DETAINED

Evgeny Mashchenko, Pro Se

Elizabeth Detention Center
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EVGENY MASHCHENKO Petitioner, v. **ERIC ROKOSKY**, WARDEN, Elizabeth Detention Center; **JOHN TSOUKARIS**, Field Office Director, Newark Field Office, U.S. Immigration and Customs Enforcement; **KRISTI NOEM**, Secretary of the U.S. Department of Homeland Security; and **PAM BONDI**, Attorney General of the United States, in their official capacities, Respondents.	**Civil Action No. 25-12387 (RK)** **PETITIONER RESPONSE TO RESPONDENTS' ANSWER TO WRIT OF HABEAS CORPUS PETITION**

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1. Certificate of Service and Request for Service
2. Petitioner Response to Respondents' Answer To Writ of Habeas Corpus Petition
3. Exhibit A - CBP intake Evgeniia
4. Exhibit B - DHS Muster
5. Exhibit C - New York Times Podcast, per Evgeny and Evgeniia, transcript
6. Exhibit D - ERO field office letter

Filed Pro Se by
Evgeny Mashchenko
A-Number: [redacted]

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EVGENY MASHCHENKO Petitioner, v. **ERIC ROKOSKY**, WARDEN, Elizabeth Detention Center; **JOHN TSOUKARIS**, Field Office Director, Newark Field Office, U.S. Immigration and Customs Enforcement; **KRISTI NOEM**, Secretary of the U.S. Department of Homeland Security; and **PAM BONDI**, Attorney General of the United States, in their official capacities, Respondents.	**DETAINED** **Civil Action No. 25-12387 (RK)** **PETITIONER RESPONSE TO RESPONDENTS' ANSWER TO WRIT OF HABEAS CORPUS PETITION**

1. Petitioner, Evgeny Mashchenko, proceeding in this matter Pro se and with the Pro bono assistance of attorney Maria Kalmanovich (Counsel), Cal. Bar No. 303621, who represents Petitioner in his immigration court proceedings, respectfully submits this Response to Respondents' Answer to Writ of Habeas Corpus Petition previously docketed by this Court. Petitioner's spouse Evgeniia Mashchenko is submitting a similar response from her respective ICE detention facility. Evgeny and Evgeniia Mashchenko are Petitioners.

INTRODUCTION

2. Petitioners submit this rebuttal to Respondents' opposition, addressing all four arguments I, II, III, and IV. Since the initial filing, Petitioners have obtained additional information that further demonstrates misconduct by DHS and we incorporate relevant newly

obtained evidence into this reply. The following demonstrates why Respondents' positions are unsupported by law and fact.

HISTORY

3. Petitioners, a married couple from Russia, entered the United States at a designated port of entry on April 29, 2025, with their 8-year-old child, [redacted] after waiting in Mexico since the summer of 2024 for a CBP One appointment, for which they registered upon their arrival in Mexico. Those appointments, as well as CBP One appointment system, were abruptly canceled on 1/20/2025 leaving them low on financial resources due to their reliance on the US Government's CBP One program and this program's sudden cancellation. Because of CPB One appointments unavailability, they asked for asylum at the border as was indicated above.

4. On April 29, 2025, Petitioners arrived at a U.S. port of entry without a visa or an appointment. They told officials they feared persecution if returned to Russia. Under the law, they should have been processed either in regular removal proceedings (INA § 240; 8 U.S.C. § 1229a) with access to asylum procedures, or in expedited removal proceedings (INA § 235; 8 U.S.C. § 1225) that include a credible fear interview and asylum consideration. Instead, they were placed in some modified form of expedited removal under INA § 235, 8 U.S.C. § 1225, pursuant to Presidential Proclamation 10888. This process barred them from seeking asylum or withholding of removal. They were not given the credible fear interview required by § 1225, and their asylum requests were ignored.

