IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-1741-NYW

SUSANNA DVORTSIN, as next friend of HAYAM EL GAMAL and her children,

Petitioner,

v.

KRISTI NOEM, Secretary of U.S. Department of Homeland Security,
TODD LYONS, Acting Director of Immigration and Customs Enforcement, and
ROBERT GUADIAN, ICE Denver Field Office Director,[1]

Respondents.

RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER (ECF No. 2)

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[1] Pursuant to Fed. R. Civ. P. 25(d), Mr. Guadian, who is currently the ICE Denver Field Office Director, is substituted as a Respondent in place of John Fabbricatore, who was named in the Petition in his official capacity as the ICE Denver Field Office Director and formerly served in that position.

Petitioner's Emergency Motion for Temporary Restraining Order (ECF No. 2, filed 6/4/25) and supporting Memorandum (ECF No. 13, filed 6/6/25) fail on every level. First, this Court lacks habeas jurisdiction because the detained individuals, Ms. El Gamal and her children, were in custody in the Western District of Texas—not in this District—at the time of filing. Second, Petitioner Susanna Dvortsin has not met her burden to be permitted to proceed as a next friend. Third, Congress has barred judicial review of challenges to detention like the one Petitioner presents here and, even if it were not barred, it would be channeled directly to the circuit courts. Fourth, Petitioner has not shown that the detention violates equal protection or due process. Ms. El Gamal and her children are being lawfully detained based on their own unlawful conduct, namely, unlawfully overstaying their visas in violation of 8 U.S.C. § 1227(a)(1)(B). And, contrary to Petitioner's claims, they will have the full opportunity to challenge their detention through the proper procedures before an immigration judge. *Id.* § 1226(a). But their attempt to bring a collateral challenge to raise those objections in this proceeding is barred multiple times over. The Court should therefore deny the motion and dismiss the case.

BACKGROUND

A. The unlawful status of Ms. El Gamal and her children.

Hayam El Gamal and her five children, all citizens of Egypt, were admitted into the United States on August 27, 2022, pursuant to nonimmigrant B-2 visitor visas. Ex. 1 ¶ 15, Attachs. 1-6 (Decl. of Alexander Williams). These visas authorized them to stay in the United States only until February 26, 2023. *Id.* They did not, however, depart the country by that date. *Id.* They remained in the United States without permission to do so. *Id.*

On June 1, 2025, Ms. El Gamal's husband, Mohamed Soliman, threw ignited "Molotov cocktails" into a crowd gathering for an event to raise awareness for hostages held by Hamas, allegedly because he "wanted to kill all Zionist people and wished they were all dead." *United States v. Soliman*, No. 25-mj-00108-NRN, ECF No. 1-2 at 2-3 (D. Colo.) (charging Soliman under 18 U.S.C. § 249(a)). In the course of investigating this offense, Department of Homeland Security ("DHS") officials determined that Ms. El Gamal and her children had remained in the United States without legal authorization. Ex. 1 ¶ 3; Ex. 2 ¶ 3 (Decl. of Dustin Mehsling).

B. The detention and service of notices to appear.

On June 3, 2025, ICE officials, including at least one Homeland Security Investigations ("HSI") agent, were informed at approximately 7:00 a.m. MT that Ms. El Gamal and her children were at a hotel in Colorado Springs incident to the investigation into the Boulder attack. Ex. 1 ¶ 4; Ex. 2 ¶ 4. ICE officials immediately went to the hotel and spoke to Ms. El Gamal. Ex. 1 ¶¶ 4-5; Ex. 2 ¶¶ 4-5. They identified themselves as ICE officials and informed Ms. El Gamal that they were taking her and her children into their custody. Ex. 1 ¶ 5; Ex. 2 ¶ 5. At approximately 7:45 a.m. MT, two vans operated by an ICE contractor, MVM, Inc. ("MVM"), arrived at the hotel and transported Ms. El Gamal and her children to the ICE Enforcement and Removal Operations ("ERO") office located in Florence, Colorado.[2] Ex. 2 ¶¶ 7, 9. The vans arrived at the ICE ERO office at approximately 9:00 a.m. MT. Ex. 1 ¶ 10; Ex. 2 ¶ 12.

At the facility, ICE officials initiated removal processing for Ms. El Gamal and her

[2] ICE contracts with MVM for the transport of juveniles and families. Ex. 1 ¶ 7; Ex. 2 ¶ 7.

children. Ex. 1 ¶¶ 13, 15; Ex. 2 ¶ 13. This process includes serving immigration charging and detention documents, which include the Notice to Appear (NTA or I-862), Warrant for Arrest of Alien (I-200), and Notice of Custody Determination (I-286). Ex. 1 ¶ 13. ICE officials provided Ms. El Gamal a Notice to Appear, Warrant for Arrest of Alien, and a Notice of Custody Determination for her and each of her minor children.[3] *Id.* ¶ 15. The Notices to Appear for each individual set forth the basis for removal, namely, that each individual was admitted as a nonimmigrant and remained in the United States longer than they were authorized to stay. *Id.* ¶¶ 15, 16, Attachs. 1-6. Petitioner and her children were thus placed in removal proceedings under 8 U.S.C. § 1229a. Ex. 1 ¶ 16.

