, in rare but important cases, the default rule would not apply. In a widely recognized concurring opinion, Justice Kennedy, joined by Justice O'Connor, explained that the immediate custodian rule is "subject to exceptions." *Id.* at 452 (Kennedy, J., concurring). And he emphasized that the five-vote majority opinion—of which the two concurring Justices were a pivotal part—"acknowledged" the same thing. *Id.* (citing *id.* at 435-36, 437-42, 444-47 (majority op.)); *see infra* I.C (discussing the "unknown custodian" exception recognized by the majority). The exceptions allow courts to fashion flexible outcomes in unique, outlier cases that are tailored to the particular situation. They do not open the door to a free-for-all, permitting the filing of a petition in "any one of the federal district courts," but only in "the one with the most immediate connection *to the named custodian*." *Id.* at 453 (emphasis added).

Justice Kennedy listed various examples of past exceptions the Supreme Court had made. *See id.* at 454. And of particular relevance here, he explained that, as a matter of fairness and in the interests of justice, he "would acknowledge an exception if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention." *Id.* "In cases of that sort," he continued, habeas jurisdiction would be

"in the district court from whose territory the petitioner had been removed." As in this case, "if the Government had removed [Ms. El Gamal and her family] from the District [where they were located] but refused to tell [their] lawyer where [s]he had been taken, the District Court would have had jurisdiction over the petition." *Id.*

Efforts by the Denver Field Office to spirit Ms. El Gamal and their family out of the district only began after Ms. El Gamal attempted to contact her lawyer, whose calls to the Florence facility went unanswered, even though the family was evidently present at that facility at the time. At 12:18 p.m. Mountain Time (11:18 p.m. Pacific Time), Ms. Dvortsin emailed Ms. El Gamal: "Hayam I'm trying to call. No answer." and "I'm calling ICE right now." *See* ECF No. 2, Exh. B. Under these conditions, Respondents' effort to move a family consisting of four young children in the middle of the night, rather than wait until the morning after the family had rested, likely has no innocent explanation. The undersigned reasonably filed this petition in the last place Ms. El Gamal and her family were known to have been, after making multiple failed efforts to locate the family using ICE's detainee locator system. Upon information and belief, Ms. El Gamal's immigration attorney attempted to call the Florence, Colorado, ICE facility while the family was detained there, but officials did not notify Ms. El Gamal that her attorney was calling, despite her repeated requests to speak to counsel. As such this Court should retain jurisdiction over the instant petition.

C. This Court Has Jurisdiction Because of the "Unknown Custodian" Exception to the Immediate Custodian Rule

Even if this Court declines to apply the immediate custodian rule here, it should retain jurisdiction under the "unknown custodian" exception to the immediate custodian rule. This exception, recognized as the "law of the land" by the majority in *Padilla*, is

necessary where it may be "impossible to apply the immediate custodian" rule because "a prisoner is held in an undisclosed location by an unknown custodian." *Padilla*, 542 U.S. at 450 n.18 (cleaned up) (discussing *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986)); *see Ozturk v. Trump et al.*, Case No. 25-cv-10695-DJC, 2025 WL 1009445 at *10 (D. Mass. Apr. 4, 2025) (noting "there is also an exception to the immediate-custodian rule where the custodian of the petitioner is unknown at the time that the Petition is filed"); *Khalil v. Joyce*, Case No. 25-cv-01963, 2025 WL 972959 at *28-30 (D.N.J. Apr. 1, 2025) (citing cases showing that "the lower federal courts have consistently embraced the unknown custodian exception to the immediate custodian rule"); *see also United States v. Moussaoui*, 382 F.3d 453, 465 (4th Cir. 2004). The habeas pleading statute likewise contemplates situations in which a petition is filed when a detainee's custodian is unknown. *See* 28 U.S.C. § 2242.[6] It is also consistent with a recent ruling by Judge Farbiarz of the District of New Jersey, which applied the unknown custodian exception "because no phone calls were allowed" to "undo the impression" that the petitioner was in New York. *Khalil,* 2025 WL 972959 at *30. *See Padilla*, 542 U.S. at 435 n.18 (noting exception would apply where detainee was held "in an undisclosed location by an unknown custodian" (citing *Demjanjuk*, 784 F.2d at 1115)). The "unknown custodian rule" does not implicate the government's reasons for transferring Ms. El Gamal, and it can and should be applied regardless of why the government moved the family.