5. Based on Petitioners' experience and contemporaneous events, CBP appears to have treated their asylum requests at the border as if they had not been made, consistent with Proclamation 10888 implementing guidance described in *Refugee & Immigrant Ctr. for Educ. & Legal Servs. (RAICES) v. Noem*, No. 25-306 (RDM), 2025 WL 1825431, at *7–8 (D.D.C. July 2,

2025) (holding that neither § 1182(f) nor § 1185(a) authorizes the President to limit the rights of aliens already present in the U.S. to apply for asylum). However, they were not screened for CAT protection either as the CBP guidance under Proclamation 10888 implementing guidance would suggest they should have been. They were then held as a family unit in CBP custody for about two weeks in CBP facilities not designed for prolonged detention. CBP's deafness to requests for asylum are further corroborated by Evgeniia's Form I-213 (Exhibit A, page 24). It states, "Credible Fear Statement: As per the Presidential Executive Order, Securing Our Borders, MARSHCHENKO and his family did not manifest a fear of return or expressed an intention to apply for asylum…". Outside of the misspelled name, incorrect gender , and a citation of an incorrect executive order, it suggests that due to a "Presidential Executive Order", any request for asylum would be ignored, while misinterpreting and ignoring CBP's own guidance Muster, dated February 28, 2025, that directs CBP to facilitate CAT screening while non-citizens are in their custody. (Exhibit B, bottom of page 29).

6. CBP transferred Petitioners to ICE custody either before or immediately after they were flown to the JFK airport. On 5/15/2025, ICE attempted to promptly deport Petitioners as would be customary for someone in expedited removal proceedings who did not ask for any asylum or protection. As Petitioners refused deportation, they were threatened that their child would be taken away from them if they persisted. Petitioners still refused and ICE carried out their threat separating their child and transferring his custody to the Office of Refugee Resettlement (ORR).

7. Petitioners' first opportunity to contact Counsel within the United States occurred a few days after they were separated from their child. This call occurred after they were already interred in an ICE detention center. On 5/26/2025, in an attempt by Counsel to promptly correct

the most consequential injury to child and family, Counsel requested ICE to reunite the family in a family detention. Counsel was aware at that time that a request for parole would have been futile, therefore, the immediate and more pressing issue of family separation was the one submitted.

8. Only on 6/2/2025 and 6/6/2025 Petitioners were finally provided with Convention Against Torture (CAT) screenings (not a credible fear interview and carried out without access to Counsel). Not knowing the result of the screening nor with any acknowledgement of their request for family reunification, Petitioners decided in mid-June that their only available option is to ask the Federal District Court for relief. On 6/30/2025 Counsel's request for reunification in a family detention was finally acknowledged, and denied. Petitioners were not made aware of the results of their CAT assessment until 7/02/2025 and only after Counsel's direct inquiry with an ICE Officer.

9. ICE separated Petitioners from their child without any individualized finding of parental unfitness, danger to the child, or exigent circumstance. At separation their child was designated as an 'Unaccompanied Alien Child' (UAC) under 6 U.S.C. § 279(g)(2) and placed in the custody of ORR. Note, Settlement of *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149–51 (S.D. Cal. 2018) prohibits separation absent parental unfitness, danger, or exigent circumstances.

10. Petitioners are now detained in separate facilities. According to his mother, [redacted] has recently grown despondent (see Exhibit C). Petitioners have been denied any custody determination, individualized parole review, meaningful opportunity to contest the separation, or attorney representation at or before their CAT Assessment or at any of the aforementioned proceedings.

11. Petitioners' Individual Calendar Hearing in immigration court is currently expected to take place on 9/17/2025.

12. Petitioners filed this habeas petition, challenging their prolonged detention, the denial of asylum screening, and the unconstitutional family separation. Respondents filed their opposition, to which Petitioners now reply. This sequence of events demonstrates multiple and ongoing due process violations, including the deprivation of liberty without individualized determinations and the unjustified interference with the parent–child relationship.

RESPONSE ARGUMENT

I. Response to Respondent's argument, "Petitioner's Detention Without Bond is Required By 8 U.S.C. § 1225(b)"

13. Petitioners expressly requested asylum and protection upon arrival at the port of entry on April 29, 2025. Despite these requests, they were placed in expedited removal under 8 U.S.C. § 1225(b)(1) without a credible-fear interview, as is mandated by § 1225(b)(1), and were detained as "arriving aliens." Respondents now argue that their detention is lawful because § 1225(b)(1) mandates detention and because Petitioners have not sought parole. That argument fails for three independent reasons.