The NTAs stated that they would appear before an immigration judge in Dilley, Texas. *Id.* ¶ 17, Attachs. 1-6. During processing, an ICE official informed Ms. El Gamal that she and her children were not going to be immediately removed from the country, but that they were being placed into ordinary removal proceedings and would appear before an immigration judge where they would be permitted to seek relief or protection from removal. *Id.* ¶ 14.

C. The permission for Ms. El Gamal to access her phone

While waiting for the vans and during the drive to Florence, Ms. El Gamal was allowed to possess and use her mobile phone. Ex. 1 ¶¶ 7-8, 11; Ex. 2 ¶¶ 7-8, 11. Upon arrival at the facility, Petitioner again used her phone to leave a voice message for her attorney. Ex. 1 ¶ 12. ICE took custody of Ms. El Gamal's mobile phone when ICE officials

[3] Two of the minor children were issued superseding NTAs after they arrived in Texas to correct minor factual errors in the original NTAs. Ex. 1 ¶ 15 n.3.

began processing her for removal proceedings. Ex. 1 ¶ 12; Ex. 2 ¶¶ 13-14. After this process was completed, ICE gave Ms. El Gamal access to her phone again, and it appeared that she retrieved some phone numbers and other information from the phone. Ex. 2 ¶ 15. MVM then took custody of Ms. El Gamal's phone during transport from Florence to San Antonio, Texas. Ex. 1 ¶ 21; Ex. 2 ¶ 19. It is standard operating procedure to take custody of an individual's mobile phone during transport. Ex. 1 ¶ 21; Ex. 2 ¶ 19.

D. The transport to a family detention center in Texas.

ICE and MVM transported Ms. El Gamal and her children to an immigration detention facility in Dilley, Texas. Ex. 1 ¶ 20; Ex. 2 ¶ 18; Ex. 3 ¶¶ 4-12 (Decl. of Crystal Davis). That facility in Dilley is one of only three immigration detention facilities in the country that are specially configured to house families. Ex. 1 ¶ 20. In contrast, the ICE contract facility located in Aurora, Colorado, is not a family detention facility. *Id.*

Ms. El Gamal and her children arrived at Denver International Airport ("DIA") just before 6:30 p.m. MT. Ex. 3 ¶ 4. Along with ICE and MVM officials, they boarded a commercial flight to San Antonio that left the gate at DIA at approximately 8:37 p.m. MT. *Id.* ¶¶ 5-6, 9. The flight arrived at San Antonio International Airport on June 3, 2025, at approximately 10:44 p.m. MT, or 11:44 p.m. CT. *Id.* ¶ 10. ICE ERO officials based in San Antonio met the detainees at the San Antonio airport and took custody of them there and took them to the ICE facility in Dilley. *Id.* ¶ 12. The ICE ERO official who came from Denver did not accompany them to Dilley. *Id.* ¶¶ 12-15. Both San Antonio and Dilley are located in the Western District of Texas.

Detainees at Dilley are provided a free three-minute phone call within the first 48

hours of their arrival, and Ms. El Gamal used such a call. Ex. 4 ¶¶ 4-6 (Decl. of Bryan Contreras). Since arriving at Dilley, she has made over 60 phone calls. Ex. 4 ¶ 7.

E. The Petition

Petitioner states that the habeas petition (Petition) was filed on June 4, at 1:45 a.m. CT, 12:45 a.m. MT, which was after Ms. El Gamal and her children arrived in Texas. ECF No. 13 at 10. Counsel stated that the Petition was filed by Ms. Dvortsin as a "next friend" because Ms. El Gamal was "currently being held incommunicado and unable to direct the litigation," and that Petitioner would "represent Ms. El Gamal once permitted access." ECF No. 1 ¶ 4 n.1. The Court issued an *ex parte* Order finding it "appropriate" for Petitioner to proceed as Ms. El Gamal's next friend in the "preliminary proceedings." ECF No. 5. Petitioner filed a motion for temporary restraining order, ECF No. 2, then a Memorandum in support of that motion, ECF No. 13. The Memorandum correctly acknowledges that Ms. El Gamal and her children have not been placed in expedited removal proceedings. ECF No. 13 at 11 n.4.[4] The Memorandum appears to clarify that the proceeding is a "Petition for Writ of Habeas Corpus." ECF No. 13 at 17.

ARGUMENT

To obtain a temporary restraining order, Petitioner must establish "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect

[4] The page citations used herein in citing the Memorandum (ECF No. 13) are to the page numbers added by the Court's CM/ECF system and shown at the top of each page.

the public interest." *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (quotations omitted). Requests for injunctions that alter the status quo "are disfavored" and require a "strong showing" of likelihood of success. *State v. EPA*, 989 F.3d 874, 883-84 (10th Cir. 2021). In a habeas proceeding, a court considering a motion for a preliminary injunction must deny the petition "if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail." *Munaf v. Geren*, 553 U.S. 674, 691–92 (2008).