[6] *Moussaoui*, 382 F.3d at 465 (where "immediate custodian" is "unknown," "the writ is properly served on the prisoner's ultimate custodian"); *United States v. Paracha*, 2006 WL 12768, at *6 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008) (similar); *Ali v. Ashcroft*, 2002 WL 35650202, at *3 (W.D. Wash. Dec. 10, 2002); *see* 28 U.S.C. § 2242 (at pleading stage, requiring naming of petitioner's warden "if known"); Hertz & Liebman, 1 Federal Habeas Corpus Practice & Procedure § 10.1 (7th ed. 2015) ("The 'immediate custodian' rule . . . is inapplicable . . . where the prisoner's current whereabouts are unknown.")

D. If this Court Determines that the District Court for the Western District of Texas Is the Sole Court of Jurisdiction Here, the Court Should Transfer Rather than Dismiss the Case.

If this Court determines it lacks jurisdiction either solely or concurrently, then transfer to Texas is appropriate, rather than dismissal. If a case is filed in an incorrect venue, 28 U.S.C. § 1406(a) permits the district court in the district in which the case was filed to "transfer such case to any district or division in which it could have been brought" if such transfer serves "the interest of justice." 28 U.S.C. § 1631 permits transfer of a civil action to any court "in which the action . . . could have been brought at the time it was filed or noticed," if such transfer "is in the interest of justice." Petitioner's decision to file in this District was a good faith effort based on a lack of information as to where Ms. El Gamal and her family were located on the night of June 3-4. The last information as to the family's whereabouts indicated the family was in this District. As such, at a minimum the Court should transfer the case to the Western District of Texas rather than dismiss.

II. A Temporary Restraining Order is Appropriate Here.

To obtain a temporary restraining order, Ms. Dvortsin must satisfy four factors. She must demonstrate that (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008); *see also Jewell*, 839 F.3d at 1281. The standards for granting a temporary restraining order and a preliminary injunction are generally the same. *See Wiechmann v. Ritter*, 44 F. App'x 346, 347 (10th Cir. 2002); *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1091 (D. Colo. 2020). Ms. Dvortsin satisfies each factor, and a temporary restraining order should be issued.

A. Ms. Dvortsin is Likely to Succeed on the Merits of Her Petition for Writ of Habeas Corpus

i. Ms. El Gamal and her Children's Detention Violates the Equal Protection Component of the Fifth Amendment

The government is confining Ms. El Gamal and her children without any constitutionally adequate reason. Ms. El Gamal and her five children cannot be held responsible for the alleged actions of their spouse and father.

Civil detention must be carefully limited to avoid grave violations of individuals' constitutional rights, as the Supreme Court has recognized regarding civil confinement. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness to support civil commitment); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders only after a jury trial on individuals' lack of volitional control and dangerousness to others).

"[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (holding that state statute denying children of undocumented parents access to public school violates Equal Protection Clause). "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (holding that state workers' compensation statute denying equal recover rights to illegitimate children violates Equal Protection Clause).

Respondents openly state that Ms. El Gamal and her family were detained and placed in removal proceedings as punishment for the alleged actions of Mr.