I.A. Detention is no longer mandatory per § 1225(b)(1)

14. First, Petitioners have passed a CAT Assessment and have been issued a Notice to Appear (NTA) for immigration court proceedings. This means that they have been moved from 8 U.S.C. § 1225 (Expedited Removal Proceedings) to 8 U.S.C. § 1229(a) (Removal Proceedings). See § 1225(b)(2)(A), "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title". It is § 1229(a) that deals with immigration court,

not § 1225. Second, even if they were still in, the mandatory detention clause § 1225(b)(2)(A) specifically states:

> "Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."

15. If we look at Exhibit A of the Respondents' response, either of the two NTAs there on the first page says, "This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture." Consequently, even under § 1225, mandatory detention no longer applies.

I.B. Parole Is Unavailable in Practice, Rendering Any Request Futile

16. Respondents emphasize that Petitioners' Counsel has not requested parole and has "stressed … they are not seeking parole or release." That strategic litigation decision was driven by DHS's own binding policy, not by any concession that Petitioners' detention is lawful. As confirmed in the June 24, 2025 memorandum from ICE Enforcement and Removal Operations ("ERO") to all Field Office Directors:

> "ERO field offices no longer have the option to discretionarily release aliens, nor decline to take aliens into custody from our counterparts in Homeland Security Investigations (HSI) or U.S. Customs and Border Protection (CBP)." (ICE ERO Memorandum, June 24, 2025, attached as Exhibit D).

17. This directive—issued in the wake of the January 20, 2025 executive orders declaring a national emergency and mandating maximum detention—eliminates the practical availability of parole nationwide. Under well-established law, a party is not required to perform a

futile act. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality). Because parole is categorically unavailable in practice, the absence of a parole request cannot defeat Petitioners' due process claim.

18. Furthermore, the Secretary of Homeland Security's parole authority under 8 U.S.C. § 1182(d)(5)(A) does not require a formal application from Petitioner or Counsel. DHS may at any time parole a detainee for urgent humanitarian reasons or significant public benefit. Petitioners' prolonged detention and forced family separation plainly satisfy these criteria, yet DHS has failed to exercise its statutory discretion.

I.C. The Lack of Any Individualized Custody Determination Violates Due Process

19. Even if 8 U.S.C. § 1225(b)(1) applied and parole were theoretically available, the complete absence of any individualized custody determination by ICE implicates procedural due process concerns. Custody determinations are ordinarily made in the first instance by DHS, yet here Petitioners have received no review whatsoever since their detention began in April 2025. The Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), solely addressed whether certain immigration statutes require bond hearings before an immigration judge; it did not hold that DHS may indefinitely detain individuals without any form of individualized custody review.

20. Moreover, as the Supreme Court recognized in *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005), statutory detention authority must be read in a manner consistent with due process, and indefinite detention without a realistic prospect of removal is impermissible. This principle applies equally to "arriving" and "admitted" noncitizens. Here, Petitioners' removal is not reasonably foreseeable while they pursue statutory protection claims, and yet DHS has provided no custody review to determine whether continued detention is justified.

I.D. Conclusion

21. Petitioners are no longer under mandatory detention provision 8 C.F.R. § 1225(b)(1), if they ever were. Their decision not to request parole was the direct result of DHS's binding policy removing all discretionary release authority, as documented in Exhibit D. A futile request is not required by law nor was any request necessary for a parole determination. Furthermore, the absence of any individualized custody review supports Petitioners' procedural due process claim notwithstanding 8 U.S.C. § 1225(b)(1)'s mandatory-detention language.

II. Response to Respondent's claim, "Petitioners Cannot Seek Asylum"

22. Respondents' contention that INA § 212(f), 8 U.S.C. § 1182(f), authorizes Proclamation 10888's suspension of asylum rights for individuals already present in the United States is unsupported by the statute's text, inconsistent with Supreme Court and Third Circuit precedent, and rests on an "invasion" premise that our research shows has been uniformly rejected by the federal courts.