I. This Court lacks jurisdiction over this habeas proceeding.

Because Ms. El Gamal and her children were in the Western District of Texas at the time the habeas petition was filed, this Court lacks jurisdiction and venue. For that threshold reason alone, the Court should deny the motion and ultimately dismiss the case.

A. Ms. El Gamal and her children were not detained in this district at the time the Petition was filed.

"For 'core habeas petitions,' 'jurisdiction lies in only one district: the district of confinement.'" *Trump v. J.G.G.*, 604 U.S. __, 145 S. Ct. 1003, 1005–06 (2025) (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004)). In enacting 28 U.S.C. § 2241(a), Congress limited district courts to granting habeas relief "within their respective jurisdictions," meaning "the traditional rule ... that the Great Writ is 'issuable only in the district of confinement.'" *Padilla*, 542 U.S. at 442 (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961)). As a result, there is "a simple rule" that "[w]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States," the petitioner must "file the petition in the district of confinement." *Id.* at 447.

This rule applies where, as here, the habeas application challenges current

detention. Petitioner observes that in some habeas cases, the "territorial location is not the decisive question," relying on *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484 (1973). ECF No. 13 at 13. But in *Braden*, the petitioner sought to challenge not his current physical custody in Alabama but his *future* custody in Kentucky. 410 U.S. at 486–87. The Supreme Court determined that in that situation, habeas jurisdiction was proper where the future custody would occur—in Kentucky. *Id.* at 493-95, 500. As the Supreme Court later explained in *Padilla*, "nothing in *Braden* supports departing from the immediate custodian rule in the traditional context of challenges to present physical confinement." 542 U.S. at 438.

The Supreme Court has already said, and Petitioner agrees, that in determining the district of confinement, the court must assess the facts at the time of filing of the habeas petition, as habeas jurisdiction "attaches on the initial filing." ECF No. 13 at 16-17 (quoting *Santillanes v. U.S. Parole Comm'n*, 754 F.2d 887, 888 (10th Cir. 1985) and citing *Serna v. Commandant, USDB-Leavenworth*, 608 F. App'x 713, 714 (10th Cir. 2015)); *see Padilla*, 542 U.S. at 448–49 (ruling that the Southern District of New York did not have jurisdiction over a habeas petition filed there where "both the petitioner and his immediate custodian were outside of the district *at the time of filing*") (emphasis added).[5]

There is no dispute that at the time the habeas petition was filed, Ms. El Gamal

[5] Petitioner observes that despite this time of filing rule, a district court can maintain jurisdiction over a petition if the petitioner is transferred to another district. ECF No. 13 at 16. But this rule applies only when the petition was first properly filed in the correct district. *Padilla*, 542 U.S. at 441 ("when the Government moves a habeas petitioner after she *properly* files a petition naming her immediate custodian, the District Court retains jurisdiction") (emphasis added). A court must still first determine whether the petition was properly first filed in the district of the petitioner's confinement.

and her children had landed in San Antonio and were in ICE custody in the Western District of Texas—*not* Colorado. *See* Ex. 3 ¶ 10. There is also no dispute that Ms. El Gamal and her children, through their proposed next friend, challenge their current detention. Therefore, the district of confinement rule applies, and this habeas petition was required to be filed in the Western District of Texas. This Court thus lacks both jurisdiction and venue over this proceeding. *Cf. Villatoro Fuentes v. Choate*, No. 24-cv-01377-NYW, 2024 WL 2978285, at *5 (D. Colo. June 13, 2024) (observing that "the distinction between proper venue, the proper respondent in a habeas case and the Court's jurisdiction over the respondent, and 'habeas jurisdiction' appears to often blur").

Nor did this Court ever acquire jurisdiction. As the Supreme Court explained in *Padilla*, if a habeas petitioner is moved from one district to another before the petition is filed, then the district court in the original district never acquired jurisdiction. *See* 542 U.S. at 441 (explaining that where "Padilla was moved from New York to South Carolina before his lawyer filed a habeas petition on his behalf ... the Southern District [of New York] never acquired jurisdiction over Padilla's petition").

Petitioner suggests that even if the Western District of Texas would have jurisdiction over this proceeding, this Court, too, could still exercise "concurrent" jurisdiction. ECF No. 13 at 17. But that runs afoul of the Supreme Court's recent reaffirmance that a habeas petition is proper in just *one* district. *See J.G.G.*, 145 S. Ct. at 1005–06. As the Court highlighted in *Padilla*, Section 2241(b) authorizes certain courts to "transfer the application ... to *the* district court having jurisdiction to entertain it." 542 U.S. at 442–43 (emphasis in original) (quoting § 2241(b)). Habeas venue, too, is limited

to one district. *J.G.G.*, 145 S. Ct. at 1006 ("venue lies in the district of confinement"). This Court thus may not exercise concurrent jurisdiction here.