Soliman. *See supra* Introduction and Background. Mr. Soliman has not been convicted of any crime and remains innocent until proven guilty, but in any event, "kin punishment" constitutes invidious discrimination, which occurs "[w]hen the law lays an unequal hand on those who have committed precisely the same offense." *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 880 (1984) (Marshall, J., dissenting) (citing *Skinner v. Oklahoma* ex rel. *Williamson*, 316 U.S. 535, 541 (1942)). A state action is "presumptively invidious" if it "disadvantage[s] a 'suspect class,' or . . . impinge[s] on the exercise of a 'fundamental right." *Plyler*, 457 U.S. at 216-17; "[I]t is invidious to discriminate against [children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). Freedom from kin punishment is so rooted in "fundamental conceptions of justice" to establish freedom from kin punishment as a fundamental right. *Weber*, 406 U.S. at 175; *Plyler*, 457 U.S. at 220. There can be no legitimate state interest in detaining and unlawfully removing Ms. El Gamal and her children from the United States.

ii. Ms. El Gamal and Her Children's Detention Violates the Due Process Clause

Ms. El Gamal and her children's detention violates their Fifth Amendment right to Due Process. "[F]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see also Black v. Decker*, 103 F.4th 133, 151 (2d Cir. 2024) (quoting *Velasco Lopez v. Decker*, 978

F.3d 842, 851 (2d Cir. 2020)). Civil detention "for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356); *Foucha*, 504 U.S. at 79; *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1210 (11th Cir. 2016), *vacated on other grounds*, 890 F.3d 952 (2018).

At a minimum, due process requires that detention be "reasonabl[y] relat[ed]" to a valid governmental purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Foucha*, 504 U.S. at 79. Courts have long acknowledged the dual purposes of civil immigration detention: the government may only subject individuals to civil immigration detention to prevent flight and danger to the community, and for no other reason. *Zadvydas*, 533 U.S. at 690; *Sopo*, 825 F.3d at 1217. And the longer that detention continues, the more additional protections are necessary to ensure that detention continues to bear a reasonable relation to its purpose. *See Zadvydas*, 533 U.S. at 691; *Jackson*, 406 U.S. at 738; *Hendricks*, 521 U.S. at 363-64. Due process requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356) (internal quotation marks omitted). "Under the Due Process Clause, civil detention is permissible only where there is a 'special justification' that 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Sopo* 825 F.3d at 1210 (quoting *Zadvydas*, 533 U.S. at 690).

The Fifth Amendment's Due Process clause mandates a deprivation of liberty

be premised on a finding of "personal guilt." *Scales v. United States*, 367 U.S. 203, 224 (1961); *see also United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004), *vacated and remanded on other grounds*, 543 U.S. 1097 (2005). Moreover, the Constitution protects intimate association—i.e., one's "choices to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Freedom of intimate association is a "fundamental element of personal liberty" guaranteed by the Due Process Clause. *Id.* It also stems from the First Amendment right to freedom of association. *See Rucker v. Harford Cnty., Md.*, 946 F.2d 278, 282 (4th Cir. 1991). Marriage is the paradigmatic example of intimate association. *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015) ("Decisions about marriage are among the most intimate that an individual can make"). The same goes for the parent-child relationship. *See Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

In seeking habeas relief, Petitioner does not ask for a radical departure from well-settled case law. Rather, her request relies on decades of Supreme Court precedent clearly establishing that the Fifth Amendment requires an individualized hearing before a neutral arbiter to determine whether detention serves a valid governmental purpose. *See Zadvydas*, 533 U.S. at 690-91.

When the Government deprives someone of a liberty interest, "the procedures attendant upon that deprivation [must be] constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citation omitted). The constitutional sufficiency of procedures is determined by weighing three factors: (i) the private interest that will be affected by the official action, (ii) the risk of erroneous deprivation

of that interest through the available procedures, and (iii) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Each factor weighs in Ms. El Gamal and her children's favor.

1. Ms. El Gamal and Her Children Have a Weighty Liberty Interest in Being Free from Confinement.

Ms. El Gamal and her children have a weighty interest in being free from confinement. The Supreme Court has decreed that "civil commitment for any purpose constitutes a *significant* deprivation of liberty that requires due process protections." *Addington*, 441 U.S. at 425 (emphasis added); *see also Zadvydas*, 533 U.S. at 690 (freedom "from government . . . detention . . . lies at the heart of the liberty [the Due Process] Clause protects."). Accordingly, the deprivation at stake in this case necessitates additional procedural safeguards.