II.A. Section 1182(f) Cannot Override Congress's Asylum Statute

23. Congress provided in 8 U.S.C. § 1158(a)(1):

> "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival …) … may apply for asylum …"

24. Section 1158(a)(2) then sets forth the *exclusive* exceptions to this guarantee. Section 1182(f) is not among them. When Congress enumerates specific exceptions, others are excluded (*expressio unius est exclusio alterius*).

25. Under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring):

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

26. Because § 1158 reflects Congress's expressed will to permit asylum applications from anyone present or arriving, the President may not, by proclamation, impose an additional bar.

II.B. Section 1182(f) Authority Is Limited to "Entry"

27. By its terms, § 1182(f) authorizes the President to "suspend the entry of all aliens or any class of aliens." In *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018), Court described § 1182(f) this way:

> "By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States."

28. Court's analysis was confined to foreign nationals abroad seeking initial admission. It did not hold — and, to the best of our knowledge based on our research, no court has held — that § 1182(f) may be used to remove rights Congress has conferred upon individuals already inside U.S. territory. Once physically present, noncitizens are processed under the INA's removal provisions, which include the statutory asylum process.

II.C. The "Invasion" Premise Has Been Consistently Rejected by Federal Courts

29. Proclamation 10888 invokes an "invasion" at the southern border to justify overriding asylum rights. The Third Circuit has squarely rejected this theory. In *State of New*

Jersey v. United States, 91 F.3d 463, 468–69 (3d Cir. 1996), Court agreed with and quoted the argument:

> "In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity".

30. In researching this issue, we have not been able to find a single federal decision concluding that migration, even on a large scale, constitutes an "invasion" within the meaning of the Constitution. By contrast, we have found dozens of federal cases — across multiple circuits — that have explicitly rejected such claims.[1] The consistent reasoning is that "invasion" refers to armed hostility by another political entity and does not encompass the arrival of noncitizens, regardless of their numbers.

II.D. Persuasive Authority Confirms That § 1182(f) Cannot Override § 1158

31. While not binding here, other federal courts have squarely addressed attempts to use § 1182(f) to curtail asylum:

- *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018):

  Argued that, "continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws."

- *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 45 (D.D.C. 2019):

  Found that a DHS rule barring certain asylum claims was inconsistent with § 1158(a)(1)

[1] See, e.g., *State of New Jersey v. United States*, 91 F.3d 463, 468–70 (3d Cir. 1996) (no invasion; political question); *Padavan v. United States*, 82 F.3d 23, 28–29 (2d Cir. 1996) (no invasion; term means armed hostility from another political entity); *California v. United States*, 104 F.3d 1086, 1091–92 (9th Cir. 1997) (same); *Chiles v. United States*, 69 F.3d 1094, 1097–98 (11th Cir. 1995) (same); *United States v. Texas*, No. 1:24-cv-00008, slip op. at 29–32 (W.D. Tex. Feb. 29, 2024) (migration surge not invasion; cites *Padavan* and *California*); *United States v. Abbott*, 87 F.4th 616, 630–31 (5th Cir. 2023), reh'g en banc denied, 90 F.4th 870 (5th Cir. 2024) (rejecting Texas's self-defense/invasion theory).

because Congress permits *any* alien present or arriving to apply for asylum and has enumerated exceptions — none of which encompassed the challenged rule.

II.E. Relevant Federal District Court Rulings on Proclamation 10888

32. Petitioners are aware of only two federal district court cases to date where analysis and decisions were issued regarding the prohibition of asylum consideration due to Presidential Proclamation 10888. In both cases, the courts found Proclamation 10888 to be invalid and directed for the asylum requests to be fully heard.