B. The Petition failed to name the proper "immediate custodian."

Beyond the fact that the district of confinement for Ms. El Gamal and her children at the time the Petition was filed was the Western District of Texas, the habeas petition suffers from a second fatal flaw: the failure to name the immediate custodian. Although Petitioner argues that at the time the Petition was filed, the immediate custodian was the Denver "ICE Field Office," ECF No. 13 at 15-17, the immediate custodian—the official maintaining custody over Ms. El Gamal and her children—was in Texas. Therefore, this Court lacks the requisite habeas jurisdiction over this official.

The "immediate custodian" rule is based on the provisions of the habeas statute requiring the petitioner to name the person who has custody, and the court to direct an order to that person. "The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is "the person who has custody over [the petitioner]." *Padilla*, 542 U.S. at 434 (quoting 28 U.S.C. § 2242; also citing 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained")). "[T]hese provisions contemplate a proceeding against some 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...." *Id.* at 435 (emphasis added).

When the petitioner challenges current physical detention, the petition must name the person "responsible for *maintaining—not authorizing*—the custody of the prisoner." *Id.* at 440 n.13 (emphasis added). The immediate custodian is thus a local official with

physical control. *See id.* at 444 ("*By definition*, the immediate custodian and the prisoner reside in the same district." (emphasis added)). The immediate custodian must be someone maintaining custody over the petitioner, and that individual is often the "warden of the facility where the prisoner is being held" rather than "some other remote supervisory official." *Id.* at 436, 446 (recognizing that the proper immediate custodian of a petitioner held on a brig in South Carolina was the commander of the brig, who was "also present in South Carolina").

These principles are strictly enforced. For example, where a petitioner is in transit, the proper custodian for the petition to name is an official located in the district where the petitioner is confined at the time of filing—even if the petitioner is confined in that place only for a short period of time. Thus, in *Villatoro Fuentes*, the court concluded that a habeas petitioner could not name a respondent in Colorado (rather than in Arizona) when, at the time the habeas petition was filed, the petitioner was temporarily housed, for a single day, at an ICE "staging facility" in Arizona. 2024 WL 2978285, at *8 & n.8.

Here, once Ms. El Gamal and her children arrived in San Antonio, their physical custody was maintained by ICE officials from Texas who were present with them in the Western District of Texas, the same district in which Ms. El Gamal and her children were (and remain) confined. Ex. 3 ¶¶ 11-15. They were in the custody of those ICE officials from Texas at the time the Petition was filed on June 4. *See* Ex. 3 ¶¶ 11-15. Petitioner alleges that Ms. El Gamal and her children were then accompanied from the San Antonio airport to Dilley by some ICE officials who, she speculates, were from the Denver Field Office, ECF No. 13 at 10, 15-16, but as a factual matter, when Ms. El Gamal and her

children arrived in San Antonio, they were taken into custody by ICE ERO Officers based in San Antonio. Ex. 3 ¶¶ 10-12. Regardless, any presence of ICE officers from Denver would not automatically make the Denver Field Office Director the correct respondent once they arrived in Texas.

Petitioner's theory also misapplies the law by improperly focusing on who exercised legal control over those Denver officers. The "identification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged 'custody.'" *Padilla*, 542 U.S. at 439. For example, in *Villatoro Fuentes*, the petitioner argued that the Denver ICE Field Office Director was the proper respondent because field officer directors exercise authority over custody decisions, but the court concluded that this theory "conflates physical control and legal control, a distinction stressed by the *Padilla* Court." 2024 WL 2978285, at *9. The court concluded that the law did not support the petitioner's argument that the general principle—that the proper respondent is not a remote supervisory official—"change[s] if the individual is in transit at the time of filing of her habeas petition." *Id.* So too here, the immediate custodian at the time of filing was not the Denver Field Officer Director, who was at the time of transit a remote supervisory official, but an official physically maintaining custody over the detained individual—an ICE official located in Texas.

C. Petitioner's contrary arguments fail.

Petitioner argues that this Court should recognize and apply an exception to the "district of confinement" and "immediate custodian" rules. ECF No. 13 at 17-19. But the exceptions Petitioner proposes either are not the law, or do not apply here.