2. Detaining Individuals in Retribution for the Alleged Actions of Relatives Poses a Substantial Risk of Erroneous Deprivation

First, the "opportunity to be heard 'at a meaningful time'" is a "fundamental requirement of due process." *Mathews*, 424 U.S. at 333 (1976) (quotation omitted). No individualized determination has been made about the detention of Ms. El Gamal and her children. On the contrary, public statements from the White House and Secretary Noem, as well as statements by ICE personnel, *see supra* Introduction and Background, indicate that Ms. El Gamal and her children are being punished solely due to association with their father. ECF No. 1, ¶¶ 1-5.

Second, Ms. El Gamal and her children must be heard "in a meaningful manner." *Mathews*, 424 U.S. at 333 (quotation omitted). But here, DHS confined the family unilaterally without review. In order for Ms. El Gamal and her children to be

heard in a meaningful manner, the continued confinement must be tested by a neutral arbiter. *See Wang v. Holder*, 569 F.3d 531, 540 (5th Cir. 2009) (recognizing that "a due process violation can be premised upon the absence of a neutral arbiter" when an immigration judge takes on the role of a prosecutor). These non-existent procedures create an especially high risk of erroneous deprivation.

3. The Government's Interest in Detaining Non-Citizens like Ms. El Gamal and her Children is Minimal

The government has no interest in detaining individuals who have not engaged in any activity that would render them a flight risk or a danger to public safety. Therefore, Ms. El Gamal and her children have raised a substantial claim that their continued confinement in retribution for the alleged acts of Mr. Soliman violates their procedural due process rights. Any notion that this family, comprised of five children, poses a threat to the public would be wrong. Nor does the family pose a flight risk; the youngest children are four-years-old and are therefore not even adept at walking yet.

iii. Subjecting Ms. Gamal and her Children to Expedited Removal Violates the INA and APA

Ms. El Gamal and her children may not statutorily be subjected to expedited removal because they entered the United States lawfully with valid B-2 visas and, upon information and belief, have resided continuously in the United States since entering the country in August 2022. 8 U.S.C. §1225(b)(1)(A)(iii)(II). Upon information and belief, Ms. El Gamal was informed on June 5, 2025, that USCIS lacks jurisdiction over her derivative asylum application and that as a result, it was denied on June 4, 2025. The APA provides for judicial review when a person is adversely affected by agency action. 5 U.S.C. § 702. Respondents' potential plans to place Ms. El Gamal and her children in expedited removal without meaningful review is final agency action, per 5

U.S.C. § 704, as a "definitive position" which caused injury to Ms. El Gamal and her children. *See Darby v. Cisneros*, 509 U.S. 137, 144 (1993). Ms. El Gamal and her children have been adversely affected by Respondents' failure to correctly apply the INA and stating that they were removing them under the expedited removal statute would constitute a final agency decision that is arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). While Respondents have now issued Notices to Appear placing the family under 8 U.S.C. § 1229a removal proceedings, Respondents retain the ability to dismiss those proceedings unilaterally. *See e.g.*, Acting DHS Secretary, Memorandum, "Guidance Regarding How to Exercise Enforcement Discretion" (Jan. 23, 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf.

B. Ms. Gamal Will Suffer Irreparable Harm in the Absence of a Temporary Restraining Order

The violation of an individual's constitutional rights is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). Indeed, "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple- Fort Collins*, 916 F.3d 792, 805–06 (10th Cir. 2019) (citing *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012)); *Connecticut Dept. of Environmental Protection v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.") (internal quotations and citations omitted)). The loss of constitutional rights constitutes irreparable harm. *See, e.g. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (loss of protected freedoms "for even minimal periods of time,

unquestionably constitutes irreparable injury, *Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1190 (10th Cir. 2003) (internal quotation marks omitted).") "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373); *see also*, Charles Alan Wright & Arthur R. Miller, *11A Federal Practice and Procedure* § 2948.1 (3d ed. 1998) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary.")