33. In *Tabatabaeifar v. Scott*, No. CV-25-01238-PHX-GMS (MTM), (D. Ariz. May 14, 2025), Court enjoined the government "from removing Petitioner from the United States prior to a complete assessment of her asylum claim, including a credible fear determination and an immigration judge's review, in accordance with 8 C.F.R. § 208.30 and 8 U.S.C. § 1225(b)(1)(B)(iii)(III)." The same Court has granted the same relief to the petitioner based on analysis above in *Togoev v. United States Attorney General*, No. CV-25-01960-PHX-GMS (MTM) (D. Ariz. June 6, 2025)

34. Similarly, in *Refugee & Immigrant Ctr. for Educ. & Legal Servs. (RAICES) v. Noem*, No. 25-306 (RDM), 2025 WL 1825431, at *8–9 (D.D.C. July 2, 2025), Court held that Proclamation 10888's implementing guidance was unlawful because it barred asylum claims from those physically present in the United States, contrary to 8 U.S.C. § 1158(a)(1). Court ordered full asylum consideration for the named plaintiffs and certified a class; Petitioners here fall within that class definition. However, the injunction as to the class itself, not the named petitioners, is currently on appeal by the government. A decision on the appeal is expected no earlier than October 2025.

35. Given that Petitioners' Individual Calendar Hearing before an Immigration Judge is scheduled for 9/17/2025—before the *RAICES* appellate decision is expected—Petitioners respectfully contend that they should receive similar relief accorded to the named petitioners in *RAICES* and to the petitioners in *Tabatabaeifar* and *Togoev*.

II.F. Conclusion

36. Proclamation 10888's suspension of asylum rights for individuals already in the United States exceeds the President's delegated authority under § 1182(f), conflicts with Congress's explicit asylum guarantees in § 1158(a)(1), and rests on an "invasion" rationale that, in our research, has been uniformly rejected by the federal courts. Under *Youngstown*, such action is at the "lowest ebb" of presidential power and must yield to Congress's enacted statute. Further, decisions such as *RAICES* and *Tabatabaeifar* confirm that where, as here, noncitizens have made asylum claims from within U.S. territory, Proclamation 10888 cannot lawfully foreclose full merits consideration under the INA.

III. Response to, "Petitioners Have Received a CAT Screening"

37. Petitioners did, in fact, pass their CAT screening and were referred to regular removal proceedings under INA § 240 (8 C.F.R. § 1229(a)). Consequently, if subsequent immigration proceedings allow for full and proper consideration of Petitioners' asylum claim, no credible fear interview, Withholding of Removal or CAT Assessment or any other screening is necessary. However, the screening process was unlawfully delayed and conducted without Counsel, contrary to 8 C.F.R. § 208.30(d)(4) and § 208.31(b), causing unnecessary detention and irreparable harm to family and child. Further, results of this screening were withheld from Petitioners for almost a month magnifying undue and unnecessary pressure on Petitioners.

IV. Response to, "Petitioners *Flores* Argument Fails"

38. Respondents frame Petitioners' family separation claim as resting solely on the *Flores* Settlement Agreement, then argue *Flores* provides no rights to parents and does not require placement of a child with detained parents. This mischaracterizes the claim and omits controlling and persuasive authority recognizing constitutional protections against family separation in immigration custody.

IV.A. Petitioners' Claim Rests on Constitutional and Statutory Protections in Addition to *Flores* Settlement

39. Petitioners do not rely exclusively on the Flores Settlement Agreement. As set forth in Count Four of the Petition, the claim is grounded in:

1. Substantive due process right to family integrity under the Fifth Amendment (see *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)); and
2. Federal statutes, including 8 U.S.C. § 1232(c)(2)(A), requiring prompt reunification and least-restrictive placement for minors.

40. The Flores Agreement is cited as one source of standards reinforcing these rights, not the exclusive basis for the claim.