1. The exception proposed by Justice Kennedy does not apply.

Petitioner first seeks to rely on an exception proposed by Justice Kennedy in his concurrence in *Padilla*. ECF No. 13 at 17-19. There, Justice Kennedy suggested that he would recognize a new exception to the district of confinement and immediate custodian rules if the government intentionally acts to hide a prisoner's location. *See Padilla*, 542 U.S. at 454 ("I would acknowledge an exception if there is an indication that the Government's purpose in removing a prisoner were to make it difficult 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.* (explaining that this proposed exception would apply if the government moved the prisoner "but refused to tell his lawyer where he had been taken"). Justice Kennedy then acknowledged that this exception was merely hypothetical, as such facts had not occurred in that case. *Id.*

That proposed exception does not support Petitioner's argument. First, it fails factually. After being taken into detention, Ms. El Gamal was allowed to use her phone, and she accurately informed Petitioner that she was in Colorado. *See* Ex. 1 ¶ 12; Ex. 2 ¶ 15; ECF No. 2-2. Filing a habeas petition in Colorado at that time would have been proper under the district of confinement and immediate custodian rules. The NTAs informed Ms. El Gamal that she and her children would appear before an immigration judge in Dilley, Texas. Ex. 1 ¶ 17, Attachs. 1-6. Once Ms. El Gamal and her children were moved to Dilley, Respondents did not conceal their location. Early on the morning of June 4, counsel for Petitioner contacted the U.S. Attorney's Office, which—by 9:00 a.m. MT on June 4—pointed Petitioner's counsel to ICE's online detainee locator, which

by that time identified the detention facility in Dilley, Texas, where Ms. El Gamal was held. The short period during the transit when Petitioner did not have communication with Ms. El Gamal does not show a continuing refusal to disclose the district of confinement.

Second, Justice Kennedy's hypothetical exception is not the law. The majority in *Padilla* did recognize a narrow exception to the immediate custodian rule, but it is not applicable here.[6] Justice Kennedy's hypothetical proposed exception was not accepted by the majority. Because there was a five-justice majority opinion in *Padilla*, Justice Kennedy's concurrence has no precedential weight, even though he (and Justice O'Connor, who joined his concurrence) also joined the majority opinion. Where members of the Supreme Court "joined in the opinion (and not merely the judgment) of the majority, their concurrence has no formal precedential weight." *United States v. Angel-Guzman*, 506 F.3d 1007, 1012 n.3 (10th Cir. 2007); *see id.* (explaining that the court of appeals was "bound to follow" the majority opinion). *See also Villatoro Fuentes*, 2024 WL 2978285, at *10 (observing that Justice Kennedy's proposed exception "has not been affirmatively recognized by a majority of the Supreme Court").

Third, other courts have not adopted or relied on this proposed exception. There is no "authority from the Tenth Circuit—or weight of authority from other circuit courts—that might justify the application of such exception (however logical) by this Court." *Id.*

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[6] The Court in *Padilla* recognized that a habeas petitioner need not name their immediate custodian "in the military context where an American citizen is detained outside the territorial jurisdiction of any district court." 542 U.S. at 436 n.9. The Court recognized a similar exception in *Rasul v. Bush*, 542 U.S. 466 (2004), which addressed jurisdiction over "persons detained outside the territorial jurisdiction of any federal district court." *Id.* at 478.

Indeed, "no court has yet relied upon the *Padilla* concurrence as the basis for jurisdiction." *Ozturk v. Trump*, No. 25-cvV-10695-DJC, 2025 WL 1009445, at *10 (D. Mass. Apr. 4, 2025).

In sum, "there is no recognized exception to the immediate custodian rule for inconvenience or exigent circumstances." *Villatoro Fuentes*, 2024 WL 2978285, at *10; *see id.* (declining to apply an exception even where case "presents unusual logistical circumstances that likely hindered counsel to act swiftly" in filing the habeas petition).

2. The unknown custodian exception does not apply.

Petitioner incorrectly relies on the "unknown custodian" exception, ECF No. 19-20, which does not apply here. This exception is extremely limited. In *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986), a circuit judge reasoned where a habeas petitioner facing extradition was held by the U.S. Marshals "in a confidential location" and so "petitioner's attorneys cannot be expected to file in the jurisdiction where petitioner is held," the petitioner could file the habeas petition in the D.C. Circuit. *Id.* at 1115-16. *Padilla* noted this exception and described it as applying where "a prisoner is held in an undisclosed location by an unknown custodian" and "it is impossible to apply the immediate custodian and district of confinement rules." 452 U.S. at 450 n.18.

That narrow exception does not apply here. Ms. El Gamal was allowed to use her phone, she accurately informed her counsel where she and her children were at the time detained, and she received NTAs informing her that she and her children would be appearing before an immigration judge in Dilley, Texas. *See* Ex. 1 ¶ 12; Ex. 2 ¶ 15; ECF No. 2-2. Nor, at this point, is there any obstacle to Ms. El Gamal filing a habeas petition

in the Western District of Texas.

Petitioner argues that she filed the Petition "in the last place Ms. El Gamal and her family were known to have been." ECF No. 13 at 19. But the majority in *Padilla* expressly rejected the proposition that a habeas petition could be properly filed in a district based on counsel's mistaken idea of where the petitioner was in custody, because of the failure of the government to immediately tell the petitioner's counsel the location of confinement. The dissent in *Padilla* took the view that because the government "allegedly failed to immediately inform counsel of its intent to transfer Padilla to military custody in South Carolina," habeas jurisdiction should have been proper in the Southern District of New York on the theory that "if counsel had been immediately informed, she "would have filed the habeas petition then and there," while Padilla remained in the Southern District, "rather than waiting two days." 542 U.S. at 448. But the majority rejected this proposed approach as "contrary to our well-established precedent," and found "no authority whatsoever" to support exercising habeas jurisdiction "premised on 'punishing' alleged Government misconduct." *Id.* at 448–49.