Irreparable physical and mental harm is inevitable for those incarcerated, especially for children like those detained here. As the Supreme Court explained, "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972); *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) ("[t]he deprivation [ ] experienced [by immigrants] incarcerated [is], on any calculus, substantial. [They] are locked up in jail. [They cannot] maintain employment or see [their] family or friends or others outside normal visiting hours. The use of a cell phone [is] prohibited, and [they] have no access to the internet or email and limited access to the telephone"); *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (recognizing in "concrete terms the irreparable harms imposed on anyone subject to immigration detention" including "subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on [persons in detention] and their families as a result of detention, and the collateral harms to children of [persons in detention] whose parents are

detained").[7]

C. The Balance of Equities Weighs Heavily in Ms. El Gamal and Her Children's Favor

The third and fourth factors tip strongly in Ms. El Gamal's favor. Where, as here, the government is a party to a case, the final two injunction factors—*i.e.*, the balance of equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 18-CV-01672 (WJM-SKC), 2019 WL 4926764 at *7 (D. Colo. Oct. 7, 2019).

When assessing whether a preliminary injunction is warranted, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). "When a constitutional right hangs in the balance," it "usually trumps any harm to the defendant." *Free the Nipple-Fort Collins*, 916 F.3d at 806. *Cf. Awad*, 670 F.3d at 1131 ("[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [a Petitioner's interest] in having his constitutional rights protected"). The "public interest is best served by ensuring the constitutional rights of person within the United States." *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266 at *13 (S.D.N.Y. 2018) (internal citation omitted); *Free*

[7] Numerous studies show the devastating, life-long physical and emotional impact that detention—even for a brief period of time—has on young children. *See e.g.*, Staff Writer, "Migrant children in U.S. detention face physical, mental harms: report," Harvard School of Public Health (Jan. 22, 2024), https://hsph.harvard.edu/news/migrant-children-in-u-s-detention-face-physical-mental-harms-report/; Sural Shah & Raul Gutierrez, "Trump's detention policy hurts kids. We know, we're pediatricians.," USA TODAY (Apr. 15, 2025), https://www.usatoday.com/story/opinion/voices/2025/04/15/trump-immigrant-detention-centers-children-health/83017611007/; INT'L DETENTION COALITION, CAPTURED CHILDHOOD 48-57, https://idcoalition.org/wp-content/uploads/2012/03/IDC-Captured-Childhood-Report-Chap-5.pdf.

the Nipple-Fort Collins, 237 F. Supp. 3d 1126, 1134 (D. Colo. 2017) (it is "always in the public interest to prevent the violation of a party's constitutional rights") (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Stawser v. Strange*, 44 F. Supp.3d 1206, 1210 (S.D. Ala. 2015)); *see Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) ("The public interest would be best served by enjoining the defendants from infringing on the plaintiff's right to equal protection"). All "interested parties [would] prevail" if this Court were to grant this temporary restraining order because ICE "has no interest in the continued incarceration of an individual who it cannot show to be either a flight risk or a danger to the community." *Velasco Lopez*, 978 F.3d at 857; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[W]e have held that plaintiffs who are able to 'establish[ ] a likelihood that [a] policy violates the U.S. Constitution . . . have also established that both the public interest and the balance of the equities favor a preliminary injunction.'") "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132.

CONCLUSION

For the foregoing reasons, the Court should grant Ms. Dvortsin's application for a temporary restraining order and enjoin Respondents from detaining Ms. El Gamal and her children. The Court should likewise continue its Order prohibiting Respondents from removing Ms. El Gamal and her children from the United States. The Court should further order Respondents to return Ms. El Gamal and her children for detention in this District and ensure that the family remains together. Additionally, the Court should issue an order to show cause to Respondents as to why the Court should not issue a preliminary injunction.

Dated: June 6, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2025, I caused the foregoing document to be electronically filed with the United States District Court, District of Colorado, by using the CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

Dated: June 6, 2025

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