IV.B. Federal Courts Have Recognized a Constitutional Limit on Family Separation in Immigration Detention

41. In *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149–51 (S.D. Cal. 2018), Court held that the government's practice of separating parents and children without a showing of parental unfitness or danger to the child likely violated substantive due process. The nationwide settlement

reached by the plaintiffs and the government is applicable to such family separation circumstances. In addition, its reasoning has been followed in other districts (e.g., *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 502 (D.D.C. 2018)). Furthermore, CBP's own guidance on implementing Presidential Proclamations directs, "The cessation of 'Catch and Release' policies do not change any of the requirements of the Ms. L Settlement Agreement or CBP policies governing the processing and separation of family units. Families may only be separated in accordance with the Ms. L Settlement Agreement." (See Exhibit B, top of page 33)

42. *Ms. L.* settlement continues to prohibit the U.S. government from adopting or implementing a blanket policy of separating noncitizen parents or legal guardians from their children in immigration custody, allowing separation only in narrowly defined, case-specific circumstances such as a credible threat to the child's safety, certain criminal custody situations, or other legally recognized exceptions. The settlement requires a custody-determination process, including investigation, and the opportunity to contest an adverse finding. Federal agencies must document every separation, explain the reasons in writing, provide instructions on how to challenge the decision, and share relevant information across DHS, ICE, CBP, and HHS systems. When reunification is possible, the government must take affirmative steps to coordinate and support it, ensuring language access and culturally appropriate communication throughout the process.

43. Here, as in *Ms. L.*, Petitioners' 8-year-old child was taken from parents without any individualized finding of parental unfitness, danger, or exigent circumstance. That is precisely the type of "flagrant" intrusion into the parent–child relationship that violates substantive due process, even when the parent is lawfully detained.

Further, in the initial petition before this Court Petitioners outlined other decisions which limited family separation on due process concerns. These are also applicable and would work in conjunction with the *Flores settlement* to arrive at a similar argument as in this section.

IV.C. *Flores* and § 1232(c)(2)(A) Reinforce, Rather Than Replace, These Constitutional Protections

44. Even if *Flores* were construed narrowly, its preference for release of minors to a parent "without unnecessary delay" and § 1232(c)(2)(A)'s requirement of placement "in the least restrictive setting that is in the best interest of the child" confirm Congress's and the courts' recognition that family unity is a paramount interest. These provisions do not authorize separation where a parent is available and suitable, absent a valid and documented justification.

IV.D. Respondents' Authorities Are Distinguishable

45. The cases Respondents cite—*Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (holding the *Flores* Settlement Agreement does not require release of parents); *United States v. Dominguez-Portillo*, 2018 WL 315759 (W.D. Tex. Jan. 5, 2018) (addressing family separation in the context of criminal custody); and *Bunikyte v. Chertoff*, 2007 WL 1074070 (W.D. Tex. Apr. 9, 2007) (considering minors' custody when parents are detained)—construe the Flores Agreement as a contractual settlement. They do not foreclose constitutional challenges to unwarranted family separation, nor do they address the statutory reunification mandate in 8 U.S.C. § 1232(c)(2)(A) or the holdings in *Ms. L.* and *Jacinto-Castanon*, which make clear that detained status alone is insufficient to justify separating a family.

46. Respondents' reliance on *Dominguez-Portillo* is misplaced. There, Court observed and Respondents quoted, "[Flores] does not provide that parents are entitled to care for their children if they were simultaneously arrested by immigration authorities[.]" Id. at *9. But in that

case the defendant challenged his separation from child in detention due to his criminal prosecution—a materially different context from Petitioner's circumstances.

47. Likewise, *Bunikyte* concerned whether the Flores Agreement's protections for minors applied when those minors were held with their parents in a family facility. Petitioner's case presents a different factual and legal posture.

IV.E. Conclusion

48. Respondents' argument fails because it artificially limits Petitioners' claim to *Flores* Settlement Agreement while ignoring binding constitutional principles and statutory mandates that protect family integrity. The government may not avoid these protections by confining its analysis to the four corners of the *Flores* Agreement and disregarding precedents that require a compelling justification for separating children from their parents in immigration custody.

V. The Habeas Petition Remains Justiciable and Redressable

49. The government argues that Petitioners' placement into immigration court (INA § 240) proceedings moots their habeas petition. That argument fails. The unlawful conduct and constitutional violations that gave rise to this case—including the attempted summary deportation, prolonged detention without individualized review, denial of asylum screening, and unlawful family separation—all occurred before the issuance of Notices to Appear. These past and continuing harms are actionable under 28 U.S.C. § 2241.