In sum, no exception to the general "district of confinement" rule permits this Court to exercise jurisdiction over the Petition. Exercising jurisdiction would be contrary to the basic rules set by the majority opinion in *Padilla,* and this case falls far outside the exceptions that were recognized in *Padilla*. And the Tenth Circuit has not endorsed any additional exceptions relevant here.

II. Petitioner has failed to establish that that she should be permitted to proceed as the next friend for Ms. El Gamal and her children.

Notwithstanding its preliminary order permitting Petitioner to proceed as a next

friend, ECF No. 5, the Court should evaluate whether Petitioner is likely to be permitted to proceed as a next friend. Such an evaluation is warranted both to determine if this Court has jurisdiction and to determine if Petitioner has shown a strong likelihood of success. *See Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) (discussing the restrictions on "next friend" standing as necessary to preserve the "jurisdictional limits of Art. III"). Here, Petitioner has failed to establish that she should be allowed to pursue this action as Ms. El Gamal's "next friend."

A habeas corpus application may be filed "by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. But "next friend" status "is by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore*, 495 U.S. at 163; *accord Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010) (next friend status "is not lightly granted" in federal court).

A petitioner seeking to proceed as a "next friend" for another must make two showings. First, the petitioner must "provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore*, 495 U.S. at 163. "[O]ne necessary condition ... is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Id.* at 165. Second, the "next friend" petitioner must show she is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," and, "it has been further suggested," "have some significant relationship with the real party in interest." *Id.* at 163-64.

"The burden is on the 'next friend' clearly to establish the propriety of [t]his status and thereby justify the jurisdiction of the court." *Id.* at 164. For example, in *Whitmore*, the Court ruled that the proposed next friend "failed to establish that [the prisoner was] unable to proceed on his behalf" where "there was no meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision." *Id.* at 166.

Under *Whitmore's* two-pronged framework, Petitioner has not established she is likely to be allowed to pursue this proceeding as Ms. El Gamal's "next friend." As to the first prong, she has not shown that Ms. El Gamal cannot appear on her own behalf as the petitioner in a habeas proceeding. Petitioner alleged in the Petition that Ms. El Gamal was "being held incommunicado" and was therefore inaccessible to her counsel. ECF No. 1 ¶¶ 4 n.1, 5. But brief temporary unavailability is not enough to show inaccessibility. For example, in denying a mother "next friend" standing where her adult daughter might be "temporarily" unavailable due to military service, a court relied on the absence of a showing of "a complete inability to access the courts." *J.B. ex rel. K.E. v. Charley*, No. 21-632 MV/SCY, 2021 WL 5768907, at *2 (D.N.M. Dec. 6, 2021).

Here, despite brief temporary periods of unavailability due to her detained status, Ms. El Gamal has had access to a phone in both Colorado and Texas, has communicated with her counsel during this proceeding, and has had counsel enter an appearance in her removal proceedings. She possessed and used her mobile phone at the hotel in Colorado Springs and during the drive to Florence. Ex. 1 ¶¶ 7-8, 11; Ex. 2 ¶¶ 7-8, 11. At the ERO office in Florence, she used her mobile phone to make calls and send emails, at which

point she was able to contact Petitioner. Ex. 1 ¶ 12; Ex. 2 ¶ 15; ECF No. 2-2; ECF No. 13 at 8, 17. And since she arrived in Dilley, she has made calls and been able to communicate with her counsel. She used a free three-minute phone call after her arrival at Dilley. Ex. 4 ¶¶ 4-6. And since arriving at Dilley, she has made at least 60 phone calls. Ex. 4 ¶ 7. Petitioner acknowledges in her own filings that Ms. El Gamal was able to speak with her retained counsel since she arrived at Dilley. ECF No. 13 at 7 n.2. And Mr. Niels Frenzen, counsel of record in this proceeding, has entered his appearance for Ms. El Gamal in her removal proceedings, Ex. 4 ¶ 8, thus demonstrating that Ms. El Gamal *can* act on her own behalf through counsel.

Those facts do not establish the inaccessibility necessary to support next friend standing. And the necessity for Ms. El Gamal to proceed through Petitioner as her next friend is further undermined by the fact that an attorney *other* than Petitioner (Mr. Frenzen) now is counsel of record in this proceeding and also represents Ms. El Gamal in her removal proceedings. While the Petition states that Petitioner (Ms. Dvortsin) "is willing and able to represent Ms. El Gamal" once she is permitted "access" to her, ECF No. 1 ¶ 4 n.1, Petitioner's Memorandum acknowledges that "undersigned counsel" (*not* Ms. Dvortsin) spoke to Ms. El Gamal on June 5, 2025. ECF No. 13 at 7 n.2.

Petitioner also has not met the second requirement. She has not established, by simply self-identifying herself as Ms. El Gamal's attorney, that she is both "truly dedicated" to Ms. El Gamal's best interests and has a significant relationship to her. *Compare Smith-Thomas v. Judges & Ct. Offs.*, No. 24-cv-607 MIS/LF, 2025 WL 326570, at *1 (D.N.M. Jan. 29, 2025) (signing habeas pleadings with "power of attorney" is "insufficient to confer

'next friend' standing"); *with Al Odah v. United States*, 321 F.3d 1134, 1137-38 (D.C. Cir. 2003) (concluding that "the next friends in these cases have demonstrated through affidavits that ... that they have a significant relationship' with the detainees" (internal quotation marks and citations omitted)), *rev'd and remanded on other grounds sub nom. Rasul v. Bush*, 542 U.S. 466 (2004).

Petitioner has not provided evidence to establish the nature, extent, or significance of her attorney-client relationship to Ms. El Gamal. The Petition simply states that Petitioner is Ms. El Gamal's attorney, ECF No. 1 ¶¶ 4 n.1, 5, and includes a short, signed statement from Petitioner stating that she is "the lawyer" for Ms. El Gamal, *id.* at 9. But it is not clear if Petitioner is permitted to represent Ms. El Gamal in immigration proceedings. In 2019, Petitioner was suspended from practicing law in South Dakota for misconduct concerning an immigration matter. U.S. Dep't of Justice, Executive Office for Immigration Review, *Decision of the Board of Immigration Appeals* (Mar. 5, 2019), https://www.justice.gov/eoir/page/file/1141486/dl?inline= (last visited June 11, 2025). The Disciplinary Counsel for DHS issued a corresponding suspension, suspending Petitioner from practicing before the Board of Immigration Appeals, the Immigration Courts, or DHS. *Id.* On this record, Petitioner has not borne her burden to show that she is likely to be permitted to proceed as next friend for Ms. El Gamal and her children. The Court should thus deny the TRO Motion on this basis as well.

III. Petitioner is not likely to succeed on her challenge to detention.

Petitioner argues that Ms. El Gamal and her children are being detained "without any constitutional reason" and that the detention is therefore unlawful. ECF No. 13 at 22-

27. Petitioner argues that the detention violates the Fifth Amendment's equal protection component because they were detained and placed in removal proceedings "as punishment for the alleged actions of Mr. Soliman," which amounts to "kin punishment." *Id.* at 22-23. Petitioner also argues that the detention violates the Fifth Amendment's Due Process Clause because that requires "an individualized hearing before a neutral arbiter" regarding the detention and "[n]o individualized determination has been made about the detention of Ms. El Gamal and her children." *Id.* at 23-27. The Court should reject these challenges.

A. The detention of Ms. El Gamal and her children is authorized by law because they have been placed in removal proceedings.

First, 8 U.S.C. § 1226(a) authorizes the detention of Ms. El Gamal and her children during their removal proceedings. That provision "empowers the Secretary of Homeland Security to arrest and hold an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Nielsen v. Preap*, 586 U.S. 392, 397–98 (2019) (footnote omitted). This includes "the discretion either to detain the alien or to release him on bond or parole." *Id.* at 397. Section 1226(a) thus authorizes detention here. Ms. El Gamal and her children have been issued notices to appear in removal proceedings under 8 U.S.C. § 1229a, and the Secretary is therefore empowered to keep them in detention at this time.

B. Congress has stripped courts of jurisdiction to review detention decisions and decisions to commence removal proceedings.

Second, the government's decision to detain Ms. El Gamal and her children during removal proceedings is not subject to judicial review—and thus is not subject to review in

this Court. As noted, they are being held pursuant to 8 U.S.C. § 1226(a). Section 1226(e) in turn provides: "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." *See Preap*, 586 U.S. at 401. Section 1226(e) precludes an alien from "challeng[ing] a 'discretionary judgment' ... or a 'decision' that the [government] has made regarding his detention or release." *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (quoting *Demore v. Kim,* 538 U.S. 510, 516 (2003)). *Accord Villaescusa-Rios v. Choate*, No. 20-cv-03187-CMA, 2021 WL 269766, at *5 (D. Colo. Jan. 27, 2021) ("The Supreme Court and the Tenth Circuit have held that Section 1226(e) ... precludes judicial review of the Executive Branch's decisions of whether to grant bond and under what conditions.").[7]

This Court similarly lacks jurisdiction to review the decision to commence the removal proceedings that are the basis of the government's authority to detain.[8] Section 1252(g) strips courts of jurisdiction "to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This bar applies "notwithstanding any other provision of law (statutory or

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[7] Congress has extended this bar to habeas proceedings. *See* 8 U.S.C. § 1252(a)(5) ("For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of Title 28...."); *Mwangi v. Terry*, 465 F. App'x 784, 786-87 (10th Cir. 2012) (explaining that in § 1252(a)(5), Congress "specifically eliminated ... a habeas petition pursuant to § 2241... as a way of challenging the Attorney General's discretionary decision.").