50. Courts routinely retain jurisdiction over habeas petitions when due process violations or unlawful detention persist, even after the initiation of removal proceedings. See *Demore v. Kim*, 538 U.S. 510, 517 (2003); *Ali v. Decker*, 466 F. Supp. 3d 406, 415 (S.D.N.Y.

2020). In particular, the ongoing separation of Petitioners from their child remains a live, redressable injury sufficient to sustain jurisdiction. Habeas is a proper vehicle to remedy both past violations that continue to cause harm and ongoing deprivations of liberty and family unity.

51. Moreover, Petitioners harbor a well-founded concern that DHS may unlawfully remove them despite their pending claims, in violation of due process or court orders. That concern is not speculative. In *Kniazev v. Kline*, No. CV-25-02036-PHX-SPL (D. Ariz. July 8, 2025), the District Court ordered DHS to explain how a removal was carried out while a district-wide injunction protecting asylum seekers was in effect. This type of noncompliance underscores the critical need for judicial oversight and protective relief in this case.

52. Petitioners therefore ask this Honorable Court to reaffirm that—regardless of Proclamation 10888—they remain entitled to full merits consideration of their asylum claims under 8 U.S.C. § 1158 and 8 C.F.R. § 1208.2(b), including in their pending immigration court (INA § 240) proceedings. This relief is consistent with the statutory asylum framework and necessary to ensure compliance with decisions such as *RAICES v. Noem* and *Tabatabaeifar v. Scott*.

53. The writ of habeas corpus is intended to provide a "swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963). Here, Petitioners have already been detained since the end of April. The response from Respondents took well beyond the statutory expectation under 28 U.S.C. § 2243. I.e., "It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed." The delay has not been caused by Petitioners, but rather by the complexity created solely through Respondents' multiple due process violations — including the denial of asylum screening, the

unlawful family separation, and the absence of any custody review. This prolonged deprivation of liberty underscores the urgent need for habeas relief.

54. Finally, Petitioners respectfully invoke a core principle of constitutional law. As the Supreme Court and others have explained, "There are two strands of the substantive due process doctrine. The first strand protects rights that are fundamental, whereas the second protects against the exercise of governmental power that shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 499 (D.D.C. 2018). Petitioners allege violations of both strands in the destruction of their fundamental right to family unity, separation, detention, and denial of asylum access. These injuries are not past—they are **deep, multifaceted, and ongoing**.

PRAYER FOR RELIEF

For the foregoing reasons, Petitioners respectfully request that this Honorable Court:

1. Order the immediate release of Petitioners from ICE custody to minimize the continuing harm caused by their unlawful detention and ongoing separation from their minor child;
2. Direct Respondents to take all necessary steps to reunify Petitioners with their child, without unnecessary delay, in a manner consistent with the Flores Settlement Agreement, the Ms. L. Settlement, and constitutional due process;
3. Enjoin Respondents from removing Petitioners or their child from the United States unless and until further order of this Court;
4. Declare that Petitioners are entitled to full and fair consideration of their asylum claims, notwithstanding Presidential Proclamation 10888, and order that their claims be

adjudicated on the merits in immigration court under 8 U.S.C. § 1158 and 8 C.F.R. § 1208.2(b);

5. Grant Petitioners the same protections afforded in *RAICES v. Noem* and *Tabatabaeifar v. Scott*, including the right to pursue asylum on the merits despite prior enforcement of Proclamation 10888;

6. Enter a prospective injunction prohibiting Respondents from engaging in similar summary removals, family separations, or denial of asylum access to similarly situated individuals, absent individualized determinations and in compliance with due process, pending further guidance from appellate courts in *RAICES* and related litigation;

7. Retain jurisdiction to monitor Respondents' compliance with this Order, particularly with respect to family reunification, protection against removal, and access to asylum proceedings; and

8. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Evgeny MASHCHENKO, Pro Se, [redacted]

[redacted] Date: 08.14.2025

(Signature)

Elizabeth Detention Center, 625 Evans Street, Elizabeth, NJ 07201