[8] Both the habeas petition and the TRO motion seek relief in the form of halting removal. Granting such relief would be premature at this juncture given that Ms. El Gamal and her children are not currently subject to a final order of removal.

nonstatutory), including section 2241 of Title 28"—*i.e.*, the provision governing this habeas proceeding. This provision bars individuals from challenging their detention or removal when alleging that they were "target[ed] ... for deportation" in violation of their Fifth Amendment rights. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 472 (1999). Rather, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488. That binding precedent is controlling here. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) ("We construe § 1252(g) . . . to include not only a decision in an individual case *whether* to commence, but also *when* to commence, a proceeding.") (emphasis in original). If aliens could challenge the commencement of proceedings on such a basis as alleged here, "the additional obstacle of selective-enforcement suits could leave the [government] hard pressed to enforce routine status requirements." *Reno*, 525 U.S. at 490.[9]

Finally, Section 1252(b)(9) separately bars Petitioner's equal protection and due process challenges. That provision provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States" is "available only in judicial review of a final order under this section." Section

[9] Under the Constitution, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the laws falls within the discretion of the Executive Branch." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). This "principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives.'" *United States v. Texas*, 599 U.S. 670, 679 (2023).

1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Reno*, 525 U.S. at 483. For this independent reason, this Court cannot reach Petitioner's constitutional challenges. To the extent that they are not barred entirely, Congress has mandated that they can *only* be raised in circuit courts, following a final order of removal.

C. Petitioner has not shown that the detention decisions violate equal protection or due process rights.

Third, even if the decisions to initiate removal proceedings and detention were subject to judicial review, Petitioner's constitutional challenges plainly fail on the merits. Ms. El Gamal and her children are not being punished for the alleged crimes of Mr. Soliman. Mr. Soliman has been charged under 18 U.S.C. § 249; Ms. El Gamal and her children have not. *United States v. Soliman*, No. 25-mj-00108-NRN, ECF No. 1 (D. Colo. June 1, 2025). Rather, Ms. El Gamal and her children are being detained and removed for their own conduct, namely, unlawfully remaining in the country without authorization. 8 U.S.C. § 1227(a)(1)(B). Petitioner does not suggest that 8 U.S.C. § 1227 treats individuals differently based on suspect classifications.[10] Nor does Petitioner anywhere

[10] Even in the criminal context, Petitioner's challenge would fail. For a selective-enforcement challenge, a party "must demonstrate that [1] the federal prosecutorial policy 'had a discriminatory effect and [2] that it was motivated by a discriminatory purpose.'" *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* "The elements are essentially the same for a *selective-enforcement* claim." *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (emphasis in original). Yet Petitioner fails to allege, much less prove, that similarly situated individuals were not detained.

contest the valid basis for the removal proceedings at issue here, namely, that Ms. El Gamal and her children do not have lawful status in the United States. Therefore, there is no merit to the argument that the detention of Ms. El Gamal and her children violates equal protection principles.

To be sure, the unlawful immigration status of Ms. El Gamal and her children came to light by virtue of her husband's terrorist attack. But that is hardly grounds for a constitutional defense to removal (and related detention). *See Reno*, 525 U.S. at 491–92 (rejecting the general proposition that removal is unconstitutional if the alien "has been improperly selected"). Again, Ms. El Gamal and her children are removable under federal immigration law, separate and apart from her husband's criminal acts. And even if Petitioner had a factual basis to conclude the Government were removing Ms. El Gamal and her children because of Ms. El Gamal's husband's misconduct, that would not remotely violate the Equal Protection Clause—it would be a sensible exercise of the enforcement discretion that the Executive Branch is charged with exercising. *See United States v. Texas*, 599 U.S. 670, 679 (2023). Either way, Petitioner's constitutional argument lacks merit.

Petitioner's due process challenge is similarly without merit. While "the Fifth Amendment entitles aliens to due process of law in deportation proceedings, ... this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. Petitioner argues that the detention of Ms. El Gamal and her children violates due process on the ground that they are entitled to an individualized hearing. ECF No. 13 at 23-27. But Section 1226(a)

provides just such review of their "detention by an officer at the Department of Homeland Security and then by an immigration judge (both exercising power delegated by the Secretary)." *Preap*, 586 U.S. at 397–98 (citing 8 CFR §§ 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1) (2018)). These "regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention." *Jennings*, 583 U.S. at 306 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)). Accordingly, any claim by Petitioner that Ms. El Gamal and her children lack an opportunity to contest their detention is contradicted by the regulations that provide them with such an opportunity, if they request it.

CONCLUSION

Petitioner's TRO Motion should be denied, and the Court should dismiss the Petition.

Dated: June 11, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 11, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing by e-mail to counsel of record.

s/ Alexandra J. Berger
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